PUBLIC FIGURES, ACTUAL MALICE AND PRESIDENT TRUMP’S CALL TO ACTION: 
AN ANALYSIS OF ERAMO V. ROLLING STONE

By

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To Spencer Kelly, who I love with all my heart
And to my father and fellow Gator, Tim Ford, who gave me the gift of a good education early in life – a gift that has benefited me greatly in life and opened the door to graduate studies all these years later
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PUBLIC FIGURES, ACTUAL MALICE AND PRESIDENT TRUMP’S CALL TO ACTION: 
AN ANALYSIS OF ERAMO V. ROLLING STONE

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This paper is an in-depth analysis of a high-profile defamation lawsuit that was tried in federal court and decided by a jury in November 2016 – Eramo v. Rolling Stone. It involves a university dean at an elite public institution, an iconic American magazine and an award-winning writer. The lawsuit resulted from a story Rolling Stone published in November 2014, titled “A Rape on Campus.” It went viral within days owing in large part to the sensational lead, which featured an egregious and graphic account of an alleged gang rape of a University of Virginia student at the hands of nine fraternity members on campus. The alleged rape, however, unraveled almost as quickly as the story went viral, leaving a litany of casualties in its wake. Nicole Eramo was one of them and she sued.

This case provides the prism through which the author explores the present state of libel and defamation law involving public figures. It is set against the backdrop of New York Times, Co. v. Sullivan, the 1964 Supreme Court case that changed the world of defamation law, to examine whether the actual malice standard crafted in that case strikes the proper balance between First Amendment protections for freedom of speech
and the press with the right of a person to the protection of their reputation today. The paper closes with analysis and discussion around the journalistic lessons of relevance to those in the field.
CHAPTER 1
INTRODUCTION

_Eramo v. Rolling Stone*_

On November 19, 2014, _Rolling Stone_ published an article online titled “A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA.” It was written by Sabrina Rubin Erdely, a contributing editor, and the story, which was touted as a special report, went viral within days of its publication. More than 2.7 million people viewed it.

The story opened with the brutal gang-rape of “Jackie,” a student at the University of Virginia who reported she was raped her freshman year during a fraternity party at the Phi Kappa Psi house. The alleged perpetrator, who supposedly took her to the party, was identified in the opening as “the handsome Phi Kappa Psi brother” and given a pseudonym, “Drew.” The lead narrative that followed was based exclusively on “Jackie’s” account of the attack. She alleged that “Drew” brought her to the frat party and led her upstairs to a dark bedroom where she endured “three hours of agony . . . during which, seven men took turns raping her, while two more – her date, “Drew,” and another man – gave instruction and encouragement.”

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2 Brief in Support of Defendants’ Motion to Include Witnesses on Trial Witness List, Exhibit 2, at 2, _Eramo v. Rolling Stone, LLC_, Civil Action No. 3:15-CV-00023-GEC (W.A. Va. Sept. 7, 2016), ECF No. 161-2. Exhibit 2 contains a complete copy of the Dec. 2, 2014 print article, “A Rape on Campus.” The online version was removed from _Rolling Stone’s_ website on April 5, 2015 and replaced by a full retraction of the article.


Although the rape purportedly occurred on Sept. 28, 2012, “Jackie” did not report it to university administrators until about eight months later when she was asked to meet with Shawn Lyons, an academic dean, about her failing grades. After their meeting, Lyons reached out to Nicole Eramo, the associate dean of students and head of the Sexual Misconduct Board, and asked her to speak with “Jackie,” as well.\(^5\)

Eramo had been the primary person handling intake for sexual assault victims at the university since 2008 or ’09.\(^6\) She counseled students and explained the reporting options available to them. And as head of the Sexual Misconduct Board, she also presided over formal hearings and informal resolution proceedings.\(^7\)

Eramo recalled Lyons telling her that “Jackie” had revealed something to him during their meeting, which prompted his referral to her. She, in turn, reached out to “Jackie” and met with her in May 2013.\(^8\) During that meeting, “Jackie” reported she had been sexually assaulted in September during a fraternity party when several men forced her to give them oral sex. She was unwilling to identify her attackers, Eramo recalled. And, she was unable to identify with clarity the fraternity house it happened in. Eramo offered to assist “Jackie” in filing a police report or initiating a formal proceeding at the university level – both options “Jackie” declined.


\(^6\) Id. at 129:24 – 130:18.


Over the next 18 months, Eramo met with “Jackie” half-a-dozen or more times and had at least as many email exchanges about the alleged assault. And, she figured prominently in the article. Erdely mentioned her by name 30 times and by title 10. She was the only real person pictured in the article. And the article drew heavily on her meetings with “Jackie,” even though Erdely never spoke with Eramo to gain her perspective for the piece.

Erdely pitched the concept for the story to her editors at Rolling Stone in the spring of 2014. She said that she was interested in exploring the topic of sexual assault on college campuses – a topic that had already garnered a fair amount of national media attention. Indeed, on May 1, 2014, the U.S. Department of Education’s Office for Civil Rights had released a list of 55 higher education institutions that were under investigation for possible violations of federal law over the handling of sexual violence complaints and among them was the University of Virginia.

Erdely said, she wanted to find and trace a sexual assault case on a college campus and follow it through the reporting process. She said her primary focus was exploring issues of institutional indifference, and whether it created a hostile environment for student survivors. When she finished her investigation and wrote the

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10 Id.


12 Id. at 235:3-235:5.
piece, institutional indifference was in fact its main theme. And, Nicole Eramo claimed she was portrayed as the chief villain who personified it.\textsuperscript{13}

The credibility of the lead narrative – the brutal gang rape – began to unravel within days of its publication. On Nov. 24, 2014, Richard Bradley, former editor of*George* magazine and current editor in chief at the Worth Group, wrote about the story in his blog. He recounted his own experience working with a writer named Stephen Glass on a series of articles that later proved fake. It was a painful experience for him, he said, but one that he learned from. And the lesson he learned was that “one must be most critical, in the best sense of that word, about what one is already inclined to believe.”\textsuperscript{14} He then turned his attention to the *Rolling Stone* story by noting the horrific nature of the sexual assault and added, “The only thing is … I'm not sure I believe it.”\textsuperscript{15}

On Dec. 2, 2014, Erik Wemple, a media critic for *The Washington Post,* wrote a piece on the story. He opened, “For the sake of Rolling Stone’s reputation, Sabrina Rubin Erdely had better be the country’s greatest judge of character.”\textsuperscript{16} He wrote that Erdely was evasive when asked on *Slate* magazine’s “DoubleX Gabfest” podcast if she had interviewed the accused.


\textsuperscript{15} Id.

By Dec. 5, 2014, T. Rees Shapiro, a reporter with The Washington Post, had spoken with several of Erdely's sources for the story, including “Jackie,” and a friend she spoke with on the night the rape is purported to have occurred. The friend of “Jackie’s” confirmed that she called him after the alleged rape that night and told him she had been forced to have oral sex with a group of men at a fraternity. This differed from the account of a vaginal assault that “Jackie” told Erdely about. Further, he denied making the comments attributed to him in the story and confirmed that he was never contacted by Erdely for his version of events. On that same date, Phi Kappa Psi issued a statement that it did not hold a party or date function on the night of the alleged rape.17

On Dec. 5, 2014, Will Dana, the managing editor at Rolling Stone, appended an editor's note to the online story. He outlined the new developments with respect to “Jackie's” rape, reaffirmed that Rolling Stone believed the story was accurate when they originally published it and offered their conclusion:

We were mistaken in honoring Jackie's request to not contact the alleged assaulters to get their account. In trying to be sensitive to the unfair shame and humiliation many women feel after a sexual assault, we made a judgment – the kind of judgment reporters and editors make every day. We should have not made this agreement with Jackie and we should have worked harder to convince her that the truth would have been better served by getting the other side of the story. These mistakes are on Rolling Stone, not on Jackie. We apologize to anyone who was affected by the story and we will continue to investigate the events of that evening.18

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In the aftermath of the media frenzy surrounding its reporting and partial retraction of the lead narrative, *Rolling Stone* requested an independent review of their reporting practices from Steve Coll, dean of the Columbia School of Journalism. *Rolling Stone* agreed to cooperate in a full investigation and to publish the report from Coll and his team upon receipt. On April 5, 2015, *Rolling Stone* published that report under a full retraction, again written by Dana, and offered an apology to readers and “to all those who were damaged as a result of the story.”

The report described *Rolling Stone*’s failure as occurring at every level of the process – “reporting, editing, editorial supervision and fact-checking.” It stated:

[The] magazine set aside or rationalized as unnecessary essential practices of reporting that, if pursued, would likely have led the magazine’s editors to reconsider publishing Jackie’s narrative so prominently, if at all. The published story glossed over the gaps in the magazine’s reporting by using pseudonyms and by failing to state where important information had come from.

On May 12, 2015, Eramo sued *Rolling Stone*, Sabrina Rubin Erdely and Wenner Media for defamation. The complaint stated Erdely painted her “as the chief villain” who was indifferent to allegations of rape, coddled “Jackie” into not reporting and did not report “Jackie’s” rape to police. Eramo claimed these statements were not only false, but were defamatory per se, as they attributed “conduct unfit for a counselor of sexual

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20 *Id.*

21 *Id.*

assault and the head of UVA’s Sexual Misconduct Board.”23 Eighteen months later, on Nov. 4, 2016, the jury returned a verdict in her favor.24

Libel Law and the 2016 Presidential Elections

Erdely and Rolling Stone were not the only subjects of intense libel and defamation charges in the fall of 2016. The media itself was on trial with then-President-elect Donald Trump threatening to “open up” libel laws as President.25 Even before he was elected Trump said, “One of the things I’m going to do if I win, and I hope we do and we’re certainly leading. I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money . . . . So, when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they’re totally protected.”26 Trump has not eased up on that pedal since his inauguration in January. On March 30, 2017, he again targeted The New York Times and accused the publication of “[getting] him wrong” in a tweet that closed with “Change libel laws?”27

23 Id. at 3.

24 Id. at 4.


26 Id.

The protection for the press that President Trump referred to stems from a civil rights-era, landmark Supreme Court case that rocked the world of defamation law – *New York Times Co. v. Sullivan*[^28]. With *Sullivan*, the First Amendment’s[^29] protection of free speech and freedom of the press was inserted into a body of state law that had evolved independent of federal intrusion since our nation’s founding[^30]. It gave journalists and the media greater latitude to report without the chilling effect of expensive litigation[^31].

This thesis is an exploration into the present state of libel and defamation laws through an in-depth legal analysis of *Eramo v. Rolling Stone*. It was inspired by President Trump’s call to action in the recent presidential elections, and it is set against the backdrop of the civil rights-era landmark case *New York Times Co. v. Sullivan*. It aims to answer the following research questions:

RQ1. Does *Sullivan* provide the proper balance in protecting the First Amendment freedoms of speech and the press with the right of a person to the protection of their reputation? Or, did it pave the way for a press that

[^28]: *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This is the landmark U.S. Supreme Court case on defamation that tied libel laws to the First Amendment and actually shifted the burden of proof in defamation cases brought by public officials. It established a new constitutional rule that required public officials who brought libel or defamation claims against the press, to prove the statements against them were not only false and defamatory, but that they were published with actual malice. To prove malice the plaintiff now had to prove the defendant knew the statements were false or exercised reckless disregard for the truth. This is the high bar that Eramo, deemed a limited-purpose public figure, overcame in *Eramo v. Rolling Stone, LLC*.

[^29]: U.S. Const. amend. I

[^30]: *Sullivan*, supra note 28, at 256.

is too insulated from the consequences of its actions – thus, bolstering support for Trump's call to open up libel laws?

RQ2. Beyond the legal analysis, what journalistic lessons can be learned from a deconstruction of this this multi-million-dollar lawsuit? What is the relevance to journalists entering the field today? And what is the relevance to those at the top of their game playing in the highly competitive field of new media?

The analysis is organized into chapters. Chapter two delves into the founding principles underlying our democracy and the legal right to reputation. It provides a brief history of libel law and then dives into *New York Times Co. v. Sullivan* and three Supreme Court cases that followed, which expanded *Sullivan* and had significant influence in shaping defamation law today. Chapter three tells the story of how "A Rape on Campus" came into existence and found its way to page 68 of *Rolling Stone's* December 2014 edition. It is a narrative timeline of the story's evolution drawn primarily from the depositions of Nicole Eramo and Sabrina Rubin Erdely. Chapter four is the legal analysis of *Eramo v. Rolling Stone*. And Chapter five is the conclusion with discussion around its findings, President Trump's call to action and the three research questions it aims to address.
In our democracy, social and political expression enjoy the highest level of protection under the First Amendment.¹ This protection was of paramount importance to the crafters of our Constitution and our founding fathers, who risked their lives and liberty to win independence from the British monarchy of King George III. They envisioned a United States of America where robust and open debate would fuel a marketplace of ideas where truth wins out and freedom of speech and the press operate as a powerful check against government abuse.²

Freedom of speech was so central to the concept of our new government that James Madison ensured there would be little room for confusion when he wrote the First Amendment in clear and plain language specifying that “Congress shall make no law . . . abridging the freedom of speech . . . .”³ And the U.S. Supreme Court has a long-standing record of support for freedom of speech on matters involving social and political concern.

In the opinion of the Court in New York Times Co. v. Sullivan, Justice William Brennan held that as a society we have a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks

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³ U.S. Const. amend. I.
on government and public officials." Chief Justice John Roberts also spoke of the high protection afforded public speech 47 years later, with his closing remarks in *Snyder v. Phelps et al.*, “As a Nation we have chosen a different course to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

But, what happens when the First Amendment protection for freedom of speech or the press clashes with the right of the individual to the protection of his or her reputation from damaging false statements and lies? This concept of an individual's right to his or her reputation is also foundational to our democracy. It is imbedded in the philosophy upon which we declared our independence. It existed as part of the social and moral code in western civilization long before that. And the U.S. Supreme Court has upheld this right as essential to the well-being of our society.

In *Rosenblatt v. Baer*, the U.S. Supreme Court recognized that, “Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.” Justice Brennan penned that sentence in the Court's opinion. And Justice Potter Stewart, in his concurring opinion further offered, “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects . . . our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.” And, although an imperfect remedy, Libel Law

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4 *Sullivan*, supra note 28, at 270.

5 *Phelps*, supra note 32, at 461.


7 Id.
“is the only hope for vindication or redress . . . to a man whose reputation has been falsely dishonored.”

A Brief History of U.S. Libel Law

U.S. libel law traces its roots to the English common law. The law developed in the early American colonies as a civilized alternative to dueling, and today, a different version is contained in the statutes of all 50 states. In its earliest form, libel law was mostly criminal law owing to its English origin where seditious libel, or criticism of the government, was also considered a crime.

Even after the American Revolutionary War, ratification of the Constitution and the Bill of Rights, seditious libel continued to exist in common law. And, it found its way to the forefront of public debate when under the administration of John Adams, the Alien and Sedition Acts were signed into federal law. The Sedition Act of 1789 made it a crime to write, print or publish “any false, scandalous and malicious writing or writings against the government... with intent to defame....”

While the act was hotly debated and ultimately expired in the next presidential term when Thomas Jefferson took office, the public dialogue raised awareness and stirred discussion on the conflict between the First Amendment's protection of free

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8 Id. at 93.

9 Morris D. Forkosch, Freedom of the Press: Croswell's Case, 33 Fordham L. Rev. 415, 448 (1965). The author traces the history of libel law for this 1802 libel suit to the English common law and its evolution in colonial America, to its first iteration “found in the 'Declaration of Colonial Rights,' adopted by the First Continental Congress,” to the common and/or codified law in the early American states.

10 Rosenblatt, supra note 37, at 93.

11 Alien and Sedition Acts, 1 Stat. 566 (1798); 1 Stat. 596 (1798).

12 1 Stat. 596 (1798).
speech and laws against criticism of government. That discussion laid the groundwork for the First Amendment to emerge as the victor over the next century. But, it was not until the landmark case *New York Times Co. v. Sullivan*, however, that the U.S. Supreme Court formally tied the common law of defamation to the First Amendment by creating a constitutional rule that would limit the protections afforded public officials suing for defamation under state law.

**New York Times Actual Malice**

**New York Times v. Sullivan**

In 1964, when *New York Times, Co. v. Sullivan* was argued before the U.S. Supreme Court, the civil rights movement was in full motion and newspapers were sending reporters to the south to cover it.\(^{13}\) *The New York Times* was one such newspaper; although, *Sullivan* did not arise from a news story it published. Rather, the case involved a full-page advertisement that *The Times* published on March 29, 1960.\(^{14}\) The ad was placed by a New York advertising agency acting for the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.\(^{15}\) It cost $4,800.\(^{16}\) And it was an appeal for funds to “support the student movement, the struggle for the

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\(^{14}\) *Sullivan*, supra note 28, at 256-257.

\(^{15}\) *Id.* at 260.

\(^{16}\) *Id.*

21
right-to-vote, and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment ….”

The advertisement was ten paragraphs long and recounted several events that occurred in Montgomery, Alabama, in response to nonviolent demonstrations mounted by students, civil-rights leaders and supporters there. Two paragraphs formed the basis of the defamation lawsuit that L.B. Sullivan, an elected commissioner of public affairs for the city of Montgomery brought, and for which he was awarded $500,000 by a jury in the Circuit Court of Montgomery County. The two paragraphs at issue follow:

In Montgomery, Alabama, after students sang ‘My Country, ‘Tis of Thee’ on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

And:

Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times -- for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury' -- a felony under which they could imprison him for ten years ….

Although none of the statements named Sullivan, he argued that as the commissioner of public affairs his duties included supervising the police in Montgomery,

17 Id at 256.

18 Id. at 257. The defendants in the underlying case were four clergymen who signed the advertisement along with The New York Times. There were actually 20 total names that appeared below the advertisement as endorsing the appeal. All but two of them were black southern clergymen. Also, “the text appeared over the names of 64 persons, many widely known for their activities in public affairs…. “ And one such person was Eleanor Roosevelt.

19 Id.

20 Id. at 257 – 258.
and as such the word “police” referred to him. He further argued that having the ultimate responsibility for police conduct meant that the charges of “ringing” the campus, attempting to starve the students, arresting King and charging him with perjury could all be imputed to him. Thus, the “They” who arrested King would be equated with the “They” who bombed his home, assaulted his person and answered his protests with intimidation and violence.

It was undisputed that some of the statements in the two paragraphs of issue were not accurate accounts of what had occurred. According to the opinion of the Court written by Justice William Brennan, there were in fact, numerous errors. For instance, the campus dining hall had never been padlocked. The students did not sing “My Country, 'Tis of Thee” during the demonstration. They sang “The Star-Spangled Banner.” A large number of police were deployed near campus three times during the demonstrations. But, they never “ringed” the campus. King was arrested four times, not seven. And although, King's home had been bombed, it occurred before the commissioner was in office, and as Justice Brennan pointed out, “the police were not only not implicated in the bombings, but had made every effort to apprehend those who were.”

21 Id. at 258.
22 Id.
23 Id.
24 Id.
25 Id. at 258-259.
26 Id. at 259.
27 Id.
The case was tried under the common law of Alabama, which similar to many other state laws of defamation found a statement was defamatory per se if “the words ‘tend[ed] to injure a person … in his [or her] reputation’ or … ‘[brought] him into public contempt.’” If a court found that a statement was libelous per se, the case was subject to strict liability and the jury was not required to consider evidence of fault, falsity or damages - three elements that potentially gave rise to a much broader defense. They needed only to decide whether the statement was published of and concerning the plaintiff, and if so, the amount to award the plaintiff.

In the Court’s review of the record, Justice Brennan noted that the Montgomery County jury who returned the verdict of $500,000 was indeed “instructed that, because the statements were libelous per se, ‘the law . . . implies legal injury from the bare fact of publication itself,’ . . . ‘falsity and malice are presumed,’ . . . ‘general damages need not be alleged or proved but are presumed,’ and ‘punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.’” Justice Brennan further noted that the Alabama Supreme Court sustained the judgment of the trial court for three main reasons.

First was the “evidence that The Times published the advertisement without checking its accuracy against the news stories in The Times’ own files which would have demonstrated the falsity of the allegations in the advertisement . . . .” Second was because The Times’ failed to issue a retraction in response to Sullivan’s demand.

28 Id. at 267.
29 Id. at 263.
30 Id. at 263, 286.
when in fact, they had issued a retraction in response to a demand from the Governor of Alabama. Here, Justice Brennan noted the Alabama Supreme Court took issue because \textit{The Times} was aware of the falsity of some of the statements, and they were “equally false as to both parties . . .”\textsuperscript{31} And the third dealt with the constitutional arguments made by \textit{The New York Times}, which the Alabama Supreme Court flatly rejected holding, “The First Amendment of the U.S. Constitution does not protect libelous publications” and “The Fourteenth Amendment is directed against State action and not private action.”\textsuperscript{32}

The U.S. Supreme Court did not agree. In a unanimous decision the Court held, “The rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First Amendment and Fourteenth Amendment in a libel action brought by a public official against critics of his official conduct.”\textsuperscript{33} Justice Brennan wrote, “The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”\textsuperscript{34} Further, “the constitutional safeguard . . . was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”\textsuperscript{35}

Indeed, the Court viewed the civil-rights movement as one of the most important public issues then facing the nation, and found the advertisement was an “expression of

\textsuperscript{31} \textit{Id.} at 263.


\textsuperscript{33} \textit{Sullivan}, supra note 28, at 264.

\textsuperscript{34} \textit{Id.} at 268.

\textsuperscript{35} \textit{Id.} at 268. (citing \textit{Roth v. United States}, 354 U.S. 476, 484 (1957).
grievance and protest” deserving of First Amendment protection. The Court further held that such protection was not forfeited due to the “falsity of some of its factual statements and by its alleged defamation of . . . Sullivan.” Indeed, Justice Brennan offered that it was Madison himself, author of the First Amendment, who acknowledged, “Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.” And he thus concluded, “Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . o survive.’”

What followed was a new constitutional rule, crafted by the Court, which changed the whole world of libel law. The new rule prohibited public officials from “recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice.’” And the Court defined actual malice as a statement made with the “knowledge that it was false or with reckless disregard of whether it was false or not.” This meant that public officials now had the burden to prove the statement was made with a reckless disregard for the truth or that the publisher “entertained serious doubts as to the truth of [their] publication.”

36 Id. at 271.
37 Id.
38 Id.
40 Id. at 279 - 280.
41 Id.
Indeed, three of the Court’s justices wrote concurring opinions to express their belief that the constitutional rule crafted by Justice Brennan did not go far enough. Justice Black wrote, “I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely ‘delimit’ a State’s power to award damages to ‘public officials against critics of their official conduct’ but completely prohibit a State from exercising such a power.” And Justice Goldberg, with whom Justice Douglas joined, offered,

The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

The decision was unanimously supported by the Court. It demonstrated, as Justice Brennan penned, the Court’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Its limitation, however, was in defining who a public official was – the Court simply did not do so. As Justice Brennan noted, “We have no occasion here to determine how far down into the lower ranks of government employees the ‘public official’ designation would extend for purposes of this rule, or

43 *Sullivan* supra at 293.
44 *Id.* at 298-299.
45 *Id.* at 270.
otherwise to specify categories of persons who would or would not be included." The Court offered some guidelines two years later in *Rosenblatt v. Baer*.

**Rosenblatt v. Baer**

In 1965, the Court reviewed among other issues, whether the public official designation under *Sullivan* applied to Frank P. Baer. Baer was a defamation plaintiff who had been awarded damages for statements made about his official conduct while employed as supervisor of the Belknap County Recreation Area. His lawsuit was decided prior to the decision in *Sullivan* and upheld after by the New Hampshire Supreme Court. The Court specifically asked the parties to brief and argue with respect to his designation as a public official.

Baer was hired by three Belknap County commissioners in 1950. His primary duties were the management of a ski resort. And he stayed in that role until 1959 when the New Hampshire legislature enacted legislation transferring its management to a special five-man commission.

In 1960, after the new management had been in place six months, Rosenblatt published the article Baer alleged libeled him. The article contained no obvious defamatory statement. It did not name Baer. It praised the new management team for substantially increasing revenues in such a short period of time and only hinted at mismanagement by the prior commission with the following questions:

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46 *Id.* at 284.

47 *Rosenblatt, supra* note 37, at 77.

48 *Id.* at 78.

49 *Id.*

50 *Id.* at 79.
What happened to all the money last year? and every other year? What magic has Dana Beane [Chairman of the new commission] and rest of commission, and Mr. Warner [Baer’s replacement as Supervisor] wrought to make such tremendous difference in net cash results?\textsuperscript{51}

To prove the article referred to him, Baer argued it was a small group and his role was so prominent and important that anyone in the small community would impute mismanagement and peculation to him. Justice Brennan, who wrote the opinion of the Court, noted that Baer’s own argument also showed, or “at the least, raise[d] a substantial argument that he was a ‘public official.’”\textsuperscript{52} The Court did not find Baer was a public official. It opted instead to send the case back to the state court for a new trial.

The Court offered some further guidance on the question, though. In the opinion of the Court, Justice Brennan held, “. . . the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”\textsuperscript{53} Further, the Court held that \textit{the New York Times} actual malice standard applied to government positions of “such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees.”\textsuperscript{54} And Justice Brennan noted, “The employee’s position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from . . . scrutiny and discussion occasioned by . . . particular charges in

\textsuperscript{51} Id. at 78-79.
\textsuperscript{52} Id. at 86.
\textsuperscript{53} Id. at 85.
\textsuperscript{54} Id.
controversy.” 55 Here, the example offered was a night watchman who rose to the public spotlight for stealing state secrets. Neither his position, nor the charges in controversy, would place him among the hierarchy of government employees subject to *The New York Times* actual malice standard.

**Curtis Publishing Co. v. Butts**

In 1967, the Court expanded the actual malice standard to public figures in *Curtis Publishing Co. v. Butts*, 56 a consolidated case before the U.S. Supreme Court. The plaintiff in that suit was Wally Butts, a well-known football coach at the University of Georgia who filed a libel action for an article published in the Saturday Evening Post that accused him of fixing a game between the University of Georgia and the University of Alabama. Because he had actually worked for the Georgia State Athletic Association, a private corporation, and not the public university, he was not considered a public official. The case made its way to the Court where the sole issue to be considered was whether *The New York Times* standard applied to public figures, too. The Court held that it did.

In his concurring opinion, Chief Justice Earl Warren held, “differentiation between ‘public figures’ and ‘public officials’ and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy.” 57 He posed that partnerships and interdependencies between the private and public sectors in our country have been increasing steadily since the 1930s and have led to a substantial merger of economic

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55 Id. at 86.


57 Id. at 163.
and policy-making power between the two and as such, "many who do not hold public office...are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Given their influence, the Court held that they too should be held to the higher standard.

While *Curtis Publishing v. Butts* expanded *The New York Times* actual malice standard to public figures, the decision did not offer much guidance in determining who qualifies as a public figure. The waters were further muddied by a 1971 Supreme Court decision, *Rosenbloom v. Metromedia, Inc.*, in which a plurality of the Court held that the constitutional protection for robust debate protected "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." In *Gertz v. Robert Welch, Inc.*, the Court sought to clarify these issues. It better defined who a public figure was, and back peddled on the fault standards for defamation claims involving private individuals by returning “substantial latitude” to the states.

58 Id. at 164.
60 Id. at 42.
62 Id. at 345.
In *Gertz v. Welch*, the Court elaborated on the differences between private and public figure plaintiffs, and in doing so, it carved out two separate categories of public figures. The first was the all-purpose public figure. These individuals have achieved widespread fame or celebrity status or they simply occupy a prominent place in society. Based on their influence and involvement in society they are subject to the same actual malice requirement as public officials. The second category was the limited-purpose, or vortex public figure. These are individuals who have voluntarily forced or injected themselves to the forefront of an issue of public concern. By doing so they become subject to *The New York Times* actual malice standard but only as it relates to the issue of public concern for which they are involved. To be considered a limited or vortex public figure the alleged defamation must involve the issue of public concern and the plaintiff must also be involved in the issue and attempted to influence its outcome.

According to the Court in *Gertz*, the reason limited-purpose, or vortex public figures are subject to the actual malice requirement is twofold. First, public figures, as well as public officials, have “voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them” and as such, the state’s interest in protecting them is not nearly as great as its interest in protecting the more vulnerable private person.” And second, “the first remedy of any victim of defamation is self-help - using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.” And public figures, as well as public

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63 *Id.*

64 *Id.* at 344-345.

65 *Id.* at 344.
officials, usually have greater access to effective means of communication, most particularly, the media, “and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”

**Background**

In 1973, Elmer Gertz asked the Supreme Court to reconsider the extent to which a publisher, Robert Welch, was entitled to constitutional protection against liability for defamation of a private individual. Gertz was the private individual. He was an attorney. He represented the family of a victim who was shot and killed by a Chicago policeman in a civil action. The family won their criminal case. The officer was convicted of murder. After, Gertz was hired to represent the family in the civil suit for damages.

In March 1969, Welch published an article in his monthly publication for the John Birch Society. The article attempted to demonstrate that the Chicago policeman convicted of murder had been framed and “his prosecution was part of the Communist campaign against the police.” The article accused Gertz of being a part of the “frame-up.” It stated that he had a police file so large it took “a big, Irish cop to lift.” And it

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66 Id.
67 Id. at 345.
68 Id. at 325.
69 Id.
70 Id. at 325.
71 Id.
72 Id. at 326.
73 Id.
accused Gertz of being a “Leninist,” . . . “Communist,” and member of a variety of communist organizations.\textsuperscript{74}

The statements contained numerous inaccuracies, among them that Gertz had a criminal record.\textsuperscript{75} Gertz filed an action for libel. He was determined to be neither a public official nor a public figure by the court and won at the trial court level. The jury awarded him $50,000. On further reflection, and in considering the plurality of the Court in \textit{Rosenbloom}, the judge concluded that \textit{The New York Times} actual malice standard applied to Gertz given the issue was one of public concern. A directed verdict was entered and the judgment of the jury set aside.\textsuperscript{76} The determination of the court was appealed and upheld.

In considering whether Gertz was a public official, however, the Supreme Court could find little support. He had served on a housing committee several years prior, and he had been appointed by the mayor. But, it was unpaid. And at the time of publication of the article, Justice Powell noted that he had never held any “remunerative government position.”\textsuperscript{77}

In considering whether he was a public figure, the Court noted Gertz was a longstanding member of the community. He was active in professional affairs, had “served as an officer of local civic groups,” published several books on legal topics and

\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 329-330.
\textsuperscript{77} \textit{Id.} at 351.
was well known in those related circles. But, the Court cautioned that it would not lightly assume such activities rendered him a public figure for all purposes. Indeed, the Court held, “Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.”

Next, the Court reduced the “public-figure question to a more meaningful context” and looked to the nature and extent of Gertz' involvement with the specific controversy giving rise to the defamation action. And, on this point the evidence was quite clear. Gertz had not injected himself into the public debate around the police shooting nor its aftermath. He did not participate in the underlying criminal action. He did not speak to the press about the criminal or the civil case. He did not attempt to engage the public on any level to shape or influence the outcome. And his sole relationship to the case was his representation of a private client.

For these reasons, the Court concluded Gertz had been properly characterized as a private figure. And because Gertz was a private individual, the Court declined to extend *The New York Times* actual malice standard to him. The Court held he had

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78 *Id.*
79 *Id.* at 352.
80 *Id.*
81 *Id.* at 352.
82 *Id.* at 326.
83 *Id.* at 326.
84 *Id.* at 352.
85 *Id.*
“relinquished no part of his interest in the protection of his own good name, and consequently he [had] a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.”86 Justice Powell further offered, “private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.”87 Further, in Gertz, the Court left to the states the right to define for themselves, “so long as they do not impose liability without fault, … the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”88

In Eramo v. Rolling Stone, the court ruled that plaintiff was a limited-purpose public figure. Although Eramo argued that she should be considered a private figure, the judge ultimately found in favor of defense’s arguments that Eramo met the Gertz threshold. A more detailed analysis of that district court ruling and the corresponding arguments is in chapter four.

86 Id. at 345.
87 Id.
88 Id. at 347.
CHAPTER 3
THE STORY OF “A RAPE ON CAMPUS”

Nicole Eramo

Her Dream Job

Eramo was 45 years old on Nov. 19, 2014, when Rolling Stone published “A Rape on Campus.” She was a UVA graduate herself and had been employed in administrative positions at the university for 18 years.¹ She had been in the dean of students’ office since 2006, and was an associate dean of students and head of the Sexual Misconduct Board in 2012 when “Jackie’s” alleged rape occurred. She recalled in her deposition that when she first moved to the dean’s office, they did not get many reports of sexual assault at all.² So, she had reached out to the women’s center on campus and started building relationships with key people and by 2008 or ’09 she had emerged as the point person on campus handling intake for sexual assault victims.³

By 2013, Eramo estimated she had met with more than 50 sexual assault victims.⁴ And during those meetings, she told students that she would help them in obtaining resources and support and would offer as much or as little as they requested.⁵ She listened to students, asked probing questions, counseled, made medical referrals, determined whether academic or housing accommodations were needed and advised

² Id. at 130:5-130:7.
³ Id. at 130:9-130:18.
⁴ Id. at 131:7-131:18.
⁵ Id. at 134:10-134:23.
students of the reporting options available to them. If student’s elected to pursue a formal complaint or to file a police report, she assisted them with that process. This was the work that Eramo loved – and felt she “was good at.”

May 2013: “Jackie” Reports Sexual Assault

During their first meeting in May 2013, “Jackie” reported that she had been sexually assaulted during a fraternity party when several men forced her to give them oral sex. She was unwilling to identify her attackers. And, she was unable to identify with clarity the fraternity house it happened in, so Eramo recorded the location as Greek property in the formal UVA reporting database. She offered to assist “Jackie” in filing a police report or initiating a formal proceeding at the university level. And, “Jackie” declined both options.

Eramo made her boss, Allen Groves, dean of students, aware of the reported sexual assault and inquired if they should try to move forward and figure out what happened with the limited information that she had been given and with a victim who at that time did not want to formally pursue the case. Groves asked Eramo to consult Susan Davis, head of student affairs, on that decision. Ultimately, they decided not to

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7 Deposition of Eramo at 341:10-341:16, Eramo v. Rolling Stone, LLC, Civil Action No. 3:15-CV-00023-GEC (W.A. Va. July 1, 2016), ECF No. 108-1. In her deposition she said, “I loved the job that I had. I was good at the job that I had.” And elsewhere in her deposition, she recalled that the student interface was an incredibly rewarding aspect of it.

8 Id. at 157:15-157:20. (The database is formally called the Advocate system).
launch an independent investigation. The plan was for Eramo to continue to try to work with “Jackie” to develop more information.\(^9\)

**Oct. 2013: Eramo Checks on “Jackie”**

On Oct. 24, 2013, Eramo met with “Jackie” and referred her to One Less, a student-run sexual assault education group that advocates for survivors of sexual assault. She also gave her name to Emily Renda, a student activist and sexual assault survivor advocate at UVA who was also active in One Less.\(^10\) Renda was a senior at the time and she recalled meeting with “Jackie” in October and helping her get involved with the advocacy organization.\(^11\) She also understood at that time that “Jackie” had not initiated a formal complaint to the University of Virginia or the police about the alleged sexual assault.\(^12\)

**April 2014: Eramo gets the police involved**

In the spring of the following semester, Eramo saw “Jackie” again during a training session for One Less and spoke with her briefly. The next time Eramo saw her was April 17, 2014, when she heard her speak at a “Take Back the Night” event on campus.\(^13\) The weeklong series of events was focused on education and sexual assault survivor support and was an effort to raise public awareness in the call to end gender

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\(^9\) *Id.* at 160:6-160:18.

\(^10\) *Id.* at 172:3-172:6.


\(^12\) *Id.* at 32:5-32:10.

violence. The Speak Out/Vigil started at 6:30 p.m. that evening and Eramo, being head of UVA's Sexual Misconduct Board, was in attendance.

Eramo recalled “Jackie” gave a somewhat similar account of what had occurred during her talk, but three items stuck prominently in her mind: First, she thought “Jackie” told her five men assaulted her, but she now said it was seven; even more concerning, she mentioned that she would see some of the alleged perpetrators around campus;\(^{14}\) and finally, she recalled “Jackie” said something that made her believe it was a vaginal assault.\(^ {15}\) Eramo recalled thinking that this was “another aspect of force that was concerning.”\(^ {16}\) And, she sent an email to “Jackie” after the vigil for the two to meet.

On April 21, 2014, the two met in Eramo's office. During that meeting, “Jackie” told her that she had been physically attacked in retaliation for what she was speaking out about on campus. She had been at The Corner when a man called out to her and threw a bottle that struck her cheek causing it to bleed.\(^ {17}\) “Jackie” told Eramo that she went to the parking garage after and cried. She had called her mom not the police.\(^ {18}\) Eramo recalled she had been able to see the bruise during their meeting.\(^ {19}\)

\(^{14}\) Id. at 176:11 - 176:23.

\(^{15}\) Id. at 177:17 - 177:20.

\(^{16}\) Id. at 178:22 - 178:24.

\(^{17}\) The Corner according to Wikipedia is a seven-block collection of bars, restaurants, bookstores and night spots on University Avenue in Charlottesville, Virginia. It is located across the street from the University of Virginia. See https://en.wikipedia.org/wiki/The_Corner_(Charlottesville,_Virginia) (last visited June 15, 2017).

\(^{18}\) Deposition of Eramo, supra note 126, at 216:7-216:9.

\(^{19}\) Id.
It was also during this meeting that “Jackie” offered the location where her alleged rape occurred - at the Phi Kappa Psi house.\textsuperscript{20} And she told Eramo that she had become aware of two other women who claimed they were sexually assaulted at the Phi Kappa Psi house.\textsuperscript{21} Eramo immediately set up a meeting with police. “I was very concerned about the retaliation,” Eramo explained during her deposition. “I was still, of course, very concerned about the initial incident and the sexual assault. And I wanted to get her in front of police to talk about the entirety of the incidents.”\textsuperscript{22}

The next day, an officer with the Charlottesville Police Department met with the two women in a conference room near Eramo’s office in Peabody Hall.\textsuperscript{23} However, “Jackie” did not give her consent to an investigation.\textsuperscript{24} Eramo followed that meeting with an email to “Jackie” encouraging her reconsider. She closed the email with, “Never forget, however, that it is YOUR choice.”\textsuperscript{25}

Eramo updated her boss, Dean Groves, on the case the following day. The two agreed that Eramo would continue to try to move the case into a full police investigation. During her deposition, Eramo recalled that she met with “Jackie” again on May 1 and again, she “declined to move forward.”\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{20} \textit{id.} at 184:1-184:4.
\item \textsuperscript{21} \textit{id.} at 184:5-184:9.
\item \textsuperscript{22} \textit{id.} at 184:14-184:25
\item \textsuperscript{23} \textit{id.} at 187:14-187:15.
\item \textsuperscript{24} \textit{id.} at 187:10-187:18.
\item \textsuperscript{25} \textit{id.} at 186:5-187:8.
\item \textsuperscript{26} \textit{id.} at 194:22-195:4.
\end{itemize}
Over the next two weeks, Eramo followed up with “Jackie” to gain information about the two other women who were allegedly assaulted at the Phi Kappa Psi house. She said she even weighed the idea of launching an investigation into the fraternity based on the limited information “Jackie” provided. However, it was her understanding through “Jackie” that the women did not wish to come forward. Eramo and Dean Groves were hopeful that over the summer “there may be an opportunity to either get [“Jackie”] to move forward or . . . at least lay eyes on these other two women and find a way forward. We were very - obviously quite concerned at this point.”

Sabrina Rubin Erdely

Her Dream Job

Sabrina Rubin Erdely was at the top of her game, and also in her 40s, when she wrote the 9,000-plus-word article featuring the alleged gang-rape of UVA student, “Jackie,” in its lead. She was an award-winning feature writer whose work appeared in numerous publications including *The New Yorker, Men’s Health* and *GQ*. And, she had been writing for *Rolling Stone* since 2008 becoming a contributing editor for the publication in 2010.

March 2014: The Pitch

In the spring of 2014, around March, Erdely spoke to her editor at *Rolling Stone*, Sean Woods, about her idea for the story that would become “A Rape on Campus.”

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27 *Id.* at 223:20-224:4.

28 *Id.* at 14:8-14-16.
Following that conversation she wrote a three-paragraph pitch outlining the story concept for the editors at *Rolling Stone* and emailed it to Woods. In it, she wrote:

I’d like to examine sexual assault on college campuses, the various ways colleges have resisted involvement and, as was recently revealed at Occidental College, juke their statistics to make their campuses appear safer than they are; how they may now be scrambling to clamp down and side-step liability; and especially how that dynamic is translating into daily social life and hookup culture. As the story’s main thread, I’ll focus on a sexual assault case on one particularly fraught campus, possibly at Yale, though the field is wide, following as it makes its way through university procedure to its resolution, or lack thereof.

She testified that the idea was based on news coverage at the time that indicated universities were in “crisis over sexual harassment and assault because with the help of student activists, known as the Title IX network, the Department of Education's Office for Civil Rights [had] initiated investigations against a dozen elite...schools, including Yale, Dartmouth, UVA, Berkeley, Princeton and Harvard Law.” She was further interested in “allegations that institutional indifference toward such complaints [had] created a hostile environment for women.”

**July 2014: Erdely sets the story at UVA**

So starting in June, Erdely spent time at Yale, Harvard and the University of Pennsylvania and “. . . interviewed a lot of different students.” She said she was

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31 *Id.* at 234:23-235:3.

32 *Id.* at 235:3-235:5.

“looking to set this story at a university that had a good reputation but also felt very representative of what was going on at American colleges across the country with regard to sexual assault.”

34 She also hoped to find a campus that was under Title IX investigation with sexual assault survivors who were willing to share their stories. And by July, she found the setting - the University of Virginia.

35 On July 8, 2014, Erdely spoke with Emily Renda, who by then had graduated and was employed by the university as a project coordinator for sexual misconduct in the Division of Student Affairs. In the spring, while still a senior at UVA, Renda had been a guest speaker at the White House Task Force on Sexual Assault Prevention and in fact consulted on the task force four times in relation to her student activism, which stemmed in part from her own story of surviving rape as a student at UVA and campus-based advocacy work in rape survivor support thereafter. 36 That opportunity, she believed, led to an invitation to speak before the U.S. Senate Committee on Health, Education, Labor and Pensions on June 26, 2014. 37 However, by the time of her testimony she was formally employed by UVA in the department that handled sexual misconduct reporting to the Vice President of Student Affairs.

38 She reached out by email to multiple stakeholders at UVA, including Eramo, to alert them that she had been asked to testify before Congress and to ask for feedback

34 Id.
35 Id.
37 Id. at 34:3-34:7.
38 Id. at 34:9-34:14.
on her testimony since she was going as a representative of the university.\textsuperscript{39} She attached a copy of her entire planned testimony to the email. At no time did any of the stakeholders, including Eramo, take issue with its content.\textsuperscript{40}

Renda had been asked to testify about Title IX and her own experience as a student and rape survivor. Instead, the testimony she wrote, which had been furnished to the UVA stakeholders, included policy recommendations, and it opened with the story of “Jenna,” a student at UVA who had been gang-raped by five fraternity men during her freshman year. During her deposition, Renda confirmed that “Jenna” was a pseudonym for “Jackie,” and that she had obtained permission from her to use the story.\textsuperscript{41} During her own deposition, Erdely testified that she read her testimony prior to writing “A Rape on Campus.”\textsuperscript{42}

When Erdely spoke with Renda on July 8, she shared what she had in mind for the story and that “ideally, [it] would follow a survivor’s experience as she navigates the aftermath of their sexual assault.”\textsuperscript{43} It would also focus on the larger picture and “get into the cultural issues that are sort of in the air and feed to the problems of rape and

\textsuperscript{39} \textit{Id.} at 138:7-139:2.

\textsuperscript{40} \textit{Id.} at 138:25-139:3.

\textsuperscript{41} \textit{Id.} at 34:21-35:3.


institutional indifference.”44 According to Erdely’s interview notes, Renda responded, “Yes, so important,” and the two continued the conversation.45

Erdely testified that the two discussed fraternities and bid night, the night during rush week when students receive offers from the different chapters to become members, and Renda told her that this occurred in February at UVA and it was a particularly dangerous night on campus.46 According to Erdely’s deposition, Renda further offered, “This may be a much darker side of this, but one girl I worked with closely alleged that she was gang-raped in the fall before rush and the men who perpetrated it were young guys who are not yet members of the fraternity, and she remembers one of them saying to another … ’come on man, don’t you want to be a brother?’”47 Erdely said that she had just read an article about a gang rape that happened on the campus of her own alma mater 20 years earlier and expressed to Renda that although shocking, she understood that “these things actually did sometimes happen.”48

The following day, Renda emailed Eramo to apprise her of the phone call with Erdely and to share the three names she intended to provide her for possible interviews. “Jackie’s” name was among them. Renda recalled in her deposition that she saw Eramo in person about an hour and a half later, they discussed the topic and Eramo told her

44 Id. at 242:3-242:5.

45 Id. at 241:14-241:25.


48 Id. at 32:15-32:21.
that “she would defer to [her] judgment.”\textsuperscript{49} The next day, Renda sent an email to “Jackie” to see if she was interested in talking with Erdely, and on July 12 “Jackie” wrote back, “Hi Emily! I’d definitely be interested in sharing my story . . . .”\textsuperscript{50} Renda put the two in contact by email later that day.

Erdely’s first interview with “Jackie” was July 14, 2014.\textsuperscript{51} According to her interview notes, “Jackie” introduced herself as a rising junior but said the rape had occurred the first month of her freshman year, in September 2012.\textsuperscript{52} She told her “it wound up being a hazing thing.”\textsuperscript{53} And she proceeded to describe a vaginal rape that involved nine “boys,” two of which did not physically participate in the rape. One of those was her date who led her upstairs to the “pitch-black” bedroom.\textsuperscript{54} She told Erdely there was a glass coffee table in the room and she tripped and fell backward onto it causing it to shatter.\textsuperscript{55} She further told Erdely that “she was hurt so badly that she got scars on her back and a huge bruise on her face.”\textsuperscript{56} “And, she recognized the last man

\textsuperscript{49} Deposition of Renda, supra note 130, at 155:15-155:21.

\textsuperscript{50} Id. at 72:4-72:5.

\textsuperscript{51} Deposition of Erdely, supra note 126, at 45:22-45:24.

\textsuperscript{52} Id. at 46:18-46:20.

\textsuperscript{53} Id. at 47:1-47:3.


\textsuperscript{55} Id. at 48:3-48:5.

\textsuperscript{56} Id. at 48:3-48:5.
who raped her as being a student in her anthropology class. During her deposition, Erdely confirmed she never asked “Jackie” for his name.  

“Jackie” told Erdely she woke up in the fraternity about 3:30 a.m. and left through a side entrance. She found herself in a field with no shoes and no sense of where she was and called her friend Ryan Duffin, a freshman at UVA who arrived shortly after with two other UVA students, Kathryn Hendley and Alex Stock. 

“Jackie” shared only their first names with Erdely during the interview and told her “that her friend Ryan wanted to take her to the hospital but that her other two friends discouraged that.” “Jackie” went on to tell Erdely that Hendley said, “She’s going to be the girl who cried rape and will never be allowed into any frat party again.” When Erdely was asked during her deposition whether she found it plausible that a girlfriend of “Jackie’s” would discouraged her “bruised and bloodied and beaten friend” from going to the hospital, Erdely responded that she found it plausible as it was consistent with Emily Renda’s testimony and the conversation they had had. 

**Three Friends and Pseudonyms** 

Erdely asked “Jackie” for the last names and contact information of the three friends during that first interview and “Jackie” told her that “she would prefer to get in

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57 *Id.* at 56:24-56:25, 57:1-57:2.

58 *Id.* at 53:5-53:7.

59 *Id.* at 57:12-57:20.

60 *Id.* at 59:6-59:9.

61 *Id.* at 59:13-59:15.

touch with Ryan because he was the friendliest of the three.” Erdely that she was not on good terms with the other two at that point. The next day, Erdely called a friend of "Jackie’s," Alex Pinkleton, and asked if she would provide the names. Pinkleton “said no, she would have to ask “Jackie” if that was okay.”

Erdely searched “Jackie’s” Facebook and could not find the friends names and persisted in her attempts to get “Jackie” to share the names on multiple occasions to no avail. She explained during her deposition that she felt “Jackie” was ultimately going to get Ryan to talk to her, but when she traveled to UVA she developed “a better understanding of the kind of resistance that she was getting to speaking to [her], it made – it made sense, a certain amount of sense, that Ryan would be so resistant to not being in the article.”

“Jackie” told Erdely about a subsequent conversation she had with Hendley during a small gathering at “Jackie’s” apartment. She relayed that Hendley was discussing the rape and said, “People have asked me, ‘Why didn’t you just have fun with it, especially if they are a bunch of hot frat guys?’” In telling the story initially to

63 Id. at 93:19-23.
64 Id. at 95:16-95:17. In Erdely’s testimony she again answers this question and recalls that she asked Alex Pinkleton for the names during her visit to UVA while they were walking around campus together. Erdely recalled Alex told her the same thing - that she would have to ask “Jackie” if it would be OK. It is not clear if this is a second request for the names or Erdely is recalling the dates wrong. The emphasis during questioning was that no one could recall where she noted the requests for the names in their review of her 400-page reporting file. So, Erdely was being asked to supplement that documentation with her recollection and it was implied by plaintiff’s counsel that a written record of her requests for the names did not exist in an otherwise copious file. See Deposition of Erdely, supra note 161, at 123:16-123:25.
65 Id. at 95:22-23.
66 Id. at 96:4-96:11.
67 Id. at 96:23-96:25.
Erdely, “Jackie” did not attribute the conversation to Hendley, but later clarified for Erdely that it was indeed a conversation with her.

Erdely chose to incorporate the quote into “A Rape on Campus” and explained to plaintiff’s counsel, Elizabeth Locke, during her deposition that she spoke with her editor at Rolling Stone about it and he had a conversation internally at Rolling Stone “and they came back to [her] and told [her] that they were going to change the names. And that since they weren’t identifiable, that there was no need to contact them.”

“Jackie” also talked to Erdely about Dean Eramo. She told her that she had met with her, absolutely loved her and thought she was fantastic.”

“Jackie” was not alone in expressing her praise of Eramo to Erdely.

Erdely spent the next three months interviewing at least seven more students, five sexual assault experts, a former assistant dean at the university, a representative from the Department of Education’s Office for Civil Rights and one administrator at UVA - President Teresa Sullivan. She hoped to speak with Eramo directly and Eramo had initially agreed and scheduled the interview in September but Eramo’s superiors ultimately decided that she should not be interviewed for the story.

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68 Id. at 196:14-196:20.

69 Id. at 62:23-62:25.

70 Id. at 150:7-19, 151:9-151:14. In her conversation with Alex Pinkleton in September, Erdely addressed concerns Pinkleton had about Dean Eramo. Pinkleton told her she was worried she would be harmed by the article and it could impact her job. Erdely noted in her response that she understood how much “Jackie” and she like the dean but she would have to figure into the story because she was the common thread in everyone’s story. And she goes on to explain that she was trying to reconcile in her own mind how everyone loved Dean Eramo and at the same time why sexual assault cases were not moving forward on campus. She was explaining that she was starting to believe there was a correlation between the two.

71 Id. at 301:21-24. See also Deposition of Eramo, supra note 126, at 263:12-163:17, 301:16-301:25.
from the public relations department canceled the interview, coordinated Erdely’s other requests for records and scheduled a phone interview with President Sullivan. 72 Neither would have the opportunity to speak with the other. Erdely attended the Board of Visitors meeting at UVA on Sept. 11, 2014. The two saw each other and said hello. Erdely told her “I’m sorry I can’t speak to you.” 73 And Eramo responded, “I’m sorry we can’t speak, too.” 74

A Theme Emerges

The theme that would emerge for the story was silence and inaction at UVA. 75 It was premised upon Erdely’s belief that “Jackie” told the same story to Eramo during their initial meeting in May 2013, most notably that the gang rape occurred at the prominent Phi Psi Kappa house and that it involved members of the fraternity and instead of taking action and warning the campus she did nothing. 76 Erdely shored up her perspective by reaching out to two sexual assault experts, Laura Dunn and Daniel Carter and talking to them about what she was finding on the campus of UVA and what types of reporting and campus warning was appropriate and required of the university under Title IX based on those findings. 77

72 Deposition of Erdely, supra note 161, at 80:19-80:25.

73 Deposition of Eramo, supra note 126, at 263:4-263:10.

74 Id. at 263:9-263:10.

75 Id. at 203:3-203:4.

76 Id. 81:10-81:25. Erdely answers plaintiff counsel’s question designed to get at the heart of this issue, “After your interview with Dean Eramo was canceled, what other steps did you take to learn whether Dean Eramo knew that Phi Psi was the fraternity that Jackie alleged, at the time Jackie alleged – when she first alleged that she was assaulted, that she told Dean Eramo that information?”

77 Id. at 203:3-203:24. Laura Dunn is a sexual assault advocate and survivor and she is with the advocacy group, SurvJustice. Daniel Carter is also a victims and campus safety advocate and is on the board of SurvJustice.
Erdely explained in her deposition that she was trying to reconcile in her own mind the love the students felt for Eramo with the lack of action and reporting she was finding on the campus of UVA.\(^78\) She addressed the issue with Dunn and included a quote from her in “A Rape on Campus,” which offered an explanation: “This is a trend I’m seeing on many campuses. It's very alarming...Schools are assigning people to victims who are pretending, or even thinking, they’re on the victim’s side when they’re actually discouraging and silencing them. It's a harsh critique, but it's true. Advocates, who survivors love, are part of the system that is hiding and failing to address sexual violence.”\(^79\)

This theme of inaction, as the central accompaniment to “Jackie’s” gang rape, led to the maelstrom of outrage when the story was published. It also led to Eramo’s lawsuit because, as Erdely herself pointed out in her deposition, “the problem is, … she’s the most public face of sexual assault on campus because she's the intake person.”\(^80\)

Interestingly enough though, when the Office for Civil Rights issued its Letter of Finding addressed to Dr. Sullivan at UVA on Sept. 21, 2015, it found that the university had, in fact, failed to take appropriate action in 22 of the 50 cases reviewed during the 2008-2009 through 2011-2012 academic years.\(^81\)


\(^79\) \textit{Id} at 207:13-207:25. This excerpt from “A Rape on Campus” was read by plaintiff’s counsel, Libby Locke, to preface a question posed of Erdely.

\(^80\) \textit{Id} at 154:3-154:5. Erdely was explaining to Alex Pinkleton and “Jackie” why Eramo would have to be in the article.

October 2014: The Final Draft

On Oct. 11, 2014, Erdely emailed her first draft of the story to Woods. And on Oct. 23, she received a text from Alex Pinkleton, “Jackie’s” friend, who texted that “Jackie” did not want her name in the article and was thinking of pulling out of the story entirely. Erdely tried to reach “Jackie” by phone that day and left her a voicemail, “I just got some alarming . . . texts from Alex. We need to talk, so call me.” She did not hear back and left another voicemail on Nov. 3.

Erdely and Pinkleton thought her recent request for the last name of “Jackie’s” attacker had prompted this. Erdely emailed Woods, “Fuck. Jackie is apparently in full freak out mode right now. Her friend Alex texted to say that Jackie is right now saying she wants her name out of the piece and is thinking of pulling out entirely. Neither girl will answer my call.” She told Woods that when she brought up contacting her attacker “she fell apart.”

The texts with Pinkleton continued until Erdely told her that she had spoken with “Jackie” and since it was “causing her so much distress,” she was “letting that go.”

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82 Deposition of Erdely, supra note 161, at 212:8-213:02.

83 Id. at 240:4-240:6.

84 Id. at 213:8-213:18.

85 Id. at 224:20-224:25.

86 Id. at 225:3-225:5.

87 Id. at 223:21-223:24.
She told Pinkleton she would have to divulge her refusal to readers, which could undermine her credibility, but it would be the solution nonetheless.\footnote{\textit{id.} at 220:5-220:19, 221:13-221:16 and 223:21-223:25. Later in her testimony, Erdely said she did in fact written write a paragraph explaining “Jackie’s” reluctance. It was cut from the final article.}

Woods finished the draft and emailed Erdely back Oct. 25. He made a few notes, minor edits and cuts and told her the piece was great.\footnote{\textit{id} at 210:11-210:24.} He further wrote, “I worry we can't confirm the two girls coming to Jackie and alleging gang rape at the same frat. Let’s discuss on Monday a.m."\footnote{\textit{id.} at 210:25-211:5.} Erdely responded, “I have the same worry. I wish I had better sourcing for a lot of the Jackie stuff. A lot right now is resting in Jackie's say-so, including the entire lead.”\footnote{\textit{id.} at 211:6-211:9. Erdely had in fact tried to independently identify the girls and believed she was successful in doing so. But, when she shared the names in an earlier conversation “Jackie” told her they were not the right girls and that she would see if she couldn’t get contact information for Erdely through the sister of one of the girls. It was Erdely’s understanding that the girls did not want to come forward with the allegations.}

The final draft was submitted Oct. 31. And the following Wednesday, Elisabeth Garber-Paul, the fact-checker at \textit{Rolling Stone}, emailed Erdely to let her know she had spent about two hours on the phone with “Jackie” and it went well. Erdely wrote back thanking her, “I'm glad to hear it went well. Thanks for letting me know and letting her know we’ll be ACCOMMODATING of her, which seems crucial towards getting her through this process.”\footnote{\textit{id.} at 245:19-245:23.}
November 2014: Publication and Publicity

The article was published online Nov. 19, 2014. Erdely was booked on “The Brian Lehrer Show” on Nov. 26, and she spoke at length on the article. One of the statements she made would reappear in count three of the complaint filed by Eramo six months later. She also spoke on Slate magazine’s “DoubleX Gabfest” podcast that day and four of the statements she made during the podcast would comprise count four of the complaint.

After these interviews, it became clear to her that people wanted to talk about her reporting and were asking questions about her sources and whether she actually spoke with or attempted to speak with the alleged rapist. Erdely called “Jackie” and asked if she would finally tell her the name of her alleged attacker given the story was already published. This time “Jackie” shared the name, but when Erdely asked her to spell it she couldn’t. Erdely made a notation in her reporting file, “Mental note: that’s odd that she doesn’t know the name of her attacker.”

In her deposition, she said she found this odd because “Jackie” was someone who was detailed and sure of herself. It struck her as odd that she would not know the

93 Complaint at 66, Eramo v. Rolling Stone, LLC, Civil Action No. 3:15-CV-00023-GEC (W.A. Va. May 29, 2015), ECF No. 1-1. During her appearance on “The Brian Lehrer Show,” Erdely made the following statement concerning Dean Eramo: [Jackie] was kind of brushed off by her friends and by the administration...And eventually, when she did report it to the administration, the administration did nothing about, they did nothing with the information. And they even continued to do nothing even when she eventually told them that she had become aware of two other women who were also gang raped at the same fraternity.” The jury ultimately found this statement actionable and found that it was made with actual malice in the verdict.

94 Id. at 67. The jury found two of the statements made actionable and found that they were made with actual malice in the verdict as well.


96 Id. at 267:8-267:9.
spelling of his last name. When she couldn’t find a name that matched his in her online queries, Erdely said that she assumed “Jackie” misdirected her in an effort to stop her further requests.

**December 2014: THAT is the Story**

The topic that concerned her much more, and which she discussed with her editors at *Rolling Stone* the week after Thanksgiving was that people were attacking the truthfulness of her story. She responded to one such inquiry from *The Washington Post* by email on Dec. 1:

> As I’ve already told you, the gang-rape scene that leads the story is the alarming account that Jackie — a person whom I found to be credible — told to me, told her friends, and importantly, what she told the UVA administration, which chose not to act on her allegations in any way — i.e., the overarching point of the article. THAT is the story: the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference.

On Dec. 4, Erdely prepared a draft response to the rising tide of allegations challenging its veracity and forwarded it to Woods to post online. Later that evening, however, she received a text from “Jackie” alerting her that Phi Psi would be issuing a statement the next day that they could find no evidence of a party or date function in the house on the night of the alleged rape. She called “Jackie” and confronted her on the discrepancies she found with the alleged attacker’s name. After this call, Erdely lost all credibility in her source. She emailed her editors at 1:54 a.m. on Dec. 5, and wrote, “We

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97 *Id.* at 269:3-269:6.

98 *Id.* at 273:1-273:10.

99 *Id.* at 274:11-274:14.

100 Complaint, *supra* note 212, at 64. This statement comprised count five in the complaint.
can't run the statement tomorrow. In fact, we're going to have to run a retraction. I just got off the phone with Jackie and her friend Alex. Neither I, nor Alex, find Jackie credible any longer.”

Will Dana appended the editor's note to the top of the online article that day and six months later Eramo filed suit. Whether the editor's note constituted a retraction or republication of the article became an issue for the jury to decide in *Eramo v. Rolling Stone*.

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101 *Id.* at 279:24 - 280:4.
CHAPTER 4
AN ANALYSIS OF ERAMO V. ROLLING STONE

Elements of a Defamation Lawsuit

There are six elements in a defamation lawsuit: Publication; identification; falsity; defamatory meaning; fault; and personal injury or damages. To win a defamation lawsuit against a defendant, a plaintiff must prove each of these elements for each defamatory statement at issue. The burden of proof for all these elements rests with the plaintiff, and the standard of proof is by a preponderance of the evidence for each element with the exception of fault, which for the public-figure plaintiff becomes clear and convincing evidence that the statement was made with actual malice.\footnote{Jury Instructions at 23, Eramo v. Rolling Stone, LLC, Civil Action No. 3:15-CV-00023-GEC (W.A. Va. Nov. 4, 2016), ECF No. 375.} This is a notch above preponderance of the evidence.

In \textit{Chapin v. Knight-Ridder, Inc.},\footnote{993 F. 2d 1087 (4th Cir. 1993).} the Court of Appeals for the Fourth Circuit (which covers Virginia) explained that in the common law of Virginia “the elements of libel are … publication of … an actionable statement with … the requisite intent.”\footnote{\textit{Id.} at 1087.} Here, the term actionable statement encompasses three of the elements for a defamation claim – falsity, identity and defamatory content. These three elements will be the launching point of the analysis.

\textbf{False and Defamatory}

While causes of action for defamation have their basis in the state common law, the application of that law – owing to the 1964 landmark \textit{Sullivan} decision– turns on the
limitations arising under the First Amendment. And one such limitation, which the Court addressed in 1988 in *Milkovich v. Lorain Journal Co. et. al.* is “the protection for statements that cannot ‘reasonably be interpreted as stating actual facts’ about an individual.”\(^4\) Thus, for a statement to be actionable, it must contain a “provably false factual connotation.”\(^5\) It cannot be pure opinion. And it is for the court to decide whether an alleged defamatory statement conveys a factual connotation or is protected opinion.\(^6\)

In his dissent in *Milkovich*, Justice Brennan noted that the U.S. Supreme Court “first hinted that the First Amendment” provided some protection for expressions of opinion in *Sullivan*.\(^7\) The idea was further expanded in *Gertz* when Justice Powell penned, “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”\(^8\)

In *Milkovich*, the Court sought to clarify the extent to which constitutional protection of opinion can actually be used to limit a defamation claim under a state’s common law and flatly declined to craft a new privilege for opinion in this arena. The Court held instead that the “'breathing space' which 'freedoms of expression require in

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\(^7\) *Milkovich v. Lorain Journal Co. et al.*, 497 U.S. 1, 23 (1990). And Justice Brennan should know – he wrote the opinion of the Court in *Sullivan*.

order to survive’ is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between opinion and fact.”

**Background**

Petitioner Mike Milkovich was a wrestling coach at Maple Heights High School in Ohio. In 1974, during a home match, his team was involved in an altercation with students from Mentor High School. As a result, he and the superintendent for the school district were called to testify at a hearing held by the Ohio Student Athletic Association and their team was suspended from playing or competing the next year.

In response, some of the parents and wrestlers sued the athletic association and asked the court for a restraining order against the ruling. Milkovich and the superintendent again testified, and this time the parents and students won. The following day, the local newspaper ran a story in the sport’s section accusing Milkovich and the superintendent of lying. The headline was "Maple beat the law with the 'big lie.'" Milkovich sued.

The defamation claim was originally dismissed at the trial court level and the Ohio Court of Appeals upheld the dismissal “on the grounds that the article constituted an 'opinion' protected from the reach of state defamation law by the First Amendment to the United States Constitution.” In an opinion delivered by Chief Justice Rehnquist, the Court held, “the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article.

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10 *Id.* at 3.

11 *Id.*
Chief Justice Rehnquist clarified that the opinion in *Gertz* was not intended to
create a “wholesale defamation exemption for anything that might be labeled
‘opinion.’”\(^{12}\) Not only would such an exemption “be contrary to the tenor and context of
the passage.”\(^{13}\) But, it would further “ignore the fact that expressions of opinion may
often imply the assertion of objective fact,”\(^{14}\) Chief Justice Rehnquist offered:

If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a
knowledge of facts which lead to the conclusion that Jones told an untruth.
Even if the speaker states the facts upon which he bases his opinion, if
those facts are either incorrect or incomplete, or if his assessment of them
is erroneous, the statement may still imply a false assertion of fact. Simply
couching such statements in terms of opinion does not dispel these
implications; and the statement, ‘In my opinion Jones is a liar,” can cause
as much damage to reputation as the statement, ‘Jones is a liar.”\(^{15}\)

Chief Justice Rehnquist did clarify that “a statement of opinion relating to matters
of public concern, which does not contain a provably false factual connotation will
receive full constitutional protection.”\(^{16}\) And in determining whether a statement conveys
a false factual connotation or is protected opinion, the Court looked at “the kind of
language used and the context in which it is used.”\(^{17}\) The Court emphasized that “loose,
figurative, or hyperbolic language … would negate the impression that the writer” was

\(^{12}\) *Id.* at 18.
\(^{13}\) *Id.* at 18.
\(^{14}\) *Id.* at 18.
\(^{15}\) *Id.* at 18.
\(^{16}\) *Id.* at 20.
\(^{17}\) *Id.* at 22, 25.
asserting fact.”\textsuperscript{18} The Court also looked at whether the language referred to “an objectively verifiable event.”\textsuperscript{19}

But, finding that a statement conveys a false factual connotation alone is not sufficient to maintain a cause of action for defamation. The statement must also be defamatory.\textsuperscript{20} As the Fourth Circuit pointed out in \textit{Chapin et al. v. Knight-Ridder, Inc}, “To defame a person is to attack his or her good name, thereby injuring his or her reputation … But not every unflattering or unwelcome remark will sustain a libel suit.”\textsuperscript{21}

In \textit{Moss v. Harwood}, the Virginia Supreme Court in 1904 offered as a general rule, “ … Any false and malicious writing published of another is libelous per se when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or to hinder virtuous men from associating with him.”\textsuperscript{22} In \textit{Chapin}, a 1992 decision, the court further offered that a defamatory statement “tends … to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”\textsuperscript{23} And, to be defamatory “it must make the plaintiff appear odious, infamous, or ridiculous.”\textsuperscript{24}

\textsuperscript{18} \textit{Id.} at 21.

\textsuperscript{19} \textit{Id.} at 21.


\textsuperscript{22} \textit{Moss v. Harwood}, 102 Va. 386, 391 (1904).


In deciding whether a statement can have the defamatory meaning attributed to it by the plaintiff, the court looks at three things: The statement in the context of the article; the plain and natural meaning of the words within the statement; and the meaning that the words may imply.\textsuperscript{25} As the Virginia Supreme Court held in 1954 in the case of \textit{Howard H. Carwile v. Richmond Newspapers, Inc.}:

\ldots it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. Accordingly, a defamatory charge may be made by inference, implication or insinuation.\textsuperscript{26}

Thus, before a jury could consider if any of the challenged statements were actionable in \textit{Eramo v. Rolling Stone}, the court had to first decide if any of the statements were protected opinion, as Erdely and \textit{Rolling Stone} argued, or if the statements were false factual assertions, as Eramo contended. In the event of the latter, the court had to also decide if the statements were capable of having the defamatory meaning that Eramo attached to them and further, if they were actually defamatory per se, as she argued.

Eramo’s argument was based on the common law of defamation in Virginia which finds defamation per se for a statement that “imputes to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment; or prejudice[s a] person in his or her profession.”\textsuperscript{27} The wording of the Virginia law mirrors almost perfectly the


\textsuperscript{26} \textit{Id.} at 7.

\textsuperscript{27} \textit{CACI Premier Technology, Inc. v. Randi Rhodes et al.}, 536 F. 3d 280, 293 (2008).
Alabama law of libel per se, under which L.B. Sullivan sued and received an award of $500,000 from a jury in the Circuit Court of Montgomery County 55 years earlier.\(^{28}\)

The *Eramo* court began with a review of the First Amendment limitations imposed on the Virginia common law and found that “it … [was] not clear … all twelve statements targeted by the plaintiff … [were] ‘exaggerated rhetoric’ or ‘the opinion of the author.’”\(^{29}\) In fact, Chief U.S. District Judge Glen E. Conrad\(^{30}\) concluded that only one of the statements could fairly be characterized as such – the “deck” that opened the article. These first few sentences were found just below the headline and read, “Jackie was just starting her freshman year at the University of Virginia when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began.”\(^{31}\)

The court found the phrase “a whole new kind of abuse” similar to the term “hired-killers,” which a radio talk show host, Randi Rhodes, used to describe the civilian contractors at Abu Ghraib detention center in Iraq. Indeed, in that case, *CACI Premier Technology, Inc. v. Randi Rhodes et al.*, the Fourth Circuit held that statement, along with several others, “were quintessential examples of non-actionable rhetorical hyperbole … intended to spark the debate about the wisdom of the use of contractors in

\(^{28}\) *Sullivan*, supra note 28, at 267.


\(^{30}\) See Official Site of the U.S. District Court for the Western District of Virginia, The Honorable Glen E. Conrad, available at http://www.vawd.uscourts.gov/judges/judge-conrad.aspx (Judge Conrad was appointed a United States District Judge for the Western District of Virginia in April 2003. He received his B.A. in 1971 from the College of William and Mary, and his J.D. from the College of William and Mary Marshall-Wythe School of Law in 1974.).

\(^{31}\) Memorandum Opinion, supra note 249, at 20.
Iraq." The Fourth Circuit further offered, quoting in part from *Milkovich*, the type of "imaginative expression' ... which has traditionally added much to the discourse of our nation."\(^3\)

In the court’s analysis, Judge Conrad observed that Erdely used exaggerated and figurative language throughout “A Rape on Campus,” but noted that it was used to “drive home … underlying factual assertions.”\(^4\) And while the “figurative language remains protected … the factual assertions do not.\(^5\) In making that determination, Judge Conrad examined the tenor and tone of the article.\(^6\) Unlike the talk-show host in *CACI*, he observed that Erdely did not make frequent use of hyperbole. Her prior work was seriously styled and “fact-intensive.” The article was described as a special report on the front cover of *Rolling Stone*, and in interviews, it was characterized as an investigation.

Judge Conrad further concluded that the statements could be objectively verified. “A jury could find that the ‘trusted UVA dean’ either did or did not discourage Jackie from sharing her story, that Eramo did or did not tell Jackie that ‘nobody wants to send their daughter to the rape school,’ and that Eramo did or did not have a nonreaction to Jackie’s assertion that two other individuals were raped at the same fraternity.”\(^7\) Similarly, the court found that a reasonable jury could find the remaining statements and

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\(^4\) *Id.* at 293.

\(^5\) *Id.* at 293.

\(^6\) *Id.* at 293.

\(^7\) *Id.*
inferences capable of the defamatory meaning Eramo ascribed to them, or not, and declined to find that the statements were defamatory per se. Instead, the court determined whether the statements actually had a defamatory meaning would be a question for the jury.\textsuperscript{38}

\textbf{Identity}

Eramo also asked the court to conclude, as a matter of law, that the challenged statements were of and concerning her. This is, of course, the second element a plaintiff must prove in a defamation lawsuit for a publication to be actionable. And, as the Virginia Supreme Court pointed out in \textit{The Gazette, Inc v. Harris}, the plaintiff “need not show that he [or she] was mentioned by name in the publication. Instead, the plaintiff satisfies the 'of or concerning' test if he shows that the publication was intended to refer to him and would be so understood by persons reading [or hearing] it who knew him.”\textsuperscript{39}

Here, there was no dispute the statements at issue concerned Eramo. The only statement in the article that Erdely and \textit{Rolling Stone} argued did not refer to Eramo was the opening to the article – the “deck,” which the court concluded was hyperbole and opinion entitled to protection under the First Amendment. The Court ultimately determined this would be a question for the jury, however, and it was included in the jury instructions on this basis.

\textbf{Publication}

Publication is, perhaps, the simplest of the elements, as a plaintiff need only show publication of the libel to one-person other than the defamed. As the court in

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\end{footnotesize}
Fleury v. Harper & Row Publishers, Inc., explained, “A cause of action for defamation does not arise until there has been an unprivileged publication of the libel to a third party.” This can occur when an individual tweets on Twitter; posts on Facebook; or publishes on WordPress. Similarly, when defamation lawsuits involve the media, libel occurs when the printed newspaper is made available to the public; the digital edition is published; or the show is broadcast. The important distinction here, again offered by the court in Fleury, is that “publication occurs at the time of actual communication of the libel, not the date on the cover of the newspaper, magazine or other printed material.”

The more complicated aspect of publication involving mass communication is the multistate and aggregate nature of it. As Justice Rehnquist noted in Keeton v. Hustler Magazine, Inc., “The tort of libel is generally held to occur wherever the offending material is circulated.” Thus, giving rise to the potential for multiple lawsuits in different states resulting from a single publication. Indeed, in Keeton Justice Rehnquist explained that historically “each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, [was treated as] a separate and distinct publication for which a separate cause of action [arose].” However, Justice Rehnquist further noted that a shift had occurred and “the great majority of States now follow the ‘single publication rule,’ which effectively mitigates the potential for multiple

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41 Id. at 1028.


43 Id. at 774.
time-consuming and resource-draining libel lawsuits by limiting claims to a single cause of action that commences on the first publication.\textsuperscript{44}

Indeed, in \textit{Morrissey v. William Morrow & Co., Inc.}, the Fourth Circuit Court of Appeals upheld the adoption of the single-publication rule in Virginia “even though the Virginia Supreme Court had not faced the issue.”\textsuperscript{45} And, the court summarized the rule as follows:

As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; (c) a judgment for or against the plaintiff upon the merits of an action for damages bars any other action for damages between the same parties in all jurisdictions.”\textsuperscript{46}

The single-publication rule also addresses complexities associated with the aggregate nature of mass communication. It is sometimes referred to as the first publication rule for this reason, as it holds that the statute of limitations governing a claim for defamation accrues with the first publication of the defamatory statement. It is not renewed each time a reader accesses the content, and it applies to print and internet publications. Without this rule, the court in \textit{Firth v. State of New York} observed, “the statute of limitations would never expire so long as a copy of [a] book remained in stock.”\textsuperscript{47}

However, as with most rules there is an exception to it and that exception to the single-publication rule is republication.\textsuperscript{48} Under the legal doctrine of republication, each

\textsuperscript{44} Id. at 778.


\textsuperscript{46} Id. at 967.


\textsuperscript{48} \textit{In re Davis}, 347 B.R. 607, 611 (W.D. Ky. 2006).
time a defamatory statement is republished, a new cause of action arises and the statute of limitations is reset.\textsuperscript{49} In \textit{Firth v. State of New York}, the court explained that republication “occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely a delayed circulation of the original edition.”\textsuperscript{50} In \textit{Charles R. Yeager v. Connie Bowlin et. al.}, the Court of Appeals for the Ninth Appellate Circuit offered the example, “… a statement made in a daily newspaper is not republished when it is repeated in later editions of that day’s newspaper … but a statement made in a hardcover book is republished when it is repeated in a later paperback version ….”\textsuperscript{51} The court in \textit{Firth} noted, “The justification for this exception … is that the subsequent publication is intended to and actually reaches a new audience.”\textsuperscript{52}

What constitutes a republication on the internet, however, “can be tricky.”\textsuperscript{53} In \textit{Firth}, the court faced the question of “whether an unrelated modification to a different portion of the website constitutes a republication.”\textsuperscript{54} And the court held that it did not. The court in \textit{Yeager} faced a similar set of facts and also rejected the claimant’s argument. The court held that the defendant did not republish a defamatory statement “by continuing to host the statement and also modifying other parts of the website.”\textsuperscript{55} In

\begin{itemize}
\item \textsuperscript{49} \textit{Charles E. Yeager v. Connie Bowlin et. al.}, 693 F.3d 1076, 1082 (2012).
\item \textsuperscript{50} \textit{George Firth v. State of New York}, 98 N.Y. 2d 365, 371 (2002).
\item \textsuperscript{51} \textit{Yeager}, supra note 269, at 1082.
\item \textsuperscript{52} \textit{Firth}, supra note 270, at 371.
\item \textsuperscript{53} \textit{Yeager}, supra note 269, at 1082.
\item \textsuperscript{54} \textit{Firth}, supra note 270, at 367.
\item \textsuperscript{55} \textit{Yeager}, supra note 269, at 1083.
\end{itemize}
contrast the court held, “… a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience.”

In *Eramo v. Rolling Stone*, there was no dispute that the single-publication rule applied to the lawsuit, nor was there any dispute among the parties that Nov. 19, 2014 was the date of first publication for the online and print article. The only dispute concerning publication was whether the editor’s note appended to the top of the online article on Dec. 5, 2014, by *Rolling Stone*’s then-managing editor, Will Dana, constituted a republication, or – as defendants argued – whether it was a retraction. If it was the former, then the jury would be charged with determining if Eramo met all elements of defamation for a second time with respect to the republished article and the original three statements at issue, as well as deciding if the statements were made with actual malice.

The court looked to *Clark v. Viacom Int’l Inc.*, to examine this question. In *Clark*, the Sixth Circuit considered the plaintiff’s argument that Viacom republished allegedly defamatory articles on its website simply because the content continued to be available to the online public. The Sixth Circuit offered, “The general rationale behind the [republication] rule is that if the speaker affirmatively says the same thing again at a later time to a new audience, then he has intended to engender additional reputational

56 Id.

57 *Clark v. Viacom Int’l Inc.*, 617 F. Appx. 495 (2015, 6th Cir.).

58 Id. at 501.
harm to the plaintiff." The court further held, "The test of whether a statement has been republished is if the speaker has affirmatively reiterated it in an attempt to reach a new audience that the statement's prior dissemination did not encompass." Erdely and Rolling Stone argued there was no change in the article from the time of its original online publication on Nov. 19, 2014, until April 2015, when the article was taken down and replaced with the independent report from the Columbia Journalism School. The only exception had been the Note to Readers, which was appended to the top of that article on Dec. 5, 2014. And that note effectively placed readers on notice that Rolling Stone had lost confidence in the integrity of their lead source – Jackie due to discrepancies that had emerged in her account of events. The note further announced that they were taking the matter seriously and "apologize[d] to anyone affected by the story." The testimony of all Rolling Stone witnesses involved in issuing was consistent in that every one of them believed that the Dec. 5 note to readers was a retraction of all information sourced to Jackie in the original article. When Erdely was asked if she "intended or hoped that the Editor’s Note would make the original article ‘reach a new and different audience and that people would continue to read it,’ she responded: ‘Heavens, no.’" Likewise, Sean Woods, the articles editor, responded, “If I could have

59 Id. at 505.

60 Id.


made it go away, I would have."

And during his video deposition, Jann Wenner, who actually made the decision to leave the original article online below the Note to Reader’s on Dec. 5, offered his thoughts behind that decision:

It was too late. The article is out there. It was gone. The people who were going to click on it were going to find it anywhere, any way, anywhere. And it would be better to have them get this article from Rolling Stone with a clear disclaimer at the top explaining the problems with it, what we didn’t support any longer, and all the material that we found inaccurate. … Taking it down, at this particular point in time, wasn’t going to change anything. It was better to have it out there with our disclaimer.

Eramo disagreed, and the jury would ultimately side with her. When her counsel asked Wenner how readers might know what information was actually retracted - the rape accusation - or, meetings and conversations Jackie had with Eramo? He responded, “You’d have to read the article.”

Thus, providing a bridge to link the number of new online visitors to the article after Dec. 5, which Eramo’s attorneys contended was 425,000, to the second half of the two-pronged test for republication offered by the court in Clark and included in the jury instructions in Eramo:

In order to find that defendant “republished” the original article on December 5, 2014, you must find that by adding the “Editor’s Note” to the top of the online article, defendants, affirmatively reiterated the content of any allegedly false and defamatory statements with an intent to reach a new audience.

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65 Id.

Erdely and *Rolling Stone* renewed their Motion for Judgment as a Matter of Law on this issue post-verdict and asked the court to set aside the judgment arguing, “the intent was to warn the worldwide audience that already had access to it, not to reach a ‘new audience that the statement’s prior dissemination did not encompass.’”67 They further argued that “there [was] no evidence in the record to support a finding that Rolling Stone intended to ‘affirmatively reiterate’ statements from a source that the Editor’s Note affirmatively repudiated.”68

The case settled in April 2017, before Judge Conrad ruled on the motion.

**Fault**

**Public official or limited-purpose public figure**

To determine the fault standard that would apply in *Eramo*, the court had to decide what category of plaintiff Eramo was. Under the law of Virginia, as with most states, a defendant may be liable for publishing a defamatory falsehood about a private individual if that statement was published negligently.69 Negligence can be thought of as carelessness.70 Its threshold is much lower than *The New York Times* actual malice standard crafted in *Sullivan*. And, its measure is what a reasonably prudent person would have published under similar circumstances.

Eramo argued she should be treated as a private individual in her defamation action. Given Eramo’s role as a university administrator at an elite public institution

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68 *Id.* at 8.


70 *Sullivan*, *supra* note 28, at 262.
however, Erdely and *Rolling Stone* asked the court to make the determination that she was a public official according to *New York Times Co. v. Sullivan*, thus requiring her to prove with convincing clarity that they acted with actual malice in publishing the statements at issue. At the very least, they argued she was a limited-purpose public figure according to *Gertz*.

Judge Conrad started with the assumption that Eramo was a private individual when “A Rape on Campus” was published and placed the burden of proving she was a public official or limited-purpose public figure on Erdely and *Rolling Stone*.71 The judge looked to *Gertz* for guidance and noted a limited-purpose public figure is someone who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”72 The rationale behind this, the court noted, is twofold. First, public figures are less vulnerable to injury because they have access to communication channels to refute harmful falsehoods. And second, the court views public figures as less deserving of protection given they assumed the risk of the heightened public scrutiny by choosing to enter the public sphere.73

Next, the court looked to a Fourth Circuit decision, *James W. Fitzgerald, Appellant, v. Penthouse International, Ltd. et al.*,74 in which the Fourth Circuit outlined the “five requirements for determining if a plaintiff is a limited purpose public figure in

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72 Id. (citing *Gertz v. Robert Welch*, 418 U.S. 323, 351 (1974)).

73 Id.

Virginia.” The burden of proof for each factor is on the defendant. Thus, Erdely and *Rolling Stone* had to prove:

1. the plaintiff had access to channels of effective communication;
2. the plaintiff voluntarily assumed a role of special prominence in a public controversy;
3. the plaintiff sought to influence the resolution or outcome of the controversy;
4. the controversy existed prior to the publication of the defamatory statements; and
5. the plaintiff retained public figure status at the time of the alleged defamation.

Judge Conrad began with the second and third factors, as they represent the heart of the matter and constitute the threshold determination. Thus, the issue was whether Eramo had “assumed a role of special prominence in a public controversy,” and if so, had she sought to influence its outcome. In *Vincent P. Foretich et al. v. Capital Cities/ABC, Inc. et al.*, the Fourth Circuit offered two questions to guide the inquiry:

“First, was there a particular public controversy that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff’s participation in that particular controversy sufficient to justify public figure status?” As Gertz had not offered much guidance in defining what constitutes a public controversy, these questions evolved from a combination of Supreme Court cases that addressed public-figure plaintiff’s in the years that followed.

75 *Id.* at 668.
76 *Id.*
79 *Id.*
The first of these cases was *Time, Inc. v. Firestone*.\(^{80}\) Here, the Court considered the very public divorce of Mary Alice Firestone from Russell Firestone, one of America’s wealthiest families and found the plaintiff was a private figure. In the opinion of the Court, Justice Rehnquist held that public controversy does not equate to “all controversies of interest to the public.”\(^{81}\) Further, the Court noted, “Dissolution of a marriage through judicial proceedings is not the sort of ‘public controversy’ referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.”\(^{82}\)

In a second case, *Hutchinson v. Proxmire et al.*,\(^{83}\) the Court considered a case involving a research scientist and adjunct professor at a state university who was allegedly defamed when a Wisconsin senator awarded him “the ‘Golden Fleece of the Month Award’ to publicize what he perceived to be the most egregious examples of wasteful governmental spending.”\(^{84}\) The Court held he was a private figure as it could not find any evidence that he “thrust himself or his views into public controversy to influence others.”\(^{85}\) Indeed, the Court couldn’t find any particular controversy involving Hutchinson that pre-existed “the controversy engendered by that award.”\(^{86}\)

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\(^{81}\) *Id.* at 454.

\(^{82}\) *Id.*

\(^{83}\) *Hutchinson v. Proxmire et al.*, 443 U.S. 111, 134-136 (1979)

\(^{84}\) *Id.* at 114.

\(^{85}\) *Id.* at 135.

\(^{86}\) *Id.*
To properly evaluate the controversy at issue in Eramo, Judge Conrad pointed to the court’s decision in *National Life Insurance Co. v. Phillips Publications, Inc.*, 87 that found “it would be inappropriate to shrink all controversies to the specific statements of which a plaintiff complains.” 88 Thus, consideration of the article in its entirety was necessary to define the scope of the controversy. And, Judge Conrad concluded after “a fair reading … that the controversy at issue … [was] UVA’s response to allegations of sexual assault.” 89

Next, the judge looked to Eramo’s conduct within the context of that public controversy and determined that she “voluntarily assumed a position of ‘special prominence’ on this issue.” 90 With respect to the public controversy, the court considered that between 2009 and 2014 Eramo gave 21 interviews to the press on the topic and wrote an opinion piece for the campus newspaper in 2013 about the university’s process for handling reports of sexual misconduct. She also spoke with local TV stations on the topic. She participated in professional panel discussion. She gave workshops. And she spoke at conferences. 91

Next, the court looked at the fourth and fifth factors, and again found that Erdely and *Rolling Stone* had met their burden of proof. The judge found evidence that the


88 *Id.*

89 Memorandum opinion, *supra* note 249, at 7.

90 *Id.*

“controversy existed prior to the publication of the defamatory statements”; and that Eramo remained in her same position - associate dean in the Office of the Dean of Students - at the time, and after the alleged defamatory statement were published.\(^92\) In support of the former, Judge Conrad remarked that Eramo’s multiple media appearances prior to, and in relatively close proximity to the articles’ publication indicated the controversy pre-existed publication of the article. The judge also found that the investigation of UVA by the Office for Civil Rights was further indicative that the controversy was pre-existing and on-going, and it provided the meaningful context from which the defamation action arose.\(^93\)

The remaining requirement to determine Eramo was a limited-purpose public figure was whether she had effective channels of communication available to her to refute the allegations in the article. And the court held that in light of the evidence above, she did. Judge Conrad noted he was not persuaded by Eramo’s theory that the plaintiff did not have access to effective channels of communication due to the Family Educational Rights and Privacy Act.

Eramo had argued that the scope of the controversy was limited to Jackie’s alleged sexual assault and her mistreatment at the hands of Eramo. As such, FERPA prevented her from discussing any facts of the case, as she would be breaching the confidentiality of a student. She buttressed her theory by pointing to the articles title, “A Rape on Campus,” and the “deck” of the story, which opened with the account of Jackie’s alleged rape. Judge Conrad countered that FERPA may have precluded her


\(^{93}\) Memorandum Opinion, supra note 249, at 8.
from discussing Jackie’s case, but it certainly did not preclude Eramo from discussing UVA’s policies with Erdely or the press. Judge Conrad noted that “UVA’s unwillingness to allow Eramo to contact the media may have put her in the difficult position of deciding between her job and her reputation.”94 But, she still had greater access to the media by virtue of her position than a private citizen. And the record demonstrated she utilized that access.

Thus, Judge Conrad concluded that Erdely and Rolling Stone had met all required elements and declared Eramo a limited-purpose public figure. The judge did not offer an analysis on whether Eramo was a public official, having already met the threshold on this narrower basis.

**Actual malice**

Because the court ruled that Eramo was a limited-purpose public figure, the jury was instructed that she would have the burden of “demonstrating by clear and convincing evidence that a defamatory statement was made by one or more defendants with actual malice, that is, with knowledge of the statements falsity or with reckless disregard of whether or not it is false.”95 In *St. Amant v. Thompson*,96 the Supreme Court explained actual malice is not ordinary negligence:

> Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his

94 *Id.* at 9.


publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.97

Thus, the issue is not standard of care. It is not motive or ill will, either. It is the very high standard of bad faith – the limited-purpose public figure must prove with convincing clarity that the defendant published the defamatory statement with the knowledge that it was false at the time it was published or published it with a reckless disregard for whether it was true.

During a TV appearance in 1968, Phil A. St. Amant - a candidate for public office - falsely accused Herman Thompson, a state deputy sheriff, of criminal conduct.98 The accusation was based on a single source - an affidavit provided by a third party whose reputation was largely unknown to St. Amant on personal level. Yet, he made no attempt to verify the information with possible witnesses. Nor did he attempt to contact Thompson directly on the charges.99

Thompson sued and was awarded $5,000 by a Louisiana trial court.100 The appellate court reversed. And the case ultimately made it to the Louisiana Supreme Court which upheld the judgment of the trial court ruling that St. Amant’s actions amounted to actual malice.

The Supreme Court reviewed the case, and in a decision written by Justice White, reversed and remanded it for further proceedings. The Court held that there was nothing in the record which demonstrated “an awareness by St. Amant of the probable

97 Id. at 731.
98 Id. at 728.
99 Id. at 733.
100 Id. at 729.
falsity of Albin’s statement about Thompson.” The Court placed emphasis on his apparent belief in the credibility of the charges and concluded that was the proper test for actual malice – not the failure to investigate. The Court further recognized that reckless disregard could “not be fully encompassed in one infallible definition.” However, it was necessary to demonstrate that the “publication was made with a ‘high degree of awareness of . . . probable falsity.’” The Gertz Court remarked that the Court here, “equated reckless disregard of the truth with subjective awareness of probable falsity.”

Twenty-two years later, in Harte-Hanks Communications, Inc. v. Connaughton, the Supreme Court ruled that given the subjective nature of the actual malice standard, “the plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the inquiry as to the defendant's actual malice ….”

Daniel Connaughton, ran for office in 1983 and lost. The local newspaper covered the election and supported the re-election of the incumbent. About a month

101 Id.
102 Id. at 733.
103 Id. at 731.
104 Id. at 731. (citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
105 Gertz, supra note 292, at 334.
107 Id. at 667.
108 Id. at 660. (He was running for municipal judge).
109 Id.
before the election, it ran a front-page story about a bribery charge brought against a member of the incumbent’s team. 110 The story focused on an informant, one of the grand jurors involved in the indictment, who told the newspaper that Connaughton had “offered her and her sister jobs and a trip to Florida in exchange for their help in the investigation.” 111 The informant told the newspaper that what Connaughton had proposed was a blackmail scheme, and she wanted “people to know. Because they shouldn't vote for a man that is this dirty.” 112 Connaughton sued.

The jury heard six days of testimony and found the story to be false and defamatory by a preponderance of the evidence and also found by “clear and convincing proof that the story was published with actual malice.” 113 The decision was confirmed on appeal by the Sixth Circuit, and the Supreme Court accepted the case for review. 114

The issue the Court addressed was whether the lower court erred in applying a standard of fault less than actual malice. 115 While the jury was instructed properly on The New York Times actual malice, the newspaper’s investigation of the story was the focus of the trial. They had in fact interviewed six witnesses. And each of them denied the allegations against Connaughton. 116 Yet, the one witness who was identified by both

110 id.
111 id. at 670.
112 id. at 675.
113 id. at 661.
114 id. at 662.
115 id. at 663-664.
116 id. at 683.
parties as being able to clear up their conflicting accounts was not contacted. The appellate court had characterized this as an extreme departure from journalistic standards of practice.

The Court noted, “Petitioner is plainly correct in recognizing that [a] public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper's motive in publishing a story – whether to promote an opponent's candidacy or to increase its circulation – cannot provide a sufficient basis for finding actual malice.” However, the Court found that “discrepancies in the testimony … may have given the jury the impression that the failure to conduct a complete investigation … [was] a deliberate effort to avoid the truth.” When taken as a whole, the Court concluded that the “newspaper's departure from accepted standards and the evidence of motive” combined to support the conclusion that the defendants “demonstrated a reckless disregard as to the truth or falsity of [the] informant’s allegations, and thus provided clear and convincing proof of 'actual malice' as found by the jury.”

As the jury was instructed in *Eramo*:

…if there is evidence that defendants failed to investigate when doubts were created because the story was weakened by inherent improbability, internal inconsistency, or apparently reliable contradictory information, you are permitted to infer from such evidence that a defendant acted with actual malice.

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117 *Id.*

118 *Id.* at 684-685.

119 *Id.*

120 *Id.* at 667-668.

Further, In *Harris v. City of Seattle,*\(^{122}\) the Ninth Circuit offered, “Evidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence.”\(^{123}\) This, Eramo argued, was the fundamental flaw that underscored every other problem with Erdely’s article.

Central to demonstrating that Erdely acted with actual malice when she and *Rolling Stone* published “A Rape on Campus” was Eramo’s argument that Erdely had a preconceived story line. Eramo contended that Erdely knew the story she wanted to write, made the pitch to her editors at *Rolling Stone,* and then spent six weeks interviewing students and visiting campus’ until she found the setting and the students that matched her vision. With the story line in place, Eramo argued, Erdely would simply need to spend enough time with her sources to have ample material from which to selectively weave the narrative together.

Eramo focused on Erdely’s pitch to *Rolling Stone*.

I’d like to examine sexual assault on college campuses, the various ways colleges have resisted involvement … As the story’s main thread, I’ll focus on a sexual assault case on one particularly fraught campus … following as it makes its way through university procedure to its resolution, or lack thereof.\(^{124}\)

Erdely had written five similarly styled articles. One of which, Eramo had lingered on during her deposition – “The Rape of Petty Officer Blumer.”\(^{125}\) The article was about


\(^{113}\) *Id.* at 568.


rape in the military. It opened with the sensational story of Petty Officer 2nd Class Rebecca Blumer who woke up naked on the concrete floor of a cell in Richmond County Jail. Erdely sent a link with this article to sources she wanted to interview for “A Rape on Campus.” She offered it as an example of the type of story she envisioned writing.

Eramo pointed out that the students Erdely interviewed felt that she did not listen to what they had to say about her. Sara Surface, a student at UVA involved with the One Less organization, was one such student. Surface was interviewed and quoted in the article. She spoke with Erdely several times and met in person with her on Sept. 13, 2014. The two discussed Eramo and Surface made a positive reference to her. Erdely responded:

I mean, I get the fact that everybody loves Dean Eramo, everybody’s been very emphatic, that one of the reasons they’re concerned with speaking with me is that she's going to take the fall, lose her job. Like, I don't think that?

Surface testified that she felt as though Erdely “already had formed an opinion about Nicole and was quite critical of her at that point.” Alex Pinkleton was another such student.

Pinkleton was a source for the article, as well. And, she too met with Erdely in September at UVA. Pinkleton testified that Erdely “made it clear that she was going to

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128 *Id.* at 152:13-15.
write some negative things about Dean Eramo.”129 And Pinkleton responded by making it clear she did not want to be associated with that opinion in the article.130 Reflecting on their conversations, she testified at trial:

I had always maintained the opinion that she [Eramo] did so much for us. I know for myself, she gave me her personal number and she was available 24/7. And I know I’m not the only one that she did that for. That’s just how she was. And she was there for survivors 100 percent.131

And notes from Erdely’s own reporting file demonstrated that students advised Erdely that her portrayal of Eramo was not accurate. Emily Renda told her Eramo was passionate about pursuing punitive measures against the fraternity involved in “Jackie’s” purported rape. Yet, that portion of their interview did not make it into the story.132 And although, “Jackie” told her that “Eramo wasn’t as ‘shocked as you might think’ upon hearing of the two other victims, but then ‘got pissed at the frat’ and suggested that the fraternity could lose its charter.”133 The first part of that statement was incorporated into the article. The second part was not.

Eramo also pointed to Erdely’s and Rolling Stone’s failure to investigate “Jackie’s” alleged rape. They argued that this was the lead that opened the story and threaded the entire narrative together. It was the basis for Erdely’s portrayal of Eramo as the villain who was indifferent to gang-rape allegations occurring at a fraternity on


130 Id. at 35:11-35:17.

131 Id. at 35:23-35:25, 36:1-36:3.


133 Memorandum Opinion, supra note 249, at 14.
campus. And as such, it required further investigation beyond the single source – “Jackie” – that Erdely relied on.

Here, Eramo was able to demonstrate that Erdely had not adequately attempted to identify and contact the three students who “Jackie” said she met with right after the purported rape. Nor did she obtain the name of “Jackie’s” alleged rapist or attempt to make any contact with him. Erdely had discussed this early on with her editor, Sean Woods, who encouraged her to continue her efforts working through “Jackie” to secure the names. When nothing materialized, Woods suggested they solve the issue by using pseudonyms. Thus, when conversations took place among the friends in the story they added the qualifier – “Jackie” recalls – to the attribution. The problem was it was not consistently used.134 An example follows:

‘What did they do to you? What did they make you do?’ Jackie recalls her friend Randall demanding. Jackie shook her head and began to cry … We have to get her to the hospital,” Randall said.

Although, Erdely consistently affirmed her belief that “Jackie” was credible throughout her reporting on the article, Eramo aimed to demonstrate that she failed to investigate further when faced with inconsistencies and improbabilities. First, Erdely was aware that “Jackie’s” story of the alleged gang rape had changed over time. When Erdely spoke with Emily Renda she reported the rape as involving five men. When Erdely later spoke with “Jackie’s” roommate, Rachel Soltis, Soltis said “Jackie” told her she was forced to have oral sex with six men. Although, “Jackie’s” story had changed over time, Erdely did not ask her further about it.

Likewise, the timing was off. Students do not pledge fraternities at UVA until the spring. Yet, “Jackie” had implied the alleged rape may be part of an initiation ritual. She recalled that during the alleged rape one of the men said, “Don’t you want to be a brother? We all had to do it, so you do, too.” And this was included in the story. But, the alleged rape was reported as occurring in September.

Further, when “Jackie” told Erdely that she met two other girls who had similar experiences at the same fraternity, she wrote in her reporting file: “I don’t know the stats on gang rape, but I can’t imagine it’s all that common. So, the idea that three women were gang raped at the same fraternity seems like too much of a coincidence.” Thus, Erdely’s own reporting notes became the door through which Eramo attempted to demonstrate exactly what was going on in her mind as her investigative unfolded. And she seized the opportunity to ask what it was she was thinking when she wrote this. How did she resolve the question that it seemed like too much of a coincidence? Did she investigate further, consider that it could be a fabrication, or simply accept that it was plausible?

The question of ill will toward Eramo also came up. And Eramo pointed to testimony from Sara Surface to underscore her point. When Sara “attempted to provide

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137 Id. at 52:1-12.
Erdely with Eramo’s ‘point of view’ Erdely referred to her as an administrative watchdog.”

And last, Eramo asked the jury to look closely at the timeline from the Nov. 18, 2014 publication until Dec. 5, 2014, when Rolling Stone appended the editor’s note at the top of the online story indicating their trust in “Jackie” had been misplaced. It was on the Nov. 26, the day before Thanksgiving, when Erdely asked “Jackie” for the name of her alleged rapist, and she finally acquiesced. Her own reporting file reflected that she thought it was odd “Jackie” did not know how to spell the name. In the report by the Columbia University Graduate School of Journalism she is quoted as saying, “An alarm bell went off in my head,” at that moment. Erdely had given interviews that day. But, it was five days after that she sent the email to The Washington Post accusing UVA of alleged inaction amid allegations of gang rape.

After listening to more than two weeks of testimony, the 10 jurors were given instructions that defined the elements of public figure libel and the actual-malice standard. They were directed to answer special verdict forms that referenced 11 statements on which the plaintiff’s claims for defamation were based. There was a special verdict form for each defendant. And the jurors were asked “to determine

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whether each statement [was] actionable against a particular defendant, and, if so, whether the defendant acted with the requisite intent."\textsuperscript{141}

On Friday, Nov. 4, 2016, the jury found Sabrina Rubin Erdely liable for two defamatory statements made in the article and liable for four defamatory statements made on “The Brian Lehrer Show,” Slate’s “DoubleX Gabfest” and to a Washington Post reporter during the publicity tour. The jury not only found these statements actionable but also found that they were made with actual malice, the high bar necessary, given Eramo’s status as a public figure.

The jury also was asked to decide whether the editor’s note that was appended to the original article on Dec. 5, 2014, constituted a republication of the article. The jury found that it did. But, it did not find Erdely liable for the republication. Here they looked to Rolling Stone and Wenner Media, its parent company. While, the jury found no liability on Rolling Stone or Wenner Media with respect to the first publication on Nov. 19, 2014. They did find the defendants liable for the four statements at issue when the editor’s note was appended to the top of the online article on Dec. 5, 2014.

As the case was bifurcated on liability and damages, and the damages phase of trial followed Monday. The jury heard testimony from the plaintiff, her husband, and physician and viewed excerpts from the videotaped depositions of two Rolling Stone witnesses, one of whom was Jann Wenner, the publisher and co-founder of Rolling Stone. The jury began deliberations at 6:30 p.m. and by 8:05 that evening the verdict

\textsuperscript{141} Jury Instructions at 32, Eramo v. Rolling Stone, LLC, Civil Action No. 3:15-CV-00023-GEC (W.A. Va. Nov. 04, 2016), ECF No. 375.
was returned and a judgment entered in the amount of $3 million – $2 million against Erdely, and $1 million against Rolling Stone, LLC, and Wenner Media, LLC.\textsuperscript{142}

CHAPTER 5
CONCLUSION

This paper set out to answer two research questions:

RQ1. Does Sullivan provide the proper balance in protecting the First Amendment freedoms of speech and the press with the right of a person to the protection of their reputation? Or, did it pave the way for a press that is too insulated from the consequences of its actions – thus, bolstering support for Trump's call to open up libel laws?

RQ2. Beyond the legal analysis, what journalistic lessons can be learned from a deconstruction of this multi-million-dollar lawsuit? What is the relevance to journalists entering the field today? And to those at the top of their game playing in the highly competitive field of new media?

With respect to the first of these questions, this paper contends that Sullivan does, in fact, provide the proper balance in protecting the First Amendment freedoms of speech and the press with the right of a person to the protection of his or her reputation. However, the author must first point out that the court in Eramo v. Rolling Stone never got to the question of whether Eramo was actually a public official. Before it took up that analysis, the judge held she met the narrower definition of a limited-purpose public figure, and that decision had the same net effect – as both categories are subject to the actual malice standard. So, the research question targeted Sullivan, but the analysis and conclusion flow from Gertz, its extension. And in a world increasingly dominated by the ultra-rich, the extension makes sense. The rich and famous harbor as much power as people in the upper echelons of government. And that is really what the decision is about. At least in part.

The other part of the decision and the portion which was directly applicable in this case dealt with limited-purpose public figures. The court reasoned that by voluntarily inserting themselves into the vortex of a public issue or controversy that these folks assume the risk of defamatory falsehoods that come from increased public
scrutiny. They enjoy better access to the media than the private citizen, owing to their more public position, and as such they can better respond to criticism in an attempt to correct false statements about them through the media. The question becomes how far down the ranks should this designation extend. And because the case upon which this analysis is based involved a university administrator, the scope of the discussion will be narrowed to this class of potential plaintiffs — college professors and administrators.

In Brown v. Board of Education, the Warren Court held that “education is perhaps the most important function of state and local government.”¹ Ten years later, it was the Warren Court that Justice Brennan wrote for when he penned the decision in Sullivan that garnered unanimous support. Although, Sullivan is touted as the landmark Supreme Court case that changed the world of defamation law, and indeed it is, it was truly a civil-rights case at the time, and it focused most notably on seditious libel — on the freedom to speak and criticize official conduct.² The Court pointed to James Madison who said, “the censorial power is in the people over the Government, and not in the Government over the people.”³ The Court noted our founding fathers believed in the “power of reason as applied through public discussion, [and] they eschewed silence coerced by law,” which they saw as “force in its worst form.”⁴

Public universities occupy a respectable rung among the higher echelons of government institutions. As institutions of research and scholarship rich in cultural

³ Id. at 282.
⁴ Id. at 270.
traditions, vast alumni networks and considerable endowments, they have tremendous influence and power to shape people, communities and policies at the state, national and global level. In fact, making a positive difference in the lives of their community is often stated in the vision and included in the overarching goals of a public university. As members of the university’s academic community and culture, the professors who teach the students, and the administrators who shape the policy sit within the very core of the rationale of *Sullivan*. And that rationale was based on our nation's founding principles.

As the *Sullivan* Court noted:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.\(^5\)

Sabrina Rubin Erdely set out to investigate the very sensitive topic of rape in the setting of a college campus. She was interested in learning firsthand how colleges handle student’s report of rape and how they bring those allegations to justice or not. The idea for the story came from headlines of the day. There was a national public controversy around the issue. The University of Virginia was, in fact, under investigation by the Department of Education’s Office for Civil Rights for its handling of complaints of sexual violence at the time. The topic was newsworthy.

Erdely had written five similar stories. The one that she used as an example to recruit sources for this story involved the military. Thus, she had a propensity and

\(^5\) *Id.* at 271 (citing *Cantwell et al. v. Connecticut*, 310 U.S. 296, 310 (1940)).
interest in looking to understand how such things happen in an institutional setting and how those institutions deal with it. She maintained throughout the course of this trial that she believed “Jackie” to be credible until the night of Dec. 5, 2014. She maintained that she was open to how the story developed and did not have a preconceived story line.

Nevertheless, at the conclusion of her reporting she found the story was indeed about institutional indifference to the report of a gang rape. And she believed the Sept. 21, 2015, Letter of Finding that the Office for Civil Rights released following her article supported her contention. The problem for Eramo, she pointed out, was that she was the very public face of the university for the issue under scrutiny. And the problem for Erdely, as The Washington Post pointed out, was she didn’t get the alleged rape right.

So, beyond the legal analysis, what journalistic lessons can be learned from a deconstruction of this multi-million-dollar lawsuit? Plenty. The first conjures Aristotle – the whole is greater than the sum of its parts. It is not a single failure to investigate that can overcome the high bar of the actual malice standard, it is rather, the collection of several failings, which when combined can give the impression that a failure to investigate is a deliberate avoidance of or reckless disregard for the truth. It is a failure to investigate amidst improbabilities, inconsistencies and contradictory information. And, it is the combining of any of these elements with evidence of motive or a preconceived storyline.

In her investigation and reporting of “A Rape on Campus,” Erdely did not check sources to corroborate “Jackie’s” story of rape. “Jackie” told Erdely that she met with three friends on the night of the rape who discouraged her from reporting it. However, “Jackie” refused to share their full names with her. Erdely’s editor on the piece, Sean
Woods, recalled asking her two or three times to find the friends and interview them. But, when Erdely told him that “Jackie” continued to refuse to share their names and she had reached a dead end, he did not push her further on it. Instead, he agreed to use pseudonyms for the three.

To compound this issue, when Erdely submitted her first draft to Woods she brought the section with the quotes from the three friends to his attention by noting the quotes were all from “Jackie’s” point of view. Woods, in turn, changed the attribution to “Jackie recalls” in some places but did not go through the entire narrative, as he should have, to change all the quotes so the attribution clearly reflected the story and dialogue came from “Jackie.” Thus, the reader had the impression that Erdely spoke with and directly quoted numerous sources who corroborated the alleged rape. Woods said during the trial that he understood the criticism around his error and owned its legitimacy.  

And as things come in threes, the icing on the cake was the discovery that Erdely had the name of one of the friends in her reporting file all along. And yet, she did not realize it at the time. But, in addition to inconsistencies in her reporting file, Erdely also noted the inherent improbability of some of the information she reported on. For instance, when “Jackie” told Erdely that she met two other girls who had similar experiences at the same fraternity, she wrote in her reporting file: “I don't know the stats

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on gang rape, but I can't imagine it's all that common. So, the idea that three women were gang raped at the same fraternity seems like too much of a coincidence.”

The second takeaway deals with the role of an editor. Although, Erdely is no longer with Rolling Stone, Sean Woods is. Woods remains the deputy managing editor and he was actually designated as the company representative during the trial. Woods was the assignment editor on the piece who approved Erdely’s pitch for the story. As the editor, he was responsible for ensuring the factual accuracy of “A Rape on Campus.” He was responsible for maintaining high ethical standards. And he was responsible for editing the copy from the first draft, through revisions until it was sent to the printer. He readily agreed during the trial that the buck stopped with him on these issues.

He was friends with Erdely and the two had worked together at Rolling Stone for six years. He asked Erdely to find the names of the sources who could possibly corroborate the alleged “Rape” – or at least an element of it – early on. But, he let it go. He offered to use fake names, so the story could move forward. The pseudonyms, he said, were used so “Jackie’s” three friends wouldn’t be harmed by their portrayal in the story. Yet, this decision is likely one of the worst made during the reporting of “A Rape on Campus.” Had he insisted that Erdely hold fast to this standard practice in journalism, it is possible the whole debacle could have been avoided.


9 Id. at 30:17-30:18.
Ultimately, the root of the problem was imbalance – the quest for sensationalism as a means to write a captivating story to bring change to college campuses came at the expense of accuracy. It sabotaged an otherwise serious piece of journalism on a serious topic. The Sept. 21, 2015, Letter of Finding by the United States Department of Education Office for Civil Rights indeed substantiated a portion of what Erdely reported in “A Rape on Campus” and the point she tried to make. But, the point was lost when the story of the alleged rape unraveled.

The letter stated in part:

[Its office] reviewed documentation associated with 50 reports of possible sexual harassment, including sexual violence, by students who chose not to file a formal complaint or proceed through the informal resolution process during the 2008-2009 through 2011-2012 academic years. Of those 50 reports, the university failed to take appropriate action in 22. Twenty-one of those reports alleged sexual assault, some including rape and gang rape.\(^\text{10}\)

The report further stated:

[It] also completed review of files of two reports of sexual assault in 2013 and 2014. . . . [and found that] the university did not promptly investigate information in cases that involved fraternities. In one of the cases, the Chair of the SMB took the written position that ‘unfortunately, the actions of our office are limited to the assistance and support of the survivor at this point as [the student who reported the sexual assault] does not wish to file a complaint through the SMB.’ In addition to reflecting the absence of a prompt investigation, the files do not reflect the university evaluating steps necessary to protect safety of the broader university community.\(^\text{11}\)

In terms of the relevance to journalists entering the field today and to those at the top of their game playing in the highly competitive field of new media, the lesson can


\(^{11}\) Id. at 17.
be found in the formula. Erdely had one that worked. She had written five prior stories on the same topic that were similarly styled. It was an effective way to tell the story. She found the perfect setting at UVA. It was in fact under a federal compliance review for its handling of complaints of sexual violence at the time. She found the perfect people to tell the story through – numerous young women who had experienced rape on campus who were open and willing to tell their stories in hope of changing the culture and response to sexual assault so they could help others.

And, Erdely had not just found several compelling stories that she would include in the piece – she discovered the story of one alleged rape that was so egregious, it would be the leading narrative. She would grab readers with the story of “Jackie” and hold onto to them for 12 paragraphs. It would compel readers to stay the course until they got to the nut graf in the 13th paragraph and learned that the bigger story was really about “genteel University of Virginia [which] has no radical feminist culture seeking to upend the patriarchy . . . . The pinnacle of its polite activism is its annual Take Back the Night Vigil, which on [the] campus of 21,000 students attracts less than 500 souls.”

And, they would read on until got to Erdely’s thesis:

But the dearth of attention isn’t because rape doesn’t happen in Charlottesville. It’s because at UVA, rapes are kept quiet, both by students – who brush off sexual assaults as regrettable but inevitable casualties of their cherished party culture – and by an administration that critics say is less concerned with protecting students than it is with protecting its own reputation from scandal.


13 Id.
By focusing on the formula that worked, Erdely overlooked inconsistencies and improbabilities in the main storyline that led the piece, so when it singly unraveled the entire thesis she had erected upon it crumbled too. Yet, there was no rush for this story. There was time to get it right. And had Erdely done so, or been pushed by her editor to do so, the outcome might have been quite different. This was not the result of inexperience. It was the result of too much experience, over confidence and complacency. Erdely relied on sources who learned of “Jackie’s” alleged rape through “Jackie’s” own testimony well after it occurred. She did not reach out to the alleged perpetrator or even conduct a thorough investigation into his existence before the publication of the story. Nor did she adequately reach out to the fraternity accused for their response to the allegations. These are the fundamentals of journalism.

To conclude, the costs are high when you get a story like this wrong. The whole point of the story was lost. A talented writer’s career at Rolling Stone was lost. A passionate university dean said the job she loved most was lost. And an iconic American magazine lost, too. It settled the $3 million judgment against Erdely, Rolling Stone and Wenner Media in April 2017, although the attorneys did not disclose the amount of the settlement. On June 13, 2017, Rolling Stone lost again. They settled a second defamation lawsuit filed by the Virginia Alpha Chapter of the Phi Kappa Psi fraternity arising from “A Rape on Campus.” That settlement cost them $1.65 million.\textsuperscript{14}

LIST OF REFERENCES

Alien and Sedition Acts. 1 Stat. 566 (1798); 1 Stat. 596 (1798).


Const., U.S. amend. I.


BIOGRAPHICAL SKETCH

Kelly Kelly is a doctoral student, researcher and educator at the University of Florida’s College of Journalism and Communications. She completed her master’s in mass communication at UF with a specialization in journalism in August 2017. During her master’s studies, she held graduate appointments as an instructor and academic advisor in the college. She taught U.S. history in Duval County Public Schools prior to entering graduate school.

After earning her bachelor’s in psychology in 1991, Kelly spent more than twenty years in a variety of corporate leadership positions. She managed litigation for Nationwide Insurance’s western regional operations for several years and closed her corporate career in 2012 as a consultant to the executive leadership team for the southern region.