MMC 4200: Law of Mass Communications

Jane Bambauer
Brechner Eminent Scholar and Professor of Journalism and Law
Instructor • Spring 2024 • section CCCC
Class: FLG 0230 on Tuesdays, 3- 4:55 p.m.; FLG 0210 on Thursdays, 4- 4:55 p.m.
Office: 2060 Weimer Hall
Email: janebambauer@ufl.edu
Office Hours: Wednesdays and Thursdays 1:00-2:00

Class Zoom Link: (only for noted class sessions) https://ufl.zoom.us/j/93456040384

Course Summary

This course is an introduction to communication law with an emphasis on how the law applies to media professionals- journalists, broadcasters, YouTubers, communications strategists, etc. Some having called this course "how to not get sued: a primer for media professionals." As future journalists and media practitioners, the laws that regulate speech, protest, privacy, copyright, and access to public records have a very real and direct effect on the way the information industry works.

Once you have completed this course, you should be able to "issue spot" the potential legal risks involved in reporting, producing, or distributing content. You will be able to explain where media outlets have clear legal rights and protections, and where they have legal obligations. And just as importantly, you will be able to spot some of the gray zones and "hard" cases, where the law is uncertain.

Some specific topics of discussion include:

- How the U.S. legal system works
- Free speech theory
- First Amendment levels of scrutiny
- Protected and unprotected speech
- Defamation
- Privacy torts and other privacy laws
- Open records and government access
- Copyright
- Broadcast regulation
- Emerging issues of digital media and the Internet

Course Objectives

- Demonstrate the ability to understand a case opinion.
- Summarize the theory of free speech and its role in a democracy and pluralist society.
- Describe the most important legal rules related to defamation, privacy, open records, copyright, and the constitutional right to free speech

- Apply these legal rules to new facts and scenarios

These learning outcomes will be assessed through exams, assignments, and quizzes through the semester.

Format

The class is designed for in-person engagement. Class time will be highly interactive. I will go over the readings, drawing out the content that I consider most important and test-worthy, using a series of questions and hypotheticals.

Tuesdays' two hour class session will generally be our "broad coverage" day, during which we will cover the readings from the textbook. Thursdays will be our "deep dive" day. We will begin with a discussion of the assigned case opinion(s) (attached to this syllabus) and discuss contemporary problems and controversies.

The Canvas page will be our information hub. I will make announcements through it, and you will take exams through it. Important announcements will also be posted on Canvas.

Textbook

The required textbook for our class is:

Mass Media Law (22nd Edition) by Clay Calvert, Derigan Silver, and Dan V. Kozlowski (ISBN: 978-1260837421)

Additional readings are attached as an addendum to this syllabus.

Some additional resource you might find helpful include:

Reporter's Committee for Freedom of the Press: http://www.rcfp.org/RCFP

Florida Sunshine Law Manual (from the Attorney General): http://www.myflsunshine.com/

Florida First Amendment Foundation: https://floridafaf.org/

The Electronic Frontier Foundation: https://www.eff.org/

The Volokh Conspiracy: https://reason.com/volokh/

The Technology and Marketing Law Blog: https://blog.ericgoldman.org/

Grades

The course grade is based on three exams, one written exercise, one group presentation, and attendance/participation points.

Item	Percent
Exam 1	25%
Exam 2	25%
Exam 3	25%
FOIA Exercise	10%
Group Presentation	5%
Daily Attendance/Participation	10%

Grading scale

A: 90 – 100%
B: 80 – 89%
C: 70 – 79%
D: 60 – 69%
F: 0 – 59%

Through the semester, four exams will be administered, the lowest of which will be dropped at the end. If you have over a 90% total grade going into the final week, you do not need to take the final exam.

Exams

Exams will consist of multiple-choice questions and will take place online. We will do many questions throughout class that are in the style of the exam questions. All exams will be based on readings and lectures. If you miss a test, it will be marked as a 0. Make-up exams will be given only with documentation of an excused absence as defined by the University of Florida.

Participation

Attendance and participation will be recorded through quizzes conducted during each class session. Quizzes will be graded for completion only.

Technical Support

Call 352-392-HELP (4357) for help resolving computer-related and other technical issues related to accessing or using Canvas, connectivity (wireless, VPN), email or software configuration, and browser and GatorLink authentication issues. Any requests for make-up consideration due to technical issues should be accompanied by the ticket number received from the Help Desk when the problem was reported to them. The ticket number will document the time and date of the problem. You should e-mail your instructor within 24 hours of the technical difficulty if requesting make-up consideration.

UF Computing Help Desk: https://helpdesk.ufl.edu or helpdesk@ufl.edu
Walk-In Support: HUB 132

Students With Disabilities

Reasonable accommodations will be made for students with disabilities and who have registered with the UF Dean of Students Office. This office will provide relative documentation to the student, who must then provide this documentation to the instructor when requesting accommodations.

UF Disability Resource Center: http://www.dso.ufl.edu/drc/

Counseling Center

Personal or health issues such as depression, anxiety, stress, career uncertainty and or relationships can interfere with your ability to function as a student. UF's Counseling and Wellness Center (CWC) offers support for students in need. CWC is located at 3190 Radio Road and open each weekday from 8 to 5.

UF Counseling and Wellness Center: http://www.counseling.ufl.edu/cwc

UF Resources

UF students have access to tutorials (video-based and otherwise) from which to learn – outside of class time – certain software and equipment needed to accomplish various required tasks this semester. These resources include but are not limited to the library, tutoring, career resource center, etc.

UF Student Resources: http://ufadvising.ufl.edu/student-resources.aspx

Course Evaluations

At the end of the semester, please offer feedback on the quality of the course instruction via GatorEvals.

Guidance on all things GatorEvals: https://gatorevals.aa.ufl.edu/students
Evaluation results: https://gatorevals.aa.ufl.edu/public-results.

Attendance, Attention, Deadlines and Academic Integrity

Attendance and Lateness

Students are responsible for satisfying all academic objectives as defined by the instructor and in this syllabus.

If you know you will be absent but don't want to miss the material, the instructor will open up a Zoom feed to stream (and record) the class session. However, as this is an in-person course, students online will not participate in the in-class activities for grades, including the participation quizzes.

UF Attendance Policies:
https://catalog.ufl.edu/ugrad/current/regulations/info/attendance.aspx

Mobile Devices

Mobile devices must be out of sight and unused during class – unless the instructor directs them to be used for purposes specific to a particular class session. Do not check text messages, social media, email, etc., during class.

Academic Integrity

Academic dishonesty of any kind shall not be tolerated in this course. To be certain, academic dishonesty includes, but is not limited to using any work done by another person and submitting it for a class assignment; submitting work done for another class; copying and pasting text written by another person without quotation marks and or without complete attribution, which usually includes a link to the original work; using images produced by someone else without explicit permission by the creator. Attribution is not the same as permission. Most images found online are not free to use.

UF Student Honor Code: https://sccr.dso.ufl.edu/process/student-conduct-code/

Artificial Intelligence: Remember that submitting any work that is not your own, including work generated by ChatGPT or other AI programs, is still considered academic dishonesty. The university and its faculty is monitoring AI and its use in the academic environment and new policies may arise to adapt to this changing communication environment.

Diversity Statement

The UF College of Journalism and Communications Department of Journalism embraces a commitment toward an intellectual community enriched and enhanced by diversity along a number of dimensions, including race, ethnicity and national origins, gender and gender identity, sexuality, class and religion. We expect all of our courses to help foster an understanding of the diversity of peoples and cultures and of the significance and impact of mass communications in a plural and complex society.

The university is a truly special place where curiosity and attention is rewarded with expanded consciousness—greater understanding, and more (and better) questions. We all owe it to each other and ourselves to be honest, open-minded, and respectful.

Please note: any course that delves into free speech law will be punctuated with harsh language, offensive content, and excesses that go beyond the bounds of good taste. The purpose of including and discussing this content is to illustrate the operation of the law.

Course Schedule

This schedule is subject to change

Week 1 (Jan 9 and 11) **Introduction to the American Legal System**	**Tues:** Syllabus review, Mass Media Law (MML) pages 1-37, and *Weirum* (below) **Thurs: ** ZOOM CLASS**** *Hustler* (below)
Week 2 (Jan 16 and 18) **Introducing the First Amendment**	**Tues:** MML pages 58-85 **Thurs: ** ZOOM CLASS**** *Brown* (below)
Week 3 (Jan 23 and 25) **Schools, Forum Analysis, and Time, Place & Manner**	**Tues:** MML pages 88-134 **Thurs:** *CLS v. UC Hastings* (below)
Week 4 (Jan 30 and Feb 1) **Categories of Unprotected Speech**	**Tues:** MML pages 134-157, *Counterman* (below) **Thurs: EXAM 1** (administered during class, covering material from Weeks 1-4)
Week 5 (Feb 6 and 8) **Defamation: the elements**	**Tues:** MML pages 160-192 **Thurs:** *Sandmann* (below)
Week 6 (Feb 13 and 15) **Defamation: First Amendment and Section 230 Limitations**	**Tues:** MML pages 195-227, *Sullivan* (below) **Thurs:** *Zeran* (below)
Week 7 (Feb 20 and 22) **Defamation: Privileges and Defenses**	**Tues:** MML pages 233-264 **Thurs: **ZOOM CLASS**** *Milligan* (below)

Week 8 (Feb 27 and 29) **Misappropriation, Right of Publicity, and False Light**	**Tues:** MML pages 268-299, and 333-343. **Thurs: Exam 2** (administered during class, covering material from weeks 5-8)
Week 9 (March 5 and 7) **Privacy**	**Tues:** MML pages 300-312, and 315-333 **Thurs:** *Facebook* and *Florida Star* (below)
Spring Break (Week of March 11)	**NO CLASS**
Week 10 (March 19 and 21) **FOIA**	**Tues:** MML pages 346-387 **Thurs:** FOIA activity/assignment
Week 11 (March 26 and 28) **Protection of Sources**	**Tues:** MML 410-448 **Thurs:** *Cohen* (below)
Week 12 (April 2 and 4) **Copyright**	**Tues:** MML pages 544-582 **Thurs:** Start of Group Presentations
Week 13 (April 9 and 11) **Telecom Law**	**Tues:** MML pages 659-684, and 696-706 **Thurs: Exam 3** (administered during class, covering material from weeks 9-13)
Week 14 (April 16 and 18)	**Tues:** Group Presentations **Thurs:** Group Presentations
Week 15 (April 23)	**Tues:** Review
FINAL- May 1st	**Exam 4 will be administered on May 1st from 3:00-5:00 p.m. It will cover material from the entire course.**

Readings

Week 1

Weirum v. RKO General
15 Cal.3d 40 (Cal. 1975)

MOSK, J.

A rock radio station with an extensive teenage audience conducted a contest which rewarded the first contestant to locate a peripatetic disc jockey. Two minors driving in separate automobiles attempted to follow the disc jockey's automobile to its next stop. In the course of their pursuit, one of the minors negligently forced a car off the highway, killing its sole occupant. In a suit filed by the surviving wife and children of the decedent, the jury rendered a verdict against the radio station. We now must determine whether the station owed decedent a duty of due care.

The facts are not disputed. Radio station KHJ is a successful Los Angeles broadcaster with a large teenage following. At the time of the accident, KHJ commanded a 48 percent plurality of the teenage audience in the Los Angeles area. In contrast, its nearest rival during the same period was able to capture only 13 percent of the teenage listeners. In order to attract an even larger portion of the available audience and thus increase advertising revenue, KHJ inaugurated in July of 1970 a promotion entitled "The Super Summer Spectacular." The "spectacular," with a budget of approximately $40,000 for the month, was specifically designed to make the radio station "more exciting." Among the programs included in the "spectacular" was a contest broadcast on July 16, 1970, the date of the accident.

On that day, Donald Steele Revert, known professionally as "The Real Don Steele," a KHJ disc jockey and television personality, traveled in a conspicuous red automobile to a number of locations in the Los Angeles metropolitan area. Periodically, he apprised KHJ of his whereabouts and his intended destination, and the station broadcast the information to its listeners. The first person to physically locate Steele and fulfill a specified condition received a cash prize. In addition, the winning contestant participated in a brief interview on the air with "The Real Don Steele."

In Van Nuys, 17-year-old Robert Sentner was listening to KHJ in his car while searching for "The Real Don Steele." Upon hearing that "The Real Don Steele" was proceeding to Canoga Park, he immediately drove to that vicinity. Meanwhile, in Northridge, 19-year-old Marsha Baime heard and responded to the same information. Both of them arrived at the Holiday Theater in Canoga Park to find that someone had already claimed the prize. Without knowledge of the other, each decided to follow the Steele vehicle to its next stop and thus be the first to arrive when the next contest question or condition was announced.

For the next few miles the Sentner and Baime cars jockeyed for position closest to the Steele vehicle, reaching speeds up to 80 miles an hour. About a mile and a half from the Westlake offramp the two teenagers heard the following broadcast: "11:13 — The Real Don Steele with bread is heading for Thousand Oaks to give it away. Keep listening to KHJ.... The Real Don Steele out on the highway — with

bread to give away — be on the lookout, he may stop in Thousand Oaks and may stop along the way.... Looks like it may be a good stop Steele — drop some bread to those folks."

The Steele vehicle left the freeway at the Westlake offramp. Either Baime or Sentner, in attempting to follow, forced decedent's car onto the center divider, where it overturned. Baime stopped to report the accident. Sentner, after pausing momentarily to relate the tragedy to a passing peace officer, continued to pursue Steele, successfully located him and collected a cash prize.

[Decedent's wife and children brought an action for wrongful death against the radio station, in addition to the teenaged drivers, and won a jury verdict. This appeal followed.]

The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law. (*Amaya* v. *Home Ice, Fuel & Supply Co.* (1963) 59 Cal.2d 295, 307 [29 Cal. Rptr. 33, 379 P.2d 513] (overruled on other grounds in *Dillon* v. *Legg* (1968) 68 Cal.2d 728, 748 [69 Cal. Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316]).) It is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts (4th ed. 1971) pp. 325-326.) Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, *Palsgraf Revisited* (1953) 52 Mich.L.Rev. 1, 15.) While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. (*Hilyar* v. *Union Ice Co.* (1955) 45 Cal.2d 30, 36 [286 P.2d 21].) However, foreseeability of the risk is a primary consideration in establishing the element of duty. (*Dillon* v. *Legg, supra,* 68 Cal.2d 728, 739.) Defendant asserts that the record here does not support a conclusion that a risk of harm to decedent was foreseeable.

We conclude that the record amply supports the finding of foreseeability. These tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium. Seeking to attract new listeners, KHJ devised an "exciting" promotion. Money and a small measure of momentary notoriety awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety.

Indeed, "The Real Don Steele" testified that he had in the past noticed vehicles following him from location to location. He was further aware that the same contestants sometimes appeared at consecutive stops. This knowledge is not rendered irrelevant, as defendant suggests, by the absence of any prior injury. Such an argument confuses foreseeability with hindsight, and amounts to a contention that the injuries of the first victim are not compensable. "The mere fact that a particular kind of an accident has not happened before does not ... show that such accident is one which might not reasonably have been anticipated." (*Ridley* v. *Grifall Trucking Co.* (1955) 136 Cal. App.2d 682, 686 [289 P.2d 31].) Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that an actor is entitled to assume that others will not act negligently. This

concept is valid, however, only to the extent the intervening conduct was not to be anticipated. If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. (*Richardson* v. *Ham* (1955) 44 Cal.2d 772, 777 [285 P.2d 269].) Here, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed.

It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable — i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved.

We need not belabor the grave danger inherent in the contest broadcast by defendant. The risk of a high speed automobile chase is the risk of death or serious injury. Obviously, neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk. Defendant could have accomplished its objectives of entertaining its listeners and increasing advertising revenues by adopting a contest format which would have avoided danger to the motoring public.

Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

We are not persuaded that the imposition of a duty here will lead to unwarranted extensions of liability. Defendant is fearful that entrepreneurs will henceforth be burdened with an avalanche of obligations: an athletic department will owe a duty to an ardent sports fan injured while hastening to purchase one of a limited number of tickets; a department store will be liable for injuries incurred in response to a "while-they-last" sale. This argument, however, suffers from a myopic view of the facts presented here. The giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit. In the assertedly analogous situations described by defendant, any haste involved in the purchase of the commodity is an incidental and unavoidable result of the scarcity of the commodity itself. In such situations there is no attempt, as here, to generate a competitive pursuit on public streets, accelerated by repeated importuning by radio to be the very first to arrive at a particular destination. Manifestly the "spectacular" bears little resemblance to daily commercial activities.

The judgment and the orders appealed from are affirmed. Plaintiffs shall recover their costs on appeal. The parties shall bear their own costs on the cross-appeal.

Wright, C.J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred.

HUSTLER MAG. V. FALWELL

485 U.S. 46 (1988)

CHIEF JUSTICE WILLIAM REHNQUIST delivered the opinion of the Court. . . .

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

[Falwell sued. The trial court directed a verdict for defendants on the privacy claim. The jury found against Falwell on the libel claim because it concluded "that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated." However, the jury found for Falwell on the intentional infliction of emotional distress claim, and awarded $100,000 in compensatory damages, as well as $50,000 in punitive damages against each defendant. The Court of Appeals affirmed.]

Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

[The Court here discussed many of the libel cases and the First Amendment standards and policies. It then described the plaintiff's separate claim for Intentional Infliction of Emotional Distress.]

In respondent's view, and in the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment. . . .

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. [The Court reviewed the history of satiric political cartoons and their role in public debate.]

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. . . .

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. . . . [T]he sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law. . . . The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE ANTHONY KENNEDY took no part in the consideration or decision of this case.

JUSTICE BYRON WHITE, concurring in the judgment.

As I see it, the decision in *New York Times Co. v. Sullivan* has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

Week 2

Brown v. Entertainment Merchants Association
564 U.S. 786 (2011)

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment .

I

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§1746–1746.5 (West 2009) (Act), prohibits the sale or rental of "violent video games" to minors, and requires their packaging to be labeled "18." The Act covers games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." §1746(d)(1)(A). Violation of the Act is punishable by a civil fine of up to $1,000. §1746.3.

Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. The Court of Appeals affirmed, and we granted certiorari.

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters* v. *New York* , 333 U. S. 507, 510 (1948) . Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.

The most basic of those principles is this: "[A]s a general matter, … government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union* , 535 U. S. 564, 573 (2002). There are of course exceptions. From 1791 to the present, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas[.] These limited areas—such as obscenity, *Roth* v. *United States* , 354 U. S. 476, 483 (1957) , incitement, *Brandenburg* v. *Ohio* , 395 U. S. 444, 447–449 (1969) *(per curiam)* , and fighting words, *Chaplinsky* v. *New Hampshire* , 315 U. S. 568 , 572 (1942)—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.* , at 571–572.

Last Term, in *Stevens* , we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. See 18 U. S. C. §48 (amended 2010). The statute covered depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that harm to the animal was illegal where the "the creation, sale, or possession t[ook] place," §48(c)(1). There was no American tradition of forbidding the *depiction of* animal cruelty—though States have long had laws against *committing* it.

The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails

the test. We emphatically rejected that "startling and dangerous" proposition. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment , "that the benefits of its restrictions on the Government outweigh the costs."

That holding controls this case.

The California Act … wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *Jacksonville* , 422 U. S. 205, 212–213 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.

California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm's Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." The Complete Brothers Grimm Fairy Tales 198 (2006 ed.). Cinderella's evil stepsisters have their eyes pecked out by doves. *Id.* , at 95. And Hansel and Gretel (children!) kill their captor by baking her in an oven. *Id.* , at 54.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. The Odyssey of Homer, Book IX, p. 125 (S. Butcher & A. Lang transls. 1909) ("Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame"). In the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. Canto XXI, pp. 187–189 (A. Mandelbaum transl. Bantam Classic ed. 1982). And Golding's Lord of the Flies recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island. W. Golding, Lord of the Flies 208–209 (1997 ed.). [4]

This is not to say that minors' consumption of violent entertainment has never encountered resistance. In the 1800's, dime novels depicting crime and "penny dreadfuls" (named for their price and content) were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the villains instead. "The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close… . They say that the moving picture machine … tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison." Moving Pictures as Helps to Crime, N. Y. Times, Feb. 21, 1909. For a time, our Court did permit broad censorship of movies because of their capacity to be "used for evil," see *Mutual Film Corp.* v. *Industrial Comm'n of Ohio* , 236 U. S. 230, 242 (1915) , but we eventually reversed course, *Joseph Burstyn, Inc.* , 343 U. S., at 502. Radio dramas were next, and then came comic books. Many in the late 1940's and early 1950's blamed comic books for fostering a "preoccupation with violence and horror" among the young, leading to a rising juvenile crime rate. But efforts to convince

Congress to restrict comic books failed. And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. Cf. *Interactive Digital Software Assn.* v. *St. Louis County,* 329 F. 3d 954, 957–958 (CA8 2003). As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." *American Amusement Machine Assn.* v. *Kendrick* , 244 F. 3d 572, 577 (CA7 2001) (striking down a similar restriction on violent video games).

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an "actual problem" in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard.

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in *Turner Broadcasting System, Inc.* v. *FCC* , 512 U. S. 622 (1994) , the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation. California's burden is much higher, and because it bears the risk of uncertainty, ambiguous proof will not suffice.

The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology. They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.

Even taking for granted Dr. Anderson's conclusions that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the "effect sizes" of children's exposure to violent video games are "about the same" as that produced by their exposure to violence on television. And he admits that the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated "E" (appropriate for all ages), or even when they "vie[w] a picture of a gun".

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly

underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK.

California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. [The Court described the video game industry's self-regulation through video game ratings.]

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires.

Week 3

Christian Legal Society Chapter of University of California Hastings College of Law v. Martinez
561 U.S. 661 (2010)

Justice Ginsburg delivered the opinion of the Court.

Founded in 1878, Hastings was the first law school in the University of California public-school system. Like many institutions of higher education, Hastings encourages students to form extracurricular associations that "contribute to the Hastings community and experience." App. 349. These groups offer students "opportunities to pursue academic and social interests outside of the classroom [to] further their education" and to help them "develo[p] leadership skills." *Ibid.*

Through its "Registered Student Organization" (RSO) program, Hastings extends official recognition to student groups. Several benefits attend this school-approved status. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. Id., at 217. RSOs may also use Law-School channels to communicate with students: They may place announcements in a weekly Office-of-Student-Services newsletter, advertise events on designated bulletin boards, send e-mails using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. *Id.,* at 216–219. In addition, RSOs may apply for permission to use the Law School's facilities for meetings and office space. *Id.,* at 218–219. Finally, Hastings allows officially recognized groups to use its name and logo. *Id.,* at 216.

In exchange for these benefits, RSOs must abide by certain conditions. Only a "non-commercial organization whose membership is limited to Hastings students may become [an RSO]." App. to Pet. for Cert. 83a. A prospective RSO must submit its bylaws to Hastings for approval, *id.,* at 83a–84a; and if it intends to use the Law School's name or logo, it must sign a license agreement, App. 219. Critical here,

all RSOs must undertake to comply with Hastings' "Policies and Regulations Applying to College Activities, Organizations and Students." *Ibid.[Footnote 1]*

The Law School's Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states:

"[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hasting's] policy on nondiscrimination is to comply fully with applicable law.

"[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities." *Id.,* at 220.

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." *Id.,* at 221.[Footnote 2] Other law schools have adopted similar all-comers policies. See, *e.g.,* Georgetown University Law Center, Office of Student Life: Student Organi zations, available at http://www.law.georgetown.edu/ StudentLife/StudentOrgs/NewGroup.htm (All Internet materials as visited June 24, 2010, and included in Clerk of Court's case file) (Membership in registered groups must be "open to all students."); Hofstra Law School Student Handbook 2009–2010, p. 49, available at http:// law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/ stuhb_handbook.pdf ("[Student] organizations are open to all students."). From Hastings' adoption of its Nondiscrimination Policy in 1990 until the events stirring this litigation, "no student organization at Hastings … ever sought an exemption from the Policy." App. 221.

In 2004, CLS became the first student group to do so. At the beginning of the academic year, the leaders of a predecessor Christian organization—which had been an RSO at Hastings for a decade—formed CLS by affiliating with the national Christian Legal Society (CLS-National). *Id.,* at 222–223, 225. CLS-National, an association of Christian lawyers and law students, charters student chapters at law schools throughout the country. *Id.,* at 225. CLS chapters must adopt bylaws that, *inter alia*, require members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. *Id.,* at 225–226; App. to Pet. for Cert. 101a.[Footnote 3] Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct." App. 226. CLS also excludes students who hold religious convictions different from those in the Statement of Faith. *Id.,* at 227.

On September 17, 2004, CLS submitted to Hastings an application for RSO status, accompanied by all required documents, including the set of bylaws mandated by CLS-National. *Id.,* at 227–228. Several days later, the Law School rejected the application; CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation. *Id.,* at 228.

CLS formally requested an exemption from the Nondiscrimination Policy, *id.,* at 281, but Hastings declined to grant one. "[T]o be one of our student-recognized organizations," Hastings reiterated, "CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." *Id.,* at 294. If CLS instead chose to operate outside the RSO program, Hastings stated, the

school "would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities." *Ibid.* CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. *Id.,* at 219, 233. In other words, Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them.

In support of the argument that Hastings' all-comers policy treads on its First Amendment rights to free speech and expressive association, CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech.[Footnote 11] Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985) (internal quotation marks omitted), the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral, *e.g., Rosenberger*, 515 U. S., at 829. See also, *e.g., Good News Club* v. *Milford Central School*, 533 U. S. 98, 106–107 (2001); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 392–393 (1993); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46 (1983).[Footnote 12]

As earlier pointed out, *supra*, at 1, 12–13, we do not write on a blank slate; we have three times before considered clashes between public universities and student groups seeking official recognition or its attendant benefits. First, in *Healy*, a state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society (SDS). 408 U. S., at 170. Characterizing SDS's mission as violent and disruptive, and finding the organization's philosophy repugnant, the college completely banned the SDS chapter from campus; in its effort to sever all channels of communication between students and the group, university officials went so far as to disband a meeting of SDS members in a campus coffee shop. *Id.,* at 174–176. The college, we noted, could require "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law," including "reasonable standards respecting conduct." *Id.,* at 193. But a public educational institution exceeds constitutional bounds, we held, when it "restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent." *Id.,* at 187–188.[Footnote 15]

We later relied on *Healy* in *Widmar*. In that case, a public university, in an effort to avoid state support for religion, had closed its facilities to a registered student group that sought to use university space for religious worship and discussion. 454 U. S., at 264–265. "A university's mission is education," we observed, "and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.,* at 268, n. 5. But because the university singled out religious organizations for disadvantageous treatment, we subjected the university's regulation to strict scrutiny. *Id.,* at 269–270. The school's interest "in maintaining strict separation of church and State," we held, was not "sufficiently compelling to justify … [viewpoint] discrimination against … religious speech." *Id.,* at 270, 276 (internal quotation marks omitted).

Most recently and comprehensively, in *Rosenberger*, we reiterated that a university generally may not withhold benefits from student groups because of their religious outlook. The officially recognized student group in *Rosenberger* was denied student-activity-fee funding to distribute a newspaper because the publication discussed issues from a Christian perspective. 515 U. S., at 825–827. By "select[ing] for disfavored treatment those student journalistic efforts with religious editorial

viewpoints," we held, the university had engaged in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.,* at 831, 830.

In all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view. "Once it has opened a limited [public] forum," we emphasized, "the State must respect the lawful boundaries it has itself set." *Id.,* at 829. The constitutional constraints on the boundaries the State may set bear repetition here: "The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, … nor may it discriminate against speech on the basis of … viewpoint." *Ibid*. (internal quotation marks omitted).

Our inquiry is shaped by the educational context in which it arises: "First Amendment rights," we have observed, "must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U. S., at 268, n. 5 (internal quotation marks omitted). This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cf. *Pell* v. *Procunier*, 417 U. S. 817, 827 (1974) ("Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties."). Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 206 (1982). See also, *e.g., Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 273 (1988) (noting our "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Healy*, 408 U. S., at 180 ("[T]his Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' " (quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 507 (1969))).

A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. See *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty.* v. *Earls*, 536 U. S. 822, 831, n. 4 (2002) (involvement in student groups is "a significant contributor to the breadth and quality of the educational experience" (internal quotation marks omitted)). Schools, we have emphasized, enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate." *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 240 (1990). We therefore "approach our task with special caution," *Healy*, 408 U. S., at 171, mindful that Hastings' decisions about the character of its student-group program are due decent respect.[Footnote 16]

2

With appropriate regard for school administrators' judgment, we review the justifications Hastings offers in defense of its all-comers requirement.[Footnote 17] First, the open-access policy "ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students." Brief for Hastings 32; see Brief for American Civil Liberties Union et al. as *Amici Curiae* 11. Just as "Hastings does not allow its professors to host classes open only to those students with a certain status or belief," so the Law School may decide, reasonably in our view, "that the … educational experience is

best promoted when all participants in the forum must provide equal access to all students." Brief for Hastings 32. RSOs, we count it significant, are eligible for financial assist- ance drawn from mandatory student-activity fees, see *supra*, at 3; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.[Footnote 18]

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions.

The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place." *Perry Ed. Assn.*, 460 U. S., at 53. If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers. See *ibid.*; *Cornelius*, 473 U. S., at 809; *Greer* v. *Spock*, 424 U. S. 828, 839 (1976); *Pell*, 417 U. S., at 827–828.

In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. App. 232–233. Although CLS could not take advantage of RSO-specific methods of communication, see *supra*, at 3, the advent of electronic media and social-networking sites reduces the importance of those channels. See App. 114–115 (CLS maintained a Yahoo! message group to disseminate information to students.); *Christian Legal Society* v. *Walker*, 453 F. 3d 853, 874 (CA7 2006) (Wood, J., dissenting) ("Most universities and colleges, and most college-aged students, communicate through email, websites, and hosts like MySpace … . If CLS had its own website, any student at the school with access to Google—that is, all of them—could easily have found it."). See also Brief for Associated Students of the University of California, Hastings College of Law as *Amicus Curiae* 14–18 (describing host of ways CLS could communicate with Hastings' students outside official channels).

Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation.[Footnote 21] Based on the record before us, CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled. App. 224, 229–230. "The variety and type of alternative modes of access present here," in short, "compare favorably with those in other [limited public] forum cases where we have upheld restrictions on access.

We next consider whether Hastings' all-comers policy is viewpoint neutral.

Although this aspect of limited-public-forum analysis has been the constitutional sticking point in our prior decisions, as earlier recounted, *supra*, at 17–19, we need not dwell on it here. It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.

Conceding that Hastings' all-comers policy is "nominally neutral," CLS attacks the regulation by pointing to its effect: The policy is vulnerable to constitutional assault, CLS contends, because "it systematically

and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." Brief for Petitioner 51; cf. *post*, at 1 (Alito, J., dissenting) (charging that Hastings' policy favors "political[ly] correc[t]" student expression). This argument stumbles from its first step because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989).

Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims.

Week 4

Counterman v. Colorado
600 U.S. __ (2023)

From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were utterly prosaic ("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. 3 App. 465. Others suggested that Counterman might be surveilling C. W. He asked "[w]as that you in the white Jeep?"; referenced "[a] fine display with your partner"; and noted "a couple [of] physical sightings." 497 P. 3d 1039, 1044 (Colo. App. 2021). And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently." Ibid. "Staying in cyber life is going to kill you." Ibid. "You're not being good for human relations. Die." Ibid.

The messages put C. W. in fear and upended her daily existence. She believed that Counterman was "threat[ening her] life"; "was very fearful that he was following" her; and was "afraid [she] would get hurt." 2 App. 177, 181, 193. As a result, she had "a lot of trouble sleeping" and suffered from severe anxiety. Id., at 200; see id., at 194–198. She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain. See id., at 182–183, 199, 201–206, 238–239. Eventually, C. W. decided that she had to contact the authorities. Id., at 184.

Colorado charged Counterman under a statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c) (2022). The only evidence the State proposed to introduce at trial were his Facebook messages.1

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an "objective 'reasonable person' standard." People v. Cross, 127 P. 3d 71, 76 (Colo. 2006). Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to prove that Counterman had any kind of "subjective intent to threaten" C. W. In re R. D., 464 P. 3d 717, 731, n. 21 (Colo. 2020). The court decided, after "consider[ing] the totality of the

circumstances," that Counterman's statements "r[o]se to the level of a true threat." 497 P. 3d, at 1045. Because that was so, the court ruled, the First Amendment posed no bar to prosecution. The court accordingly sent the case to the jury, which found Counterman guilty as charged.

[The Colorado Court of Appeals affirmed, and the Colorado Supreme Court denied review.]

Courts are divided about (1) whether the First Amendment requires proof of a defendant's subjective mindset in true-threats cases, and (2) if so, what mens rea standard is sufficient. We therefore granted certiorari.

True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless demands that the State in a truethreats case prove that the defendant was aware in some way of the threatening nature of his communications.

"From 1791 to the present," the First Amendment has "permitted restrictions upon the content of speech in a few limited areas." United States v. Stevens, 559 U. S. 460, 468 (2010). These "historic and traditional categories" are "long familiar to the bar" and perhaps, too, the general public. Ibid. One is incitement—statements "directed [at] producing imminent lawless action," and likely to do so. Brandenburg v. Ohio, 395 U. S. 444, 447 (1969) (per curiam). Another is defamation—false statements of fact harming another's reputation. See Gertz v. Robert Welch, Inc., 418 U. S. 323, 340, 342 (1974). Still a third is obscenity—valueless material "appeal[ing] to the prurient interest" and describing "sexual conduct" in "a patently offensive way." Miller v. California, 413 U. S. 15, 24 (1973). This Court has "often described [those] historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest" in their proscription. Stevens, 559 U. S., at 470 (internal quotation marks omitted; emphasis deleted).

"True threats" of violence is another historically unprotected category of communications. Virginia v. Black, 538 U. S. 343, 359 (2003); see United States v. Alvarez, 567 U. S. 709, 717–718 (2012) (plurality opinion). The "true" in that term distinguishes what is at issue from jests, "hyperbole," or other statements that when taken in context do not convey a real possibility that violence will follow (say, "I am going to kill you for showing up late"). Watts v. United States, 394 U. S. 705, 708 (1969) (per curiam). True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." Black, 538 U. S., at 359. True threats subject individuals to "fear of violence" and to the many kinds of "disruption that fear engenders." Black, 538 U. S., at 360 (internal quotation marks omitted). The facts of this case well illustrate how.

Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. See Philadelphia Newspapers, Inc. v. Hepps, 475 U. S. 767, 777 (1986). Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a "cautious and restrictive exercise" of First Amendment freedoms. Gertz, 418 U. S., at 340. And an important tool to prevent that

outcome—to stop people from steering "wide[] of the unlawful zone"—is to condition liability on the State's showing of a culpable mental state.

That kind of "strategic protection" features in our precedent concerning the most prominent categories of historically unprotected speech. Gertz, 418 U. S., at 342. Defamation is the best known and best theorized example. False and defamatory statements of fact, we have held, have "no constitutional value." Id., at 340; see Alvarez, 567 U. S., at 718–719 (plurality opinion). Yet a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not."

The same idea arises in the law respecting obscenity and incitement to unlawful conduct. Like threats, incitement inheres in particular words used in particular contexts: Its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. But still, the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were "intended" (not just likely) to produce imminent disorder. Hess v. Indiana, 414 U. S. 105, 109 (1973) (per curiam); see Brandenburg, 395 U. S., at 447; NAACP v. Claiborne Hardware Co., 458 U. S. 886, 927–929 (1982). That rule helps prevent a law from deterring "mere advocacy" of illegal acts—a kind of speech falling within the First Amendment's core. Brandenburg, 395 U. S., at 449. And for a similar reason, the First Amendment demands proof of a defendant's mindset to make out an obscenity case. Obscenity is obscenity, whatever the purveyor's mental state. But we have repeatedly recognized that punishment depends on a "vital element of scienter"—often described as the defendant's awareness of "the character and nature" of the materials he distributed. Hamling v. United States, 418 U. S. 87, 122– 123 (1974);

The same reasoning counsels in favor of requiring a subjective element in a true-threats case.

The next question concerns the type of subjective standard the First Amendment requires. The law of mens rea offers three basic choices. Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he "consciously desires" a result—so here, when he wants his words to be received as threats. United States v. Bailey, 444 U. S. 394, 404 (1980). Next down, though not often distinguished from purpose, is knowledge. Ibid. A person acts knowingly when "he is aware that [a] result is practically certain to follow"—so here, when he knows to a practical certainty that others will take his words as threats. Ibid. (internal quotation marks omitted). A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." Voisine v. United States, 579 U. S. 686, 691 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See Borden v. United States, 593 U. S. ___, ___ (2021) (plurality opinion) (slip op., at 5). But still, recklessness is morally culpable conduct, involving a "deliberate decision to endanger another." Voisine, 579 U. S., at 694. In the threats context, it means that a speaker is aware "that others could regard his statements as" threatening violence and "delivers them anyway." Elonis, 575 U. S., at 746 (ALITO, J., concurring in part and dissenting in part).

Among those standards, recklessness offers the right path forward.

It is true that our incitement decisions demand more— but the reason for that demand is not present here. When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to

purpose or knowledge. See Hess, 414 U. S., at 109; supra, at 8. In doing so, we recognized that incitement to disorder is commonly a hair'sbreadth away from political "advocacy"—and particularly from strong protests against the government and prevailing social order. Brandenburg, 395 U. S., at 447. Such protests gave rise to all the cases in which the Court demanded a showing of intent. See ibid.; Hess, 414 U. S., at 106; Claiborne Hardware Co., 458 U. S., at 888, 928. And the Court decided those cases against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction. See, e.g., Whitney v. California, 274 U. S. 357 (1927); Gitlow v. New York, 268 U. S. 652 (1925); Abrams v. United States, 250 U. S. 616 (1919). A strong intent requirement was, and remains, one way to guarantee history was not repeated.

But the potency of that protection is not needed here. For the most part, the speech on the other side of the true-threats boundary line—as compared with the advocacy addressed in our incitement decisions—is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions. It is not just that our incitement decisions are distinguishable; it is more that they compel the use of a distinct standard here.

That standard, again, is recklessness. It offers "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats.

It is time to return to Counterman's case, though only a few remarks are necessary. Counterman, as described above, was prosecuted in accordance with an objective standard. See supra, at 3. The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. For the reasons stated, that is a violation of the First Amendment. We accordingly vacate the judgment of the Colorado Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Week 5

SANDMANN V. WP CO.
401 F. SUPP. 3D 781 (E.D. KY. 2019)

OPINION AND ORDER

WILLIAM O. BERTELSMAN, District Judge

This is a defamation action arising out of events that occurred in our nation's capital on January 19, 2019, among various groups who were exercising their rights to free assembly and speech. In this age of social media, the events quickly became the subject of posts, squares, tweets, online videos, and – pertinent here – statements published by major media outlets.

As a result, plaintiff Nicholas Sandmann ("Sandmann") found himself thrust into the national spotlight. He has filed suit against defendant WP Company LLC d/b/a The Washington Post ("The Post"), alleging that The Post negligently published false statements about him that were defamatory in relation to the events in question.

Factual and Procedural Background

On January 18, 2019, a group of students from Covington Catholic High School in Park Hills, Kentucky attended the March for Life in Washington, D.C., accompanied by sixteen adults. (Compl. ¶ 20). Among the students was plaintiff Nicholas Sandmann, who was wearing a "Make America Great Again" ("MAGA") hat that he had bought as a souvenir.

Sandmann and his classmates were instructed to wait at the steps of the Lincoln Memorial for the buses to arrive for their return trip to Kentucky. While the students waited, a group of men from an organization called the Black Hebrew Israelites began yelling racial epithets and threats of violence towards them.

When this yelling had been going on for almost an hour, a third group of individuals – Native Americans who had been attending the Indigenous Peoples March on the National Mall that day – began approaching the students, singing and dancing, and recording a video. At the front of the group was a Native-American activist named Nathan Phillips ("Phillips"). Phillips was beating a drum and singing.

When the Native Americans reached the students, Sandmann was at the front of the student group. Phillips walked very close to Sandmann, beating his drum and singing within inches of Sandmann's face. Sandmann did not confront Phillips or move toward him, and Phillips made no attempt to go past or around Sandmann. Sandmann remained silent and looked at Phillips as he played his drum and sang. The encounter ended when Sandmann and the other students were told to board their buses.

That evening, Kaya Taitano, a participant in the Indigenous People's March, posted online two short videos showing portions of the interaction between Sandmann and Phillips.

At 11:13 p.m., a Twitter account tweeted a short excerpt from Taitano's videos with the comment "This MAGA loser gleefully bothering a Native American protestor at the Indigenous Peoples March."

On Saturday, January 19, 2019, one of the Hebrew Israelite members who had been at the demonstration posted on Facebook a 1-hour, 46-minute video of the incident with Sandmann and Phillips, which Sandmann alleges accurately depicts those events.

That same day, the Post published the first of seven articles that Sandmann alleges were defamatory in various respects: one article on January 19; four on January 20; and two on January 21. The Post also published three Tweets on its Twitter page on January 19 which Sandmann alleges were likewise defamatory.

The Court must now determine whether Sandmann's allegations state a viable claim for relief. These are purely questions of law that bear no relation to the degree of public interest in the underlying events or the political motivations that some have attributed to them.

Analysis

Kentucky Defamation Law

In Kentucky, a cognizable claim for defamation requires:

(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.

The Court notes that the present motion does not require the Court to address the elements of truth/falsity, publication (which is not disputed), or negligence. At issue are only whether the statements are about Sandmann, whether they are fact or opinion, and whether they are defamatory.

Before turning to the merits, the Court must first discuss these important legal principles in more detail.

1. "About" or "Of and Concerning" the Plaintiff

The first element of a defamation claim requires that the challenged statements be "about" or "concerning" the plaintiff.

Generally, "the plaintiff need not be specifically identified in the defamatory matter itself so long as it was so *reasonably understood* by plaintiffs 'friends and acquaintances ... familiar with the incident.' " *Stringer* , 151 S.W.3d at 794 (alteration in original) (emphasis added) (quoting *E. W. Scripps Co. v. Cholmondelay* , 569 S.W.2d 700, 702 (Ky. Ct. App. 1978)). But this rule is limited by the principle, now memorialized in the Restatement, that "where defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action." *See, e.g.* , *Louisville Times v. Stivers* , 252 Ky. 843, 68 S.W.2d 411, 412 (1934) (citation omitted).

Rest. 2d § 564A cmt. a ("no action lies for the publication of defamatory words concerning a large group or class of persons" and "no individual member of the group can recover for such broad and general defamation."); *id.* at cmt. c ("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").

For an individual plaintiff to bring a defamation action based on such comments, the Kentucky Supreme Court has instructed that "the statement must be applicable to every member of the class, and if the words used contain no reflection upon any particular individual, no averment can make them defamatory." *Kentucky Fried Chicken, Inc. v. Sanders* , 563 S.W.2d 8, 9 (Ky. 1978). This determination should be made "in the context of the whole article." *Id.*

2. The "Falsity" Requirement is Met Only Where the Words Used State Verifiable Facts, Not Opinions

The first element of a defamation claim also requires that the allegedly libelous statement be objectively false. Under Kentucky law, a statement in the form of an opinion can be defamatory, but it is "actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Yancey v. Hamilton* , 786 S.W.2d 854, 857 (Ky. 1989) (quoting REST. 2d § 566). In *Milkovich v. Lorain Journal Co.* , however, the Supreme Court subsequently held that " 'a statement of opinion relating to matters of

public concern which does not contain a provably false factual connotation will receive full constitutional protection' and that 'statements that cannot reasonably [be] interpreted as stating actual facts, are not actionable.' " *Jolliff v. N.L.R.B.* , 513 F.3d 600, 610 (6th Cir. 2008) (internal quotation marks omitted) (quoting *Milkovich v. Lorain Journal Co.* , 497 U.S. 1, 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)).

Here, The Post's articles concern groups of citizens who were assembled in the nation's capital to support or oppose various causes of importance to them. This is inherently a matter of public concern.

Kentucky has rejected the doctrine of "neutral reportage"; that is, a newspaper may still be held liable for quoting "newsworthy statements" of third parties.

3. The Publication, Evaluated as a Whole, Must be Defamatory, Not Merely False

Lastly, to satisfy the first element of a defamation claim, the language in question must "be both false *and defamatory.* A statement that is false, but not defamatory is not actionable; a statement that is true is not actionable even if defamatory." *Dermody v. Presbyterian Church U.S.A.* , 530 S.W.3d 467, 472-73 (Ky. Ct. App. 2017) (emphasis added). Sandmann alleges that the challenged statements "are defamatory *per se* , as they are libelous on their face without resort to additional facts."

The Restatement explains that what constitutes actionable defamation is not subject to the whims of those in society who are faint of heart:

Although defamation is not a question of majority opinion, neither is it a question of the existence of some individual or individuals with views sufficiently peculiar to regard as derogatory what the vast majority of persons regard as innocent. The fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them.

Finally, the Court must "analyze the article in its entirety and determine if its gist or sting is defamatory."

C. The Post Articles

1. Article One

The First Article does not mention Sandmann by name, there is no identifiable description of him, and there is no picture of Sandmann in the article.

Instead, statement numbers 1-3, 8, 13, 15, and 16 refer to "hat wearing teens"; "the teens"; "teens and other apparent participants"; "A few people"; "those who should listen most closely"; and "They." These statements are not actionable because they are not about Sandmann.

Like the statements about groups or classes such as "the Stivers clan"; Kentucky Fried Chicken restaurants; and "teachers," statements such as "hat wearing teens," are clearly "made against an aggregate body of persons," and thus "an individual member not specially imputed or designated cannot maintain an action." *Id.* Sandmann is not specifically mentioned in the article. Therefore, because

"the words used contain no reflection upon any particular individual, no averment can make them defamatory."

These statements are also not actionable for other reasons, discussed below.

Opinion versus Fact

Few principles of law are as well-established as the rule that statements of opinion are not actionable in libel actions.

This Court has had occasion to address this issue several times. *See Loftus v. Nazari* , 21 F. Supp.3d 849, 853-54 (E.D. Ky. 2014) (holding that patient's statements regarding allegedly poor results of plastic surgery were protected opinion); *Lassiter v. Lassiter* , 456 F. Supp. 2d 876, 881-82 (E.D. Ky. 2006) (holding that woman's statement that her ex-husband had committed adultery was protected opinion because the facts on which she based that statement were all disclosed in the publication in question), *aff'd* , 280 F. App'x 503 (6th Cir. 2008).

Pure opinion ... occurs where the commentator states the facts on which the opinion is based, or where both parties to the communication know or assume the exclusive facts on which the comment is based.

Under these authorities, the statements that Sandmann challenges constitute protected opinions that may not form the basis for a defamation claim.

First, statements 1-3, 10, 13, 16, 17 are not actionable because they do not state or imply "actual, objectively verifiable facts." Instead, these statements contain terms such as "ugly," "swarmed," "taunting," "disrespect," "ignored," "aggressive," "physicality," and "rambunctious." These are all examples of "loose, figurative," "rhetorical hyperbole" that is protected by the First Amendment because it Is not "susceptible of being proved true or false." *Milkovich* , 497 U.S. at 17, 21, 110 S.Ct. 2695 ; *Seaton v. TripAdvisor LLC* , 728 F.3d 592, 597 (6th Cir. 2013).

The above terms are also "inherently subjective," like "dirtiest," *Seaton* , 728 F.3d at 598, or "squandered" and "broke," *Welch* , 3 S.W.3d at 730, all of which are "not so definite or precise as to be branded as false." *Id.* ; *see also Turner v. Wells* , 879 F.3d 1254, 1270 (11th Cir. 2018).

Next, statement 2 quotes Phillips as saying he "felt threatened" when he was "swarmed." And statement 10 quotes this assertion:

> It was getting ugly, and I was thinking: "I've got to find myself an exit out of this situation and finish my song at the Lincoln Memorial," Phillips recalled. I started going that way, and **that guy in the hat stood in my way and we were at an impasse. He just blocked my way and wouldn't allow me to retreat.**
>
> (Doc. 1-5 at 3) (emphasis added).

Again, even if these statements could be construed to refer to Sandmann, they do not convey "actual, objectively verifiable facts." *Compuware* , 499 F.3d at 529 ; *Yancey* , 786 S.W.2d at 857. How Phillips "felt" is obviously subjective, and whether Phillips was "swarmed" or "blocked" is simply not "capable of

being proved objectively incorrect." *Clark* , 617 F. App'x at 508 (citing *Milkovich* , 497 U.S. at 20, 110 S.Ct. 2695).

The word "block" is a transitive and "figurative" verb meaning "to obstruct or close with obstacles." "Swarm" simply means to "come together in a swarm or dense crowd." And one individual obviously cannot "swarm" another.

Sandmann admits he was standing in silence in front of Phillips in the center of a confusing confrontation between the students and the Indigenous Peoples group. Sandmann's intent, he avers, was to diffuse the situation by remaining motionless and calm. Phillips, however, interpreted Sandmann's action (or lack thereof) as blocking him and not allowing him to retreat. In statement 10, Phillips disclosed the reasons for his perception: the size of the crowd, the tense atmosphere, taunts directed at his group, and his memories of past discrimination. (Doc. 1-5). There were no undisclosed facts, and the reader was in as good a position as Phillips to judge whether the conclusion he reached – that he was "blocked" – was correct.

c. Defamatory Meaning

Even assuming, *arguendo* , that the above statements are "about" Sandmann and that they convey objectively provable facts, "there is no allegation of special damages, [so] unless the publication may be considered as actionable per se," the Court must dismiss the action.

Sandmann alleges that the "gist" of the First Article is that he (1) "assaulted" or "physically intimidated Phillips"; (2) "engaged in racist conduct"; and (3) "engaged in taunts." But this is not supported by the plain language in the article, which states none of those things.

Instead, Sandmann's reasoning is precisely the type of "explanation" and "innuendo" that "cannot enlarge or add to the sense or effect of the words charged to be libelous, or impute to them a meaning not warranted by the words themselves." And while unfortunate, it is further irrelevant that Sandmann was scorned on social media. That is "extrinsic evidence of context or circumstances" outside the four corners of the article.

First, the article cannot reasonably be read as charging Sandmann with physically intimidating Phillips or committing the criminal offense of assault. At best, Phillips is quoted in the article as saying that he "felt threatened" and "that guy in the hat ... blocked my way." As in *Roche* , where an individual stated he "feels harassed by [the plaintiff] and wants no contact," here, Phillips' statement that he "felt threatened" is merely "a third party's subjective feelings" and that "would not tend to expose [Sandmann] to public hatred or to suggest his unfitness to work" and therefore "does not constitute libel per se."

Second, it is unreasonable to construe the article as meaning that Sandmann "engaged in racist conduct." The article, at most, quotes Phillips, who stated that an individual in a hat "blocked" his path and "we were at an impasse." It is irrelevant that others may have attributed a derogatory meaning to this statement. There is nothing defamatory about being party to a stubborn "impasse."

As the Restatement and Kentucky law make clear: if individuals, "by an unreasonable construction" attach a "derogatory meaning," this "does not render the language defamatory." REST. 2d § 563 cmt. c.

Finally, the article does not state that Sandmann "engaged in racist taunts." The article makes a vague reference to teens and other participants "taunting" the "indigenous crowd" and then merely states that "[a] few people ... began to chant build that wall," a political statement on an issue of public debate and often associated with party affiliation. This is not defamatory.

Articles Two and Three

Articles Two and Three merely repeat the statements contained in Article One, with the exception that they add statement 18 – a quote from the joint statement released by Covington Catholic High School and the Diocese of Covington – and Article Three adds statement 22, a headline.

Statement 18, as set forth in the attached chart, does not mention Sandmann but speaks only of "students," and as such it is not actionable. Further, the adjectives "jeering" and "disrespectful" are subjective opinions, and the balance of the statement conveys only that the speakers are investigating the matter and will take "appropriate action, up to and including expulsion." Sandmann alleges that the statement coveys that he "violated the fundamental standards of his religious community and violated the policies of his school such that he should be expelled." But the statement, in fact, conveys the opposite: the speakers had reached *no* conclusion about what occurred and were investigating the matter.

Finally, statement 22 is the headline on the Third Article: "Marcher's accost by boys in MAGA caps draws ire." (Doc. 1-7 at 2). This headline does not identify Sandmann but refers only to "boys," which is nonactionable for the reasons already discussed.

Further, the headline "Marcher's accost by boys in MAGA caps draws ire" is laden with rhetorical hyperbole. And the word "accost" has various meanings, including "To approach and speak to ... in a bold, hostile, or unwelcome manner; to waylay a person in this way; to address.... To draw near to or unto; to approach."

[The court considered several additional articles, but came to the same conclusions.]

Accordingly, Sandmann cannot maintain a claim based on any of the Post's publications, and the Court will dismiss the Complaint in its entirety.

IT IS ORDERED that The Post's motion to dismiss be, and is hereby, **GRANTED.**

Week 6

N.Y. TIMES CO. V. SULLIVAN

376 U.S. 254 (1964)

MR. JUSTICE WILLIAM J. BRENNAN delivered the opinion of the Court.

[The plaintiff, Sullivan, an elected commissioner in charge of police, sued the New York Times Company and others for libel allegedly contained in a full-page advertisement published

in the New York Times. He recovered $500,000 in the Alabama courts after the New York Times Company rejected his demand for retraction. The ad appealed for funds to support the civil rights movement and was signed by a number of well-known persons. It referred to "an unprecedented wave of terror" in the South. It went on as follows:]

"In Montgomery, Alabama, after students sang 'My Country, Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission." Sixth paragraph: "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a felony under which they could imprison him for ten years. . . ."

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested (Dr. King) seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. . . .

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. . . .

[The jury was instructed under the common law rules allowing recovery without proof of actual damages. The trial judge refused to charge that actual malice or intent to harm was required. The Alabama Supreme Court affirmed.]

[Under Alabama law,] [o]nce "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. . . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion."

The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, gave the principle its classic formulation: "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional

protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

. . . The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." . . . "[T]he people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." . . . "Whatever is added to the field of libel is taken from the field of free debate."

Injury to official reputation. . . affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation." Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. That statute made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States."

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." . . .

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. [The Fourteenth Amendment applies the First Amendment's restrictions to the states by way of the due process clause.]

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . .

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge. . . .

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on

the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

. . .

[Alabama law provides that] where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions." . . .

This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression . . .

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. [There was no evidence that individual signers of the ad or the New York Times were aware of erroneous statements at the time of publication.]

The Times' failure to retract upon respondent's demand . . . is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. . . .

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. . . . We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

We also think the 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. . . .

[The Alabama Supreme Court found sufficient reference to the plaintiff because "the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body."]

This proposition has disquieting implications for criticism of governmental conduct. 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." The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. . . . Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent. . . .

Reversed and remanded.

MR. JUSTICE HUGO BLACK, with whom MR. JUSTICE WILLIAM O. DOUGLAS joins (concurring).

. . . I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. . . .

MR. JUSTICE ARTHUR GOLDBERG, with whom MR. JUSTICE WILLIAM O. DOUGLAS joins (concurring in the result).

. . . In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. . .

ZERAN V. AMERICA ONLINE, INC.

129 F.3d 327 (4th Cir. 1997)

J. HARVIE WILKINSON III, CHIEF JUDGE. . . .

On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts." The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call "Ken" at Zeran's home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to "please call back if busy" due to

high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages. AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The district court granted AOL's motion, and Zeran filed this appeal.

II.

A.

Because § 230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party.

The relevant portion of § 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).[2] By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet

[2] Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). The term "information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(e)(3). The parties do not dispute that AOL falls within the CDA's "interactive computer service" definition and that the unidentified third party who posted the offensive messages here fits the definition of an "information content provider."

medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, *with a minimum of government regulation.*" *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*" *Id.* § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.

Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.,* 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). There, the plaintiffs sued Prodigy—an interactive computer service like AOL—for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

B.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part IIA. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

For the foregoing reasons, we affirm the judgment of the district court.

Week 7

MILLIGAN V. SINCLAIR TELEVISION OF NASHVILLE, INC.

670 F.3d 686 (6th Cir. 2012)

R. GUY COLE JR., CIRCUIT JUDGE.

I. BACKGROUND

In October 2006, law enforcement officials across twenty-four states conducted Operation Falcon III ("the Operation"), a week-long fugitive round-up that led to the arrest of 10,733 people. During the Operation, the U.S. Marshals Service ("the Marshals") worked in conjunction with local law enforcement officers to locate and apprehend individuals wanted on federal, state, or local felony warrants. In Nashville, the Marshals worked with officers at the Metropolitan Nashville Police Department ("Metro"), who were specially deputized as U.S. Marshals for the Operation. Plaintiff Paula Milligan was among the numerous arrestees. It is undisputed that, due to a series of clerical mistakes, police arrested the wrong person.

In preparation for the Operation, Metro's Warrants Division received all the outstanding warrants for processing. A data entry clerk received the warrants and entered each suspect's name and identifying information into a spreadsheet, and this information was later used to create arrest folders for use during the Operation. One of these warrants was for "Paula Milligan

a.k.a. Paula Rebecca Staps," ("Milligan/Staps") a five-foot, three-inch, twenty-four-year old white female with brown hair and blue eyes, and a North Carolina driver's license and address. Rather than manually entering all this information, the clerk responsible for processing the warrant first looked her up in the Master Name Index, a database containing information of individuals already in Metro's system. When the clerk processed the warrant for "Paula Milligan a.k.a. Paula Rebecca Staps," he searched for "Paula Milligan" and, because an entry existed, allowed the database to auto fill all of Paula Milligan's identifying information. Unknown to the clerk, this personal information actually belonged to a different Paula Milligan—the Plaintiff, a five-foot, six-inch, forty-two-year old white female with blond hair and brown eyes, and a Tennessee driver's license and address. This Paula Milligan's information appeared in the index because of a traffic ticket she received a few years prior to the issuance of the warrant. The clerk failed to cross-reference the physical description given on the warrant with the description already in the index, and this mistake caused Milligan's date of birth and driver's license number to be linked to the outstanding warrant for Milligan/Staps.

Metro then sent this completed spreadsheet to the Marshals, who forwarded it to the Tennessee Bureau of Investigations ("Bureau") to prepare the arrest files. After forwarding the spreadsheet, Metro prepared a second version, removing all individuals with out-of-state addresses since the focus of the Operation was on local cases. This second version was not forwarded to the Bureau, so the Bureau prepared arrest files for local and out-of-state suspects, including one for Milligan/Staps. Because the Milligan/Staps warrant had a North Carolina address and was removed from the second spreadsheet, had the Bureau instead relied on the second spreadsheet, it would not have created this arrest file.

On October 24, Officer Doug Anderson and his team arrived at Milligan's home to execute the arrest warrant. Anderson carried a copy of her arrest file, though the file did not contain the warrant. It is unknown whether Anderson reviewed the file, but immediately prior to the arrest, he called a warrant clerk to verify that the warrant was still active. Anderson provided the warrant clerk with Milligan's name and date of birth, and the clerk immediately confirmed that the warrant was active. Given the immediacy of the clerk's response, the Defendants concede that she [the warrant clerk] did not physically locate and review the warrant. Additionally, had she reviewed the warrant, she would have noticed that the date of birth did not match the one Anderson provided. Relying on the clerk's assurance, Anderson and his team arrested Milligan, despite the Milligans' adamant claims of mistaken identity. On November 1, 2006, all criminal charges against Milligan were dropped, as it became clear that she had been erroneously arrested. The court issued a final order confirming the dismissal on November 6, 2006.

Prior to the Operation, the Marshals contacted local media outlets and offered an opportunity to ride along and report on the Operation. WZTV-Fox 17 ("Fox 17"), a local television station operated by Sinclair Broadcasting, accepted. Fox 17 was permitted to ride along on October 24, 2006, but agreed not to air footage until November 2, 2006, after the Operation concluded. On the day of Milligan's arrest, a Fox 17 reporter and videographer accompanied Anderson's team to her home, observing and filming her arrest. The reporter was aware that the officers had an arrest file for Milligan, but never reviewed the contents in preparation for the news story.

On November 2, 2006, the day after criminal charges against Milligan were dropped, the news embargo lifted and Fox 17 was permitted to air its story on the Operation. That day, Fox 17 broadcasted a news story providing general information about the Operation as well as footage of people being arrested and descriptions of their crimes. The report also had interviews with police officers and video footage of two arrests, one of which was Milligan's arrest. The story stated that "[t]heir first arrest came early—Paula Milligan, wanted on four counts of forgery and one count of identity theft" and claimed that the arrests were made "with warrants in hand." The report also included about seven seconds of video showing Milligan being escorted into the police car.

The report also focused on other people arrested during that day, including arrests for drug and sex offenses.

The story originally ran on the news at 9:00 at night and then a shorter version played again an hour later. Fox 17 also placed the video on its website, along with a written story. . . .

[The Milligans sued Sinclair Broadcasting and various Sinclair employees for defamation and invasion of privacy. The Milligans also brought various civil rights claims against certain government entities and officials.] [T]he district court granted Sinclair's motion for summary judgment on the defamation and false light claims. . . . The Milligans timely appeal . . . .

II. ANALYSIS

The Tennessee fair report privilege is a qualified privilege . . . . Media defendants benefit from this privilege when reporting on an official action or proceeding or of a meeting open to the public that deals with a matter of public concern. As the privilege is qualified, not absolute, it applies only when the report is a fair and accurate summation of the proceeding and displays balance and neutrality. Thus, Sinclair Broadcasting may take advantage of the fair report privilege . . . if it (1) reported on an official action, and (2) provided a fair and accurate report of the events.

We must first determine whether Fox 17's report concerned an official action. The fair report privilege does not protect a media defendant's reporting on all statements made by any governmental employee in any circumstance, but rather it is limited to reports of public proceedings or official actions of government that have been made public. The privilege has expanded to include reports of public meetings of local government, reporting on the contents of arrest and search warrants, as well as reports of judicial documents and proceedings. . . . An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer is within the fair report privilege; however, statements made by the police or by the complainant or other witnesses as to the facts of the case are not.

Under this standard, Fox 17's Operation news story is a report of an official action for purposes of the fair report privilege. The report included only one statement concerning Milligan, asserting that "[t]heir first arrest came early—Paula Milligan wanted on four counts of forgery and one count of identity theft." This report does not include any opinions or embellishments from third parties and is limited to reporting only the fact of the arrest and the charge of the crime.

We must next turn to the issue of whether Fox 17's Operation news report was a fair and accurate portrayal of Milligan's arrest. The fair report privilege protects only fair and accurate portrayals of the official action; however, a report need not be a verbatim, technically accurate account in every detail, as long as it conveys a correct and just impression of what took place. Minor, insignificant factual discrepancies will not overcome the fair report privilege, but a media defendant may not rely on the privilege when reporting false statements of fact regarding what occurred during the proceeding or a one-sided account of the proceeding.

The Milligans contend that Fox 17's report was not fair and accurate because it erroneously implied that the officers arresting Milligan had a warrant physically present at the time of arrest. The Operation segment opened with the phrase "with warrants in hand, teams of officers swarmed across Middle Tennessee." The report later showed footage of Milligan's arrest and stated that she was arrested on four counts of forgery and one count of identity theft. It should first be noted that the statement "with warrants in hand" is most appropriately viewed as an introductory remark, not commentary on the particulars of Milligan's arrest. But even if this comment is imputed directly to Milligan's arrest, this minor inaccuracy is insufficient to defeat the fair report privilege because it is an insignificant, technical discrepancy. The overall gist of the report is that Milligan was arrested on forgery and identity theft charges, and whether the officers physically had a warrant in hand at the time of this arrest or radioed it in to the Warrants

Division has no real effect on whether the report conveyed a just impression of what took place. Even though the "with warrants in hand" statement is false as applied to Milligan, it is not such a large transgression that it creates a one-sided defamatory account of the official action, and therefore, it is covered by the fair report privilege. . . .

Therefore, we conclude that the district court properly found that the Tennessee fair report privilege shields Sinclair Broadcasting's liability for any inaccuracies in their Operation news report regarding Milligan's arrest. . . . [T]he district court properly granted Sinclair Broadcasting's motion for summary judgment.

WEEK 9

In re Northwest Airlines Privacy Litigation

2004 WL 1278459 (D. Minn. 2004)

Plaintiffs are customers of Defendant Northwest Airlines, Inc. ("Northwest"). After September 11, 2001, the National Aeronautical and Space Administration ("NASA") requested that Northwest provide NASA with certain passenger information in order to assist NASA in studying ways to increase airline security. Northwest supplied NASA with passenger name records ("PNRs"), which are electronic records of passenger information. PNRs contain information such as a passenger's name, flight number, credit card data, hotel reservation, car rental, and any traveling companions.

[Plaintiffs sued based on a number of theories, including state tort liability for intrusion upon seclusion.]
Intrusion upon seclusion exists when someone "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." Thus, to make out a claim for intrusion upon seclusion, Plaintiffs must show that the alleged intrusion would be highly offensive to a reasonable person. The Court may properly preliminarily determine whether the alleged intrusion is sufficiently offensive to state a claim for intrusion upon seclusion. When making this determination, the Court should consider the "degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded."

In this instance, Plaintiffs voluntarily provided their personal information to Northwest. Moreover, although Northwest had a privacy policy for information included on the website, Plaintiffs do not contend that they actually read the privacy policy prior to providing Northwest with their personal information. Thus, Plaintiffs' expectation of privacy was low. Further, the disclosure here was not to the public at large, but rather was to a government agency in the wake of a terrorist attack that called into question the security of the nation's transportation system. Northwest's motives in disclosing the information cannot be questioned. Taking into account all of the factors listed above, the Court finds as a matter of law that the disclosure of Plaintiffs' personal information would not be highly offensive to a reasonable person and that Plaintiffs have failed to state a claim for intrusion upon seclusion.

In re Facebook, Inc. Internet Tracking Litigation,

956 F.3d 589 (9th Cir. 2020)

Facebook uses plug-ins to track users' browsing histories when they visit third-party websites, and then compiles these browsing histories into personal profiles which are sold to advertisers to generate revenue. The parties do not dispute that Facebook engaged in these tracking practices after its users had logged out of Facebook.

Facebook facilitated this practice by embedding third-party plug-ins on third-party web pages. The plug-ins, such as Facebook's "Like" button, contain bits of Facebook code. When a user visits a page that includes these plug-ins, this code is able to replicate and send the user data to Facebook through a separate, but simultaneous, channel in a manner undetectable by the user.

As relevant to this appeal, the information Facebook allegedly collected included the website's Uniform Resource Locator ("URL") that was accessed by the user. URLs both identify an internet resource and describe its location or address. "[W]hen users enter URL addresses into their web browser using the 'http' web address format, or click on hyperlinks, they are actually telling their web browsers (the client) which resources to request and where to find them. *In re Zynga Privacy Litig.,* 750 F.3d 1098, 1101 (9th Cir. 2014). Thus, the URL provides significant information regarding the user's browsing history, including the identity of the individual internet user and the web server, as well as the name of the web page and the search terms that the user used to find it.

Facebook allegedly compiled the referer headers it collected into personal user profiles using "cookies"—small text files stored on the user's device. When a user creates a Facebook account, more than ten Facebook cookies are placed on the user's browser. These cookies store the user's login ID, and they capture, collect, and compile the referer headers from the web pages visited by the user. As most relevant to this appeal, these cookies allegedly continued to capture information after a user logged out of Facebook and visited other websites.

[Plaintiffs Facebook users filed suit with a range of claims, including intrusion, and Facebook filed a motion to dismiss.]

We first consider whether a defendant gained unwanted access to data by electronic or other covert means, in violation of the law or social norms. To make this determination, courts consider a variety of factors, including the customs, practices, and circumstances surrounding a defendant's particular activities.
Thus, the relevant question here is whether a user would reasonably expect that Facebook would have access to the user's individual data after the user logged out of the application. Facebook's privacy disclosures at the time allegedly failed to acknowledge its tracking of logged-out users, suggesting that users' information would not be tracked.

The applicable Facebook Statement of Rights and Responsibilities ("SRR") stated:

> Your privacy is very important to us. We designed our Privacy Policy to make important disclosures about how you can use Facebook to share with others and how we collect and can use your content and information. We encourage you to read the Privacy Policy, and to use it to make informed decisions.

SRR, dated April 26, 2011.
Facebook's applicable Data Use Policy, in turn, stated:

> We receive data whenever you visit a game, application, or website that uses [Facebook's services]. This may include the date and time you visit the site; the web address, or URL, you're on; technical information about the IP address, browser and the operating system you use; and, if you are logged in to Facebook, your user ID.

Data Use Policy, dated September 7, 2011.
Finally, Facebook's "Help Center" at the time included answers to questions related to data tracking. Most relevantly, one answer from a Help Center page at the time answered the question "[w]hat information does Facebook receive about me when I visit a website with a Facebook social plug in?" The Help Center page first stated that Facebook collected the date and time of the visit, the referer URL, and other technical information. It continued, "[i]f you are logged into Facebook, we also see your user ID number and email address.... If you log out of Facebook, we will not receive this information about partner websites but you will also not see personalized experiences on these sites."

Plaintiffs have plausibly alleged that an individual reading Facebook's promise to "make important privacy disclosures" could have reasonably concluded that the basics of Facebook's tracking— when, why, and how it tracks user information —would be provided. Plaintiffs have plausibly alleged that, upon reading Facebook's statements in the applicable Data Use Policy, a user might assume that only logged-in user data would be collected. Plaintiffs have alleged that the applicable Help Center page affirmatively stated that logged-out user data would not be collected. Thus, Plaintiffs have plausibly alleged that Facebook set an expectation that logged-out user data would not be collected, but then collected it anyway.

In light of the privacy interests and Facebook's allegedly surreptitious and unseen data collection, Plaintiffs have adequately alleged a reasonable expectation of privacy. Case law supports this determination. In *In re Google Cookie*—where the Third Circuit similarly interpreted California Law—the court held that users maintained a reasonable expectation of privacy in their browsing histories when Google tracked URLs after the users denied consent for such tracking. That users in those cases explicitly denied consent does not render those cases distinguishable from the instant case, given Facebook's affirmative statements that it would not receive information from third-party websites after users had logged out. Indeed, in those cases, the critical fact was that the online entity represented to the plaintiffs that their information would not be collected, but then proceeded to collect it anyway.

The nature of the allegedly collected data is also important. Plaintiffs allege that Facebook obtained a comprehensive browsing history of an individual, no matter how sensitive the websites visited, and then correlated that history with the time of day and other user actions on the websites visited. This process, according to Plaintiffs, resulted in Facebook's acquiring "an enormous amount of individualized data" to compile a "vast repository of personal data."

Facebook argues that Plaintiffs need to identify specific, sensitive information that Facebook collected, and that their more general allegation that Facebook acquired "an enormous amount of individualized data" is insufficient. However, *both* the nature of collection and the sensitivity of the collected information are important. The question is not necessarily whether Plaintiffs maintained a reasonable expectation of privacy in the information in and of itself. Rather, we must examine whether the data itself is sensitive *and* whether the manner it was collected—after users had logged out—violates social norms.

When we consider the sensitivity of that data, moreover, we conclude there remain material questions of fact as to whether a reasonable individual would find the information collected from the seven million websites that employ Facebook plug-ins "sensitive and confidential."

Thus, viewing the allegations in the light most favorable to Plaintiffs, as we must at this stage, the allegations that Facebook allegedly compiled highly personalized profiles from sensitive browsing histories and habits prevent us from concluding that the Plaintiffs have no reasonable expectation of privacy.

However, in order to maintain a California common law privacy action, "[p]laintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be 'highly offensive'

to a reasonable person, and 'sufficiently serious' and unwarranted so as to constitute an 'egregious breach of the social norms.'" Determining whether a defendant's actions were "highly offensive to a reasonable person" requires a holistic consideration of factors such as the likelihood of serious harm to the victim, the degree and setting of the intrusion, the intruder's motives and objectives, and whether countervailing interests or social norms render the intrusion inoffensive. While analysis of a reasonable expectation of privacy primarily focuses on the nature of the intrusion, the highly offensive analysis focuses on the degree to which the intrusion is unacceptable as a matter of public policy.

The ultimate question of whether Facebook's tracking and collection practices could highly offend a reasonable individual is an issue that cannot be resolved at the pleading stage. Plaintiffs have identified sufficient facts to survive a motion to dismiss. Plaintiffs' allegations of surreptitious data collection when individuals were not using Facebook are sufficient to survive a dismissal motion on the issue. Indeed, Plaintiffs have alleged that internal Facebook communications reveal that the company's own officials recognized these practices as a problematic privacy issue.

In sum, Plaintiffs have sufficiently pleaded the "reasonable expectation of privacy" and "highly offensive" elements necessary to state a claim for intrusion upon seclusion and invasion of privacy to survive a 12(b)(6) motion to dismiss.

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Questions.

Is collecting browsing behavior "highly offensive"? How would a court assess such a question?

Does it matter, for the purpose of the prima facie case of an Intrusion tort, that the business model for free online services like Facebook rely on customers "paying with their data" rather than with money? In other words, to what extent should courts take into consideration whether a data subject gets a benefit out of a putative intrusion upon seclusion when considering whether their expectations of privacy are reasonable or whether the intrusion is highly offensive?

Notice that in In re Northwest the court said that, as a matter of law, the intrusion was not highly offensive. Should this be a judicial decision? A jury decision? A judicial decision only when no reasonable juror could find high offense? Does it matter that users might be more offended by the sharing of some information—credit card numbers, for example—than other information? Does it matter to offensiveness whether the government could or could not get that information through a request or subpoena without a warrant?

Notes.

Cookies and behavioral advertising. In an early, influential privacy case brought against DoubleClick (later acquired by Google), a district court found that web-tracking cookies that help firms compile data and promote behaviorally targeted advertising do not violate federal wiretap or stored communications laws because the websites that are tracked voluntarily share their visitor's data with these third party trackers. In re DoubleClick Inc. Privacy Litigation, 154 F.Supp.2d 497 (2001). The state invasion of privacy claims brought against DoubleClick were dismissed for lack of federal jurisdiction and were not refiled. The Facebook case therefore breathes new life into intrusion claims based on behavioral advertising practices.

Note, though, that the Facebook case is unusual. Other cases have found that collecting and sharing browsing data for the purposes of behavioral advertising is not highly offensive, even when the collection violates the website's privacy policies. In re Google, Inc. Privacy Policy Litigation, 58 F.Supp.3d 968, 988 (2014). Thus, the fact that Facebook users were logged out when data was collected is a highly important fact for sustaining this sort of intrusion case.

What result would you expect if Facebook had clearly disclosed its data collection practices to users? If the third-party websites that had installed Facebook plugins disclosed the data-sharing practice in their websites' user agreements, would the intrusion claim be weaker?

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The Florida Star v. B.J.F.

491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989)

Justice THURGOOD MARSHALL delivered the opinion of the Court.

Florida Stat. § 794.03 (1987) makes it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of the victim of a sexual offense. Pursuant to this statute, appellant The Florida Star was found civilly liable for publishing the name of a rape victim [B.F.J.] which it had obtained from a publicly released police report. The issue presented here is whether this result comports with the First Amendment. We hold that it does not. . . .

We conclude that imposing damages on appellant for publishing B.J.F.'s name violates the First Amendment, although not for either of the reasons appellant urges. Despite the strong resemblance this case bears to *Cox Broadcasting*, that case cannot fairly be read as controlling here. The name of the rape victim in that case was obtained from courthouse records that were open to public inspection, a fact which Justice White's opinion for the Court repeatedly noted. Significantly, one of the reasons we gave in Cox Broadcasting for invalidating the challenged damages award was the important role the press plays in subjecting trials to public scrutiny and thereby helping guarantee their fairness. That role is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.

Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels are not resolving anticipatorily. Indeed, in Cox Broadcasting, we pointedly refused to answer even the less sweeping question "whether truthful publications may ever be subjected to civil or criminal liability" for invading "an area of privacy" defined by the State. Respecting the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society," we instead focused on the less sweeping issue of "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a

public prosecution and which themselves are open to public inspection." We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

In our view, this case is appropriately analyzed with reference to such a limited First Amendment principle. It is the one, in fact, which we articulated in *Daily Mail* in our synthesis of prior cases involving attempts to punish truthful publication: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." According the press the ample protection provided by that principle is supported by at least three separate considerations, in addition to, of course, the overarching public interest, secured by the Constitution, in the dissemination of truth. The cases on which the Daily Mail synthesis relied demonstrate these considerations.

First, because the Daily Mail formulation only protects the publication of information which a newspaper has "lawfully obtain[ed]," the government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity. To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the Daily Mail principle the publication of any information so acquired. To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts. . . .

A second consideration undergirding the Daily Mail principle is the fact that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act. It is not, of course, always the case that information lawfully acquired by the press is known, or accessible, to others. But where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release. . . .

A third and final consideration is the "timidity and self-censorship" which may result from allowing the media to be punished for publishing certain truthful information. Cox Broadcasting noted this concern with over deterrence in the context of information made public through official court records, but the fear of excessive media self-suppression is applicable as well to other information released, without qualification, by the government. A contrary rule, depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object was to reproduce, with no substantial change, the government's rendition of the event in question.

Applied to the instant case, the *Daily Mail* principle clearly commands reversal. The first inquiry is whether the newspaper "lawfully obtain[ed] truthful information about a matter of public significance." It is undisputed that the news article describing the assault on B.J.F. was accurate. In addition, appellant lawfully obtained B.J.F.'s name. Appellee's argument to the contrary is based on the fact that under Florida law, police reports which reveal the identity of the victim of a sexual offense are not among the matters of "public record" which the public, by law, is entitled to inspect. But the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government. Nor does the fact that the Department apparently failed to fulfill its obligation under § 794.03 not to "cause or allow to be . . . published" the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful. Even assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step. It is, clear, furthermore, that the news article concerned "a matter of public significance," in the sense in which the *Daily Mail* synthesis of prior cases used that term. That is, the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.

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1. **Relationship to the public disclosure tort.** Keep in mind that *Florida Star* concerned a special rape shield statute that penalized publishers no matter how the identity of the rape victim was obtained. If the plaintiff had sued based on the public disclosure tort, presumably she would have lost on the "private facts" element since the government had already disclosed her identity to outsiders (in a press room, no less.) What if the newspaper had learned the name of the rape victim in some other manner—from a family member, for example. If we set aside the government's involvement in the *Florida Star* case, could a rape victim sue a newspaper for public disclosure of private facts?

The last paragraph quoted above suggests not. As long as the "article generally" involved a matter of paramount public import, the article may be protected either by the First Amendment or through the newsworthiness element of the tort itself. *See also Four Navy SEALs & Jane Doe v. AP,* 413 F.Supp.2d 1136 (2005) finding that photographs revealing the identity of Navy SEALs who posed with Iraqi detainees who were placed in humiliating positions was a matter of public concern because "the expressions on the SEALs' faces form an integral part of the story about potential mistreatment of captives."

2. **Lawfully obtained? Receiving stolen goods.** Suppose a third party wiretaps the plaintiff's phone, unlawfully obtaining information about him, and then gives the information to defendant newspaper, which publishes it. Does *Florida Star* permit the courts to impose liability upon either the third-party or the newspaper? In *Bartnicki v. Vopper,* 532 U.S. 514 (2001), the defendant published some illegally taped conversations on matters of public concern. The court assumed that the defendant knew that the information had been obtained in violation of federal wiretap laws. Nevertheless, since the matter was one of public concern, and since the defendant did not himself have any role in the illegal information-gathering, the First Amendment shielded the defendant from liability for the subsequent publication. If the third-party eavesdropper knew in advance that the conversation would be highly newsworthy, could he be shielded from liability

for the intrusive recording? If not, why should a media company be shielded from liability for giving publicity to the same information?

3. **Disclosing juror information.** Allegations in *Burgess v. Busby,* 544 S.E.2d 4 (2001), asserted that the plaintiffs had all been jurors in a medical malpractice case in which Dr. Busby had been a defendant. The jurors found one doctor negligent, but not Dr. Busby. Busby then sent out a letter listing the jurors with their addresses as jurors who had found a doctor guilty of negligence. The letter went to medical practitioners in the county. The plaintiffs alleged that Busby had done so in retaliation and for the purpose of encouraging doctors to refuse or limit medical care to the plaintiffs. They claimed intentional infliction of emotional distress, a common law obstruction of justice tort, and invasion of privacy. As North Carolina refuses to recognize the private fact and false light versions of privacy invasion, the plaintiffs asserted that this was an intrusive invasion of privacy. The court held it was not an intrusive invasion and hence denied the privacy claim. But it permitted the plaintiff to proceed on the emotional distress theory and the obstruction of justice theory. *Florida Star* was not cited. Thus, IIED seemed to provide an end run around First Amendment precedents.

4. **Speech v. privacy.** In the United States, the conflict between free speech and privacy is often resolved in favor of free speech. In Europe, the two principles are weighted more equally. See Julia A. Davies and Paul T. Hayden, Global Issues in Tort Law (2007).

Week 11

Cohen v. Cowles Media Co.

501 U.S. 663 (1991)

JUSTICE WHITE delivered the opinion of the Court.

The question before us is whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. We hold that it does not.

During the closing days of the 1982 Minnesota gubernatorial race, Dan Cohen, an active Republican associated with Wheelock Whitney's Independent-Republican gubernatorial campaign, approached reporters from the St. Paul Pioneer Press Dispatch (Pioneer Press) and the Minneapolis Star and Tribune (Star Tribune) and offered to provide documents relating to a candidate in the upcoming election. Cohen made clear to the reporters that he would provide the information only if he was given a promise of confidentiality. Reporters from both papers promised to keep Cohen's identity anonymous and Cohen turned over copies of two public court records concerning Marlene Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor. The first record indicated that Johnson had been charged in 1969 with three counts of unlawful assembly, and the second that she had been convicted in 1970 of petit theft. Both newspapers interviewed Johnson for her explanation and one reporter tracked down the person who had found the records for Cohen. As it turned out, the unlawful assembly charges arose out of Johnson's participation in a protest of an alleged failure to hire minority

workers on municipal construction projects, and the charges were eventually dismissed. The petit theft conviction was for leaving a store without paying for $ 6 worth of sewing materials. The incident apparently occurred at a time during which Johnson was emotionally distraught, and the conviction was later vacated.

After consultation and debate, the editorial staffs of the two newspapers independently decided to publish Cohen's name as part of their stories concerning Johnson. In their stories, both papers identified Cohen as the source of the court records, indicated his connection to the Whitney campaign, and included denials by Whitney campaign officials of any role in the matter. The same day the stories appeared, Cohen was fired by his employer.

Cohen sued respondents, the publishers of the Pioneer Press and Star Tribune, in Minnesota state court, alleging fraudulent misrepresentation and breach of contract. The trial court rejected respondents' argument that the First Amendment barred Cohen's lawsuit. A jury returned a verdict in Cohen's favor, awarding him $ 200,000 in compensatory damages and $500,000 in punitive damages. The Minnesota Court of Appeals, in a split decision, reversed the award of punitive damages after concluding that Cohen had failed to establish a fraud claim, the only claim which would support such an award. However, the court upheld the finding of liability for breach of contract and the $ 200,000 compensatory damages award.

A divided Minnesota Supreme Court reversed the compensatory damages award [on First Amendment grounds].

]The initial question we face is whether a private cause of action for promissory estoppel involves "state action" within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered. For if it does not, then the First Amendment has no bearing on this case. The rationale of our decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964), and subsequent cases compels the conclusion that there is state action here. Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. In this case, the Minnesota Supreme Court held that if Cohen could recover at all it would be on the theory of promissory estoppel, a state-law doctrine which, in the absence of a contract, creates obligations never explicitly assumed by the parties. These legal obligations would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute "state action" for purposes of the Fourteenth Amendment.

Respondents rely on the proposition that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).That proposition is unexceptionable, and it has been applied in various cases that have found insufficient the asserted state interests in preventing publication of truthful, lawfully obtained information. See, *e. g., Florida Star* v. *B. J. F.*, 491 U.S. 524 (1989).

This case, however, is not controlled by this line of cases but, rather, by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. As the cases relied on by respondents recognize, the

truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. See *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Similarly, the media must obey the National Labor Relations Act, *Associated Press* v. *NLRB*, 301 U.S. 103 (1937), and the Fair Labor Standards Act, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-193 (1946); may not restrain trade in violation of the antitrust laws, *Associated Press* v. *United States*, 326 U.S. 1, 89 L. Ed. 2013 (1945); and must pay non-discriminatory taxes, *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943). It is, therefore, beyond dispute that "the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *NLRB, supra*, at 132-133. Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Accordingly, the judgment of the Minnesota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Notes

1. *Cohen* establishes that non-disclosure agreements can be enforced through standard contract proceedings without the First Amendment interfering even though enforcement might get in the way of the public's access to information of public concern. Why should contractual obligations of non-disclosure be treated differently from statutory or other legal requirements of non-disclosure?

Denson v. Donald J. Trump for President (S.D.N.Y. 2021)

In August 2016 – soon after Donald J. Trump was selected as the Republican Party's nominee for the office of President of the United States – Denson applied to work for the Campaign, and was hired as a national phone bank administrator. Prior to beginning work, the Campaign required Denson – along with other Campaign employees – to sign the Employment Agreement, a form contract that contains non-disclosure and non-disparagement clauses. Denson remained an employee of the Campaign until November 10, 2016.

The Employment Agreement provides as follows:

> During the term of your service and at all times thereafter you hereby promise and agree:
> a. not to disclose, disseminate or publish, or cause to be disclosed, disseminated or published, any Confidential Information;
> b. not to assist others in obtaining, disclosing, disseminating, or publishing Confidential Information; …

The Employment Agreement defines "Confidential Information" as

> all information (whether or not embodied in any media) of a private, proprietary or confidential nature or that Mr. Trump insists remain private or confidential, including, but not limited to, any information with respect to the personal life, political affairs, and/or business affairs of Mr. Trump or of any Family Member, including but not limited to, the assets, investments, revenue, expenses, taxes, financial statements, actual or prospective business ventures, contracts, alliances, affiliations, relationships, affiliated entities, bids, letters of intent, term sheets, decisions, strategies, techniques, methods, projections, forecasts, customers, clients, contacts, customer lists, contact lists, schedules, appointments, meetings, conversations, notes, and other communications of Mr. Trump, any Family Member, any Trump Company or any Family Member Company.

On November 9, 2017, Denson filed a complaint against the Campaign in Supreme Court of the State of New York, New York County, alleging sex discrimination, harassment, and slander. On December 20, 2017, the Campaign commenced an arbitration proceeding against Denson, claiming that she had "breached confidentiality and non-disparagement obligations contained in a written agreement she executed during her employment with [the Campaign]." The Campaign claimed that Denson had "breached her obligations by publishing certain confidential information and disparaging statements in connection with a lawsuit she filed against claimant in New York Supreme Court." On March 19, 2018, in Supreme Court of the State of New York, New York County, the Campaign filed a motion to compel arbitration of certain of Denson's pending claims. On September 7, 2018, the court denied the Campaign's motion to compel arbitration. On March 26, 2018, Denson filed a complaint in this District, seeking a declaration that the Employment Agreement is void and unenforceable.

The Campaign has brought claims for arbitration against other former Campaign workers for alleged breaches of the Employment Agreement (or similar non-disclosure agreements). On August 14, 2018, former Campaign employee Omarosa Manigault Newman published a book entitled *Unhinged: An Insider's Account of the Trump White House*. That same day, the Campaign commenced an arbitration proceeding against Newman for breaches of a non-disclosure agreement.

On August 31, 2019, President Trump tweeted,

> ...Yes, I am currently suing various people for violating their confidentiality agreements. Disgusting and foul mouthed Omarosa is one. I gave her every break, despite the fact that she was despised by everyone, and she went for some cheap money from a book. Numerous others also!

On January 29, 2019, former Campaign employee Cliff Sims published a book entitled *Team of Vipers*. That same day, the Campaign's then-Chief Operating Officer Michael Glassner tweeted that the Campaign was "preparing to file suit against Cliff Sims for violating our NDA." That same day, President Trump tweeted, "[a] low level staffer that I hardly knew named Cliff Sims wrote yet another boring book based on made up stories and fiction. He pretended to be an insider when in fact he was nothing more than a gofer. He signed a non-disclosure agreement. He is a mess!"

Denson argues that the Employment Agreement's non-disclosure and nondisparagement provisions are unenforceable under New York law because they (1) do not "contain any temporal limit"; (2) define "Confidential Information" to include "staggeringly broad categories" including "anything 'Mr. Trump insists remain private or confidential'"; (3) restrict speech on matters of highest political importance and subject Campaign workers to potentially crippling financial penalties for exercising basic rights"; (4) "lack the requisite definiteness required of all valid agreements"; (5) "contravene[] public policy" by violating "the United States' and New York's commitment to public debate on matters of public concern . . . [and] New York's public policy against contracts that prevent the reporting of misconduct"; and (6) are unconscionable.

The Campaign responds that (1) it "has compelling and constitutionally-based privacy interests"; (2) "there is nothing about the lack of a durational component that makes a confidentiality or non-disparagement provision 'ipso facto' unenforceable"; (3) "parties are free to waive their First Amendment rights contractually[,]" and the non-disclosure and nondisparagement provisions are not "unreasonably burdensome"; (4) the definition of "Confidential Information" "specifically includes the protected categories of information which the courts have found are intrinsically 'private' for political campaigns[,]" and Denson "does not present any facts or circumstances against which to measure the [Employment] Agreement"; and (5) the Employment Agreement is not unconscionable.

"Restrictive covenants, such as . . . confidentiality agreements [], are subject to specific enforcement to the extent that they are '"reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee."'" Ashland Mgmt. Inc. v. Altair Invs. NA, LLC, 59 A.D.3d 97, 102 (1st Dept. 2008). Under New York contract law, however, "[i]mpenetrable vagueness and uncertainty will not do[,]" because "definiteness as to material matters is of the very essence in contract law." Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109 (1981).

Enforceability requires "a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." In re Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 589 (1999).

The Employment Agreement's non-disclosure provision does not meet any of the elements of the Ashland test. …

The non-disclosure provision's vague, overbroad, and undefined terms also render it unduly burdensome. It is difficult if not impossible for Denson or another Campaign employee to know whether any speech might be covered by one of the broad categories of restricted information; whether that speech might relate to one of the several hundred potential subjects of the non-disclosure provision; or whether that speech may relate to a matter that President Trump will determine is confidential. Because the effect of these burdens is to chill the speech of Denson and other former Campaign workers about matters of public interest, the non-disclosure provision is harmful not only to them but also to the general public.