ALL I REALLY NEED TO KNOW ABOUT DEFAMATION LAW IN THE TWENTY-FIRST CENTURY I LEARNED FROM WATCHING HULK HOGAN

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If there is a body of law that is ripe for reappraisal in light of changing times, it is defamation law. Changes in how news is reported and entertainment is produced have blurred some of the traditional legal rules regarding the distinction between actionable fact and nonactionable fiction. At the same time, advances in technology and changes in society have caused some—most notably Supreme Court Justices Thomas and Gorsuch—to question whether the traditional New York Times Co. v. Sullivan *standard used in defamation cases should remain good law. Indeed, it is fair to question whether modern defamation law is equipped to deal with a news and entertainment landscape that increasingly blurs the lines between fact and fiction. This Article suggests that courts need to update their approach when dealing with defamation claims stemming from political commentary, parody, works of fiction based on real events, reality TV, and similar publications. In doing so, they might consider looking to one area of popular entertainment that has long blurred the line between reality and fiction: professional wrestling. This Article explores a defamation claim brought by Hulk Hogan years ago and how the decision in the case illustrates some of the shortcomings of the courts' approach to defamation cases involving publications that blur the line between reality and fiction.*

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TABLE OF CONTENTS

> *Every fiction writer knows that his creation is in some sense false.*
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> - *Guglielmi v. Spelling-Goldberg Productions, 603 P.2d 454, 461 (Cal. 1979)*

INTRODUCTION

Most Americans agree that fake news is a significant problem.[1] But it turns out that, as a society, we aren't terribly good at distinguishing between reality and fiction when it comes to the news. In one Pew Research Center study, 16 percent of respondents indicated that they had unknowingly shared a made-up news story.[2] The problem isn't limited to news consumers. In one study, 80 percent of journalists admitted to having been tricked by false information.[3] And while the interviewed journalists denied having published false information themselves, some said that they knew of other journalists who had unknowingly posted information about a news event that later turned out to be untrue.[4]

But it's not just that Americans aren't great at distinguishing between fake news and real news; we also aren't great at distinguishing fake news from parody and distinguishing opinion from fact. In one study, 21 percent of Republican respondents indicated that that they believed the following statement from the conservative satirical website *The Babylon Bee* was "definitely true": "CNN news anchor Anderson Cooper said his belief that Trump colluded with Russia is unshakable; it will not change regardless of statements or evidence to the contrary."[5] Similar numbers were reported for the believability of satirical statements for both Republicans and Democrats.[6] Other studies report both a lack of

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1. *See* Amy Mitchell et al., *Many Americans Say Made-Up News Is a Critical Problem That Needs To Be Fixed*, PEW RSCH. CTR. (June 5, 2019), https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/. *But see* Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357, 411 (2020) (arguing that fake news can promote social cohesion between like-minded people).

2. Michael Barthel et al., *Many Americans Believe Fake News Is Sowing Confusion*, PEW RSCH. CTR. (Dec. 15, 2016), https://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/.

3. *See* INST. FOR THE FUTURE, FALSE INFORMATION IN THE CURRENT NEWS ENVIRONMENT 5 (2018), https://www.iftf.org/fileadmin/user_upload/images/DigIntel/1_False_information_in_current_news_FINAL_031119.pdf.

4. *Id.* at 6.

5. R. Kelly Garrett et al., *Too Many People Think Satirical News Is Real*, CONVERSATION (Aug. 16, 2019), https://news.osu.edu/too-many-people-think-satirical-news-is-real/.

6. *Id.* Democrats were more likely than Republicans to believe that satirical pieces appearing on *The Onion* were definitely true. *Id.*

confidence and a lack of ability on the part of participants to distinguish between fact and opinion.[7]

These kinds of cognitive deficiencies are particularly concerning given the sheer volume of made-up news, misleading memes, internet deepfakes, and other forms of deceptive information prevalent in today's society.[8] The blurring of reality and fiction extends beyond coverage of the news. For example, there is often little *reality* in "reality TV shows," as producers frequently contrive situations in order to increase drama and conflict among participants.[9] Reality TV producers have also become adept at creative editing—sometimes known as "frankenbiting"—that results in a resequencing of events or dialogue in order to advance a storyline.[10]

As news and entertainment increasingly blur the line between fiction and reality, technology has increased the potential for defamatory publications to reach a wider audience. One result of these societal changes is the increased potential for defamation lawsuits. Whereas the Supreme Court's early defamation decisions involved defamatory statements that were easily susceptible of being proved true or false, modern defamation cases more frequently involve publications that straddle the line between fact, on the one hand, and opinion, fiction, satire, parody, hyperbole, and other forms of speech that have an air of "truthiness" to them, on the other.[11]

These changes pose particular concerns for courts. Just as many individuals are not particularly good at distinguishing fact from opinion and fact from parody, courts often struggle to distinguish between actionable false statements of fact and nonactionable statements of opinion, parody, and other similar forms of speech.[12] Courts have developed various multifactor tests to aid in this determination, but it is sometimes difficult to predict how a court will rule on the issue of whether a particular statement is sufficiently

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7. *See infra* notes 273–78 and accompanying text.

8. *See* Katy Steinmetz, *How Your Brain Tricks You into Believing Fake News*, TIME (Aug. 9, 2018, 6:19 AM), https://time.com/5362183/the-real-fake-news-crisis/.

9. *See infra* Subpart II.C.

10. *See* Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs "Illegal Contests" in Violation of Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 141, 162–63 (2007).

11. *See Truthiness*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/truthiness (last visited Mar. 20, 2022) (defining "truthiness" as "a truthful or seemingly truthful quality that is claimed for something not because of supporting facts or evidence but because of a feeling that it is true or a desire for it to be true").

12. *See* Dunlap v. Wayne, 716 P.2d 842, 848 (Wash. 1986) (noting the difficulty courts have experienced in trying to determine when speech is nonactionable opinion).

factual to be actionable.[13] The result has been a confusing and sometimes contradictory body of law.[14] Part of the difficulty stems from the need to balance the competing interests in such cases. The fundamental issue in most defamation cases involves balancing an individual's reputational interest against the societal interest in freedom of expression.[15] Striking the appropriate balance between these interests becomes more difficult when the speech in question involves a strange hybrid of fiction posing as truth.

In some instances—such as Representative Devin Nunes' (R-CA) defamation suits against parody Twitter accounts "Devin Nunes' Cow" and "Devin Nunes' Mom"—traditional defamation rules seem up to the task arriving at the appropriate result.[16] Traditional defamation rules pretty clearly dictate that defamation suits brought by public officials over obviously hyperbolic or satirical statements should fail. But in other instances—such as where participants have said (or have been made to appear to have said) defamatory things about others in the course of a reality TV show—the answer is not always so clear. Not surprisingly, there have been numerous defamation claims involving reality TV shows brought within the past several years.[17] Similar claims have been brought in the case of movies that are supposedly based on real events.[18] Where should courts draw the line between reality and fiction in these kinds of situations for purposes of a defamation claim?

These sorts of issues are emerging at a time when there are increasing concerns about whether existing defamation rules are up to the challenge of striking the appropriate balance between society's interests in speech rights and individuals' reputational rights. While society struggles to deal with the effects of changing technology and changing conceptions of reality, defamation law has remained largely rooted in the past. *New York Times Co. v. Sullivan*,[19] the single most

13. *See id.* (referencing different tests used to distinguish actionable false statements of facts from nonactionable statements of opinion).

14. *See infra* note 58 and accompanying text.

15. *See, e.g.*, David L. Hudson Jr., *Libel and Slander*, FIRST AMENDMENT ENCYCLOPEDIA (May 14, 2020), https://www.mtsu.edu/first-amendment/article/997/libel-and-slander.

16. *See* Colby Itkowitz, *Devin Nunes Cannot Sue Twitter Over Fake Cow Parody Account, Judge Rules*, WASH. POST (June 25, 2020), https://www.washingtonpost.com/politics/devin-nunes-cannot-sue-twitter-over-fake-cow-parody-account-judge-rules/2020/06/24/88116298-b673-11ea-a8da-693df3d7674a_story.html. The accounts mocked Representative Nunes, for example, by stating that Nunes had been voted "'Most Likely to Commit Treason' in high school." *Id.* Representative Nunes's claims were dismissed. *Id.*

17. *See infra* Subpart II.C.

18. *See infra* Subpart II.B.

19. 376 U.S. 254 (1964).

important Supreme Court decision regarding defamation,[20] was decided nearly sixty years ago, and there has not been a significant Court decision on the subject since approximately 1991.[21] Within the past several years, there has been a virtual torrent of criticism from judges, lawyers, and academics about the continued viability of the Court's *New York Times* decision.[22]

Is modern defamation law equipped to deal with a news and entertainment landscape that increasingly blurs the lines between fact and fiction? This Article suggests that courts need to update their approach when dealing with defamation claims stemming from political commentary, parody, works of fiction based on real events, reality TV, and similar publications. In doing so, they might consider looking to one area of popular entertainment that has long blurred the line between reality and fiction: professional wrestling.

Politics and political discourse have frequently been likened to professional wrestling.[23] The implication is that televised political discussion is itself essentially "fake," with the participants simply playing characters as part of the production. But commentators have also suggested that popular culture as a whole increasingly amounts to professional wrestling, "a stage-managed 'reality' in which scripted stories bleed freely into real events, with the blurry line between truth and untruth seeming to heighten, not lessen, the audience's addiction to the melodrama."[24] As the lines between truth and untruth become increasingly blurred, it should not be surprising that courts have struggled with where to draw the line on actionable defamation claims when a statement is made in a context that straddles both reality and fiction.

A twenty-year-old case involving professional wrestling may provide some guidance for courts in such situations. In 2000, professional wrestling legend Hulk Hogan sued World Championship Wrestling ("WCW") after he was allegedly defamed in the ring by another performer during a broadcast in one of the most controversial

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20. *See* David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 774 (2020) (referring to the decision and its progeny as "bedrock free speech law").

21. Arguably, the last two significant decisions from the Court concerning defamation were *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

22. *See infra* Subpart I.A.2.

23. *See, e.g.*, Donald J. Weidner, *The Common Quest for Professionalism*, 78 FLA. BAR J. 18, 20 (2004) ("Too many of our public discussions are like political food fights—more like verbal professional wrestling matches than thoughtful exchanges of ideas."); Ben Sixsmith, *Politics as Pro Wrestling*, WASH. EXAM'R (Jan. 30, 2020, 11:00 PM), https://www.washingtonexaminer.com/opinion/politics-as-pro-wrestling (discussing the "pro-wrestlification of politics").

24. Jeremy Gordon, *Is Everything Wrestling?*, N.Y. TIMES (May 27, 2016), https://www.nytimes.com/2016/05/27/magazine/is-everything-wrestling.html.

incidents in the history of professional wrestling.[25] The case raised some of the same issues that courts face today as they attempt to navigate a new landscape in which it is not always easy to distinguish real news from fake news and fact from opinion, parody, fiction, and hyperbole. The Georgia Court of Appeals' complete and utter botching of the case should serve as an example for today's courts as how not to approach such cases and why some rethinking of the defamation tort is in order.[26]

Part I of the Article provides background concerning the legal rules most applicable in defamation cases in which there is some question concerning whether a defamatory statement concerning a public figure is actionable. Part II examines some of the scenarios—including opinions and other statements on news shows, works of fiction based on real events, and depictions in reality TV—in which courts face increasing difficulty in deciding whether allegedly defamatory statements are actionable. Part III makes a connection between the changing nature of modern news and entertainment with "kayfabe" in professional wrestling, the practice of maintaining the illusion of reality within an inherently "fake" setting. Part IV discusses how in the 1990s, professional wrestling increasingly experimented with a form of blended fact and fiction known as the "worked shoot," designed to make viewers question whether what they were watching was "real." Part V then explores the Hulk Hogan defamation litigation and how the Georgia Court of Appeals' decision illustrates some of the shortcomings of the courts' approach to defamation cases involving publications that blur reality and fiction. Finally, Part VI discusses how courts need to rethink their past approaches to cases in which the line between truth and opinion and other nonactionable statements is not always clear.

I. THE ACTUAL MALICE STANDARD AND NONACTIONABLE STATEMENTS

The essence of a defamation claim is that the defendant published a false and defamatory statement about the plaintiff.[27] In the run-of-the-mill case, applying the elements of the defamation tort poses no exceptional problems for courts. But when the plaintiff is a public official or figure or when the allegedly defamatory statement falls into the gray area between provable fact and opinion, hyperbole, parody, or other forms of imaginative expression, the defamation tort poses special challenges.

25. *See* Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92, 94–95 (Ga. Ct. App. 2005).

26. *See infra* Part V.

27. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

A. The Actual Malice Standard

1. New York Times Co. v. Sullivan *and the Evolution of the Actual Malice Standard*

Lester Bruce ("L.B.") Sullivan was, in the words of his critics, "a famous racist and hater of [B]lack people and anything they stood for."[28] As a staunch segregationist, Sullivan successfully ran for police commissioner in 1959 in Montgomery, Alabama, by attacking the incumbent for supposedly being too soft on Martin Luther King Jr. and civil rights demonstrators in Montgomery.[29] When Freedom Riders arrived in Montgomery, Sullivan reportedly allowed a white mob to attack them with chains and clubs.[30]

Sullivan played a crucial role in one of the most important free speech cases in all of American history. On February 25, 1960, a group of students from Alabama State College staged a sit-in at a segregated lunch counter in Montgomery.[31] A few days later, the Governor of Alabama expelled the student-leaders from the college.[32] This prompted a large-scale student protest at the college, which armed Montgomery police ultimately broke up.[33] On March 29, 1960, the *New York Times* (the "*Times*") ran an advertisement by the Committee to Defend Martin Luther King and the struggle for freedom in the South, entitled "Heed Their Rising Voices."[34] The ad accused local police and "Southern violators" of unleashing "an unprecedented wave of terror" against civil rights demonstrators.[35] The ad appeared at a time when Americans were increasingly learning about the burgeoning civil rights movement in the South and the sometimes violent response to that movement on the part of local officials.[36] While the descriptions of the incidents in the ad were

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28. Kermit Hall, *Alabama in the 1960s*, *in* 100 AMERICANS MAKING CONSTITUTIONAL HISTORY: A BIOGRAPHICAL HISTORY 189, 191 (Melvin I. Urofsky ed., 2004).

29. *See id.* at 189.

30. *See id.* at 190.

31. Matthew Haag, *An Alabama Sit-In in 1960, an Apology and the Lifetimes Between*, N.Y. TIMES (May 30, 2018), https://www.nytimes.com/2018/05/30/us/alabama-students-sit-in-apology.html.

32. *Id.*

33. *Alabama Protest Sends 37 to Jail; Police Halt a Demonstration on Montgomery Campus—Flogging Investigated*, N.Y. TIMES (Mar. 9, 1960) [hereinafter *Alabama Protest*], https://www.nytimes.com/1960/03/09/archives/alabama-protest-sends-37-to-jail-police-halt-a-demonstration-on.html.

34. *Heed Their Rising Voices*, DOCUMENTED RTS., https://www.archives.gov/exhibits/documented-rights/exhibit/section4/detail/heed-rising-voices-transcript.html (last visited Mar. 20, 2022).

35. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256–57 (1964).

36. *See, e.g.*, Steve Rose, *Alabama, May 1963: How the Observer Captured America's Racial Tensions*, GUARDIAN (May 12, 2018, 9:13 AM), https://www.theguardian.com/media/2018/may/12/alabama-1963-unseen-

generally accurate, there were several accusations that were not. For example, the ad falsely stated that "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus" and that police padlocked the dining hall to starve protesting students into submission.[37] Neither of these things were true.

Sullivan subsequently filed a libel action against the *Times* for publishing the false and defamatory advertisement.[38] Sullivan's theory was that the ad falsely accused Montgomery police of misdeeds, and because he supervised the police as a commissioner, the ad effectively accused him of the police's misdeeds.[39] Sullivan's lawsuit was not an isolated incident. The suit was actually part of a larger effort by segregationists to combat positive media coverage of the civil rights movement.[40] By suing news outlets for libel over inaccuracies in reporting, segregationists hoped to chill media coverage of the movement.[41]

While this was a disgusting tactic, the idea to use libel suits as a tool to stifle criticism wasn't crazy. Sullivan actually prevailed at trial against the *Times*, and the jury awarded him $500,000 in damages under Alabama's libel laws.[42] Other news organizations were facing similar lawsuits, with more than $300 million in alleged damages.[43] Some reporters became gun-shy about reporting on civil rights issues for fear of facing defamation suits, and the *Times* actually discouraged its reporters from going to Alabama for fear of provoking lawsuits.[44]

After losing its appeal in front of the Alabama Supreme Court, the *Times* appealed the jury verdict in favor of Sullivan to the United States Supreme Court.[45] The appeal led to one of the most important free speech decisions in history: *New York Times Co. v. Sullivan*. Sullivan faced two potential obstacles in his quest to hold on to his $500,000 jury verdict. First was the fact that the "Heed Their Rising Voices" ad never actually referenced Sullivan.[46] Second was the Supreme Court's concern that permitting a public official, like

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photographs-civil-rights-montgomery-colin-jones; *Alabama Protest*, *supra* note 33.

37. *Sullivan*, 376 U.S. at 257.

38. *Id.* at 256.

39. *Id.* at 258.

40. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 42 (1991).

41. *Id.*; Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 468 (2020).

42. *See New York Times v. Sullivan (1964)*, BILL OF RTS. INST., https://billofrightsinstitute.org/e-lessons/new-york-times-v-sullivan-1964 (last visited Mar. 20, 2022).

43. *See* Reynolds, *supra* note 41, at 468.

44. *Id.* at 469.

45. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 263–64 (1964).

46. *Id.* at 258.

Sullivan, to recover damages stemming from criticism of official actions in office might deter the media and members of the public from expressing such criticism for fear of being sued.[47]

In order to prevent the threat of a defamation claim from having such a chilling effect on free speech, the Supreme Court held that when a public official, like Sullivan, seeks to bring a defamation action based on criticism of the official's actions in office, s/he must satisfy a demanding standard of proof.[48] First, the public official plaintiff must prove that the speaker acted with "actual malice," meaning that the speaker either *knew* what he was saying was untrue or at least entertained serious doubts about the truth of what he was saying.[49] And, the Court noted, not only does a plaintiff bear the burden of proving actual malice but the plaintiff must also do so with "convincing clarity."[50]

Eventually, the Court extended its actual malice standard to public *figures* as well as public officials.[51] Thus, the spokesperson for a private interest group who thrusts herself into the midst of a public controversy in order to sway public opinion on a matter has to establish that a defendant who says something false about the spokesperson was either knowingly lying or at least entertained serious doubts about the truth of the statement.[52] Likewise, the very famous—those with "pervasive fame or notoriety"—have assumed some risk of public comment and criticism and must therefore prove actual malice on the part of the speaker if they hope to prevail on a defamation claim.[53]

In practice, the result of litigation often hinges on whether a court classifies a plaintiff as a public official/figure or a private figure.[54] Because it requires demonstration of a defendant's subjective awareness of the falsity or probable falsity of the defamatory statement, the actual malice standard is notoriously difficult to

47. *Id.* at 279.

48. *Id.* at 279–80.

49. *Id.* Originally, the Court held that the public official must prove that the statement was made with knowledge that it was false or with reckless disregard as to its truth or falsity. *Id.* Over time, the Court clarified that this concept of "reckless disregard" included the situation in which the speaker entertained serious doubts about the truth of the statement. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

50. *Sullivan*, 376 U.S. at 285–86.

51. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

52. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

53. *See id.* at 351–52.

54. *See* Alex B. Long, *The Lawyer as Public Figure for First Amendment Purposes*, 57 B.C. L. REV. 1543, 1548 (2016) ("Given the obvious proof problems a plaintiff faces in satisfying the actual malice standard, many defamation cases are won or lost on the question of whether a plaintiff qualifies as a public figure.").

satisfy in practice.[55] Therefore, if the plaintiff is determined to be a public official or figure, the odds are that the plaintiff will lose.

2. Criticisms of the Actual Malice Standard

The *New York Times* decision and its progeny have been subjected to intense criticism over the years.[56] The criticisms have taken various forms. One criticism is simply that the actual malice standard strikes the balance so strongly in favor of the free speech interest that it allows individuals and the media to "cast false aspersions on public figures with near impunity."[57] Another criticism is that the Court provided insufficient guidance to lower courts in its decisions as to how to distinguish between public officials or figures and private figures and how to determine what qualifies as a matter of public concern.[58] This lack of guidance has produced inconsistent results, making it difficult to predict what the resolution of this all-important preliminary question will be in any case.[59]

A final criticism is that the Court's stated justifications for holding public officials/figures to the demanding actual malice standard carry less weight than they did when the cases were

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55. *See* Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. 455, 496–97 (2013).

56. *See, e.g.*, Benjamin Barron, *A Proposal to Rescue* New York Times v. Sullivan *by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 85–88 (2007) (criticizing the decision for failing to deter negligent media conduct while under-protecting individuals' reputational interests); David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 761 (2020) ("[I]t is now clear that the Court's constraints on defamation law have facilitated a miasma of misinformation that harms democracy by making it more difficult for citizens to become informed voters.").

57. *See* Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 254 (D.C. Cir. 2021) (Silberman, J., dissenting), *cert. denied*, 142 S. Ct. 427 (2021).

58. *See* Marcone v. Penthouse Int'l Mag. for Men, 754 F.2d 1072, 1082 (3d Cir. 1985) (stating that due to the lack of guidance, "courts and commentators have had considerable difficulty in determining the proper scope of the public figure doctrine"); Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1664–65 (1987) (noting that the *Gertz* approach has produced inconsistent results); Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1042 (1996) ("[T]he inherent imprecision, and hence malleability, of the public controversy requirement has precluded uniform and predictable results.").

59. *See* Long, *supra* note 54, at 1544 ("[I]t is widely acknowledged that the focus on whether an individual qualifies as a public figure often yields unpredictable results."); William P. Robinson III et al., *The Tie Goes to the Runner: The Need for Clearer and More Precise Criteria Regarding the Public Figure in Defamation Law*, 42 U. HAW. L. REV. 72, 88 (2019) (stating "there is still simply too much uncertainty with respect to which persons and entities will be deemed to be public figures, and uncertainty necessarily discourages the journalist").

decided.[60] In *Gertz v. Robert Welch, Inc.*,[61] decided in 1974, the Court articulated two justifications for requiring public officials/figures to satisfy the demanding actual malice standard.[62] One justification was that such individuals assume a certain amount of risk of negative public comment by virtue of their positions.[63] The other was that such individuals "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then [sic] private individuals normally enjoy."[64] Thus, public officials/figures have the ability to engage in a measure of self-help that private individuals lack.[65]

As the world evolved in the ensuing decades, these justifications have lost some of their strength.[66] Given the access that most Americans have to the internet, it becomes much easier for average citizens to thrust themselves into the vortex of public discussion. In addition, the ease with which social media allows individuals to spread information has exponentially increased the potential for people to be the subject of defamatory statements online after voluntarily posting information online.[67] At the same time, the internet provides a platform to individuals to combat defamation that the Supreme Court could not have conceived of in 1974 when it spoke of the "greater access to the channels of effective communication" that public figures have when compared to private individuals and, hence, the "more realistic opportunity to counteract false statements."[68]

Criticism of the *New York Times* framework increased in 2019 following a concurrence by Justice Clarence Thomas to the Court's denial of certiorari in a defamation case.[69] Justice Thomas argued

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60. *See* Douglas B. McKechnie, *The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer*, 64 HASTINGS L.J. 469, 484–85 (2013) (referring to the Court's decision as being based on an outdated concept of defamation).

61. 418 U.S. 323 (1974).

62. *See id.* at 344.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* McKechnie, *supra* note 60, at 484–85 (stating that "[t]he Supreme Court's creation of a public figure/private figure dichotomy was based . . . on a now-outdated concept of defamation.").

67. *See* Thomas E. Kadri & Kate Klonick, *Facebook v.* Sullivan*: Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 78, 84 (2019) (discussing the potential for individuals to provoke a viral reaction and become a public figure by posting information online).

68. *Gertz*, 418 U.S. at 344; *see also* Jeffrey Omar Usman, *Finding the Lost Involuntary Public Figure*, 2014 UTAH L. REV. 951, 987 (2014) (noting the lack of "channels of communication" open to most individuals at the time).

69. *See generally* McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari).

that it was time to reconsider the landmark decision.[70] Justice Thomas's concerns with *New York Times* and its progeny were not with how lower courts had applied the decisions or that changing times had called into question the underpinnings of the decisions. Instead, Justice Thomas argued that the decisions "were policy-driven decisions masquerading as constitutional law."[71] Following Justice Thomas's concurrence, commentators and litigators have picked up on Justice Thomas's theme and called for a reconsideration of *New York Times* and its progeny.[72]

In 2021, Justice Thomas once again published a dissent to the Court's denial of certiorari in a defamation case, this time involving a supposedly true story contained in a book that was turned into the movie *War Dogs*.[73] Once again, Justice Thomas cited the lack of historical support for the actual malice rule, but this time he also referenced "the doctrine's real-world effects" as another reason for revisiting the rule.[74] Justice Thomas linked the protection afforded by the actual malice rule to the "proliferation of falsehoods" in recent years and the harmful effects those falsehoods may have, citing the "Pizzagate" shooting among other examples.[75] Justice Neil Gorsuch authored his own dissent.[76] Justice Gorsuch echoed many of the same questions raised by others about whether the original justifications for the *New York Times* standard remain solid.[77] In short, while it may be too strong to suggest that the *New York Times* framework is on the verge of being cast aside, recent events have increasingly called into question the framework's continued viability.

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70. *Id.* at 676 (explaining that, despite concurring with the Court's decision not to address the plaintiff's classification as a limited-purpose public figure, "in an appropriate case, we should reconsider the precedents that require courts to [consider the classification] in the first place").

71. *Id.* In 2021, Judge Laurence H. Silberman wrote a blistering dissent in which he called for the Court to overrule the *New York Times* decision. Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting), *cert. denied*, 142 S. Ct. 427 (2021).

72. *See* Reynolds, *supra* note 41, at 480 (suggesting the Court might choose to target some of *New York Times*' "descendants" rather than overruling the decision outright); Jacqueline Thomsen, *Alleging Vengeance and 'Dubious Sources,' Devin Nunes' Attorney Presses Defamation Case Against Washington Post*, N.Y. L.J., May 20, 2021, at 2 (noting lawyer's argument that the decision needs to be reconsidered).

73. Berisha v. Lawson, 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting from the denial of certiorari).

74. *Id.* at 2425.

75. *Id.*

76. *Id.* (Gorsuch, J., dissenting).

77. *Id.* at 2426–28; *see also supra* notes 60–68 and accompanying text.

B. Nonactionable Statements

1. Opinion, Hyperbole, Parody, and Other Nonactionable Statements

Before a defendant can act with actual malice, the statement must actually be false to begin with. A statement need not be the literal, 100 percent truth in order to qualify as being "true" for purposes of a defamation claim. It is enough that the publication is "substantially true."[78] As stated by one court, "the test look[s] to the sting of the article to determine its effect on the reader; if the literal truth [would have] produced the same effect, minor differences [a]re deemed immaterial."[79] In the classic defamation case, this analysis is usually relatively straightforward.

Sometimes more complex is the issue of whether a statement is actionable as defamation to begin with. To be actionable, the statement must be capable of being proven true or false or at least imply the existence of undisclosed defamatory facts.[80] An assertion that is not capable of being proven true or false on the basis of a core of objective evidence is not actionable.[81] Thus, as the Supreme Court has explained, mere insults, name-calling, "imaginative expression," "rhetorical hyperbole," and other forms of "loose" language are not actionable. [82] Put another way, language that is "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage" cannot form the basis of a defamation claim.[83] Similarly, statements that could not reasonably be "interpreted as stating actual facts" are not actionable.[84] Thus, satire and parody are not actionable as defamation, at least where it is clear that the work was not stating actual facts.[85]

2. Problems with Courts' Treatment of Such Cases

While these sorts of distinctions seem simple enough in theory, courts have struggled when confronted with defamatory statements

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78. *See* Rouch v. Enquirer & News of Battle Creek, 487 N.W.2d 205, 214 (Mich. 1992).

79. *Id.*

80. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 21 (1990).

81. *See id.*

82. *Id.* at 17 (quoting Letter Carriers v. Austin, 418 U.S. 264, 284–86 (1974)).

83. *Id.* at 32 (Brennan & Marshall, JJ., dissenting).

84. *Id.* at 20 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

85. *See* Joseph H. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to be Understood as Fact*, 2008 UTAH L. REV. 875, 914 (2008) (explaining that "[w]hether a parody should be potentially actionable as defamation depends on whether the statement is deemed factual and thus potentially actionable, or is a matter of protected opinion and not actionable").

emanating from opinions, hyperbole, parody, and similar forms of communication. In the case of opinions, for example, one author has observed that the lower courts' attempts to distinguish between sufficiently factual statements and statements of opinion "has resulted in a muddled and often contradictory jurisprudence."[86]

A similar problem exists in the realm of parody and similar works. As Professor Joseph King observed, this area of defamation law "has been plagued by confusion and lack of consensus."[87] Most, but not all, courts agree that "the fictional or humorous nature of a publication will not necessarily insulate it from a libel claim."[88] Thus, there is no categorical exclusion for parody, satire, and similar forms of communication. Instead, some courts focus more broadly on whether the parody could "reasonably [be] interpreted as stating actual facts."[89]

Other courts, however, take what Professor King describes as a one-dimensional approach.[90] Once these courts decide that an article or other work, *as a whole*, amounts to parody, the analysis effectively stops. Then, these courts simply apply a bright-line rule that "parody cannot constitute a false statement of fact and cannot support a defamation claim."[91] But as Professor King notes, the result is that these courts "may overlook the possibility that even if the overall tenor of the parody is not believable as actual events, there may be some depicted events that are reasonably believable or the parody may imply other events or conduct that are believable as actual facts."[92] It may be possible, for example, for an otherwise satirical work to "have embedded within it an express or implied assertion of fact that would support a defamatory imputation if malice can be shown."[93] Courts applying the one-dimensional approach to parodic works may miss this subtlety.

Interestingly, courts often treat these kinds of cases as also implicating the actual malice standard. So, for example, when Hustler Magazine was sued for running an obvious parody of feminist author Andrea Dworkin, a federal court explained that Dworkin had not proved that Hustler acted with actual malice: "[I]f a speaker knowingly publishes a literally untrue statement without holding the

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86. Adam Lamparello, *The Case for Defamatory Opinion*, 25 GEO. MASON U. C.R.L.J. 301, 307 (2015).

87. King, *supra* note 85, at 914.

88. *Id.* at 916; *see also* Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92, 97 (Ga. Ct. App. 2005) (stating that one who makes statements in a fictional setting does not act with actual malice).

89. *See* King, *supra* note 85, at 917 (quoting *Milkovich*, 497 U.S. at 20).

90. *See, e.g.*, Hamilton v. Prewett, 860 N.E.2d 1234, 1247 (Ind. Ct. App. 2007).

91. King, *supra* note 85, at 878 (quoting *Hamilton*, 860 N.E.2d at 1247).

92. *Id.* at 918–19.

93. *Id.* at 927.

statement out as true, he may still lack subjective knowledge or recklessness as to the falsification of a statement of fact required by *New York Times* [*v. Sullivan*]."[94] By adding a defendant's state of mind into the analysis, these courts add another element of complexity to an already uncertain area.

C. Of and Concerning the Plaintiff

In addition, the false and defamatory statement must be "of and concerning" the plaintiff.[95] In most instances in which the issue has arisen, the defamatory publication has not specifically referenced the plaintiff but nonetheless might be understood by people familiar with the plaintiff that the statement is about the plaintiff.[96] As discussed in greater detail below, the issue of whether a publication is of and concerning a particular plaintiff is sometimes more complicated when the publication in question straddles the line between fiction and reality.[97]

II. SITUATIONS INVOLVING DEFAMATION AND ALTERED REALITY

Aside from the fact that the case involved a public official where there were special First Amendment concerns at issue, *New York Times v. Sullivan* dealt with a relatively simple scenario. The defamatory statements in question were easily capable of being proved true or false. Either "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus" or they did not.[98] Either the police padlocked the dining hall or they did not. But these kinds of straightforward scenarios are probably not the norm today in defamation cases. The following Part discusses scenarios in which the concepts of truth and fiction have become more complicated in today's world.

A. Opinions and Other Statements Not Capable of Being Taken as True When Discussing Newsworthy Events

One situation in which a defamation claim may arise based upon statements that straddle the lines between fact, opinion, hyperbole, or some other form of nonactionable statement is where a speaker appears on a news program devoted to discussion of current events.[99]

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94. Dworkin v. Hustler Mag., Inc., 867 F.2d 1188, 1194–95 (9th Cir. 1989).

95. *See* Elias v. Rolling Stone LLC, 872 F.3d 97, 105 (2d Cir. 2017).

96. *See id.* ("It is not necessary that the world should understand the libel; it is sufficient if those who know the plaintiff can make out that she is the person meant.").

97. *See infra* Part II.

98. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 257 (1964).

99. *See* Bentley v. Bunton, 94 S.W.3d 561, 566–67 (Tex. 2002) (affirming the court of appeals verdict against the host of a call-in talk show); Jones v. Heslin, No. 03-19-00811-CV, 2020 WL 1452025, at *1 (Tex. Ct. App. Mar. 25, 2020)

When assessing whether statements made on such programs could reasonably be construed as stating actual facts, courts look at the extent to which the medium may shape the expectations of the recipient. So, for example, the editorial and op-ed pages of newspapers are devoted to the expression of opinions. Thus, in the words of one author, "readers can be expected to discount the statements made in that context as more likely to be the stuff of opinion than fact."[100] As a result, the fact that a statement appeared on the op-ed page of a newspaper historically has weighed heavily in a court's determination that a reasonable reader would take the statement with a grain of salt.[101] In addition, courts also often assume that where there is discussion of matters of public concern, "the audience is prepared for mischaracterizations and exaggerations, and is likely to view such representations with an awareness of the subjective biases of the speaker."[102]

Of course, today more people get their news online or on television where there are fewer visual cues than traditional print media alerting readers or viewers to the fact that they may be reading opinion rather than fact.[103] In addition, the style of online journalism differs even from modern print journalism. One study describes online journalism as "tend[ing] to be more conversational, with more emphasis on interpersonal interactions and personal perspectives and opinions" than print journalism.[104] According to the report, there has been a "gradual and subtle shift over time and between old and

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(involving defamation claim against host Alex Jones); Aaron Keller, *Record $274 Million Verdict Awarded Against Talk Show Host After Radio Rants*, LAW & CRIME (Sept. 29, 2017, 3:12 PM), https://lawandcrime.com/high-profile/record-274-million-verdict-awarded-against-talk-show-host-after-online-rants/.

100. RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 6:12(4)(a) 6-50.2 (2d ed. 1986).

101. *See id.* at 6-50.3 ("[I]t is clear that the editorial context is regarded by the courts as a powerful element in construing as opinion what might otherwise be deemed fact.").

102. Dunlap v. Wayne, 716 P.2d 842, 848 (Wash. 1986); *see also* Edwards v. Schwartz, 378 F. Supp. 3d 468, 535 (W.D. Va. 2019) (quoting this language from *Dunlap* and Phoenix Trading, Inc. v. Loops LLC, 732 F.3d 936, 945 (9th Cir. 2013)).

103. *See* Kevin M. Lerner, *Journalists Believe News and Opinion Are Separate, but Readers Can't Tell the Difference*, CONVERSATION (June 22, 2020, 8:17 AM), https://theconversation.com/journalists-believe-news-and-opinion-are-separate-but-readers-cant-tell-the-difference-140901 ("With many readers coming to news sites from social media links, they may not pay attention to the subtle clues that mark a story published by the opinion staff.").

104. Jennifer Kavanagh et al., *Facts Versus Opinions: How the Style and Language of News Presentation Is Changing in the Digital Age*, RAND CORP. (2019), https://www.rand.org/pubs/research_briefs/RB10059.html.

new media toward a more subjective form of journalism that is grounded in personal perspective."[105]

These changes raise new concerns in defamation cases. Fox News's Tucker Carlson hosts a show that Fox describes as "an hour of spirited debate and powerful reporting"[106]—in other words, a mixture of opinion and news. In 2018, Carlson spoke about the controversy surrounding Karen McDougal's alleged affair with President Donald Trump and Trump's payments to McDougal to keep the story from going public.[107] Carlson mentioned a recent *Times* story about the incident and told viewers to assume, for the sake of argument, that the allegations reported in the story were true.[108] Carlson then told viewers, "[r]emember the facts of the story. These are undisputed. Two women approached Donald Trump and threatened to ruin his career and humiliate his family if he doesn't give them money. Now that sounds like a classic case of extortion."[109] In reality, these were not "facts"; all of the available reporting suggests McDougal had not done these things.[110] Moreover, these were not even "facts" mentioned in the article; the *Times* article never said McDougal did these things.[111] Later in the same broadcast while discussing the matter with a guest, Carlson again stated that the women in question were "threatening to make public details of [President Trump's] personal life" unless they were paid.[112] Again, the available facts suggest that McDougal did not do this, and the *Times* story—the supposed source for Carlson's statements—never claimed she did. Intentionally or negligently, Carlson was creating a fictional storyline concerning the event.

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105. *Id.*

106. *Tucker Carlson Tonight*, FOX NEWS, https://www.fox.com/tucker-carlson-tonight/ (last visited Mar. 20, 2022).

107. *See* McDougal v. Fox News Network, LLC, 489 F. Supp. 3d 174, 178 (S.D.N.Y. 2020).

108. *Id.* at 179.

109. *Id.* For a transcript of this segment, see Tucker Carlson, *Do the Mueller Filings Prove Trump Committed a Crime?*, FOX NEWS (Dec. 10, 2018), https://www.foxnews.com/transcript/do-the-mueller-filings-prove-trump-committed-a-crime.

110. *See* David Folkenflik, *You Literally Can't Believe the Facts Tucker Carlson Tells You. So Say Fox's Lawyers*, NPR (Sept. 9, 2020, 4:34 PM), https://www.npr.org/2020/09/29/917747123/you-literally-cant-believe-the-facts-tucker-carlson-tells-you-so-say-fox-s-lawye; Erik Wemple, *Opinion: First Amendment Bails Out Tucker Carlson*, WASH. POST (Sept. 24, 2020), https://www.washingtonpost.com/opinions/2020/09/24/first-amendment-bails-out-tucker-carlson/.

111. *See* Folkenflik, *supra* note 110; Wemple, *supra* note 110; Sharon LaFraniere et al., *Prosecutors Say Trump Directed Illegal Payments During Campaign*, N.Y. TIMES (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/nyregion/michael-cohen-sentence.html.

112. *McDougal*, 489 F. Supp. 3d at 184.

Despite this, a federal court in New York dismissed McDougal's subsequent defamation claim based on these statements.[113] The court focused primarily on Carlson's use of the term "extortion," which the court classified as "'loose, figurative, or hyperbolic language' that does not give rise to a defamation claim."[114] The court suggested that the context in which Carlson made the statements made it "abundantly clear that Mr. Carlson was not accusing Ms. McDougal of actually committing a crime. As a result, his statements are not actionable."[115] In the court's view, Carlson's statements could not reasonably be understood as being factual, even though the statements appeared on a show featuring "powerful reporting" broadcasted by a network devoted to news.[116]

But McDougal also alleged that Carlson's more general statement that she had approached President Trump and threatened to ruin his career and humiliate his family if he did not pay her was false and defamatory, regardless of whether such actions amounted to a crime.[117] However, according to the court, the "'general tenor' of the show should then inform a viewer that [Carlson] is not 'stating actual facts' about the topics he discusses and is instead engaging in 'exaggeration' and 'non-literal commentary.'"[118] There is more than a hint in the opinion that Carlson's statements should not be taken as stating actual facts because, in part, Carlson is essentially playing a character within a television construct. According to the court, Carlson had developed a reputation as "challeng[ing] political correctness and media bias."[119] Therefore, given Carlson's reputation, "any reasonable viewer 'arrive[s] with an appropriate amount of skepticism' about the statements he makes."[120]

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113. *Id.*

114. *Id.* at 183.

115. *Id.*

116. *See id.* at 188.

117. *Id.* at 179.

118. *Id.* at 183 (first quoting Milkovich v. Lorain J. Co., 497 U.S. 1, 20–21 (1990); and then quoting Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997)).

119. *Id.*

120. *Id.* at 183–84 (quoting 600 W. 115th Corp. v. Von Gutfeld, 603 N.E.2d 930, 936 (N.Y. 1992)). Conspiracy theorist Alex Jones has advanced similar arguments. Jones is famous for, among other things, claiming the Sandy Hook massacre was a hoax and stating that "Hillary Clinton has personally murdered children." Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html; Diane Orson, *Conspiracy Theorist Alex Jones Found Liable for Defamation in Sandy Hook Case*, NPR (Nov. 16, 2021, 5:08 AM), https://www.npr.org/2021/11/16/1056082127/conspiracy-theorist-alex-jones-found-liable-for-defamation-in-sandy-hook-case. In defending defamation claims brought against him, Jones has similarly asserted—with less success than

On the other side of the political spectrum, MSNBC's Rachel Maddow avoided liability on a defamation claim brought by the owner of conservative news outlet One America News Network ("OAN") by advancing a similar argument. During *The Rachel Maddow Show*, Maddow summarized a recent news story appearing in *The Daily Beast* in which it was reported that an OAN reporter was also "simultaneously writing for Sputnik, a Kremlin-owned news wire that played a role in Russia's 2016 election-interference operation."[121] Maddow laughed as she referenced the story (including while pointing out that President Trump encouraged viewers to watch OAN) and at one point stated, "the most obsequiously pro-Trump right wing news outlet in America *really literally is paid Russian propaganda*."[122]

Like Carlson, Maddow argued that her statement about OAN "literally" being Russian propaganda was not actionable because it did not imply an assertion of objective fact.[123] Maddow's argument was somewhat similar to that of Carlson's argument: given the "general tenor" of the program, which involves Maddow sharing her opinions on news stories, audiences realize that they are not watching a traditional news program.[124] Instead, "audiences could expect her to use subjective language that comports with her political opinions."[125] Agreeing, the court concluded, "a reasonable viewer would not conclude that the contested statement implies an assertion of objective fact."[126]

Carlson—that given his "characteristic 'passionate, hyperbolic, over-the-top style,'" viewers should understand that Jones is stating opinions, not facts. *See* Gilmore v. Jones, 370 F. Supp. 3d 630, 678 n.51 (W.D. Va. 2019) (rejecting this argument advanced by Jones in a defamation suit); Jones v. Heslin, No. 03-19-00811-CV, 2020 WL 1452025, at *4 (Tex. Ct. App. Mar. 25, 2020) (rejecting argument that Jones's statements were nonactionable statements of opinion). Indeed, in a child custody dispute, Jones's lawyer explicitly argued that Jones is merely playing a character as part of his InfoWars program, and his statements should not be taken literally. *See* Callum Borchers, *Alex Jones Should Not Be Taken Seriously, According to Alex Jones's Lawyers*, WASH. POST (Apr. 17, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/04/17/trump-called-alex-jones-amazing-joness-own-lawyer-calls-him-a-performance-artist/. In other words, the "Alex Jones" who complains about the Deep State and Illuminati on his program is a character; the real Alex Jones is a performance artist. *See id.*

121. Herring Networks, Inc. v. Maddow, 445 F. Supp. 3d 1042, 1046 (S.D. Cal. 2020), *aff'd*, 8 F.4th 1148 (9th Cir. 2021).

122. *Id.*; Rachel Maddow, *Staffer on Trump-Favored Network Is on Propaganda Kremlin Payroll*, MSNBC (July 22, 2019), https://www.msnbc.com/rachelmaddow/watch/staffer-on-trump-favored-network-is-on-propaganda-kremlin-payroll-64332869743.

123. *Maddow*, 445 F. Supp. 3d at 1048.

124. *Id.* at 1049–50.

125. *Id.* at 1050.

126. *Id.*

Despite the similar arguments and outcomes, there are at least two significant differences between the decisions in the Carlson and Maddow matters. First, unlike Carlson, Maddow accurately summarized her source material before making the controversial statement in dispute, which was at least generally in keeping with the facts as reported in the source material. Not only was Carlson's "non-literal commentary" not stating actual facts, but his characterization of the supposed underlying facts forming the basis for that commentary was also not accurate. Second and more importantly, the decision in Maddow's case examines the possibility that "a particular statement may imply an assertion of objective fact and thus constitute actionable defamation" even within the broader context of opinion or fictional work.[127] In other words, while viewers might understand not to take *everything* Maddow says literally, they might still reasonably view *some* statements as amounting to an assertion of objective fact. But in this instance, Maddow's overall tone, which included "laughing, expressing her dismay . . . and calling the segment a 'sparkly story' and one we must 'take in stride,'" clued the reasonable viewer in to the fact that her statement about OAN literally being paid Russian propaganda—made while laughing and immediately after referring to OAN as "the most obsequiously pro-Trump right wing news outlet in America"—was rhetorical hyperbole.[128] In contrast, Carlson's segment did not contain these sorts of cues as to the exaggerated nature of his statements regarding extortion and demands for payment.

B. Works of Fiction "Based on Real Events"

> This is a true story. The events depicted in this film took place in Minnesota in 1987. At the request of the survivors, the names have been changed. Out of respect for the dead, the rest has been told exactly as it occurred.
>
> - Opening credits, *Fargo* (1996)[129]

It turns out that this famous introductory text to the award-winning film *Fargo* is not substantially true. According to writer/producer Joel Coen, there were two real-life events that were used in the film (one involved a woodchipper, the other involved vehicle identification number fraud), "[b]ut beyond that, the story is made up."[130] According to his brother Ethan, the film's director, "[w]e wanted to make a movie just in the *genre* of a true story movie. You

127. *Id.* (citing Partington v. Bugliosi, 56 F.3d 1147, 1155 (9th Cir. 1995)).

128. *Id.* at 1046, 1053–54.

129. FARGO (PolyGram Filmed Entertainment 1996).

130. Bill Bradley, *The Coen Brothers Reveal 'Fargo' Is Based on a True Story After All*, HUFFPOST (Mar. 8, 2016, 3:31 PM), https://www.huffpost.com/entry/coen-brothers-fargo-true-story_n_56de2c53e4b0ffe6f8ea78c4.

don't have to have a true story to make a true story movie."[131] Other filmmakers have similarly led audiences to believe that what they were witnessing onscreen was based on real-life events when, in reality, the films were entirely or almost entirely fictional. Horror movies, in particular, often use this convention, presumably because the more "real" events seem, the more viewers can empathize with the characters and be frightened by what they experience.[132]

There are countless examples of films and other works of fiction that purport to be based on real events. Not surprisingly, some of the people who were participants in the events on which the works of fiction were supposedly based have sued for defamation when the "character" counterparts were presented in a defamatory manner.[133] One example involves the film *The Wolf of Wall Street*, based on the actions of the real Stratton Oakmont securities firm.[134] The film featured a character named Nicky Koskoff, who was depicted as using illegal drugs, having sex with prostitutes, and committing various crimes.[135] According to the film's writer and producers, the character of Nicky Koskoff was a composite of three different people, one of whom was the plaintiff, Andrew Greene.[136] The Nicky Koskoff character shared some traits with Greene, most notably that both were in-house lawyers at the firm and both wore what was described as "the worst toupee this side of the Iron Curtain."[137] Greene sued, alleging that the portrayal of the character was of and concerning him.[138] In support of his theory, he introduced the testimony of several Stratton Oakmont employees who said they all assumed the character was based on Greene, although they did not associate him with all of the character's negative traits.[139] A federal court in New York dismissed the defamation claim, citing the fictionalized nature

131. *Id.* (emphasis added).

132. Examples include *The Blair Witch Project*, *The Amityville Horror*, and *The Strangers*. *See* Orrin Grey, *12 Movies that Pretended to be Based on True Stories*, RANKER (Feb. 25, 2021), https://www.ranker.com/list/false-movies-based-on-true-stories/orrin-grey.

133. *See, e.g.*, Greene v. Paramount Pictures Corp., 813 F. App'x 728, 729 (2d Cir. 2020) (involving libel claim based on the movie *The Wolf of Wall Street*); Mossack Fonesca & Co. v. Netflix Inc., No. CV 19-9330-CBM-AS(x), 2020 WL 8510342, at *1 (C.D. Cal. Dec. 23, 2020) (involving libel claim based on the movie *The Laundromat*).

134. *See* John Marzulli, *EXCLUSIVE: $50M Defamation Lawsuit Against Makers of 'Wolf of Wall Street' Movie Can Proceed, Says Judge*, N.Y. DAILY NEWS (Nov. 30, 2015), https://www.nydailynews.com/new-york/50m-suit-wolf-wall-street-proceed-article-1.2449992.

135. Greene v. Paramount Pictures Corp., 340 F. Supp. 3d 161, 165 (E.D.N.Y. 2018), *aff'd*, 813 F. App'x 728 (2d Cir. 2020).

136. *Id.* at 166.

137. *Id.* at 165–66.

138. *Id.* at 168.

139. *Id.* at 166–67.

of the movie, the fact that the Nicky Koskoff character was a composite, and the fact that the movie contained the standard disclaimer explaining that "certain characters, characterizations, incidents, locations and dialogue were fictionalized or invented for purposes of dramatization" and that any similarity between a fictionalized character and a real person was "not intended to reflect on an actual character."[140]

Even without such a disclaimer, some courts appear to proceed from the assumption that viewers understand that "docudramas" or movies based on real events, are, in the words of one court, "more fiction than fact."[141] For example, Hollywood legend Olivia de Havilland brought defamation claims against FX Networks for FX's depiction of de Havilland in a miniseries.[142] A California appellate court questioned whether a reasonable viewer would interpret the miniseries as entirely factual.[143] According to the court, "[v]iewers are generally familiar with dramatized, fact-based movies and miniseries in which scenes, conversations, and even characters are fictionalized and imagined."[144] The Supreme Court has made a similar observation, suggesting that characterizing a work as a docudrama or historical fiction "might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed."[145]

C. Reality TV

"This is the true story of seven strangers picked to live in a house, work together, and have their lives taped."; so began the opening to each episode of MTV's groundbreaking reality series *The Real World*, which premiered in 1992.[146] The idea of filming the day-to-day lives of real people and turning it into entertainment was first tried by PBS in 1973 with its show *An American Family*.[147] But the popularity of

140. *Id.* at 165, 171 n.6, 172.

141. Partington v. Bugliosi, 56 F.3d 1147, 1155 (9th Cir. 1995).

142. de Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 630 (Cal. Ct. App. 2018).

143. *Id.* at 643.

144. *Id.*

145. Masson v. New Yorker Mag., Inc., 501 U.S. 496, 512–13 (1991).

146. *See* Bill Keveney, *'The Real World' Reunites Original Cast 29 Years Later in Same NYC Loft: 'It Was Surreal,'* USA TODAY, https://www.usatoday.com/story/entertainment/tv/2021/03/04/the-real-world-revisits-1992-first-season-reunion/6859040002/ (Mar. 5, 2021, 7:21 PM); Jessica MacLeish, *For a Time, the Story of Culture Was Told Through 'The Real World,'* RINGER (Apr. 29, 2020, 5:40 AM), https://www.theringer.com/tv/2020/4/29/21240341/the-real-world-cultural-influence-chappelles-show-parodies.

147. Matt Schudel, *Craig Gilbert, Creator of 'An American Family,' Called the First Reality TV Show, Dies at 94*, WASH. POST (Apr. 18, 2020), https://www.washingtonpost.com/local/obituaries/craig-gilbert-creator-of-an-

The Real World spawned a host of new shows based on the conceit that what viewers were watching was real.

When *An American Family* aired, its creator responded to charges that the content of the show was manipulated and sensationalized by stating, "[e]verything happened as it happened . . . . No tricks. No retakes. There's more manipulation and staging in one segment of '60 Minutes' than there is in 12 hours of 'An American Family.'"[148] But as more reality shows hit the airwaves in the 1990s and 2000s, it became clear that there was a fair amount of manipulation and staging taking place. Producers staged events in order to create storylines and engaged in creative editing to enhance drama.[149] In the process, they frequently blurred the line between reality and fiction. This is true not just with respect to storylines but also with respect to the participants. Producers alter reality in order to make a participant seem more villainous or more endearing as necessary to further the producer's preferred storyline.[150]

Reality programs have spawned a host of defamation lawsuits. One of the first was a libel suit brought in 2002 by a participant in a BBC reality show entitled *Castaway*, where the plaintiff claimed that the show was edited in such a way as to make him appear "aggressive and temperamental."[151] The plaintiff ended up recovering £16,000 in a settlement.[152] Since then, there have been multiple defamation suits brought by reality show participants who have claimed that they were defamed by the fictionalized reality that ultimately aired.[153] Not even the Kardashian family has been free from such claims.[154]

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american-family-called-the-first-reality-tv-show-dies-at-94/2020/04/18/ea66b34c-7e4e-11ea-9040-68981f488eed_story.html.

148. *Id.*

149. *See* Podlas, *supra* note 10, at 162–65 (discussing the use of staged events and selective editing on reality shows).

150. *See id.* at 162–63.

151. *See* Joel Michael Ugolini, *So You Want to Create the Next* Survivor*: What Legal Issues Networks Should Consider Before Producing a Reality Television Program*, 4 VA. SPORTS & ENT. L.J. 68, 75 (2004).

152. *See* Owen Gibson, *BBC Pays Out in Dispute with Castaway Ron*, GUARDIAN (May 20, 2002, 7:07 AM), https://www.theguardian.com/media/2002/may/20/realitytv.broadcasting.

153. *See* Ledwell v. Ravenel, 843 F. App'x 506, 507 (4th Cir. 2021); Lundin v. Discovery Commc'ns Inc., 352 F. Supp. 3d 949, 953–55 (D. Ariz. 2018), *aff'd*, 796 F. App'x 942 (9th Cir. 2020); Shapiro v. NFGTV, Inc., No. 16 Civ. 9152 (PGG), 2018 WL 2127806, at *1–2 (S.D.N.Y. Feb. 9, 2018); Mossack Fonesca & Co. v. Netflix Inc., No. CV 19-9330-CBM-AS(x), 2020 WL 8510342, at *2 (C.D. Cal. Dec. 23, 2020); Eckhardt v. Idea Factory, LLC, 2021 IL (210813), at *1 (Ill. App. Ct. Sept. 30, 2021); Klapper v. Graziano, 970 N.Y.S.2d 355, 357–58 (N.Y. Sup. Ct. 2013).

154. *See* Dominic Patten, *Kardashians "Scripted" Lawsuit for Their E! Reality Series, Says Court Filing by Widow*, DEADLINE (July 11, 2013, 4:58 PM),

To date, the defendants in these cases have generally avoided liability by having participants sign broad consent agreements, which release producers from liability based on defamation and other claims.[155] However, the cases raise an interesting question as to whether defamation claims in this context are actionable to begin with and, if so, how the *New York Times* actual malice standard should apply. Those who have studied audience response to reality TV observe that audiences are generally aware that "the settings and situations can be contrived," they notice "that many of the events presented on the shows are staged or manipulated by producers," and they understand that "the cast members routinely play up for the cameras and for other cast members."[156] In other words, many audience members realize that perhaps they should not take what is said and what occurs on these programs as reflecting actual facts.

If that is true, to what extent can statements made on reality TV be actionable as defamation to begin with? A court that takes a one-dimensional approach to defamation claims based on works of fiction or parody might conclude that nothing that is said on a reality TV show is actionable as defamation.[157] But research suggests that reality TV viewers often monitor the cast members "for moments when their artifice breaks down and they reveal their 'true' selves."[158] This would suggest that despite the fictional nature of the programs, it is possible that there may be statements that are sufficiently factual that should be actionable as defamation. But a court that takes a one-dimensional approach to works of satire or fiction might miss this type of subtlety.[159]

Reality shows also raise issues concerning the *New York Times* actual malice standard. One who writes fiction obviously has a subjective awareness that what is being written is not true; this is the nature of fiction. But does this mean that when the writer says something that might be sufficiently factual to qualify as actionable defamation that the writer has acted with actual malice? If the producers of such shows are more akin to fiction writers than documentarians, to what extent should they be held to the actual malice standard?

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https://deadline.com/2013/07/kardashians-lawsuit-widow-ryan-seacrest-539473/ (summarizing defamation claim stemming from plaintiff's characterization in *Keeping Up with the Kardashians*).

155. *See, e.g.*, *Shapiro*, 2018 WL 2127806, at *2–4; *Klapper*, 970 N.Y.S.2d at 359–61.

156. Alice Hall, *Perceptions of the Authenticity of Reality Programs and Their Relationships to Audience Involvement, Enjoyment, and Perceived Learning*, 53 J. BROAD. & ELEC. MEDIA 515, 516 (2009).

157. *See supra* note 90 and accompanying text.

158. Hall, *supra* note 156, at 516.

159. *See supra* notes 91–92 and accompanying text.

III. PROFESSIONAL WRESTLING AND THE PRACTICE OF KAYFABE

> **Kayfabe:** term used to describe the illusion (and up-keep of the illusion) that professional wrestling is not staged (i.e., that the on-screen situations between performers represent reality). Also used by wrestlers as a signal to close ranks and stop discussing business due to an uninformed person arriving in earshot. The term is said to have been loosely derived from the Pig Latin pronunciation of the word "fake" ("akefay").
>
> - Pro Wrestling Fandom.com, Glossary of Professional Wrestling Terms[160]

Professional wrestling shares some of the same traits as the other forms of news and entertainment discussed in the preceding Part. Above all, professional wrestling has a somewhat complicated relationship with the concepts of reality and fiction. As such, it potentially has something to teach courts when it comes to defamatory statements that straddle the line between fact and opinion, parody, and other forms of nonactionable statements.

Originally, to enter the world of professional wrestling was to enter a world based on illusions and secrets. The business has its roots in the traveling carnivals of the late nineteenth century.[161] Promoters would put on wrestling exhibitions in which locals could test their skill against the carnival's resident wrestler.[162] While the carnival wrestlers were tough guys who would legitimately and routinely defeat audience members, these were, after all, carnivals. So, sometimes the promoters would employ a little deception, perhaps by installing a "plant" in the audience, in order to encourage volunteers or increase the amount of money wagered.[163] Customers were "targets" or "marks," and it was the job of the carny to separate

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160. *Glossary of Professional Wrestling Terms*, PRO WRESTLING WIKI, https://prowrestling.fandom.com/wiki/Glossary_of_professional_wrestling_terms#V (last visited Mar. 20, 2022); *see also* James Grimmelmann, *The Platform Is the Message*, 2 GEO. L. TECH. REV. 217, 223 (2018) (defining kayfabe as "the unspoken contract between wrestlers and spectators: We'll present you something clearly fake under the insistence that it's real, and you will experience genuine emotion" (quoting Nick Rogers, *How Wrestling Explains Alex Jones and Donald Trump*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/opinion/wrestling-explains-alex-jones-and-donald-trump.html)).

161. LEW FREEDMAN, PRO WRESTLING: A COMPREHENSIVE REFERENCE GUIDE, at xi (2018).

162. *Id.*

163. *See Is This Guy the Only Person in the World Who Still Speaks Carny?*, RIPLEY'S (Mar. 12, 2019), https://www.ripleys.com/weird-news/last-to-speak-carny/. There is at least one reported judicial decision involving a wrestler at a carnival being convicted of a crime for breaking the leg of a customer who decided to test his luck against the wrestler. *See* Allen v. State, 54 S.W.2d 810, 810 (Tex. Crim. App. 1932).

the mark from his money.[164] Since it was important to maintain the deception that all of the carnival's attractions were on the level, carnies would often speak a secret carny language in order to keep outsiders in the dark as to what was really going on.[165] As those in the business would say, it was crucial to maintain "kayfabe."

Professional wrestling gained a reputation for being "fake" during the twentieth century as the theatricality of the events took on more importance.[166] But well until at least the 1980s, there were still plenty of paying customers who believed that at least some of what they witnessed in the ring was on the level.[167] So, people in the wrestling business believed it was necessary to preserve the illusion of reality in order to deceive the audience.[168] If too many people in the audience stopped believing that what they saw was "real" (or if the "fakeness" became too obvious to overlook), the thinking was, they might stop buying tickets. So, promoters and wrestlers did their best to maintain the illusion of reality, albeit a highly stylized version of reality. The moves wrestlers used may not have been designed to injure an opponent, but the simulated violence still needed to look as real as possible. And insiders would still close ranks and speak carny when in the presence of outsiders.[169] This devotion to maintaining kayfabe included wrestlers sometimes physically injuring outsiders who questioned whether wrestling was "fake."[170] Throughout most of

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164. *See Is This Guy the Only Person in the World Who Still Speaks Carny?*, *supra* note 163.

165. *See, e.g.*, Carol L. Russell & Thomas E. Murray, *The Life and Death of Carnie*, 79 AM. SPEECH 400, 408 (2004).

166. *See* Jamie Sharp, *Pinned Down: Labor Law and Professional Wrestling: Part I: The History of the Billion-Dollar Pro-Wrestling Industry*, 23 ENT. & SPORTS LAW. 3, 4–5 (2005) (discussing the public's increasing realization during the first half of the twentieth century that professional wrestling was fixed).

167. For example, when wrestler Eddie Gilbert ran over rival Jerry "the King" Lawler with his car in 1990 in Memphis, multiple fans called the police to report the "crime." *See* David Shoemaker, *Wrestling's Greatest Shoots, Volume 2: Doug Gilbert vs. Jerry Lawler*, GRANTLAND (June 7, 2013), https://grantland.com/the-triangle/wrestlings-greatest-shoots-volume-2-doug-gilbert-vs-jerry-lawler/.

168. In one famous incident, in 1987, the WWF fired two wrestlers who were supposedly involved in a feud after police pulled them over riding in the same car, thus shattering the illusion that they were feuding. *See* Sharp, *supra* note 166, at 5.

169. *See* Russell & Murray, *supra* note 165, at 405.

170. *See* Peter W. Kaplan, *TV Notes: ABC Reporter May Sue Wrestler Who Hit Him*, N.Y. TIMES (Feb. 23, 1985), https://www.nytimes.com/1985/02/23/arts/tv-notes-abc-reporter-may-sue-wrestler-who-hit-him.html (discussing wrestler "Dr. D." David Schultz's attack on reporter John Stossel). As another example, Florida promoter Eddie Graham supposedly told his wrestlers that if they got into a bar fight with a customer in real life and lost that they would be fired; Graham's business thrived on the perception that his wrestlers were legitimate tough guys, and he couldn't afford for his performers to be viewed as anything less. *See* Paul Guzzo, *You Won't Believe How Hard They Once Worked to Make*

the twentieth century, kayfabe was the wrestling business's form of "omerta," the Mafia code of silence.[171]

Eventually, wrestling's façade gradually gave way to reality—or at least a form of reality. No one actually believes professional wrestling is real anymore, at least in the sense that matches are legitimate competitions. Yet, the business survives. So, it's not as if those in the business today are trying to deceive the audience into believing that professional wrestling storylines and matches are 100 percent real. Everyone knows that the violence is simulated. No one tries to maintain kayfabe in this sense.

But illusions remain critical to the success of professional wrestling. There is an unspoken contract between performers and audience members. For their part of the deal, performers will create an illusion of competition and violence that advances an interesting plot. As their part of the deal, audience members will suspend disbelief and respond appropriately to what transpires in order to aid the performers in their task (provided the performers do a good job). Wrestling fans accepted the fact that when Brock Lesnar administered his famed F-5 finishing move, his opponent was not going to get up.[172] Wrestling fans accepted the fact that when Dwayne "the Rock" Johnson delivered the People's Elbow to his opponent, the match was over.[173] Wrestling fans accepted these things not because they believed that the moves had actually injured the other wrestlers but because everyone involved—performers and audience members alike—understood that acceptance of this fake reality was necessary to the orderly resolution of the matches.

Ultimately, it is a mistake to view professional wrestling in terms of being "real" or "fake." Wrestling is based on an agreed upon suspension of disbelief, not deception. Even back in the time when professional wrestlers did try to deceive their audiences, the blood the wrestlers spilled and the neck and spinal injuries they sometimes suffered were most definitely real. But for several decades, there has been an understanding between promoters and viewers as to the product. Historically, wrestlers played either the role of a good guy

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Professional Wrestling 'Real,' TAMPA BAY TIMES (Mar. 19, 2020), https://www.tampabay.com/news/hillsborough/2020/03/19/you-wont-believe-how-hard-they-once-worked-to-make-professional-wrestling-real/.

171. *Omerta*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/omert%C3%A0 (last visited Apr. 1, 2022).

172. *See* Tarun Nair, *Brock Lesnar's Signature Destructive Finisher Move - The F5*, REPUBLICWORLD, https://www.republicworld.com/sports-news/other-sports/brock-lesnars-signature-destructive-finisher-move-the-f5.html (Sept. 25, 2019, 11:46 IST).

173. *See* Bob Garcia IV, *The Rock Invented the People's Elbow to Make The Undertaker Laugh*, SPORTSCASTING (June 13, 2020), https://www.sportscasting.com/the-rock-invented-the-peoples-elbow-to-make-the-undertaker-laugh/.

(the babyface) or a bad guy (the heel).[174] Within these broad categories, there are also various archetypes that wrestling fans are familiar with. For example, there is the "badass-good-guy-who-takes-no-crap-from-authority-figures" character (e.g., Stone Cold Steve Austin); the "cowardly bad guy" character (e.g., the Honky Tonk Man and Seth Rollins); and "the egotistical bad guy" character (e.g., Gorgeous George, Ric Flair, Maxwell Jacob Friedman, and others too numerous to list). Modern viewers accept that they are watching characters and that what they see is only "real" within the fictional world the promoters have created.

IV. HULKING UP: THE RISE OF HULK HOGAN, WORLD CHAMPIONSHIP WRESTLING, AND THE "WORKED SHOOT"

In 2000, professional wrestler Hulk Hogan, using his real name of Terry Bollea, sued his employer, WCW, on a defamation theory.[175] The claim stemmed from statements made in the wrestling ring during a pay-per-view event by one of WCW's writers, who also had an onscreen presence at WCW events.[176] The incident is one of the most famous and controversial in modern wrestling history. It also illustrates several of the problems that courts face when dealing with nontraditional defamation claims.

A. The Rise of Hulk Hogan and World Championship Wrestling

Hulk Hogan was born as Terry Bollea.[177] After wrestling under the names "Terry Boulder" and "Sterling Golden," Bollea eventually settled on the name "Hulk Hogan" after going to work for promoter Vince McMahon, Sr., in 1979.[178] By the mid-1980s, Hogan was not only the most famous professional wrestler in the world but also was one of the most famous people in the world. He appeared in movies, television shows, and on magazine covers.[179] In 1987, Hogan, along with Andre the Giant, headlined the legendary WrestleMania III pay-per-view event, which set a then record for indoor attendance (supposedly over ninety-three thousand) and shattered previous pay-per-view purchasing records.[180] In short, "Hulkamania" ran wild in

174. *See* Cynthia Vespia, *Why Labeling Wrestlers 'Babyface' or 'Heel' Is no Longer Necessary*, FANSIDED (Oct. 14, 2019), https://fansided.com/2019/10/14/why-labeling-wrestlers-babyface-or-heel-is-no-longer-necessary/.

175. Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92, 94–95 (Ga. Ct. App. 2005).

176. *Id.*

177. *Hulk Hogan Biography*, BIOGRAPHY, https://www.biography.com/personality/hulk-hogan (last updated June 7, 2021).

178. Rachel Chang, *10 Things You May Not Know About Hulk Hogan*, BIOGRAPHY (Mar. 9, 2021), https://www.biography.com/news/hulk-hogan-facts.

179. *See Hulk Hogan Biography*, *supra* note 177.

180. *See* David Bixenspan, *How Many People Were Actually at WrestleMania III? A Deadspin Investigation*, DEADSPIN (Mar. 30, 2018, 10:29 AM),

the World Wrestling Federation ("WWF") (later renamed the World Wrestling Entertainment ("WWE")) during the 1980s and into the early 1990s.[181]

But by the early 1990s, Hogan's routine was starting to grow stale. WWF fans had heard Hogan's catchphrases ("Whatchya gonna do when Hulkamania runs wild on you?") for years, and they had watched Hogan dispatch a host of heels in matches to the point that there were few surprises left, either in the ring or on the microphone. Hogan eventually left the WWF in 1994 to join the organization's chief rival, the WCW, owned by Ted Turner.[182]

To say that the WCW was a legitimate rival to the WWF at the time would be generous. WCW was part of Ted Turner's media empire.[183] But the "wrasslin" company was viewed as something of an embarrassment by Turner executives, who had long sought to kill off the company.[184] A perpetual money loser for Turner's empire, the WCW survived in large part because of Turner's fondness for professional wrestling.[185] The hope was that the signing of Hulk Hogan would breathe new life into the company.[186]

But by mid-1995, it was clear that Hogan's act had once again grown tired, despite the new stage the WCW had provided. Tired of being bested by rival Vince McMahon, Turner gave the green light to WCW executives to develop a new program to air on Monday nights starting in September that would compete directly with McMahon's *Monday Night Raw* on the USA Network. The idea was to create "event programming" along the lines of *Monday Night Football* that fans would just have to tune in to watch.[187] The new show would be called *WCW Monday Nitro* ("*Nitro*") and would broadcast live each week with the goal of luring viewers by adding a strong dose of unpredictability to the broadcast.[188]

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https://deadspin.com/how-many-people-were-actually-at-wrestlemania-iii-a-de-1824178481. There is good reason to believe the number of attendees was inflated. *See id.*

181. Lance Tominaga, *When Hulkamania Ran Wild*, ESPN HONOLULU, https://www.espnhonolulu.com/2021/02/28/when-hulkamania-ran-wild/ (last visited Mar. 20, 2022).

182. Alex Hoegler, *Eric Bischoff Reveals Reasons Why Hulk Hogan Chose to Leave WWE for WCW*, SPORTSTER (Sept. 16, 2020), https://www.thesportster.com/news/eric-bischoff-why-hulk-hogan-left-for-wcw/.

183. *See WWE Entertainment, Inc. Acquires WCW from Turner Broadcasting Cross-Brand Story*, WWE (Mar. 23, 2001), https://corporate.wwe.com/news/company-news/2001/03-23-2001.

184. *See* GUY EVANS, NITRO: THE INCREDIBLE RISE AND INEVITABLE COLLAPSE OF TED TURNER'S WCW 5 (2018).

185. *Id.* at 2–5.

186. *Id.* at 14.

187. *Id.* at 24.

188. *Id.* at 25–26.

Hulk Hogan's role in this new undertaking would be crucial. In an effort to add to the unpredictability of *Nitro* and to revitalize Hogan's career, the WCW brain trust (led by Senior Vice President and on-air personality Eric Bischoff)[189] devised perhaps the greatest "heel turn" in the history of professional wrestling. At the Bash at the Beach, a pay-per-view event in 1996, it was revealed as part of the storyline that the character of Hulk Hogan had secretly been working with a group of former WWE wrestlers who were "invading" the WCW.[190] Fans responded as if what they were witnessing was real.[191] As trash hurled by fans rained down inside the ring, Hogan verbally spat on his former Hulkamaniacs and announced the formation of "the New World Order" ("NWO"), a faction that planned to take over the WCW.[192]

The heel turn worked. Over the next several years, the NWO storyline would help propel *Nitro* and the WCW past *Raw* and the WWE in the ratings and usher in the wrestling boom of the late 1990s.[193] The competition prompted the WWE to reformulate its own approach, triggering huge TV ratings for both organizations.[194] Perhaps not coincidentally, as the TV ratings for professional wrestling on Monday nights soared, the ratings for ABC's long-time juggernaut *Monday Night Football* declined precipitously.[195] Live wrestling broadcasts on Monday nights and pay-per-view broadcasts became "must-see" events, sometimes featuring in-ring appearances from celebrities like Jay Leno and athletes like Mike Tyson, Karl Malone, and Dennis Rodman.[196] And at the center of it all for WCW was Hulk Hogan.

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189. Eric Bischoff, PRO WRESTLING WIKI, https://prowrestling.fandom.com/wiki/List_of_professional_wrestling_terms#S (last visited Mar. 20, 2022)

190. *Id.* at 111, 123.

191. *Id.* at 124.

192. WWE, *List This! - Legends of the Fall No. 1: Hulk Hogan & NWO*, YOUTUBE (Sept. 10, 2011), https://www.youtube.com/watch?v=3hILCw66sLU. Hogan actually botched the announcement of the organization's name at the time, referring to the group as "the New World Organization." *Id.*

193. *See Monday Night Wars Ratings*, PRO WRESTLING WIKI, https://prowrestling.fandom.com/wiki/Monday_Night_Wars_Ratings (last visited Mar. 20, 2022).

194. *Id.*

195. Richard Sandomir, *TV Sports; ABC Losing its Hold on Monday Ratings*, N.Y. TIMES (Sept. 25, 1998), https://www.nytimes.com/1998/09/25/sports/tv-sports-abc-losing-its-hold-on-monday-ratings.html.

196. Lou Flavius, *Rare Footage of Hulk Hogan/Mike Tyson Confrontation Surfaces After 30 Years*, SPORTSTER (Jan. 14, 2021) https://www.thesportster.com/news/rare-footage-hulk-hogan-mike-tyson-resurface/; Joe Nguyen, *In 1998, Karl Malone and Dennis Rodman Did Battle. In a Pro Wrestling Ring.*, DENVER POST, https://www.denverpost.com/2018/07/12/karl-malone-dennis-rodman-wcw-bash-at-the-beach/ (last updated Apr. 28, 2020); *WCW/NWO Road*

B. The Rise of the "Worked Shoot"

> **Work (noun):** an event booked to happen, from the carnival tradition of "working the crowd." A work can also refer to the match itself. The opposite of a work is a shoot.
>
> **Shoot (noun):** any "real" event in the world of wrestling. . . .
>
> - Pro Wrestling Fandom.com, Glossary of Professional Wrestling Terms[197]

Unpredictability was a huge part of the success of the wrestling wars of the 1990s. Part of that unpredictability involved the incorporation of more elements of reality into the programming. In the 1980s, promoter Vince McMahon, Jr., took over the WWF from his father and decided to forego any pretense that wrestling was on the level.[198] Instead, he started developing a more cartoonish and family-friendly form of wrestling that he pointedly referred to as "sports entertainment" instead of "wrestling."[199] McMahon let viewers in on the idea that wrestling was entertainment, not sport. Gradually, promoters stopped trying to deceive audiences and both performers and fans accepted the reality that professional wrestling was only real within the fictionalized world the performers and promoters created.

But as revenues began to decline in the 1990s, both the WCW and WWE started to incorporate more reality-based elements into their performances.[200] The decision to weave elements of real life into the simulated reality of professional wrestling coincided with the rise of the internet. Prior to the internet, only a limited number of fans knew what was taking place behind the scenes in the world of professional wrestling. But the growth of the internet enabled "smart" fans to become even smarter about what was happening behind the curtain. Wrestling websites soon sprang up, increasingly reporting behind-the-scenes rumors, leaked storylines, and leaked endings to matches.[201]

The WCW's product reflected this new reality. In the world of professional wrestling, that which is real is a "shoot."[202] That which

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Wild, IMDB, https://www.imdb.com/title/tt0448264/?ref_=tt_ch (last visited Mar. 20, 2022) (including Jay Leno).

197. *Glossary of Professional Wrestling Terms*, *supra* note 160.

198. *See* Sharp, *supra* note 166, at 5.

199. *See id.*

200. *See Monday Night Wars*, PRO WRESTLING WIKI, https://prowrestling.fandom.com/wiki/Monday_Night_Wars (last visited Mar. 20, 2022).

201. *See* Matt Binder, *Pro Wrestling Learns to Accept Leaks in the Age of Social Media*, MASHABLE (Sept. 10, 2021), https://mashable.com/article/pro-wrestling-leaks-social-media.

202. *Glossary of Professional Wrestling Terms*, *supra* note 160.

is part of the act is a "work."[203] Shoots occasionally happened when, for example, one wrestler took offense to what his opponent had done in-ring and responded with something approximating a real punch. But otherwise, nearly everything that occurred at a wrestling event was a work.

During the boom of the late 1990s, the wrestling business began to experiment with the so-called "worked shoot." As described by one source, a worked shoot is "a scripted segment that takes place in a show with elements of reality being exposed, such as . . . off-screen incident[s] between wrestlers being used as fuel for an on-screen rivalr[ies] . . . . It can also be a segment that fans are meant to believe is a shoot, but is not."[204] In other words, the worked shoot blurred the line between fiction and reality by bringing some measure of reality into the fantasy world of professional wrestling. In at least some sense, the use of worked shoots represented something of a return to kayfabe; viewers were not always sure whether what they were seeing was real or fake. It was a creative device that the WCW would increasingly employ.[205]

The blurring of reality only increased when Vince Russo, a former writer for the rival WWE, was brought onboard. As WCW ratings once again began to decline in 2000, Bischoff and Russo came up with a storyline that drew upon backstage politics.[206] The idea was that there was a civil war within the WCW, with the younger wrestlers (the "New Blood") tired of being kept down by the older wrestlers (the "Millionaire's Club"), who refused to pass the torch.[207] The onscreen leader of the New Blood would be none other than Vince Russo, playing an authority figure.[208] And drawing upon real-life rumors that Hogan refused to make room for new talent, the onscreen leader of the Millionaire's Club would, of course, be Hulk Hogan.[209] Complaining that the members of the New Blood "couldn't sell out a flea market," Hogan made it clear as part of the storyline that he was "not moving aside for anybody."[210]

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203. *See id.*

204. *Id.*

205. *See* EVANS, *supra* note 184, at 84–85 (discussing a 1996 angle involving wrestler Brian Pillman designed to confuse fans as to whether in-ring incident was a genuine "shoot" by a possibly mentally unstable Pillman).

206. *See* Jordan Talbot, *Vince Russo and Ed Ferrara – 3 Months of Power in WCW*, PRO WRESTLING STORIES, https://prowrestlingstories.com/pro-wrestling-stories/vince-russo-ed-ferrara-wcw/ (last visited Mar. 20, 2022).

207. *See* EVANS, *supra* note 184186, at 445.

208. *New Blood*, PRO WRESTLING WIKI, https://prowrestling.fandom.com/wiki/New_Blood (last visited Mar. 20, 2022).

209. *Aces and Eights: WCW's New Blood Storyline Reinvented in TNA?*, BLEACHER REP. (Nov. 2, 2012), https://bleacherreport.com/articles/1394640-aces-and-eights-wcws-new-blood-storyline-reinvented-in-tna.

210. EVANS, *supra* note 184, at 445–46.

Part of the intrigue of the New Blood/Millionaire's Club angle was that the real Hulk Hogan—Terry Bollea—was actually widely believed to be unwilling to move aside for anybody.[211] In fact, his employment contract gave him that right. Bollea's contract contained a "creative control" clause, which provided that "Bollea shall have approval over the outcome of all wrestling matches in which he appears, wrestles and performs, such approval not to be unreasonably withheld."[212] Therefore, if the real Hogan did not want the Hulk Hogan character to lose a match or if he did not want the Hulk Hogan character to lose a match in a particular way, he could exercise his creative control and veto the plan proposed by the booker.

The real Hogan had a reputation as the consummate backstage politician.[213] By this point, the reputation was known both within the locker room and among internet smart marks.[214] Other wrestlers involved in the creative process complained in real life about how difficult it was to advance new ideas due to Hogan's creative control clause.[215] In one example, wrestling legend Bret Hart proposed an idea for an angle but was told that he would "have to convince Terry [Bollea]" first.[216] Once again, it was difficult to determine where the line between fiction and reality was when it came to Hogan and the Millionaire's Club.

C. Bash at the Beach

Fittingly enough, the real Hulk Hogan's legal troubles with the WCW began at the same pay-per-view event where the character of Hulk Hogan had first turned heel four years earlier: Bash at the Beach. The plan was for Hogan to wrestle Jeff Jarett, the world heavyweight champion.[217] The problem was that no one could agree on a finish to the match. Russo suggested several possible finishes to Hogan, all of which allowed Jarrett to retain the championship while still allowing Hogan to maintain the appearance of strength.[218]

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211. *See* Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92, 95 (Ga. Ct. App. 2005).

212. Bollea, 610 S.E.2d at 97.

213. Benjamin Benya, *WWE Tall Tales: 27 Stories from WrestleMania History*, BLEACHER REP. (Mar. 1, 2011), https://bleacherreport.com/articles/622872-wwe-tall-tales-27-stories-from-wrestlemania-history

214. *Id.*

215. EVANS, *supra* note 184, at 309.

216. WCW Worldwide, *Bret Hart Calls Out "William Goldberg," Defeats the Spear – WCW Monday Nitro [March 29th, 1999]*, TUMBLR (Oct. 8, 2013), https://wcwworldwide.tumblr.com/post/63481309604/bret-hart-steel-plate.

217. Lyle Kilbane, *Jeff Jarrett Was "Thoroughly Disgusted" with Bash at the Beach Fiasco*, INSIDE THE ROPES (July 10, 2021), https://itrwrestling.com/news/jeff-jarrett-was-thoroughly-disgusted-with-bash-at-the-beach-fiasco/.

218. EVANS, *supra* note 184, at 478.

Eventually, Hogan agreed to such a finish.[219] But Hogan subsequently changed his mind and, invoking his creative control clause, announced that he did not agree to Russo's planned finish.[220]

This is where memories start to differ, and things become complicated. In retrospect, it is difficult to understand how the average wrestling fan was even supposed to make sense of what Russo supposedly had planned. But the short version is that Hogan agreed to a finish in which Jarrett would literally lie down in the ring and allow Hogan to pin him, thus allowing Hogan to leave with the championship belt and setting up a future match with another wrestler, Booker T.[221] Hogan would then deliver a promo accusing Russo of instructing Jarrett to lie down and ruining the company.[222] According to the plan, Hogan would leave the arena in a huff, along with Bischoff, in an attempt to lead everyone to believe that Jarrett's act of lying down was a shoot and not part of the script.[223] Russo would then later appear on the show and, in keeping with the New Blood/Millionaire's Club storyline, deliver a promo excoriating Hogan for being part of the old guard that refused to pass the torch.[224]

All of this went according to plan until, as Hogan alleged, Russo went off script during his promo.[225] Here is where reality and fiction once again became blurred. When Russo entered the ring, one of the announcers observed, "that's not Vince Russo, the character. That's Vince Russo, the boss!"[226] Another announcer informed viewers that "this is real-life here, fans."[227] Russo then delivered a promo in which he complained about the "b[******]t of the politics behind that curtain" and advanced the storyline about the members of the New Blood, who actually "give a s[**]t about this company," being held back by the veterans.[228] And as an example of the veterans who didn't "give a s[**]t about [the] company," Russo singled out "that g[*****]n politician Hulk Hogan."[229] Russo then referenced the actual, real-life negotiations he had been having with Hogan over the planned match with Jarrett and complained about the real-life fact that "Hulk Hogan want[ed] to play his creative control card."[230] Russo then promised

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219. @CoolGuy41, *Vince Russo Shoots on Bash at the Beach 2000*, YOUTUBE (July 11, 2020), https://www.youtube.com/watch?v=hJgiBsdHAUI.

220. EVANS, *supra* note 184, at 478.

221. @CoolGuy41, *supra* note 219.

222. *Id.*

223. *Id.*

224. *Id.* If all of this sounds convoluted, that's because it is.

225. @CoolGuy41, *supra* note 219.

226. @yiyi_marginal, *Vince Russo Fires Hulk Hogan Bash at the Beach 2000*, DAILYMOTION (Nov. 4, 2008), https://www.dailymotion.com/video/x7apq6.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

the audience that they would "never see that piece of s[**]t again."[231] He explained to the crowd that the championship belt that Hogan left with was meaningless and that Jarrett would wrestle Booker T. that night for the real championship.[232] Russo ended his promo by addressing Hogan, saying "you big bald son of a b[***]h, kiss my a[**]!"[233]

The real Hulk Hogan was not amused. While he may have agreed to the bizarre finish to the match with Jarrett, he had not agreed to the substance of Russo's promo. So, Hogan filed a defamation suit in a Georgia state court against WCW and Russo styled *Bollea v. World Championship Wrestling, Inc.*[234] While the case would involve the legal rules regarding defamation, the underlying factual dispute came down to whether Russo's statements were a shoot or simply a worked shoot.

V. DEFAMATION AT THE BEACH

As the court filings suggest, the gist of Bollea's claim was that all of Russo's statements about Hulk Hogan playing the "creative control card" in order to keep down other wrestlers were false and "were designed to make Hogan less popular with wrestling fans and less employable by wrestling organizations in the future."[235] Bollea faced at least three interrelated challenges to success: (1) were Russo's statements "of and concerning" Bollea; (2) were the statements even actionable as defamation; and (3) if so, could Bollea prove Russo made the statements with actual malice?

A. The "Of and Concerning" Requirement (or "When Is a Statement About Hulk Hogan Not Of and Concerning Hulk Hogan?")

One of the requirements of a defamation claim is that the defamatory statements must be "of and concerning" the plaintiff.[236] Stated more simply, can the statements reasonably be interpreted as being about the plaintiff?[237] This requires an analysis of whether the "'public acquainted with the parties and the subject' would recognize the plaintiff as a person to whom the statement refers."[238] The problem that Bollea faced was that Russo had never accused *Terry Bollea* of keeping other wrestlers down. Instead, Russo had accused "Hulk Hogan" of such conduct. So, were Russo's statements about

231. *Id.*
232. *Id.*
233. *Id.*
234. 610 S.E.2d 92 (Ga. Ct. App. 2005).
235. Brief of Appellant at 15–16, Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92 (Ga. Ct. App. 2005) (No. A04A1743).
236. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 288 (1964).
237. *See* Eidson v. Berry, 415 S.E.2d 16, 17 (Ga. Ct. App. 1992).
238. Elias v. Rolling Stone LLC, 872 F.3d 97, 104–05 (2d Cir. 2017) (quoting Carlucci v. Poughkeepsie, 57 N.Y.2d 883, 885 (1982)).

Hulk Hogan the real person (i.e., Terry Bollea), or Hulk Hogan the fictional character?

As a matter of law, the important question was whom members of the wrestling audience reasonably believed the statements to be about, not whom Russo actually intended to reference. If reasonable wrestling fans would believe that Russo was really referencing the actions of the real person portraying the character of Hulk Hogan, that should have been enough for Bollea to satisfy this requirement.

For example, in one case from Georgia, the defendant wrote a book with a character who was presented as "an unrehabilitated alcoholic . . . foul-mouthed, insensitive and ill-mannered [individual], a 'right-wing reactionary' and atheist, and a 'loose cannon' with a bad temper."[239] The plaintiff sued, claiming that the author stated facts about her when she referenced the character.[240] In support of her claim, the plaintiff pointed out that the character bore so many similarities to the plaintiff, whom the author had known for fifty years, that the plaintiff's friends did not discuss the book around her because they did not want to embarrass her.[241] The Georgia Supreme Court held that if members of that community could reasonably believe that the book was stating actual facts about the real-life person—even though the facts were supposedly in reference to the fictional character—the plaintiff could proceed on her defamation action.[242]

Applying that law to the facts of the case, a reasonable wrestling fan could pretty clearly believe that Russo was referring to the "real" Hulk Hogan during his promo. For one thing, the announcers insisted to the viewers that Russo was not playing a character but was really being himself.[243] If that was true, then of course the "real" Vince Russo would logically address his comments to the "real" Hulk Hogan.

Beyond that, the WCW broadcasts leading up to Bash at the Beach had actually introduced to viewers the idea that there was Hulk Hogan, the real person, and "Hulk Hogan," the character. For example, one broadcast featured an interview with Hogan, in which both the interviewer and Hogan addressed real-life happenings in the WCW.[244] The interview clearly meant to convey the impression that the interview was taking place with the "real" Hulk Hogan, not the character. At one point, the interviewer actually asked Hogan about the *character* of Hulk Hogan and whether that *character* was still

239. Smith v. Stewart, 660 S.E.2d 822, 826 (Ga. Ct. App. 2008).

240. *Id.* at 826–27.

241. *Id.* at 827.

242. *Id.* at 829.

243. @yiyi_marginal, *supra* note 226 ("That's not Vince Russo, the character. That's Vince Russo, the boss!").

244. *Hulk Hogan's Shoot Interview on the State of WCW in 2000* (Apr. 2000) (on file with author).

viable.[245] At another point, the interviewer asked Hogan a "personal" question: "Does Terry Bollea think that he needs to reinvent the persona of Hulk Hogan for the new millennium and, if so, how do *you* go about accomplishing that?"[246] The "real" Hogan then proceeded to discuss the character of Hulk Hogan.[247] Thus, viewers had been primed to recognize that there were two Hulk Hogans: the real-life person and the character. Certainly then, a reasonable viewer might believe that when Russo talked about the Hulk Hogan, who had creative control and tried to hold down younger wrestlers, he was talking about the "real" Hulk Hogan and not the character.

But, most tellingly, a reasonable viewer could believe Russo was speaking about the "real" Hogan because Russo has since admitted that this is exactly what he wanted people to believe. Amazingly, Russo claims to have viewed Hogan's match against Jarrett and Hogan's subsequent promo on Russo as a worked shoot meant to confuse fans as well as the other wrestlers—including Jeff Jarrett—as to what was really going on.[248] According to Russo, he actually wanted Jarrett and the other wrestlers to believe that the "real" Hogan had refused to let Jarrett win and that Jarrett's act of lying down was the only solution Russo could come up with.[249] And according to Russo, this is exactly what Jarrett believed in real life.[250] So, if one of the participants in the incident believed that Russo was actually "shooting" on the real Hogan, certainly a fan who tuned in that night and watched Russo deliver his promo could reasonably believe the same thing.

Somehow, all of this was lost on the courts in the matter. After Bollea filed his lawsuit, the WCW moved for summary judgment on the defamation claim.[251] The trial court granted the motion, and the Georgia Court of Appeals affirmed.[252] The court emphasized the fictional nature of professional wrestling and observed that "Russo never mentioned Bollea, only the fictional character Hogan."[253] In addition, the court pointed to Russo's sworn affidavit, in which he said that he delivered his promo "solely as his on-air character" and not as the real-life Russo.[254] (This, of course, conflicts with what announcers were telling viewers at the time and what Russo has since said he

245. *Id.*
246. *Id.* (emphasis added).
247. *Id.*
248. @CoolGuy41, *supra* note 219.
249. *Id.*
250. *Id.*
251. Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92, 95 (Ga. Ct. App. 2005).
252. *Id.* at 95, 97.
253. *Id.* at 97.
254. *Id.*

hoped viewers would believe.)[255] Remarkably, the court never considered how the average viewer might have perceived Russo's promo. Instead, in the court's view, there was a clear distinction between the real-life Hogan and the fictional Hogan and the real-life Russo and the fictional Russo. Despite all evidence to the contrary, the court seemed to believe that no one could reasonably be confused between the two. Therefore, the Georgia Court of Appeals concluded that Russo's promo "could not be understood as stating actual facts about Bollea."[256]

B. Statements Not Capable of Being Proved False (or "Are Worked Shoots Actionable?")

Several of Russo's statements about "Hulk Hogan" were clearly not actionable. For example, Russo's references to Hogan as "a g[*****]n politician" and a "big bald son of a b[***]h" clearly fall into the category of "rhetorical hyperbole" or "imaginative expression," which cannot form the basis of a defamation claim.[257] But Bollea's lawyers argued that there was at least one statement in Russo's promo that was provably false: Russo's statements to the effect that Hogan had used the creative control clause in his contract to thwart the careers of other wrestlers.[258] Hogan's lawyers were absolutely correct. This is the sort of assertion that could theoretically be proven true or false based on the testimony of other witnesses. The interesting question was whether the assertion was actually false.

According to Bollea's lawyers, "Hogan had in fact never used his creative control rights for any purpose, much less to hold back other wrestlers."[259] In support of this argument, the lawyers produced an affidavit from Bollea in which "Hogan detailed eleven specific instances in which WCW/Russo caused Hogan to be beaten in confrontations with wrestlers of lesser stature than Hogan. In none of these matches did Hogan exercise creative control. He did not change the outcome of any match."[260] Hogan's assertion that he "never used his creative control rights for any purpose" flies in the face of the statements of his colleagues at the time and what is widely accepted as gospel among wrestling fans.[261] Therefore, it would have been fascinating (for wrestling fans at least) to watch this particular issue be litigated at trial.

Unfortunately, the Georgia Court of Appeals failed to appreciate the idea that a statement can be false even with the context of a supposedly fictional presentation. Instead, the court adopted the sort

255. @CoolGuy41, *supra* note 219; @yiyi_marginal, *supra* note 226.
256. *Bollea*, 610 S.E.2d at 97.
257. *See supra* notes 82–83, 229–33 and accompanying text.
258. Brief of Appellant, *supra* note 235, at 12–13.
259. *Id.* at 6.
260. *Id.* at 14–15.
261. *Id.* at 6; *see also supra* notes 211–12 and accompanying text.

of one-dimensional approach to works of fiction or parody that Professor King previously identified.[262] Under this approach, if professional wrestling is fictional, any statements made in the course of a professional wrestling event are not actionable, even if they are grounded in fact and intended to be treated as being factual by the audience. The court agreed with the trial court's conclusion "that Russo's speech was made in a fictional context and [his] asserted opinions amount[ed] to hyperbole, which could not be proved false."[263] As such, Russo's statements were not actionable.

C. The Actual Malice Requirement (or "Does a Plaintiff Have to Establish Actual Malice in the Case of a Worked Shoot?")

Bollea's lawsuit also raised another interesting issue relevant to modern defamation law. According to Bollea, Russo was speaking as his actual self and knew what he was saying about Hogan was false.[264] According to Russo's position in court, he was speaking as a character advancing a plot.[265] According to Russo's subsequent statements, he was engaging in a worked shoot.[266] Did the supposedly altered nature of the reality of Russo's promo also alter the requirements of Bollea's prima facie case?

Hogan's lawyers conceded that Hogan was a public figure and was, therefore, required to prove that Russo made his statements with actual malice.[267] But according to his lawyers, this was a relatively easy burden to satisfy in this case. They argued that not only was it false for Russo to assert that Hogan had used his creative control power to keep down other wrestlers but also that Russo knew this assertion to be false.[268] Hogan pointed to the fact that he had agreed to lose several matches to wrestlers of lesser stature heading into Bash at the Beach, a fact that Russo was well aware of by virtue of the fact that he, as part of the booking committee, helped set up those matches.[269]

But once again, the fictional nature of professional wrestling worked to Hogan's disadvantage. According to the court, statements "*made in a fictional setting*[] do not contain the necessary consciousness of falsity because the speaker does not think he is publishing a statement of fact."[270] As a result, the court affirmed the

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262. *See supra* notes 90–91 and accompanying text.

263. Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92, 96–97 (Ga. Ct. App. 2005).

264. Brief of Appellant, *supra* note 235, at 3–4.

265. *Id.* at 6–7.

266. *See* @CoolGuy41, *supra* note 219.

267. Brief of Appellant, *supra* note 235, at 19.

268. *Id.* at 14.

269. *Id.* at 14–15.

270. Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92, 97 (Ga. Ct. App. 2005) (emphasis added).

trial court's decision to grant summary judgment to the WCW.[271] Once again, the reality that a statement could be taken by the audience as factual, even within the broader context of a fictional production, does not appear to have influenced the court's decision. As a result, the court missed the opportunity to explore how the actual malice requirement should apply when the defendant intended or at least should have known that reasonable members of the audience would treat a defamatory statement as factual in nature.

VI. LESSONS FROM *BOLLEA V. WORLD CHAMPIONSHIP WRESTLING* FOR MODERN DEFAMATION LAW

It would be tempting to argue that one lesson of Hulk Hogan's legal odyssey is that courts should treat the Tucker Carlsons and Kim Kardashians of the world like Hulk Hogan and other wrestlers. When Carlson and Kardashian appear onscreen, they are engaging in a worked shoot. They are playing fictionalized versions of themselves within the confines of the "real world" for the entertainment of viewers. If that is true and if, as the courts in *Bollea* and Carlson's case seem to believe, viewers understand that they are not watching reality, there should be no liability for defamatory statements made on such programs. If, as these courts assume, viewers know not to take what happens onscreen as stating actual facts or depicting real events, those facts and events are not capable of being defamatory. This would certainly be the easiest and cleanest way to deal with the fact that there is more fiction appearing under the guise of reality in the world of news and entertainment programming than in the past.

But, as discussed below, this approach would be at odds with the research that seems to suggest that viewers are not quite as skilled at distinguishing between fact and fiction as these courts assume.[272] Instead, courts need to take the changing nature of journalism and entertainment into account when deciding defamation cases. They need to take a lesson from the failures of the Georgia Court of Appeals in the Hulk Hogan saga.

A. The Need for Courts to Take Notice of the Blurred Line Between Reality and Fiction

Bollea illustrates how allegedly false statements—statements that are actually susceptible of being proven true or false—can be embedded within a supposedly fictional or opinion-based publication. When the WCW began to blur the lines between fiction and reality by introducing worked shoot angles into its events, it effectively surrendered the right to claim that "everyone knows wrestling is fake" when subsequently sued for a specific and otherwise plausible defamatory statement made during an event. Kayfabe was mostly

271. *Id.*
272. *See* discussion *infra* Subpart VI.A.

dead prior to the WCW's decision to introduce worked shoots into its events.[273] Fans knew that what they were seeing was "fake."[274] With the WCW's increased reliance on worked shoots, however, fans were not always so sure what was real and what was fake.[275] They may have still understood that the outcomes of matches were predetermined and that the wrestlers were portraying characters. But the WCW also wasn't putting on a play in which the performers and the audience were both in on the fact that what was taking place was not real. Instead, the WCW was putting on a performance in which only a few of the participants knew for sure what was real and what was not. If, as he says, Russo intended to trick at least a portion of the audience into believing that what was going on in his promo was real, and if, in fact, what he was saying was false, there is a good argument that he acted with actual malice. But given the WCW's intentional introduction of reality elements into its programming, a reasonable viewer could certainly be forgiven for believing that specific statements of fact based in reality were, in fact, actual statements of fact rather than kayfabe facts.

The *Bollea* decision nicely illustrates Professor King's observation about the tendency of some courts to simply classify a particular work as a whole as parody or fiction and, therefore, not actionable without stopping to analyze whether a particular statement or characterization could reasonably be interpreted as stating actual, provable facts.[276] Once the *Bollea* court concluded that professional wrestling was fictional, the quite specific factual statements that Russo made no longer seemed to matter. Context no longer matters once a broader work is classified as fiction.[277] But as the U.S. Court of Appeals for the Tenth Circuit has explained

> [t]he test is not whether the story is or is not characterized as 'fiction,' 'humor,' or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally.[278]

Yet, there are still courts that view the primary question as being about fiction or not fiction, satire or not satire. *Bollea* is a clear example of this tendency.

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273. *See supra* Part III.

274. *See supra* Part III.

275. *See supra* Subpart IV.B.

276. *See supra* notes 90–92, 262–563 and accompanying text.

277. *See* Bollea v. World Championship Wrestling, Inc., 610 S.E.2d 92, 96–97 (Ga. Ct. App. 2005) (discussing events in the context of fictionalized presentation).

278. Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 442 (10th Cir. 1982).

This approach may have been defensible in another era. But in a world of internet deepfakes,[279] reality show frankenbiting, and other "worked shoots" that have the capacity to confuse even digitally savvy viewers as to the reality of what they are watching, more careful consideration from courts should be expected. For one, courts need to be mindful of the need not to allow the "general tenor" of a publication to cloud the fact that there may still be specific statements that could reasonably be construed as stating actual facts. This is especially true where the publication blends facts with opinions and other nonactionable statements. If, for example, Fox News is going to describe Tucker Carlson's show as "an hour of spirited debate *and powerful reporting*,"[280] courts should not be so quick to accept the argument that viewers know better than to take Carlson's statements at face value when he acts as a reporter of facts.

While the "general tenor" of the publication may put viewers on notice about the need to take whatever is said with a grain of salt, it should not prevent courts from engaging in the analysis necessary to determine whether a specific allegedly defamatory statement could be interpreted by reasonable audience members as stating actual facts. Viewers may "arrive[s] with an appropriate amount of skepticism" when they watch Vince Russo, Tucker Carlson, Kim Kardashian, or a fictional portrayal of Olivia de Havilland on TV.[281] But that shouldn't preclude a court from considering whether specific statements occurring in the course of their programs are actionable as defamation, particularly where the publication gives off more than a hint of reality.

In addition, courts need to be more skeptical about how the average viewer or reader might construe the statement at issue. At present, some courts seem to have a high opinion of the average person's ability to distinguish between fact and opinion, satire, and imaginative expression. The research in the field is still developing, but so far it seems to suggest that the optimism of these judges is somewhat unfounded.

Participants in several studies demonstrated a problem recognizing satire and fake news when they saw it.[282] Participants in one study also had trouble distinguishing what was satire (which is meant to entertain or make a point) and what was fake news (which

279. Deepfake technology "leverages machine-learning algorithms to insert faces and voices into video and audio recordings of actual people and enables the creation of realistic impersonations out of digital whole cloth." Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1758 (2019).

280. *See supra* note 106 and accompanying text.

281. *See supra* note 120 and accompanying text.

282. *See supra* notes 2–7 and accompanying text.

is meant to deceive).[283] One Pew Research study found that only 17 percent of participants with low political awareness were able to correctly identify which of ten statements were stating facts (defined as something capable of being proved true or false) and which were stating opinions.[284] Participants with high political awareness fared better, but not so much better (only a 36 percent success rate) to instill a lot of confidence in their ability to distinguish fact from opinion.[285] Another study found that only 43 percent of respondents believed they could easily distinguish between fact and opinion.[286] In short, the existing evidence—empirical and anecdotal—would suggest that the reasonable viewer has less ability to distinguish between fact and nonactionable forms of expression than some courts profess to think.[287]

As Professor Lyrissa Lidsky has stated, "speakers should not be held liable for 'misreadings' of their speech by idiosyncratic or unsophisticated audience members."[288] Today's content consumer may be sophisticated enough to appreciate that a docudrama or reality TV show is not "*entirely* accurate," and that certain dramatic liberties have been taken with respect to conversations and events.[289] Likewise, viewers may understand from the "general tenor" of a political talk show that the essence of the show typically involves opinions and hyperbole rather than a neutral presentation of the news.

But given the difficulty many people have in distinguishing parody from reality and, in the news context, distinguishing fact from fiction, it is doubtful that viewers generally understand that these publications are more fiction than fact. The blurring of these lines

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283. Michele Bedard & Chianna Schoenthaler, *Satire or Fake News: Social Media Consumers' Socio-Demographics Decide*, *in* COMPANION PROCEEDINGS OF THE 2018 WORLD WIDE WEB CONFERENCE 613, 616–17 (2018), https://dl.acm.org/doi/10.1145/3184558.3188732.

284. Amy Mitchell et al., *Distinguishing Between Factual and Opinion Statements in the News*, PEW RSCH. CTR. (June 18, 2018), https://www.journalism.org/2018/06/18/distinguishing-between-factual-and-opinion-statements-in-the-news/.

285. *Id.*

286. Kevin Loker, *Confusion About What's News and What's Opinion Is a Big Problem, but Journalists Can Help Solve It*, AM. PRESS INST. (Sept. 19, 2018), https://www.americanpressinstitute.org/publications/reports/survey-research/confusion-about-whats-news-and-whats-opinion-is-a-big-problem-but-journalists-can-help-solve-it/.

287. Research also suggests that people are not particularly great at distinguishing real images from fake images. *See* Sophie J. Nightingale et al., *Can People Identify Original and Manipulated Photos of Real-World Scenes?*, 2 COGNITIVE RSCH , 2017, at 2–3, 19.

288. Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 842 (2010).

289. *See supra* note 141 and accompanying text.

has become more pronounced over time to the point that even relatively sophisticated audience members may have difficulty drawing these distinctions. Even if viewers generally understand that certain publications are more fiction than fact, it should not immunize a defendant who embeds specific false statements of fact that a reasonable person would understand as stating actual fact within the broader fictional construct. And the more the publisher attempts to create the perception that the publication is more fact than fiction, the less the publisher should be able to rely on the supposedly fictitious nature of the publication to avoid liability.

B. Worked Shoots, Actionable Statements of Fact, and Actual Malice

Bollea also illustrates the uneasy fit between the actual malice standard and the rules regarding when a statement is actionable as defamation. The question of whether a statement is actionable as defamation is completely separate from the question of whether the defendant knew the publication was false or entertained serious doubts as to its falsity. As the Supreme Court has noted, "[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact."[290] Application of the actual malice standard poses no particular conceptual challenges where a speaker misstates facts in a clearly factual setting.[291] Where, for example, a reporter incorrectly states a fact in a news story, it makes sense to ask whether the reporter knew the fact was false or entertained serious doubts as to its falsity. Reasonable people may disagree as to whether this actual malice rule is the appropriate standard to apply in such cases or complain about the difficulty in proving such subjective awareness. But at least it makes sense to ask the question.

The kinds of situations discussed in this Article—political commentary, parody, works of fiction based on real events, and reality TV—present special problems, however. When asking whether an allegedly defamatory statement is actionable, defamation law typically doesn't focus heavily on what the speaker knew or intended. It focuses primarily on whether the audience could reasonably interpret the statement as stating fact.[292] The primary inquiry is on the recipient's interpretation, not the speaker's mental state.[293] The fact that the speaker intended to engage in humor or parody but was so bad at it that the joke didn't land with the recipient does not

290. Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974).

291. *See supra* notes 84–85 and accompanying text.

292. *See supra* Subpart I.B.1.

293. Courts do sometimes consider the fact that the defendant did not intend for a statement to be taken literally as a consideration when deciding whether a statement is actionable. *See* Robel v. Roundup Corp., 59 P.3d 611, 622 (Wash. 2002) (en banc) (noting that words in question "were plainly abusive words not intended to be taken literally as statements of fact").

prevent the statement from being actionable. And, as discussed in this Article, the fact that the speaker may have been trying to make the recipient believe that the work in question was "real" is largely irrelevant if the court concludes that the recipient could not have reasonably interpreted the statement as stating actual facts about the plaintiff.[294]

But once it is determined that a defamatory statement concerning a public figure is actionable, defamation law changes gears and focuses on the speaker's mental state. To prove that the defendant published a statement with actual malice, the plaintiff must prove that the defendant knew the statement was false or entertained serious doubts as to its falsity.[295] But this results in an odd inquiry when the defendant was merely attempting to engage in satire or some similar communication. When a statement is not intended by the speaker to be taken as true, it makes little sense to ask whether the speaker knew the statement was false or had doubts about whether it was true—of course he did. The speaker never intended to hold the statement out as true to begin with. But if a court applies the actual malice standard in such cases, the result would be what one court referred to as a form of "automatic actual malice."[296]

Recognizing the odd results that may occur when the actual malice standard is applied in the case of a failed attempt at parody and similar statements, some courts have devised alternate tests in such cases. For example, in *New Times, Inc. v. Isaacks*, a case from Texas, the Texas Supreme Court considered allegedly defamatory statements contained in a satirical newspaper article about two public figures.[297] The court first concluded that the supposedly defamatory statements could not reasonably be understood as stating actual facts about the plaintiffs, in part, because the author had clearly indicated to the audience through intentionally exaggerated language that the article did not purport to state actual facts.[298] Then, the court proceeded to consider what the outcome of the case would be if the court was actually wrong in its conclusion that the

294. Where a statement is determined to be not actionable, it makes little sense to ask whether the defendant knew of the falsity of the statement or acted with reckless disregard as to its truth or falsity. The fact that the allegedly defamatory statement is not actionable to begin with effectively ends the case. But as *Bollea* illustrates, some courts go ahead and ask the question anyway, with the result being that the defendant did not act with actual malice. *See, e.g.*, Dworkin v. Hustler Mag. Inc., 867 F.2d 1188, 1194–95 (9th Cir. 1989); *see also supra* note 94 and accompanying text.

295. *See supra* note 49 and accompanying text.

296. New Times, Inc. v. Isaacks, 146 S.W.3d 144, 162 (Tex. 2004).

297. *Id.* at 148–49.

298. *Id.* at 158–59, 161.

piece could not reasonably be understood as stating actual facts.[299] In other words, does the *New York Times* actual malice standard apply when the defendant's attempts at parody failed to convey to the reader that the piece was, in fact, parody?

According to the Texas Supreme Court, the answer was "no." The court acknowledged both the conceptual difficulties and the constitutional concerns involved in holding a speaker liable when the speaker obviously knew that the statements were not true and never intended to suggest otherwise.[300] Instead, the court articulated a slightly different standard: "Did the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts?"[301] Under this standard, if the author knew that the supposedly satirical piece would be interpreted as stating actual facts or strongly suspected that reasonable readers would receive the piece in this manner, liability should attach.[302] This standard protects the inept but innocent parodist while potentially subjecting those who engage in worked shoots to liability.

Bollea provides an example of how this standard might be an effective way of dealing with such cases, both in terms of assessing whether a statement is actionable and what effect a defendant's subjective appreciation of the likely effect of the statement should have in terms of liability. In *Bollea*, Russo was, according to his own statements, trying to make people believe that what he was saying was true.[303] Thus, *Bollea* was not a case in which the public failed to get the satirist's joke; it was a case in which the speaker deliberately blurred the line between reality and fiction. If one assumes that words sometimes have their desired effect, then the fact that Russo intended to trick viewers is relevant to the question of how the reasonable viewer might have interpreted his statements. The fact that a speaker tries to make the recipient believe a statement is true is at least some evidence of how the reasonable recipient might have interpreted the statement. Thus, the fact that a defendant knew or strongly suspected that a publication presented a substantially false impression should be relevant not only on the ultimate issue of liability but on the issue of whether the publication should be actionable to begin with. And if the statement in question is sufficiently factual to be actionable, the defendant should be treated as having the requisite mental state necessary to impose liability. If the Vince Russos and Tucker Carlsons of the world wish to blur the line between fiction and reality, let them include disclaimers alerting viewers as to what they are doing.

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299. *Id.* at 161–63.

300. *Id.* at 162.

301. *Id.* at 163.

302. Turner v. KTRK Television, Inc., 38 S.W.3d 103, 120 (Tex. 2000); *see also* Hoppe v. Hearst Corp., 770 P.2d 203, 208 (Wash. Ct. App. 1989).

303. *See supra* notes 248–49 and accompanying text.

In contrast, where the defendant was simply an inept but otherwise blameless parodist or other purveyor of statements not intended to be taken as true about a public figure, the actual malice standard should shield the defendant from liability even if the statement is ultimately deemed actionable. Again, the fact that the speaker did not seriously think that recipients might take a statement as true should be some evidence of how a reasonable recipient would have interpreted the statement. But if the statement is nonetheless determined to be actionable, the actual malice standard strikes the appropriate balance of the competing interests.

CONCLUSION

Finish: the planned end of a match.

- Pro Wrestling Fandom.com, Glossary of Professional Wrestling Terms[304]

Hulk Hogan never worked for the WCW again following Bash at the Beach.[305] By the time *Bollea* finally settled in 2005, the WCW had ceased to exist. The organization limped along for the rest of 2000 and into 2001 before finally being bought out by long-time rival Vince McMahon, Jr., of the WWE.[306] Less than two years after Bash at the Beach, Hogan returned to the WWE where he tried to catch lightning in a bottle a second time.[307] Hogan was featured prominently in WWE events.[308] But a little over a year later, Hogan was gone once again due to creative differences with those who controlled the storylines.[309]

Courts had been struggling with how to deal with defamatory statements in the context of fiction, opinion, parody, and similar works for some time before Hogan filed his defamation claim against the WCW. But Hogan's lawsuit was one of the first defamation cases brought in the age in which the traditional distinctions between fact and fiction were starting to erode. These distinctions have continued to erode since Hogan's lawsuit, leaving even relatively sophisticated recipients sometimes unclear as to the nature of the content in

304. *Glossary of Professional Wrestling Terms*, *supra* note 160.

305. Hoegler, *supra* note 182.

306. *Id.*

307. *See* Nishant Jayaram, *"You Better Bring It" – WWE Icon Reveals What Vince McMahon Told Him After His WWE Return*, SPORTSKEEDA (Apr. 1, 2021), https://www.sportskeeda.com/wwe/news-hulk-hogan-reveals-vince-mcmahon-told-wwe-return-2002.

308. Alex Hoegler, *Why the Return of Hulkamania in 2002 Failed*, SPORTSTER (Oct. 1, 2021), https://www.thesportster.com/why-hulkamania-2002-failed/.

309. *See* Christopher Haring, *6 Failed Hulk Hogan Storylines (That Should Have Worked)*, SPORTSTER (Dec. 24, 2021), https://www.thesportster.com/hulk-hogan-failed-storylines-should-have-worked.

question. As the traditional distinctions continue to blur, courts will increasingly be called upon to determine whether allegedly defamatory publications are actionable. Some may find that their old approaches are not suited to the task. And at the same time, courts are being asked to assess these difficult issues at a time when the continued viability of the actual malice standard—one of the bedrock principles of modern defamation—is under increased discussion.[310]

In short, courts may need to recalibrate their approaches in such cases. Back when Hulk Hogan was still a household name, the Georgia Court of Appeals, apparently unwilling to consider the possibility that a statement made in a fictional context could be intended to be taken as stating actual facts and actually taken as true by recipients, provided an example for future courts to avoid.

310. *See* New Times, Inc. v. Isaacks, 146 S.W.3d 144, 163–64 (Tex. 2004).