FIRST AMENDMENT — DEFAMATION LAW — FIRST CIRCUIT APPLIES LIBEL LAW THAT DOES NOT ALLOW TRUTH AS A DEFENSE IN CASES OF "ACTUAL MALICE." — *Noonan v. Staples, Inc.*, 556 F.3d 20, *reh'g denied*, 561 F.3d 4 (1st Cir. 2009).

Few issues touch more closely on an individual's well-being than his reputation, and few state actions raise more sharply concerns of overly intrusive government than telling people what they can and cannot say. First Amendment jurisprudence has struggled to reconcile the tension between an individual's right to bring claims for harm to his reputation and the freedom of others to engage in speech without fear of legal liability.[1] But whatever tensions defamation cases raise with regard to free speech, one assumption that has largely gone unchallenged and unlitigated is that a person may not be held liable for making a true statement.

Last February, however, in *Noonan v. Staples, Inc.*,[2] the First Circuit applied a Massachusetts libel law that does not allow truth as a defense for statements made with "actual malice"[3] in reversing a district court's grant of summary judgment. While the First Circuit did not err in concluding that the defendant was procedurally barred from attacking the constitutionality of the statute for the first time in a petition for rehearing, the court's decision reveals the tenuous constitutional ground on which the Massachusetts libel law currently stands. The statute's only doctrinal protection is the distinction between speech concerning public matters and speech concerning private matters. Though this distinction may be sensible in some contexts, it should not extend to statutes concerning truthful statements, both because the affected party in such cases lacks a robust reputational interest and because the distinction is likely to chill protected speech in cases that blur the line between matters of public and private concern.

In November 2005, Staples fired an employee named James Dorman, whom it had discovered embezzling money through fraudulent expense claims.[4] This incident prompted Staples to audit expense reports from a sampling of other employees.[5] Alan Noonan was a Staples sales director who travelled for business, and company policy required him to file expense reports for reimbursement.[6] Staples's audit revealed that in May 2005, Noonan had requested $1622 more than

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[1] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[2] Noonan v. Staples, Inc. (*Noonan II*), 556 F.3d 20, *reh'g denied*, 561 F.3d 4 (1st Cir. 2009).

[3] MASS. GEN. LAWS ch. 231, § 92 (2009).

[4] *Noonan II*, 556 F.3d at 23.

[5] *Id.*

[6] *Id.*

he actually spent.[7] Concluding that Noonan had deliberately falsified a number of expense reports, Staples fired him.[8] Noonan had entered into two stock option agreements and a severance agreement with Staples, none of which Staples was required to uphold if Noonan was terminated for cause.[9] Staples neither allowed Noonan to exercise the stock options nor gave him severance benefits.[10] Staples executive Jay Baitler also sent an email to approximately 1500 employees, informing them that Noonan had been fired for violating company policy and reminding them of the importance of compliance.[11]

Noonan, a Florida resident, sued Staples in Massachusetts state court, and Staples removed to the U.S. District Court for the District of Massachusetts.[12] His complaint alleged (1) libel based on Baitler's email, (2) breach of the stock option agreements, and (3) breach of the severance agreement.[13] Both parties made motions for summary judgment, and the district court granted summary judgment to Staples on all claims, finding that the information in Baitler's email was true, that there was no evidence of actual malice, and that Noonan was fired for cause and thus ineligible for the stock options and benefits.[14] Noonan appealed these three determinations to the First Circuit.[15]

The First Circuit initially affirmed the district court's decision in full,[16] but upon rehearing, the same panel reversed and remanded on the libel count.[17] To establish libel in Massachusetts, as in most jurisdictions, a plaintiff must ordinarily establish: "(1) that the defendant published a written statement; (2) of and concerning the plaintiff; that was both (3) defamatory, and (4) false; and (5) either caused economic loss, or is actionable without proof of economic loss."[18] Noonan reiterated his argument that Baitler's email was false, but the First Circuit agreed with the district court that "the evidence clearly established that Noonan did indeed violate the company's travel and expense policy and that the email was consequently true."[19] In Massachusetts, as

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[7] *Id.*

[8] *Id.*

[9] *Id.* at 24.

[10] *Id.*

[11] *Id.* at 23–24. The full text of the email is available in the opinion. *Id.*

[12] *Id.* at 24.

[13] *Id.* Noonan's original complaint contained two other claims that were dismissed by the district court and were not appealed. *Id.* at 24 n.1.

[14] *Id.* at 24–25.

[15] *Id.* at 25.

[16] *See* Noonan v. Staples, Inc. (*Noonan I*), 539 F.3d 1, 2008 WL 3866927 (1st Cir. 2008), *withdrawn*, *Noonan II*, 556 F.3d 20.

[17] *See Noonan II*, 556 F.3d at 31.

[18] *Id.* at 25 (citing Stanton v. Metro Corp., 438 F.3d 119, 124 (1st Cir. 2006)).

[19] *Id.* at 26.

elsewhere, truth is usually an absolute defense to libel.[20] But Massachusetts law contains an exception: truth is not a defense to libel if the plaintiff can show that the defendant acted with "actual malice" in making the statement.[21] Therefore, Noonan could still make out a libel claim if he could show that Staples acted with "actual malice."

Section 92 does not define "actual malice," but a 1903 case from the Massachusetts Supreme Judicial Court (SJC) defined the term as "malicious intention" or "ill will."[22] Since 1964, however, the Supreme Court has used the term "actual malice" in public-figure defamation cases to mean "knowledge [of a statement's falsity] or . . . reckless disregard of whether [a statement is] false or not."[23] For two reasons, the First Circuit decided that, in the context of section 92, "actual malice" should have the meaning "ill will."[24] First, the Massachusetts statute was passed in 1902, so it could not have been intended to incorporate the more modern meaning of "actual malice."[25] Second, and more fundamentally, the knowledge-or-reckless-disregard-of-falsity standard makes little sense in this context, as section 92 takes the statement as *true*. The court reasoned that it would be very strange for the statute "only to apply to the rare case where a defendant utters a true statement which he seriously doubts or sincerely disbelieves."[26] Using the "ill will" definition, the First Circuit held that Noonan had presented a genuine issue as to whether Staples had acted with "actual malice" in sending the email, and thus reversed the grant of summary judgment on the libel claim and remanded for trial.[27]

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[20] *Id.*

[21] MASS. GEN. LAWS ch. 231, § 92 (2009) ("The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libellous; and the truth shall be a justification *unless actual malice is proved*." (emphasis added)). The district court opinion was somewhat misleading, as it stated, incorrectly, that "[t]ruth is an absolute defense to a defamation action under Massachusetts law." Noonan v. Staples, Inc., No. 06-CV-10716-MEL, 2007 WL 6064454, at *2 (D. Mass. June 28, 2007) (citing Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 42 (1st Cir. 1998)). The court seemed to be implying an exception for "actual malice" in that statement, however, because after concluding that the statement was true, the court also made the finding that "there [was] no evidence of actual malice." *Id.*

[22] Conner v. Standard Publ'g Co., 67 N.E. 596, 598 (Mass. 1903).

[23] *Noonan II*, 556 F.3d at 28 (quoting Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 251 (1974)) (internal quotation marks omitted).

[24] *Id.* at 29. The panel's decision to hear the case again seemed to be for the very purpose of switching which definition of "actual malice" it adopted. *See id.* ("[W]e had concluded that the public-figure definition of actual malice applied throughout 'the context of defamation.' We now reject this conclusion for a number of reasons." (citation omitted)).

[25] *Id.*

[26] *Id.*

[27] *See id.* at 31. The First Circuit did uphold the grants of summary judgment on the stock option and severance agreement claims. *Id.* at 35–36.

On a petition for rehearing, construed alternatively as a petition for rehearing en banc and certification to the Massachusetts SJC, Staples challenged section 92's constitutionality, an argument it had not made in the First Circuit's original rehearing.[28] The petition was denied, however, because the First Circuit found that Staples had waived the question of constitutionality,[29] that the issue was not so clear that the panel should have struck down the statute sua sponte,[30] and that certification to the state court was unnecessary as the question was one of federal constitutional law that could be decided without certification.[31] Specifically with regard to the question of clarity, the First Circuit noted that Staples had cited no case for the proposition that truth is a necessary defense for cases of *private* concern, although the Massachusetts SJC had previously held that section 92 was unconstitutional when applied to matters of *public* concern.[32]

Though the First Circuit was arguably correct not to overturn the statute in this particular proceeding, *Noonan* highlights the serious First Amendment hazards of section 92. The nature of the interest at stake in defamation cases suggests that truth should always be an absolute defense. Furthermore, in potential cases that straddle the unclear line between private and public concerns, there is a severe risk that even speech protected by the law will be chilled.

The absence of clear case law justified the First Circuit's refusal to weigh in on a constitutional claim that was raised impermissibly late in the proceedings. At the same time, the court's brief discussion of why the law *may* be constitutional provides no convincing argument that it *is* constitutional; on the contrary, the court's analysis serves as an indication that, had the constitutional claim been appropriately asserted, the law would not have survived. The court cited *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[33] to illustrate "the reduced constitutional value of speech involving no matters of public concern."[34] *Dun & Bradstreet*'s distinction between matters of public and matters of private concern, however, is beside the point in this case.[35]

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[28] Noonan v. Staples, Inc. (*Noonan III*), 561 F.3d 4 (1st Cir. 2009) (order denying petition for rehearing, rehearing en banc, and certification).

[29] *Id.* at 6. On original rehearing, the panel did note that Staples suggested the statute was unconstitutional on its face, but the panel declined to consider the issue because Staples had neither timely developed the argument nor raised it in initial briefing. *Noonan II*, 556 F.3d at 28 n.7.

[30] *Noonan III*, 561 F.3d at 6–7.

[31] *Id.* at 7.

[32] *Id.* at 6–7 (discussing Shaari v. Harvard Student Agencies, Inc., 691 N.E.2d 925 (Mass. 1998)).

[33] 472 U.S. 749 (1985).

[34] *Noonan III*, 561 F.3d at 7 (quoting *Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion)).

[35] To be sure, the Court in *Dun & Bradstreet* held that for false speech on private concerns, as opposed to public concerns, states need not require a showing of "actual malice" for defamation recovery. *Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion). But "actual malice" in that con-

After all, the First Amendment protections in *New York Times Co. v. Sullivan*[36] and *Gertz v. Robert Welch, Inc.*[37] that the *Dun & Bradstreet* Court declined to extend to private matters involved *false* statements. The statutes in those cases allowed truth as a defense, so the public-private distinction in all three was used only to determine what protection *false* speech deserved.[38] There is no obvious reason why the public-private distinction for false statements should apply identically to true statements.[39] Supreme Court jurisprudence has little to say about this question, and at least in the Anglo-American tradition, the common law has protected truth as a defense to libel in civil actions without regard for whether the statement at issue concerned matters of public concern.[40] Indeed, *Garrison v. Louisiana*[41] seems to be the only Supreme Court case directly touching on a statute imposing liability for *true* statements, and there, the Court struck the statute down.[42]

Of course, even if Supreme Court precedent offers little insight into the public-private divide regarding truth as a defense, the Massachusetts SJC has at least suggested such a distinction. As the First Circuit noted, the SJC, in *Shaari v. Harvard Student Agencies, Inc.*,[43] held only that section 92 was unconstitutional when applied to *public* matters.[44] Nothing inherent in the SJC's reasoning, however, limits the holding in *Shaari* to this context. Indeed, portions of the *Shaari* opinion can be read to support invalidation in the private context as well. As the SJC noted, *Gertz* seems to suggest that the First Amendment by

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text referred to the knowledge-or-reckless-disregard-of-falsity standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), not the "ill will" standard used in *Noonan*. *See id.* at 279–80.

[36] 376 U.S. 254.

[37] 418 U.S. 323 (1974).

[38] *See Dun & Bradstreet*, 472 U.S. at 751 (plurality opinion) ("The question presented in this case is whether . . . *Gertz* applies when the *false and defamatory statements* do not involve matters of public concern." (emphasis added)); *Gertz*, 418 U.S. at 332 ("The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory *falsehoods* . . . may claim a constitutional privilege against liability . . . ." (emphasis added)); *N.Y. Times Co.*, 376 U.S. at 278 ("The state rule of law is not saved by its allowance of the defense of truth.").

[39] Of course, the First Circuit did not use *Dun & Bradstreet* to say that the Massachusetts law *is* constitutional with regard to private statements. The court merely asserted that the law is not *obviously unconstitutional*. *See Noonan III*, 561 F.3d at 7. The cases the court cited do not settle the issue one way or the other.

[40] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *151 ("In a civil action, we may remember, *a libel must appear to be false*, as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit." (emphasis added) (footnote omitted)).

[41] 379 U.S. 64 (1964) (holding that a Louisiana criminal libel law incorporated unconstitutional standards for defamation because it criminalized even true statements about public officials if made with actual malice).

[42] *Id.* at 77.

[43] 691 N.E.2d 925 (Mass. 1998).

[44] *Noonan III*, 561 F.3d at 7 (citing *Shaari*, 691 N.E.2d at 929).

its very nature requires plaintiffs to establish a "defamatory *falsehood*."[45] The SJC, attempting to decide constitutional questions narrowly, simply may have wished to avoid striking down a statute on its face when it could rule on an as-applied challenge.[46]

But even assuming that the SJC *did* wish to preserve the public-private distinction in this context, the application of well-established First Amendment principles suggests that such a rule does not make sense. As a fundamental matter, individuals simply have a less important interest in being protected against true statements than against false statements. To the extent courts are concerned with "balancing" the benefits of unrestricted speech against harm to individuals, perhaps private speech counts for less than public speech, but harm from true statements should weigh less than harm from false statements. The First Amendment should not be sacrificed to protect plaintiffs' reputations from true facts.[47]

But even beyond the basic theoretical inconsistency of the Massachusetts law, there is a separate, more practical reason why truth should always be a defense to defamation: there is simply no clear line to distinguish speech concerning public and private matters. This ambiguity creates an undue risk that even truthful, *public* speech will be deterred where truth is not a defense for truthful, *private* speech. In *Connick v. Myers*,[48] the Supreme Court held that the First Amendment protects a government employee from being fired for speech only

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[45] *Shaari*, 691 N.E.2d at 927 (emphasis added) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)).

[46] In general, courts prefer to rule on as-applied challenges over facial challenges for constitutional questions. *See, e.g.*, Gonzales v. Carhart, 127 S. Ct. 1610, 1638–39 (2007) (stating a preference for as-applied challenges to the federal Partial-Birth Abortion Ban Act of 2003).

[47] *Cf.* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 419 (1978) ("If what is revealed is something the individual has concealed for purposes of misrepresenting himself to others, the fact that disclosure is offensive to him and of limited interest to the public at large is no better reason for protecting his privacy than if a seller advanced such arguments for being allowed to continue to engage in false advertising of his goods."). This argument is limited, however, to the context of truth as a defense to defamation. It is not meant to suggest that the First Amendment protects all true statements of every kind from any civil liability. But where there is a sufficient interest in being protected against true statements, that interest is best protected not through the tort of defamation but through the use of a different class of tort, such as intentional infliction of emotional distress or invasion of privacy. The interests at stake in these latter kinds of torts are different because the statements there have the potential to be hurtful precisely because they are true, not because they mislead people into drawing unwarranted conclusions about the affected party. Additionally, in those contexts, plaintiffs already face a high burden of proof, so the defense of truth is less necessary to protect against unwarranted liability. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496–97 (1975) (refusing to allow civil liability in an invasion of privacy action against a broadcaster where the information at issue was already available to the public in official court records). If there are concerns that First Amendment doctrine provides insufficient guarantees of privacy, they should be addressed in the context of these alternative torts, not through defamation.

[48] 461 U.S. 138 (1983).

if that speech touches on a matter of public concern.[49] To identify what qualifies as a public concern, the Court stated, rather unhelpfully, that one must look to "the content, form, and context of a given statement, as revealed by the whole record."[50] On its face, this rule may seem reasonable, but the Court clearly struggled with its own standard, deciding by a vote of 5–4 that the employee's speech did not address a public concern.[51] Yet the speech in question pertained to "the confidence and trust that Myers'[s] co-workers possess[ed] in various supervisors, the level of office morale, and the need for a grievance committee."[52] These questions would seem relevant "in evaluating the performance of the District Attorney as an elected official,"[53] and *this* sort of evaluation would clearly be a matter of public concern. The inability of courts to create a meaningful definition of the public-private line is by no means limited to this case.[54]

Of course, even if the line between public and private concerns is hazy, it probably still has *some* role to play in First Amendment jurisprudence. To say otherwise would be to apply *New York Times Co.* protections to *all* defamation claims.[55] But even if there is conceptual value in the public-private distinction generally, the practical concerns that arise when truth is not a defense are too serious to be outweighed. The main problem is the potential for laws to chill protected speech by inducing fear that speakers will be sued, even if the hypothetical speech they would have engaged in would not have been prohibited. It is well established that laws can run afoul of the First Amendment solely because of their potential to chill protected speech.[56] The par-

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[49] *Id.* at 154.

[50] *Id.* at 147–48.

[51] *Id.* at 148; *see id.* at 156 (Brennan, J., dissenting).

[52] *Id.* at 148 (majority opinion).

[53] *Id.*

[54] *See* Eugene Volokh, Essay, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred*,* 44 LiquorMart*, and* Bartnicki, 40 HOUS. L. REV. 697, 744 n.213 (2003) ("Lower courts have likewise found that speech wasn't of public concern even when it alleged race discrimination by a public employer, criticized the way a public university department is run, and criticized the FBI's layoff decisions — not results that fit well with conventional understandings of what's a matter of legitimate public concern." (citing Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984); Lipsey v. Chi. Cook County Criminal Justice Comm'n, 638 F. Supp. 837 (N.D. Ill. 1986); Landrum v. E. Ky. Univ., 578 F. Supp. 241 (E.D. Ky. 1984))).

[55] That is, libel plaintiffs in all cases would be required to show that the false statements were made with knowledge of falsity or reckless disregard of the truth. At present, that standard applies only to false statements concerning public officials or public issues. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[56] *See, e.g.*, *id.* at 279 ("Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.'" (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958))).

ticular kind of chilling discussed in *New York Times Co.* was the fear of making a false statement that one thought to be true,[57] but the same logic would apply a fortiori to the public-private question. If there are sufficient First Amendment concerns in requiring individuals to verify rigorously the truth of their statements, then surely we should be concerned with requiring individuals to verify in advance whether their statements, even truthful ones, would be construed by courts as touching on public matters.[58]

Of course, the actual speech in *Noonan* is probably not a good example of speech that raises strong concerns of chilling: Staples would likely concede that its intracompany email was private speech. However, it is easy to imagine much more problematic cases. Consider commercial advertisements, in which companies frequently argue that competitors are disingenuous about the quality, safety, or even cost-effectiveness of their products. Such ads, particularly if truthful, are likely to hurt the reputation of the businesses they target. Is one business attacking the reputation of another a public matter? The Supreme Court has made clear that commercial speech is entitled to only intermediate constitutional protection,[59] and it is easy to imagine courts holding that commercial criticism is not always a public issue. Yet this distinction would be frightening where truth is not a defense, as a business that wished to put forward *true* information about why its product is better for the public than a competitor's might nevertheless be silenced by the threat of libel.

The tensions and controversies that exist between defamation and the First Amendment arise because freedom of expression and protection against false attacks on one's reputation are both highly important values. But one area of defamation law that generally has not been, and should not be, controversial is the freedom of individuals to make true statements without fear of legal liability. Laws like section 92 are the exception for a reason, and whether through legislation or litigation, they ought to be overturned.

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[57] *Id.*

[58] It might be contended that it is not obvious why this chilled speech argument should be specific to the defense of truth, but one response is simply to say that such a rule would complement the chilled speech argument in *New York Times Co.* Where a potential defendant may not be able to verify rigorously the truth of his statement, he may nevertheless rely on the certainty that his speech concerns a public official or a clear public matter. Where a potential defendant may not know whether his speech will be seen as public or private, he may nevertheless rely on the certainty of its truth. It is unclear why one kind of protection but not the other should apply under the First Amendment.

[59] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980) (subjecting restrictions on commercial speech to intermediate rather than strict scrutiny).