

HANDLE WITH CARE: THE EVOLVING ACTUAL MALICE STANDARD AND WHY JOURNALISTS SHOULD THINK TWICE BEFORE RELYING ON INTERNET SOURCES

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This note examines two phenomena at the intersection of traditional media law and evolving forms of expression on the Internet, focusing on whether courts' increasing tendency to view Internet sources as dubious will result in more findings of defamation among journalists who rely on those sources. Both phenomena are examined through the lens of traditional defamation law, under which a defendant may be found guilty of defamation if he is guilty of possessing "actual malice" in publishing the offending material—in one case, defined as writing "based wholly on" a source the defendant had obvious reasons to doubt. The first phenomenon is the pressure that the "24-hour news cycle" has put on journalists, who with increasing frequency are relying on what they read on the Internet as research for their articles. When those Internet sources turn out to be incorrect, the harm has often already been done because a respected news outlet such as CNN has re-reported the incorrect news. The second phenomenon is the recent cases in which courts have stated that certain Internet sources should automatically be viewed with skepticism, including sites that do not undergo a rigorous editorial process. Given these developments and the recent spate of embarrassing mistakes by news media in high-profile cases such as the reliance on false reports on Twitter of the chaos in New York after Hurricane Sandy and the misreporting of the name of the Sandy Hook shooter, the author advocates for greater diligence by reporters in checking the Internet sources upon which they rely, and discusses how societal recognition of the dubious nature of Internet sources could chip away at the significant protection against legal action traditionally given to journalists.

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INTRODUCTION

Readers of the *People's Daily* November 27, 2012 online version were largely mystified to read that North Korean ruler Kim Jong-Un had been named the “Sexiest Man Alive.”¹ Quoting the original article in *The Onion*, the *People's Daily* (the Chinese Communist Party's official newspaper) extolled the leader's “devastatingly handsome, round face, his boyish charm and his strong, sturdy frame,” and his “air of power that masks an unmistakable cute, cuddly side.”² *The Onion* is an American satirical newspaper and website. Previous winners of its Sexiest Man Alive title included Unabomber Ted Kaczynski and disgraced financier Bernie Madoff,³ both of whom had as little in common with conventional sex symbols as Kim. The online version of the *People's Daily* is apparently less rigorously edited than the print version,⁴ and someone had fallen into the trap of giving too little scrutiny to a source that, on its face, should have prompted skepticism. This pattern of taking sources at face value has become too common in the current journalistic landscape in which Internet sources play a large part in breaking the news.

News outlets reporting on a 24-hour news cycle place a premium on speed. Unfortunately, that emphasis, coupled with a distressing lack of caution when

¹ Edward Wong, *Kim Jong-Un Seems to Get a New Title: Heartthrob*, N.Y. TIMES (Nov. 28, 2012), <http://www.nytimes.com/2012/11/28/world/asia/chinese-news-site-cites-onion-piece-on-kim-jong-un.html>.

² *See id.*

³ *See Kim Jong-Un Named The Onion's Sexiest Man Alive for 2012*, THE ONION (Nov. 14, 2012), <http://www.theonion.com/articles/kim-jongun-named-the-onions-sexiest-man-alive-for,30379>.

⁴ Wong, *supra* note 1.

journalists use sources from the Internet, threatens standards for accuracy. When journalists republish material found on the Internet without conducting their own fact-checking, they run the risk of putting their stamp of approval on source material that has not been properly vetted or edited in the first instance. The tendency, even among established news organizations, to blindly trust what they read online is troubling, even more so given how quickly news spreads.

The actual malice standard for defamation is deeply engrained in judicial opinions dating back to the 1960s, with subsequent case law fine-tuning its requirements. As new forms of media and speech have arisen, commentators have increasingly questioned whether the structures for finding defamation should change. The Internet has spurred a disconcerting practice of irresponsible journalism, but when established defamation law is applied, writers are largely protected from being found guilty of actual malice. When both professional and less-traditional writers rely on Internet sources in their work, they engage in journalistic practices that are removed from traditional reporting methods—information found on the Internet is inherently different from information gathered by speaking to sources or witnessing events firsthand. When use of Internet sources erodes the accuracy of reporting, journalists relying on them risk becoming the target of defamation suits. A goal of this paper is to help those in the media industry avoid such suits by recommending best practices with respect to web sources.

As defined in the seminal 1964 First Amendment case *New York Times Co. v. Sullivan*, a defendant may be found guilty of defamation if actual malice was present, “that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁵ Later cases such as *St. Amant v. Thompson* proposed specific sources that might provide circumstantial evidence of actual malice.⁶ One of *St. Amant*’s suggestions was that actual malice might be found if writing were “based wholly on” a source the defendant had obvious reasons to doubt.⁷ The possibility of courts’ viewing a writer’s use of dubious sources as proof of actual malice becomes more striking when viewed in the context of recent decisions about information on the Internet. In light of some courts’ statements that Internet material should always be viewed with skepticism and doubt,⁸ there is a strong

⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

⁶ *See St. Amant v. Thompson*, 390 U.S. 727 (1968).

⁷ *Id.* at 732.

⁸ *See, e.g., Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220, 1231 (D. Or. 2011) (holding that blog entries posted on an obviously critical website should be viewed with a skeptical eye); *Too Much Media, LLC v. Hale*, 20 A.3d 364, 379 (2011) (explaining that posts

possibility that courts may begin to view a journalist's use of Internet sources as circumstantial evidence of actual malice, and may even impose additional duties of fact-checking.

The first section of this note outlines the history of the actual malice standard for defamation through landmark cases. In it I also define terms and provide background for understanding the current state of the law and how susceptible it is to change. The second section discusses the current state of information dissemination on the Internet, explaining how the focus is a 24-hour news cycle. Part two also examines many courts' belief that consumers should be skeptical of information they read online and points out reasons why these developments could indicate a need for reform. The third section presents possible ways the actual malice standard could change based on the nature of Internet sources, using current examples to demonstrate why changing the standard is necessary and considering whether such changes will realistically occur. The fourth section addresses the overarching policy concern of encouraging increased responsibility among writers and offers practical advice to professional journalists and other writers.

I

THE HISTORY OF THE ACTUAL MALICE STANDARD FOR DEFAMATION

In the United States, defamation is a false statement of fact that tends to harm the reputation of the subject of the statement or deter others from associating with him.⁹ To find a party guilty of defaming a public figure or official, that party must have possessed "actual malice." The Supreme Court first articulated the concept of actual malice in 1964 in *Times v. Sullivan*, defining it as a statement made, "with knowledge that it was false or with reckless disregard of whether it was false or not."¹⁰ *Gertz v. Robert Welch* further elucidated the definition, explaining that the actual malice standard applied when public figures and officials are subjects of defamation, while each state could set the standard for private individuals.¹¹ The *St. Amant* court expanded the requirements for a finding of actual malice, stating, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or

on Internet message boards do not undergo a rigorous editorial oversight process and do not have the credibility of publications that do).

⁹ Restatement (Second) of Torts §559 (1977).

¹⁰ *Times v. Sullivan*, 376 U.S. at 280.

¹¹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

falsity and demonstrates actual malice.”¹² *St. Amant* identified three types of circumstantial evidence that could support a finding of recklessness and lack of good faith:

Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.¹³

Similarly, the 1989 *Harte-Hanks v. Connaughton* decision defined actual malice as occurring when a defendant made the false publication with a high degree of awareness of probable falsity.¹⁴

One of the biggest obstacles to plaintiff victories in defamation suits is the subjectivity of the standard. According to *St. Amant*, the defendant must have “in fact entertained serious doubts.”¹⁵ Likewise, *Gertz* described actual malice as having “subjective awareness of probable falsity.”¹⁶ While the court in *St. Amant* conceded that such subjectivity might appear to put “a premium on ignorance,” the use of the recklessness standard and requirement of subjective belief were actually the most effective measures to protect First Amendment values and promote the public interest.¹⁷ While the three types of circumstantial evidence that indicate recklessness are indeed important, the subjective belief requirement remains a prerequisite to a finding of actual malice. For example, in 1984 the court in *Bose Corp v. Consumers Union* distinguished a finding of actual malice from a finding of falsity, stating that even when the information disseminated was found to be false, it did not necessarily follow that the disseminator knew it was false.¹⁸ Similarly, the First Circuit used the subjectivity requirement to justify the lower court's holding in *Levesque v. Doocy*, refusing to impute serious doubts to news

¹² *St. Amant*, 390 U.S. at 727, 731.

¹³ *Id.* at 732.

¹⁴ *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989).

¹⁵ *St. Amant*, 390 U.S. at 731.

¹⁶ *Gertz*, 418 U.S. at 335 n.6.

¹⁷ *St. Amant*, 390 U.S. at 731.

¹⁸ *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984).

commentators even though the commentators/anchors were relying on an Internet source that the court pointed out was ridiculous.¹⁹

Another wrinkle in the analysis is whether the defendant's statement was an asserted fact (which is actionable) or if it was simply an opinion (which is generally not actionable). It is possible, though, to sue for defamation based on a hybrid opinion that includes both elements of fact and opinion. According to *Milkovich v. Lorain Journal Co.*, statements of opinion can be actionable if they imply a provably false fact, whereas the First Amendment protects pure opinions.²⁰ Furthermore, in *Gross v. New York Times Co.*, the New York Court of Appeals explained that a statement of opinion could be actionable if it implied a basis in facts that are not disclosed to the reader or listener. However, the court also held that a statement of opinion is not actionable when accompanied by a recitation of the facts upon which it is based or when it does not imply the existence of undisclosed underlying facts.²¹

In spite of the actual malice line of cases, recent cases pose challenges for the courts hearing them, as they bring up novel issues of journalistic practice and technologies that did not exist when courts first articulated defamation law. Increasingly, it appears that the old guidelines are inadequate to address these new problems. Whether or not the courts or legislators will fashion new tools remains unknown.

II

SKEPTICISM TOWARD INTERNET SOURCES COULD CAUSE A REEVALUATION OF DEFAMATION

A. *Internet Journalism Emphasizes Speed Over Accuracy*

The Internet has created new forms of journalism that are vastly different from the traditional forms used in the past. In particular, the "24-hour news cycle" allows news outlets to post articles and updates on their websites, broadcasting them at any time, day or night, rather than waiting for the next day's newspaper or the next week's magazine.²² With each outlet racing to be the first to post breaking news, a premium is placed on speed at the expense of accuracy.²³ The 24-hour

¹⁹ See *Levesque v. Doocy*, 560 F.3d 82, 92-93 (1st Cir. 2009).

²⁰ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

²¹ See *Gross v. New York Times Co.*, 623 N.E.2d 1163, 1168 (N.Y. 1993).

²² David A. Logan, *All Monica, All the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U. ARK. LITTLE ROCK L. REV. 201, 205-06 (2000).

²³ See *id.* at 213.

news cycle, which began with CNN's coverage of the Gulf War in 1991,²⁴ has transformed both the quality of news and the format in which it is presented. Editors must now make on-the-spot decisions about whether to publish or send a story back for additional fact-checking. Previously, such decisions were made with a comfortable next-day or next-week deadline.²⁵ As a result, more opinions, sometimes masquerading as facts or interpreted as facts, are part of the collective consciousness of news. This development is leading courts to reevaluate the role of media and the professional responsibility of journalists, particularly on the Internet.

B. Courts Have Encouraged Skepticism Toward Internet Sources

Strikingly, courts have begun placing the onus on consumers of Internet information, ruling that they should be skeptical of what they read. This warning reflects courts' awareness of the often-unverified nature of information disseminated on the Internet. With the ever-evolving nature of Internet sources, courts are addressing each new source as it enters the marketplace—from standard websites, to blogs, to Twitter feeds. While these cases do not always directly implicate the actual malice standard, that traditional measure remains the backdrop against which courts shape standards of journalistic responsibility.

In the 2011 case *Obsidian Finance Group v. Cox*, an Oregon federal district court warned of the danger in relying on blogs for information, writing that they are “a subspecies of online speech which inherently suggest that statements made there are not likely provable assertions of fact.”²⁶ Similarly, a federal court in California addressing personal websites and Internet discussion groups held that, “[i]n this context, readers are less likely to view statements as assertions of fact.”²⁷ In *Too Much Media, LLC v. Hale*, the New Jersey Supreme Court distinguished online message boards from other information sources on the Internet because of the lack of editorial oversight.²⁸ New Jersey's high court explained that hyperbole, exaggeration, and a “looser, more relaxed communications style”²⁹ promote an environment in which the border between fact and opinion is blurred, and commenters should not be taken at their word. In fact, as discussed in *Obsidian Finance Group*, just the name of a website can be enough to alert the reader that he

²⁴ Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 686 (2007).

²⁵ *See id.*

²⁶ *Obsidian Fin. Group, LLC v. Cox*, 812 F. Supp. 2d 1220, 1223 (D. Or. 2011).

²⁷ *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999).

²⁸ *Too Much Media, LLC v. Hale*, 20 A.3d 364, 379-80 (N.J. 2011).

²⁹ *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 238 (App. Dep't Super. Ct. 2008).

should be skeptical of what he finds therein. For example, a site such as www.romneyexposed.com can indicate a one-sided opinion.³⁰ Such rulings seem to make the consumers responsible for determining what is an untrustworthy source.

The distinction between fact and opinion becomes especially confusing when writers make claims supposedly based on research, but expressed as statements that are deemed too informal to be trustworthy. For example, in *Too Much Media v. Hale*, the defendant wrote many posts on message boards that cited extensive research she had conducted on the pornography industry, including interviews with participants and her congressional representatives and studying websites and information in the mainstream media. Based on her purported research, the defendant made accusations in these posts regarding a security breach that released identifying information of adult website subscribers and singled out specific individuals as responsible for the breach and subsequent cover-up.³¹ The court rejected Hale's argument that she should benefit from the New Jersey shield law, which requires a "sufficient relationship or connection to the 'news media,'"³² holding that as a mere writer of posts on a message board, she did not have a strong enough relationship to the media.³³ Even if the writer claims to have done research, the medium of the message—in this case, an online forum—should make consumers skeptical of such claims. Most importantly, consumers should attempt to differentiate pure opinion from opinion purporting to be fact. This distinction is important because, as discussed in Part I, pure opinion is not actionable under defamation law, while opinion masquerading as fact can be actionable.³⁴

The dividing line between fact and opinion is especially fuzzy in the context of blogs, web forums, and other unedited content. For example, in *Obsidian Financial Group*, a blogger used the website "obsidianfinancesucks.com" to accuse members of Obsidian of violating bankruptcy laws.³⁵ As the court noted, the hostile tenor of the comments suggested that the blogger had a personal vendetta against the targets of her accusations and the vitriolic language she used

³⁰ See *Obsidian*, 812 F. Supp. 2d at 1232.

³¹ See *Too Much Media*, 20 A.3d at 369-70.

³² *Id.* at 238.

³³ The court explained that message boards were too far removed from traditional media outlets to be eligible for shield law protection, in part because writers in those forums were not subject to any editorial scrutiny. See *id.* at 235.

³⁴ See *Gross v. New York Times Co.*, 623 N.E.2d at 1167-68 (N.Y. 1993).

³⁵ See *Obsidian*, 812 F. Supp. 2d at 1230.

invited further comment and debate.³⁶ Such biased content “undermine[s] the reader’s expectations that defendant’s statements are to be understood as assertions of provable fact.”³⁷ Thus, even if a defendant includes statements that imply provable assertions, the statements “lose the ability to be characterized and understood as assertions of fact when the content and context of the surrounding statements are considered.”³⁸ Regarding the actual malice standard, the problem with opinions is that the protection for republishing them grossly expands the First Amendment freedom of speech principles at the heart of *Times v. Sullivan*—there is no actual malice when a writer republishes something he believes is opinion, since by definition he has no reason to doubt the facts therein since he does not realize that there are even facts there, thinking he is simply restating another’s beliefs. Because the actual malice standard’s heavy-handed exclusion of opinion from defamation shows no signs of revision in the foreseeable future, such instances of over-protection where journalists republish what they believe to be purely opinion ends up distributing false or misleading information to the public, thereby undermining journalistic responsibility.

C. *Redmond v. Gawker Takes a Different Tack*

While exercising suspicion towards Internet sources has become the judicial position, the 2012 case *Redmond v. Gawker* seems to push back against this stance.³⁹ The *Redmond* ruling shielded defendant bloggers from defamation charges, in part because their piece had cited to a multitude of other Internet sources. The court reached this result even though the bloggers had not verified the sources’ accuracy before citing to them. Gawker’s Gizmodo blog published a post on plaintiff Scott Redmond’s business ventures, including Peep Wireless Telephony Company, entitled *Smoke & Mirrors: The Greatest Scam in Tech*. The article questioned whether or not Redmond’s inventions actually did what they promised. The piece went on to note that Redmond had a pattern of getting funding for projects that never materialized. The writers provided links to websites that described now-defunct past projects of Redmond’s.⁴⁰ The court stated that providing the links made the article “transparent” because it cited to many Internet sources:

³⁶ *Id.* at 1232.

³⁷ *Id.*

³⁸ *Id.* at 1234.

³⁹ *Redmond v. Gawker Media, LLC*, No. CGC–11–508414, 2012 WL 3243507 (Cal. App. Dep’t Super. Ct. Aug. 10, 2012) (unpublished decision).

⁴⁰ *See id.*

Having ready access to the same facts as the authors, readers were put in a position to draw their own conclusions about Redmond and his ventures and technologies. As shown by the comments posted, many readers did view these sources, and not all of them agreed with the authors' views. Statements are generally considered to be nonactionable opinion when the facts supporting the opinion are disclosed.⁴¹

The court's statement raises two key issues. First, it can be argued that the skeptical tone of Redmond's post and the questions the authors raised might, by themselves, qualify the authors' assertions as opinions. Yet, the court's declaration that revealing the facts behind the opinions rendered the opinions nonactionable means the court viewed the other Internet sources as facts. This leads to the second issue of whether the *Gross* court was using the proper definition of facts; perhaps Redmond did not disclose facts at all, and instead merely cited other unverified articles.⁴²

Notwithstanding *Redmond*, the judicial position of distrusting Internet sources suggests that journalists should be on notice that courts will begin considering their use of online sources in determining the presence of actual malice. Essentially, courts are ruling that everyone should be skeptical of Internet sources that have not undergone significant editing. Hence, one would expect that it should be easier to find actual malice, using a defendant's reliance on Internet sources as circumstantial evidence of recklessness and subjective doubts. However, such circumstantial evidence may be rebutted by evidence of diligent fact-checking.

III

NEW TIMES MAY MEAN A NEW ACTUAL MALICE STANDARD

A. News Organizations Are Not Being Careful Enough

Myriad examples illustrate how the current standard for defamation combined with the need for speed in the 24-hour news cycle encourage mistakes that are difficult for courts to prevent and punish. While thus far courts have focused on informal Internet information sources such as blogs or message boards,

⁴¹ *Id.* at *6.

⁴² As a side note, I would advocate an examination of *Redmond* with regard to its treatment of unverified Internet sources as facts. Awarding defendants an automatic out just for pointing readers to other, possibly dubious source material is poor policy that does not encourage fact-checking.

more established news media are also susceptible to the inaccuracy that accompanies tight deadlines. Driven by the pressure to constantly disseminate information, news outlets often rush to publish before their reports have been adequately checked. This practice has far-reaching consequences, as other outlets rely on the first outlet's reporting, taking the initial story at face value without vetting it themselves and thereby falling prey to spreading misinformation.

In the fall of 2012 during Hurricane Sandy, the Twitter handle “@comfortablysmug” published several Tweets on the social media site Twitter. The Tweets, which alarmingly reported that the New York Stock Exchange floor was flooded with three feet of water, Governor Andrew Cuomo was trapped in Manhattan, and other such panic-inducing statements, were later revealed to be lies created by Shashank Tripathi.⁴³ During the storm, Tripathi's Tweets were retweeted on Twitter more than six hundred times, heightening anxiety during the disaster.⁴⁴ Unfortunately, several news outlets including CNN and the National Weather Service (“NWS”) picked up the Tweets.⁴⁵ Reporting them as news, CNN and the NWS gave the Tweets a legitimacy they had not had when they were merely posts on Twitter. CNN and the NWS's decision to republish implied editorial oversight and a degree of fact-checking. While it was reported that law enforcement officials were pursuing action against Tripathi, claiming that he endangered the public by stirring hysteria without a proper foundation,⁴⁶ currently no action is being taken against the news outlets for furthering the spread of false information even though their actions seem to constitute a much graver lapse of judgment as the public places tremendous trust in the media.

Immediately following the December 2012 Sandy Hook Elementary School shooting in Newtown, Connecticut, police found Ryan Lanza's ID card at the

⁴³ Kim LaCapria, *Twitter Sandy Hoaxer May Face Criminal Charges for Spreading False Information*, THE INQUISITR (Nov. 1, 2012), <http://www.inquisitr.com/384679/twitter-sandy-hoaxer-may-face-criminal-charges-for-spreading-false-information>.

⁴⁴ Mark Duell, *Hoaxer, 29, who fooled CNN with false 'NYSE has flooded' tweet during Superstorm Sandy is outed as Wall Street Analyst*, THE DAILY MAIL ONLINE (Nov. 1, 2012), <http://www.dailymail.co.uk/news/article-2226188/Superstorm-Sandy-Twitter-user-fooled-CNN-believing-NYSE-flooded-Wall-Street-analyst-Shashank-Tripathi.html>.

⁴⁵ *See id.*

⁴⁶ Suzanne Choney, *Man Who Made False Tweet about Sandy Apologizes; Could Face Prosecution*, <http://www.nbcnews.com> (Nov. 2, 2012), <http://www.nbcnews.com/technology/man-who-made-false-tweet-about-sandy-apologizes-could-face-1C6807076>.

scene of the shooting.⁴⁷ Citing Connecticut law enforcement officials, early reports identified Ryan Lanza as the shooter. These reports sparked a veritable witch-hunt that spread to many other news organizations. By 5pm that day, Ryan Lanza's Facebook profile picture had been shared more than fourteen thousand times,⁴⁸ and websites such as *Slate* and *The Huffington Post* displayed a screenshot and provided links to the profile.⁴⁹ Ryan Lanza received countless messages from Facebook users vilifying him, and people listed as his Facebook friends were harangued for being connected to the suspected shooter.⁵⁰ When it turned out that the initial reports had mistakenly identified Ryan Lanza instead of his brother Adam, the media was quick to issue retractions and expose CNN as the source of the inaccurate reporting.⁵¹ CNN defended itself by noting that it had continued to report new information as it developed, and the information had come from law enforcement officials.⁵² Still, as Washington Post writer Eric Wemple points out, while it is difficult to do rapid fact-checking of police statements, other outlets that were heavily covering the Sandy Hook story did not simply take the police's word for it and directly report, choosing instead to report with a citation to CNN.⁵³ In an apparently unique attempt to fact-check, among the reporting outlets, at approximately 3pm a former Jersey Journal reporter said he had spoken with Ryan Lanza earlier in the day and that Ryan denied his involvement.⁵⁴ Unfortunately, by that point Ryan Lanza's reputation had already been subject to hours of damage.

⁴⁷ Brian Ross, Chris Cuomo, & Richard Esposito, Connecticut Shooter Adam Lanza: 'Obviously Not Well', ABC NEWS THE BLOTTER (Dec. 14, 2012), <http://abcnews.go.com/WNT/video/conn-shooter-adam-landa-17979660>.

⁴⁸ Spencer Ackerman, Internet Identifies, Threatens Wrong Man as Newtown Shooter, WIRED (Dec. 14, 2012), <http://www.wired.com/dangerroom/2012/12/newtown-shooter-face-book>.

⁴⁹ Adam Serwer, How the Press Got It Wrong on the Newtown Shooter, MOTHER JONES (Dec. 14, 2012), <http://www.motherjones.com/mojo/2012/12/ryan-landa-newtown-shooting-media-fail>.

⁵⁰ Alyson Shontell, What It Was Like Being Ryan Lanza's Facebook Friend When The World Thought He Was A Killer, BUSINESS INSIDER (Dec. 17, 2012), <http://www.businessinsider.com/what-it-was-like-to-be-ryan-landas-facebook-friend-when-the-world-thought-he-was-a-killer-2012-12>.

⁵¹ Erik Wemple, CNN Addresses Ryan-Adam Lanza Mis-ID, THE WASHINGTON POST (Dec. 15, 2012), <http://www.washingtonpost.com/blogs/erik-wemple/wp/2012/12/15/cnn-addresses-ryan-adam-landa-mis-id>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Terrence T. McDonald, Facebook page of Hoboken man identified as Connecticut shooter: 'It wasn't me', NJ.COM (Dec. 14, 2012), http://www.nj.com/hudson/index.ssf/2012/12/hoboken_man_identified_by_medi.html.

The summer before, ABC News had been the culprit, due to its coverage of the July movie theater shooting in Aurora, Colorado. After federal law enforcement officials released the name of the shooter, James Holmes, to media outlets, ABC reporter Brian Ross speculated, on air, that an Aurora man named Jim Holmes who had a page on the Colorado Tea Party website was the suspect.⁵⁵ In fact, Jim Holmes was a 52-year-old father and former law enforcement officer,⁵⁶ and was not the actual shooter, who was a 24-year-old.⁵⁷ In ABC's apology, the network acknowledged its error in "disseminating . . . information before it was properly vetted."⁵⁸ According to Wemple, by reporting this unverified story, Ross committed a serious "journalistic felony." As Wemple explains, "[y]ou can speculate on air about Mitt Romney's motives for not releasing his tax returns; you can speculate on air about whether the heat wave will pass; [but] you cannot speculate on air about the identity of an alleged mass murderer."⁵⁹ The consequences for the other Jim Holmes could have been disastrous. Apart from allegations of political bias, many criticized ABC for not adequately checking its facts.⁶⁰ Fortunately for ABC, Jim Holmes did not bring an action for defamation against the network, and as I will discuss, under the current state of defamation law, he probably would not have been successful anyway.

Thus far, the courts have only heard a handful of cases brought against news outlets for irresponsibly reporting information found on the Internet without first conducting proper fact-checks. However, the recent case *Levesque v. Doocy* illustrates how the subjective belief requirement of the actual malice standard can sink a plaintiff's case even when the news outlet did not properly fact-check their

⁵⁵ Jack Mirkinson, Aurora Shooting: ABC's Brian Ross Incorrectly Suggests Tea Party Link, THE HUFFINGTON POST (July 10, 2012), http://www.huffingtonpost.com/2012/07/20/brian-ross-tea-party-colorado-shooting_n_1689471.html.

⁵⁶ Alex Pappas, Colorado tea partier describes 'surreal' day of wrongly being linked to theater massacre, THE DAILY CALLER (July 20, 2012), <http://dailycaller.com/2012/07/20/colorado-tea-partier-describes-surreal-day-of-wrongly-being-linked-to-batman-massacre>.

⁵⁷ *Id.*

⁵⁸ Matthew Mosk, Brian Ross, Pierre Thomas, Richard Esposito, & Megan Chuchmach, Aurora Suspect James Holmes' Mother: 'You Have the Right Person', ABC NEWS THE BLOTTER (July 20, 2012), <http://abcnews.go.com/Blotter/aurora-dark-knight-shooting-suspect-identified-james-holmes/story?id=16818889#.UVc9Jqsjr4g>.

⁵⁹ Erik Wemple, Colorado Shootings: ABC News's bogus report, WASH. POST (July 20, 2012), http://www.washingtonpost.com/blogs/erik-wemple/post/abc-news-invites-bias-claims-with-bogus-aurora-report/2012/07/20/gJQAJWcyW_blog.html.

⁶⁰ Erik Wemple, Aurora shootings: Was Brian Ross's mistake evidence of bias?, WASH. POST (July 24, 2012), http://www.washingtonpost.com/blogs/erik-wemple/post/aurora-shootings-was-brian-rosss-mistake-evidence-of-bias/2012/07/24/gJQACCu76W_blog.html.

sources, in some cases reporting information that on its face alone is plainly ridiculous.⁶¹ At issue in *Levesque* was an incident that occurred in a middle school cafeteria in Maine. A student put a bag containing ham on a table where some Muslim students were eating lunch. After the Muslim students became upset and reported the incident to the school administration, the offending student was suspended for ten days and the incident was reported to local police as a hate crime. Plaintiff Leon Levesque, the superintendent of the school district, gave an interview to a local paper, the *Lewiston Sun Journal*, and was quoted as saying that the incident was being taken seriously: “All our students should feel welcome and safe in our schools.”⁶² Upon seeing this article, freelance writer Nicholas Plagman wrote a parody piece that was mostly true but changed some of the facts and quotes to mock what he saw as an excessive emphasis on political correctness.⁶³ The ham became a ham sandwich and Plagman fabricated quotes by Levesque including, “[t]hese children have got to learn that ham is not a toy, and that there are consequences for being nonchalant about where you put your sandwich” and “[a]ll our students should feel welcome in our schools, knowing that they are safe from attacks with ham, bacon, porkchops, or any other delicious meat that comes from pigs.”⁶⁴ The website Associated Content published the piece, which falsely cited the Associated Press as a source.⁶⁵

On April 24, 2011, *Fox and Friends*, a daily morning television show hosted by defendants Steve Doocy and Brian Kilmeade, included a segment on the Plagman article, which they did not realize was a fabrication.⁶⁶ A Fox News researcher had done a web search on the incident to confirm certain facts reported in the Plagman piece such as the existence of the school. The researcher found the local news article and confirmed that the *Sun Journal* was legitimate.⁶⁷ After the news bit was passed on to the hosts, Doocy used Google News to find both the Plagman and *Sun Journal* articles as well as a *Boston Globe* article, sourced to the Associated Press, confirming the general facts of the incident. The hosts appeared on the show that morning speaking derisively of Levesque’s involvement in the ham incident.⁶⁸ Doocy and Kilmeade attempted to interview Levesque on-air,

⁶¹ *Levesque v. Doocy*, 560 F.3d 82 (1st Cir. 2009).

⁶² *Id.* at 84.

⁶³ Nick Plagman, *The Ham Hate Crime*, NICK PLAGMAN FOR DAILY SHOW INTERN <http://nplagman.myweb.uga.edu/lawsuit.html> (last visited Apr. 29, 2013).

⁶⁴ *Levesque*, 560 F.3d at 85.

⁶⁵ See Plagman *supra* note 63.

⁶⁶ *Levesque*, 560 F.3d at 85.

⁶⁷ *Id.*

⁶⁸ *Id.*

leaving two messages at his office at 8AM.⁶⁹ Levesque, who did not return the calls, sued for defamation and false light invasion of privacy.⁷⁰

The crux of the case was the actual malice inquiry. Although the district court found that the defendants had conducted very limited research on the Internet before broadcasting,⁷¹ the First Circuit emphasized that “[a]ctual malice then is measured neither by reasonably prudent conduct nor an industry’s professional standards; rather, it is wholly subjective.”⁷² Levesque pointed to both the defendants’ failure to adequately check the outrageous quotes in the Plagman article as well as their statements during the broadcast that they hoped they weren’t being “duped,” as evidence of reckless disregard for the truth. The court disagreed:

It is true that a more deliberate consideration of the Plagman article should have caused reasonable skepticism about the source and that the defendants were careless in relying on it, but this is an indication of negligence, not actual malice, and Superintendent Levesque faces the heavy burden of providing evidence that the defendants recognized the carelessness with which they were proceeding.⁷³

Thus the court recognized that despite the absurdity of the defendants’ actions, because they did not actually entertain serious doubts, their conduct did not amount to reckless disregard of the truth and therefore was not actual malice, however professionally irresponsible their behavior may have been.

B. Courts May Impose Additional Duties on Journalists

In light of incidents such as those described in the previous section, it is worth considering whether additional duties should be imposed on reporters to make it more difficult to republish untrustworthy material found on the Internet without conducting adequate fact-checking. Currently, there is no duty to investigate. Still, perhaps there should be an intermediate duty of care that is higher than the current duty of not being reckless while not as strict as requiring

⁶⁹ *Id.* at 86.

⁷⁰ *Id.* False light invasion of privacy is a tort that occurs when a non-public figure is portrayed in a misleading way to the public, thereby having his privacy invaded. *See generally*, *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

⁷¹ *See Levesque*, 560 F.3d at 92.

⁷² *Id.* at 90, internal citations omitted.

⁷³ *Id.* at 91, internal citations omitted.

investigation. Courts should consider using the established dubious nature of Internet sources to justify requiring increased vigilance for reporters relying on them.

One possible revision of the actual malice standard is the creation of a heightened duty to investigate when citing to Internet sources. The *Redmond* decision illustrates the ease with which defendants may protect themselves in defamation actions by simply using their citation of unverified Internet sources to reveal the supposed facts behind their stated assertion(s).⁷⁴ While this appears to be the *Gross* designation of facts making opinions unactionable,⁷⁵ courts' view of Internet sources as dubious casts doubt on whether Internet sources can be treated as "facts." In *Redmond*, some of the "facts" the bloggers relied on were websites and online promotional material posted by the plaintiff himself⁷⁶ (and thus were more likely to be actual facts than if the bloggers had only read third-party accounts of the plaintiff's work). But the court's reasoning does not seem to rely on the quality of the facts; it wrote that the blog post was "transparent," holding that citing sources (the "facts") made the piece unactionable.⁷⁷ The court did not say what would result if the piece had cited to sources that were less favorable to the plaintiff's work. For example, what would have been the result if the bloggers had cited to a website such as Obsidianfinancesucks.com? The court in *Obsidian Financial* indicated that the very name of the website, as well as the personal tone of its criticism, should put the reader on alert that this was a possibly biased source.⁷⁸ Would this qualify as citing to a fact under *Redmond*?

The uncertainty of what ought to be treated as a fact should encourage a heightened fact-checking standard when using Internet sources. Arguably, forming an opinion based on Obsidianfinancesucks.com when that source should obviously be subject to further investigation is not a journalistic practice that should be automatically shielded from a defamation action. At the very least, the source should not be cited baldly without any couching to indicate its potential bias.⁷⁹ It is one thing to report that such allegations exist, but it is another to use them as support for one's own argument. For example, a reporter for the *New York Times*

⁷⁴ See *Redmond v. Gawker Media, LLC*, No. CGC-11-508414, 2012 WL 3243507 at *1 (Cal. App. Dep't Super. Ct. Aug. 10, 2012) (unpublished decision).

⁷⁵ See *Gross v. New York Times Co.*, 623 N.E.2d at 1167-68 (N.Y. 1993).

⁷⁶ See *Redmond*, 2012 WL 3243507 at *2.

⁷⁷ See *id.* at *6.

⁷⁸ See *Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220, 1232-33 (D. Or. 2011)

⁷⁹ Journalistically, making clear that a site has a prejudiced opinion may not even be as good as trying to avoid such extremely biased sites altogether if trying to publish a responsible piece.

would not use a person screaming conspiracy theories on a street corner to support an article she was writing on possible corrupt bank practices. The existence of Obsidianfinancesucks.com gives it a guise of respectability, albeit thin, because it is written down in some form. But it is important to remember that it is not much harder to obtain a domain name than it is to shout theories on the street.

When sources report information quickly, basing their information on unchecked sources that subsequent news outlets republish without checking the sources themselves, an additional difficulty arises. Should there be a heightened standard to investigate even when a supposedly reliable outlet reports first? The more these incidents happen with a specific outlet, such as CNN's reporting the Hurricane Sandy Twitter rumors and the incorrect name of the Newtown shooter, the more other publications should be on notice that they need to check the facts behind what CNN reports before putting the information under their own names and exacerbating the problem. Most likely, CNN trusting the Twitter reports would fall under the previous discussion of the *Obsidian* hypothetical, since courts would likely hold that Twitter, as a journalistic source, should be viewed skeptically like a website with a name such as Obsidianfinancesucks.com, since there is no editorial oversight of Tweets. Other news outlets certainly have a reasonable belief that CNN is trustworthy because it has historically been a mostly accurate, dependable news source. Still, the frequency with which established news organizations are now stumbling should put other outlets on notice. Perhaps even more significantly, the rapidity with which information can spread online means that reputations can be destroyed within moments and may even endanger people's lives. By naming the wrong suspect in the Aurora shooting, Brian Ross could have instigated a vigilante justice lynch mob. The same could have happened to Ryan Lanza, and indeed there was a huge backlash online. With such high stakes, a heightened standard of fact-checking, even when the information comes from other news outlets, should be encouraged as industry practice.

As such, the current subjective belief standard is too forgiving. The defendant's victory in *Levesque* signified a victory for the stringent subjective belief standard that is unsettling. By relieving the defendant of liability for beliefs that when examined are clearly ridiculous simply because he subjectively held them, stretches the desire to protect journalistic freedom too far. Where it is absurd for defendants to believe they were reporting the truth or that the underlying facts could be relied upon, their actions should rise to the level of recklessness. At the very least, such defendants ought to be punished more severely than merely having to issue a retraction. Such a revision in the subjective belief standard might amount

to courts viewing the use of Internet sources, when unverified, as circumstantial evidence of the defendant possessing serious doubts as to their sources.

C. The Ingrained Legal Standards Will Be Resistant to Change

Despite the impulse to impose heightened obligations or revise the subjective belief requirement, courts and legislators (as well as journalist interest groups) will likely resist such change. Traditional defamation standards are extremely protective of writers in order to protect their First Amendment rights and avoid chilling their ability to report. *New York Times v. Sullivan* established the rationale for this protectiveness, citing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁸⁰ In defending the often-harsh results of the subjective belief requirement, the Supreme Court in *St. Amant* balanced the interest of plaintiffs in achieving justice against society’s interest in protecting the press, emphasizing the importance of furthering First Amendment values: “[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.”⁸¹ These cases push back against tightening the actual malice standard.

One factor that might impact a court’s decision of whether to view a writer’s use of Internet sources as a reason to impute doubts to them is whether society, as a whole, believes what is read on the Internet. According to a Pew Research Center study, twenty-nine percent of Americans believe that news organizations get the facts straight, and forty-two percent of Americans use the Internet as their primary news source.⁸² While a significant part of society may be aware that they should not trust everything they read on the Internet, not every reader is savvy enough to know that what he reads on a blog, or even on CNN.com, may not have been verified.

It may be possible for the unreliable nature of Internet sources to be integrated into defamation law in the category of “dubious sources.”⁸³ Some courts have said that a journalist’s reliance on such untrustworthy sources may support a

⁸⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁸¹ *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

⁸² PEW RESEARCH CTR., PUBLIC EVALUATIONS OF THE NEWS MEDIA: 1985-2009, PRESS ACCURACY RATING HITS TWO DECADE LOW (2009), <http://people-press.org/reports/pdf/543.pdf> (last visited Apr. 20, 2013).

⁸³ *Foretich v. Am. Broad. Cos.*, Nos. Civ.A. 93-2620, Civ.A. 94-0037(HHG), 1997 WL 669644, at *8 (D.D.C. Oct. 17, 1997).

finding of actual malice, while *St. Amant* states, “recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”⁸⁴ Similarly, in *Foretich v. American Broadcasting Companies*, the district court stated, “[a] broadcaster’s complete reliance on dubious sources can support a finding of actual malice.”⁸⁵ Likewise, in *Bentley v. Bunton*, the court laid out the requirements for finding actual malice based on unprofessional reporting:

The defendant's state of mind can—indeed, must usually—be proved by circumstantial evidence. A lack of care or an injurious motive in making a statement is not alone proof of actual malice, but care and motive are factors to be considered. An understandable misinterpretation of ambiguous facts does not show actual malice, but inherently improbable assertions and statements made on information that is obviously dubious may show actual malice. A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is.⁸⁶

Given the receptiveness of courts to treat at least some sources as dubious, it seems probable that they would consider use of dubious Internet sources as circumstantial evidence of recklessness.

IV HOW WRITERS CAN ADAPT WITH THE TIMES

A. *What Can Be Done to Encourage More Responsibility Among Writers?*

A judicial revision of the actual malice standard would be a forceful way to crack down on irresponsible journalism stemming from the use of Internet sources, and, as seen above, would likely meet strong resistance due to traditional First Amendment values. Nevertheless, judicial enactment of less dramatic changes might be feasible. Such changes could ensure recognition of the need for greater responsibility when dealing with Internet sources. Likely all journalists can agree that the 24-hour news cycle has increased the frequency of instances in which unverified reports go viral.

In the case of informal journalists, greater enforcement of professional standards is highly desirable since they do not have editors to keep them in line.

⁸⁴ *St. Amant*, 390 U.S. at 732.

⁸⁵ *Foretich*, 1997 WL 669644, at *8.

⁸⁶ *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002).

However, how such enforcement would be carried out is unclear. As seen in *Obsidian Financial*, anyone who can afford a domain name (which can be obtained for an average of eight to ten dollars a year)⁸⁷ can buy a mouthpiece to the world. Blogs are even more accessible as they are free on most platforms.⁸⁸ Additionally, commenting on message boards and articles published by other news sources is free, though one might have to first register with the website.⁸⁹ Admittedly, people who utilize these channels to disseminate information are at the extreme end of the spectrum of types of journalists. They are not usually subject to any editorial scrutiny and despite their lack of affiliation with an established news organization, their words have power and are often the subjects of defamation suits. The New Jersey Supreme Court discussed this phenomenon in *Too Much Media*:

[S]elf-appointed journalists or entities with little track record ... claim the [shield law] privilege require[s] more scrutiny...The popularity of the Internet has resulted in millions of bloggers who have no connection to traditional media. Any of them, as well as anyone with a Facebook account, could try to assert the privilege.⁹⁰

The question is whether traditional defamation standards are enough to encourage professionalism among these writers whose voices are disproportionately loud compared to the legitimacy of their messages. When respected news outlets rely on sources like these, the problem is compounded.

One solution would require bloggers and anonymous disseminators of information to show that what they publish has been vetted by others in the form of acknowledgements attached to their pieces. Both *Obsidian Financial Group, LLC* and John Dougherty's Reformulating Shield Laws to Protect Digital Journalism in an Evolving Media World, suggest that this vetting process is necessary to encourage accurate reporting.⁹¹ Digital authors could provide proof of editorial

⁸⁷ Martin Zwilling, *Get a Domain Name without Bankrupting Your Start-Up*, FORBES (Jan. 14, 2013), <http://www.forbes.com/sites/martinzwilling/2013/01/14/get-a-domain-name-without-bankrupting-your-startup/>.

⁸⁸ See, e.g., TUMBLR, <http://www.tumblr.com> (last visited Oct. 16, 2013); WORDPRESS, <http://www.wordpress.org> (last visited Oct. 16, 2013).

⁸⁹ See, e.g., GAWKER, www.gawker.com (last visited Oct. 16, 2013).

⁹⁰ *Too Much Media, LLC v. Hale*, 20 A.3d 364, 383 (N.J. 2011) (explaining why courts should give extra scrutiny to non-traditional writers who claim shield law protection).

⁹¹ John J. Dougherty, Comment, *Obsidian Financial Group, LLC v. Cox and Reformulating Shield Laws to Protect Digital Journalism in an Evolving Media World*, 13 N.C.J.L. & TECH. ON. 287, 320 (2012), available at <http://ncjolt.org/obsidian-financial-group-llc-v-cox-and-reformulating-shield-laws-to-protects-digital-journalism-in-an-evolving-media-world>.

oversight in the form of a colleague, co-contributor, or traditional editor, or there could be an area for comments to enable crowd-sourcing.⁹² In *Wiki Authorship, Social Media, and the Curatorial Audience*, Jon Garon encourages the development of citizen journalism and new media, while emphasizing that only those who maintain standards of accuracy, attribution, impartiality, and integrity will survive.⁹³ Unfortunately, due to lack of resources or the fact that most bloggers work alone and are not sponsored by a larger organization, it may be difficult for informal journalists to provide such assurances of editorial oversight to their readers. Still where possible, bloggers would be well advised to strive for standards of accuracy.

B. Practical Advice to Journalists and Other Writers

What constitutes due diligence when relying on Internet sources? The root of the problem for professional journalists is that the time pressure of the news cycle encourages publishers to be irresponsible, whereas less-established writers simply may not know how to be responsible. Given the growing recognition among courts that what one reads on the Internet should be questioned, all writers, amateur and professional alike, should take note.

The level of fact-checking most journalists must adhere to should be above merely republishing Internet sources without any attempt to verify them. An encouraging development in this direction took place in the aftermath of the Boston Marathon bombings on April 15, 2013. Two days after the bombing, CNN reported that authorities had identified and arrested a suspect.⁹⁴ The Associated Press followed suit, citing an unnamed law enforcement official.⁹⁵ While many other news outlets hurried to republish the material and announce the arrests, some remained skeptical and attempted to verify the reports before getting on the bandwagon. NBC and CBS, citing their own sources, reported that no arrest had

⁹² *See id.*

⁹³ Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95, 137 (2010). As new media experiment with tools for accuracy, such as crowd-sourcing, Garon cautions that traditional media must continue to uphold rigorous fact-checking methods. *See id.* at 138.

⁹⁴ Gary Levin, *News outlets retract claim of Boston bomber arrest*, USA TODAY (Apr. 17, 2013), <http://www.usatoday.com/story/life/tv/2013/04/17/boston-bomb-ap-cnn-fox-news/2091127>.

⁹⁵ Denise Lavoie & Rodrique Ngowi, *Correction: Boston Marathon-Explosions Story*, THE ASSOCIATED PRESS (Apr. 18, 2013), <http://bigstory.ap.org/article/fbi-appeals-help-solving-marathon-bombings>.

been made and held firm to this line despite numerous reports to the contrary.⁹⁶ Their refusal to publish unverified news was rewarded when the FBI released a statement that refuted arrest reports and asked for better fact-checking:

Contrary to widespread reporting, there have been no arrests made in connection with the Boston Marathon attack. Over the past day and a half, there have been a number of press reports based on information from unofficial sources that has been inaccurate. Since these stories often have unintended consequences, we ask the media, particularly at this early stage of the investigation, to exercise caution and attempt to verify information through appropriate official channels before reporting.⁹⁷

Based on the case law and trend of unreliability of Internet sources, the following is a list of basic tips to guide journalists and other writers faced with the task of searching for truth on the World Wide Web:

- When evaluating a website's trustworthiness, do not overlook the name of the site. Obsidianfinancesucks.com, a site that obviously has a strong opinion, should be met with more skepticism than a well-established news organization known for impartial reporting such as nytimes.com.
- Check the website for evidence of editorial oversight. A one-man blogging operation should be viewed differently than a site known for the rigor of its editorial process. In the same vein, a Tweet, even by a professional journalist, usually does not undergo a second look from an editor or colleague.
- Be aware of a website's record for accuracy. If a website is known to have frequent slip-ups, it is not wise to take its reporting at face value.
- When republishing what other well-respected news organizations have reported, it is advisable to corroborate the facts before putting one's own imprimatur on the news. NBC's reluctance to republish news that an arrest had been made in Boston, based on its own

⁹⁶ See Levin, *supra* note 94.

⁹⁷ *No Arrest Made in Bombing Investigation*, THE FED. BUREAU OF INVESTIGATION (Apr. 17, 2013), <http://www.fbi.gov/boston/press-releases/2013/no-arrest-made-in-bombing-investigation>.

sources' insistence that no arrest had been made, provides a perfect illustration. Furthermore, in the digital age in which we live, accounts and websites of even the most respected institutions can be hacked, allowing for the spread of misinformation.⁹⁸ Where possible, it is always preferable to speak with live people to confirm or deny a story or fact, rather than relying solely on an unconfirmed Internet report.

- Keep in mind that there are many joke news sites, most of which do not make it obvious that their content is tongue-in-cheek. For example, The Duffel Blog posts satirical content about the U.S. Military, but its name is less recognized than other sites like The Onion.⁹⁹ As a result of an article published therein, in the fall of 2012 Senator Mitch McConnell's office sent a letter to the Pentagon complaining about the Department of Defense offering veterans' benefits to prisoners at Guantanamo Bay.¹⁰⁰ The Army veteran who created the site told the *Wall Street Journal*, "Incidents like this only illustrate a serious problem with our education system [...] ... Apparently, they aren't teaching skepticism or critical thinking in some parts of the country anymore."¹⁰¹

CONCLUSION

While this paper has discussed possible ways to revise the actual malice standard, including imposing additional duties journalists should follow, making it easier to punish journalists is not my intent. Rather, I am striving to convey a cautionary tale for writers who may not fully grasp the dubious nature of many sources of information they encounter each day. To avoid defamation actions, journalists of all stripes, from the New York Times to the solo blogger, should operate under high standards of accuracy. Today, anyone with an Internet connection wields power, thus those who choose to make their voices heard must do so responsibly.

⁹⁸ See, e.g., Nicole Perlroth & Michael D. Shear, *In Hacking, A.P Twitter Feed Sends False Report of Explosions*, N.Y. TIMES (Apr. 23, 2013), <http://thecaucus.blogs.nytimes.com/2013/04/23/hacked-a-p-twitter-feed-sends-erroneous-message-about-explosions-at-white-house>.

⁹⁹ THE DUFFEL BLOG, <http://www.duffelblog.com> (last visited Apr. 29, 2013).

¹⁰⁰ Dion Nissenbaum, *Prank and File: These Military Reports are Out of Line*, WALL ST. J. (Apr. 21, 2013), <http://online.wsj.com/news/articles/SB10001424127887324345804578426881030734960>.

¹⁰¹ *Id.*