

NOTE

ELIAS V. ROLLING STONE: SMALL-GROUP DEFAMATION IN AN INVESTIGATIVE AGE*

I. INTRODUCTION

One of the media's most powerful attributes in recent years has been its ability to put pressure on groups to reform themselves. An unfettered social media enabled Black Lives Matter activists to protest institutionalized police violence and seek nationwide reform.¹ Upstart news websites like *BuzzFeed* sparked a nationwide conversation on the intractable problem of campus sexual assault.² Traditional media outlets detailed a scourge of previously hidden sexual harassment in Congress³ and the allegations of sexual assault against movie producer Harvey Weinstein (while also exposing the cultures that enabled such behavior).⁴ A wave of similar reports has exposed institutionalized harassment at various organizations, including NBC News⁵ and the Humane Society.⁶

* Brian Mahoney, J.D. Candidate, Temple University Beasley School of Law, 2019. Thank you to Professor Jaya Ramji-Nogales for advising me. Thank you to Chase Howard and Emily Litka for reviewing several drafts of this Note, and to Linda Levinson, Peter Hyndman, Owen Healy, Aleksander Smolij, Emily Berg, Brittany Clarke, and the staff editors of the *Temple Law Review* for their thoughtful edits. I dedicate this Note to my father Don on his retirement from forty years in tort law, and to my loving wife Ashley.

1. See DEEN FREELON ET AL., CTR. FOR MEDIA AND SOC. IMPACT, BEYOND THE HASHTAGS: #FERGUSON, #BLACKLIVESMATTER, AND THE ONLINE STRUGGLE FOR OFFLINE JUSTICE 33–34 (2016), http://cmsimpact.org/wp-content/uploads/2016/03/beyond_the_hashtags_2016.pdf [<http://perma.cc/QN7E-VWJP>] (describing growth of the #BlackLivesMatter hashtag alongside protests against nationwide police violence).

2. See, e.g., Tim Baysinger, *How BuzzFeed Became the Outlet That Made the Stanford Rape Victim's Letter Go Viral*, ADWEEK (June 7, 2016), <http://www.adweek.com/digital/how-buzzfeed-became-outlet-make-stanford-rape-victims-letter-go-viral-171870/> [<http://perma.cc/8URZ-6W8U>] (“The letter has garnered universal acclaim, not just for the bravery shown by the author, but for continuing to shine a light on campus rape culture and the privilege afforded to many college athletes.”).

3. E.g., MJ Lee et al., *Congress Paid Out \$17 Million in Settlements. Here's Why We Know So Little About That Money.*, CNN (Nov. 16, 2017, 8:10 PM), <http://www.cnn.com/2017/11/16/politics/settlements-congress-sexual-harassment/index.html> [<http://perma.cc/9KCS-DEFH>] (discussing recently uncovered allegations of sexual harassment in Congress).

4. Megan Twohey et al., *Weinstein's Complicity Machine*, N.Y. TIMES (Dec. 5, 2017), <http://nyti.ms/2nwRu0n> [<http://perma.cc/9HTJ-45FQ>] (describing the journalism that exposed Harvey Weinstein).

5. See Sarah Ellison, “Everybody Knew”: Inside the Fall of Today's Matt Lauer, VANITY FAIR (Nov. 29, 2017, 7:50 PM), <http://www.vanityfair.com/news/2017/11/inside-the-fall-of-todays-matt-lauer>

This reporting has a common thread. Media reports on individuals often reveal flaws within a group. A victim's published letter not only indicts her rapist but also the fraternity culture that enabled such victimization.⁷ Exposés of a film executive not only reveal a serial predator but also a corporate culture that turned a blind eye to his violence.⁸ The reporting, in turn, brings accountability to groups—police departments,⁹ film companies,¹⁰ fraternities¹¹—that the law has long been unable, or unwilling, to reform.¹²

This reporting, adversarial to traditional institutional power, has coincided with a relevant trend in defamation law. Courts and scholars are beginning to favor a relaxed standard for individual defamation claims arising from remarks made against groups.¹³ A consequence of a loosened standard is that members of small groups will have an easier time suing the media for disparaging their group.¹⁴

[<http://perma.cc/H7DA-X6FX>] (discussing Matt Lauer's sexual harassment at NBC and the institutional apathy that allowed it to go on).

6. See Ian Kullgren, *Female Employees Allege Culture of Sexual Harassment at Humane Society*, POLITICO MAG. (Jan. 30, 2018), <http://www.politico.com/magazine/story/2018/01/30/humane-society-sexual-harassment-allegations-investigation-216553> [<http://perma.cc/TV6M-YKK6>] (“In November, a month after the Harvey Weinstein expose unleashed the #MeToo movement, Rachel Perman, a major donor at the charitable arm of Tofurky, the vegan food company, emailed the Humane Society's 31 board members, asking them to investigate harassment in the organization . . .”).

7. See Baysinger, *supra* note 2 (describing how journalism exposed rape culture in college fraternities).

8. See Twohey et al., *supra* note 4 (characterizing Weinstein's web of corporate allies as a “complicity machine”).

9. See Dan Hinkel, *Chicago's Deal with ACLU, Black Lives Matter Changes Political Calculus for Police Reform*, CHI. TRIB. (Mar. 26, 2018, 6:48 AM), <http://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-oversight-20180321-story.html> [<http://perma.cc/Y4R5-XDNP>] (describing Chicago's new police reform effort in the wake of the Black Lives Matter movement).

10. See Jessica M. Goldstein, *After Weinstein, the So-Called Casting Couch's Number Is Up*, THINKPROGRESS (June 13, 2018, 1:59 PM), <http://thinkprogress.org/actors-union-fights-to-end-abusive-auditions-and-the-casting-couch-be5df0019e31/> [<http://perma.cc/AT4Q-B6HP>] (discussing reforms in the film industry after the Weinstein revelations).

11. See Anemona Hartocollis & Dana Goldstein, *Schools Are Tackling 'Bro' Culture. The Kavanaugh Case Shows Why That's Hard To Do.*, N.Y. TIMES (Sept. 28, 2018), <http://nyti.ms/2Qk2nwj> [<http://perma.cc/H2A6-RA3K>] (describing fraternity culture as on the defensive in the wake of public scrutiny of sexual assault allegations against then-Judge Brett Kavanaugh).

12. E.g., Catharine A. MacKinnon, *Opinion, #MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <http://nyti.ms/2GOhQ3N> [<http://perma.cc/Q7XW-37YF>] (“This mass mobilization against sexual abuse, through an unprecedented wave of speaking out in conventional and social media, is eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims.”).

13. E.g., *Elias v. Rolling Stone LLC (Elias II)*, 872 F.3d 97, 97 (2d Cir. 2017) (allowing for a group defamation claim against *Rolling Stone* magazine using the flexible intensity of suspicion test); see also 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 4:71 (2d ed.), Westlaw (database updated Nov. 2018); Jeffrey I. Greenwood, Note, *Group Defamation, Power, and a New Test for Determining Plaintiff Eligibility*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 871, 925–26 (2018) (favoring a more flexible approach to group defamation claims).

14. See Nat Stern, *The Certainty Principle as Justification for the Group Defamation Rule*, 40 ARIZ. ST. L.J. 951, 959 (2008) (describing relaxed standard as enabling more plaintiffs to withstand summary judgment motions).

A recent example of this modern trend is the Second Circuit's 2017 decision in *Elias v. Rolling Stone LLC*.¹⁵ After *Rolling Stone* magazine published a false allegation of rape by individuals at a University of Virginia fraternity, members of the fraternity not mentioned in the article sued for defamation.¹⁶ In doing so, they invoked the so-called small-group defamation theory, alleging that the false exposé defamed each fraternity member as an individual.¹⁷

The Second Circuit held that the fraternity members had adequately stated a claim, reversing a lower court's dismissal of the small-group defamation claim.¹⁸ Applying New York law, the court held that the facts in the lawsuit plausibly alleged that the article implied each member was complicit in or had guilty knowledge of a tradition of gang rape at the fraternity.¹⁹ The decision, in effect, allowed *each* member of the fraternity to sue *Rolling Stone* for its defamatory article based on a charge that they had guilty knowledge of the fraternity's violent rape culture.²⁰

This Note argues against the holding in *Elias*. It defends the majority rule, which generally limits group defamation claims as actionable only for groups with twenty-five or fewer members. This rule gives journalists greater certainty in reporting on the structural flaws of groups at a time when such reporting is vital to public discourse. It is time for minority jurisdictions to adopt it, and courts should resist calls to adopt the minority rule in the wake of *Elias*.

While critics of the majority approach can reasonably fault it for its unsatisfying formalism, using a broader standard like that favored in *Elias* will do little to add doctrinal certainty or coherence to defamation law, while undoubtedly presenting a new weapon for aggrieved and litigious plaintiffs.

Elias is only one case, but it is important for two reasons. First, the *Elias* court's decision applied the law of New York,²¹ a state that is home to many major media companies.²² Many news organizations are therefore subject to

15. 872 F.3d 97 (2d Cir. 2017).

16. See *Elias II*, 872 F.3d at 104–05 (discussing the plaintiffs' group defamation claim).

17. See *id.* at 107 (“Plaintiffs argue that . . . the Article defamed a small group to which each Plaintiff belongs . . .”).

18. *Id.* at 109–10.

19. *Id.*

20. See *id.* at 110 (“Because the [defamatory material] plausibly implied that all fraternity brothers knew about the alleged rapes, Plaintiffs sufficiently alleged that they were defamed because they were members of the fraternity at the relevant time.”); see also Greenwood, *supra* note 13, at 877 (“In *Elias*, the Second Circuit applied the Intensity of Suspicion test in a manner that would permit every member of [the fraternity] to recover individually, where the defamatory material named none of the plaintiffs directly.” (footnote omitted)).

21. *Elias II*, 872 F.3d 97, 104 (2d Cir. 2017).

22. See Brief of *Amicus Curiae* Media Organizations in Support of Defendant-Appellants and Reversal at 2, 3M Co. v. Davis, Nos. 12–7012, 12–7017, 2012 WL 5897085 (D.C. Cir. Oct. 19, 2012), 2012 WL 4361549 (listing New York headquarters of several media companies, including Advance Publications, Hearst Corporation, NBC Universal, Dow Jones & Company, the New York Times Company, Pro Publica, Time, and Tribune Company).

general personal jurisdiction there.²³ Finally, early analyses of *Elias* suggest that the case is representative of a departure from the traditional approach that sharply restricted the viability of small-group defamation claims.²⁴ Accordingly, *Elias* is a harbinger of more modern and expansive approaches to small-group defamation worthy of critique.

In furtherance of these arguments, Section II summarizes the background and facts of *Elias*. Section III traces the evolution of group defamation in constitutional law and in the American common law. Section IV discusses the Second Circuit's rationale for allowing a group defamation claim to proceed in *Elias*. Finally, Section V suggests several reasons why the Second Circuit should have declined to expand the group defamation theory and how the New York Court of Appeals should rule when it next considers the issue.

II. FACTS AND PROCEDURAL HISTORY

To provide context for the decision in *Elias*, this Section provides a background of the magazine article that sparked the underlying lawsuit. The article—*A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*²⁵—was published November 19, 2014, and ultimately retracted by *Rolling Stone* after media reports exposed errors in its reporting.²⁶

In July 2014, the magazine journalist Sabrina Rubin Erdely wanted to report a story on the “pervasive culture of sexual harassment/rape culture” on college campuses in the United States.²⁷ In the course of her research, Erdely met a University of Virginia (UVA) student, pseudonymously known as Jackie, who claimed that she was the victim of a brutal gang rape at UVA's Phi Kappa Psi fraternity (PKP).²⁸ Erdely found Jackie's story compelling and used it as the focal point for her larger critique of college rape culture.²⁹

Erdely's article began with Jackie attending a party alongside “[a] handsome Phi Kappa Psi brother” pseudonymously named ‘Drew,’” who knew Jackie as a fellow lifeguard at the university pool.³⁰ After midnight, the story alleged, Drew brought Jackie to a bedroom on the second floor of the fraternity

23. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014) (“The paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business.”).

24. See SMOLLA, *supra* note 13 (describing *Elias II* as part of a modern trend); Greenwood, *supra* note 13, at 876 (describing *Elias II* as a “bold doctrinal step”).

25. Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014) (retracted) (available at <http://archive.is/20141119163531/http%3A%2F%2Fwww.rollingstone.com%2Fculture%2Ffeatures%2Fa-rape-on-campus-20141119> [http://perma.cc/NRD4-HWKT]).

26. Sheila Coronel et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015, 11:30 PM), <http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405> [http://perma.cc/ELJ8-HFLK].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Elias II*, 872 F.3d 97, 102 (2d Cir. 2017) (alteration in original) (quoting Erdely, *supra* note 25).

house, where several men raped her.³¹ At various points, the article quoted perpetrators making statements like, “What, she’s not hot enough for you?,” “Don’t you want to be a brother?,” and “We all had to do it, so you do, too.”³² The article stated further that Jackie reported the rape to a UVA dean, who suggested that the group at large was not involved when she reportedly said in 2014 that “all the boys involved have graduated.”³³

While portraying in great detail the alleged assault, the article also broadly indicted the culture at PKP and at UVA.³⁴ It recounted several confirmed incidents of sexual assault that occurred at the university, including a rape at the PKP fraternity in the 1980s.³⁵ Erdely reported that the university was, along with eleven other schools, subject to a “sweeping” federal investigation by the U.S. Department of Education’s Office for Civil Rights.³⁶

Erdely’s story went viral.³⁷ It attracted 2.7 million page views and was one of the most widely read articles *Rolling Stone* had ever published.³⁸ The story inspired a series of similar stories, testimonials, and sympathetic responses from readers and the news media.³⁹ Erdely appeared on television, on the radio, and in podcasts.⁴⁰ In an appearance on a *Slate* podcast that would play a large role in *Elias*, she discussed the seemingly ritualistic violence of the fraternity she exposed:

I mean I would think that the first thing that they would do is at least tell her, you know, this needs to go to the police, these are dangerous people who are hurting people—who are hurting people—if they hurt you, and you know, and she heard them saying things during the rape like oh, you know, you have to, you know egging—keep egging each other on saying things like “Don’t you wanna be a brother?” which seems to indicate that this is some kind of initiation ritual.

...

I would speculate that life inside of a frat house is a—probably—you know, you have this kind of communal life where everybody’s sort of

31. *Id.*

32. *Id.* at 102–03 (quoting Erdely, *supra* note 25).

33. *Id.* at 103 (quoting Erdely, *supra* note 25).

34. See Erdely, *supra* note 25 (“[A]t UVA, rapes are kept quiet, both by students—who brush off sexual assaults as regrettable but inevitable casualties of their cherished party culture—and by an administration that critics say is less concerned with protecting students than it is with protecting its own reputation from scandal. Some UVA women, so sickened by the university’s culture of hidden sexual violence, have taken to calling it ‘UVrApe.’”).

35. *Id.*

36. *Id.*

37. Coronel et al., *supra* note 26.

38. *Id.*

39. NICKIE D. PHILLIPS, BEYOND BLURRED LINES: RAPE CULTURE IN POPULAR MEDIA 143–44 (2017).

40. T. Rees Shapiro, *In Her Own Words: Rolling Stone’s Sabrina Rubin Erdely on Experience with ‘Jackie,’* WASH. POST (July 3, 2016), <http://www.washingtonpost.com/news/grade-point/wp/2016/07/03/in-her-own-words-rolling-stones-sabrina-rubin-erdely-on-experience-with-jackie/> [http://perma.cc/PH2G-YUPH]; see also *Elias II*, 872 F.3d 97, 103 (2d Cir. 2017) (describing a podcast on which Erdely appeared).

sharing information, it's a very—it's a life where, you know, people are living their lives very closely with one another. And, um, it seems impossible to imagine that people didn't know about this, that some people didn't know about this, maybe not everybody—it's a fairly large fraternity—there's something like 82 brothers in the fraternity now, currently in there—But it seems impossible to imagine that people did not know about it.⁴¹

Continued press scrutiny of Erdely's article quickly exposed its poor factual foundation.⁴² Blogs, podcasts, and mainstream news articles began sowing doubt about the veracity of Jackie's account.⁴³ The *Washington Post* published critical stories undermining Erdely's reporting and raising questions about *Rolling Stone's* failure to follow standard journalistic practices in its reporting and fact-checking.⁴⁴ The scrutiny caused *Rolling Stone* to admit, in an editor's note appended to the story, several "discrepancies" in the article.⁴⁵ It pledged to conduct an internal review of its processes.⁴⁶ By April 5, 2015, the magazine decided to retract the story and published on its own website an exhaustive Columbia University School of Journalism report explaining how and why the magazine published a false account.⁴⁷

The story caused significant damage to PKP and its membership.⁴⁸ Members "went into hiding" in the days after publication.⁴⁹ The fraternity house

41. *Elias II*, 872 F.3d at 103 (omission in original) (quoting Hanna Rosin et al., *The Waves* (formerly *DoubleX Gabfest*): *The Butch Goddess Edition*, at 11:32, 7:52, SLATE (Nov. 27, 2014), http://www.slate.com/articles/podcasts/doublex_gabfest/2014/11/the_double_x_gabfest_on_uva_frats_and_rape_in_rolling_stone_husbands_hurting.html [<http://perma.cc/K2B2-V6VZ>] [hereinafter *The Butch Goddess Edition*] (interviewing Erdely about the *Rolling Stone* article)).

42. *See id.* at 103–04.

43. *Id.*

44. *See* Paul Farhi, *Author of Rolling Stone Article on Alleged U-Va. Rape Didn't Talk to Accused Perpetrators*, WASH. POST (Dec. 1, 2014), http://www.washingtonpost.com/lifestyle/style/author-of-rolling-stone-story-on-alleged-u-va-rape-didnt-talk-to-accused-perpetrators/2014/12/01/e4c19408-7999-11e4-84d4-7c896b90abdc_story.html [<http://perma.cc/DGL8-BPMU>] [hereinafter Farhi, *Didn't Talk*] (reporting that Erdely did not speak with key individuals implicated in her story); Paul Farhi, *Rolling Stone Never Asked U-Va. About Specific Gang Rape Allegations, According to Newly Released E-mails and Audio Recording*, WASH. POST (Dec. 19, 2014), http://www.washingtonpost.com/lifestyle/style/rolling-stone-never-asked-u-va-about-gang-rape-allegations-according-to-newly-release-d-e-mail-exchanges/2014/12/19/1b9cc248-87cf-11e4-9534-f79a23c40e6c_story.html [<http://perma.cc/CQ6L-5VQ8>] [hereinafter, Farhi, *Never Asked*] ("Erdely and *Rolling Stone's* reporting of the U-Va. story . . . has already been fraught with basic reporting lapses."); T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), http://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html [<http://perma.cc/REY9-BZR4>] (describing "fresh doubt" about the article's accuracy).

45. Farhi, *Never Asked*, *supra* note 44.

46. *Id.*

47. Coronel et al., *supra* note 26.

48. T. Rees Shapiro, *U-Va. Phi Psi Members Speak About Impact of Discredited Gang Rape Allegations*, WASH. POST (Jan. 14, 2015), http://www.washingtonpost.com/local/education/u-va-phi-kappa-psi-members-speak-about-impact-of-discredited-gang-rape-allegations/2015/01/14/d781ad90-9c04-11e4-bcfb-059ec7a93ddc_story.html [<http://perma.cc/P73B-LUYC>] [hereinafter Shapiro, *Phi Psi Members*].

was vandalized.⁵⁰ The story sparked a police investigation (which ultimately cleared the fraternity of wrongdoing).⁵¹ The wave of criticism and press attention after the article's publication caused significant emotional distress among the members.⁵² Particularly harmful, according to several members, was the article's implication that rape was part of a hazing ritual in which everyone in the fraternity had to participate.⁵³ Fraternity member George Elias said the day the story was published was "the most emotionally grueling" day of his life.⁵⁴ So he sued.⁵⁵

In 2015, Elias and fellow PKP members Stephen Hadford and Ross Fowler sued *Rolling Stone*, Erdely, and *Rolling Stone* publisher Wenner Media, alleging three counts of defamation.⁵⁶ The defamation counts related to the online publication of the story, the print publication of the story, and comments made by Erdely on the *Slate* podcast.⁵⁷ The plaintiffs filed suit in the U.S. District Court for the Southern District of New York, which had diversity jurisdiction over the state law defamation claims.⁵⁸

For all three counts, the parties alleged a theory of small-group defamation, claiming that statements in the article led readers to believe that rape was "'part of an initiation ritual' at the fraternity."⁵⁹ The complaint similarly alleged that Erdely's comments in the *Slate* podcast led listeners to believe that then-members of the fraternity "had guilty knowledge of Jackie's rape."⁶⁰ Erdely's article and podcast commentary, the complaint alleged, combined to give readers a false notion about a culture of sexual assault at the fraternity.⁶¹ And the fraternity was so small that any reference to the group would also, in the mind of the reader, reference any member as an individual.⁶²

49. *Id.*

50. *Id.*

51. Owen Robinson & Sheryl Gay Stolberg, *Police Find No Evidence of Rape at University of Virginia Fraternity*, N.Y. TIMES (Mar. 23, 2015), <http://nyti.ms/1LOBqN5> [<http://perma.cc/xe7m-nce6>].

52. Shapiro, *Phi Psi Members*, *supra* note 48.

53. *Id.*

54. *Id.*

55. *See Elias II*, 872 F.3d 97, 104 (2d Cir. 2017).

56. *Elias v. Rolling Stone LLC (Elias I)*, 192 F. Supp. 3d 383, 387 (S.D.N.Y. 2016), *rev'd in part, Elias II*, 872 F.3d 97 (2d Cir. 2017).

57. *Id.* at 389–90.

58. *Id.* at 388.

59. *Id.* at 398 (quoting Second Amended Complaint ¶¶ 65, 152, 169, 179, *Elias I*, 192 F. Supp. 3d 383 (S.D.N.Y. 2016)). No plaintiff was named in the article. *Id.* at 387. However, the plaintiffs argued that certain details in the story led reasonable readers to conclude that they individually participated in the alleged rape. *See, e.g., id.* at 392 (discussing the argument that the article's detail of the second-floor bedroom was "of and concerning" a plaintiff who had lived on the second floor of the fraternity). Additionally, the plaintiffs alleged they were under a theory of small-group defamation because of statements that led people to believe the fraternity generally had an initiation ritual involving gang rape. *Id.* at 398.

60. *Id.* at 398.

61. *Id.*

62. *See id.* ("They argue that Erdely's interview comments and the text of the article, combined, gave readers the false impression that gang rape was an initiation ritual required of all Phi Kappa Psi

On June 28, 2016, a New York federal judge dismissed the defamation claims under Federal Rule of Civil Procedure 12(b)(6), holding that the plaintiffs failed to state a claim for small-group defamation.⁶³ The court held that, when taken together, Erdely's comments and statements in the podcast and the reporting in her article amounted to speculation and did not "expressly or impliedly" state that the fraternity required all participants to participate in sexual assault as a condition of membership.⁶⁴ Because such an implication could not be imputed to *all* members of the fraternity, the court rejected the small-group defamation theory.⁶⁵ The plaintiffs appealed to the Second Circuit.⁶⁶

III. PRIOR LAW

This Section explores the historical and theoretical underpinnings of group defamation. Part III.A explores the principles underlying defamation law generally and how courts have balanced two often-competing interests. Part III.B explores the two majority approaches to group defamation claims defined by the *Restatement (Second) of Torts*. Part III.C discusses the minority approach.

A. *The Competing Principles of Defamation Law*

Defamation law operates under two competing principles.⁶⁷ The first principle is remedial.⁶⁸ False and disparaging communications pose real reputational harm to their subjects.⁶⁹ It is proper that the law recognizes that harmfulness by providing a remedy in tort.⁷⁰ The second principle is constitutional.⁷¹ Courts fear that expansive defamation liability stifles discourse on matters of public concern, in violation of the First Amendment.⁷² Accordingly, even false speech may warrant protection to avoid chilling speech.⁷³ These competing principles require courts to engage in highly subjective line

members, thereby making the statements 'of and concerning' the individual plaintiffs and all other then-members of UVA's Phi Kappa Psi chapter.").

63. *Id.* at 399.

64. *Id.*

65. *Id.*

66. *Elias II*, 872 F.3d 97, 104 (2d. Cir. 2017).

67. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (discussing the "competing values" of defamation law).

68. *See id.* (describing one value of defamation law as the provision of a legal remedy for dignitary harm).

69. *See id.* (characterizing defamation as a wrongful injury to reputation).

70. *See id.* at 348 (describing as "legitimate" the state interest in providing compensation for wrongful injury to one's reputation).

71. *See id.* at 349 (discussing the need to balance the state's remedial interest with the "constitutional command of the First Amendment").

72. *See Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97, 106 (Cal. 1986) (noting the "delicate balance . . . between the protection of an individual's interest in redressing injury from published falsehoods, and the protection of society's interest in vigorous debate and free dissemination of the news").

73. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

drawing.⁷⁴ Judges must pick and choose the kinds of speech that the law can justifiably curtail while remaining sensitive to the necessity of open discourse on matters of public concern.⁷⁵

This remedial-constitutional tension is not immediately evident in black-letter tort law.⁷⁶ A typical claim of defamation comprises a multielement test with no reference to constitutional limitations.⁷⁷ This claim requires a plaintiff to show the following:

1. a false and defamatory statement concerning another;
2. an unprivileged publication to a third party;
3. fault amounting at least to negligence on the part of the publisher [with respect to the act of publication]; and
4. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁷⁸

The common law test has no reference to constitutional limitations because constitutional law did not traditionally limit defamation doctrine.⁷⁹ Until the mid-twentieth century, defamation was considered “low-level” speech not entitled to constitutional protection.⁸⁰ That changed in 1964, when the Supreme Court sharply limited liability for defamatory publications made against public officials.⁸¹ The vehicle for this new restriction was the Court’s famous decision in *New York Times Co. v. Sullivan*.⁸²

1. *Sullivan* and Its Progeny

The plaintiff in the case was L. B. Sullivan, an elected commissioner of public affairs for the City of Montgomery, Alabama.⁸³ The offending publication was an advertisement placed in the *Times* by civil rights leaders.⁸⁴ The

74. See Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power To Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1207–08 (2006) (discussing judicial confusion arising from applying the Supreme Court’s “actual malice” standard).

75. See Joseph H. King, Jr., *Reference to the Plaintiff Requirement in Defamatory Statements Directed at Groups*, 35 WAKE FOREST L. REV. 343, 348 (2000).

76. See RESTATEMENT (SECOND) OF TORTS § 558 (listing the elements of defamation without mentioning constitutional limitations).

77. *Id.*

78. *Id.*

79. See *Stern*, *supra* note 14, at 973 (discussing the “constitutionalization” of defamation law after 1964).

80. Kevin Francis O’Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 230–31 (2000); *Stern*, *supra* note 14, at 970 (“Prior to *New York Times Co. v. Sullivan*, the Supreme Court had relegated defamation to the realm of ‘low-level’ speech undeserving of First Amendment recognition.” (footnotes omitted)).

81. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (imposing a strict “actual malice” standard on defamation suits brought by public officials).

82. 376 U.S. 254, 267 (1964) (discussing necessity for constitutional restrictions on state defamation law).

83. *Sullivan*, 376 U.S. at 254.

84. *Id.* at 256.

advertisement critiqued the repressive tactics of Montgomery's police and government officials.⁸⁵ Some factual claims within the advertisement were inaccurate.⁸⁶ Sullivan sued the *Times* and won a \$500,000 jury verdict.⁸⁷

The Supreme Court, in a unanimous opinion by Justice Brennan, reversed the judgment on First Amendment grounds.⁸⁸ The Court sought to protect freedom of expression on "public questions," even "vehement, caustic, and sometimes unpleasantly sharp attacks" on public officials.⁸⁹ Robust, wide-open public debate was a fundamental principle of the constitutional order, the Court held.⁹⁰ And for this reason, even the inevitable false statement against public officials deserved First Amendment protection to preserve "breathing space" for discussion.⁹¹

Accordingly, the Court held that statements against a public official—even if untrue—would be immune from defamation liability in the absence of clear and convincing evidence of "actual malice."⁹² A defendant acted with "actual malice" when she knew that the relevant statement was false or acted with "reckless disregard of whether it was false or not."⁹³

The Court also found the defamation claim "constitutionally defective" because the relevant advertisement did not name Sullivan or give the reader any way to conclude that the allegedly libelous statements were "of and concerning" him as an individual.⁹⁴ The decision showed concern about intransigent state courts and juries.⁹⁵ The national media's coverage of civil rights had caused millions of dollars in state defamation liability, which threatened public debate on that consequential and urgent national concern.⁹⁶

The *Sullivan* standard only applied initially to statements made against public officials.⁹⁷ But it is relevant to group defamation for two reasons. One, it

85. *See id.* at 257 (describing the advertisement).

86. *Id.* at 289.

87. *Id.* at 256.

88. *Id.* at 264.

89. *Id.* at 269–70.

90. *See id.* at 270 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

91. *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

92. *Id.* at 279–80.

93. *Id.* at 280.

94. *Id.* at 288.

95. *See id.* at 294–95 (Black, J., concurring) ("There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the *Times* or any other newspaper or broadcaster which might dare to criticize public officials.").

96. *See id.* at 295 ("In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the *Times* seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000.").

97. *See id.* at 279 (majority opinion) (applying actual malice standard to public official plaintiffs).

established that the First Amendment limits the scope of defamation liability.⁹⁸ Two, it suggested a specific constitutional limitation on the so-called “of and concerning” requirement, which requires that a reader understand the defamatory comment to specifically concern the plaintiff.⁹⁹

Sullivan launched a thirty-year quest by the Court to clarify the bounds of constitutional defamation law.¹⁰⁰ At first, defendants won more protection from liability.¹⁰¹ The Court’s 1967 decision in *Curtis Publishing Co. v. Butts*¹⁰² imposed the actual malice standard on public figures who were not public officials.¹⁰³ The Court also resisted attempts to loosen the “actual malice” standard.¹⁰⁴ In the *Rosenbloom v. Metromedia, Inc.*¹⁰⁵ plurality opinion, Justice Brennan even went so far as to favor expansion of the actual malice standard to communications against private individuals, as long as the relevant communication was on a matter of public concern.¹⁰⁶

The Court would quickly reject that approach. In *Gertz v. Robert Welch, Inc.*,¹⁰⁷ it affirmed the distinction between private and public officials that Justice Brennan had sought to expunge in *Rosenbloom*.¹⁰⁸ The stated rationale for differing treatment was that public officials would be better able than private individuals to rebut false charges (e.g., the ability to counter a statement via a press release).¹⁰⁹ Public officials also assumed the risk of public scrutiny in accepting their position, thereby inviting “attention and comment” on their actions.¹¹⁰

98. See Stern, *supra* note 14, at 973 (noting that *Sullivan* marked the first constitutional limitation on defamation law).

99. See *Sullivan*, 376 U.S. at 288 (finding a defamation claim constitutionally deficient because it failed the “of and concerning” requirement). Scholars debate whether the constitutional limits on the “of and concerning” requirement affects private-plaintiff defamation actions. *E.g.*, Stern, *supra* note 14, at 971–72.

100. Stern, *supra* note 14, at 971.

101. *Id.* (“In the period immediately following the case, the Court’s rulings by and large augmented the protective thrust of [*Sullivan*].”).

102. 388 U.S. 130 (1967).

103. *Curtis Publ’g*, 388 U.S. at 164.

104. See Stern, *supra* note 14, at 971 (“The Court . . . deflected attempts to broaden the meaning of actual malice beyond knowledge of falsity or conscious indifference to the truth of the publication.”).

105. 403 U.S. 29 (1971).

106. *Rosenbloom*, 403 U.S. at 44 (Brennan, J., plurality opinion).

107. 418 U.S. 323 (1974).

108. *Gertz*, 418 U.S. at 343 (concluding that a lesser standard should apply to private figures).

109. *Id.* at 344 (“Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.” (footnote omitted)).

110. See *id.* at 345 (“[T]hose classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.”).

Gertz allowed states to define their own standard of liability for publishers of defamatory falsehoods against private citizens, so long as they did not impose liability without a showing of fault.¹¹¹ But it did not entirely remove private plaintiffs from First Amendment scrutiny.¹¹² States could no longer impose strict liability on private figure defamation actions,¹¹³ and private figure plaintiffs would have to at least satisfy a negligence standard before proving fault.¹¹⁴ Punitive damages, moreover, would require proof of actual malice.¹¹⁵

Nonetheless, subsequent decisions would confirm *Gertz*'s plaintiff-friendly turn. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹¹⁶ for example, limited the breadth of the actual malice standard while also suggesting that *Gertz* only mandated a fault requirement for statements on matters of public concern.¹¹⁷ Both *Gertz* and *Dun & Bradstreet*, moreover, emphasized the more limited applicability of constitutional principles to statements made against private individuals or concerning private matters.¹¹⁸

2. The "Of and Concerning" Requirement

Sullivan and its progeny raised difficult questions about how the First Amendment affected the respective elements of a common law defamation claim.¹¹⁹ For example, *Sullivan* transformed the common law fault requirement, imposing an actual malice standard for claims brought by public figures.¹²⁰ But, as already mentioned, *Sullivan* similarly added a constitutional dimension to the first element of a defamation claim—the so-called "of and concerning" or "reference to the plaintiff" requirement.¹²¹

111. *Id.* at 347.

112. *Id.* at 348 ("Our accommodation of the competing values at stake in defamation suits by private individuals . . . is not based on a belief that the considerations which prompted the adoption of the [*Sullivan*] privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals.").

113. *See id.* at 347.

114. *See id.* at 353 (Blackmun, J., concurring) (discussing the negligence standard).

115. *Id.* at 347–48; *see also* Greenwood, *supra* note 13, at 883 (discussing the *Gertz* standards).

116. 472 U.S. 749 (1985).

117. *See Dun & Bradstreet*, 472 U.S. at 757 (Powell, J., plurality opinion) (finding *Gertz*'s fault requirement inapplicable "when the defamatory statements involve no issue of public concern"); *see also* Stern, *supra* note 14, at 972 n.34 ("[*Dun & Bradstreet*] called into question whether *Gertz*'s requirement of fault applies to defamatory expression about matters of private concern.").

118. *See Gertz*, 418 U.S. at 345–46 (allowing states "substantial latitude" to fashion defamation law for private individuals without violating the First Amendment); *Dun & Bradstreet*, 472 U.S. at 758–59 (Powell, J., plurality opinion) (noting that the First Amendment provides greater protection for speech on matters of public concern).

119. *See Stern*, *supra* note 14, at 971 (describing post-*Sullivan* case law).

120. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

121. *See King*, *supra* note 75, at 351 ("[T]he Court has signaled that the reference to the plaintiff requirement has a constitutional dimension. In other words, there are limits on how far state courts will be permitted to relax the reference to the plaintiff requirement without crossing the line.").

To satisfy this requirement, a plaintiff must show that the defendant's communication at issue objectively referred to the plaintiff.¹²² The reference to the plaintiff requirement ensures that defamation plaintiffs recover only when it is sufficiently certain that their *individual* reputations—rather than a group's reputation—has come under undue suspicion.¹²³ In doing so, it balances the competing interests of defamation law. It fulfills a remedial purpose by allowing plaintiffs to recover when their individual reputations suffer harm.¹²⁴ It fulfills a constitutional purpose by insulating *general* critiques of groups from liability, thereby promoting discussion and debate.¹²⁵

When plaintiffs are not named in the offending publication, they can still meet the reference to the plaintiff requirement by presenting circumstantial evidence that the offending statement points to them individually.¹²⁶ A "reasonable reader" standard then applies.¹²⁷ If a reasonable reader in the plaintiff's community sees the statement as referencing the individual, the requirement is met.¹²⁸ It only matters that *some* readers would understand the publication to reference the specific plaintiff.¹²⁹ As one court characterized the test, "it is not necessary that all the world should understand the libel."¹³⁰

The claim in *Sullivan* was constitutionally defective in part because the plaintiff failed to proffer sufficient evidence to show that the advertisement was "of and concerning" him.¹³¹ The advertisement did not personally reference Sullivan, either by name or position.¹³² And many of the facts listed in the advertisement (for example, that Martin Luther King, Jr.'s house was bombed) were not about police activity.¹³³ Sullivan argued that the inaccurate characterizations of police action were sufficient to injure his reputation, but the Court held that the reference to the police did not even obliquely reference Sullivan.¹³⁴ Moreover, the Court rejected the lower court's holding that the advertisement's critiques of the government necessarily attached to Sullivan by virtue of his leadership position.¹³⁵ That holding would have improperly

122. RESTATEMENT (SECOND) OF TORTS § 564 cmt. f (AM. LAW INST. 1977); 1 ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 1:2.7 (4th ed. 2010).

123. RESTATEMENT (SECOND) OF TORTS § 564A cmt. c.

124. *See id.*

125. *See King, supra* note 75, at 383.

126. RESTATEMENT (SECOND) OF TORTS § 564A(b).

127. *See id.*

128. *See id.*

129. *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 925 (2d Cir. 1987).

130. *Id.* (quoting *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966)); 1 SACK, *supra* note 122, § 1:2.7.

131. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964) (finding that the general reference to the police did not refer to the individual complainant).

132. *Id.* at 288.

133. *Id.*

134. *Id.* at 289 ("Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual.").

135. *Id.* at 292.

transformed impersonal criticism of government into personal criticism of an individual.¹³⁶

The Court reached a similar conclusion in *Rosenblatt v. Baer*,¹³⁷ where it concluded that a county park official failed to meet the reference to the plaintiff requirement in his lawsuit against a newspaper columnist who had criticized the performance of the park official's office.¹³⁸ The plaintiff in *Rosenblatt* brought suit after an editorial criticized the past administration in which the plaintiff served.¹³⁹ The editorial, the Court explained, constituted "an otherwise impersonal attack on governmental operations" that "cast suspicion indiscriminately" without specifically attacking the plaintiff.¹⁴⁰ The verdict was constitutionally defective because the jury had been instructed to award damages based merely on the fact that the official was "one of a small group" acting for the government, "some of whom were implicated, but all of whom were tinged with suspicion."¹⁴¹

B. *The Problem of Group Defamation*

The reference to the plaintiff requirement poses analytic difficulty for courts presented with group defamation claims.¹⁴² Courts strain to discern whether a reference to the group necessarily references the individual.¹⁴³ The central question in these cases becomes "whether the plaintiff was in fact defamed, although not specifically designated."¹⁴⁴

Even the earliest courts grappled with this uncertainty.¹⁴⁵ One English case from 1700, for example, held that a writing "against mankind in general, or against a particular order of men . . . must descend to particulars and individuals to make it a libel."¹⁴⁶ An early case from the New York Court of Appeals, *Sumner v. Buel*,¹⁴⁷ read this statement as precluding any action for group defamation unless the plaintiff was specifically named.¹⁴⁸ This rule did not hold, but decisions evolved to preclude claims made against large groups, for either

136. *Id.*

137. 383 U.S. 75 (1966).

138. *Rosenblatt*, 383 U.S. at 83; King, *supra* note 75, at 351.

139. *Rosenblatt*, 383 U.S. at 77.

140. *Id.* at 79–81 (quoting *Sullivan*, 376 U.S. at 292); King, *supra* note 75, at 351.

141. *Rosenblatt*, 383 U.S. at 82.

142. *See, e.g.*, *Serv. Parking Corp. v. Wash. Times Co.*, 92 F.2d 502, 505 (D.C. Cir. 1937) (finding a group too large for a group defamation claim to succeed).

143. *See, e.g.*, *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 51–52 (Okla. 1962) (determining that a reference to a group references the individual when it increases the "intensity of . . . suspicion" against the individual plaintiff (quoting Note, *Liability for Defamation of a Group*, 34 COLUM. L. REV. 1322, 1325 (1934))).

144. *Id.* at 52; Stern, *supra* note 14, at 959.

145. *See* Jeffrey S. Bromme, Note, *Group Defamation: Five Guiding Factors*, 64 TEX. L. REV. 591, 600 n.50 (discussing history of group defamation claims).

146. *Id.*

147. 12 Johns. 475 (N.Y. Sup. Ct. 1815).

148. *Sumner*, 12 Johns. at 477; Stern, *supra* note 14, at 953–54 (discussing *Sumner*).

practical, procedural, or constitutional reasons.¹⁴⁹ The general rule that emerged, according to Judge Robert D. Sack, was that an individual group member cannot bring a claim if the group is so large that there is no likelihood that that reader understands the article to refer to any particular member of the group.¹⁵⁰

Size has therefore proven a useful benchmark for imposing certainty on the analysis.¹⁵¹ The Kentucky Court of Appeals provided a commonly cited distillation of this approach when it wrote, “As the size of the group increases, it becomes more and more difficult for the plaintiff to show he was the one at whom the article was directed”¹⁵² The group, in short, must be sufficiently small that the individual is “ascertainable” from the defendant’s reference to the collective.¹⁵³

This size requirement immunizes a host of communications made against very large groups.¹⁵⁴ Defaming all Roman Catholics will not, for example, give rise to a group defamation claim.¹⁵⁵ Claims against vast groups produce little difficulty for courts, however.¹⁵⁶ The more vexing issue arises when the group has a membership under one hundred.¹⁵⁷ To analyze such claims, courts have opted for one of two approaches: (1) apply a loose presumption that typically precludes claims when the group is larger than twenty-five¹⁵⁸ or (2) apply a multifactorial test that considers several characteristics—including group size—to determine the harm the statement posed to the individual plaintiff.¹⁵⁹ The first test is the *Restatement* approach.¹⁶⁰ The second is the intensity of suspicion test.¹⁶¹

149. See Greenwood, *supra* note 13, at 900 (“When claims fail to meet group defamation requirements, the connection between the defamatory material and the individual is too attenuated to support a claim, either for practical and procedural reasons or because constitutional protections of speech prohibit such claims.” (footnotes omitted)).

150. 1 SACK, *supra* note 122, § 2:9.4.

151. See RESTATEMENT (SECOND) OF TORTS § 564A (AM. LAW INST. 1977).

152. *Louisville Times v. Stivers*, 68 S.W.2d 411, 412 (Ky. 1934); Stern, *supra* note 14, at 954.

153. *Serv. Parking Corp. v. Wash. Times Co.*, 92 F.2d 502, 506 (D.C. Cir. 1937).

154. See Stern, *supra* note 14, at 986 (“A consensus has long existed that charges against a vast class of individuals, however derogatory, do not give rise to individual claims by members of the class.”).

155. See *id.*

156. See 1 SACK, *supra* note 122, § 2.94 (“Members of large groups are not permitted to prevail in defamation suits for reasons of policy preventing the unwarranted proliferation of litigation and its attendant cost to free expression.”).

157. See, e.g., *Fawcett Publ’ns, Inc. v. Morris*, 377 P.2d 42, 52 (Okla. 1962) (grappling with a small-group defamation claim arising from a communication against a sixty-member football team).

158. RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (AM. LAW INST. 1977).

159. See, e.g., *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 793 (App. Div. 1981) (adopting intensity of suspicion test).

160. Stern, *supra* note 14, at 969.

161. *Brady*, 445 N.Y.S.2d at 792–93.

1. The *Restatement* Approach

This Part discusses the *Restatement (Second) of Torts*'s formalistic approach to small-group defamation claims and justifications for the approach. Part III.B.1.a outlines the history of the *Restatement* approach and relevant cases that applied a numerical limitation to group-defamation claims. Part III.B.1.b explains two justifications for the *Restatement* approach: certainty and the protection of free expression.

a. *The Origins of the Restatement Approach*

The *Restatement*'s twenty-five-member benchmark likely originated from an influential New York case, *Neiman-Marcus v. Lait*.¹⁶² In *Neiman-Marcus*, the U.S. District Court for the Southern District of New York dismissed a suit against a publisher for alleging in a book exposé that 382 saleswomen at a Neiman-Marcus department store were call girls.¹⁶³ The court held that no reader could "conclude from the publication a reference to any individual saleswoman."¹⁶⁴ Furthermore, no precedent allowed recovery for a group so large.¹⁶⁵ At the same time, the court allowed twenty-five men of the retailer's men's store to pursue their claim after the book in question wrote that "most of the sales staff" in that section were "fairies."¹⁶⁶ This group was sufficiently small to enable the reference to the group to attach to the individuals.¹⁶⁷

Neiman-Marcus proved influential: the *Restatement (Second) of Torts* ultimately incorporated its holding by noting that "the cases in which recovery has been allowed usually have involved numbers of 25 or fewer."¹⁶⁸ Perhaps more significantly, the torts scholar William Prosser stated that a rule dismissing group defamation claims "has been applied quite uniformly to comparatively large groups or classes of a definite number, exceeding, say twenty-five persons."¹⁶⁹ The *Restatement* approach came to reflect the dominant mode of analysis for courts adjudicating group defamation claims.¹⁷⁰

162. 13 F.R.D. 311 (S.D.N.Y. 1952); see Stern, *supra* note 14, at 955 ("Probably most influential in shaping developments that would culminate in the *Restatement* framework were the mixed results of *Neiman-Marcus v. Lait*.").

163. *Neiman-Marcus*, 13 F.R.D. at 317.

164. *Id.* at 316.

165. *Id.*

166. *Id.* at 313, 316.

167. *Id.* at 316.

168. RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (AM. LAW. INST. 1977); see also Stern, *supra* note 14, at 955 (discussing how *Neiman-Marcus* inspired the *Restatement* formulation).

169. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 750 (4th ed. 1971). One author notes that Prosser's commentary "famously infused" the small-group defamation claim "with numerical precision." Stern, *supra* note 14, at 952.

170. Stern, *supra* note 14, at 952.

b. Justifications for the Restatement Approach

The *Restatement's* twenty-five-member threshold has invited criticism for its seeming arbitrariness.¹⁷¹ This is understandable. It is difficult to defend a formalistic bar for highly fact-intensive and variegated claims like defamation.¹⁷² Nonetheless, as explained below, the *Restatement* approach has two primary advantages: (1) it gives courts an analytic tool to apply consistently across group-defamation claims, and (2) it preserves free expression by limiting the availability of the group defamation theory.

i. Certainty

Professor Nat Stern has noted that the *Restatement* approach is consistent with a mode of defamation analysis commonly known as the certainty principle.¹⁷³ The principle requires a high degree of confidence that requisite meaning and states of mind exist before the defamation claim can proceed.¹⁷⁴ In the defamation analysis, the judge must probe the mind of the hypothetical reader and permit liability only when sufficient certainty exists that the offending statement is directed at the plaintiff.¹⁷⁵ A claim will likely fail if the defamatory publication is not sufficiently fixed in meaning—or qualifies as an opinion, rather than a factual assertion.¹⁷⁶ To Stern, the multiple degrees of epistemic inquiries underscore the importance of establishing certainty of mind and meaning before imposing defamation liability.¹⁷⁷ And while principles of certainty are inherent in all legal rules, defamation is unique in the degree of certainty required before liability may attach.¹⁷⁸

The group-defamation context, however, defies certainty.¹⁷⁹ Courts have little factual basis to discern just when or how a reference to a group attaches to the individual plaintiff.¹⁸⁰ The solution to this problem of uncertainty is a numerical threshold. The twenty-five-member benchmark provides a

171. *Id.*

172. *See, e.g., Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 51–52 (Okla. 1962) (“[W]e have found no substantial reason why *size* alone should be conclusive. We are not inclined to follow such a rule where, as here, the complaining member of the group is as well known and identified in connection with the group as was the plaintiff in this case.”).

173. Stern, *supra* note 14, at 979.

174. *Id.* at 973–74.

175. *See id.* at 978 (“[C]ourts have been charged with initially determining as a matter of law whether a factfinder could plausibly construe a statement as implying a defamatory fact about the plaintiff.”).

176. *See id.* at 976–77 (“[T]he conclusion that a statement does not assert a provably false fact effectively terminates a suit.”).

177. *See id.* at 976 (“At every stage, then, an examination of the strength and foundation of the defendant’s belief, conducted by a decision maker sensitive to the quality of his or her own perceptions, determines the course of the suit.”).

178. *See id.* (“While these considerations are not absent from other litigation, defamation suits call for a heightened self-consciousness about the capacity for knowledge and its limits in the evaluated and evaluator alike.”).

179. *See id.* at 982.

180. *Id.* at 981.

“presumptive safe harbor” for statements made against groups of over twenty-five members.¹⁸¹ When considering the uncertainty inherent in the group defamation claim, the value of a heuristic like the *Restatement* formulation is more defensible as a tool for analysis.¹⁸²

ii. *Free Expression*

The imposition of an artificial benchmark is also defensible because group defamation implicates policy concerns about free speech. Although the Supreme Court has not directly addressed a small-group defamation claim, it has hesitated to allow defamation claims for impersonal remarks or critiques of a group’s collective failing.¹⁸³

Cases like *Sullivan* and *Rosenblatt* also underscore the “constitutional dimension” of the reference to the plaintiff requirement.¹⁸⁴ That is, the Court has placed limits on defamation actions arising from non-specific references to the plaintiff, while not wholly precluding such claims.¹⁸⁵ Courts have subsequently held that group defamation claims raise constitutional concerns.¹⁸⁶ In *Schuster v. U.S. News & World Report, Inc.*,¹⁸⁷ for example, a federal court rejected a group defamation claim against a group of drug distributors because allowing the claim would deter free speech.¹⁸⁸ Constitutional concerns also kept a Michigan federal court from finding liability for a statement made against a group of hunters, so as to “avoid [a] conflict with First Amendment values.”¹⁸⁹ The general limitation on group defamation, even when couched in terms of general tort principles, similarly shows concerns about deterring free expression.¹⁹⁰ Accordingly, the *Restatement* formulation operates as a check on a common law that threatens to deter speech.

181. *Id.* at 983.

182. *See id.* at 980 n.182.

183. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (finding that a general reference to police did not refer to any individual complainant).

184. *See* King, *supra* note 75, at 351.

185. *See* Rosenblatt v. Baer, 383 U.S. 75, 81–82 (1966) (finding no reference to the plaintiff without ruling such a requirement unconstitutional).

186. *See* 1 SACK, *supra* note 122, § 2:9.4[B] (discussing group defamation cases where constitutional interests played a role).

187. 459 F. Supp. 973 (D. Minn. 1978), *aff’d*, 602 F.2d 850 (8th Cir. 1979).

188. *Schuster*, 459 F. Supp. at 978; *see also* 1 SACK, *supra* note 122, § 2:9.4[B] (discussing *Schuster*).

189. Mich. United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff’d*, 665 F.2d 110 (6th Cir. 1981); *see also* 1 SACK, *supra* note 122, § 2:9.4[B] (discussing *Mich. United*).

190. *See* 1 SACK, *supra* note 122, § 2:9.4[B] (“Indeed, the ‘general tort principles’ themselves arose, at least in part, from recognition that freedom of expression was inconsistent with the ability of large groups of people to maintain actions for libel or slander against those who spoke against the groups.”).

The *Restatement* approach also has the virtue of simplicity.¹⁹¹ Where the plaintiff's interest needs to be balanced against freedom of expression, scholars have advocated rigid formulas that create clear rules of the road for publishers.¹⁹² A clear rule protects defendants from expensive liability by enabling the early dismissal of claims that do not pass clearly defined thresholds like a size requirement.¹⁹³ This reduces the costs of litigation by allowing publishers easy dismissal of claims against them.¹⁹⁴ It also reduces the likelihood of abusive defamation suits by limiting the filing of multiple individual claims from aggrieved members of large groups.¹⁹⁵ The formulation therefore mitigates the risk that defendants will use group defamation liability as a weapon to chill speech.¹⁹⁶

2. The Intensity of Suspicion Test

A minority of jurisdictions, first and most notably Oklahoma, prefer the so-called “intensity of suspicion test,” a fact-intensive inquiry that attempts to determine the extent to which the defamatory comments against the group focus on each of the individual members of the group.¹⁹⁷ A New York Appellate Division Court later adopted the test,¹⁹⁸ and the *Elias* court relied on that decision in allowing the group-defamation claim to proceed against *Rolling Stone*.¹⁹⁹ Part III.C.1 focuses on the representative cases underlying the intensity of suspicion test. Part III.C.2 discusses justifications and critiques of the intensity of suspicion test.

a. Intensity of Suspicion Defined

The intensity of suspicion test requires a court to conduct a rigorous factual inquiry to determine the degree that the statements against the whole group implicate the individual member-plaintiffs.²⁰⁰ Size is a factor in determining whether a statement made against a group also references the individual, but it is

191. King, *supra* note 75, at 384–85 (“A clear numeric limitation has the virtue of simplicity. It is responsive to concerns about the effects of the increasingly impenetrable legal complexity of the American system of justice.”).

192. *See id.* at 383 (“[A]ttempts to satisfy the reference to the plaintiff requirement for claims by individual plaintiffs by extrapolating claims from group references hover close to the line of unconstitutionality. Thus, while such claims may be compatible with the First Amendment in principle, a cautious, tailored rule is needed.”).

193. *See id.* at 382.

194. *See id.*

195. *See id.*

196. *See id.*

197. *See, e.g., Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 792–93 (App. Div. 1981) (adopting the intensity of suspicion test); *see also Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 51–52 (Okla. 1962) (favoring the intensity of suspicion test).

198. *Brady*, 445 N.Y.S.2d at 792–93.

199. *Elias II*, 872 F.3d 97, 108 (2d Cir. 2017).

200. *See, e.g., Brady*, 445 N.Y.S.2d at 792–93.

not determinative.²⁰¹ Size must be balanced against other factors such as the prominence of the group itself and the prominence of the individual within the group.²⁰² The principle underlying this multifactor, case-by-case test is that such an inquiry enables the court to “determine the *degree* that the group accusation focuses on each individual member of the group.”²⁰³ Because the analysis required is so fact intensive, it is worthwhile to explore closely two major cases adopting the test.

i. Fawcett Publications, Inc. v. Morris

The intensity of suspicion test gained currency after its adoption by the Oklahoma Supreme Court in *Fawcett Publications, Inc. v. Morris*,²⁰⁴ which involved an allegation of defamation against a college football team.²⁰⁵ The defendant owned a publication called *True* magazine, which published a story called *The Pill That Can Kill Sports*.²⁰⁶ The purpose of the “studiously prepared” article was to expose rampant amphetamine use in youth sports throughout the country.²⁰⁷

After noting that athletes often ingest drugs through nasal atomizers, the offending article stated, “[W]hile Oklahoma was increasing its sensational victory streak, several physicians observed Oklahoma players being sprayed in the nostrils with an atomizer.”²⁰⁸ Immediately following this description, the article quoted a doctor who declared “acidly” that when horses received similar treatment, “the case went to court” and that “[m]edically, there [was] no reason for such treatment.”²⁰⁹

When an Oklahoma football player sued for defamation and showed before trial that the atomizers contained not amphetamine but peppermint, the trial court directed a verdict against the publisher.²¹⁰ In affirming the directed verdict, the Oklahoma Supreme Court acknowledged “substantial precedent” holding that members of large groups may not recover unless they are referred to in the publication.²¹¹ Nonetheless, the court dismissed the importance of group size in the analysis, thereby allowing recovery for the individual plaintiff when the allegedly defamatory article impugned a group of roughly sixty to seventy

201. *Id.* at 793.

202. *Id.*

203. *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 837 (Okla. 1984) (emphasis added).

204. 377 P.2d 42 (Okla. 1962).

205. *Stern*, *supra* note 14, at 965.

206. *Fawcett*, 377 P.2d at 44.

207. *See id.* at 46–47 (quoting the article in question as stating that “[r]acehorses are scrupulously guarded against doping violations, yet the same drugs are given freely to young athletes”).

208. *Id.* at 47 (quoting from the article in question).

209. *Id.* at 55 (Halley, J., dissenting) (quoting from the article in question).

210. *Id.* at 44–47 (majority opinion).

211. *Id.* at 51 (“[T]here is substantial precedent from other jurisdictions to the effect that a member of a ‘large group’ may not recover in an individual action for a libelous publication unless he is referred to personally . . .”).

players.²¹² The case, one scholar argued, showed the potential for liability in cases that would have otherwise been “thwarted by a numeric limitation.”²¹³

ii. *Brady v. Ottaway Newspapers*

New York also favors the intensity of suspicion test, most notably in its case *Brady v. Ottaway Newspapers, Inc.*²¹⁴ In *Brady*, a New York appellate court allowed police officer plaintiffs to pursue a defamation claim against a newspaper that published an editorial criticizing the city’s police department.²¹⁵ The police officers were not expressly named in the article.²¹⁶ Nonetheless, the court held that the police department, which had fifty-three members, was sufficiently small to allow a small-group defamation claim, notwithstanding the *Restatement’s* twenty-five member threshold.²¹⁷

Brady involved a local newspaper editorial published on July 19, 1979, in the *Times Herald Record*.²¹⁸ The editorial concerned the future oversight of the Newburgh City Police Department in Newburgh, New York.²¹⁹ The police department suffered embarrassment in 1972 after eighteen officers, including the department police chief, were indicted on various charges, including burglary and the planting of evidence.²²⁰ As an oversight measure, the Newburgh City Council instituted a new police commissioner system.²²¹ In 1979, however, the city considered ending the commissioner system after the scandal.²²²

The *Times Herald Record* opposed the abolition of the commissioner system.²²³ It published an editorial criticizing the proposed return to the status quo ante and suggested that the police department was still in need of oversight because those who were not indicted might still have been aware of the alleged criminal conduct of their colleagues.²²⁴ The editorial then made a charge against the entire department: “It is inconceivable to us that so much misconduct could have taken place without the guilty knowledge of the unindicted members of the department. If so, they all were accessories after the fact, if not before and during.”²²⁵ The unindicted members of the department then sued the newspaper for defamation.²²⁶

212. *Id.*

213. Stern, *supra* note 14, at 969.

214. 445 N.Y.S.2d 786 (App. Div. 1981).

215. *Brady*, 445 N.Y.S.2d at 795.

216. *See id.* at 787.

217. *Id.* at 791–93.

218. *Id.* at 787.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

The prime issue on appeal in *Brady* was whether the police plaintiffs—who were unnamed in the editorial itself—adequately pled that the editorial referenced them as individuals.²²⁷ The media defendants argued that the plaintiffs had failed to meet the reference to the plaintiff requirement because the group of which they were members—that is, the fifty-three-member police department of Newburgh—was too large for the small-group defamation doctrine to apply.²²⁸ The media defendants urged the court to apply the *Restatement's* proposed twenty-five member rule to the case and to instruct the lower court to dismiss.²²⁹

The intermediate appellate court declined, for four reasons.²³⁰ First, New York case law on defamation had never articulated a limit on size for small-group claims.²³¹ Second, the court noted that there was no “compelling logic” to adopting the *Restatement's* twenty-five-member ceiling.²³² Third, the court held that no public policy was served by such a rigid cap because the limit, in the court’s opinion, did not necessarily “protect frank discussions” on matters of public importance.²³³

Finally, the court—with little explication—suggested that the size limitation ignored the different characteristics and circumstances of groups.²³⁴ The necessarily context-driven inquiry that courts must perform in determining the validity of a small-group claim should not be artificially hampered by a strict limitation on size.²³⁵ Instead of adopting the *Restatement* approach, the court in *Brady* adopted the intensity of suspicion test, citing *Fawcett*.²³⁶

Applying the test to the Newburgh editorial, the court found that the police officer plaintiffs could maintain their defamation action.²³⁷ The group was explicitly defined in the editorial as the unindicted police officers.²³⁸ Whereas the group was larger than the twenty-five salesmen in *Neiman-Marcus*,²³⁹ the police department occupied a place of prominence within the community.²⁴⁰ According to the court, whether the department had twenty-five or fifty-three members was

227. *Id.* at 788.

228. *Id.*

229. *Id.* at 791–92 (“The argument of the media defendants in the instant case that the defamation of this particular group cannot support individual actions is based solely on the fact that the group exceeds twenty-five.”).

230. *See id.* at 788–92.

231. *Id.* at 792.

232. *Id.*

233. *Id.*

234. *Id.* (“Lastly, size limitations ignore the different characteristics of groups and the varied circumstances of publication which may permit relief for individual injury without interfering with First Amendment guarantees.”).

235. *Id.*

236. *Id.* at 792–93.

237. *Id.* at 793–95.

238. *Id.* at 793.

239. *Id.* at 794.

240. *Id.* at 795.

not significant because the disparaging editorial was still capable of individual application regardless of group size.²⁴¹

The police department also had a high degree of organization—group size was restricted and membership was “highly visible by virtue of badges and uniforms.”²⁴² This made the public more likely to impute disparaging remarks against the group to its individuals.²⁴³ The *Brady* court acknowledged that the plaintiff police officers were not prominent individuals in the community they served.²⁴⁴ Nonetheless, the court held that it could not say, as a matter of law, that personal application to the plaintiffs was *not* possible.²⁴⁵

The court therefore concluded that the editorial comments were capable of personal application and declined to order dismissal of the lawsuits.²⁴⁶ The decision in *Brady* would become the main authority for the Second Circuit in its decision to revive the small-group defamation claims in *Elias v. Rolling Stone*.²⁴⁷

b. Justifications for the Intensity of Suspicion Test

The primary justification for the intensity of suspicion test is that it lacks the *Restatement's* artificial and excessive focus on group size.²⁴⁸ No “compelling logic” exists for a twenty-five member threshold.²⁴⁹ The *Restatement* doctrine appears to afford less risk of liability to a defendant creating “a greater number of wrongs.”²⁵⁰ One might just as easily disparage a group of thirty-five members in a way that demeans each individual member.²⁵¹ But because the claim fails the size requirement, the harmed plaintiffs have a diminished likelihood of success.²⁵² This is both arbitrary and unfair. The *Restatement* approach unnecessarily immunizes one who “assails and reviles a great number of individuals,” while punishing the “less hardy slanderer.”²⁵³

Another compelling argument in favor of the intensity of suspicion test is that it better enables the court to recognize when a group member has faced individual injury by a communication made against the group. Group size does

241. *Id.* at 794–95.

242. *Id.* at 794.

243. *See id.* (“[T]he comments are capable of personal application to the individual members of the defamed group, because over the years, the membership of the defamed group has remained constant and is easily discernible.”).

244. *See id.* at 795 (“We have no evidence of the personal prominence of the plaintiff police officer . . .”).

245. *Id.*

246. *Id.* at 796.

247. *Elias II*, 872 F.3d 97, 108 (2d Cir. 2017).

248. *See, e.g., Brady*, 445 N.Y.S.2d at 792 (concluding that no justification existed for considering size alone in the group defamation analysis).

249. *Id.*

250. *Id.* (quoting Mason C. Lewis, Comment, *The Individual Member's Right To Recover for a Defamation Leveled at the Group*, 17 U. MIAMI L. REV. 519, 535 (1963)).

251. *See id.* at 791–92 (discussing the unnecessary harshness of the twenty-five-member threshold).

252. *See id.*

253. *Id.* at 792.

little to inform a court about the effect the offending statement may have had on any individual members.²⁵⁴ Considering other factors—such as the prominence of the individual plaintiff within the group or specifics about the plaintiff's surrounding community—allows the court to determine with certainty that the claimed injury is a legitimate one.²⁵⁵ Under this approach, a defamation claim against a group with fifty members—presumptively barred by the *Restatement* approach—would be allowable where the individual group member's prominence within the group and the community means that he is more readily associated with the group than are other members.²⁵⁶

The intensity of suspicion test is compelling as a tool for analysis because it supplements, rather than replaces, the *Restatement's* emphasis on group size.²⁵⁷ The likelihood of success still falls as the group grows larger, but the size of the group is not sufficient to preclude a claim.²⁵⁸ The court must consider other factors before doing so.²⁵⁹ Thus, the test still balances the constitutional and remedial principles of defamation law without the harsh bar posed by a size requirement.²⁶⁰ The test serves to “prevent vexious actions based on impersonal discussions of matters of public concern without terminating suits on an arbitrary size limitation where real injury is present.”²⁶¹

Courts favoring the intensity of suspicion test also do not believe a rigid size requirement guarantees wide-open debate on issues of public importance.²⁶² This First Amendment interest is more compelling when the disparaging remark applies to large groups or sects such as religions or political parties.²⁶³ Courts, however, have long sought to insulate generalized comments like these from defamation liability.²⁶⁴ The First Amendment concerns are less compelling for smaller groups because of the real harm posed by the remarks to the individual members of these groups.²⁶⁵ The intensity of suspicion test therefore serves to satisfy the constitutional interest by excluding the most problematic group defamation claims—those directed at groups with vast membership.

254. *Id.* at 788, 794 (“[G]iven the nature and specificity of the charge herein and its compelling logic, the increased size is not sufficient to dilute the harm caused to the individuals from the statement so that the resulting injury falls below the threshold of legal recognition.”).

255. *Cf. id.* at 792–93 (noting prominence within the group as a compelling factor under the intensity of suspicion test).

256. *Id.* at 793.

257. *See Elias II*, 872 F.3d 97, 108 (2d Cir. 2017).

258. *See id.* (noting that size is not necessarily a bar to group defamation claims).

259. *Id.*

260. *See Brady*, 445 N.Y.S.2d at 792–93.

261. *Id.* at 793.

262. *See, e.g., id.* at 792 (“[A] limit on size does not necessarily protect frank discussions on matters of public concern.”).

263. *See, e.g., id.* at 789 (describing the dismissal of a defamation claim for a statement attacking Muslim people generally).

264. *Id.*

265. *See id.* at 790.

IV. COURT'S ANALYSIS

On appeal in *Elias*, the Second Circuit reversed the dismissal of the small-group defamation claims against *Rolling Stone*.²⁶⁶ The court declined to certify the question of the applicability of the small-group defamation theory to the New York Court of Appeals.²⁶⁷ It reasoned that the *Brady* court's adoption of the intensity of suspicion test was both applicable to the case and unquestionably the controlling law in New York.²⁶⁸ Applying *Brady*, the court held that the plaintiffs below had adequately pled that the offending article sufficiently referenced them and that the size of the fifty-three-member Phi Kappa Psi fraternity did not preclude a small-group defamation claim.²⁶⁹ Furthermore, the *Elias* majority held that the lower court erred in dismissing the case at the pleading stage.²⁷⁰ Because the court was considering the grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), it considered the grant de novo, construing the complaint liberally and the factual allegations as true and in the light most favorable to the plaintiff.²⁷¹

This Section examines the Second Circuit's decision in *Elias*. Part IV.A discusses the legal principles the court applied in the case. Part IV.B discusses the reasoning behind the Second Circuit's recognition of a small-group defamation claim. Part IV.C examines the dissenting opinion in *Elias*.

A. *Reference to the Fraternity Members Becomes a Primary Issue*

Elias identified the reference to the plaintiff requirement as a crucial issue on appeal.²⁷² It read New York law to require the plaintiff to plead facts showing that the "reading public acquainted with the parties and subject" would recognize the plaintiff as the person referred to in the offending publication.²⁷³ Furthermore, when a plaintiff uses extrinsic facts to support the assertion that the publication references the plaintiff, the plaintiff must show that it is reasonable to conclude that the reader was aware of those extrinsic facts when reading the publication.²⁷⁴ For example, if a plaintiff is not specifically named in an allegedly defamatory publication, she may still recover if outside evidence (e.g., interviews with the author) shows that readers construed the publication as referencing her individually.²⁷⁵

266. *Elias II*, 872 F.3d 97, 111 (2d Cir. 2017).

267. *See id.* at 113 (Lohier, J., concurring in part and dissenting in part).

268. *Id.* at 108 (majority opinion).

269. *Id.* at 110.

270. *See id.* at 111.

271. *Id.* at 104.

272. *Id.*

273. *Id.* at 104–05 (quoting *Carlucci v. Poughkeepsie Newspapers, Inc.*, 442 N.E.2d 442, 443 (N.Y. 1982)).

274. *Id.* (citing *Chicherchia v. Cleary*, 616 N.Y.S.2d 647, 648 (App. Div. 1994)).

275. *Cf. id.* at 109 (using an author interview as outside evidence to support the "reference to the individual plaintiff" argument).

The court then explained the applicability of New York's group defamation doctrine to the case.²⁷⁶ It explained that the individual plaintiffs alleged that the article defamed a small group, the members of PKP who were members of the organization at the time of the alleged rape, to which they belonged.²⁷⁷ The plaintiffs therefore had to show that the article reasonably inferred at least one of two possible meanings—that all fraternity members committed rape as a condition of initiation or that they knew that others had committed such a crime.²⁷⁸ The lower court had said such an inference could not be reasonably made from the content and context of the article.²⁷⁹ The *Elias* court disagreed and allowed the small-group defamation claim to proceed, for reasons explained more fully below.²⁸⁰

B. *The Elias Court's Reasoning*

The *Elias* court then explained New York law on small-group defamation.²⁸¹ It first acknowledged that, in most circumstances, a statement about a group is not understood to refer to individual members of that group unless the individual plaintiff is somehow distinguished from the group in the article.²⁸² The restriction loosens, however, when the offending publication implicates a small group, because reference to the individual plaintiff becomes more likely in the context of small groups.²⁸³ Therefore, a plaintiff-member of a small group can maintain a defamation action by virtue of her membership.²⁸⁴

The court concluded that *Brady* required it to apply the intensity of suspicion test to the facts before it.²⁸⁵ The application of the *Brady* factors required the court to reverse dismissal of the small-group defamation claim.²⁸⁶ Those factors included the size of the group, whether the statement “impugn[ed]” all or only some of the group's members, and the prominence of the group and the individuals in the community.²⁸⁷ The plaintiffs, the court held, had adequately pled facts to make a prima facie claim that the article contained defamatory statements “of and concerning” every member of PKP at UVA

276. *Id.* at 107–08.

277. *Id.* at 107.

278. *Id.*

279. *Elias I*, 192 F. Supp. 3d 383, 394 (S.D.N.Y. 2016) (“Viewed in the overall context of the article, the quotes cannot reasonably be construed to state or imply that the fraternity enforced a rape requirement as part of an initiation ritual or a pre-condition for membership.”), *rev'd in part*, *Elias II*, 872 F.3d 97 (2d Cir. 2017).

280. *Elias II*, 872 F.3d at 107.

281. *Id.*

282. *Id.* (citing *Three Amigos SJJ Rest., Inc. v. CBS News Inc.*, 15 N.Y.S.3d 36, 41 (App. Div. 2015), *aff'd*, 65 N.E.3d 35 (N.Y. 2016)).

283. *Id.* at 108 (citing *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 790 (App. Div. 1981)).

284. *Id.* (citing various sources).

285. *Id.* at 108–10.

286. *Id.* at 111.

287. *Id.* at 108–10.

when the article was published.²⁸⁸ The *Elias* court had little trouble concluding that the size of the fraternity did not preclude the small-group action.²⁸⁹ Most importantly, New York courts had not set a size requirement for small-group defamation actions.²⁹⁰ The court did acknowledge, however, that success is more likely when the group is smaller, citing the twenty-five person limitation from the *Restatement (Second) of Torts*.²⁹¹

But the decision in *Brady* was conclusive authority for the proposition that even a group as large as fifty-three would not necessarily preclude the applicability of the small-group defamation doctrine.²⁹² The court acknowledged that the lower court agreed with it on this point.²⁹³ The Second Circuit, however, disagreed with the lower court's conclusion that the article could not be read to imply that sexual assault was an initiation requirement of the fraternity or that the members at least knew of such an initiation requirement.²⁹⁴

The lower court erred, the Second Circuit held, by reading the allegations in isolation instead of within the context of the entire article.²⁹⁵ New York law required the court to construe the challenged language in the "context of the publication as a whole."²⁹⁶ Applying that principle, the court concluded that the individual statements within the article could be read together to impart a defamatory meaning imputable on every plaintiff—that they participated in the brutal crime alleged in the story, or at least knew such crimes were required as a condition of membership in the fraternity.²⁹⁷ As evidence of the plausibility of this reading, the court pointed to the extrinsic statements of the article's author, Sabrina Rubin Erdely.²⁹⁸ Erdely suggested in an interview with the news organization *Slate* that the comments of the fraternity members in the article suggested that sexual assault was "part of an initiation ritual" to the organization.²⁹⁹ Furthermore, the court held that other evidence within the article suggested that the article could be read to support such an inference.³⁰⁰ For example, the article reported that other female students had reported gang rapes at the fraternity, suggesting assault regularly occurred within the organization.³⁰¹

288. *Id.* at 108.

289. *Id.*

290. *Id.*

291. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (AM. LAW INST. 1977)).

292. *Id.*

293. *Id.*

294. *Id.* at 108–09.

295. *Id.* at 109.

296. *Id.* (citing *Herbert v. Lando*, 781 F.2d 298, 307 (2d Cir. 1986)); *Armstrong v. Simon & Schuster, Inc.*, 649 N.E.2d 825, 829 (N.Y. 1995).

297. *Elias II*, 872 F.3d at 109.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

To further support this conclusion, the court compared the allegedly defamatory statement in *Brady* (“It is inconceivable to us that so much misconduct could have taken place without the guilty knowledge of the unindicted members of the department.”) with the *extrinsic* statement Erdely made in her interview with *Slate* (“It seems impossible to imagine that people didn’t know about this.”).³⁰² “Connecting the dots,” the court held, “a reader could plausibly conclude that PKP had a long tradition of requiring pledges to participate in gang rapes as a condition of membership.”³⁰³

Finally, the court concluded that the relevant community where the alleged acts took place—UVA’s campus—and the prominence of PKP within that community supported the small-group defamation theory.³⁰⁴ The court reasoned that New York law is more sympathetic to small-group defamation theories in the context of small communities, like college campuses.³⁰⁵ The court then made a direct parallel between the small community in *Brady* and the college campus in the case before it.³⁰⁶ The *Elias* court did not, however, inquire into the individual prominence of the unnamed plaintiffs in the community, as the *Brady* court instructed.³⁰⁷

C. *The Dissent*

The dissenting opinion in *Elias* argued that the allegations in the case did not support a claim for small-group defamation under New York law.³⁰⁸ Although the majority applied *Brady*’s intensity of suspicion test, a New York appellate court had not applied the doctrine to a small-group defamation case in thirty-six years.³⁰⁹ Furthermore, the *Brady* court was the only New York appeals court to try to formulate a small-group defamation theory, meaning that the New York Court of Appeals—the highest court in the state—had never formally adopted the *Brady* test.³¹⁰

Even accepting the validity of the test, however, the dissent claimed that the majority still erred.³¹¹ The statement in *Brady* was directed at all members of the group, whereas the article in *Elias* did not concern, even by implication, every member of the fraternity.³¹² Instead, in the dissent’s view, the majority erroneously read the article in conjunction with Erdely’s statements to *Slate*,

302. *Id.* (alterations omitted) (first quoting *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 787 (App. Div. 1981); and then quoting *The Butch Goddess Edition*, *supra* note 41, at 8:09).

303. *Id.*

304. *Id.* at 110.

305. *Id.*

306. *Id.* (citing *Brady*, 445 N.Y.S.2d at 795).

307. *See id.*

308. *Id.* at 111–12 (Lohier, J., concurring in part and dissenting in part).

309. *See id.* at 112.

310. *See id.*

311. *Id.* at 111–13.

312. *Id.* at 112.

which did not implicate “all” of the members of the group, as the small-group defamation doctrine requires.³¹³

The dissent also took issue with the majority’s characterization of fraternities as “intimate communities” and the majority’s conclusion that the fraternity was sufficiently prominent to support a small-group defamation claim.³¹⁴ The dissent did not “accept the analogy” between the police officers in *Brady* and the fraternity members on UVA’s campus because the New York case law was simply too scant.³¹⁵ It was not clear, the dissent argued, that the New York Court of Appeals would choose to maintain the *Brady* factors in this context, or if they would choose a wholly different test.³¹⁶

Given the lack of direction from the case law, the dissent would have chosen an alternate path: certifying the question to the New York Court of Appeals.³¹⁷ The Second Circuit had held in the past that small-group defamation presented “thorny questions” not easily answered in extant New York law.³¹⁸ Even if *Brady*’s authority was unquestionable, the application of the case’s formulas remained unclear.³¹⁹ Where the precedent is unclear on an important question of law, the Second Circuit has deferred to the New York Court of Appeals by certifying the question.³²⁰

But if the facts alone compelled certification to the New York Court of Appeals, the majority’s analysis made certification even more urgent.³²¹ The dissent argued that the *Elias* majority expanded the doctrine of small-group defamation to allow people who live or work closely to the defamed to file suit if the article suggests that the plaintiff *knew* of the alleged misconduct.³²² Whether New York law actually intends to have such an expansive doctrine is a policy decision for the state court or the legislature, not the Second Circuit, the dissent argued.³²³ The important policy implications of the majority decision—and its flawed analogy of the facts in the case to *Brady*—made certification the appropriate decision.³²⁴

In the absence of certification, the dissent would have dismissed the small-group defamation claim because the majority’s interpretation of the

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 112–13.

318. *Id.* at 113 (quoting *Algarin v. Town of Wallkill*, 421 F.3d 137, 139 (2d Cir. 2005) (quoting 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2.9.4.1 (3d ed. 2005))).

319. *Id.* at 112.

320. *Id.* at 113 (citing *Doe v. Guthrie Clinic, Ltd.*, 710 F.3d 492, 497–98 (2d Cir. 2013)).

321. *See id.*

322. *Id.* (arguing that the majority “extends the doctrine by holding that individuals who live or work in close proximity may be defamed with ‘guilty knowledge’ whenever one in their midst is falsely accused of misconduct” (quoting *id.* at 109–10 (majority opinion))).

323. *Id.*

324. *Id.*

article—that it could be plausibly read to imply that gang rape was an initiation ritual for PKP—was a “strained,” if not “artificial construction.”³²⁵ That interpretation was unsupported by any of the text, the dissent argued, requiring dismissal of the small-group claim.³²⁶

V. ANALYSIS

Part V.A argues, consistent with the dissent in *Elias*, that the *Elias* court should have certified the small-group defamation question to the New York Court of Appeals to consider the propriety of the intensity of suspicion test. Part V.B argues that the majority in *Elias* expanded the small-group defamation theory beyond the vague boundaries of *Brady*. Part V.C argues that the decision injected significant uncertainty into the group defamation doctrine at a time when such certainty is crucial to investigative reporting.

A. *Close Call Deserved Certification*

As a matter of procedure, the *Elias* court should have elected to certify to the New York Court of Appeals the question of *Brady*'s applicability to the facts of the case and whether the state follows the *Restatement* approach or the intensity of suspicion test. As the dissenting opinion in *Elias* pointed out, the application of the small-group defamation theory has long presented “thorny questions” for the Second Circuit in applying New York law.³²⁷ Moreover, the Second Circuit previously acknowledged that it remained unclear, even in light of *Brady*, how rigorously or leniently a court should apply the factors when analyzing whether to maintain a small-group defamation claim.³²⁸ Although there is no single standard or requirement for certifying a question to the New York courts, the Second Circuit has certified questions when state appellate decisions provided little direction and the Second Circuit had no precedent of its own.³²⁹ It should have done so here.

B. *The Second Circuit Unnecessarily Expanded Small-Group Defamation*

Even assuming, however, that the Second Circuit appropriately declined to certify the issue to the New York Court of Appeals, the application of *Brady* to the facts in *Elias* was needlessly expansive. Indeed, *Brady* is more easily distinguishable than the *Elias* court presumed.³³⁰ The most obvious distinction between *Brady* and *Elias* is the content of the allegedly defamatory statements themselves. The alleged defamatory work in *Brady* explicitly suggested a link between the indicted and unindicted police officers and then made a conditional

325. *Id.* at 114 (quoting *Golub v. Enquirer/Star Grp., Inc.*, 681 N.E.2d 1282, 1283 (N.Y. 1997)).

326. *Id.*

327. *Id.* at 113.

328. *Id.*

329. *Id.* (citing *Doe v. Guthrie Clinic, Ltd.*, 710 F.3d 492, 497–98 (2d Cir. 2013)).

330. *Id.*

statement about the group generally—if the police knew about the criminal conduct, then they were accessories to the fact.³³¹

In contrast, there is no singular statement in the *Rolling Stone* article that draws a direct line between the purported sexual assault and the criminality of every single member of the fraternity.³³² Rather, the *Elias* court held that a charge of criminality against the entire fraternity could be plausibly inferred from a holistic reading of the article.³³³ Specifically, the *Elias* court placed tenuous reliance on the portion of the article where a fraternity brother is alleged to goad a fellow member into the assault by saying, “Don’t you want to be a brother?” and, “We all had to do it, so you do, too.”³³⁴ Unlike the explicit editorial in *Brady* that directly implicated all members of the Newburgh Police Department, the statements in *Elias* require a far more attenuated inferential leap: that all members of the fraternity were required to participate in, or at least had knowledge of, sexual assault as an initiation ritual into the fraternity itself.³³⁵

Unlike the explicit reference in the article at issue in *Brady*, the inferential leap required in *Elias* is untenably reliant on suggestion and innuendo.³³⁶ This violates a core principle of New York defamation law that courts may not “enlarge upon the meaning of words so as to convey a meaning that is not expressed,” as the dissenting opinion in *Elias* also noted.³³⁷ Furthermore, as the dissenting opinion in *Elias* pointed out, New York law precludes a court from divining a defamatory meaning from a “strained or artificial construction.”³³⁸ The *Elias* majority’s strained construction of the statement—imputing statements about a specific incident to every single member of the named group—is different from the unambiguous charge of criminality in the editorial at issue in *Brady*.³³⁹

Further straining its construction of the article, the *Elias* majority concluded that, even if the fraternity members were not alleged to have committed sexual assault as an initiation ritual, the article plausibly suggested that “they all *knew* that their fraternity brothers had.”³⁴⁰ To arrive at this conclusion, however, the court declined to examine the statements made in the article itself,³⁴¹ as the

331. *Id.* at 113 n.1.

332. *See id.* at 112.

333. *Id.* at 109 (majority opinion).

334. *Id.*

335. *Id.* at 112 (Lohier, J., concurring in part and dissenting in part). The *Elias* majority held that “the Article can reasonably be read as describing a fraternity in which many members committed gang rapes and all members were aware of the crimes.” *Id.* at 109 n.9 (majority opinion).

336. *Id.* at 114 (Lohier, J., concurring in part and dissenting in part).

337. *Id.* (quoting *Tracy v. Newsday, Inc.*, 155 N.E.2d 853, 855 (N.Y. 1959)); *see also* *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 796 (App. Div. 1981) (rejecting the defendant’s argument that the statement in full expressed an opinion and was thus entitled to greater deference).

338. *Elias II*, 872 F.3d at 114 (Lohier, J., concurring in part and dissenting in part) (quoting *Golub v. Enquirer/Star Grp., Inc.*, 681 N.E.2d 1282, 1283 (N.Y. 1997)).

339. *Id.*

340. *Id.* at 109 (majority opinion) (emphasis added).

341. *See id.*

Brady intensity of suspicion test requires.³⁴² Instead, the Court relied on statements made by *Rolling Stone* journalist Sabrina Rubin Erdely in an interview after the publication of the offending article.³⁴³ In that interview, Erdely characterized life at the fraternity as a place where “people are living their lives very closely with one another. . . . [I]t seems impossible to imagine that people didn’t know about this.”³⁴⁴ The court then compared this extrinsic statement directly to the allegedly defamatory statement in *Brady* (“It is inconceivable to us that so much misconduct could have taken place without the guilty knowledge of the unindicted members of the department.”).³⁴⁵ In so doing, the *Elias* court unwisely focused its inquiry on a statement outside the allegedly defamatory article and one which the court decided, in the same opinion, was not subject to an action for defamation.³⁴⁶

The resulting holding is based on an apples-and-oranges comparison. The statement in *Brady* was a direct charge of criminality that unequivocally labeled all group members unindicted coconspirators.³⁴⁷ The *Rolling Stone* article contained no such explicit charge, so the *Elias* court elected to base its finding in part on a statement *not found* in the article itself and one that it had declared nondefamatory.³⁴⁸ The resulting decision is thus an unnecessarily strained and broad application of *Brady*’s intensity of suspicion test unsupported by New York case law.

C. Public Policy Requires New York To Adopt the Restatement Approach

This Part envisions an alternate scenario in which the Second Circuit decided to certify the small-group defamation question to the New York Court of Appeals. It argues that New York should adopt the majority *Restatement* approach as a matter of policy to protect reporting hat critiques institutional failure.

It is admittedly difficult to argue a position that would insulate the erroneous reporting in *Elias* from defamation liability. Sabrina Rubin Erdely and *Rolling Stone* made basic and avoidable errors in reporting about sexual assault at UVA.³⁴⁹ Furthermore, PKP and its individual members faced undeniable harm when the offending article was published and disseminated rapidly throughout the world.³⁵⁰ Defamation law is designed to provide remedies for the harm to reputation posed by recklessly false allegations like those published in

342. *Brady*, 445 N.Y.S.2d at 792–93.

343. *Elias II*, 872 F.3d at 109.

344. *Id.* (omission in original) (alteration in original) (quoting *The Butch Goddess Edition*, *supra* note 41, at 8:06).

345. *Id.* (alteration omitted) (quoting *Brady*, 445 N.Y.S.2d at 787).

346. *Id.* at 109–10.

347. *Id.* at 113 n.1 (Lohier, J., concurring in part and dissenting in part).

348. *See id.* at 109–10 (majority opinion).

349. For a discussion of the errors made by *Rolling Stone*, see *supra* Section II.

350. For a discussion of the harms suffered by the fraternity members, see *supra* Section II.

Rolling Stone.³⁵¹ It also encourages responsible and thorough reporting by ensuring that journalists make reasonable efforts to confirm the veracity of their reporting.³⁵² That Erdely and *Rolling Stone* proceeded with the erroneous story might suggest that defamation liability is not strong enough to dissuade such reporting.

These concerns, however, fall away when one considers the multitude of remedies available to the defamed individuals in this case. In a separate action in Virginia, *Rolling Stone* and Erdely had already been held liable for millions of dollars in defamation damages and settlement payouts.³⁵³ In *Elias*, several individual plaintiffs successfully argued that they could bring traditional defamation claims based on details in the story that plausibly referenced them as individuals.³⁵⁴ If *Elias* had affirmed dismissal of the small-group claims, some of the plaintiffs would still have been able to proceed on other theories.³⁵⁵

The New York Court of Appeals should have little concern for the equities in abandoning the intensity of suspicion test. The remedial interest in allowing the small-group theory is substantially weakened because far stricter theories had already enabled recovery.³⁵⁶ The success of the plaintiff's *other* claims highlights the extraneous, indeed excessive, recovery that the small-group claim enables. *Elias* represents a classic instance of a case where good facts make bad law. The case's accounting of egregious reporting screamed for a remedy, and the court granted it with little regard for the effect of the holding on subsequent reporting.

Both the holding and the sustained intensity of suspicion test represent a particularly dangerous doctrine in an investigative age, where a variety of reporting has exposed structural injustices within groups of various sizes.³⁵⁷ Consider the trio of cases supporting the application of the intensity of suspicion test: *Fawcett*, *Brady*, and *Elias*. Recall that *Fawcett* involved defamatory statements made against a football team of over sixty players.³⁵⁸ *Brady*, meanwhile, involved a police department consisting of fifty-three officers.³⁵⁹

Now consider the types of journalism punished by all three cases. In *Fawcett*, the reporting aimed to expose a rampant and independently

351. See *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 54 (Okla. 1962) (explaining the rationale for defamation).

352. See David M. Cohn, Comment, *The Problem of Indirect Defamation: Omission of Material Facts, Implication, and Innuendo*, 1993 U. CHI. LEGAL F. 233, 251 n.122 (suggesting that defamation law promotes responsible reporting).

353. John Bacon, *Jurors Award \$3 Million to UVA Administrator Defamed by 'Rolling Stone,'* USA TODAY (Nov. 7, 2016, 9:22 PM), <http://www.usatoday.com/story/news/nation/2016/11/07/jurors-weigh-damages-rolling-stone-defamation-trial/93416190/> [<http://perma.cc/4K77-U4PT>]; Sydney Ember, *Rolling Stone To Pay \$1.65 Million to Fraternity over Discredited Rape Story*, N.Y. TIMES (June 13, 2017), <http://nyti.ms/2slxpel> [<http://perma.cc/LWG4-ZK6Z>].

354. *Elias II*, 872 F.3d 97, 106–07 (2d Cir. 2017).

355. *Id.*

356. See *id.* (allowing other claims beyond the small-group claim to proceed).

357. See *supra* Section I.

358. *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 47 (Okla. 1962).

359. *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 788 (App. Div. 1981).

corroborated wave of drug abuse among college football teams throughout the country.³⁶⁰ To do so, it highlighted in part the individual actions of the Oklahoma football team.³⁶¹ Similarly, in *Brady*, the opinion editorial sought to expose the corruption that conceivably remained in a police department that had been undeniably corrupt in the past.³⁶² Finally, in *Elias*, the reporting sought to cover a rampant culture of sexual assault and recklessness that characterized campus life throughout the United States.³⁶³ It supplemented this otherwise legitimate reporting with its false reporting about the alleged rape at PKP.³⁶⁴

The group defamation theory in all three cases would have been presumptively invalid under the *Restatement* approach as involving groups twice the size of the *Restatement* benchmark.³⁶⁵ But the multifactorial approach of the intensity of suspicion test enabled the claims to survive.³⁶⁶ The intensity of suspicion test, therefore, makes it more likely that cases indicting collective group failure—such as pervasive drug use in college football, corruption in police departments, and sexual assault in fraternities—will give rise to prima facie claims of defamation.³⁶⁷

Press indictments of collective failure, however, have been traditionally protected from defamation liability.³⁶⁸ In *Sullivan*, the Court refused to allow a defamation claim for critiques of a police department's repressive police tactics.³⁶⁹ In *Rosenblatt*, it protected an editorial critiquing the malfeasance rampant in a parks department.³⁷⁰ While both of these cases involved public departments, they share a common thread more relevant to *Elias*: they focused on a "collective failure of an entity or group" over anything that "can reasonably be traced to individual failures . . ."³⁷¹ The failing in *Sullivan* was a racist police department, not necessarily a racist plaintiff.³⁷² The failing in *Rosenblatt* was a dysfunctional agency, not necessarily a dysfunctional supervisor.³⁷³

The failing in *Elias* was a fraternity ensconced in rape culture, not necessarily a fraternity where every member commits or has guilty knowledge of

360. *Fawcett*, 377 P.2d at 46–47.

361. *Id.* at 47.

362. *Brady*, 445 N.Y.S.2d at 787.

363. *Elias II*, 872 F.3d 97, 114 (2d Cir. 2017) (Lohier, J., concurring in part and dissenting in part).

364. *Id.* at 102–03 (majority opinion).

365. See RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (AM. LAW INST. 1977).

366. See, e.g., *Elias II*, 872 F.3d at 97 (allowing the group defamation claim to proceed).

367. See Stern, *supra* note 14, at 969 ("Accordingly, the flexibility offered by multi-factor approaches is accompanied by greater resistance to defendants' summary judgment motions, and therefore the costs associated with permitting more claims to proceed.").

368. King, *supra* note 75, at 352.

369. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282–83 (1964).

370. *Rosenblatt v. Baer*, 383 U.S. 75, 78, 83 (1966).

371. King, *supra* note 75, at 352.

372. See *Sullivan*, 376 U.S. at 258.

373. See *Rosenblatt*, 383 U.S. at 82.

a specific rape.³⁷⁴ Rather, the article critiqued the university—and, by extension, the fraternity—for creating an enabling environment where rapes, like the one alleged, were more likely to occur.³⁷⁵ When referencing the group, the article indicted nonfeasance and apathy.³⁷⁶ The reading that it suggested *every* member committed or at least knew about the alleged rape is implausible by comparison.

By reading such collective indifference to give rise to defamation liability, however, the Second Circuit threatens to chill necessary reporting on institutionalized cultures of violence that remain entrenched in companies, governments, and groups across the United States. Unlike the *Restatement* approach, which offers courts a rough heuristic to follow when applying the doctrine—and would have resulted in dismissal of the claims in *Elias*—journalists must now wade through a multifactorial test that will make the outcome of such litigation less predictable.³⁷⁷ This reality threatens to give publishers pause before publishing claims indicting group behavior. Litigation poses significant costs for journalists, especially in an age defined by aggressive litigation tactics against the media.³⁷⁸

Elias also has breathed new life into the minority intensity of suspicion test that threatens to slowly erode the presumption of immunity afforded by the *Restatement* approach. Previously, *Fawcett* and *Brady* were considered two outliers in a small-group defamation regime that largely followed the *Restatement* approach.³⁷⁹ *Elias* added the authority and influence of the Second Circuit to this one-sided debate.

Moreover, the *Elias* decision risks moving the benchmark for the analysis of small-group defamation claims in United States courts. The decision was lauded by legal observers.³⁸⁰ In *Vasquez v. Whole Foods Market*,³⁸¹ the defendants argued that the court should follow *Lines v. Cablevision Systems Corp.*³⁸² and reject the plaintiffs' group libel claim.³⁸³ Instead of using the *Restatement*

374. See *supra* Section II for a discussion of the article's focus on a culture indifferent to sexual assault.

375. See *supra* Section II.

376. See *supra* Section II.

377. Cf. Stern, *supra* note 14, at 984 (“The [intensity of suspicion] test thus carries an unpredictability that inhibits speech shielded and therefore encouraged by the Restatement's more intelligible approach.”).

378. See, e.g., Jeffrey Toobin, *Gawker's Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER (Dec. 19, 2016), <http://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment> [<http://perma.cc/28S3-Q443>].

379. See Stern, *supra* note 14, at 967 (“Oklahoma and New York have remained lonely enclaves of official embrace of the [intensity of suspicion] test.”).

380. See, e.g., Jonathan Turley, *Like a Rolling Stone: Defamation Lawsuit Against Magazine Reinstated by Second Circuit*, JONATHAN TURLEY (Sept. 20, 2017), <http://jonathanturley.org/2017/09/20/like-a-rolling-stone-defamation-lawsuit-against-magazine-reinstated-by-second-circuit/> [<http://perma.cc/JA7A-MGBA>] (agreeing with the decision and stating that the case was “an important addition to group defamation case law”).

381. 302 F. Supp. 3d 36 (D.D.C. 2018).

382. No. 04-CV-2517, 2005 WL 2305010 (E.D.N.Y. Sept. 21, 2005).

383. *Vasquez*, 302 F. Supp. 3d at 65.

framework, the court explained that the plaintiffs' group libel claim could go forward because *Lines* would have been decided differently in a post-*Elias* world: "[I]f three plaintiffs of a 53-member fraternity could advance a small-group theory of defamation, then surely one plaintiff of a 14-person group of terminated employees could do so, too"³⁸⁴

The case is telling because it represents the inherently uncertain nature of group defamation and how courts latch on to heuristics and precedent to create certainty in this area of the law. *Elias* threatens to unmoor small-group defamation from the *Restatement's* safe harbor, undermining investigative journalism at a time when it is proving vital to public discourse.

VI. CONCLUSION

Contemporary journalism has shown great power in shedding light on and even reforming institutions that have been previously resistant, if not impervious, to change. The *Elias* court's expansive small-group defamation doctrine should be reconsidered in light of that context. Because of the dearth of authority on defamation and contemporary journalism, the Second Circuit should have certified the small-group defamation question to the New York Court of Appeals. If the New York Court of Appeals ever considers the question, it should choose to generally limit small-group defamation claims as actionable only for groups with twenty-five or fewer members to promote and protect the media as a vigorous adversary against institutional injustice in the United States.

384. *Id.*