"Defamation Live": The Confusing Legal Landscape of Republication in Live Broadcasting and a Call for a "Breaking News Doctrine"

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ABSTRACT

Live, broadcast defamation is a murky area of law garnering surprisingly scant scholarly attention. But because libel law typically creates republication liability for broadcasters who air defamatory statements uttered by third parties—even when news organizations have no idea what the third parties are about to say—broadcasters covering live, breaking news events face significant risks of liability for remarks by people at the scene. This Article analyzes the case law of live and spontaneous broadcast defamation, explores the statutory backdrop in such cases and, ultimately, proposes a solution in the form of a "breaking news doctrine" that relieves broadcasters of republication liability if five prerequisites are satisfied.

INTRODUCTION

Imagine you are a broadcast journalist for a local television station doing a live segment in the immediate aftermath of an apparent bombing of a downtown office building. Having rushed to the scene with your cameraperson, you ask a question—"Who do you think committed this horrible act?"—of a bystander (Mr. X), who you anticipate will name a local man (Mr. Y) as the bomber. That's because you've overheard Mr. X—whom you have never met before but have no reason not to trust—telling others in the crowd that he knows Mr. Y did it.

Sure enough, Mr. X names Mr. Y—a person of no particular notoriety or power—live on the air. It later turns out that Mr. Y had nothing to do with the bombing. Mr. Y sues you, your station, and Mr. X for defamation.[1] Are you liable

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1. Defamation generally refers "to false communications about another person that damage that person's reputation or bring her into disrepute. Both slander and libel are forms of defamation. The general purpose of libel law is to allow people who have been defamed to restore their reputations." ROBERT TRAGER ET AL., THE LAW OF JOURNALISM AND MASS COMMUNICATION 144 (4th ed.

for defamation, as well as your source? What about your employer?

Now, suppose you had *not* anticipated that Mr. X (the bystander) would name Mr. Y. You had no idea, in fact, what Mr. X would say. Would or should that lack of scienter, as it were, on your part make a difference in determining whether you and your station are liable for defamation?[2] After all, as Professor Leslie Kendrick writes, "[t]he constitutional standards for defamation famously turn on the state of mind of the speaker."[3]

Ultimately, then, should courts and lawmakers create what the authors of this Article call a "breaking news doctrine" to protect broadcast journalists from liability in such time-sensitive scenarios? Is there even a need for such a doctrine, given the current status of the law regarding what might be called live or spontaneous defamation cases?

Surprisingly, the law of most states is quite murky in such scenarios. One defamation treatise, authored by federal appellate court judge Robert D. Sack, for instance, describes these "rarely encountered cases" as an "interesting laboratory in which to examine republication problems."[4]

That's because defamation law generally holds liable everyone who republishes a defamatory statement. As the *Restatement (Second) of Torts* puts it, "[o]ne who repeats or otherwise republishes defamatory material is subject to liability as if he had originally published it."[5] This ancient principle was articulated by one nineteenth-century court with the pithy phrase, "Talebearers are as bad as tale-makers."[6] So, if a statement goes out live over a broadcaster's signal, regardless of who said it, the broadcaster is considered a republisher—and thereby culpable—in most jurisdictions.

There are, of course, various ameliorating doctrines that may soften the blow of this "harsh" republication rule.[7] These doctrines include a fair report privilege for reporting official statements by government officials and a neutral reportage privilege that exists in a few jurisdictions.[8] Nonetheless, in many scenarios broadcasters face significant risks when third parties make defamatory statements in live broadcasts, particularly when the broadcaster has some advance knowledge of what is about to be said.

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2. Scienter generally refers to "knowledge and belief." A. G. Harmon, *Defamation in Good Faith: An Argument for Restating the Defense of Qualified Privilege*, 16 BARRY L. REV. 27, 49 (2011).

3. Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1636 (2013).

4. 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS 7–10 § 7:3.5(a)(2) (4th ed. 2010).

5. RESTATEMENT (SECOND) OF TORTS § 578 (1977).

6. Harris v. Minvielle, 48 La. Ann. 908, 915 (1896).

7. *See* Jonathan Donnellan & Justin Peacock, *Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations*, 50 N.Y.L. SCH. L. REV. 237, 245 (2006) (calling the lesson of the republication doctrine "a *harsh one* for journalists. In practice, it places an almost impossible demand on republishers, who often lack first-hand access to the information reported upon, particularly when the subject is government investigations and allegations," and adding that "[t]he *harshness of the doctrine* is one of design") (emphasis added).

8. These doctrines are addressed in greater detail in Part I of this Article.

Despite the gravity of "live" defamation for broadcasters, there is almost no contemporary legal scholarship on the problem.[9] This Article fills that void by deeply examining the jurisprudence of live defamation. Specifically, Part I explores a variety of legal doctrines that prevent the application of republication liability. Part II then analyzes case law involving live, on-air defamation. Although the cases illuminate the problem to some degree, relatively few jurisdictions have directly ruled on these issues and, when they have, the holdings are sometimes so narrow and fact-specific as to be less than helpful in predicting future outcomes.

Next, Part III explores various state laws known as "due care" statutes that may affect the question. Finally, this Article concludes in Part IV by offering suggestions for clarifying and improving the legal standards in this difficult area of the law. Specifically, it suggests the potential adoption of a breaking news doctrine and it spells out the elements of such a doctrine.

I. PRIVILEGES AGAINST REPUBLICATION LIABILITY: WHY NONE FIT THE LIVE-DEFAMATION SCENARIO

Several extant doctrines, at least in some situations, may help to resolve defamation cases stemming from live broadcasts. Professor David Ardia, for instance, observes that doctrines such as the fair report privilege, the wire service defense, and the neutral reportage privilege have developed over the years that "protect[] the republication of certain unverified statements."[10] This part addresses some of these principles and explains why they may or may not apply to live-defamation cases like the hypothetical scenario at the start of this Article.

A. FAIR REPORT PRIVILEGE

First Amendment scholar Rodney Smolla observes that "[t]he common law has long recognized the unique privilege to publish fair and accurate reports of certain defined judicial, legislative, and executive proceedings."[11] He adds that this privilege "is technically an exception to the normal common-law position that one who republishes a libel 'adopts it as his own' and becomes liable as if he were the originator of the defamation."[12]

This privilege, however, would not apply to the hypothetical in the Introduction. That's because the broadcast journalist is not reporting a judicial, legislative, or

9. One of the few articles to broadly, but not directly, address the issue is now more than sixty years old. *See* Robert A. Leflar, *Radio and TV Defamation: "Fault" or Strict Liability?*, 15 OHIO ST. L.J. 252 (1954).

10. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 395 (2010).

11. 1 RODNEY A. SMOLLA, RIGHTS AND LIABILITIES IN MEDIA CONTENT § 6:83, 6-608 (2d ed. 2011).

12. *Id.* at § 6:83, 6-609.

executive proceeding. Rather, he is reporting on breaking news.

Yet, the public policy behind this privilege certainly supports extending it to such scenarios and to the creation of a breaking news doctrine. As Smolla, current Dean of Widener University Delaware Law School, encapsulates it, "[t]he rationale for the privilege is of considerable vintage but remains as relevant as ever: The reporter is a surrogate for the public, permitting it to observe through the reporter's eyes how the business of government is being conducted."[13]

By extension of this logic, the broadcast journalist described in the Introduction is a surrogate for the public who cannot be at the scene of an alleged bomb attack. The journalist permits the public to see and hear what others who are there are saying and doing at an event of obvious public concern. The same journalist, in turn, fairly and accurately reported the comment by Mr. X that ultimately turned out to be false and defamatory.

In brief, then, the fair report privilege would need to be extended beyond the narrow confines of selected governmental proceedings and stretched to apply to locations where breaking news of specific kinds—such as the possible terrorist attack in the bombing hypothetical—occur. The difficulty in this extension, of course, is twofold: (1) delineating the specific types of breaking news events to which the privilege would apply; and (2) determining when news no longer is "breaking," as it were, such that the privilege would be extinguished by the passage of time.

B. WIRE SERVICE DEFENSE

The wire service defense "was originally developed for newspapers who served as conduits for national wire service reports,"[14] and it "recognizes the importance of publication before news becomes stale."[15] Today, it also reflects "the realities in which smaller market media outlets operate" and "the fast-paced world in which our modern media operate."[16] It does so by allowing local news operations to rely on content supplied by reputable news organizations, such as the Associated Press, without having to independently verify the content in the absence of something indicating it is false.[17]

Historically, the wire service defense dates back more than eighty years to the Supreme Court of Florida's ruling in *Layne v. Tribune, Co.*, which held that:

> [t]he mere reiteration in a daily newspaper, of an actually false, but apparently authentic news dispatch, received by a newspaper publisher from a generally recognized reliable source of daily news, such as some reputable news service agency

13. *Id.* at § 6:83, 6-610.

14. Kapetanovic v. Stephen J. Cannell Prods. Inc., No. 97 C 2224, 2002 U.S. Dist. LEXIS 5489, at *19 (N.D. Ill. Mar. 27, 2002).

15. Ripps v. Gannett Co., Inc., CV 91-B-1954-S, 1993 U.S. Dist. LEXIS 8552, at *18, n.4 (N.D. Ala. Mar. 3, 1993).

16. Burke v. Gregg, 2011 R.I. Super. LEXIS 15, at *20–21 (R.I. Feb. 4, 2011), *aff'd in part, vacated in part*, 55 A.3d 212 (R.I. 2012).

17. O'Brien v. Williamson Daily News, 735 F. Supp. 218, 225 (E.D. Ky. 1990).

> engaged in collecting and reporting the news, cannot through publication alone be deemed *per se* to amount to an actionable libel by indorsement [sic], in the absence of some showing from the nature of the article published, or otherwise, that the publisher must have acted in a negligent, reckless carelss [sic] manner in reproducing it to another's injury.[18]

The defense generally applies "when a local media organization republishes a release from a reputable news agency without substantial change and without actually knowing that the release is false."[19] As a Michigan appellate court summed it up, the "defense is available where a local news organization reproduces, without substantial change or knowledge of falsity, an apparently accurate wire release by a reputable news-gathering agency."[20]

In the context of broadcasting, the wire service defense is "applied to shield network affiliates from liability when they act as mere conduits for national network news broadcasts."[21] Because the heart of the defense is the principle that "that there can be no 'conduit liability' in the absence of fault," it applies in the broadcast context only "where the affiliates merely acted as conduits for the broadcast and *played no role in its reporting, production or editing*."[22] In brief, a local affiliate must have "absolute non-involvement with the underlying broadcast."[23]

The public policy behind the wire service doctrine—that journalists should not be held strictly liable (liable without fault) when they act as mere conduits of information, especially in a fast-paced media world[24]—supports creating a breaking news doctrine for situations like that described in the Introduction. This seems especially true when journalists have no advance reason to doubt the credibility of the people they interview live.

Policy aside, however, the wire service defense itself clearly would *not* apply to such situations for several reasons. First, the doctrine only applies when the source of the information is a reputable news agency, such as the Associated Press or a broadcast television network, not a man-on-the-street bystander like Mr. X in the opening hypothetical. Second, the broadcast journalist in the hypothetical *is* involved in the underlying broadcast; he chooses who to interview and the questions to ask. Thus, the requirement of "absolute non-involvement with the underlying broadcast" is not satisfied.[25]

18. 108 Fla. 177 (1933).

19. Kapetanovic v. Stephen J. Cannell Prods. Inc., No. 97 C 2224, 1999 U.S. Dist. LEXIS 745, at *11 (N.D. Ill. Jan. 21, 1999).

20. Howe v. Detroit Free Press, Inc., 219 Mich. App. 150, 154 (1996).

21. Kapetanovic v. Stephen J. Cannell Prods., Inc., No. 97 C 2224, 1999 U.S. Dist. LEXIS 745, at *12 (N.D. Ill. Jan. 21, 1999).

22. Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc., 931 F. Supp. 1487, 1492 (D. Ariz. 1996) (emphasis added).

23. *Id.*

24. *Id.*; *see also* Burke v. Gregg, 2011 R.I. Super. LEXIS 15, at *21 (R.I. Feb. 4, 2011).

25. *Med. Lab. Mgmt. Consultants*, 931 F. Supp. at 1492.

C. NEUTRAL REPORTAGE PRIVILEGE

A few courts have extended a so-called neutral reportage privilege to protect journalists when they convey certain false statements about public figures.[26] The privilege "developed in the 1970s to shield unbiased reports of newsworthy defamatory statements,"[27] with the U.S. Court of Appeals for the Second Circuit laying the foundation in *Edwards v. National Audubon Society*.[28]

Citing the "public interest in being fully informed about controversies that often rage around sensitive issues," the Second Circuit in *Edwards* articulated the privilege as follows: "when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity."[29] In brief, the privilege holds that "a republisher who accurately and disinterestedly reports certain defamatory statements made against public figures is shielded from liability, regardless of the republisher's subjective awareness of the truth or falsity of the accusation."[30]

Even among those few courts today that do recognize the neutral reportage privilege, it would not apply to the scenario in the Introduction. That is because it is "only applied to cases involving public figures."[31] Recall that Mr. Y—the defamed individual in the hypothetical—is "a person of no particular notoriety or power." Furthermore, the privilege would not apply because the source of the defamatory statement must be "a responsible person or organization."[32] In this instance, the source (Mr. X) was a bystander previously unknown to the journalist. Thus, while the public policy behind the neutral reportage privilege of allowing the press to supply newsworthy information to the public without fear of liability may support the application of the privilege to the scenario at the start of this Article, its actual elements would thwart its usefulness.

D. SECTION 230 IMMUNITY

Finally, it must be briefly noted that while Section 230 of the Federal Communications Decency Act provides immunity from defamation liability for those who relay content supplied by third parties, the privilege is limited in application to an

26. *See* Ashley Messenger, *The Problem With New York Times Co. v. Sullivan: An Argument for Moving From a "Falsity Model" of Libel Law to a "Speech Act Model*," 11 FIRST AMEND. L. REV. 172, 185 (2012) (noting that "[a]lthough some courts have extended protection for neutral reportage, most have not").

27. Dan Laidman, *When the Slander is the Story: The Neutral Reportage Privilege in Theory and Practice*, 17 UCLA ENT. L. REV. 74, 76 (2010).

28. 556 F.2d 113 (2d Cir. 1977).

29. *Id.* at 120.

30. Barry v. Time, Inc., 584 F. Supp. 1110, 1123 (N.D. Cal. 1984).

31. TRAGER ET AL., *supra* note 1, at 214.

32. KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 166 (9th ed. 2014).

"interactive computer service."[33] It thus would not apply to the broadcast journalist described in the Introduction.

In summary, this discussion has illustrated how several doctrines and privileges that shield defendants from liability for defamation do not apply to the newsworthy, live-defamation scenario described in the Introduction. This is despite the fact that the underlying policy concerns behind some of the doctrines and privileges described above, especially when viewed collectively, provide some support for establishing a carefully articulated breaking news doctrine.

II. THE CASE LAW OF LIVE AND SPONTANEOUS DEFAMATION: RADIO CALL-IN SHOWS LEAD THE WAY

Most of the relatively small samples of reported live-defamation decisions have, in free press friendly fashion, cleared broadcasters of liability. Consider, for example, *Adams v. Frontier Broadcasting Co.*, decided by the Wyoming Supreme Court in 1976.[34] Bob Adams, a businessman and active Wyoming politician, sued Frontier, owner of KFBC radio, after a live caller to KFBC's talk show, "Cheyenne Today," defamed him. The caller, after saying that she had a prepared statement to read, stated that Adams "had been discharged as Insurance Commissioner for dishonesty."[35]

After finding that Adams was a public figure and thus requiring him to demonstrate actual malice, as in *New York Times v. Sullivan*, the state Supreme Court upheld a lower court's summary judgment determination that the failure of the station to employ an electronic delay system did not rise to the level of actual malice.[36] While it was undisputed that the radio station lacked actual knowledge of the content of the caller's remarks—and thus could not *know* them to be untrue prior to the broadcast—Adams unsuccessfully argued that the failure to use a delay system amounted to "reckless disregard" under *Sullivan* and thus constituted actual malice.[37]

The court noted that to establish reckless disregard, "it was and is Adams' burden to point to factual material in the record which could constitute proof that Frontier in fact entertained serious doubts with respect to the truth of this publication."[38] Adams could, of course, not meet that standard because the station had no foreknowledge whatsoever of the content of the caller's remarks. The court further reasoned that because, under *Sullivan* and its progeny, failure to investigate

33. 47 U.S.C. § 230 (2015).

34. 555 P.2d 556 (Wyo. 1976).

35. *Id.* at 557.

36. In *Sullivan*, the Supreme Court held that the First Amendment "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." 376 U.S. 254, 279–80 (1964).

37. *Adams*, 555 P.2d at 563.

38. *Id.* at 564.

is *not* equivalent to actual malice, neither was "simply depriving oneself of the opportunity to evaluate the information and form a conclusion with respect to falsity or doubt as to truth."[39]

In *dicta*, the *Adams* court added that broadcasting was an area heavily regulated by the federal government, which had outlined clear policy goals to avoid censorship.[40] The requirement of delay technology to avoid defamation liability might tempt the broadcaster to "screen out the comments of those with whom the broadcaster, for whatever reasons, did not agree . . . ."[41]

A Washington appellate court reached a similar conclusion in 2011 in *Brecht v. Fisher Communications, Inc*.[42] Paul Brecht, a prominent endorser of a local political candidate, sued the Fisher Communications radio station for defamation after two anonymous callers during a morning talk show accused him of having been convicted of domestic violence.[43] The court found that because Brecht was a limited-purpose public figure, and the talk show hosts had failed to evaluate the anonymous callers' statements ahead of time "or to form some conclusion as to the truth or falsity of those statements," Brecht was precluded "from making the factual showing necessary to demonstrate actual malice."[44]

In one case where an electronic delay system was available but unused, the Utah Supreme Court nonetheless found that failure to activate the "panic button" did not create liability for the station. In *Demman v. Star Broadcasting Co*., an anonymous caller on a radio show verbally attacked a local political candidate at 2:30 p.m. on Election Day.[45] Although the station was equipped with a delay, the host failed to press "the panic button to cut off the air," as the court described it.[46] The Utah Supreme Court nonetheless, in an oddly jovial opinion, held that this failure did not rise to the level of malice and thus affirmed a judgment in favor of the radio station.

At least one reported case from a Louisiana appellate court reached the opposite conclusion. In *Snowden v. Pearl River Broadcasting Corp*., callers to a live call-in radio show accused the plaintiffs, including a local doctor, of selling illegal drugs.[47] The station, which did not own delay equipment, defended on the grounds that the statements were protected by the First Amendment since there was no actual malice and because the statements concerned "private individuals who become involved in an event or subject of public or general interest."[48] The latter standard derived

39. *Id.* at 565; *see also* Weber v. Woods, 334 N.E.2d 857 (Ill. App. Ct. 1975) (finding that the conduct of broadcaster passively carrying defamatory remarks of talk show guest did not rise to level of actual malice); Pacella v. Milford Radio Corp., 462 N.E.2d 355 (Mass. App. Ct. 1984) (same).

40. *Adams*, 555 P.2d at 565 ("In addition, this case arises within an administered area which appropriately has been preempted by the federal government, and within which the federal government has legislated, regulated, and litigated extensively.").

41. *Id*.

42. 2011 WL 1120506, 160 Wash. App. 1040 (2011).

43. *Id.* at *1.

44. *Id.* at *6.

45. 497 P.2d 1378 (Utah 1972).

46. *Id.* at 1379.

47. 251 So. 2d 405 (La. Ct. App. 1971).

48. *Id.* at 409.

from the now discredited U.S. Supreme Court plurality opinion in *Rosenbloom v. Metromedia, Inc*., a decision that extended *Sullivan*'s actual malice doctrine to private-figure plaintiffs for the few brief years it was considered good law.[49]

Applying the actual malice standard, the Louisiana court in *Snowden* found that the station's conduct rose to the level of reckless disregard for the truth.[50] The court reasoned that it "would have no difficulty in finding a station liable, if it received defamatory material from an anonymous source, and broadcast the report without attempting verification. The direct broadcast of such anonymous defamatory material, without the use of any monitoring or delay device, is no less reprehensible in our judgment."[51] The court also found that the program's host did little to discourage defamatory statements or unfounded rumors from being aired.[52] As a result, the broadcast of anonymous, defamatory remarks "was easily foreseeable and likely to occur, as it in fact did. In our judgment, the First Amendment does not protect a publisher against such utter recklessness."[53]

Snowden seems poorly reasoned, at least when compared to *Adams* and the other cases discussed above. Although one might agree with the *Snowden* court that it might be "reckless," as that term is used colloquially, to turn live callers loose on the air with no delay, that sort of recklessness is not the appropriate standard according to *Sullivan* and its progeny. "Reckless disregard" is a legal term of art that requires proof that the defendant was highly aware of the probable falsity of the statement or, put slightly differently, had serious doubts about the veracity of the statement.[54]

The *Adams* line of cases readily seems to carry the better interpretation here—namely, that until a broadcaster actually knows the contents of the assertion, there can be no such serious doubt. In the case of a live broadcast, the statement already has been transmitted before the broadcaster can even begin to assess the statement's veracity, so establishing reckless disregard simply is not possible. Even with a delay of some seconds, there would almost certainly not be sufficient time to make the complicated judgment necessary to decide if a particular statement was

49. 403 U.S. 29 (1971), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *see* David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts to Circumvent New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 828 (2007) ("What now seems quite clear is that the Court will not revive and enhance Rosenbloom v. Metromedia's now discredited qualified First Amendment privilege for matters of public concern . . . .").

50. *Snowden*, 251 So. 2d at 410.

51. *Id.*

52. *Id.* ("The procedure employed amounted to an open invitation to make any statement a listener desired, regardless of how untrue or defamatory it might be, about any person or establishment, provided only that the declarer identify himself. The announcer's qualifying remarks did not even remotely indicate that unfounded remarks were out of order, or that statements and accusations should be based on personal knowledge, or that mere rumor, speculation, suspicion and hearsay would not be permitted. The clear import of the announcer's remarks was that an identified caller was free to make such accusations as he chose.").

53. *Id.* at 411.

54. *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665–67 (1989) (addressing the meaning of actual malice and reckless disregard); *see also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964); St. Amant v. Thompson, 390 U.S. 727, 730–31 (1968).

defamatory and to then analyze one's subjective sense of the truthfulness of the statement.

Actual malice pivots on the defendant's mental state of mind at the time of publication, not a course of conduct per se.[55] Essentially, it poses an epistemological question—what did the plaintiff know about the truth of the statements in question? If the defendant knew nothing at the time of publication, and the presence or absence of delay technology seems almost irrelevant given the extremely limited time to process the statements, then actual malice in either its "known falsity" or "reckless disregard" guises seems utterly impossible.

Unfortunately, however, the *Adams* line of cases holds almost no relevance in a situation in which either: (1) actual malice is not required (because the plaintiff is a private figure, as in the case of Mr. Y in the hypothetical at the start of this Article); (2) the broadcaster has some advance knowledge of the nature of the third-party statement; or (3) both. Thus, the current case law provides slight and slender guidance for the breaking news situation addressed in the Introduction. A number of states, however, have statutes that might come into play in such a scenario. Those statutes are addressed in the next part of this Article.

III. "DUE CARE" STATUTES: STATUTORY PROTECTION FOR LIVE BROADCASTERS

Numerous states have adopted specific statutes designed to protect broadcasters from statements made by third parties during live broadcasts.[56] As described below, these statutes typically require a demonstration either by the plaintiff that the broadcaster was negligent or by the broadcaster itself that it was *not* negligent. In either situation, however, negligence replaces the harsh ramifications of strict liability or liability without fault.

Consider, for example, Virginia's statute, which provides that owners and operators of broadcast stations, as well as their agents, shall not be liable for a defamatory statement "published or uttered" by third parties unless the plaintiff proves that the broadcaster "failed to exercise due care to prevent the publication or utterance of such statement, in such broadcast."[57] This language is apparently part of a "model act" suggested to state legislatures by the National Association of

55. *See* Messenger, *supra* note 26, at 220 (observing that "the actual malice standard typically requires an inquiry into the subjective state of mind of the publisher").

56. *See, e.g.*, ALA. CODE § 6-5-183 (2014); CAL. CIV. CODE § 48.5(1) (2015); COLO. REV. STAT. § 13-21-106 (2015); FLA. STAT. § 770.04 (2015); GA. CODE ANN. § 51-5-10(A) (2014); IND. CODE ANN. § 34-1-5-2 (2014); IOWA CODE § 659.5 (2014); KAN. STAT. ANN. 60-209(j) (2014); KY. REV. STAT. ANN. § 411.062 (2014); ME. REV. STAT. ANN., Tit. 14, §153 (2014); NEB. REV. STAT. § 25-840.02(1) (2014); N.H. REV. STAT. ANN. § 515:6 (2014); OHIO REV. CODE § 2739.03(B) (2014); OR. REV. STAT. § 31.200(1) (2014); S.D. CODIFIED LAWS § 20-11-6 (2014); TEX. CIV. PRAC. & REM. CODE ANN. § 73.003 (2015); UTAH CODE ANN. § 45-2-7 (2014); VA. CODE ANN. § 8.01-49 (2014); WASH. REV. CODE ANN. § 4.36.130 (2014); W. VA. CODE § 57-2-4 (2014); WYO. STAT. ANN. § 1-29-101 (2014).

57. VA. CODE ANN. § 8.01-49 (2015).

Radio and Television Broadcasters (now the National Association of Broadcasters).[58] Similarly, South Dakota law provides that "the complaining party" must prove that the broadcaster "failed to exercise due care to prevent the publication or utterance of such statement in such broadcast."[59]

Other states have similar statutes, but place the burden on the broadcaster to establish an *absence* of negligence. Ohio, for instance, removes liability for third-party statements from broadcasters "if the owner, licensee, or operator proves that the owner, licensee, or operator exercised reasonable care to prevent the publication or utterance of the statement in such broadcast time."[60]

Texas's statute allows libel defendants to put into evidence "all facts and circumstances under which the libelous publication was made" in order to help "determine the extent and source of actual damages and to mitigate exemplary damages."[61] This seems to allow broadcasters in breaking news scenarios like that described at the start of this paper to put into evidence the "facts and circumstances" that the story demanded immediate coverage and that the broadcasters did not know in advance what the bystander-source would say.[62]

A number of these statutes also exempt broadcasters from liability completely when defamatory statements are made by candidates for political office, given that broadcasters are sometimes required by federal law, particularly the equal opportunities provision, to carry such statements.[63] Ohio's statute has this exemption "if the statement is not subject to censorship or control by reason of any federal statute or any ruling or order of the federal communications commission made pursuant thereto . . . ."[64] A typical statute of this sort has no negligence component—the broadcaster is held entirely blameless due to the unavoidable fact that the candidate's speech is forced upon it by government mandate and the broadcaster has no legal ability to censor the speech.

The "due care" statutes that require negligence and would apply to a live broadcast situation have been somewhat overtaken by the constitutionalization of libel law that followed *Sullivan*. The majority of these statutes were passed in the late 1940s or 1950s, a time when much of the common law of libel was under a strict liability standard.[65] With such a brutal regime for defendants, a negligence requirement, regardless of the placement of the burden of proof, no doubt seemed quite auspicious to the broadcasters who lobbied for these statutes. Since *Sullivan* and *Gertz v. Welch, Inc.*,[66] however, most states now require negligence for all

58. *See* Am. Broad.-Paramount Theatres, Inc. v. Simpson, 126 S.E.2d 873, 876 n.2 (Ga. Ct. App. 1962).

59. S.D. CODIFIED LAWS § 20-11-6 (2015).

60. OHIO REV. CODE § 2739.03(B) (2015).

61. TEX. CIV. PRAC. & REM. CODE § 73.003 (2014).

62. *Id.*

63. 47 U.S.C. § 315 (2015).

64. OHIO REV. CODE § 2739.03(A) (2015).

65. *See* Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 78 (1985) (writing that "[a]t common law, defamation was a strict liability tort and, even in actions for slander, the only issue of fact was publication").

66. 418 U.S. 323 (1974).

private plaintiffs to recover damages against public defendants,[67] meaning that the "due care" statutes in many cases simply codify what the law would be in any event in a private plaintiff action, regardless of the medium by which the defamation was disseminated.

Although the "due care" statutes were an advance in their own era from a free speech perspective, the authors of this Article believe enhanced protection is needed in the breaking news scenario discussed in the Introduction. The final part of the Article concludes with an analysis of the state of law in this scenario and proposes a breaking news doctrine that the authors believe is a preferable alternative to the current state of affairs.

IV. CONCLUSION

Under current defamation doctrine, broadcasters already possess reasonable protection for live and spontaneous defamatory statements uttered by third parties that happen to be about public officials or public figures (rather than private individuals). That's largely because the actual malice standard, which focuses on the subjective state of mind of the defendant about the statements at the time they are uttered, is rarely breached in practice.[68] Additionally, if courts follow what appears to be the majority rule from the *Adams* case discussed earlier, it would be quite difficult to hold a broadcaster liable for third-party live utterances that concerned public plaintiffs.[69]

Of course, one complicating factor is that broadcasters, often with very little lead time, would need to somehow determine the public or private status of the potentially defamed party with legal accuracy in order to feel confident of this protection. In breaking news scenarios like that described in the Introduction, fathoming public versus private status in rapid fashion would be exceedingly difficult, amounting to a vast burden on broadcast journalists that might well delay reporting information to the public. Nonetheless, if indeed the potential plaintiff turns out to be a public official or public figure in the judgment of a later court—something that is not always a straightforward determination—the *Sullivan* regime seems to provide relatively reliable protection.

In private plaintiff litigation, however, suddenly all bets are off. The negligence standard that would almost certainly be applied in most jurisdictions creates broad latitude for juries to weigh a variety of factors and to produce an essentially impressionistic determination of whether the broadcaster exercised reasonable care or was negligent. A few jurisdictions do, indeed, apply a higher fault standard than negligence, including New York, which has established a "gross irresponsibility"

67. RODNEY A. SMOLLA, LAW OF DEFAMATION § 3.10 (2d ed. 2014).

68. *See* C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 253 (1993) (observing that actual malice focuses "on the defendant's state of mind regarding the truth or falsity of the defamation" and that "[t]he concern of the actual malice standard is with the defendant's own subjective state of mind") (emphasis omitted).

69. *See supra* notes 34–41 and accompanying text (addressing *Adams*).

standard.[70]

Nevertheless, most states have adopted negligence as the relevant standard in private figure defamation cases.[71] In the scenario discussed in the Introduction, where a broadcast reporter has foreknowledge that a source may utter potential defamation against a private plaintiff on live air, it seems not at all unlikely that a jury could find the broadcaster (and its employee) to be negligent.

The authors of this Article believe such weak protection is inadequate to protect the press and, in turn, the public's unenumerated First Amendment right to know.[72] Breaking news situations often are enormously important to the public, and reporters must be able to rapidly provide as much information as possible without undue fear of later legal consequences. Whether the story concerns a terrorist attack, a school shooting, a violent demonstration, a natural disaster, a humanitarian crisis, or a host of other critical topics, such information must reach the public quickly and without unnecessary self-censorship. This holds particularly true with the use of third-party sources, who may be the only people available on short notice with firsthand knowledge of, or perspective on, the event. If journalism is to be the rough draft of history, then that first draft of breaking news must be sketched with "uninhibited, robust, and wide-open" reportage.[73]

The imposition of the negligence standard simply does not do enough to protect broadcasters from liability for live or spontaneous utterances. Negligence is wildly unpredictable, given the array of factors that a jury may consider. One commentator astutely notes that, "[t]he myriad devices that may be used to demonstrate negligence on the part of a defendant in a defamation case are as wide and diverse as the collective imagination and ingenuity of the plaintiffs' bar."[74] The *Restatement* offers three factors that can be considered when determining negligence in defamation cases: (1) a time element (how important is prompt publication?); (2) the level of importance of the interest in publishing the information; and (3) the extent of the injury if the statement proves false.[75] Nonetheless, as one libel scholar notes, "tort theories of negligence have long permitted an evaluation of 'all the circumstances' in assessing 'reasonable care'. . .

70. Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571–72 (N.Y. 1975).

71. BRUCE SANFORD, LIBEL AND PRIVACY § 8.3.1 (2d ed. 2003 Supp.).

72. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (finding that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the *right to receive*, the right to read") (emphasis added); *see also* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 242 (1991) (writing that "[a]lthough often tied specifically into demands for freedom of information statutes and open meeting laws, the right to know gained a momentum of its own and was, by the end of the 1960s, treated by the media as a synonym for freedom of the press"); Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139, 141–42 (2003) (observing that "[f]ew of the corollary principles that grow out of the First Amendment have inspired more thoughtful scholarship and impassioned debate than the notion that an implicit right to know accompanies the explicit right to speak").

73. N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).

74. SMOLLA, *supra* note 67, § 3:95.

75. RESTATEMENT (SECOND) OF TORTS § 580B cmt. h (1977).

."[76] Given the potential swirl of factors that may overwhelm lay jurors with little knowledge of news media practices and scant appreciation for the exigencies of breaking news, a negligence standard arguably creates too much uncertainty to allow the necessary freedom to report breaking news in a broadcast context.

Instead, this Article suggests a possible breaking news doctrine that would provide enhanced and more determinate protection in the live and spontaneous defamation context. It is somewhat akin to the sudden emergency doctrine in negligence tort law, under which "a defendant who is confronted by an emergency is not expected to exercise the same amount of care as is a defendant not facing exigent circumstances."[77] The sudden emergency doctrine springs from the *Restatement (Second) of Torts*, which provides that, "[i]n determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action."[78]

Although the concept of a breaking news doctrine is, to the authors' knowledge, an original one, it is hardly without support in existing law.[79] As noted above, the *Restatement* considers the timeliness of news to be an important factor in a negligence determination.[80] Similarly, as Dean Smolla notes, "courts frequently take into account the presence or absence of time pressure in assessing the existence of actual malice, evidencing a much greater tendency to excuse such error made in a 'hot news situation.'"[81] While considering breaking news as a factor in a fault determination is certainly worthwhile, the authors believe courts should go further in situations like that described in the Introduction. Multifactor analyses in the law are notoriously slippery, while a more determinate privilege for breaking news could provide the protection necessary to safeguard this vital broadcast role.

Adding to the confusion of the negligence standard, different jurisdictions cannot agree on the perspective from which to consider whether a defendant exercised reasonable care.[82] Some jurisdictions focus on the professional standard

76. SANFORD, *supra* note 71, § 8.3.

77. David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U. ARK. LITTLE ROCK L. REV. 201, 218–19 (2000).

78. RESTATEMENT (SECOND) OF TORTS § 296(1) (1965).

79. A LexisNexis search conducted by the authors on September 9, 2015, of both federal and state case law, as well as law review articles, for the phrase "breaking news doctrine" revealed no responses. Professor David Logan, however, has argued against a journalistic emergencies defense, asserting that, "a journalist's self-serving assertion that a particular story is 'hot news' should not be treated as an abracadabra to which courts must defer." Logan, *supra* note 77, at 220. Logan adds that "courts must be vigilant to rebuff unjustified efforts by the media to transform every reportorial context into 'hot news.'" *Id.*

80. *Supra* note 75 and accompanying text.

81. SMOLLA, *supra* note 67, § 3:75.

82. *See generally* Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 342 (1985) (observing that "[c]ourts that have considered the question have split on whether to apply a professional or an ordinary person standard"); Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM. L. REV. 449, 454–57 (1984) (observing that "[m]ost states require the private figure plaintiff to prove negligence, but this is only half of the fault equation. The courts must also decide whether to apply an ordinary negligence standard or a journalism malpractice standard," adding that "[m]ost courts that have recognized the distinction between the

of care, asking the jury to consider the difficult question of whether a journalistic defendant has committed professional malpractice given industry standards in the media business.[83] "Customs and practices within the profession are relevant in applying the negligence standard," in the *Restatement* formulation.[84] Other jurisdictions ignore this dimension entirely and focus solely on the ordinary reasonable person standard, which itself creates serious problems for a lay jury.[85] As Dean Smolla wryly notes, "[a]nyone, these cases seem to intimate, can understand the job of a reporter or editor."[86] These discordant standards add more confusion and uncertainty to the negligence determination. And, ultimately as Professor Kendrick emphasizes, "[a] negligence standard pays no regard to the actual state of mind of a speaker and thus takes insufficient account of speaker interests."[87] In the live and spontaneous defamation scenario, of course, the broadcaster is the speaker for purposes of the republication rule.

For these reasons, the authors believe breaking news should constitute a defense to defamation, similar to the fair report privilege, for live broadcasting during important breaking news events. As a tentative first step to identifying the scope of such a privilege, the following elements might be considered by courts, all of which must be present for the privilege to be successfully asserted: (1) a bystander or private person who is previously unknown to a journalist; (2) at the scene of a breaking news event that is of public concern;[88] (3) utters a spontaneous, false and defamatory remark to that same journalist; (4) about another private person; (5) live on the air.

A key foundation of this doctrine is that the breaking nature of a news event

ordinary negligence standard and the journalism malpractice approach have chosen to employ the ordinary negligence standard," and pointing out that "[o]ther courts appear to employ a reasonable journalist standard, but do so in form only. Although these courts use malpractice language, they fail to inform the jury how the standards of the reasonably prudent journalist are to be established . . .").

83. *See, e.g.*, Triangle Publ'ns, Inc. v. Chumley, 317 S.E.2d 534, 537 (Ga. 1984) (defining negligence "by reference to the procedures a reasonable publisher in appellants' position would have employed"); Martin v. Griffin Television, Inc., 549 P.2d 85, 92 (Okla. 1976) (observing that "[o]rdinary care is that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances, and the failure to exercise such ordinary care would be negligence").

84. RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1977).

85. *Cf.* Don R. Pember & Clay Calvert, Mass Media Law 197 (19th ed. 2015) (asserting that "[i]n simple terms, negligence implies the failure to exercise ordinary care. In deciding whether to adopt the negligence or the stricter actual malice fault requirements, state courts are providing their own definitions of the standard").

86. SMOLLA, *supra* note 67, § 3:93.

87. Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1292 (2014).

88. In 2011, the U.S. Supreme Court wrote that:

> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community" . . . or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."

Snyder v. Phelps, 562 U.S. 443, 453 (2011) (internal citations omitted). The *Snyder* court pointed to three elements courts should consider in determining if speech relates to a matter of public concern—content, form and context. *Id.*

does not permit a journalist adequate time to ascertain the truth of an assertion before it is broadcast. This holds true even if the journalist anticipates, to some degree, what might be said on camera, either through hearing the source make the statement to others or through some sort of pre-interview procedure. Should adequate time be available to investigate the statements in advance of broadcast, however, then the privilege would be vitiated.

The authors fully recognize the difficulties, from a legal perspective, in determining *how much time* is *too much time* for the privilege to lapse. Yet courts already use and wrestle with the phrase "breaking news" in defamation cases.[89] Ultimately, in the heat of a live news event, a journalist should not be forced to either avoid the interview or halt an interview in progress or face the possibility of serious legal repercussions later.

Furthermore, the fact that the source bystander is a private person previously unknown to the journalist should not strip away First Amendment interests. Indeed, as the U.S. Supreme Court has observed, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source."[90]

The proposed breaking news doctrine can profitably be compared to similar, if more capacious, protection for third-party comments offered to websites through Section 230 of the Communications Decency Act.[91] Section 230 provides immunity from republication liability to an "interactive computer service"—which courts have interpreted to include website operators—for third-party statements. Although Section 230's reach extends beyond defamation, it is a powerful example of how protecting a medium against republication liability can enhance free speech values. The proposal here is far more modest, of course, but it similarly advances First Amendment concerns by ensuring that information that may be of great importance to the public is not censored by broadcast entities to avoid reputational harms via republication.

In summary, live defamation scenarios are fraught with peril for broadcasters, particularly when the targets of spontaneous defamatory remarks are private individuals. A breaking news doctrine could offer meaningful clarity in those scenarios, while significantly furthering First Amendment values, including the public's right to know about events of public concern. At the very least, the authors hope this Article sparks scholarly and, perhaps, legislative debate about the pros and cons of adopting such a privilege.

89. *See* Levesque v. Doocy, 557 F. Supp. 2d 157, 169 (D. Maine. 2008) (noting that "[o]ne would hope that when a publisher is poised to report outrageous quotations from such a source, for a story that is *not even breaking news*, the publisher's failure to confirm the accuracy of the quotations demonstrates 'an extreme departure from professional standards'") (emphasis added) (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665 (1989))); Curran v. Philadelphia Newspapers, Inc., 546 A.2d 639, 648 (1988) (opining that the issuance of a criminal "indictment was *a breaking news story of regional importance* and *not the type of story to which several days could be devoted in writing*. It is undisputed that [reporter] Frump was writing with a deadline, a factor which must be weighed in his favor") (emphasis added).

90. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

91. 47 U.S.C. § 230 (2015).