Substantial Truth in Defamation Law

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Abstract
Truth is a complete defense to a defamation charge, but a defendant does not have to prove the literal truth of a defamatory statement to prevail. An effective defense can rely on the substantial truth doctrine. Under the substantial truth doctrine, a defamatory statement is First Amendment-protected if it is factually similar to the pleaded truth, and does not differ from the truth by more than immaterial details. This Article presents and analyzes the theory, application, and constitutional foundations of the substantial truth doctrine. It concludes that the doctrine promotes the values of the First Amendment by reducing the risk of self-censorship, yet preserves defamation law’s reputational protection and compensatory function.

Introduction

On June 5, 1971, a news article in the Memphis Press-Scimitar reported that Ruth Ann Nichols had been shot with a .22 rifle and treated at a local Hospital for a bullet wound in her arm.1 The incident took place when the alleged assailant arrived at the Nichols’ home and found the victim there in the company of the assailant’s husband.2 According to a police report, the assailant fired several shots at her husband, Mr. Newton, who fled the scene.3 The assailant then entered the house where she fired at Mrs. Nichols, striking her in the arm.4

Ruth Ann Nichols and her husband, Bobby Lee Nichols, sued the newspaper for defamation and invasion of privacy.5 The plaintiffs claimed that by omitting the fact that several other people besides Mrs.


1 Memphis Publ’g Co. v. Nichols, 569 S.W.2d 412, 414 (Tenn. 1978).
2 Id. at 414.
3 Id.
4 Id.
5 Id.
Nichols and Mr. Newton were also present at the house in a social gathering, the article falsely implied that Mrs. Nichols and the assailant’s husband were involved in an adulterous relationship and were “caught” by Mrs. Nichols.  

The newspaper-defendant’s principal defense was that all material facts in the article were true. The defendant emphasized in its brief that it did not assert that Mrs. Nichols and Mr. Newton had an adulterous relationship. The brief also emphasized that

Mrs. Nichols was in fact treated at St. Joseph’s Hospital for a bullet wound in her arm after the shooting. A 40-year old woman was in fact held by police in connection with the shooting. A shot was in fact fired at the suspect’s husband. The suspect did in fact find her husband at the Nichols’ home with Mrs. Nichols. The suspect did in fact fire a shot at her husband and then at Mrs. Nichols and did in fact strike her in the arm.

The trial court accepted the defendant’s argument and granted its motion for a directed verdict. The court of appeals reversed, and the Supreme Court of Tennessee granted certiorari.

The supreme court held that, even though every material fact in the article was true, “the defendant’s reliance on the truth of the facts stated in the article . . . [was] misplaced,” and its motion for a directed verdict must be denied.

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6 Id. Undisputed evidence showed that Mrs. Nichols and the assailant’s husband, Mr. Newton, as well as Mr. Nichols and two neighbors, were all at the Nichols’ home, talking in the living room, when Mrs. Newton arrived at three o’clock in the afternoon. Mr. Newton heard a commotion outside the house and when he went to investigate, his wife fired several shots at him. Mr. Newton then ran away and the assailant, Mrs. Newton, entered the house and shot Mrs. Nichols. Id.

7 Id. at 420.

8 Id.

9 Id. (emphasis added).

10 Id. at 414.

11 Id. at 415

12 Id. at 420.

13 Id. at 419.
truth, conveyed a false and defamatory implication to readers. The defamatory implication of the article, as an ordinary reader would read and understand it, was that Mrs. Nichols and Mr. Newton were involved in an adulterous relationship and were surprised by Mrs. Newton, which triggered the shooting incident. This implication was clearly false, and it was reasonable to infer that it would injure Mrs. Nichols’ reputation.

This narrative, from *Memphis Publishing Co. v. Nichols*, illustrates the substantial truth doctrine in defamation law. In a defamation action, the plaintiff must prove the falsity of the defamatory statement that allegedly harmed her reputation, while the defendant may rely on its truthfulness as a defense. Although absolute truth is a complete defense to a defamation charge, a defendant does not have to prove the literal truth of a defamatory statement to prevail. An effective defense can rely on the substantial truth doctrine. The substantial truth doctrine overlooks minor inaccuracies and focuses upon the meaning conveyed by a publication. Under the doctrine, a publication would be substantially true, and thus First Amendment-protected, provided that it (a) is factually similar to the pleaded truth, and (b) differs from the truth by no more than

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14 *Id.* at 420; see also 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, 246 (1993) (“Even if all the statements in a publication were true, the false and defamatory meaning providing the basis for the libel action might be implied from particular statements of fact, expressions of opinion, or the publication generally.”).

15 *Memphis Publ’g Co.*, 569 S.W.2d at 419.

16 *Id.* (“If so read, it can hardly be doubted that Mrs. Nichols’ reputation would be injured.”). In a footnote, the court noted the custom of Tennessee courts to follow the practice of construing allegedly defamatory words in their “‘plain and natural’ import.” *Id.* at 419 n.7 (citations omitted).

17 *Id.* at 414.


20 See Restatement (Second) of Torts § 581A (1977) (“One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.”).
insubstantial details” if the statement does not harm the plaintiff’s reputation more than would the pleaded truth.\textsuperscript{21}

In \textit{Memphis Publishing Co.}, the defendant's truth defense failed because its publication was substantially false. In this case, a news report of a shooting incident was factually similar to the truth, but the report omitted significant details. By omitting key facts the article conveyed a defamatory implication to readers that falsely portrayed the plaintiff in a negative light. The Court therefore refused the defendant’s motion for a directed verdict, reasoning that a jury may find that the article conveyed a \textit{substantially} false and defamatory implication, in spite of its \textit{literal} truth.\textsuperscript{22}

This Article presents and analyzes the principles, application, and constitutional foundations of the substantial truth doctrine in defamation law.

\section*{I. Principles of Defamation}

The tort of defamation is an invasion of the interest of a person or corporation in their reputation and good name.\textsuperscript{23} A defamatory statement is a statement of fact about a person or business entity that tends to harm the plaintiff’s reputation, respect, or goodwill.\textsuperscript{24} It has, for instance, been

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\item \textsuperscript{21} Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) ("[A] statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’") (quoting ROBERT D. SACK, \textsc{Sack on Defamation: Libel, Slander, and Related Problems} 138 (1980)); see SMOLLA, supra note 19, \S 5.08.
\item \textsuperscript{22} See also Diesen v. Hessburg, 437 N.W.2d 705, 709 (Minn. Ct. App. 1989) ("There may be defamation by implication, where known facts are omitted, which could have changed the defamatory implication of the article.”).
\item \textsuperscript{23} \textsc{Restatement (Second) of Torts} \S 559 (1977). Defamation is the broader term for libel and slander. Libel is concerned with written or printed words, or more generally, embodiment of the defamatory message in tangible or permanent form. Slander constitutes oral defamation. See, e.g., W. PAGE KEETON \textsc{et al.}, \textsc{Prosser and Keeton on the Law of Torts} \S 112, at 785-88 (5th ed. 1984) [hereinafter \textsc{Prosser and Keeton on the Law of Torts}].
\item \textsuperscript{24} See Jessica R. Friedman, \textsc{A Lawyer’s Ramble Down the Information Superhighway: Defamation}, 64 \textsc{Fordham L. Rev.} 794 (1995); \textsc{Restatement (Second) of Torts} \S 558, 559 (1977) (“A communication is defamatory if it tends so to harm the
held to be defamatory to say that a person is a credit risk,\textsuperscript{25} that a kosher meat dealer has sold bacon,\textsuperscript{26} and that a physician has advertised.\textsuperscript{27} A person or corporation can be defamed by more than written or spoken words.\textsuperscript{28} Defamation may occur by means of a picture, gesture, a loaded question, or an insinuation.\textsuperscript{29} The defamatory imputation may be indirect. Signing the plaintiff’s name to false\textsuperscript{30} or bad authorship,\textsuperscript{31} for instance, has been held to be defamatory. Modern technology occasionally generates a false alarm, such as a false positive mammogram, sobriety, or HIV test; which may cause emotional distress and, in some cases, actionable reputational harm.\textsuperscript{32}

Defamation law aims to protect the reputational interests of a plaintiff by allowing her to restore her good name and to obtain compensation and redress for harm caused by defamatory statements.\textsuperscript{33} Courts have


\textsuperscript{26} See Braun v. Armour & Co., 173 N.E. 845 (N.Y. 1930).

\textsuperscript{27} See Gershwin v. Ethical Publ’g Co., 1 N.Y.S.2d 904 (N.Y.C. Mun. Ct. 1937).

\textsuperscript{28} The Restatement supports a broad interpretation of what may constitute defamatory speech. See Restatement (Second) of Torts § 565 cmt. b (1977) (“To be defamatory under the rule stated in this Section, it is not necessary that the accusation or other statement be by words. It is enough that the communication is reasonably capable of being understood as charging something defamatory.”); see also English Defamation Act 1996, § 17(1) (stating that a defamatory statement means “words, pictures, visual images, gestures or any other method signifying meaning”).

\textsuperscript{29} Smolla, supra note 19, §§ 4:1, 4:4.


\textsuperscript{32} See Meiring de Villiers, Opinionated Software, 10 VAND. J. ENT. & TECH. L. 269 (2008) (analyzing computer virus false alarm as defamatory statement of fact).

\textsuperscript{33} See Milkovich v. Lorain Journal Co., 497 U.S. 1, 12 (1990) (“Defamation law developed not only as a means of allowing an individual to vindicate his good name,
extended the protection of defamation law to the reputational interests of corporations. 34 Although a corporation has no reputation in the personal sense of an individual, 35 it has a reputation and standing in the business in which it operates. 36 It can sue for defamatory statements related to matters affecting its business reputation and practices, such as financial soundness, management, and efficiency. 37

The complexity of the tort of defamation is illustrated by the elements that have to be satisfied to establish a cause of action. One author has identified nine elements, 38 while another lists twenty three, 39 each crucial to a defamation action. The defamation plaintiff must plead and prove the following elements: 40

1. The statement of fact must be published to a third party other than the plaintiff. 41


36 See DiGiorgio Fruit Corp., 215 Cal. App. 2d at 569-70.


40 See Smolla, supra note 19, § 1:34; Friedman, supra note 24, at 794.

41 Prosser and Keeton on the Law of Torts, supra note 23, § 111, at 774 (“[I]t is enough that the communication would tend to prejudice the plaintiff in the eyes of
2. The statement must be false.
3. The statement must be defamatory, in other words, harmful to the reputation of the plaintiff.
4. The statement must have reasonably referred to the plaintiff.
5. The defendant must have acted with the requisite degree of fault. The fault requirement depends on the plaintiff’s status. A private-figure plaintiff must prove negligence, namely that, by a preponderance of the evidence, the defendant lacked reasonable grounds for believing the statement to be true, or failed to take reasonable care to ascertain the truth. A public plaintiff\(^{42}\) must prove by clear and convincing evidence that the defendant published the statement with “actual malice.” Actual malice is defined as “with knowledge that the statement was false, or with reckless disregard of whether it was false or not.”\(^{43}\)
6. The statement must be objectively capable of being proven materially false.\(^{44}\)
7. The statement must have caused actual harm to the plaintiff. There are three categories of defamation damages, namely special, presumed, and punitive damages. Special damages compensate the plaintiff for pecuniary or economic loss flowing directly from the reputational harm caused by the defamatory statement. This type


\(^{43}\) Sullivan, 376 U.S. at 279-80.

\(^{44}\) Under the constitutional standard articulated by the Supreme Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), statements that are not objectively verifiable, or that do not contain a provably false connotation, are entitled to full First Amendment protection. Id. at 19.
of harm must be proven with reasonable certainty.\textsuperscript{45} In cases where damages are difficult to quantify, a plaintiff may be allowed to recover presumed damages, if certain conditions are met.\textsuperscript{46} The plaintiff may recover punitive damages in cases where the defendant published a statement with knowledge of its falsity, or with reckless disregard for its truth or falsity.\textsuperscript{47}

8. The statement must not be privileged, as a privileged publication is not actionable. Judges, attorneys, jurors, and legislators, for instance, can plead an absolute privilege for statements made in furtherance of their official duties.\textsuperscript{48}

The truth or falsity of an alleged defamatory statement and the degree of fault exhibited by the defendant clearly play a prominent role in a defamation action. This Article focuses on the theory, application, and constitutional foundations of the substantial truth doctrine, the constitutional standard of truth and falsity in defamation law.

\section*{II. The Substantial Truth Doctrine}

A plaintiff must plead and prove the falsity of an alleged defamatory statement.\textsuperscript{49} Truth is a complete defense to a defamation claim,\textsuperscript{50} even

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\item \textsuperscript{45}See Matherson v. Marchello, 473 N.Y.S.2d 998, 1000 (N.Y. 1984).
\item \textsuperscript{46}Presumed damages may be allowed, even if special damages cannot be proven, provided the defamation falls into a “per se” category. A statement that the plaintiff had committed a crime, for instance, would be defamation per se. See \textit{Restatement (Second) of Torts} § 570 (1977).
\item \textsuperscript{47}\textit{Prosser and Keeton on the Law of Torts}, supra note 23, § 116, at 845.
\item \textsuperscript{48}See id. at 824-32.
\item \textsuperscript{49}See Smolla, supra note 19, §§ 5.3, 5:11-5:13.
\item \textsuperscript{50}See id. § 5:10. (“The better view . . . is that the first amendment’s protection of truth, like its protection of opinion, stands on its own footing, and is analytically distinct from fault rules. . . . Just as under the first amendment there is ‘no such thing’ as a false idea, there should be ‘no such thing’ as liability for defamation for speaking the truth.’”); \textit{Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems} § 3.3.2.1 (3d ed. 1999) (“The Supreme Court has not decided whether the Constitution permits liability for truthful speech that fails the ‘public concern’ test, is not contained in the media, or both. But open or not, the question is largely academic. Even if courts may impose such liability, in practice they do not.”); see also \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}, 472 U.S. 749, 783-84 (1985) (finding no
\end{itemize}
though a truthful statement may harm a plaintiff’s reputation as much as a false statement. The rationale for exonerating a truthful defamer is that a truthful defamatory statement merely deprives the plaintiff of a reputation that she was not entitled to in the first place.\(^\text{51}\) Dissemination of truthful information also provides a public benefit that generally outweighs the plaintiff’s interest in suppressing the inconvenient information.\(^\text{52}\)

A defendant does not have to prove the literal truth of a defamatory statement to prevail.\(^\text{53}\) An effective defense can rely on the substantial truth doctrine.\(^\text{54}\) The substantial truth doctrine states that “[t]ruth will protect the defendant from liability even if the precise literal truth of the constitutional basis for press or non-press distinction in defamation cases); First Nat’l Bank v. Bellotti, 435 U.S. 765, 801 (1978). Lower courts routinely follow Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986), in non-media cases. See, e.g., Burroughs v. FFP Operating Partners, 28 F.3d 543 (5th Cir. 1994).

\(^\text{51}\) McPherson v. Daniels, (1829) 10 B. & C. 263, 272 (Eng.) (ruling that truth is a complete defense to a charge of defamation, because the law “does not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess”); see also W.V.H. Rogers, Winfield & Josowicz on Torts 340-41 (14th ed. 1994) (“[D]efamation is an injury to a person’s reputation, and if people think the worse of him when they hear the truth about him that merely shows that his reputation has been reduced to its proper level.”).

\(^\text{52}\) 3 William Blackstone, Commentaries on the Laws of England 118-19 (London, John Murray 1876) (“It was meritorious for the defamer to give warning about a bankrupt tradesman, a quack physician, a crooked lawyer and a heretic divine, [and] if the fact be true, it was damnnum absque injuria, and where there is no injury, the law gives no remedy.”); see also Marc A. Franklin, The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law, 16 Stan. L. Rev. 789, 812 (1964) (“The answer is not to ban [revelation of embarrassing information about a person] and keep the community in ignorance . . . ; the public must learn to live with the truth, often an unpleasant obligation but the essence of the human condition. Suppression results in no lasting benefit and may lead to whispered, truth-garbling rumors more damaging than a clear statement. Revelation will provide opportunity for human development otherwise unreachable.”).

\(^\text{53}\) See Smolla, supra note 19, § 5:14; Sack, supra note 50, § 3.7; Jackson v. Pittsburgh Times, 25 A. 613, 615 (Pa. 1893) (“It is not necessary to be correct in every word . . . that is not common sense, and could not be done . . . .”).

\(^\text{54}\) Vachet v. Cent. Newspapers, Inc., 816 F.2d 313, 316 (7th Cir. 1987); Guccione v. Hustler Mag., Inc., 800 F.2d 298, 301 (2d Cir. 1986) (noting that under New York law “‘substantial truth’ suffices to defeat a charge of libel”).
defamatory statement cannot be established,” as long as the “gist” or “sting” of the statement is true.\(^5\)

A crisp formulation of the doctrine states that a publication is substantially true if (a) it is factually similar to the literal truth, and (b) it differs from the truth by no more than immaterial details.\(^7\) A statement differs from the truth “by no more than immaterial details” if the statement does not harm the plaintiff’s reputation more than would the pleaded truth.\(^5\) Justice (then Judge) Scalia provided the following illustrative example in *Liberty Lobby v. Anderson.*\(^5\) Suppose a newspaper reports that a person has committed thirty-five burglaries, while he has actually committed only thirty-four.\(^6\) Although the statement is defamatory and factually incorrect, it would likely not be actionable.\(^6\) It is substantially true, because (a) it is factually similar to the truth, namely that the person

\(^5\) *Smolla, supra* note 19, § 5:14; *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 516 (1991) (“The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth.”) (internal citation omitted).

\(^6\) *See, e.g., Zerangue v. TSP Newspapers,* Inc., 814 F.2d 1066, 1073 (5th Cir. 1987) (“Truth is a defense to libel. . . . A publication is also protected if it is ‘substantially true,’ i.e., if it varies from the truth only in insignificant details or if its ‘gist’ or ‘sting’ is true.”); *Prosser and Keeton on the Law of Torts,* *supra* note 23, § 116, at 842 (“It is not necessary to prove the literal truth of the accusation in every detail, and . . . it is sufficient to show that the imputation is substantially true, or, as it is so often put, to justify the ‘gist,’ the ‘sting,’ or the ‘substantial truth’ of the defamation.”).

\(^7\) *See Zerangue, 814 F.2d* at 1073 (Under the substantial truth doctrine, a communication is protected if it varies from the truth only in insignificant details.); 2 *Dan B. Dobbs, The Law of Torts* 1148 (2001) (“[I]f (a) the publication states facts similar to the truth and (b) the sting of the publication is substantially equivalent to the sting of the truth, the truth defense should ordinarily apply.”); *Smolla, supra* note 19, § 5:20 (“[A] distinction should be made between (1) inaccuracies that amount to charges of an act of misconduct different from the one plaintiff actually engaged in, and (2) cosmetic inaccuracies that correctly identify the act but err in describing minor details concerning the act.”).

\(^5\) *See Masson,* 501 U.S. at 517 (“[A] statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’”) (quoting *Sack, supra* note 21, at 138); *Smolla, supra* note 19, § 5.17.

\(^5\) 746 F.2d 1563 (D.C. Cir. 1984).

\(^6\) *Liberty Lobby,* 746 F.2d at 1568 n.6.

\(^6\) *Id.*
is a habitual burglar, and (b) the incorrectly reported number of burglaries is an immaterial detail. It makes no difference to the average reader of the report whether a habitual burglar committed thirty-four or thirty-five burglaries.\(^{62}\)

Justice Kennedy, writing for the Court in *Masson v. New Yorker Magazine, Inc.*,\(^{63}\) formulated the substantial truth doctrine in terms of a mental impact test, namely that “a statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’”\(^{64}\) The mental impact test determines the truth of a communication by viewing it through the eyes of the average recipient of the communication.\(^{65}\) If the average recipient is likely to characterize the difference between the communication and the proven truth as insignificant, then the communication is substantially true.\(^{66}\)

\(^{62}\) *Id.; see also Masson*, 501 U.S. at 517 (“Minor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’”) (citing Heuer v. Kee, 59 P.2d 1063, 1064 (1936)). Subsequent courts have adopted Judge Scalia’s example in applying the substantial truth doctrine. See, e.g., Moldea v. N.Y. Times Co., 22 F.3d 310, 319 (D.C. Cir. 1994).


\(^{64}\) *Masson*, 501 U.S. at 517 (citing SACK, *supra* note 21, at 138); see also SMOLLA, *supra* note 19, § 5.17 (“The key is to determine if the allegedly defamatory statement would have no different effect on the reader than that which the literal truth would have produced.”).

\(^{65}\) *See Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1073 (5th Cir. 1987).

\(^{66}\) *See Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 302 (2d Cir. 1986); see also Rudin v. Dow Jones & Co., 557 F. Supp. 535, 537 (S.D.N.Y. 1983) (stating defamatory meaning depends on the “sense in which the words were likely to be understood by the ordinary and average reader”); Shihab v. Express-News Corp., 604 S.W.2d 204, 208 (Tex. Civ. App. 1980) (“The critical test should be whether the defamation, as published, would [a]ffect the mind of the reader or listener in a different manner than would the misconduct proved. If the effect on the mind of the recipient would be the same, any variance between the misconduct charged and the misconduct proved should be disregarded.”); Thomas D. Yannucci, *Debunking “The Big Chill”–Why Defamation Suits by Corporations Are Consistent With the First Amendment*, 39 ST. LOUIS U. L.J. 1187, 1196 n.30 (1995) (“When a court determines whether a [communication] is substantially true, it views the [communication] through the eyes of the average . . . member of the audience. If the average person is likely to characterize the mistake as a mere ‘technicality,’ then it is substantially true.”) (citing *Guccione*, 800 F.2d at 302).
The decision in *Vachet v. Central Newspapers, Inc.* illustrates the mental impact test. In *Vachet*, a local newspaper, the Vincennes Sun-Commercial, reported that the Vincennes Police arrested one Michael Vachet on a warrant issued in Knox County Superior Court, on charges of harboring a fugitive. The fugitive was a suspect in the brutal rape of an eighty-three-year-old woman in Vincennes, Indiana. Vachet was in fact arrested on those charges, but without a search warrant. Under Indiana law a police officer does not need a warrant to arrest a suspect on a felony charge, but still needs to show probable cause. Vachet responded by suing *Central Newspaper* for defamation, alleging that the article falsely reported that he had been arrested and charged with a criminal offense.

The defendant-newspaper moved for summary judgment on the basis that the article was substantially true. In support of its motion, Central Newspapers filed Vachet’s deposition in which he admitted that he was arrested for harboring a fugitive. The defendant’s motion was granted by the district court. Vachet appealed, alleging that the newspaper article was not completely true, because it stated that he was arrested on a warrant when, in fact, no warrant had been issued.

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67 816 F.2d 313, 316 (7th Cir. 1987).
68 *Vachet*, 816 F.2d at 315.
69 *Id.*
70 *Id.* at 314.
72 *Id.* § 35-33-1-1(a)(2) (“A law enforcement officer may arrest a person when the officer has . . . probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit, a felony.”); see also Doering v. State, 49 Ind. 56, 56 (1874) (“In cases of misdemeanor, the officer must arrest on view or under a warrant; in cases of felony, he may arrest without a warrant, upon information, where he has reasonable cause.”).
73 *Vachet*, 816 F.2d at 315.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* at 316.
The appellate court began its analysis by stating that substantial truth is a defense to a libel claim under Illinois law. A publication with technical errors would therefore not be actionable if the meaning it conveys is true. The defamatory meaning of the news article is the connection it implies between the plaintiff and the suspected rapist of an elderly woman. The implied connection was proven to be true, because Vachet admitted that he was in fact arrested on the charge of harboring the rape suspect. The details of the arrest, namely whether it was authorized by an arrest warrant or a state statute, were immaterial. The method of arrest would make no difference to the average reader, because both methods require a showing of probable cause. Neither method therefore implies a greater degree of culpability on the part of the arrestee.

78 Id. at 316 (citing Cook v. E. Shore Newspapers, 64 N.E.2d 751, 759 (Ill. App. Ct. 1946)).
79 Id.
80 Id. at 316-17 (“[I]mplicit in the charge of harboring a fugitive is a relationship or link between the arrestee and the fugitive.”).
81 Id. (“[Vachet] admits that he was arrested on the charge of harboring [the suspect] . . . . [I]mplicit in the charge of harboring a fugitive is a relationship or link between the arrestee and the fugitive.”).
82 Id. at 316
83 Vachet, 816 F.2d at 316. (citing IND. CODE § 35-33-1-1 (allowing an arrest based on probable cause to believe the arrestee has committed a felony), 35-33-2-1(c)(2) (requiring probable cause to issue arrest warrant) (DATE)).
84 Courts have held that insubstantive mistakes in legal terminology are not sufficient to overcome the substantial truth defense. See, e.g., Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978), cert. denied, 440 U.S. 960 (1979) (describing a violation of securities laws as fraud is substantially true); Sivulich v. Howard Publ’ns, 466 N.E.2d 1218 (Ill. App. Ct. 1984) (involving a report that the plaintiff was charged with aggravated battery is substantially true, even though the plaintiff was sued in civil action, because it is clear from entire article that legal action was civil, not criminal). However, falsely elevating administrative sanctions to the level of criminal misconduct may be actionable. See, e.g., St. Surin v. Virgin Islands Daily News, 21 F.3d 1309 (3d Cir. 1994) (holding that sufficient evidence of falsity existed to preclude summary judgment in a case concerning a news story that falsely implied that criminal charges were forthcoming against plaintiff); see also Kevin L. Kite, Note, Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine, 73 N.Y.U. L. REV. 529, 537 n.25 (1998) (involving a report that a person has been incarcerated is not justified by proof of his release on bond pending appeal, because the latter connotes less culpability).
court concluded that the article as published was substantially true, and summary judgment for the defendant was appropriate.85

Older courts did not embrace the substantial truth doctrine, and accepted only the exact truth as a defense.86 In Downs v. Hawley,87 for instance, the court held that a charge of sodomy with a horse is not justified by proof of sodomy with a cow.88

III. Evidentiary Precision

Proof of the substantial truthfulness of a defamatory allegation must be as precise and specific as the allegation itself.89 An allegation that a plaintiff embezzled money cannot be justified by proving that the plaintiff breached a fiduciary duty,90 and a charge that a plaintiff committed a burglary cannot be justified by proving that the plaintiff committed a murder.91

Courts require precise proof of the factual similarity of the defamatory allegation to the pleaded truth in order to establish substantial truth, but overlook dissimilarity of immaterial details.92 Proof of breach of fiduciary duty does not justify an allegation of embezzlement, because the two

85 Vachet, 816 F.2d at 317.
86 See Lisa K. Snow, Note, A Broader Approach to the Substantial Truth Defense, 29 B.C. L. REV. 769, 772 (1988) (“Although courts were slow to adopt truth as a complete defense in civil defamation cases, by the late eighteenth or early nineteenth century most courts did allow the defendant to assert truth as a defense. At this time, courts required the defendant to prove the literal truth of the communication to establish the defense.”) (emphasis added)); see also id. at 772 n.30 (citing cases).
87 112 Mass. 237 (1873).
88 Downs, 112 Mass. at 240.
89 Smolla, supra note 19, § 5:19 (“When the defamatory allegation is narrow and specific, the evidence of truth must more strictly conform to the allegation.”), § 5:16 (“As the character of the defamatory charge becomes more generalized and unspecified, the evidence used to establish substantial truth may encompass a broader range of conduct and events.”).
92 See Smolla, supra note 19, § 5:20.
crimes are not factually similar.  Proof of thirty-four burglaries, on the other hand, does not render an allegation of thirty-five burglaries substantially false, because the proven facts are factually similar to the alleged facts (both suggest habitual burglary) and the numerical discrepancy is immaterial.

The common law position seems unduly strict. A defendant may, with apparent justification, argue that an allegation that the plaintiff had embezzled money does not harm the plaintiff’s reputation substantially more than the exact truth, namely that the plaintiff had breached a fiduciary duty. However, Professor Rodney Smolla explains that “[t]he relative strictness of the common law position on substantial truth when specific defamatory charges are made can be justified on the grounds that more detailed charges of misconduct often tend to create greater reputational injury because the existence of detail tends to lend credibility to the accusation.” A defamer who uses specificity to strengthen the credibility of his story, must pay the price, namely be required to prove the truth with evidence as precise as the allegation itself.

IV. Role of Judge and Jury

The plaintiff has considerable control over the focus of a court’s substantial truth analysis. Under common law pleading rules, the plaintiff must allege the defamatory meaning conveyed by the defendant’s statement, namely that aspect of the statement which harmed the plaintiff’s reputation. If the court determines that the statement is not capable of bearing the meaning asserted by the plaintiff, it will dismiss the complaint. If, on the other hand, the court determines that the interpre
tation is reasonable, it will hand the issue to the jury.\textsuperscript{98} The jury determines whether the defamatory meaning of the statement was so understood by the recipient, either correctly or mistakenly, but reasonably.\textsuperscript{99} The jury must then decide the truth or falsity of the defamatory meaning.\textsuperscript{100} The defamatory meaning need not be the interpretation of a majority of listeners for the statement to be actionable. If there are listeners who reasonably understand a statement in a defamatory sense, a defamation action may be maintained, even if most of those who hear the statement will give it an innocent interpretation.\textsuperscript{101}

\textsuperscript{98} See Sharon v. Time, Inc., 575 F. Supp. 1162, 1165 (S.D.N.Y. 1983) (“The court may not . . . interfere with the jury’s role by treating as nondefamatory a statement that a reasonable juror may fairly read in context as defamatory.”) (citation omitted)); Adams v. Daily Tel. Printing Co., 356 S.E.2d 118, 122 (S.C. Ct. App. 1986) (stating that a defamation case will be handed to a jury unless “the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory”); Memphis Publ’g Co. v. Nichols, 569 S.W.2d 412, 419, 420 (Tenn. 1978) (“Whether [the defendant’s publication] was, in fact, understood by readers in its defamatory sense is ultimately a question for the jury. But preliminary determination of whether the article is capable of being so understood is a question of law to be determined by the court.”).

\textsuperscript{99} See Restatement (Second) of Torts § 563 (1977) (“The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands it was intended to express.”); Richwine v. Pittsburgh Courier Publ’g Co., 142 A.2d 416 (Pa. Super Ct. 1958); Prosser and Keeton on the Law of Torts, supra note 23, § 116, at 782-83 (“[I]t remains a question for the court whether the meaning claimed might reasonably be conveyed, and for the jury whether it was so understood.”).

\textsuperscript{100} See Restatement (Second) of Torts § 617(b) (1977) (“Subject to the control of the court whenever the issue arises, the jury determines whether . . . the matter was true or false . . . .”); Fields Found., Ltd. v. Christensen, 309 N.W.2d 125, 135 (Wis. Ct. App. 1981); Thomas Gibbons, Defamation Reconsidered, 16 Oxford J. Legal Stud. 587, 606 (1996) (“The jury must decide by looking to the ‘gist’ or the ‘sting’ of the allegation, asking whether the discrepancy between the facts required to be justified and those proved to be true would make any difference to the judgment of reasonable people.”); see also Snow, supra note 86, at 785 (“The jury is the appropriate factfinder in this situation because the jury represents the average reader or listener. The jury is in the best position to determine whether the opprobrium attached to the alleged misstatement is similar to the opprobrium attached to the act actually committed.”).

\textsuperscript{101} See Sack, supra note 21, at 73 (“In most jurisdictions, so long as there are
Ambiguous or vague language will not necessarily defeat the plaintiff’s claim, even though some courts have wrongly immunized such language as “opinion.”102 If the defendant’s statement is capable of multiple interpretations, the jury must determine whether the claimed meaning was in fact the recipient’s interpretation.103 In *Rovira v. Boget*,104 the court wrestled with a defamation claim based on an ambiguous phrase.105 The plaintiff was a stewardess on the *Orizaba*, a steamer cruising between the United States, Cuba, and Spain.106 The defendant, a second steward on the ship, after a heated exchange, allegedly referred to the plaintiff as “worse than a cocotte.”107 The word “cocotte” is a French word with an ambiguous connotation.108 In some contexts it may mean a prostitute, while in others it may refer to a poached egg.109 The appellate court held that a jury must decide which of the two meanings was reasonably under-
stood by the listeners. The ambiguity of the phrase “worse than a cocotte” did not immunize it from a defamation claim. It may be actionable if a jury finds that a defamatory meaning is reasonable under the circumstances.

V. Constitutional Analysis

A. Introduction

Defamation law is concerned with two competing constitutional interests, namely freedom of speech and protection of reputation. Until its constitutionalization, defamation law strongly favored the plaintiff’s
reputational interest over the defendant’s expressive interest, and defama-
tion was outside the scope of First Amendment protection. Defamation
law strongly favored the plaintiff, and the courts treated defamation
virtually as a strict liability tort. The plaintiff had to merely allege falsity to establish a cause of action for defamation, while the defendant
had to prove the truth. Liability and damages were presumed, and a
plaintiff could recover without showing any actual harm. Defendants
had several potential defenses, including truth, absolute privilege, condi-
tional privilege, and fair comment. In practice, however, these defenses
were difficult to establish and pleading them sometimes exposed defend-
ants to further liability. In a series of landmark decisions, the United

114 See Russell L. Weaver et al., The Right to Speak Ill Defamation,
Reputation and Free Speech 37 (2006) (“[F]or nearly two centuries, the Court
viewed defamation as a subject that deserved no First Amendment protection.”); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that “libelous . . . utterances . . . are 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 order and morality”).

115 Smolla, supra note 19, § 1:7 (“Prior to the intervention of the Supreme Court
in New York Times v. Sullivan, the American common law of defamation was a strict liability tort.”); see also Franklin & Bussel, supra note 97, at 826; James J. Brosnahan,
From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The
First Amendment, 26 Hastings L.J. 777, 778 (1975) (“Prior to the Supreme Court’s
decision in New York Times Co. v. Sullivan, a publisher printed materials susceptible
of a defamatory meaning at his peril.”).

116 See L.H. Bloom, Proof of Fault in Media Defamation Litigation, 38 Vand. L.

117 See, e.g., Lewis v. Hayes, 171 P. 293, 294 (1918).

118 According to one commentator,

[a] defendant could invoke a fair comment privilege by proving that, (1) the
statement concerned a matter of legitimate public interest, (2) the facts upon which
the statement was based were either stated or known to the reader, (3) the statement
was the actual opinion of the defendant, and (4) the statement was not motivated
solely by the purpose of causing harm to the plaintiff.

Rodney W. Ott, Fact and Opinion in Defamation: Recognizing the Formative Power

119 Franklin & Bussel, supra note 97, at 826 n.6 (“In addition to the difficulty with
regard to proof, an assertion in the pleadings that the statement was true may expose
the defendant to further liability. If he should fail to prevail on that issue, the court may
consider the pleading to be a republication of the libel.”).
States Supreme Court shifted the constitutional balance toward greater protection of First Amendment values.

The United States Supreme Court revolutionized its First Amendment defamation jurisprudence with decisions in *New York Times Co. v. Sullivan*, *Gertz v. Robert Welch, Inc.*, *Philadelphia Newspapers, Inc. v. Hepps*, and *Milkovich v. Lorain Journal Co.* Three important implications of these decisions are: (1) the plaintiff must plead a defamatory statement of fact that is objectively verifiable as true or false, (2) the plaintiff must prove the falsity of the defamatory statement with convincing clarity, and the defendant may prove the truthfulness of the statement as a defense, and (3) the defendant must have acted with the requisite degree of fault.

This section analyzes the constitutional evolution of defamation law, which led to the Supreme Court’s adoption of the substantial truth doctrine as the constitutional standard of truth and falsity, in *Masson v. New Yorker Magazine, Inc.*

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124 *Milkovich*, 497 U.S. at 20 (stating 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) (citing *Hepps*, 475 U.S. 767).
125 *Sullivan*, 376 U.S. at 279-80; *Hepps*, 475 U.S. at 733; see also Franklin & Bussel, *supra* note 97, at 825 (“[T]he plaintiff must establish the existence of a disprovable defamatory statement and must prove the falsity of that statement with convincing clarity.”).
126 Franklin & Bussel, *supra* note 97, at 825.
127 The fault requirement depends on the plaintiff’s status. A private-figure plaintiff must prove negligence, namely that, by a preponderance of the evidence, the defendant lacked reasonable grounds for believing the statement to be true, or failed to take reasonable care to ascertain the truth. A public plaintiff must prove by clear and convincing evidence that the defendant published the statement with “actual malice.” Actual malice is defined as “with knowledge that the statement was false, or with reckless disregard of whether it was false or not.” *Sullivan*, 376 U.S. at 279-80; see *Gertz*, 418 U.S. at 343-46.
B. Constitutional Evolution: Balancing Reputation and Freedom of Expression

In a defamation action, reputational integrity and free expression inevitably come into conflict. Both rights must be accommodated, because “[n]either the right to be free from critical speech, nor the right to criticize is absolute.” The United States Supreme Court has resolved this tension in defamation law by developing a jurisprudence that attempted to balance the two inherently conflicting rights.

The Supreme Court has frequently employed a balancing methodology to resolve constitutional issues. A balancing opinion analyzes a constitutional question by identifying, valuing, and comparing competing interests at issue, and formulating a rule or doctrine that accommodates each interest in accordance with the value assigned to it. A court may

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129 HOPKINS, supra note 113, at 163; see also Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YAL E L.J. 877, 912 (1963) (expressing the view that “[t]he Court must, in each case [involving the First Amendment], balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression”).

130 See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757 (1985) (accommodating the conflicting constitutional interests by “balanc[ing] the State’s interest in compensating . . . individuals for injury to their reputation against the First Amendment interest in protecting . . . expression”); Gertz, 418 U.S. at 340-48 (recognizing that the state’s strong and legitimate interest in “compensating private individuals for injury to reputation” must be balanced against the First Amendment interest in “uninhibited, robust and wide-open” public discussion); Curtis Pub’g Co. v. Butts, 388 U.S. 130, 153 (1967); Milkovich Lorain Journal Co., 497 U.S. 1, 21-22 (1990); Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (stating that the court must accommodate the “interests in free expression . . . and in an individual’s reputation”); see also Dienes & Levine, supra note 14, at 251 (describing the Supreme Court’s judicial methodology as “interest balancing, with a presumption in favor of the interest in freedom of expression in the public official context”); HOPKINS, supra note 113, at 90 (“To Brennan’s way of thinking, there are few absolutes under the First Amendment. The free-expression guarantee, being as much for the benefit of society as for the benefit of the individual, meant that rights must be balanced to ensure the greatest possible benefit for both society and the individual.”); HOPKINS, supra note 113, at 163.

131 Brosnahan, supra note 115, at 778 (describing a balancing approach as “the methodology employed by the Court in resolving a variety of constitutional issues”).

132 See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YAL E L.J. 943, 945 (1987); HOPKINS, supra note 113, at 83-84 (“[W]hen First Amend-
decide that one interest outweighs the others, and issue a ruling that accommodates exclusively the “favored” interest. A different approach to balancing accommodates all the competing interests, although not necessarily in equal proportions. The Supreme Court followed the latter approach in its defamation jurisprudence, namely a balancing approach that recognized and accommodated both constitutional interests of concern in defamation law. The Court preserved the compensatory function of defamation law, but moved the constitutional balance toward greater First Amendment protection by establishing strategic safeguards for defamatory speech.

In New York Times Co. v. Sullivan, the Court first formally recognized that the plaintiff-friendly status quo did not adequately protect free speech and tended to create an atmosphere of “intolerable self-censorship.” The Court expressed doubt that the danger of self-censorship would be mitigated by the common law defense of truth. The truth

133 In Schneider v. State, 308 U.S. 147 (1939), the first free speech case that explicitly applied balancing, the issue before the Court was the constitutionality of a prohibition against the distribution of handbills. The competing interests were free speech and clean streets. Id. at 153. The Court found that the defendants’ First Amendment interests outweighed the state’s interest in clean streets, and concluded that a municipality could not prohibit the distribution of handbills. Id. at 163.

134 In Tennessee v. Garner, 471 U.S. 1 (1985), the Court considered the constitutionality of a state statute permitting the use of deadly force against fleeing felons. Id. at 3. The competing interests were the state interest in preventing the escape of criminals and an individual’s interest in life. Id. at 8. The Court applied a balancing process that recognized both interests. Id. The Court’s ruling limited the use of deadly force to situations where “such force . . . is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of . . . serious physical injury.” Id. at 3; see also Aleinikoff, supra note 132, at 946.

135 Sullivan, 376 U.S. at 272 (Defamation law lacks constitutional safeguards to ensure that free speech had adequate “breathing space.”); id. at 279 (stating that the traditional defamation regime “dampens the vigor and limits the variety of public debate”); see Smolla, supra note 19, § 2:3.

136 Sullivan, 376 U.S. at 278; see also Brosnahan, supra note 115, at 781 (“A major
defense, with the burden of proof on the defendant, creates the danger that not only false speech will be deterred, but also truthful assertions that are difficult to prove. A risk-averse critic of official conduct may be reluctant to voice truthful and justifiable criticism if she doubts that the truth of her statement can be proven in court.

The Court set the stage for its landmark opinion by expressing its 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.” Justice Brennan, writing for the Court, then stated the Court’s holding which would revolutionize the law of defamation: “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.” In addition, the Court required that actual malice be shown with “convincing clarity,” a standard which shifted the constitutional balance further in favor of free expression.

138 Sullivan, 376 U.S. at 279; see Smolla, supra note 19, § 2:3.
139 Sullivan, 376 U.S. at 279 (“Under such a rule, [risk-averse] 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.”); id. at 279 (“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.’”); Rosenbloom v. MetroMedia, Inc., 403 U.S. 29, 50 (1971) (observing that the “[f]ear of guessing wrong [about a statement’s truth] must inevitably cause self-censorship and thus create the danger that [a] legitimate utterance will be deterred”).
140 Id. at 279-80; see also Hopkins, supra note 113, at 85 (1991). Professor Rodney Smolla describes the “breathing space argument that was central to the rationale in New York Times” as “a cornerstone of First Amendment doctrine, applying in many contexts outside of defamation law.” Smolla, supra note 19, § 2:3.
141 Sullivan, 376 U.S. at 285-86. The “convincing clarity” standard is significantly more rigorous than the usual civil standard of preponderance of the evidence. See Smolla, supra note 19, § 3:26.
Subsequent cases added refinements to the *Sullivan* safeguards. Three years after *Sullivan*, in *Curtis Publishing Co. v. Butts*, the Court extended the actual malice standard to public figure defamation plaintiffs. Subsequent to *Butts*, in *Gertz v. Robert Welch, Inc.*, the Court delivered an opinion described as the framework of modern defamation law. The *Gertz* opinion established three major results: (1) adoption of a constitutional balancing test weighing First Amendment interests against individual interests in reputational protection, (2) refinement of the definition and scope of the actual malice standard, and (3) establishment of new rules governing damages in defamation actions.

The plaintiff in *Gertz*, Elmer Gertz, filed a defamation suit against a magazine which had made several untrue statements about the plaintiff, including a charge that he was an official in a Communist organization which advocated the violent overthrow of the United States government. The plaintiff prevailed at trial and won a jury award. The trial court overturned the jury verdict, holding that, although Elmer Gertz was a private figure, the *Sullivan* fault standard of actual malice nevertheless applied to defamation actions involving matters of public concern, a standard which the plaintiff had not met. The Supreme Court agreed to hear the case.

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143 388 U.S. 130 (1967).
144 See *Brosnahan*, supra note 115, at 785 (“[A] public figure-plaintiff is one who because of status or conduct is the voluntary subject of continuing and substantial public interest independent of the publication at issue, and who therefore has access to the means of counterargument sufficient to rebut the defamatory falsehood directed at him.”); *Cepeda v. Cowles Magazine & Broad.*, Inc., 392 F.2d 417, 419 (9th Cir. 1968) (Public figures include artists, athletes, business people, dilettantes, and “anyone who is famous or infamous because of who he is or what he has done.”); *Butts*, 388 U.S. at 155 (stating that public figures are people who are in the public eye, but not public officials). The *Butts* Court also held that a public figure plaintiff must prove malice by clear and convincing evidence. *Id.* at 164.
146 *Smolla*, *supra* note 19, §§ 1:19.
148 *Gertz*, 418 U.S. at 325.
149 *Id.* at 328-29.
150 *Id.* at 329.
The Supreme Court began by stating that the polar extremes, strict liability and absolute First Amendment freedom, are both unacceptable.\footnote{Id. at 339-40.} Strict liability creates an unacceptable degree of self-censorship,\footnote{Id. at 340 (compelling a speaker to “guarantee the accuracy of his factual assertions may lead to intolerable self-censorship”). The Supreme Court, as well as academic commentators, have emphasized the importance of the First Amendment policy goal of minimizing self-censorship. \textit{See} Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (holding that the avoidance of self-censorship is a policy goal of the protection of speech); \textit{N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)} (arguing that even if a defense of truth is established, the burden and expense of having to prove the truth will execute a self-censorship which “dampens the vigor and limits the variety of public debate”); \textit{Thomas I. Emerson, Toward a General Theory of the First Amendment} 4-14 (1967); \textit{see also} Neil J. Kinkopf, \textit{Note, Malice in Wonderland: Fictionalized Quotations and the Constitutionally Compelled Substantial Truth Doctrine}, 41 \textit{Case W. Res. L. Rev.} 1271, 1294 (1991) (reviewing the social theories of the First Amendment and concluding that each of the theories “imposes the same requirement on the law of defamation, namely avoidance of self-censorship”).} while a regime of absolute freedom of speech does not adequately protect reputational interests.\footnote{Gertz, 418 U.S. at 341 (The court emphasized the danger of self-censorship but cautioned that “[t]he need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . . [A]bsolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation”—namely reputational protection.”); \textit{Milkovich v. Lorain Journal Co., 497 U.S. 1, 21-22 (1990)} (emphasizing that in addition to the rights and protections of the First Amendment, “there is also another side to the equation; we have regularly acknowledged the ‘important social values which underlie the law of defamation’” (citation omitted)).} An optimal balance must accommodate both interests.\footnote{Gertz, 418 U.S. at 341; \textit{see Hopkins, supra} note 113, at 93.} The \textit{Gertz} Court shifted its point of optimality somewhat from the \textit{Sullivan} focus on First Amendment interests toward the state interest in reputational protection.

The Court endorsed the \textit{Sullivan} actual malice standard in defamation actions brought by public persons, but found that the standard was too stringent for a private plaintiff.\footnote{See \textit{Gertz}, 418 U.S. at 343.} A private figure’s reputational interest merited greater protection than provided under the actual malice require-
The Court held that the States may define for themselves the standard of fault they apply to private plaintiffs, as long as they do not impose liability without fault. A private individual must therefore prove that the defendant acted at least negligently. The Court also established that a plaintiff must prove actual malice to receive punitive damages, a requirement intended to eliminate "significant and powerful motives for self-censorship." The Court justified the greater protection for the reputation of private persons by pointing out that public officials and public figures have superior access to the media to publicly respond to a defamatory allegation and minimize its impact. Furthermore, an individual who thrusts herself into the public eye by assuming a role of prominence in society, and enjoys the benefits of her public profile, must assume the risk of public scrutiny. Society also has a legitimate interest in aspects of a

156 *Id.* at 343-46; *see also* Hopkins, *supra* note 113, at 93 ("[Justice Brennan, writing for the Court,] noted that, while the Court’s decisions in *New York Times v. Sullivan* and *Curtis Publishing Co. v. Butts* were correct, the need to avoid self-censorship by the news media was not the only societal value at issue. State interests in libel actions must also be accommodated . . . and those state issues demanded additional protection for the reputation of private persons."); Brosnahan, *supra* note 115, at 777 ("[C]onstitutional protection for the press reaches its zenith where the press is performing its function as critic of the state. Conversely, where the target of adverse commentary is a private individual, the constitutionally protected status of the press is most tenuous.").

157 Gertz, 418 U.S. at 347; *see also* Brosnahan, *supra* note 115, at 788 ("[T]he Court’s refusal to extend Sullivan immunity to private persons was based on respect for the purposes served by state libel law.").

158 Gertz, 418 U.S. at 349.

159 *Id.* at 354. In *Dun & Bradstreet*, the Supreme Court ruled that the Gertz requirement that a plaintiff must prove actual malice to receive punitive damages does not apply to defamatory statements which do not involve matters of public concern. 472 U.S. at 758; *see also* Brosnahan, *supra* note 115, at 789 ("The Court reasoned that allowing awards of presumed and punitive damages vested in juries an uncontrolled discretion enabling them to punish unpopular opinion and thus exacerbated the danger of media self-censorship.").

160 Gertz, 418 U.S. at 344.

161 *Id.; see also* Brosnahan, *supra* note 115, at 784 ("The galvanizing force which brought unanimity to the Supreme Court in *Sullivan* was the fact that Mr. Sullivan was clearly a public official. He had direct government responsibility for the Montgomery police force and had voluntarily assumed a position which was the legitimate subject of substantial public debate.").
public person’s private life relevant to, for instance, the person’s honesty and integrity.\textsuperscript{162} Private individuals, in contrast, neither seek nor benefit from such public exposure, and are therefore not only more vulnerable than public individuals, but also more deserving of protection.\textsuperscript{163}

The Court described its opinion as providing “a more equitable boundary between the competing concerns” of defamation law, by accommodating the state’s interest in protecting private individuals from reputational harm, yet “shield[ing] the press and broadcast media from the rigors of strict liability for defamation.”\textsuperscript{164}

The fault requirements articulated by the Supreme Court in \textit{Sullivan}, \textit{Butts}, and \textit{Gertz} focus on the defendant’s state of mind regarding the truth or falsity of a defamatory statement.\textsuperscript{165} Proof of fault therefore requires an appropriate standard of truth and falsity.\textsuperscript{166} The opinions did not specify such a standard, but the issue was resolved in 1991, when the

\textsuperscript{162} \textit{Gertz}, 418 U.S. at 344; see also Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). In \textit{Monitor Patriot}, the Court considered what aspects of the conduct of a public figure may be publicly discussed with First Amendment safeguards. \textit{Id.} The Court held that discussion of matters relevant to an official’s fitness for office must be protected. \textit{Id.} at 277. The Court held that “as a matter of constitutional law . . . a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official’s or a candidate’s fitness for office.” \textit{Id.}

\textsuperscript{163} \textit{Gertz}, 418 U.S. at 344-45.

\textsuperscript{164} \textit{Id.} at 347-48.

\textsuperscript{165} A private-figure plaintiff must prove negligence, namely that, by a preponderance of the evidence, the defendant lacked reasonable grounds for believing the defamatory statement to be true, or failed to take reasonable care to ascertain the truth. A public plaintiff must prove by clear and convincing evidence that the defendant published the statement with “actual malice.” Actual malice is defined as “with knowledge that the statement was false, or with reckless disregard of whether it was false or not.” \textit{N.Y. Times Co. v. Sullivan}, 376 U.S. 254, 279-80 (1964); see \textit{Gertz}, 418 U.S. at 345.

\textsuperscript{166} Dienes & Levine, \textit{supra} note 14, at 237.

There is a close association between the issue of truth or falsity and the actual malice standard. \textit{Only calculated} falsity defeats the First Amendment privilege. It is when the defendant publishes knowing that his statement is false or when he is subjectively aware that it is probably false that he forfeits First Amendment protection. For a plaintiff to prove such a state of mind, he logically must establish that the published statement is false.

\textit{Id.} at 237 n.89.
Supreme Court adopted the substantial truth doctrine as its constitutional standard.  

**C. Masson v. New Yorker Magazine, Inc.**

Although the substantial truth doctrine is deeply rooted in modern common law, the United States Supreme Court first formally recognized the doctrine in *Masson v. New Yorker Magazine, Inc.* Petitioner Jeffrey Masson held an appointment as Projects Director of the Sigmund Freud Archives near London. The Archives contained writings and other personal documents of the renowned psychoanalyst, Sigmund Freud. In 1982, Janet Malcolm, an author and contributor to *The New Yorker Magazine*, conducted a series of interviews with Masson for articles she wrote on his relationship with the Archives. The articles were published in *The New Yorker Magazine* and also as part of a book published by Alfred A. Knopf. The articles and book portrayed Masson

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168 See Kinkopf, supra note 152, at 1294 n.64 (‘Prior to [the ruling in Masson], substantial truth was strictly a common law doctrine. In all the defamation cases to reach the Supreme Court between its decisions in *New York Times* and *Masson*, the Court used the term ‘substantial truth’ only once, and then it noted explicitly that this was a common law doctrine.’); Curtis Pub’g Co. v. Butts, 388 U.S. 130, 137 (1967) (‘[T]he only defense raised by petitioner Curtis was one of substantial truth. No constitutional defenses were interposed . . ..’). For a description of the common law evolution of the substantial truth doctrine, see Snow, supra note 86, at 771-74.
169 501 U.S. 496, 516-17 (1991). The Court alluded to the substantial truth doctrine in *Time, Inc. v. Pape*, 401 U.S. 279, 289 (1971) (holding that a minor discrepancy could not support a “finding of ‘actual malice’”). See also Dienes & Levine, supra note 14, at 268 (“Since ‘the issue of falsity relates to the defamatory facts implied by a statement,’ the falsity of the speaker’s beliefs and opinions are not at issue; rather, it is the falsity of the implied defamatory statement of fact that is critical.”) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 n.7 (1990)).
170 Masson, 501 U.S. at 500.
171 Id.
172 Id.
in an unflattering light, because of self-condemnatory quotations attributed to him.\textsuperscript{175}

Masson claimed that he did not make the statements attributed to him, and brought action for defamation against Janet Malcolm, \textit{The New Yorker Magazine}, and Alfred A. Knopf.\textsuperscript{176} The defendants conceded that some of Masson’s comments had been deliberately altered, but they claimed protection under the First Amendment.\textsuperscript{177} The district court granted the defendants’ motion for summary judgment, holding that the “allegedly fabricated quotations were either substantially true or were ‘one of a number of possible rational interpretations’ of a conversation or event that ‘bristled with ambiguities,’ and thus were entitled to constitutional protection.”\textsuperscript{178} The court of appeals affirmed the decision,\textsuperscript{179} and the Supreme Court granted certiorari.\textsuperscript{180}

The constitutional question before the Court was whether the respondent acted with actual malice, namely whether the respondent “in fact entertained serious doubt as to the truth of his publication, or acted with a ‘high degree of awareness of [its] probable falsity.’”\textsuperscript{181} This inquiry raised a question as to the degree of falsity required to satisfy the actual

\textsuperscript{175} One reviewer described the portrayal of Masson by his own words as follows:

Masson the promising psychaanalytic scholar emerges gradually, as a grandiose egotist–mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile—a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession.


\textsuperscript{176} \textit{Masson}, 501 U.S. at 499.

\textsuperscript{177} \textit{Id}.

\textsuperscript{178} \textit{Id.} at 508-09 (citing Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1399 (N.D. Cal. 1987)).

\textsuperscript{179} S\textit{MOLLA, supra} note 19, § 5:26.

\textsuperscript{180} \textit{Masson}, 498 U.S. at 808.

\textsuperscript{181} \textit{Id.} at 510 (citations omitted).
malice standard, and whether the requisite degree of falsity inhered in the defendants’ statements.\textsuperscript{182}

The Court considered two extreme approaches: (1) an absolute definition of falsity under which any alteration of a speaker’s actual words constitutes sufficient falsity to satisfy the Constitution,\textsuperscript{183} and (2) the rule applied by the lower courts, namely that any quotation that is a rational interpretation of the speaker’s actual words merits First Amendment protection.\textsuperscript{184} Neither approach satisfied the Court as an optimal balance of defamation law’s competing interests.

The Court rejected the absolute definition of falsity, reasoning that such a strict standard would stifle journalistic practice in a way which is inconsistent with precedent as well as First Amendment principles.\textsuperscript{185} The Court reasoned that there must be an optimal tradeoff between a requirement of stifling perfection in journalism on the one hand, and absolute First Amendment freedom on the other.\textsuperscript{186} A degree of reporting error is inevitable, and even efficient.\textsuperscript{187} The process of editing and translating a speaker’s statement into printed words, while striving to preserve

\textsuperscript{182}Id. at 499 (“We consider in this opinion, whether the attributed quotations had the degree of falsity required to prove [actual malice].”); see SMOLLA, supra note 19, § 5:26; Kinkopf, supra note 152, at 1282 (“Having determined that the First Amendment governs the rule by which falsity is determined, it was left for the [Masson] Court to articulate this rule.”).

\textsuperscript{183}Masson, 501 U.S. at 514. The plaintiff’s actual position on the falsity issue was not quite as extreme as the absolute truth test. Masson accepted that journalists should be free to edit grammar and syntax, but should not change a speaker’s actual words. Any deliberate alteration beyond grammar and syntax, according to Masson, constitutes sufficient falsity to satisfy the actual malice standard. Id.

\textsuperscript{184}Id. at 516.

\textsuperscript{185}Id. at 514 (“If every alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles.”); id. at 515 (Under the “literal truth” standard, an author would lack First Amendment protection if “she reported as quotations the substance of a subject’s derogatory statements about himself.”); see also Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 486 (D. Mass. 1980) (quoting Time, Inc. v. Johnson, 448 F.2d 378, 384 (4th Cir. 1971) (“A fussy insistence upon literal accuracy ‘would condemn the press to an arid, desiccated recital of bare facts.’”)).

\textsuperscript{186}Masson, 501 U.S. at 515.

\textsuperscript{187}Id.
the meaning of the statement and remain faithful to its original context, makes it unrealistic and inefficient to expect a verbatim rendition of the original comments.\textsuperscript{188} A journalist’s editing may in some cases actually make reporting more accurate by preserving the meaning that an inarticulate speaker may have intended but failed to express.\textsuperscript{189} Furthermore, in some cases an edited quotation may convey a truthful meaning where an exact, but out of context quotation of a speaker may unnecessarily distort the speaker’s meaning.\textsuperscript{190}

The Court also rejected the rational interpretation rule, cautioning that such a flexible interpretation of “substantial truth” would allow journalists to distort the words of their subjects beyond the First Amendment’s intended protection.\textsuperscript{191} This would erode the values of the First Amendment by undermining public trust in the press and reducing the willingness of newsworthy persons to speak to the press.\textsuperscript{192}

\textsuperscript{188} Id. (“The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker’s perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy.”); see also Curtis Pub’g Co. v. Butts, 388 U.S. 130, 148 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1954) (recognizing that the media must be allowed a margin of error in reporting facts if they are to function efficiently).

\textsuperscript{189} Masson, 501 U.S. at 515 (“[I]f a speaker makes an obvious misstatement, for example, by unconscious substitution of one name for another, a journalist might alter the speaker’s words but preserve his intended meaning.”).

\textsuperscript{190} Id.; see also Smolla, supra note 19, § 5:25 (“In the popularization of an event, or in the reducing of a complex set of facts into an intelligible story, the writer or broadcaster will often exercise literary or editorial judgment, making cosmetic additions to or subtractions from the raw events.”); Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1308 (N.Y.), cert. denied, 434 U.S. 969 (1977) (Immaterial alterations are “largely a matter of editorial judgment in which the courts, and juries, have no proper function.”).

\textsuperscript{191} Masson, 501 U.S. at 520.

\textsuperscript{192} Id. (The court concluded that adopting the rational interpretation standard “would ill serve the values of the First Amendment,” as “[n]ot only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists,” knowing that meanings they had not intended may be attributed to them.); see also Stephen Klaidman & Tom L. Beauchamp, The Virtuous Journalist 154 (1987) (“The media need not ever be loved or even fully understood to carry out their functions in society. But they must be trusted if they are to be credible in their watchdog role over the government, which has the power—with public backing—to restrict press freedom.”); Lee C. Bollinger, The End of New York
The *Masson* Court declined to create a separate standard of falsity for altered quotations, and adopted the common law substantial truth doctrine as the appropriate constitutional standard.\(^{193}\) Applying the substantial truth doctrine to the context of the case, the Court held that an altered quotation conveys a substantially false meaning if there is a material difference between the meaning conveyed by the altered quotation and that conveyed by the plaintiff’s actual statement.\(^{194}\)

Under *Masson’s* interpretation of substantial truth and fault, demonstrating actual malice requires proof that (1) the expression at issue conveys a materially false meaning, and (2) the defendant was aware of the probable falsity of the meaning.\(^{195}\) The Court observed that an altered quotation may convey a defamatory meaning in at least two ways. First, an alteration may be defamatory by attributing an untrue assertion to the plaintiff, such as admission of a crime.\(^{196}\) Second, the attribution may cast a negative light on the character of the speaker by, for instance, attributing a profane or racist comment to the speaker.\(^{197}\)

The *Masson* Court extended the strategic safeguards for free expression created by preceding Supreme Court decisions. Its adoption of the substantial truth doctrine as a constitutional standard strengthened the safeguards by relieving publishers of the obligation to guarantee the absolute accuracy of their factual assertions. The Court’s analysis reflects

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\(^{193}\) *Masson*, 501 U.S. at 516-17 (articulating the principles of the substantial truth doctrine and concluding that “[t]hese essential principles of defamation law accommodate the special case of inaccurate quotations without the necessity for a discrete body of jurisprudence directed to this subject alone”).

\(^{194}\) *Id.* at 517 (holding that “a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan* . . . unless the alteration results in a material change in the meaning conveyed by the statement”).

\(^{195}\) See, e.g., Dienes & Levine, supra note 14, at 283; Franklin & Bussel, supra note 97, at 834, 836-37.

\(^{196}\) *Masson*, 501 U.S. at 511.

\(^{197}\) *Id.* at 511-12.
a balancing of the competing interests of defamation law, which can be summarized as follows.

First, an important policy goal of the First Amendment is avoidance or minimization of self-censorship. An absolute truth standard would impose an unreasonable and inefficient degree of self-censorship on publishers. Second, a rational interpretation standard would give significant expressive freedom to the media, but it would likely harm public confidence in the press, on balance resulting in a net negative impact on First Amendment values. It would also result in uncompensated reputational harm by immunizing publications that a jury may have found offensive. Third, the substantial truth doctrine reduces the risk of self-censorship, yet preserves defamation law’s compensatory function. The doctrine allows publishers a reasonable margin of error by tolerating errors that do not harm a plaintiff’s reputation more than would the pleaded truth. It protects reputational interests by preserving liability for speech that is materially harmful to reputation.198

Conclusion

The substantial truth doctrine has been adopted by the United States Supreme Court as the constitutional standard of truth and falsity in defamation law. Under the substantial truth doctrine, a defamatory statement is First Amendment-protected if it is factually similar to the pleaded truth and does not differ from the truth by more than immaterial details. The focus is therefore not on the literal truth of a statement, but on the truthfulness of the meaning it conveys to a reasonable recipient. Minor inaccuracies are immaterial, as long as the “gist” or “sting” of the statement is true.

198 Id. at 516 ("If an author alters a speaker’s words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as defamation."); see also Republic Tobacco Co. v. N. Atlantic Trading Co., 381 F.3d 717, 727-28 (7th Cir. 2004) (The substantial truth doctrine “derives from the recognition that falsehoods which do no incremental damage to the plaintiff’s reputation do not injure the only interest the law of defamation protects.” (citation omitted)).
The substantial truth doctrine governs the plaintiff’s burden of proof of falsity and the defendant’s truth defense. Even when all the statements contained in a publication are factually accurate, the publisher may nevertheless be held liable if readers could reasonably infer a false and defamatory implication. Conversely, a statement that contains false elements may be held to be substantially true, as long as the falsities are immaterial and the meaning conveyed accurate. The fault element of a defamation cause of action is likewise defined in terms of substantial truth. A public plaintiff must prove actual malice by showing that the defendant had published an expression that she knew to convey a false and defamatory meaning.

The substantial truth doctrine’s focus on defamatory meaning, rather than literal accuracy, is consistent with First Amendment principles, as well as the compensatory goals of defamation law. The doctrine promotes the values of the First Amendment by reducing the risk of self-censorship, yet preserves defamation law’s reputational protection and compensatory function.