



TRUE DEFAMATION

Jeffrey S. Helmreich *

Until the late 18th century, defamation was often treated as an actionable wrong even when the defamer’s claims were undeniably true (indeed, sometimes especially when true, as reflected in the slogan, “the greater the truth, the greater the libel”). In the following centuries, however, truth became a complete defense to defamation lawsuits. Even outside the law, falsity became an essential element of the common understanding of “defamation,” to the point that today most English dictionaries and many extra-legal discussions of the defamatory treat it as necessarily untrue. Here I challenge the new understanding of the wrong of defamation that took flight under the law’s wing, arguing that it is unduly narrow. Accurate defamation is a serious wrong and current understandings—and tort practice, in particular—harmfully hide this fact. Privacy law, moreover, does not provide adequate redress for it either, for reasons I set out.

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INTRODUCTION

Holy Land was a thriving grocery chain in Minneapolis, owned and operated by a Palestinian American family. One of them, the CEO's 25-year-old daughter, served as its catering director. She had also lately become a progressive activist, joining in the city's Black Lives Matter protests shortly after the George Floyd killing. An observer who knew her name, and who may have been irked by her newly prominent politics, unearthed some posts from a retired Instagram account she had used 10 years earlier, when, at age 14, she went through a radical phase. The 9th grader had then posted racist and anti-Semitic statements, which the observer now reposted on a variety of social media sites, effectively publishing them as current news.

The business became the target of nearly daily protests and threats of boycotts, ultimately losing thousands of dollars in catering contracts and the lease of one of its newer stores. The owner ceremoniously fired his daughter, even though she had demonstrably shed these hateful ideas long ago. In the shadow of this public vilification, she struggled to find new employment.¹

Paul McMullan, features writer for the celebrity gossip-oriented *News of the World* in England, wrote a detailed story of the stormy life of actor Denholm Elliott's daughter, Jennifer, who was otherwise unknown to the public. Jennifer Elliott, he wrote, had fallen on hard times many years ago, turning not only to drugs but, at one brief point, to prostitution.

¹ Seren Morris, *Minneapolis CEO Fires Daughter from Company over Racist, Pro-Hitler Tweets*, NEWSWEEK, June 5, 2020.

Within days of the publication, Jennifer took her own life, an act McMullan self-critically attributes to his article: “I humiliated her, I destroyed her, and it wasn’t necessary.”²

In February 2008, the advertising blog *Agency Spy* ran a brief, incendiary post on the management style, or mismanagement style as they might have called it, of ad executive Paul Tilley, Creative Director of DDB in Chicago, quoting and criticizing brief excerpts from internal memoranda he had sent to subordinates. The post was followed by a dozen or so anonymous comments about him as a boss, most of them harshly critical. Less than three days later, Tilley jumped to his death from a window at the Fairmont Chicago Hotel.³

These three episodes share several features. First, they all involve what used to be known as *defamation*—the act of damaging the reputation of others by spreading denigratory claims about them. Second, the defamers knowingly inflicted great harm, precisely the sort involved in standard tort defamation cases today. And yet, third, the victims (or their families) would have no basis to sue for defamation. They could not recover for their losses in court, at least not for having been defamed.

Although defamation like this was long treated as both a wrong and a crime—dating back to ancient Rome—current defamation law, at least in American and English common law (and criminal law), excludes it altogether, in effect treating it as permissible, at least when no privacy violation is involved. While false defamation is a tort⁴ and can in some cases be a crime,⁵ accurate public denigration—as in these cases—is not in itself a basis for liability today, no matter how harmful or ill-motivated. No law explicitly prohibits even the act of deliberately destroying another’s reputation for the sole purpose of making her suffer.

Lately, this trend in legal practice has been mirrored by a shift in the public understanding of the wrong itself. Where “defamation” had once been understood to include accurate public denigration, which I will hereafter call “true defama-

² James Robinson, Lisa O’Carroll & Josh Halliday, *Andy Coulson and Rebekah Brooks ‘Knew About Phone Hacking at NoW’*, *GUARDIAN*, Nov. 29, 2011.

³ Bob Tedeschi, *After Suicide, Blog Insults are Debated*, *N.Y. TIMES*, Mar. 3, 2008.

⁴ *RESTATEMENT (SECOND) OF TORTS* § 558 (1977).

⁵ *See, e.g.*, *WIS. STAT.* § 942.01 (2012).

tion,” it is now increasingly equated in the public sphere with defamatory misrepresentation (hereafter “false defamation”), as tort law construes it.⁶ The narrower legal notion, in other words, is steadily overtaking the broader understanding, with falsity becoming an element of the general idea of defamation beyond the law. To defame is, in today’s predominant popular understanding, to defame falsely.

By coopting and narrowing the term—and the concept—of defamation, current tort practice threatens to leave us without a means of identifying and discouraging the practice of destroying another’s good name by publicizing highly unflattering facts that nobody needs to know. Taken together with tort law’s singling out false defamation as the only kind that is actionable, the effect is to broadcast that there is nothing especially wrong with destroying another’s reputation, as long as one tells the truth.

Of course, not everyone will lament this development. Some cling to a once-ascendant view of reputation as akin to earned property or credit. On that conception, no one has a legitimate claim to a reputation that is even a little better than they “deserve,” which is to say, one that overlooks any misdeed they actually committed, whatever its distance from the present or from present-day concerns. As long as it is part of one’s life history, in other words, it may unobjectionably constitute one’s public image. On this conception, true defamation would seem to be unworthy of criticism, much less moral or legal sanction.

This article challenges that conception of reputation. More generally, it challenges the thesis about defamation that it supports, reflected now in tort practice and in the popular understandings: that defamation is only wrongful, and indeed only genuinely defamatory, when it is false. To the contrary, I will argue, there is no principled reason to identify false defamation as a wrong, in the way that our current tort practice does, while leaving true defamation beyond reproach. Just as knowingly damaging another’s body or property is wrongful, all else equal, I will argue that knowingly damaging another’s reputation is wrongful, even when accurate, especially when no countervailing need or interest of comparable weight is served.

⁶ See, e.g., *Defamation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/defamation>; *Defamation*, DICTIONARY.COM, <https://www.dictionary.com/browse/defamation>; *Defamation*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/defamation>.

Before doing so, I should clarify three points.

First, my focus, as in the above examples, is on true defamation of *private individuals*. There are sound moral and policy reasons to permit and at times call for the denigration of public figures, especially prominent public servants, and nothing here should be understood to suggest otherwise.

Second, I do not mean to imply that tort law should necessarily track or clarify our moral norms. Rather, my target is the *implication* of current legal practice, which uses the name of the time-honored wrong of “defamation”; and its impact, what I call the law’s *conceptual encroachment* on the notion of “defamation” beyond the law. I will be arguing that legal practice, whatever its explicit purpose or content, has the pernicious *effect* of promoting a narrow interpretation of the wrong of defamation at the expense of another.

Third, in challenging this conceptual encroachment on tort law’s part, I do not assume that legal wrongs should in general match their moral counterparts, even when they go by the same name. For example, the prominent tort of negligence diverges significantly from moral negligence,⁷ but that does not appear to raise the concerns I have voiced here about defamation. What distinguishes defamation in this regard from other such legal “wrongs,” including negligence and assault, is that defamation is in unique danger of yielding to the narrow legal construal, while the others are not.

Negligence, for example, does not appear to be equated increasingly with the objective, largely behavioristic version of “negligence” in tort.⁸ In other words, negligence as a wrong does not appear to be in danger of conceptual encroachment. Consider that the verb form of “negligence”—*to neglect*—continues to be understood almost exclusively in the nonlegal sense, which involves, unlike the tort, a subjective state of insufficient regard or care for the safety of others.⁹ The law’s special conception of negligence, in other words, has done nothing to erode the public understanding of what it means to neglect another’s safety or wellbeing, and why it is wrong to do so. In contrast, the infinitive verb form of defamation, namely “to

⁷ See, e.g., Seana Valentine Shiffrin, *The Moral Neglect of Negligence*, 3 OXFORD STUD. POL. PHIL. 197 (2017).

⁸ RESTATEMENT (SECOND) OF TORTS § 282 (1965) (defining “negligence” as “conduct” that falls below an objectively set standard).

⁹ See, e.g., *Neglect*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/neglect>.

defame,” is increasingly understood as “to defame falsely.”¹⁰ In other words, to “defame” is now equated with denigrating another inaccurately, implying, again, that true defamation is no part of the wrong and, perhaps, that it is not wrong at all. That is the interpretation I aim to challenge.

To that end, this essay proceeds in three parts. In Part I, I begin with a brief sketch of how we got here. I suggest that victims of true defamation, such as those with which I began, may have once enjoyed legal recourse but no longer do and that this legal shift has accompanied, and by all appearances caused, a parallel conceptual shift in the public sphere, wherein the notion of “defamation” largely excludes true defamation.

In Part II, I argue against the newly emergent understanding of the wrong of defamation, which equates it with false defamation.

In Part III, I explore other legal instruments, particularly privacy law, as potential counters to the trend I have described. I suggest that privacy-protecting torts often benefit victims of true defamation but do less to counter the law’s conceptual encroachment on what it means to defame. That is, in part, because the two types of wrongs diverge: Invading someone’s privacy—by, for example, leaking a flattering nude photograph—need not damage anyone’s reputation, and public denigration like that of Paul Tilley’s (see above) need not invade anyone’s privacy. To redress the conceptual encroachment, which is manifest largely at the level of public debate outside the courtroom, a conversation needs to begin at the same level—one that directly and explicitly challenges the implication of current tort practice, to wit: that there is nothing wrong with destroying another’s reputation, so long as the vilification is true.

I. FROM DEFAMATION TO FALSE DEFAMATION

Historically, it has been considered wrong—and often a crime—to disparage someone in public. Ancient Roman law prohibited the public rebuke of another (accurately or not).¹¹ The Catholic Tradition forbade the act of “detraction,” which

¹⁰ See *supra* note 6.

¹¹ The act was called *injuria* and included paradigmatically the loud insult leveled at someone in a public setting. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 550–51, 563–64 (1903).

amounts to spreading negative truths about another,¹² and the Jewish tradition forbade *lashon harah*,¹³ the act of speaking negatively about another, albeit accurately. Many of the same traditions also forbade false vilification, as in the related theme in Judaic law of *motzi shem rah*, literally “releasing a bad name,” or creating a false (negative) reputation.¹⁴

The earliest English usages of the term “defamation” united both of these forms of reputational damage in a single type of act. The first English dictionary in 1603, Robert Cawdrey’s *Table Alphabeticall*, defined “defaming” as “to slander, to speak ill of.”¹⁵ The more prominent 1768 volume, *A Dictionary of the English Language* by Samuel Johnson, echoed the earlier definition’s inclusivity, defining “defamation” as “the act of defaming or bringing infamy upon another; calumny; reproach; censure; detraction.”¹⁶

The turn away from Cawdrey’s focus on the spoken word (“to speak ill . . .”) may reflect the practice at the time of distinguishing two forms of defamation, slander (spoken) and libel (written), with the latter being more severe.¹⁷ Still, as with Cawdrey’s earlier work, Johnson’s definition included true defamation.

Legal practice reflected this understanding. In addressing criminal libel, the English courts of the 17th and 18th century largely adopted the view of the royally appointed Star Chamber, to the effect that truth is irrelevant to the wrong of publicizing defamatory information:

[I]t is not the matter but the manner which is punishable: for libelling against a common strumpet is an offence as against an honest woman, and perhaps more dangerous the breach of the peace: for as the woman said she would never grieve have been told of her red nose if she had not one indeed, neither is it a ground to examine the truth or falsehood.¹⁸

¹² John E. Murphy, *Detraction in Public Life*, in THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA: PROCEEDINGS OF THE EIGHTH ANNUAL CONVENTION 131–33 (1953).

¹³ *Pesachim* 118a:13; see also *Lashon Hara*, SEFARIA, <https://www.sefaria.org/topics/lashon-hara?sort=Relevance&tab=sources>.

¹⁴ *Arakhin* 15b:10 (The William Davidson Talmud); see also 15b, SEFARIA, <https://www.sefaria.org/Arakhin.15b?lang=bi>.

¹⁵ *Defame*, in ROBERT CAWDREY, A TABLE ALPHABETICALL (1604).

¹⁶ *Defamation*, in SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768).

¹⁷ *King v. Lake* [1670] 145 Eng. Rep. 499.

¹⁸ Veeder, *supra* note 11, at 567.

Some of the leading English thinkers went further, arguing that accuracy is actually an *aggravating* feature of defamation, as reflected in the maxim: “[T]he greater the truth, the greater the libel.”¹⁹ Similar reasoning prevailed in prominent civil actions for libel as late as 1812.²⁰

That is not to say the law did not sometimes, even then, manifest greater tolerance of true than of false defamation. In actions for slander, for example, truth appears to have sometimes been allowed as a defense. But the reasoning did not reflect any notable shift in how the wrong of defamation was understood; specifically, it did not imply that true defamation was anything other than wrongful. Consider the following explanation offered in a legal treatise of late 18th century England:

[F]or though in actions for words the law through compassion admits the truth of the charge to be pleaded as a justification, yet this tenderness of the law is not to be extended to written scandal, in which the author acts with more coolness, whereas in words men often in a heat and passion say things which they are afterwards ashamed of, yet the scandal sooner dies away and is forgotten; and therefore, from the greater degree of mischief and malice attending the one than to the other, the law allows the party to justify in an action for words, though not for written scandal.²¹

Notice that on this reasoning truth does not actually justify defamatory slander; it is simply a basis for compassion toward the slanderer who, in the grip of such a truth, may have spread it carelessly in the “heat of passion.” The doctrine in the treatise thus reflects a larger theme in the story of how defamation law changed: Often, when truth crept in as a defense or mitigating factor, it was not because true defamation was judged acceptable, as a general matter, or outside the scope of wrongful defamation. Rather, there were other reasons it was independently thought that true defamation should not be legally sanctioned. For example, it was suggested that permitting true defamation helps warn the public against dangerous people (whatever its merits for most targets).²² It may also have been thought that wrongdoers—the accurately defamed—lose their privilege to accuse others, including their defamers (even if they deserve it).²³

¹⁹ This line has been attributed to Lord Mansfield, cited in Bertram Harnett & John V. Thorton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425, 426 (1949).

²⁰ *Thorley v. Lord Kerry* [1812] 128 Eng. Rep. 367, 371.

²¹ Roy Robert Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 49–50 (1931).

²² *Id.* at 55.

²³ *Id.* Thanks also to Ben Zipursky for acquainting me with this rationale.

Similarly, and more prominently, when U.S. law began to permit true defamation in the early 1800s, it was largely to accommodate the free speech principles enshrined in the First Amendment, rather than to reflect any tolerant view of the act itself. Those First Amendment principles, it was thought, called for granting true speech—no matter how harmfully defamatory—a wide legal berth. The turning point was arguably the criminal libel case *People v. Croswell*,²⁴ in which a newspaper editor was charged with libelously publishing a report about Thomas Jefferson, to the effect that Jefferson had paid someone to characterize George Washington as a traitor, a robber, and perjurer. The defense was denied an opportunity to call the alleged agent of Jefferson's purported character assassination, James Callender, to prove the truth of the report; that is, to establish that the defamation was at least accurate.

In support of the defense motion, Alexander Hamilton argued famously for the value of a free press and its need to pursue and publicize the truth about matters—and people—of public interest, however defamatory or otherwise unpleasant.²⁵ Although it did not carry the day in court, Hamilton's defense of the freedom of the press was so influential that the New York State legislature became the first of many to adopt truth as a defense to libel.²⁶

This First Amendment ground for allowing true, even if defamatory, publication has become even more influential since then, especially in civil law, to the point that the same principles were extended even to *false* defamation of public figures, if publicized with neither knowledge nor reckless disregard as to whether it was false.²⁷ The value of free and unfettered debate about matters of public concern, as enshrined in the First Amendment, came to dominate concerns about the interests of those defamed. In less than a century, not only had truth become a decisive defense to defamation and libel, both criminal and civil, but falsity even became an

²⁴ 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

²⁵ THE WORKS OF ALEXANDER HAMILTON 387–425 (Henry Cabot Lodge ed., 1904) (quoted in Morris D. Forkosch, *Freedom of the Press: Croswell's Case*, 33 *FORDHAM L. REV.* 415, 437 (1965)).

²⁶ 1805 N.Y. Laws 233.

²⁷ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

element of “defamation” as defined in some statutes.²⁸ To “defame,” on the emerging legal understanding, was to publicize something both defamatory and false. That is more or less where things stand today.

Again, the reasoning behind the shift toward penalizing only false defamation had, for the most part, less to do with reinterpreting the wrong of defamation and more to do with other emerging norms, such as the value of public inquiry and debate. Still, the narrower legal construal came to supplant the prior, broader understanding of defamation, even beyond the law.

Although the *Oxford English Dictionary* continues to define the act broadly to include true defamation,²⁹ many others have followed contemporary legal usage. Webster’s English dictionary in 1828, when the legal debate was still in flux, had a hybrid account of “to defame,” including both false defamation as well as, alternately, “to speak evil of.”³⁰ But today Merriam-Webster defines the act of defaming as “to harm the reputation of by communicating *false* statements about”.³¹ The *Cambridge English Dictionary* likewise defines defamation as “the action of damaging the reputation of a person or group by saying or writing bad things about them that are not true.”³²

These definitions do not claim to be about the *legal* wrong, in particular—they do not, for example, include publication as part of the meaning of “defame.” They simply define the public term “defame” and “defamation” as a type of action, much as it had always been used outside the law. Yet the way they do so reflects the shift toward excluding true defamation.

²⁸ See, e.g., MICH. COMP. LAWS § 600.2911; CAL. CIV. CODE § 45.

²⁹ *Defamation*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/search/dictionary/?scope=Entries&q=defamation>.

³⁰ *Defame*, WEBSTER’S DICTIONARY, <https://webstersdictionary1828.com/Dictionary/defame>.

³¹ *Defame*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/defame> (emphasis added).

³² *Defamation*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/defamation>.

And that shift is evident elsewhere in public life. When New Jersey Governor Chris Christie fired his education commissioner Brett D. Schundler, he publicly announced that “the moral of the story is don’t lie to the governor.”³³ Schundler immediately shot back that the governor had “defamed” him, because Christie had accused him of lying when he had not, in fact, lied. The *New York Times* headline on the story read, “Fired Education Chief Says New Jersey Governor Defamed Him.”³⁴ Yet Schundler did not accuse the governor, in that instance, of tortious conduct; he simply charged that the governor characterized him in public in a way that was both disparaging and, more to the point, false. Both the commissioner and the *Times* simply took for granted that to “defame” is, inter alia, to speak falsely.

The *New York Times* also reported that James R. Thompson, special counsel for the embattled insurance company Ullico (and a former governor), claimed the company “defamed him” when it said a report he had completed about the company found no violations of state fiduciary law, when in fact, Thompson claimed, it had found many such violations.³⁵ The public misrepresentation amounted to “defamation,” said Thompson, though he referred to no legal violation. Rather, Thompson—and the *New York Times*—simply expressed their understanding of defamation as public misrepresentation. Similarly, former Die Antwoord rap artist Ben Jay Crossman told *News 24* that the rap duo “defamed” him when it claimed he was a stalker: “They have defamed me,” he said, “tarnished my name, filled with lies.”³⁶

The growing popular equation of “defamation” with “false defamation” does not necessarily imply an acceptance of true defamation. It suggests at most that the phenomenon is under-interpreted and, for similar reasons, undertheorized. But it leaves true defamation without the presumptions that attach to the name of a wrong. While individual cases of true defamation may well be found morally problematic, they no longer face the public under a description that—in itself—presumptively disapproves of the act.

³³ Richard Pérez-Peña, *Fired Education Chief Says New Jersey Governor Defamed Him*, N.Y. TIMES, Sept. 1, 2010.

³⁴ *Id.*

³⁵ Steven Greenhouse, *Ex-Governor Says Company Defamed Him*, N.Y. TIMES, Apr. 5, 2003.

³⁶ Iavan Pijoo & Tammy Petersen, ‘They Have Defamed Me’—Die Antwoord’s Former ‘Secret Artist’ Hits Back, NEWS 24 (May 26, 2022), <https://www.news24.com/news24/southafrica/news/they-have-defamed-me-die-antwoords-former-secret-artist-hits-back-20220526>.

As Augustine noted, to call something a “lie” or a “theft” already characterizes it as presumptively wrong, no matter what justifications may be brought to excuse or permit a particular instance.³⁷ To engage in the practice is to do something that calls for defense; the burden is on the perpetrator. Such was once the status of true defamation, inasmuch as it constituted defamation. The exclusion of true defamation from this recognized wrong, together with tort law’s singling out of only false defamation as worthy of legal action, broadcasts that there is nothing automatically wrong with accurately destroying another’s reputation, even for no worthy purpose.

II. TRUE DEFAMATION IS WRONG

Whatever the reasons true and false defamation came to be treated—and understood—differently, it remains uncontroversial that both acts involve knowingly damaging someone’s reputation. By “reputation,” I refer here to the general opinion or appraisal of someone shared by members of the public on the basis of information available to them outside the context of any personal relationship they have with her. This is, of course, not the only way to understand “reputation”; one might, instead, define it as the set of opinions and appraisals of all or many people about someone, perhaps including their intimates.³⁸ But little of what follows turns on the difference, as long as we understand the “opinions” involved in people’s reputation to be something formed more or less involuntarily as a consequence of receiving information being circulated about them.

What I do assume going forward—along with what appears to be common consensus—is that *false defamation*, as is actionable in tort, is a wrongful harming, and that the harm is knowingly³⁹ inflicted by way of damaging the victim’s reputation. Indeed, I assume, damaging someone’s reputation is sufficient to harm her.⁴⁰

³⁷ St. Augustine, *To Consentius, Against Lying*, NEW ADVENT, <https://www.newadvent.org/fathers/1313.htm>.

³⁸ See, e.g., Benjamin C. Zipursky, *Defamation, Presumed Damages, and Reputational Injury: A Legal and Philosophical Inquiry*, 4 J. FREE SPEECH L. 797 (2024).

³⁹ I am not claiming that defamers *intend* to harm their victims, though I do believe they intend, *inter alia*, to defame them—to damage their reputation—and I believe they do so with the awareness that this would constitute a harm. Hence the defamation is “intentional” and the harming is “knowing.”

⁴⁰ That is, however, not to assume that the harm involved would necessarily count as damages for legal purposes.

In this way, one's reputation, like one's hand or one's home, is an aspect or extension of oneself, at least insofar as damage to it suffices as a harm to oneself, quite apart from any further impact it might have. It is, in other words, inapt to ask, "Your reputation may have suffered, but how exactly did that hurt you?" There is also another important way reputation is an aspect of oneself: It is not primarily constituted by the voluntary acts of *other* people, like a store owner's share of the consumer market or a school board candidate's share of the electorate. Unlike purchases or votes, the appraisals of others that constitute their reputation do not reflect the appraisers' choices—some decision to begin viewing the person this way or that—but are instead generally formed as natural, passive consequences of learning the relevant information.

I further assume that the harmful damage a false defamer inflicts on his victim's reputation is not limited to misrepresentation. Indeed, if one mischaracterizes someone as a hero or a saint, it is questionable whether the purported hero or saint has thereby suffered any harm.⁴¹ But falsely defaming someone as a cheat, a liar, or a thief, is harmful in part because it is harmful to have a reputation as a cheat, a liar, or a thief—indeed, as anything that is the target of scorn or disapproval.⁴²

In short, one's reputation—like one's body parts or one's house—is an extension or aspect of oneself that is harmfully damaged by denigration, accurate or not. It is, moreover, an aspect of oneself in which one has an interest, often a *strong* interest. All of this, it seems to me, follows from the assumptions that seem to ground contemporary practice: that false defamation wrongfully harms people, no matter what else it brings about, and that being mischaracterized is not the whole of the harm they consequently suffer.

I will start with one further working assumption, for now: It is wrong, all else equal, to knowingly damage an aspect of other people—like their face or their farm—in which they have strong interests. So it appears to be wrong, all else equal,

⁴¹ Questionable, but not clearly false—excessive praise might make their targets uncomfortable or burden them with the task of setting the record straight. Thanks to Jordan Wallace-Wolf for pointing this out.

⁴² An important question, though one which I do not address here, is whether damaging a reputation requires that anyone actually regard the damaging depiction in a negative way, such as calling someone ruthless in a society or community where the trait is valued, or calling someone a cheat where everyone is expected to cheat in business dealings and anyone who fails to do so is disdained as a "sucker." See Kenneth W. Simons, *Defamatory in Whose Eyes?*, 4 J. FREE SPEECH L. 761 (2024).

to knowingly damage someone's reputation. All else equal, then, true defamation is wrong.

It is, therefore, unsurprising that it was until recently considered wrongful—an instance of the presumptive wrong of defamation in general. And as I tried to explain, the reasons it came to be excluded from the category did not reflect any departure from this understanding. Nevertheless, considered anew, true defamation may be thought sufficiently different from its false counterpart that it *should* be excluded from the larger category of wrongful defamation, regardless of why it came to be, or what the two acts have in common with each other and with other wrongful harmings. I turn now to consider some possible reasons for thinking as much, which I will present and attempt to refute.

A. *The Freedom to Tell the Truth*

One basis for denying that true defamation is a wrong, perhaps, is that it arguably involves the exercise of an important freedom, even a right, that must be permitted. Specifically, it is the freedom to speak the truth. The “freedom” suggested here should not be confused with that of legal protections, like the First Amendment right to free expression. Rather, the hypothesis is that there cannot even be a *moral* prohibition on speaking the truth, or, at least, one cannot have a right against another that they refrain from saying what they genuinely believe to be true.

First, it should be clarified that defamation generally refers to communication that undermines another's reputation, rather than isolated conversation between friends, say, or officemates. But even setting that aside, the hypothesis that truthful speech must be permissible falters on familiar counterexamples, most prominently duties of confidentiality. It is widely agreed that, in many cases, one is prohibited from divulging that which was revealed in confidential communication, such as between lawyers and clients or physicians and patients (or spouses or intimate friends). Nor is it generally permissible to reveal what one promised another—to be it a friend or employer—to keep secret. That these expressions involve speaking the truth does not exclude them from the category of wrongs or wrongdoing, either morally or legally.

Another example, which I discuss at greater length in Part III, is invasion of privacy, which names not only a tort⁴³ but a wrong. If it is wrong to disclose private facts about another, then at least sometimes it will be wrong to speak the truth about

⁴³ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

them, such as that they were patients in a highly unusual and embarrassing operation that concerns nobody else (besides being an interesting medical curiosity), or that they are the people depicted in a blurry nude video that recently went viral. Expressing truths can be wrongful, as legal practice already recognizes, even weighed against the values behind free speech protections.

To be clear, that on its own does not establish that there is no right or freedom to defame others accurately. It is merely to show that if there is such a right, it is not a right to speak the truth, even presumptively. One can wrong others even by spreading accurate information about them, at least in some cases, and the present proposal is that true defamation is one such case.

B. Setting the Record Straight

That is not to suggest, however, that true defamation is *always* such a case, which is to say *always* a wrong, if sometimes a permissible wrong. Even if there is no blanket freedom to defame others accurately, there may be instances in which it is not only permissible but called for, if only because the defamer in those particular cases acts on an essential freedom, need, or interest, even if true defamers in general do not. For example, to protect one's own reputation, a newly appointed public official—like a judge—may be asked by a legislative panel why she was fired from a job 10 years ago, where the answer could be that she had an abusive boss. This, of course, defames the employer, but she could well argue that the answer is compelled by her own interest, even need, to protect her reputation and employability. Accurately defaming public figures, too, might count as a case in which a significant interest justifies an act that would otherwise be wrongful.

Indeed, true defamation may occasionally be justified even when it does not protect the defamers. As I have argued elsewhere,⁴⁴ wrongdoers who fail to redress the harm they inflicted—offering no attempt at apology or reparation—commit the further expressive harm of treating their victims as though what they suffered was acceptable, or as though they did not suffer at all. This is a message the victims may rightly wish to counter,⁴⁵ be it through memoirs, public pronouncements, or more limited acts of protest, in effect declaring that they indeed suffered at the

⁴⁴ Jeffrey S. Helmreich, *The Apologetic Stance*, 43 PHIL. & PUB. AFF. 75 (2015).

⁴⁵ For the canonical argument to that effect, see Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 PHIL. & PHENOMENOLOGICAL RES. 529 (2001).

wrongful hands of their victimizer, and it was not acceptable.⁴⁶ This need is, perhaps, most traumatically felt when the unrepentant wrongdoer enjoys a glowing reputation, manifesting a public acceptance of him as someone with nothing to redress, no delinquency to overcome, even as his victim's suffering remains harmfully unacknowledged and unredressed, by him or anyone else. In such extreme cases, the victims may justifiably seek to set the record straight, though it requires a resort to true defamation.⁴⁷

In these respects, however, true defamation does not differ from other instances of wrongfully harming aspects of others in which they have important interests—like their bodies or their property. In those instances, too, countervailing interests could justify the injuries even if they are otherwise, all things equal, wrongful. We can assault or vandalize when greater interests or needs compel them; which is just to say these acts, like defamation, are *presumptive* wrongs, which countervailing considerations can sometimes render permissible and even justified, all things considered.

The same, it will be noticed, is true of special contexts in which the parties involved consent to being harmed in ways that are otherwise wrongful. One small town bakery owner could portray his competitor as producing inferior goods, and therefore as embarrassingly incompetent—and at the very craft to which he has devoted his passion, his life, even his very identity in the community. He could consequently lose both his reputation—as a competent professional—along with the esteem it had lavished upon him, as well as his livelihood. But the context of business competition might well be one in which participants consent to this type of risk (public service might be another). Again, the same could be true of wrongs like battery, say, for which wrestling matches constitute an exception because the parties consent to the otherwise impermissible harms. That it may be true of defamation, too, especially in competitive contexts, is insufficient to show that the act is not otherwise wrongful.

C. *Is There a Right to Reputation?*

That is, unless true defamation, unlike damage to person or property, undermines assets to which one has no legitimate claim. On this hypothesis, keeping one's reputation clear of a true, if defamatory, fact is more than one may reasonably

⁴⁶ Thanks to Seana Shiffrin for reminding me about this form of justified true defamation.

⁴⁷ I am indebted to Larry Sager for prompting me to consider this type of example.

expect. Instead, according to this suggestion, one has a defensible interest only in a reputation that reflects one's *actual* deeds and misdeeds, rather than one that flatters.

This proposal fits a conception of reputation, or at least the valuable interest that reputation safeguards, as earned credit or property, a view that played some role at the foundations of contemporary defamation law.⁴⁸ On this conception, one is entitled only to the regard of others that one has actually earned through one's known behavior over time. False defamation robs one of this well-earned good name, but true defamation does not.

But the reputation-as-property conception of the interest at stake here is flawed, which may explain why legal practice never fully adopted it.⁴⁹ For one, it fails to account for why it is wrong to defame someone regardless of the reputation they have managed to establish beforehand. More importantly, it fails to account for the legitimate claim even a newcomer—one who first enters a community, perhaps because of having just grown into adulthood—has to an untarnished reputation. Even if we assume, aligning with tort practice, that false defamation is the only wrong in this vicinity, it is arguably just as wrong to inflict it upon someone who has earned no good name (yet) as on someone who has a record of good deeds to her name. Indeed, smearing the newcomer may be worse, as the victim would be robbed even of a chance to build up credit that could be used to counter the smear.

A more plausible picture of the reputational interest at stake can be found in the notion of *good standing*—an idea that can be related to “dignity,” also an established basis for contemporary defamation law.⁵⁰ “Good standing” here refers to being treated as a respected member, or member in good standing, of one's community. As Robert Post describes it, “the dignity that defamation law protects is thus

⁴⁸ Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693–96 (1986).

⁴⁹ *Id.* at 697.

⁵⁰ *Id.* at 707–12. Post's notion of “dignity,” to which he traces certain important strands in contemporary defamation law, includes much more than merely the presumption I am describing, but the presumption suffices for purposes of the present argument. *Id.* at 713.

the respect (and self-respect) that arises from full membership in society.”⁵¹ Defamation law, then, serves to protect one’s interest in being held worthy of inclusion and association among one’s fellows, at least as a starting point. Call it the *Presumption of Good Standing*. Defaming someone wrongfully undermines that presumption.

Yet on this picture, true defamation poses a dilemma. If the defamatory fact is one that does not warrant a withdrawal of the presumption of good standing—as might be the case with a minor misdeed from decades earlier—then publicizing it should be harmless to that interest, and should not be counted as a significant wrong, undermining the socially constituted dignity of the individual in her community. If, on the other hand, the defamatory fact *does* warrant withdrawing the presumption of good standing, then perhaps it *should* be withdrawn. That someone is a serial liar, for example, arguably justifies withdrawal of his good standing, his credit-worthiness in the community—in which case defaming someone that way is justified. Either way, it would seem, true defamation cannot be a wrongful harm.

Both horns of the dilemma, however, rely mistakenly on a model of reputation as a kind of personnel file, in which each fact is a piece of data, part of an unfinished collection to which new information may be added and everything is taken for (just) what it is. But outside close relationships, we have only a few facts to ground our decision to trust or include another as a fellow community member in good standing. So each of the necessarily partial, public facts plays an outsized and distorting role—one shorn of the context necessary to assess and weigh it accurately. Its presence in someone’s public profile also violates the usual order by which people can reasonably expect to get to know one another, first learning the most basic and general facts, then finding out more details—still about the here-and-now—eventually unearthing details of the past, not all of them pleasant. The gradual, present-biased nature of this process, as it usually unfolds, allows even unflattering information to emerge in a way that preserves good standing. Indeed, we all depend on this process as one in which we have some control, and some dignity, in presenting ourselves to others. But publicizing a sordid or unflattering fact from long ago places it front and center for all but the person’s current relations—upending the usual order and, again, giving it a distortedly prominent role in framing the

⁵¹ *Id.* at 711. Post identifies as a core purpose of finding defamation liability: “In effect the court, speaking for the community at large, designates the plaintiff as worthy of respect, thereby confirming his membership within the community.”

person. The presumption of good standing is undermined, quite regardless of whether it should be.

For example, that someone shoplifted 15 years ago may be irrelevant, in the broad evaluation of her, and meaningless when seen in light of what else befell her, or was ingested by her, on that day, to say nothing of the thousands of additional days before or since that episode. But if it is one of the only facts you know about them, it may affect your choice regarding whether, and to what extent, you trust them as an equal member of the community in good standing.

In other words, the *actual* relevance of some defamatory facts about people will likely have little to do with their real-world impact on their good standing. Instead, because most facts about others are not public, that which becomes public will necessarily play an outsized role in the general impression that strangers form, one which bears on the presumption of good standing that they consequently enjoy (or lose). Ironically, this point also illustrates that the difference between true and false defamation may not be as sharp as initially appears; both acts paint a distorted picture of their targets, which harmfully undermines their interest in being held in good standing, especially by strangers.

Moreover, if reputational interest is understood as a presumption of good standing, then there is another reason to prohibit true defamation, one that depends upon the presumption, namely what might be called the right to a fresh start. By “a fresh start,” I mean the right to have a misdeed from long ago eventually cease to be part of one’s current reputation, so that it ceases to have any impact on one’s life. Like having something expunged from a criminal record, this would amount to the freedom to begin to live as though a distantly past wrongdoing did not occur, to be free of it after a certain amount of time.

This interest is merely the negation of a phenomenon rendered notorious by the internet, namely the inability to erase an incriminating fact from the public record, no matter how outdated, minor or irrelevant. Today, misdeeds no longer fade with time and the accumulation of superseding acts and events; they are, instead, preserved in the protective ether of cyberspace, functioning as though they just took place. The interest in a fresh start stands against this veritable life sentence—an interest, instead, in being treated as a new person, no longer associated with a misdeed from long ago. This interest is likewise undermined by true defamation, at least in some cases, like those of the young Holy Land caterer.

There are, in short, many unflattering facts about people that should not, or should no longer, play any role in our overall first impressions of them. Or, if they may justifiably play a small role, they should not have the outsize impact that publication would afford them to many distant strangers who might otherwise get to know them gradually on initially more neutral terms. To decide, nevertheless, to publicize these facts thus knowingly inflicts substantial harm. If no countervailing interest or need is at stake, doing so is arguably as unjustified as any other type of knowing infliction of substantial harm to another's important interests.

D. Protective Defamation?

These considerations, however, raise the question of what happens when the defamatory fact *does*, or *should*, bear on good standing, after all, even if it is otherwise distorting. This could occur, for example, when the defamatory truth gives us reason to fear or warn others about its subject, so much so that a particular act is deemed worthy of over-emphasis in their public profile. For example, a recent history of sexual assaults or predatory business practices—heretofore unknown—may constitute good reasons to be wary of certain individuals. Some acts of true defamation are undoubtedly motivated by such purposes, which are difficult to discount in light of the well-known dangers of silence, secrecy and cover-up.

In this, however, true defamation is not interestingly different from the other wrongs with which I have grouped it, namely assault and vandalism, or more generally, that of intentionally damaging an important aspect of another person, be it her face, her farm or her good standing. All of these wrongs, and many others like them, become justified—or at least permissible—when done to protect people from serious harm. We may assault others to repel an otherwise deadly attack; we may flatten another's tires or trucks to stop them from ramming someone else or doing even greater harm.

There is, however, an important qualification when it comes to harming others for protective purposes: the injury one inflicts should be scrutinized for considerations of necessity and proportionality. Specifically: was it limited to what was needed to ward off the danger? One may not shoot someone, for example, to prevent him from stealing one's car, or from verbally harassing his employee. An over-protective, and thus over-injurious, act of defense is wrongful to the extent that it exceeds the scope of what was necessary for protection.

Can protective true defamation be properly restrained in the same way? It would be difficult to determine; today publication can last a lifetime, following people from one community and profession to the next, effectively banishing them and preventing any form of rehabilitation. This may be warranted by the need to protect people from them, but that ground is not likely to justify every case of true defamation that amounts to permanent banishment. I doubt that it applies to most such cases.

That is because defamation varies in severity along at least three axes that are all potentially infinite: duration, egregiousness, and audience size.⁵² For example, the same defamatory fact, the same past misdeed, can be public for a duration of 10 months or 10 years. It can be about a minor awkward violation of etiquette or a frightening act of violence; it can reach 500 people or five million. If it goes too far along any such axis, it will exceed the scope of any justification or excuse that might permit it, unless these be infinite. Yet it is very difficult to tell if any current efforts to defame (only) those who should be, in light of the harm they would otherwise inflict, are limited along these lines, especially those of duration and audience size, which often lie beyond the control of the defamer. Whenever true defamation goes too far along such lines, it loses the justification that protection may be thought to afford it.

E. Isn't False Defamation Worse?

All of these considerations are brought to counter the implied message broadcast by current tort practice, in its singling out of false defamation, to the effect that true defamation is unproblematic. But there is perhaps another implication that may be suggested in defense of tort practice: False defamation is singled out because it is distinctively worse, and thus much worthier of legal protection. In this, true defamation would stand with other wrongs that tort law leaves without legal remedy—wrongs like insulting someone loudly in a crowded auditorium, or negligently inflicting emotional distress when it does not coincide with any adverse physical effects or health risks⁵³—whose lack of legal recourse hardly implies that they are above board.

⁵² There is also the degree to which audiences believe it, but that factor is excluded here because it is arguably beyond the responsibility of the defamer.

⁵³ See, e.g., *Zell v. Meek*, 665 So. 2d 1048, 1052–53 (Fla. 1995).

It is, however, far from clear that false defamation is distinctively worse than true defamation. True, it involves a distinctive wrong—that of lying—and a distinctive harm, that of being misrepresented, over and above the damage to one’s reputation. But that does not render the wrongfulness, or the harms, of true defamation somehow milder or less severe. In the kinds of cases that motivated the campaign to curb cyberbullying, people sought to insult others practically to death,⁵⁴ by finding just the right devastating facts that would cause their targets to suffer crushing and irreversible shame. This intentional infliction of grave psychic harm involves malice that is comparable to anything motivating the false defamer, or at least it could be—and the harm inflicted by it, the humiliation and anguish, is no less intense, as the opening cases illustrate.

Of course, being misrepresented is, as already noted, a distinctive harm over and above being vilified, and it is unique to false defamation. But there is a countervailing factor that is likewise unique to false defamation, namely that the falsity can be exposed. One can appeal to evidence, or at least voice a sincere and unrelenting plea, supporting the claim that it is false. True defamation, however, cannot be remedied in the same ways. Denying it requires dishonesty and in any event only invites further scrutiny that can further verify and thus reinforce the defamation. True defamation, in short, can be as ill-motivated and as harmful as false defamation.

III. ALTERNATIVE LEGAL REMEDIES: PRIVACY, BAD FAITH, AND THE FIRST AMENDMENT

The concern articulated to this point has been that true defamation is distorted by current legal practice and its consequent impact on public understanding, to the point that it goes unrecognized, and under-enforced, for the wrong that it is.

Of course, it may be argued that there is simply no way to accommodate both the wrong of true defamation and the protections of the First Amendment, in which case the policy reasons to keep those protections in place will necessarily limit the scope of the legal wrong of defamation. But that may be too quick. A broader look at legal practice, beyond the confines of defamation law, tends to show that accurate publication can still face legal liability, and be treated as a wrong in much the way I have found wanting in defamation law, even in the wake of free speech protection.

⁵⁴ See, e.g., Andrew Hackman, *When Bullying Goes Too Far*, L.I. HERALD, Mar. 3, 2010.

Indeed, a look beyond the specific tort of defamation may suggest that, contrary to what I have argued thus far, legal practice does, indeed, recognize the wrong of true defamation, in all the ways necessary to preserve the public understanding of the wrong. It simply does so by other names. In particular, many states offer the protections afforded by privacy law, specifically the invasion of privacy tort that includes the public disclosure of private facts. With this cause of action, we can hold others to account and redress for publicizing intimate truths about us when the publication would be highly offensive to a reasonable person and is “not of legitimate concern to the public.”⁵⁵

This “public disclosure” form of the tort of invasion of privacy might seem like a promising alternative for victims of true defamation. As Robert Post has observed, this tort shares with defamation a role in enforcing civility norms within a community that help constitute both personal boundaries and the public sphere.⁵⁶ But unlike the tort of defamation, the “public disclosure” tort counts at least some accurate denigration as wrongful and, at least in principle, actionable even in the face of Constitutional scrutiny.

For example, an overcautious parent may decide to publish a brief in the town newspaper about the extramarital affair, 20 years ago, of the Sunday School Bible teacher, in all its salacious details. Assuming the affair was an isolated event long over, the story would arguably be of no public concern anymore. But it would be defamatory, characterizing the teacher as impious, hypocritical and unfaithful. The public disclosure tort could well provide the teacher with a basis for recovery and vindication in court.

True, a First Amendment challenge might be raised on grounds that, say, the infidelities of clergy and religion teachers are an important data point in the public debate about them and the issues for which they stand. But such a challenge can be forcefully met by the argument that an isolated incident from decades ago says little, of contemporary relevance, either about this particular person or the larger classes to which he, and the act, belong. Or, if it says anything in those domains, its value as data and news is negligible, in contrast to the immense harm it could cause.

⁵⁵ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

⁵⁶ Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 963 (1989).

A similar argument could be made about the opening example of the disclosure of the sordid past of Jennifer Elliot, the actor's daughter, especially her stint with criminal prostitution.⁵⁷ The factoid's newsworthiness is negligible, but its suicide-prompting exposure could well count as "highly offensive." Indeed, the producers of a non-fiction film about a former prostitute who was tried for murder—all in a "past life" long abandoned—was found liable as a wrongful public disclosure.⁵⁸

In short, the invasion of privacy tort that proscribes public disclosure offers hope for at least *some* victims of true defamation, both as a vindication of the claim that they were wronged and perhaps even as a vehicle for recovery. But its promise in this regard is limited. First, courts have chipped away at the domain of disclosures considered too far from public concerns to merit First Amendment protection. Jennifer Elliott's brief brush with prostitution, for example, might seem the quintessence of a purely private matter, especially years later. The Supreme Court in *Florida Star*, however, held that reports of crimes taken from public records automatically enjoy First Amendment protection.⁵⁹

Second, even if public disclosure liability were less circumscribed, it would still fail to counter what I have called the law's conceptual encroachment on the wrong of true defamation. That is because, on even the broadest interpretations, true defamation and invasion of privacy name fundamentally different wrongs, despite their occasional overlap. This can be seen most clearly in cases where they diverge. Consider, for example, a book of World Records of Biological Wonders,⁶⁰ featuring the photographs of highly unusual and deforming bodily injuries sustained during surgery, singled out for their exotic hideousness. A former patient identified publicly, and against his will, as the one whose anatomy is therein depicted, has a credible case for public disclosure of private facts. But there would be nothing defamatory in the publication.⁶¹

⁵⁷ See *supra* note 2.

⁵⁸ *Melvin v. Reid*, 112 Cal. App. 285, 291–92 (1931). But see *Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679 (2004), and more broadly, *Florida Star v. B.J.F.*, 491 U.S. 524, 533–35 (1989), effectively overruling *Melvin* in arguing that publicizing someone's past crimes, if they are contained in public records, is protected by the First Amendment.

⁵⁹ 491 U.S. at 535.

⁶⁰ There is no such book, as far as I know.

⁶¹ See, e.g., *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 586–89 (D.C. 1985), discussed in Post, *supra* note 56, at 983.

Conversely, Paul Tilley, the Chicago advertising executive defamed by the blog post about his alleged mismanagement, might have been hard-pressed to convince a court that his privacy was invaded in an especially offensive way by the post, beyond that it was negative and heretofore unknown. The disclosure arguably did not offend sensibilities in any of the ways plausibly associated with violations of norms of civility and decency, and it does not seem to involve facts that would be considered especially intimate or indecent to share. Yet he was indisputably defamed by it.

One reason for this divergence may be that with public disclosure of private facts, publication itself is a significant harm to the victims—quite apart from what anyone might consequently think of them. The fact that other people *can now perceive* the photo or X-Ray is itself humiliating, and a good part of why it is wrongful, both legally and morally. With defamation, on the other hand, what is harmful about the publication lies at least as much in what judgments people will form about the victim *once* they perceive it; how it is poised to change what they think of the person defamed. In this way, defamatory publication is, in important part, *instrumentally* harmful (even if it may also be harmful in other ways), in that its harm lies in the denigratory judgments it prompts and supports.⁶² With invasion of privacy, in contrast, the fact's becoming public is *intrinsically* harmful. That people perceive or know about it—that they see the nude photographs, flattering or not, or the gory medical records—is itself the harm, quite apart from what they in turn feel or conclude about it; quite apart, that is, from anything to do with reputation.

Of course, as Professor Post has shown, the reason publication harms private personality, intrinsically or otherwise, can be traced to social mores, which vary

⁶² There are, however, other ways of drawing the lines so that audience beliefs about the defamed constitute the harm regardless of how, or whether, they may act on them, and so in that way constitute intrinsic harm. See, e.g., Adam Slavny, *The Normative Foundations of Defamatory Meaning*, 37 LAW & PHIL. 523, 528 (2018). In that case, the present point could be reformulated as dividing along whether it is the perception/apprehension of the publicized facts that matter, as with invasion of privacy, or the judgment or impression that might be based on it (as with defamation as I'm delineating it here).

across societies, ages and other contexts,⁶³ in a way that may open the door to liability for true defamation.⁶⁴ Not only may social mores affect whether, say, partial nudity or restroom use is private in a given society. They may also determine whether a financial or legal misstep—bankruptcy, delinquency or a past crime—are in some ways intimate, belonging to one’s protected “information preserves,”⁶⁵ so that it would be not only unflattering but *uncivil* or *indecent* to disclose. For these reasons, defamation and invasion of privacy may converge in many actual cases, even if the harm wrongfully inflicted is different—the one being the intrinsic (often humiliating) fact of publication, the other being the impact on the victim’s reputation as a result of how the audience will react to the publication.

Inasmuch as true defamation is at least as much about this instrumental sort of harm, rather than the sort primarily implicated in invasion of privacy, legal treatment of the latter may not be enough to counter the conceptual encroachment upon the former. But it definitely helps, standing as a public counter to the impression that acts of true defamation are automatically above reproach. And even if the two wrongs sometimes diverge, the tort of invasion of privacy serves as a helpful model for how true defamation might withstand constitutional scrutiny. As with public disclosures of private facts, we can ask whether a true but defamatory publication was sufficiently newsworthy or in the public interest to justify the harm it inflicts on victims. At least sometimes, as with *Holy Land* and *Tilley*, the answer may well be no.

Another, perhaps more promising, way true defamation has occasionally withstood First Amendment scrutiny is through a focus on its purpose. Massachusetts law, for example, recognizes a narrow exception to truth as a defense: the libel action may proceed even for accurate vilification if the plaintiff can show that the defendant acted with “actual malice” in spreading it.⁶⁶ In *Noonan v. Staples*,⁶⁷ the national office supplies firm fired Noonan, a Massachusetts employee, for allegedly padding expense reports, and then sent an email to some 1,500 Staples employees

⁶³ Post, *supra* note 53, at 992–96.

⁶⁴ See also Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1057–70 (2018).

⁶⁵ Post, *supra* note 53, at 979–87.

⁶⁶ MASS. GEN. L. ch. 231, § 92 (2010).

⁶⁷ 556 F.3d 20 (1st Cir. 2009).

announcing that it had done so and why. Having provided substantial evidence that the claim of expense-padding—the embarrassing fact suggested in its email—was true, Staples moved for summary judgment in federal court (where the case had been moved). The trial court granted the motion but the circuit court denied it—despite agreeing that Staples had shown the defamatory claim true. Still, as the Court viewed it, one could reasonably infer that the email was sent “in order to humiliate [Noonan],” which in the Court’s view amounted to “malice” for purposes of the Massachusetts statute.⁶⁸ In short, there were grounds to pursue the “actual malice” exception to the truth defense. Thus, Noonan’s defamation case, though a case of true defamation, could proceed to trial.

In such “bad faith” cases, as with invasion of privacy, accurate publications have been found so unacceptable, as well as sufficiently lacking in public interest, as to give rise to a cause of action despite the usual First Amendment protections for true speech. That may be a promising avenue for redressing the potential harms of at least certain types of true defamation. As with public disclosure-invasion of privacy, however, its promise is limited. For one, the court in *Noonan* drew on the questionable assumption—challenged forcefully by the Supreme Court in *Garrison v. Louisiana*⁶⁹—that otherwise protected speech may be restricted entirely because of its purpose. The chilling impact of a such a restriction is obvious: even well-intentioned speakers will have to worry that ill-will could be imputed to their otherwise permissible speech.⁷⁰

That is not to say the defamatory speech in cases like *Noonan*, or Paul Tilley’s online detractors, merits First Amendment protection. What the worries about chilling effect suggest, rather, is that the speaker’s malice should not be the *only* basis for restriction. Instead, drawing on the considerations that guided the court in *Noonan*, tort liability could be extended to true defamation that transparently serves almost no end other than to ruin a private person’s reputation, and which is of almost no concern to the public. I say “almost” because it is always possible to find *some* worthy end that defamatory speech could be said to serve, and *some* way it relates to a matter of public concern, albeit remotely. But that has not been

⁶⁸ *Id.* at 30.

⁶⁹ 379 U.S. 64, 81 (1964)

⁷⁰ *Id.* See also Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1393–97 (2016).

enough to shield other instances of speech that courts have found undeserving of First Amendment protection,⁷¹ especially false defamation of private, largely unknown individuals.⁷² And that bears on the status of true defamation because, as I argued above,⁷³ isolated episodes from the pasts of private individuals tend to distort rather than illuminate the truth about them. In such cases, true defamation has little more to recommend it for First Amendment protection than its false counterpart.

Restricting certain types of true defamation in this way, modeled on *Noonan*, would fare better than privacy torts in redressing the conceptual encroachment I have highlighted, because while the target would be narrower than true defamation generally,⁷⁴ it is arguably the most egregious form of what is identifiably the same wrong. If there is anything problematic about true defamation, it arguably reaches its apotheosis in the knowing destruction of a private person's good name for no worthy purpose. But for the same reason such narrowly tailored tort liability would not go far enough, inasmuch as true defamation encompasses much more. Adding privacy torts and others⁷⁵ to the mix would, of course, increase the amount of true defamation that might overcome First Amendment scrutiny. It bears repeating,

⁷¹ See, e.g., *Welch v. Chicago Tribune Co.*, 34 Ill. App.3d 1046, 1053 (1975), holding a newspaper liable for publicizing that an employee was terminated for, inter alia, "alcoholism," "inefficiency" and "unreliability." Needless to say, a worthy purpose can be found for such a publication—the need to preserve the paper's integrity and discourage harmful journalistic practices, perhaps—and public issues are indirectly addressed, pertaining to alcoholism, journalistic reliability and accountability, among others. But that was not enough for the court to treat the statement, primarily denigrating the employee, as a matter of public concern worthy of First Amendment protection. For a critical discussion of this case and the public-private concern distinction more generally, on the other hand, see Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731, 782–88 (2013).

⁷² See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

⁷³ See *supra* Part II.C.

⁷⁴ That is especially so in light of the narrowing of the class of speech courts count as purely of private concern. See *supra* note 55 and the accompanying discussion of *Florida Star*.

⁷⁵ For example, intentional infliction of emotional distress. See *Snyder v. Phelps*, 562 U.S. 443 (2011) ("whether the First Amendment prohibits holding protestors liable for [intentional infliction of emotional distress for] speech in this case turns largely on whether that speech is of public or private concern").

however, that the wrong of true defamation is a single wrong, rather than a disjunctive set of related wrongs. Providing distinct legal remedies for otherwise different types of acts that happen to constitute subclasses of true defamation—while promising—does not communicate or imply that true defamation in itself is presumptively wrong. The conceptual encroachment remains.

Instead, or in addition, what could counter that encroachment is a more direct approach, in which the reinterpretation spurred by the law is publicly challenged. Those who knowingly and harmfully engage in the true defamation of others without justification could be called out—though not excessively, lest they become victims of the same. And more generally, true defamation could be resurrected and identified as a form of the wrong of defamation. In short, to the extent that the problem lies in the public understanding of defamation, that is where a solution could most fittingly begin.

CONCLUSION

This article began with the story of a normative transition: from a time when the wrong of defamation was thought to include accurate character assassination, or true defamation, to one in which—following legal practice—it came to be associated only with *false* defamation. Moreover, it tells the story critically, objecting to the conceptual encroachment upon the wrong of defamation wrought by tort law and related practices over the past two centuries.

That might give the impression that this is a conservative plea for a return to the values of a bygone era, which trace back to ancient traditions now largely neglected. But that would be a misreading. For my main arguments appealed, instead, to present-day values: if true defamation were scrutinized closely with respect to the harms it inflicts, and the purposes for which the defamer knowingly inflicts them, it would emerge as manifestly wrong, and for many of the same reasons other acts, including false defamation, assault and vandalism, count as wrong.

Instead, the legal and conceptual shifts regarding “defamation”—in effect discouraging and disapproving only of the false variety—took place largely under the moral radar, so to speak, for reasons that have little to do with how defamation should be understood. Once true defamation is scrutinized, I have tried to show, it emerges inescapably as part of the wrong of defamation in general. Indeed, it is often indisputably monstrous. Moreover, there are advantages to retaining true defamation as the name of a wrong, or part of the wrong of defamation as it is publicly

understood. To that end, the dominant, tort law distortion of defamation needs to be re-examined in public discussion. That is what I hope to have begun here.