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Reviving the Intracorporate Communications No-Publication Rule: A Strategy to Encourage Effective Investigation of Internal Misconduct

Doris DelTosto Brogan



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REVIVING THE INTRACORPORATE COMMUNICATIONS NO-PUBLICATION
RULE: A STRATEGY TO ENCOURAGE EFFECTIVE INVESTIGATION OF
INTERNAL MISCONDUCT

Doris DelTosto Brogan *

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INTRODUCTION

Roberta League, a teacher certification specialist at Gonzaga University, overheard student Julia Lynch describe to a fellow student the possible rape

*Professor of Law, Villanova University Charles Widger School of Law. My thanks to Villanova for the summer grant that supported this research, and for the always-outstanding support of our librarians. Thanks also to my colleagues for suggestions and encouragement and special appreciation for excellent research assistance from Anna Boyd.

of another female student by a male student whom League recognized as a candidate in the teacher certification program. Lynch apparently learned this information through her role as resident assistant (RA); the purported victim was a student in Lynch's dorm. In the overheard conversation, Lynch criticized the university because "no one had bothered to find out what happened."¹ At the time of the overheard conversation, Lynch was no longer an RA, but was an office assistant at the university.²

What ensued was a tangled series of communications among university employees, Lynch, the alleged victim (identified as Jane Doe in the case, hereinafter Jane), outside individuals including an investigator for the Washington state teacher certification investigation unit, the teacher certification authority, and eventually the alleged perpetrator (identified as John Doe in the case, hereinafter John).³ The school refused to certify him and reported the information to the teacher certification authorities.⁴ John denied the allegations, but to no avail.⁵ Because of the devastating impact on his reputation and career, John sued the university, as well as Jane, Lynch, and two other university employees individually, for among other things, defamation.⁶

Critical to John's defamation claim was the question of whether communications among various individuals within the university (employees

¹Doe v. Gonzaga Univ., 24 P.3d 390, 393 (Wash. 2001), *rev'd on other grounds*, 536 U.S. 273 (2002). Lynch did not report this information herself at the time of the occurrences, although she did take Jane to the student health center after the last incident. *Id.*

²*Id.*

³For clarity, I will refer to the alleged victim as Jane and the alleged perpetrator as John since the court used the "Doe" alias for both Jane and John. John was not questioned as part of the investigation. He was only informed of the allegations just prior to graduation and after the University officials had decided they could not certify his character to the state teacher certification authorities. *Id.* at 395.

⁴*Id.*

⁵*Id.*

⁶John also sued for negligence, breach of contract, intrusion upon seclusion privacy, and under 1983 for violation of his FERPA nondisclosure rights. His original complaint named Jane whom he sued for falsely accusing him of rape; Jane cross-claimed against John for sexual assault and sued the University for negligent investigation and defamation. Jane and John dismissed their suits against each other, and Jane dismissed her claims against the University. *Id.* at 396. The Washington state supreme court held that John could bring an individual private action against the University for violation of FERPA. The United States Supreme Court reversed this finding holding that Congress did not create an implied private individual cause of action. *Gonzaga*, 536 U.S. at 290 ("FERPA nondisclosure provisions contain no rights-creating language . . . and therefore create no rights enforceable under § 1983.").

and students) constituted “publication” as it is legally understood to satisfy the publication element of defamation. To prevail on his claim, John was required to prove all elements of defamation, including publication. Relying on the intracorporate communications doctrine, the university argued that that communications among individuals within the organization (intracorporate communications) were not in fact publications, for the purposes of defamation, but rather amounted to the organization talking to itself. The university based this argument on a doctrine announced in the 1919 Washington case, *Prins v. Holland–North Am. Mortgage Co.* which held that an employee of a corporation who sends a libelous communication to another employee of the corporation does not publish it for the purposes of a defamation claim because, as Gonzaga University argued, “[i]t is but communicating with itself.”⁷

How should the law balance John’s interest in his reputation against the institution’s need to effectively discharge its obligations to its students and to the public by investigating allegations of possible sexual misconduct? This article will use the *Gonzaga* case as a backdrop to consider these difficult issues and to offer some recommendations designed to strike an effective balance between protecting an individual’s reputation, and empowering institutions to uncover wrongdoing, to take the steps necessary to prevent further harm and to remedy what might be grave injury done to the entity, its constituents and others.

To be sure, individuals’ rights in reputation and privacy must be protected. Real harm can ensue, as it did in John Doe’s case. Providing broad-based immunity through an overly broad no-publication rule could doom legitimate defamation actions where individuals were unjustifiably harmed. But, at a time when entities (schools, corporations, partnerships) are being held to higher standards of accountability and due diligence regarding internal misconduct, the question of whether and, if so, how, the entity “talks to itself” as it engages in the robust investigations that due diligence requires, must be answered correctly, and defined clearly, in a way that both serves the policy goals of increased accountability and protects individuals’ legitimate reputational and privacy interests.

⁷*Doe*, 24 P.3d at 397 (citing *Prins v. Holland–North Am. Mortgage Co.*, 181 P. 680, 680–81 (Wash. 1919) (providing that when an agent of a corporation makes libelous communication to another agent of the same corporation it does not constitute publication for purpose of defamation, but rather amounts to the corporation “communicating with itself.”)).

Courts have split on whether to adopt the intracorporate communications doctrine at all, and those that do have split on whether to analyze intracorporate communications as no-publication or as a publication subject to a conditional privilege.⁸ Courts that do adopt the doctrine as a no-publication rule have not always been clear in describing its contours, operation, or its underlying rationale.⁹ Further, the term “intracorporate communications” is often used interchangeably to refer to both the no-publication rule and the qualified privilege approach.¹⁰ Some courts do acknowledge the difference and wrestle with it with varying degrees of success, while other courts have simply conflated the analysis of no-publication and qualified privilege.¹¹

The distinction matters.¹² Non-publication means the plaintiff cannot plead an essential element of his case and the matter will be dismissed on the pleadings.¹³ On the other hand, a finding of publication subject to a qualified privilege gets past the missing-element argument, permitting the plaintiff to state his prima facie case.¹⁴ It then is up to the defendant to raise and prove the affirmative defense of conditional privilege, which gives qualified protection to the speech involved.¹⁵ Thus, rather than dismissal on the pleadings, the case will go to the jury which will decide it on the merits, including whether the privilege applies and whether it was abused or exceeded.¹⁶

And clarity matters. The point of the protection—whether an absolute privilege or a qualified privilege—is to encourage people with information

⁸ See *infra* notes 102–138.

⁹ See Anthony W. Kraus, *Absolute Protection for Intracorporate Personnel Communications Under Defamation Law: A Philosophical Reappraisal of the Nonpublication Doctrine*, 25 U. Mem. L. Rev. 155, 169 (1994).

¹⁰ See, e.g., *Cummings v. Valley Health Sys., LLC*, 705 F. App'x 529, 531 (9th Cir. 2017) (referring to intracorporate communication “privilege” and applying qualified privilege analysis).

¹¹ See, e.g., *Hagebak v. Stone*, 61 P.3d 201, 205 (N.M. Ct. App. 2002) (courts that recognize intracorporate communication exception to publication “apparently confuse[] the issues of publication and privilege.”); *Jones v. Britt Airways*, 622 F. Supp. 389, 391 (N.D. Ill. 1985); Kraus, *supra* note 9, at 161; Jane M. Draper, Annotation, *Defamation: Publication by Intracorporate Communication of Employee’s Evaluation*, 47 A.L.R. 4th 674, 680 (1986); Robert D. Sack, Sack on Defamation Libel, Slander, and Related Problems, § 2:5.3 (Keith Voelker ed., 5th ed. 2017).

¹² See, e.g., Kraus, *supra* note 9, at 191.

¹³ *Id.* at 182.

¹⁴ *Id.* at 165.

¹⁵ *Otten v. Schutt*, 113 N.W.2d 152, 156 (Wis. 1962).

¹⁶ *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 514 S.E.2d 126, 134 (S.C. 1999).

to speak up by assuring them they will be protected (to a greater or lesser degree) from tort liability. To accomplish this, individuals must be able to understand how and when the protection works.

The institutional motivation for protecting internal communications through an intracorporate communications doctrine is clear, and the need for protection is acute. Organizations are being required or strongly encouraged to engage in programs designed not only to detect, correct, and self-report violations and misconduct, but also to proactively prevent misconduct. These obligations are imposed on schools, health care providers, and corporations that deal with the government or are otherwise subject to federal or state oversight.¹⁷ To meet these expectations, entities need those individuals (employees and others within the organization) who think, know and act on the entity's behalf, to be able to communicate, explain and report freely and candidly about what is going on. That is, the entity must be able to talk to itself through its constituents. Thus, defining the applicability, nature and scope of the intracorporate communications doctrine takes on increasing importance because of the protection it might provide for these crucial communications. That is the goal of this article.

I take the position that courts should recognize a carefully circumscribed and clearly articulated intracorporate communications doctrine in defamation cases.

First, I argue that courts must disentangle the question of whether a statement is published" for defamation purposes (the issue addressed by the intracorporate communications doctrine) from the question of whether a particular statement should be partially protected by a qualified privilege. This distinction has become blurred by many courts. But clarity is essential for organizations attempting to behave responsibly regarding potential misconduct within the organization.

Second, returning to the facts of the *Gonzaga* case, I set the stage for how the intracorporate communication doctrine operates by setting out the elements of the cause of action for defamation. The intracorporate communications doctrine operates on the element of publication, essentially foreclosing the plaintiff from proving publication when the doctrine applies.

Third, I explore how the intracorporate communications doctrine developed, identifying aspects of its history and pedigree that contribute to confusion about the doctrine and about how, when and, in fact, whether it

¹⁷Russlynn Ali, Dear Colleague Letter, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (April 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> at 15.

should apply. In this section, I examine the criticisms of commentators and the reasons offered by courts rejecting the doctrine. Typically, these courts find the intracorporate communications doctrine's virtual immunization of arguably false and defamatory speech to be unnecessary, preferring to apply a qualified privilege. I respond to this by demonstrating that the qualified privilege does not provide sufficient protection to foster the candid, forthcoming communications necessary to combat wrongdoing within entities.

Next, I examine the decisions of those courts that have applied the doctrine and their reasoning for doing so. I also explore the confusion in how courts have applied the doctrine and the difficulty of untangling the intracorporate communications doctrine from both the qualified privilege and the doctrine of respondeat superior.

Finally, I take the position that a clearly defined, appropriately limited intracorporate communications doctrine should be adopted if we are to take seriously preventing and policing wrongdoing within organizations. I propose a model for such a doctrine and apply it to the Gonzaga facts to demonstrate how such a doctrine would work to encourage those who know about wrongdoing within entities to speak up and to do so to the appropriate individuals

THE GONZAGA CASE

The *Gonzaga* case provides a rich case study, bringing the interests of both those invoking the doctrine, and those seeking to avoid its impact into sharp contrast, and demonstrating the problem lack of clarity creates.

Gonzaga involved an alleged campus sexual assault, and while that will be the primary focus of this article, its lessons illuminate other areas where institutions face pressure to discover and to deal with internal misconduct.

Recognizing the importance of dealing forthrightly with campus sexual violence, government regulators and activists placed increasing pressure on colleges and other institutions to proactively confront sexual violence and harassment.¹⁸ Even in an era where federal regulators have begun dialing

¹⁸ See, e.g., Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016) (describing steady expansion of regulatory concepts of sex discrimination and violence. Gersen and Suk criticize this as resulting in over bureaucratization that might contribute to trivializing sexual violence and harassment); Nancy Chi Cantalupo, *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, 3 NASPA J. About Women Higher Educ. 49 (2010), <https://scholarship.law.georgetown.edu/facpub/431/>

back the pressure on universities to initiate action, and are pushing for greater process protections for the accused,¹⁹ pressure from other sources—students, parents, the public—will, and should cause most schools to continue to proactively address the issues of sexual violence. And in the “times up” era, entities of all kinds, from major media organizations to multinational corporations face the possibility of having to undertake an internal investigation of allegations of sexual misconduct.²⁰ Effective programs must involve rigorous investigation, along with systems that help uncover unreported sexual assaults, that encourage victims to report, and that motivate bystanders (fellow students, faculty, and staff) to intervene and report when appropriate.²¹

In the *Gonzaga* case, League made the decision to follow up on a disturbing conversation she had overheard.²² She questioned Lynch and

(suggesting victim-centered responses to combat problem of underreporting); Tyler Bishop, *The Laws Targeting Campus Rape Culture*, THE ATLANTIC, (Sept. 11, 2015), <https://www.theatlantic.com/education/archive/2015/09/the-laws-targeting-campus-rape-culture/404824/> (describing federal mandates that focus on prevention including by emphasizing by-stander intervention and putting burden of prevention on all students, faculty members and employees); Monica Vendituoli, *Colleges Face New Requirements in Proposed Rules on Campus Sexual Assault*, CHRONICLE OF HIGHER EDUCATION, (June 20, 2014), <https://www.chronicle.com/article/Colleges-Face-New-Requirements/147275> (describing increased legal responsibility to investigate and respond to students’ reports of sexual violence).

¹⁹ See Notice of Proposed Rulemaking, Department of Education, Title IX of the Education Amendments of 1972 (to be codified 34 C.F.R. pt. 106), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>; Erica L. Green, New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges, New York Times, (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html>; Caroline Kitchener & Adam Harris, *A Step-by-Step Guide to Trump’s College Sexual-Assault Policy*, The Atlantic (Aug. 30, 2018), <https://www.theatlantic.com/education/archive/2018/08/a-guide-to-how-the-new-rules-on-campus-sexual-assault-could-work/569035/>.

²⁰ Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1585 (2018) (“2017 marked an inflection point in evolution of social norms regarding sexual misconduct.”); Barbara Stark, *Mr. Trump’s Contribution to Women’s Human Rights*, 24 ILSA J. Int’l & Comp. L. 317, 329 (2018) (providing that Professor Anita Hill appointed to head a privately funded Sex Abuse Commission “to ‘tackle widespread sexual abuse and harassment in the media and entertainment industries.’”).

²¹ See, e.g., Cantalupo, *supra* note 18; Bishop, *supra* note 18. Ruth A. Kennedy, *Insulating Sexual Harassment Grievance Procedures from the Chilling Effect of Defamation Litigation*, 69 WASH. L. REV. 235, 235–36 (1994). Of course, effective systems must also ensure the rights of the accused.

²² *Doe v. Gonzaga Univ.*, 24 P.3d at 393 (the Washington Supreme Court characterized this as “eavesdropping,” implying a level of nefariousness. The facts do not clearly indicate whether

collaborated with other arguably appropriate university officials to investigate the possibility of a sexual assault (or multiple sexual assaults) allegedly committed by a student poised to be certified as a teacher.²³ Isn't this exactly the sort of pro-active response necessary to confront effectively the vexing problem of sexual assault on campus, and the disturbing reality that many victims are reluctant to come forward?²⁴ Lynch, an acquaintance—actually a residence advisor--of the alleged victim, described what she understood to be serious misconduct.²⁵ While perhaps better directed initially to responsible authorities, once her conversation was overheard, and she was approached, she told what she knew—that a student in her dorm stated she had been raped by a fellow student.²⁶ Again, isn't this exactly the sort of information the institution needs?

And as noted, while campus sexual assaults provide a compelling venue for this discussion, the issue is not confined to this area. Organizations are being are being required or strongly encouraged to engage in programs designed not only to detect, correct and self-report violations and misconduct,

League happened to catch the conversation, or more affirmatively was listening in, nor is it clear this would make much of a difference.).

²³ *Id.*

²⁴ U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., Q&A on Campus Sexual Misconduct, (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term (“Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.”). This document replaced the Obama administration’s 2011 Dear Colleague letter requiring colleges to more aggressively investigate and prosecute campus sexual violence. Russlynn Ali, Dear Colleague Letter, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., 4, 15 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (schools that know or should have known of incident involving sexual violence should promptly investigate regardless of whether individual formally complains; training for employees should include how to identify sexual assault; schools should take proactive measures to prevent sexual harassment and violence). The most significant difference between these two documents appears to relate to the standard of proof required and the availability of mediation to resolve cases. *Id. See, e.g.,* Elaine Chamberlain, *Athletics & Title IX of the 1972 Education Amendments*, 19 *Geo. J. Gender & L.* 231, 239 (2018) (unclear what the changes Secretary DeVos contemplates will entail). *See also,* Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus Save Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 *J.C. & U.L.* 443, 447–48 (2014) “Title IX requires institutions to stop the harassment [including sexual violence], prevent future occurrence, and remedy its effects.”

²⁵ *Gonzaga*, 24 P.3d at 393.

²⁶ *Id.*

but also to proactively prevent such misconduct.²⁷ To prevent or uncover misconduct within corporations and other entities, misconduct that can range from financial frauds, to environmental crimes, to violation of consumer's rights—these entities must be able to engage in thorough investigations that will necessarily require candid communication among the various members of the entity. It is this candid communication that the intracorporate communications doctrine encourages.

There are different ways to conceptualize an entity's internal communications. Using the *Gonzaga* case as the example, one may think of Lynch, League, and the other university agents as nerves in the body carrying messages to the brain which then sends a signal to react: "Hot! Danger! Pull the hand back." Translated to the *Gonzaga* case, "Sexual assault! Danger! Investigate to prevent further harm!" That metaphor relies on a single-entity conceptualization as distinct from the idea of the constituent members communicating with each other. An alternative that I prefer, as explained in more detail below, can be illustrated by the movie *Inside Out*. In the movie, the protagonist's emotions are represented by individual members of a team ("anthropomorphized emotions"). They communicate, figure out what is

²⁷ See, e.g., John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 317 (2004) (Federal Sentencing Guidelines apply promise of lesser sentence if criminal conviction occurs if corporation has adopted voluntary compliance and disclosure program to detect and report possible wrongdoing). Baker notes other examples including the healthcare industry. *Id.* at 315 (citing Publication of the OIG's Provider Self-Disclosure Protocol, 63 FR 58399-02 (participants in Federal health care programs have ethical and legal duty to ensure integrity which includes taking measures to detect and prevent fraudulent, abusive and wasteful activities)). The EPA also provides incentives for voluntary investigation and reporting. See, Joseph F. Guida & Jean M. Flores, *From Here to A Penalty: Anatomy of EPA Civil Administrative Enforcement*, 43 TEX. ENVTL. L.J. 129, 140 (2013) (EPA encourages companies to engage in voluntary environmental audits and objective, systematic, documented procedure reflecting "due diligence" in preventing, detecting, and correcting violations). The *Gonzaga* case itself provides further evidence of government expectations of proactive investigation. In his Amicus Brief, the Washington State Superintendent of Instruction stated: Those rules [requiring investigation and disclosure of information pertaining to teacher candidates' character] are intended to be "bullet proof", which is to say that the State Board has attempted to legislate away any implication that education professionals can 'turn a blind eye' to potential misconduct, or pass the problem teachers along to others, or make outright misrepresentations or omit material facts. . . . There is absolutely no question that Gonzaga University 'did the right thing' by internally investigating allegations of sexual misconduct and by reporting its concerns about John Doe's pending teacher application. Brief for Superintendent of Instruction as Amicus Curie Supporting Respondent, *Doe v. Gonzaga Univ.*, 2000 WL 34539744, No. 69456-7 (Wash. 2000) at 13.

going on and move on to propose and execute responsive strategies.²⁸ The analogy isn't perfect, but it helps illustrate the idea that an entity exists only conceptually, and can think, learn, understand, discover and act only through the people who make it up. Thus, the doctrine of intracorporate communication conceptualizes the entity-talking to itself through, or perhaps more accurately, among its constituent members.

In the *Gonzaga* case, the investigation appears to have been badly mishandled after the initial steps. But the fact that the players bungled the information should not be conflated with the status of, or protection that should be afforded to the internal communications—especially the original communications. These communications were essential for the institution to discover a problem and the need to take action, and to then execute that action. That is, *Gonzaga*, the entity, needed to learn the facts and to do so through individuals—through individuals asking questions and through other individuals answering the questions—in order to gather and assess the information necessary to draw conclusions and to take appropriate steps.

Viewed from John's perspective, however, harmful, allegedly false information about him was being spread—and spread broadly within the institution.²⁹ John found out about the scandalous accusations directed at him only after a good number of people both inside and outside the university heard about the shocking charges, and after the responsible university official had decided not to certify his character.³⁰ John was not questioned or given an opportunity to provide his side of the story as part of the investigation.³¹ His teaching career would be doomed before he ever set foot in a classroom; the damage to his reputation was real and devastating—damage that resulted from people repeating defamatory information about him. A freewheeling concept of intracorporate communication could completely immunize baseless, false and damaging statements, giving no recourse to those, such as John, who are grievously injured.

²⁸Zach Schonfeld, *What Do Child Psychiatrists Think of Pixar's 'Inside Out'? They Love It*, NEWSWEEK (June 28, 2015), <http://www.newsweek.com/what-do-child-psychiatrists-think-pixars-wondrous-inside-out-347114> (“team of anthropomorphic emotions—Joy, Anger, Disgust, Fear, Sadness—sift through a fantastical memory-storage apparatus and fight to stabilize Riley's mental state”).

²⁹*Gonzaga*, 24 P.3d at 95.

³⁰*Id.*

³¹*Id.* at 395.

DEFAMATION CLAIMS: A POWERFUL COUNTERPUNCH TO INTERNAL INVESTIGATIONS

In some ways, *Gonzaga* represents an outlier in the constellation of intracorporate communications cases. Most often the doctrine is discussed in defamation-based employment suits.³² Employees who are terminated often sue not only for wrongful termination, but also for defamation and sometimes for publicity given to private facts.³³ But the issue promises to come up with increasing frequency outside the wrongful termination context as organizations are being held to more rigorous standards of accountability across the spectrum of activities. Schools and other entities face increasing pressure to respond quickly and effectively to allegations of sexual misconduct.³⁴ To meet these obligations, entities will need those individuals (employees and others within the organization) who think, know and act on the entity's behalf, to be able to communicate, to explain and to report freely and candidly about what is going on. That is, as illustrated above, the entity must be able to talk to itself through its constituents. Thus, defining the applicability, nature and scope of the intracorporate communications doctrine takes on increasing importance because of the protection it might provide for these crucial communications. To understand this, we must first examine the common law defamation cause of action.

A. *Defamation*

1. Elements of the Cause of Action

As described above, in the *Gonzaga* case John Doe alleged he was “injured when false allegations that he had stalked and raped another student” were “casually and routinely” shared among members of the Gonzaga University faculty and staff.³⁵ He sued for, among other things, defamation, basing his claims on the internal communications among members of the university faculty, staff and a student (who was also employed by the university in two different part-time capacities at the relevant points) made as part of the investigation, as well as reports to external regulatory and

³² See Kraus, *supra* note 9, at 156.

³³ *Id.*

³⁴ See *supra* note 27 and accompanying text.

³⁵ See Brief for Respondent in Opposition to Petition for Certiorari, *Gonzaga Univ. v. Doe*, 2002 WL 32101189, No. 01-679, (Wash. 2002) at 1.

licensing agencies.³⁶ We begin, then, by considering the elements of defamation.

To state a claim for defamation, a party must plead: publication of false and defamatory information, of and concerning the party, made with at least negligence, and without an applicable privilege.³⁷

Publication requires that the information was communicated to one who understood its defamatory meaning.³⁸ Thus, if an individual writes a defamatory statement, and then tears it up before anyone reads it, or locks it in a drawer where it is never found, or simply is mumbling to himself and isn't heard by another, there is no publication.³⁹ Publication occurs only when a party, other than the speaker or the allegedly defamed person, hears, sees or reads, and then understands the communication.⁴⁰

The repeater rule adds that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it," and this is true regardless of qualifiers or cautions the repeater attaches to the repeated defamatory communication.⁴¹ The originator of the defamatory communication will also usually be liable for the repetition, provided repetition was authorized or it could reasonably be expected.⁴² As with all

³⁶ See *Petition for Writ of Certiorari, Gonzaga Univ. v. Doe*, 2001 WL 34092009, No. 01-679, (Wash. 2001) at 5.

³⁷ See RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW. INST. 1977).

³⁸ See *id.* at § 577 cmt. c; *Wallulis v. Dymowski*, 918 P.2d 755, 758 (Or. 1996) ("[p]ublication or communication of the defamatory statement is an essential element of an action for defamation"); *K-Mart Corp. v. Pendergrass*, 494 So. 2d 600, 602 (Ala. 1986); *Shively v. Bozanich*, 80 P.3d 676, 683 (Cal. 2003).

³⁹ *Cf.*, RESTATEMENT (SECOND) OF TORTS § 577, cmt. b, illus. 1 (AM. LAW INST. 1977); *Wallulis*, 918 P.2d at 758 (1996) (no publication when individual utters defamatory statement about another, but utterance is not conveyed to a third party.).

⁴⁰ See *Shively*, 80 P.3d at 383.

⁴¹ See RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977); *Pan Am Sys., Inc. v. Atl. Ne. Rails & Ports, Inc.*, 804 F.3d 59, 64 (1st Cir. 2015) (one who repeats defamatory statement as liable as original defamer). Thus, even if the repeater states, "Joe says Mary is a liar, but I don't believe him," the repeater is liable for the defamatory communication. The qualifier might affect damages if it causes the person hearing the communication not to believe or place much credibility in the allegation, but it does not change the publication, the falsity or the defamatory meaning. See *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980) ("One who re-publishes a libel subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original source and even though he expressly disavows the truth of the statement." (citing *Hoover v. Peerless Pub. Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978))).

⁴² See RESTATEMENT (SECOND) OF TORTS § 576 (AM. LAW. INST. 1977).

elements of defamation, the publication of a defamatory utterance must be done at least negligently.⁴³

A defamatory communication is defined as an utterance that “tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁴⁴ Accusations of serious crimes, especially such heinous crimes as rape or sexual assault, will virtually always be deemed defamatory.⁴⁵

To establish falsity, the plaintiff must show that the communication is provably false which typically requires that it contains or at least clearly implies facts that can be shown to be untrue.⁴⁶

These elements must be considered against the background of the constitutionalization of defamation law that began with *New York Times Co. v. Sullivan*.⁴⁷ *Sullivan* and its progeny. These cases radically changed the landscape of common law defamation.⁴⁸ *Sullivan* broke constitutional ground, holding that when the communication in question involves a public official and relates to the individual’s official conduct (later extended to public figures in matters of public interest), the constitution requires the plaintiff to show reckless disregard for truth or falsity of the defamatory matter published.⁴⁹ The Court reasoned that this high threshold was necessary to ensure breathing room necessary for robust debate.⁵⁰ For private

⁴³*Id.* at § 577 (1); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

⁴⁴*See Huon v. Denton*, 841 F.3d 733, 738 (7th Cir. 2016) (statement is defamatory if it tends to harm a person’s reputation to the extent it lowers that person in the eyes of community or deters others from associating with person); RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977).

⁴⁵*See also Cianci*, 639 F.2d at 59, 62 (finding allegation of charge of rape defamatory).

⁴⁶*See Phila. Newspapers Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (constitution requires plaintiff to carry burden of proving falsity in defamation action); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (statement must be provable as false in cause of action for defamation).

⁴⁷376 U.S. 254, 279 (1964).

⁴⁸*See Doris DeTosto Brogan, Expungement, Defamation and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?* 49 LOY. U CHI. L.J. 1, n. 163–69 (2017); Paul Horwitz, *Institutional Actors in New York Times Co. v. Sullivan*, 48 GA. L. REV. 809, 810–14 (2014).

⁴⁹*Sullivan*, 376 U.S. at 279.

⁵⁰*See id.* at 279–80. False speech itself is not constitutionally protected, but the Court recognized to protect free and robust debate, it needed to provide breathing room, and so held that even false, defamatory speech would only be actionable upon a showing of actual malice (reckless disregard for the truth or falsity) in cases where a public official was involved and the matter related to the official’s public duties. The Court later extended the *Sullivan* holding to public figures in *Curtis Publishing*. That case involved high-profile University of Georgia athletic director Wallace

figures entangled in matters of public interest, the Court set less stringent thresholds, but still required more than the common law.⁵¹ The Supreme Court held in *Gertz v. Robert Welch Inc.* that liability for defamation could not be imposed without a showing by clear and convincing evidence of, at a minimum, some fault (understood to mean at least negligence) with respect to the truth or falsity of the publication, and with respect to the actual act of publication itself.⁵² In *Philadelphia Newspapers v. Hepps* the Court held that the constitution required the plaintiff to prove the element of falsity as part of the prima facie case, rejecting the common law rule that presumed falsity if the communication was defamatory.⁵³ After *Hepps*, the plaintiff (even a private figure, at least when the matter was of public interest) must carry the burden of pleading and proving the element of falsity.⁵⁴

In short, *Sullivan* and its progeny “encompassed all of defamation,”⁵⁵ at least to the extent it involved a matter of public interest. In *Dun and Bradstreet v. Greenmoss Builders*, the Court kicked the puzzle pieces a bit, holding in a fractured opinion, that with respect to damages, the *Gertz* requirements did not apply unless the matter was of public concern.⁵⁶ *Dun and Bradstreet* did attempt to clarify one question that had lurked in the *Sullivan* line of cases: Did the constitutional requirements apply only to

Butts and allegations that he had fixed the Alabama v. Georgia football game by giving Crimson Tide coach Bear Bryant detailed information about Georgia’s plays and defensive patterns. The rivalry was legendary, and the allegations were incendiary. Thus, Butts was deemed a public figure and the matter one of public interest, and the Court applied *Sullivan*’s constitutional standards. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (public figure may recover damages for a defamatory falsehood only upon showing of highly unreasonable conduct that constitutes extreme departure from reporting standards).

⁵¹*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

⁵²*See id.* That is, the actual communication of defamatory material had to be done with some minimal level of fault. For example, if someone wrote something defamatory in a diary, and carefully locked it up but in an unforeseeable way, the lock was breached and the diary read, there would be no fault and no liability. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 577(1) cmt. (o) (AM. LAW INST. 1977). The requirement that publication be at least negligent predates the *Sullivan* case. *See, e.g.*, RESTATEMENT (FIRST) OF TORTS § 577 cmt. (n) (AM. LAW INST. 1938).

⁵³475 U.S. 767, 777 (1986).

⁵⁴*Id.* at 770, 776. Under the common law, the default position was that the individual’s reputation was good, and so a defamatory communication was presumed false. The speaker bore the burden of proving truth, which then operated as an absolute defense. *See* RESTATEMENT (FIRST) OF TORTS § 613 (AM. LAW INST. 1936).

⁵⁵Sheldon W. Halpern, *Of Libel, Language and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 284–85 (1990).

⁵⁶472 U.S. 749, 751, 763 (1985).

media defendants or to all speakers? The Court held that the media/non-media status of the defendant did not matter, at least in the context of a credit report, despite language in *Sullivan* as well as some other non-defamation, first amendment cases suggesting that the media played a different role in public debate and so deserved heightened first amendment protections.⁵⁷

Finally, we must also fold in application of the doctrine of respondeat superior. Every first year law student learns that when an employee commits a tort while acting within the scope of her employment, the entity for which she works will be held responsible.⁵⁸ Defamation is no exception; respondeat superior applies in these cases as in any other tort.⁵⁹ Thus, the victim may sue the individual speaker or speakers, and the entity/employer for the communication made by the employee.⁶⁰ The elements of respondeat superior, specifically the scope-of-employment requirement, can muddy analysis of the intracorporate communications doctrine, since, the intracorporate communication doctrine is often described as protecting employees' communications about matters within the scope of their responsibility—the same, or at least very similar to the scope of employment.⁶¹ The contours of the two concepts overlap, but are different because their delineations are informed by the different purposes of the two doctrines.

⁵⁷*Id.* at 763. In *Sullivan*, the Court seemed to carve out a special place for the media, describing its key role in monitoring government. *Sullivan*, 376 U.S. at 275. Also, in a line of cases striking down efforts to punish the press for or prohibit the press from publishing truthful information legitimately obtained, the Court often cited the special role of the press in matters of public interest. *See, e.g.*, *Cox Broadcasting v. Cohn*, 420 U.S. 469, 492–93 (1975); *Florida Star v. B.J.F.* 491 U.S. 524, 533 (1989). *See also*, Horwitz, *supra* at note 48.

⁵⁸STUART M. SPEISER ET AL, 1 AMERICAN LAW OF TORTS § 4:3 (1983) (“It is hornbook law that the doctrine of respondeat superior renders an employer or master vicariously liable for a tort committed by the employee or servant.”).

⁵⁹RESTATEMENT (SECOND) OF AGENCY § 247 (master subject to liability for defamatory statements made by servant acting within the scope of employment); *Nelson v. Lapevrouse Grain Corp.*, 534 So. 2d 1085, 1093, 1095 (Ala. 1988) (communication by employee to customer not privileged so employee liable for defamation and corporation liable for employee's tort because operating in the scope of employment).

⁶⁰*See, e.g.*, *Lawson v. Boeing Co.*, 792 P.2d 545, 549 (Wash. Ct. App. 1990) (plaintiff may bring defamation claims against fellow employees who lodged sexual harassment complaints, employees assigned to investigate and via respondeat superior employer).

⁶¹*See, e.g.*, *Rice v. Comtek Mfg. of Or., Inc.*, 766 F. Supp. 1539, 1541–42 (D. Or. 1990).

2. Elements Applied to the Facts of *Gonzaga*

Parsing the elements of defamation, using the *Gonzaga* case as our example, will highlight the essential nature of and rationale supporting the intracorporate communication doctrine as a defense to a defamation claim in the context of an internal investigation. We begin by identifying the key people who communicated the allegations against John that formed the basis of his defamation suit, and the role of each within the university. Each of several core communications presents a different potential intracorporate communication, and each individual brings different credentials to claim the shield of the intracorporate communication doctrine.

The overheard conversation (eavesdropping) has provided a literary tool to authors for centuries, providing a plot device to initiate narrative.⁶² An overheard conversation initiated the saga in *Doe v. Gonzaga University*, as well.⁶³ League, a university administrator, overheard one student (Lynch) tell another student (unidentified) that John, a male student had raped Jane, a female student. According to Lynch's conversation, Jane had told Lynch (at that point Jane's RA) that John had raped her.⁶⁴ In the conversation League overheard, Lynch complained angrily that the university had done nothing about the alleged rape.⁶⁵ Important to this analysis, when Lynch became aware of Jane's allegations against John, she was a Residence Advisor (RA).⁶⁶ The report of a sexual assault committed by a student against another student would fall squarely within Lynch's responsibilities as an RA. But apparently at the time of the overheard conversation, Lynch was no longer an RA, but was a part time clerk or secretary in a university office.⁶⁷

Beyond this conversation which all seem to agree on, the testimony regarding who said what to whom and when was at best unclear.⁶⁸ One can

⁶² See ANN GAYLIN, *EAVESDROPPING IN THE NOVEL FROM AUSTEN TO PROUST*, (Cambridge Univ. Press 2002).

⁶³ 24 P.3d 390, 393 (Wash. 2001).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 398. In analyzing the applicability of the intracorporate communications doctrine, the court focused on Lynch's role as an employee (finding she was an office clerk at the time she made the statement, and that the alleged rape of a student did not fall within her reasonable duties of that role). As will be discussed below, given the context, Lynch's role as a student with pertinent information provides a more meaningful way to determine her status. Alternatively, the fact that she learned about the allegations in her role as RA should be considered in applying the doctrine.

⁶⁸ *Id.*

glean from the opinion that League recognized John as a student in the teacher certification program and was concerned that if the allegations were true, these were facts that would implicate the university's obligations in attesting to John's character for his teaching certification. League consulted Kyle, a director of teacher field placement, sharing what she had overheard.⁶⁹ Determining that they should investigate, League and Kyle questioned Lynch about what League had overheard.⁷⁰ In this interview, Lynch told League and Kyle that Jane told Lynch that John had sexually assaulted Jane several times and that John had verbally coerced Jane into other sexual activities.⁷¹ Lynch further stated that at some point Lynch had accompanied Jane to the student health center.⁷² Lynch reported that the nurse at the health center "concluded that Jane Doe had been date raped."⁷³ After Lynch's interview with them, at League's and Kyle's suggestion, Lynch asked Jane to discuss the situation with them; Jane refused and said she did not want to file a complaint, at least at this time.⁷⁴

League and Kyle next contacted Adelle Nore, an agent with the state teacher certification agency.⁷⁵ Nore indicated that League and Kyle should question John.⁷⁶ They did not; the opinion indicates Nore assumed they had done so or would do so.⁷⁷ Nore also understood from her conversations with League and Kyle that Jane was credible and ready to make a statement.⁷⁸

⁶⁹ *Id.* at 393.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Gonzaga*, 24 P.3d at 393–94. The nurse's testimony at trial was more equivocal. "At trial, Nurse Vicki Olson (Olson) testified that she did not perform a physical examination of Jane Doe. She recorded Jane Doe's subjective symptoms and scheduled an appointment for her with Dr. Nancy Crotty (Crotty). When Olson asked Jane Doe if she wanted to report a rape, Jane Doe said no. Crotty testified that when she examined Jane Doe the following day, her findings were consistent with intercourse. Crotty testified that Jane Doe did not accuse John Doe of date rape or sexual assault. Crotty suggested that Jane Doe seek counseling if she felt that she had been unwillingly involved in intercourse. [At trial] John Doe testified that Jane Doe told him the nurse or doctor had said the intercourse appeared forced. When John Doe asked Jane Doe, 'Well, was it?' She responded, 'I don't know. Was it?'" *Id.* at 394 n.4 (*citing* *Gonzaga Univ. v. Doe*, Report of Proceedings (RP) at 366, 536).

⁷⁴ *Gonzaga*, 24 P.3d at 394.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* For our purposes, the conversation with Nore is relevant only as evidence of League and Kyle's mishandling of the investigation; the conversation with her, while likely subject to a qualified

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Eventually, Jane did agree to speak with League and Kyle.⁷⁹ According to the testimony, Jane seemed confused (“I guess I really don’t know what rape is.”) and indicated she “promised John she would not tell.”⁸⁰ Shortly after this, Jane spoke with Professor William Sweeney who described Jane as hysterical and said Jane told him John had repeatedly sexually assaulted her and had threatened her.⁸¹

Yet later, Jane asked Janet Burcalow, chair of the teacher education department not to pursue any action against John.⁸² Burcalow later reported that in her conversations with Jane, Jane would not say that nothing had happened, and Jane told Burcalow that she was afraid of John. Burcalow scolded Jane, asking if she knew “where people who lie go?”⁸³

Finally, Dr. Corrine McGuigan dean of the School of Education, met with League, Kyle, Burcalow and Sweeney and requested summaries from them.⁸⁴ After reviewing this information, McGuigan determined not to certify John’s character to the teacher certification board.⁸⁵

Approximately one month later, John learned of the allegations against him and learned that McGuigan would not be certifying his character because of these allegations.⁸⁶ John sued, and the jury awarded him \$500,000 on his defamation claim.⁸⁷

For the simplicity, I will focus only on those communications made by and to Lynch, League and Kyle, and I will consider only those communications made within the university because these are the conversations that might qualify for the intracorporate communications doctrine protection.⁸⁸

privilege (that may or may not have been exceeded or abused), was *not* an intercorporate communication.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* This exchange evidences again the mishandling of the investigation, and the need for training and clear guidance on how one conducts an investigation of this sort.

⁸⁴ *Id.* at 395.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 396. As noted above, John alleged a variety of claims, most of which were dismissed voluntarily or by the courts.

⁸⁸ To be sure, the most damaging communications were those made to outside licensing agencies. These reports might be protected by other privileges, and so only muddy the analysis here. Also, for simplicity, I will not examine Jane’s communications, except as they implicate other

Based on these facts, there is certainly enough evidence to support a jury finding that the communications were defamatory. Allegations of rape and retaliation surely would tend to harm John's reputation and lower his esteem among his peers—and this is especially so for an aspiring teacher as McGuigan's refusal to certify his character demonstrates.⁸⁹ And anyone making such a communication would certainly understand that the accusation was defamatory (whether true or not, certainly an allegation that would seriously damage a person's reputation). Thus, both defamatory meaning and fault are established.⁹⁰ As for falsity, John denied the claims, and indeed the inconsistent testimony regarding Jane's accusations could certainly provide sufficient evidence for the jury to find falsity.⁹¹ But again, the speaker must act at least negligently with respect to the falsity of the statement.⁹² The university's failure to conduct any investigation could tend to prove at least carelessness (negligence) with respect to the question of

speakers. As the victim, her communications also bring in other privileges that would only unnecessarily confuse the analysis.

⁸⁹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 574 (AM. LAW INST. 1977) (charges of serious sexual misconduct constitutes slander *per se*); *Arledge v. Hendricks*, 715 So. 2d 135, 140 (aggravated rape is a criminal offense, therefore, accusation constitutes defamation *per se*). The labels slander *per se* and libel or defamation *per se* are confusing and arguably obsolete in light of the *New York Times v. Sullivan* line of cases. See generally *New York Times v. Sullivan*, 376 U.S. 254, 278–80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (constitutionalizing certain requirements and eliminating certain common law presumptions the *per se* designations permitted).

⁹⁰ RESTATEMENT (SECOND) OF TORTS § 580B cmt. d (AM. LAW INST. 1977).

⁹¹ To be clear, Jane's equivocation about reporting the incident, her inconsistency in statements, her fear of reprisal and her confusion about what is rape, are not unusual, especially when the alleged rapist is an acquaintance. See, e.g., Caroline Kitchener, *How to Encourage More College Sexual Assault Victims to Speak Up*, THE ATLANTIC (Aug. 23, 2013), <https://www.theatlantic.com/national/archive/2013/08/how-to-encourage-more-college-sexual-assault-victims-to-speak-up/278972/> (often the victim does not report because she does not want to ruin accused's life, or fears possible stigma and social isolation if she reports); Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 263, 270 (2006), [https://onlinelibrary.wiley.com/doi/pdf/10.1007/s10464-006-9069-](https://onlinelibrary.wiley.com/doi/pdf/10.1007/s10464-006-9069-9?casa_token=_mw7aGYCUcQAAAAA:8bDK7n6HXnlaRfng9i1X5gpAS_tJgbZyJqmoAz28UE4PvrD8A3ZkhTrGarPnzYGVbCVmZFOcE1mYBy8K)

9?casa_token=_mw7aGYCUcQAAAAA:8bDK7n6HXnlaRfng9i1X5gpAS_tJgbZyJqmoAz28UE4PvrD8A3ZkhTrGarPnzYGVbCVmZFOcE1mYBy8K. Nonetheless, the inconsistencies in what she said about the incidents, and the inconsistencies among the testimony of several of the witnesses, as well as the failure of the university officials to solicit John's side of the story and investigate his version could provide a jury with sufficient evidence to find falsity, as the jury in the case did.

⁹² See *Gertz*, 418 US at 349; RESTATEMENT (SECOND) OF TORTS § 577 cmt. a (AM. LAW INST. 1977).

falsity for the later communications—that is, reporting to the external agencies. But negligence is less clear in the context of the earlier, initial communications by League, Burcalow, and McGuigan. Did they spread the rumor without engaging in a sufficient investigation and in the face of Jane’s equivocation? Or were these communications part of the investigation, or at least part of attempting to figure out how to move forward. And weren’t Jane’s inconsistent statements to be expected in such a case?⁹³ This could go either way, but on the facts a reasonable jury could find both falsity, and at least negligence regarding falsity, satisfying this element.

Turning to Lynch’s initial statement, it may be more difficult to find fault on her part with respect to the truth or falsity of her statements. She repeated what Jane told her. That doesn’t shield her. Even though she was only repeating Jane’s allegations, and regardless of whether she clarified that she was not necessarily attesting to their truth, Lynch is liable if the allegations were in fact false and she was at least negligent with respect to their falsity.⁹⁴ Was she? Lynch had reason to believe Jane’s account. In her case, the fault requirement regarding falsity presents more of an obstacle. And yet the jury in *Gonzaga* must have found fault.⁹⁵ Indeed, in light of this, Lynch’s circumstances provide the most compelling argument for adopting the intracorporate communications no-publication rule—Lynch may be the most important player in this situation as will be shown in more detail below, and she might also be the most vulnerable.

Which leaves publication. Publication occurs when “the defamatory matter is [communicated] intentionally or by a negligent act to one other than the person defamed.”⁹⁶ In the case of each of the relevant communications, the speaker was repeating information from another source. But, as noted above, the repeater is as liable as the originator of the statement, even if the speaker qualifies her own belief in the veracity of the statement.⁹⁷ And except arguably for Lynch, each publication was intentional—that is the speaker spoke for the very purpose of communicating the defamatory information to another with the purpose that the other would understand, thus clearing the

⁹³ See *supra* note 91.

⁹⁴ See *supra* notes 35–37 and accompanying text.

⁹⁵ *Doe v. Gonzaga Univ.*, 24 P.3d at 396.

⁹⁶ RESTATEMENT (SECOND) OF TORTS § 577 (AM. LAW INST. 1977). The defamatory communication must also be understood, but that is not at issue here.

⁹⁷ See RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977). See also *supra* text and notes 41–43.

fault requirement imposed by the *Sullivan* line of cases.⁹⁸ Lynch spoke intending for the unidentified student to whom she was speaking to understand the defamatory statement about John Doe, but not for League, who also heard.⁹⁹ However, Lynch's lack of care with respect to others (in this case League) who might be able to hear her allegations would be at least negligent, again sufficient to satisfy the fault requirement for that publication to League.¹⁰⁰

So, on their face (that is, without considering the impact of the intracorporate communications doctrine), each of the communications we are focusing on satisfies, or at least arguably satisfies, the element of legal publication—that is in each instance the defamatory material was communicated to a third party (not the plaintiff), with requisite intent, and that party understood the defamatory meaning.¹⁰¹

Therefore, the facts of the case support the jury's finding for John Doe and against Gonzaga, Lynch, League and Kyle on John's claims for defamation. Unless, of course the doctrine of intracorporate communication, whose application on these facts was rejected by the court, should be applied to immunize the communications involved.

B. The Intracorporate Communication Doctrine and the Element of Publication

In *Gonzaga*, the university relied on a Washington Supreme Court case, *Prins v. Holland-North American Mortgage Company* in arguing for protection of the intracorporate communications doctrine.¹⁰² As noted above, *Prins*, which is often cited as the leading authority for the intracorporate communication doctrine, explained “[f]or a corporation, therefore, acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives, cannot be a publication of the libel on the part of the corporation. It is but communicating with itself.”¹⁰³ *Prins*

⁹⁸ See cases cited *supra* note 89.

⁹⁹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 577, cmt. k (AM. LAW INST. 1977).

¹⁰⁰ See, e.g., RESTATEMENT (SECOND) OF TORTS § 577 cmt. k, illus. 4 (AM. LAW INST. 1977). Lynch's communication of the information to the unknown student would also constitute publication but is extraneous to this analysis.

¹⁰¹ See RESTATEMENT (SECOND) OF TORTS § 577 (AM. LAW INST. 1977).

¹⁰² See *Doe v. Gonzaga Univ.*, 24 P.3d at 397 (citing *Prins v. Holland-North Am. Mortg. Co.*, 181 P. 680, 680–81 (Wash. 1919).

¹⁰³ *Prins*, 181 P. at 680–81.

offers the most straight-forward and absolute application of the doctrine—*to wit*, there is no communication of the defamatory statement from one individual to another when one agent of the entity communicates with another agent of the entity—in short, no publication.¹⁰⁴

Courts and commentators are split over whether or not to adopt the doctrine, and, as discussed in more detail below, courts that do adopt it have not been uniform in describing its purpose or contours.¹⁰⁵

Anthony Kraus explored the jurisprudential foundations of the intracorporate communications doctrine as a no-publication rule in an illuminating article that plumbed the historical context in which the doctrine arose.¹⁰⁶ He believed that the doctrine flowed from the first understandings of the very nature of the corporation. He explained, jurisdictions applying the doctrine “view intracorporate communications as expressions of the unified corporate entity,” and described such communications as “expressions of a single actor.”¹⁰⁷ Kraus drew on early conceptualizations of corporations and their essential nature in developing his explanation of how the doctrine evolved.¹⁰⁸ This conceptualization is best understood as structural.

These early understandings, Kraus explains, described a corporation “as a composite entity in which the separate identities of its officers and employees are fused,” leading to the conclusion that communications by constituent members are communications “of a single corporate individual” rather than communications or publications among separate persons.¹⁰⁹ This theoretical explanation draws on discussions that can be traced back to early Roman times, and later in discussions of canon law.¹¹⁰ These debates argued about whether fictional associations (such as corporations) exist as distinct recognizable entities, and wrestled with whether they have a “mind” and can think.¹¹¹ During the early part of the nineteenth century the more modern

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., Kraus, *supra* note 9; Jane M. Draper, Annotation, *Defamation: Publication by Intracorporate Communication of Employee’s Evaluation*, 47 A.L.R.4th 674 (1986); ROBERT D. SACK, SACK ON DEFAMATION § 2.5.3.1 (Keith Voelker ed., 5th ed. 2017).

¹⁰⁶ Kraus, *supra* note 9. Kraus’s article is thorough and thoughtful in its analysis of the doctrine, and is worth reading to fully understand the concept and how it fits with the conditional privilege.

¹⁰⁷ *Id.* at 157.

¹⁰⁸ *Id.* at 170.

¹⁰⁹ *Id.* at 162.

¹¹⁰ *Id.* at 170–71. For example, the ecclesiastical discussions typically considered anthropomorphic questions—can the entity be punished, say by excommunication (no).

¹¹¹ *Id.* at 170.

characterization of corporations and other entities evolved, drawing on these ideas.¹¹² By the turn of the century, the “concept of corporations as separate units seemed to be confirmed in the contemporaneous evolution of business corporations in American society.”¹¹³ Thus, according to Kraus:

From these origins, the personification of the corporation became a fixed idea in judicial thinking Such personification had three essential elements: (1) the autonomy of corporations from the state; (2) the functional existence of the unit with rights and duties distinct from owners and agents comprising it; and (3) a vague open-ended sense of analogy between corporations and persons in other respects, including a coordinated mental life concentrated in its management.¹¹⁴

The intracorporate communications no-publication doctrine fit neatly into this structurally-anchored idea of a corporation as a single entity whose component members were fused into a unified and singular identity.

1. Critiques of the Doctrine

Early critics of the rush to anthropomorphize corporations cautioned that the concept of corporate personality functioned essentially as a metaphor, and as such operated to inappropriately shorthand careful analysis.¹¹⁵ Kraus cites Lon Fuller’s work on legal fictions which offered a moderate critique.¹¹⁶ Fuller argued that while fictions such as corporate identity can be useful, they should not be taken literally.¹¹⁷ They should be used “as, at most, a convenient point of departure” and not “as a self-justifying basis for” any conclusion reached.¹¹⁸ Fuller’s concerns suggest the exercise of caution in adopting the intracorporate communication no-publication doctrine simply on the basis of a corporation as a “person” and as such an indivisible unit.¹¹⁹ He argues overreliance on these fictions will result in lack of care and

¹¹² *Id.* at 171.

¹¹³ *Id.* at 172.

¹¹⁴ *Id.* at 174.

¹¹⁵ *Id.* at 176.

¹¹⁶ *Id.* at 177.

¹¹⁷ *Id.* at 178.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

precision in thought. Rejection of the indivisible unit conceptualization of corporations led many courts to reject the intracorporate communications doctrine.¹²⁰

Some other critics do not rely on rejecting the unity theory and offer humanist pleas. Pushing back against adoption of the doctrine and particularly the concept of giving an identity to the corporate entity, one court argued that to do so necessarily would require swallowing up the individual:

To hold that a stenographer is not an individual but a mere cog in the machine because of modern development necessitated by the changes in business methods is a derogation of human personality, and not in harmony with the modern conception of the dignity of labor.¹²¹

Other critiques of the intracorporate communications doctrine raised more instrumentalist arguments. They posited that the doctrine would permit widespread character assassination accomplished by individuals within a corporation because the no-publication doctrine would insulate all communications.¹²² This probably overstates the impact of the approach, even as understood in the earliest conceptualizations. But at some level it was a natural consequence of the structural explanation of a unified-identity concept applied to justify the intracorporate communications doctrine.

Thus, a good number of commentators and treatises reject the doctrine.¹²³ Indeed, the Restatement, Second did so emphatically, finding publication (though perhaps qualifiedly privileged publication) in virtually any circumstance involving an agent of an entity.¹²⁴

¹²⁰ See *Wallulis v. Dymowski*, 918 P.2d 755, 760 (Or. 1996) (citing DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE, § 1:6[b], 66 (1993)).

¹²¹ *Rickbeil v. Grafton Deaconess Hosp.*, 23 N.W.2d 247, 255 (N.D. 1946).

¹²² See *Hagebak v. Stone*, 61 P.3d 201, 207 (N.M. Ct. App. 2002) (while doctrine may protect corporation from litigation, it does so at a huge cost by insulating false statements knowingly made, even malicious lies disseminated with devastating effect on individuals' reputations on equal plane with statements innocently made in the best interest of the corporation); Kraus, *supra* note 9, at 164–65.

¹²³ See *Hagebak*, 61 P.3d at 207–08 (citing W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 113, 798 (5th ed. 1984); FOWLER V. HARPER & FLEMING JAMES JR., THE LAW OF TORTS § 5.15 n. 21, 124 (2d ed. 1986)).

¹²⁴ RESTATEMENT (SECOND) OF TORTS § 577 cmt. e–f, h–i (AM. LAW INST. 1977) (communication to defamer's agent; communication to defamed person's agent; communication to stenographer for transcription; communication by one agent to another of the same principal and this constitutes publication by both the agent and the entity).

2. Courts Rejecting the Doctrine

Many, indeed, probably the majority of courts, have followed the commentators' lead, rejecting broad application of the intracorporate communications doctrine as a no-publication rule.¹²⁵

In refusing to apply the no-publication rule, these courts draw on the commentators' critiques. They reject the fiction of unity of entity and raise legitimate policy concerns regarding the need to provide a remedy for the harm to the individual's reputation.¹²⁶ In *Wallulis v. Dymowski* the court quoted commentator David Elder:

The criticisms of this ... no-publication rule are well-reasoned, indeed, unanswerable. ... [The rule] ignores the fact that distinct personalities are involved within the corporate structure, that reputational damage therein "may be just as devastating as that effected by defamation spread to the outsider," and that the nonliability rule may open the door to serious abuse.¹²⁷

As noted above, at some level, this critique flows from embracing as the rational for the rule the structurally-anchored idea of a corporation as a single entity whose component members were fused into a unified and singular identity—it would be like one hand clapping. Many modern understandings

¹²⁵ See Draper, *supra* note 105; See also Soto-Lebron v. Fed. Express Corp., 538 F.3d 45, 63 (1st Cir. 2008) (majority of jurisdictions hold intracorporate communication of defamatory statement satisfies publication requirement); Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89, 103 (Conn. 1995) (intracorporate communication doctrine has been almost entirely abandoned); Luttrell v. United Tel. Sys., Inc., 683 P.2d 1292, 1293–94 (Kan. Ct. App. 1984), *aff'd*, 695 P.2d 1279 (Kan. 1985) (listing courts that as of 1984 had rejected the doctrine); RESTATEMENT OF EMPLOYMENT LAW § 6.01 cmt. b (AM. LAW INST. 2014) (defamatory communication can occur entirely within organization according to the majority of courts).

¹²⁶ See, e.g., Simpson v. Mars Inc., 929 P.2d 966, 968 (Nev. 1997) (law of defamation meant to provide incentive not to spread injurious lies and since most people spend majority of their time and effort at work, and have many colleagues there, it is particularly damaging to allow employer to circulate lies around the workplace with impunity); Luttrell, 683 P.2d at 1294 ("Certainly, damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside."); Pirre v. Prtg. Dev., Inc., 468 F. Supp. 1028, 1041 (S.D.N.Y. 1979), *aff'd*, 614 F.2d 1290 (2d Cir. 1979) (if corporate officers spread injurious falsehoods it causes harm which is exactly the evil that the law of defamation is designed to remedy; privilege would ignore the human beings involved).

¹²⁷ Wallulis v. Dymowski, 918 P.2d 755, 760 (Or. 1996) (*citing* ELDER, *supra* note 120, at 66).

of the rule, and my own conceptualization, argue from a functional rather than structural-unity rationale.¹²⁸

But while the court in *Wallulis* began with this rationale, it continued, raising concerns less easily countered:

The legal fiction created by the intracorporate no-publication rule is inconsistent with the purpose for which the common law recognizes defamation claims. An individual's interest in maintaining a good reputation in the business community to which the individual belongs is not modified by the individual's relationship to the defamer. A defamatory statement made to one's employer can harm one's business reputation with the employer, whether the defamer is a co-worker or is instead removed from the employment relationship.¹²⁹

Further, challenging what it perceived as unjustifiable favoritism for "corporations", the court in *Wallulis* also argued that the intracorporate communication rule, which it interpreted to apply only to legally incorporated entities, was unfair since it "arbitrarily mandates differential treatment based on the adventitious choice of business association."¹³⁰ This assumes that only corporations are entitled to the protection. Despite its name, which some might infer as referring to corporations (that is entities incorporated under a particular jurisdiction's laws), the better understanding—and the position I take—interprets corporate to mean "of, relating to, or formed into a unified body of individuals,"¹³¹ and so applies the doctrine to a range of entities, again because of the functional (not structural) approach my conceptualization of the doctrine employs.¹³²

¹²⁸ See, e.g., *Gray v. AT&T Corp.*, 357 F.3d 763, 767 (8th Cir. 2004) (relying on the need to know of entity and individuals within or affiliated with organization rather than notion of entity communicating with itself to justify no-publication rule of intracorporate communications).

¹²⁹ *Wallulis*, 918 P.2d at 760.

¹³⁰ *Id.* See also *Luttrell*, 683 P.2d at 1294. *Luttrell* discussed in more detail below.

¹³¹ *Corporate*, MERRIAM-WEBSTER'S DICTIONARY (10th ed., 1993).

¹³² See, e.g., *Fink v. Dodd*, 649 S.E.2d 359, 363 (Ga. Ct. App. 2007) (finding no publication "when the communication is intracorporate, or between members of unincorporated groups or associations"). Because of the possibility of confusion, I did consider using a different, more inclusive name for the doctrine in this article in order to eliminate any implication that it applied only to entities incorporated under state corporate law. However, given the consistent use of this name, and the well-developed jurisprudence using intracorporate communications to label the

Taking yet another very different tack, in *Bals v. Verduzco*, an Indiana court cited its state constitution in rejecting the intracorporate communications doctrine.¹³³ The court relied on two provisions of the Indiana Constitution.¹³⁴ Most important, it cited a constitutional provision that once protected freedom of expression, but then also held speakers to the consequences of their speech:

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: *but for the abuse of that right, every person shall be responsible.*¹³⁵

The *Bals* court also relied on a state constitutional provision that specifies “[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.”¹³⁶ The court found a “particular assurance of remedy for injury to reputation in the Indiana Constitution” and concluded adoption of the intracorporate communications doctrine would be inconsistent with this constitutionally assured remedy.¹³⁷

The Qualified Privilege as an Alternative to the Intracorporate Communications Doctrine

Many courts and commentators who reject the intracorporate communications doctrine reason that the qualified privilege provides all the protection necessary.¹³⁸ For example, in *Hagebak v. Stone*, the court refused

doctrine, it seemed unwise to further muddy the waters with a new name that would not connect to this history.

¹³³ 600 N.E.2d 1353, 1355 (Ind. 1992).

¹³⁴ *Id.*

¹³⁵ *Id.* (emphasis added by the court).

¹³⁶ *Id.* (emphasis added by the court).

¹³⁷ *Id.*

¹³⁸ See, e.g., *Hagebak v. Stone*, 61 P.3d 201, 205 (2002) (rejecting intracorporate communications doctrine in favor of qualified privilege); *Pirre, Printing Developments, Inc.*, 468 F. Supp. 1028, 1041 (S.D.N.Y. 1979) (providing that although corporate officers are the embodiment of the corporation they still remain distinct individuals among whom communication constituting publication occurs); RESTATEMENT OF EMPLOYMENT LAW § 6.01 PFD (AM. LAW INST. 2014) (recognizing the qualified privilege to encourage candid intra-organizational communication protection while a majority of courts do not recognize intracorporate communication protection); Richard J. Larson, *Defamation at the Workplace Employers Beware*, 5 HOFSTRA LAB. L.J. 45, 51

to apply the intracorporate communications doctrine, describing it as “an absolute bar based on the theoretical impossibility of a corporation communicating with itself,” an idea the court rejected, embracing instead the “fact based [qualified privilege] defense to defamation” as the better alternative.¹³⁹

Thus, in *Bals*, discussed above, after soundly rejecting the intracorporate communications doctrine as violating constitutional assurances of a remedy for defamation, the Indiana Supreme Court in the next breath embraced the qualified privilege, explaining that it “accommodated the important role of free and open intracompany communications.”¹⁴⁰

Similarly, in *Luttrell v. United Telephone Systems*, the Kansas Court of Appeals rejected the intracorporate communications doctrine’s no-publication approach, reasoning that while communications between supervisors in a corporation concerning an employee may be qualifiedly privileged, “they are still publication.”¹⁴¹ The court found unpersuasive defendant United Telephone’s argument that employers need the protection of the intracorporate communication’s no-publication rule in order to “be free to evaluate . . . employees’ work performance,” countering that “the law in this state has already extended protection to comments made within a work situation by means of a qualified privilege.”¹⁴² In concluding that the privilege provided sufficient protection the court explained, “[b]y virtue of the qualified privilege, the employer who is evaluating or investigating an

(1987) (acknowledging courts abolishing the doctrine note that many intracorporate communications will be protected by the qualified privilege).

¹³⁹ 61 P.3d at 205.

¹⁴⁰ 600 N.E.2d at 1356–57.

¹⁴¹ 683 P.2d 1292, 1294 (Kan. Ct. App. 1984), *aff’d*, 236 Kan. 710, 695 P.2d 1279 (Kan. 1985).

¹⁴² *Id.* In a brief opinion, the Kansas Supreme Court affirmed the decision and the Court of Appeal’s reasoning. After conducting its own careful review of “the record, the briefs of the parties, the reported cases in Kansas and other jurisdictions, and the commentary on the subject,” the Supreme Court “adopt[ed] the opinion of the Court of Appeals.” *See also* *Soto-Lebron v. Fed. Express Corp.*, 538 F.3d 45, 63 (1st Cir. 2008) (“clear and unequivocal publication” occurred, only discussion necessary is of conditional privilege); *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 99 (1st Cir. 1996) (holding intracorporate communication constitutes publication but communication may be subject to qualified immunity); *De Leon v. Saint Joseph Hosp., Inc.*, 871 F.2d 1229, 1237 (4th Cir. 1989) (“[W]hile the district court probably erred technically in granting summary judgment on the basis of no publication, there has been no *actionable* publication” by virtue of conditional privilege); *Bander v. Metro. Life Ins. Co.*, 47 N.E.2d 595, 602 (Mass. 1943) (Rejecting a no-publication argument reasoning that the qualified privilege “furnishes as great protection as ought to be allowed”).

employee in good faith and within the bounds of the employment relationship is protected from the threat of defamation suits by the enhanced burden of proof which the plaintiff would have to bear.”¹⁴³ “We see no reason for greater freedom from liability for defamation to be accorded the corporate employer than that already available to all employers through the qualified privilege.”¹⁴⁴ Again, this court appears to assume the privilege applies only to incorporated entities.¹⁴⁵

Despite the confidence of many courts and commentators that the qualified privilege should suffice, it in fact doesn’t offer sufficiently robust protection.¹⁴⁶ To understand why requires considering the applicability and operation of the qualified (often called “conditional”) privilege.

Qualified privileges evolved across the common law based on long-standing policies focusing on the public good.¹⁴⁷ With respect to the qualified privilege in defamation, that public good is an assessment “that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory.”¹⁴⁸

The court in *Luttrell* summarized the qualified privilege in defamation, explaining: “A communication is qualifiedly privileged if it is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if it is made to a person having a corresponding interest or duty.”¹⁴⁹

¹⁴³ *Luttrell*, 683 P.2d at 1294.

¹⁴⁴ *Id.* Note that the court in *Luttrell* also assumed the intracorporate communications doctrine applied only to corporations, a misapplication of the rule discussed above. This does not change the essence of the court’s reasoning, however.

¹⁴⁵ *Id.*

¹⁴⁶ See, e.g., Kennedy, *supra* note 21, at 241–42 (discussing that fear of defending defamation suit, regardless of fact that defendant may prevail, can chill employers from engaging in adequate investigation of sexual harassment claims); Kraus, *supra* note 9, at 157–58 (1994) (stating that defense of privilege can be tenuous, intracorporate communications doctrine provides “bright line protection as a matter of law”); Larson, *supra* note 138, at 52 (providing that the intensified uncertainty by facing risk of trial raises serious risks for defendants).

¹⁴⁷ A.G. Harmon, J.D., Ph.D., *Defamation in Good Faith: An Argument for Restating the Defense of Qualified Privilege*, 16 BARRY L. REV. 27, 28–29 (2011).

¹⁴⁸ Kristin Berger Parker and Ellen G. Sampson, *Defamation in Employment Investigations: Bahr v. Boise Cascade Corporation and O’Donnell v. City of Buffalo*, 4 WM. MITCHELL J.L. & PRAC. 1 (2010) (internal quotation marks omitted) (quoting *Bolton v. Dep’t of Human Servs.*, 527 N.W.2d 149, 155 (Minn. Ct. App. 1995), *rev’d on other grounds*, 540 N.W.2d 523 (Minn. 1995)). See also, Harmon, *supra* note 147, at 28; Kraus, *supra* note 9, at 182.

¹⁴⁹ 683 P.2d at 1294.

The essential elements of a qualifiedly privileged communication are good faith, an interest to be upheld, a statement limited in its scope to the upholding of such interest and publication in a proper manner only to proper parties.”¹⁵⁰ The Restatement (Second) of Torts defines the privilege as follows: “One who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused.”¹⁵¹

Despite what appears to be a straightforward definition, the qualified privilege can be confounding. A.G. Harmon called the qualified privilege in defamation among the most perplexing in law, describing it as “dependent upon situational determinants, fraught with shifting burdens, and rife with contradictory terms.”¹⁵² For example, Harmon puzzles over the feedback loop created by the requirement necessary to invoke the privilege and the circumstances that will overcome or nullify it: To invoke the privilege, the defendant must be found to have acted in good faith (this a question of law to be determined by the court), but then in every case, the plaintiff can overcome the privilege by showing the defendant acted in bad faith (a question of fact to be determined by the jury).¹⁵³ As Harmon put it:

If a privilege arises only upon a showing of ‘good faith,’ then how does that establishment square with one of the customary ways of overcoming that privilege—a showing of ‘actual malice’? If good faith were to mean ‘no actual malice’ . . . then proof of good faith alone would make for a complete defense.¹⁵⁴

The Restatement did, at least to some degree, disentangle the initial question of whether the privilege should attach, from the later question of whether it was forfeited.¹⁵⁵ By hinging determination of whether the privilege could be invoked in the first instance on the circumstances

¹⁵⁰ *Id.*

¹⁵¹ RESTATEMENT (SECOND) OF TORTS § 593 (AM. LAW INST. 1977).

¹⁵² Harmon, *supra* note 147, at 28.

¹⁵³ Harmon, *supra* note 147, at 27. *See also* RESTATEMENT (SECOND) OF TORTS § 613 (AM. LAW INST. 1977) (describing who carries the burden of proof).

¹⁵⁴ Harmon, *supra* note 147, at 29. And, as both Harmon and Larson point out, all of this is further complicated by ambiguity in how the *Gertz* case’s constitutional requirements apply to the common law privilege and non-media speakers. *See, e.g., Id.*; Larson, *supra* note 138, at 60, both citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁵⁵ RESTATEMENT (SECOND) OF TORTS §§ 594–98A, 600–05A (AM. LAW INST. 1977).

justifying the speech (as opposed to the speaker's motives or state of mind as the "good faith" articulation implied) the Restatement broke the feedback loop discussed above clarifying that two separate questions were involved: 1. Did the *circumstances* justify the communication? If yes, 2. Did the speaker abuse the privilege?¹⁵⁶ While this provides some clarity, the area remains fraught with ambiguity and uncertainty for litigants.¹⁵⁷

The court in *Bals* explained how the qualified privilege is litigated as follows:

The burden is upon the defendant in the first instance to establish the existence of a privileged occasion for the publication, by proof of a recognized public or private interest which would justify the utterance of the words. When the occasion was a privileged one, it is a question to be determined by the court as an issue of law, unless of course the facts are in dispute, in which case the jury will be instructed as to the proper rules to apply. Once the existence of the privilege is established, the burden is upon the plaintiff to prove that it has been abused by excessive publication, by use of the occasion for an improper purpose, or by lack of belief or grounds for belief in the truth of what is said.¹⁵⁸

The Restatement (Second) also sets out these grounds for forfeiture, 1. If the publisher knows the information is false or acts with reckless disregard for the falsity,¹⁵⁹ 2. if the "defamatory matter is published for a purpose other than the purpose justifying the privilege;"¹⁶⁰ 3. if the defamatory matter is published too broadly, or to a person "not reasonably believed to be necessary to accomplish the purpose" of the privilege;"¹⁶¹ or if the defamatory matter includes defamatory information unnecessary to reasonably accomplish the purpose of the privilege.¹⁶² These matters, of course, are left to the jury to decide.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 600 N.E.2d 1353, 1356–57 (Ind. 1992).

¹⁵⁹ RESTATEMENT (SECOND) OF TORTS § 600 (AM. LAW INST. 1977) (incorporating *Gertz's* constitutional threshold).

¹⁶⁰ *Id.* § 603.

¹⁶¹ *Id.* § 604.

¹⁶² *Id.* §§ 605–05A.

Thus, assuming the court finds the defendant is entitled to invoke the privilege, the defendant then must expose itself to the burdens and risks of a full-blown trial, compounded by the uncertainty in how juries understand and apply inconsistent and murky standards to determine when the privilege is abused and therefore forfeited. (If, as Harmon contends, this is confusing to lawyers, how much more so to lay jurors?) Too risky for the entity, and even more daunting for the individual within the organization. Bradley Saxton, writing in the context of employer references observed:

The standards for abuse and loss of the qualified privilege vary so considerably from jurisdiction to jurisdiction... employers and their counsel are uncertain as to which legal standards will govern their potential exposure to defamation liability on account of an adverse [employment] reference. The result, again consistent with other aspects of the current legal framework, is to encourage employers to adopt a conservative, 'no comment' reference policy to minimize the risk of liability.¹⁶³

Also writing about employer references, Robert S. Adler and Ellen R. Peirce strike the same chord:

There is, therefore, a confusing patchwork of conflicting standards that are applied to defamation claims, and the employer is caught in the middle. With such a confused interpretation of abuse of the privilege and application of the term 'malice,' the employer is uncertain which standards will be applied when that employer gives a reference. The fact that so many diverse standards apply is reason enough to keep one's mouth shut.¹⁶⁴

Other commentators have explicitly pointed to the chilling effect the threat of a defamation suit—even one that the entity might win—can have.¹⁶⁵

¹⁶³Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of Overdeterrence and A Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 74 (1995).

¹⁶⁴Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1412 (1996); see also, Saxton, *supra* note 163, at 71–73.

¹⁶⁵See, e.g., Deborah A. Ballam, *Employment References-Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 39 AM. BUS. L.J. 445, 447 (2002) (stating that employers do not necessarily fear losing a defamation suit but fear steep legal expenses that will be incurred even

Translate the employer's retreat to "no comment" in the context of an employment reference to how we might expect an individual within an entity who is considering reporting misconduct, or an entity itself considering whether to engage in a robust investigation of suspected internal wrongdoing—one can expect the same reluctance. Indeed, Ruth Kennedy argues exactly that in an article addressing effective handling of sexual harassment claims.¹⁶⁶ Kennedy points to the economic impact on an employer-defendant litigating a defamation claim which she asserts has become a more common response by individuals either under investigation or charged with sexual harassment.¹⁶⁷ She echoes the concerns expressed regarding employer recommendations discussed above observing, "[i]f employers hesitate to fully investigate complaints or employees are afraid to notify employers of potential problems, then private enforcement [of Title VII's sexual harassment provisions] will be undermined."¹⁶⁸ And, in a critical observation, she notes that providing to the defendant the remedy of "dismissal on summary judgment," is crucial, explaining it as necessary to avoid burdensome litigation costs that would inhibit effective pursuit of this type of wrong doing.¹⁶⁹

In short, the qualified privilege does not sufficiently protect the entity or the individuals within it who are in the best position to report, investigate and stop wrongdoing. To ensure that individuals within the entity will be forthcoming—either in raising concerns about possible misconduct in the first instance or in responding candidly and openly to investigations—and that the entity will feel confident to initiate inquiry into potential misconduct,

in lawsuits they successfully defend); Markita D. Cooper, *Beyond Name, Rank, and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL'Y & L. 287, 300 (1998) (deeming qualified privilege not reliable as employers concerned about juries evaluating actions in hindsight); Markita D. Cooper, *Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication*, 72 NOTRE DAME L. REV. 373, 374–75 (1997) (noting an increase in workplace defamation claims and fact that win or lose defendants face high defense costs); Ann M. Barry, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 MARQ. L. REV. 264, 300–02 (1989) (noting erosion of qualified privilege results in reluctance of employers to discipline and evaluate workers undermining mechanisms to provide safe and productive workplace); Larson, *supra* note 138, at 60 (providing that employers relying on qualified privilege face significant risks because of inconsistency and ambiguity in application of standards and guidelines).

¹⁶⁶ See Kennedy, *supra* note 21, at 241.

¹⁶⁷ See Kennedy, *supra* note 21, at 241.

¹⁶⁸ See Kennedy, *supra* note 21, at 241.

¹⁶⁹ See Kennedy, *supra* note 21, at 241.

or in response to reports to engage in a thorough investigation of possible misconduct, the protection must kick in early—that is at summary judgment (to avoid the costs of litigation which will be incurred win or lose) and must be reliable. The qualified privilege meets neither of these needs.

3. The No-Publication Intracorporate Communications Doctrine

While courts appear to be trending away from the absolute protection provided by the no-publication intracorporate communications doctrine, a number of jurisdictions do still apply it.¹⁷⁰ However, they offer varying justifications and describe its contours differently—and these differences matter.

Prins, the case that set out the rule that was arguably applied (and at least narrowed but more likely transformed) in *Gonzaga*,¹⁷¹ invoked the “corporation talking to itself” rationale. In *Prins*, “agents and employees” of the corporation reported to the company’s officers that the unsatisfactory profits in a branch office of the company were attributable to mismanagement of investments by the plaintiff, the branch manager.¹⁷² Explaining its understanding of the privilege, the court noted:

Agents and employees of this character are not third persons in their relations to the corporation, within the meaning of the laws pertaining to the publication of libels. . . . [T]hey are a part and parcel of the corporation itself, so much so, indeed, that their acts within the limits of their employment are the acts of the corporation. For a corporation, therefore, acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives, *cannot be a publication* of the libel on the

¹⁷⁰*Newell v. JDS Holdings, L.L.C.*, 834 N.W.2d 463, 471 (Iowa Ct. App. 2013) (noting that the no-publication rule represents the minority position (citing 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 15:8 (2012)) and that the “contemporary view” is that there is publication but it may be privileged). This case makes clear the distinction between the pure no-publication intracorporate communications doctrine and qualified privilege. As noted above, many courts use the term intracorporate communications doctrine to refer to a qualified privilege regime, which has caused confusion. *See, e.g.*, Kraus, *supra* note 9, at 182.

¹⁷¹*Gonzaga* cited *Prins*, but then at a minimum narrowed the no-publication rule or perhaps transformed Washington into a qualified privilege jurisdiction. *Doe v. Gonzaga Univ.*, 24 P.3d 390, 397–99 (Wash. 2001) (en banc), *rev’d*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). *See* notes 144, 185–192 and accompanying text, *infra*.

¹⁷²*Prins v. Holland-N. Am. Mortg. Co.*, 181 P. 680 (1919).

part of the corporation. *It is but communicating with itself*. . . . [A] corporation, although it can act only through officers and agents, is not guilty of publishing a libel, when it writes a libelous letter at one of its branch offices and mails it to another.¹⁷³

While *Prins* seemed emphatic in its application of a firm no-publication rule (applying an absolute privilege), half a century later, a Washington case purporting to apply the *Prins* rule created ambiguity by unnecessarily injecting notions of qualified privilege into its analysis of who might invoke the no-publication rule and when.¹⁷⁴ In *Pate v. Tyee Motor Inn*, the trial court dismissed a slander action brought by maids working for the Tyee Motel.¹⁷⁵ The maids alleged that a supervisor had made a statement to a large group of maids charging that the union organizing being engaged in by some or all of the maids was Communism.¹⁷⁶ In dismissing the case pursuant to the defendant's summary judgment motion, the trial court apparently invoked the *Prins* rule as an absolute no-publication rule, but then called it a qualified privilege.¹⁷⁷ As noted above, whether the qualified privilege will operate to shield the defendant turns on knotty questions of fact, that in all but the most obvious cases are decided by the jury—so not typically ripe for summary judgment.¹⁷⁸ The appellate court more clearly invoked *Prins* for the no-publication rule, stating that it applied to “officers of the company whose

¹⁷³ *Id.* at 680–81 (emphasis added).

¹⁷⁴ *Pate v. Tyee Motor Inn, Inc.*, 467 P.2d 301, 302 (Wash. 1970).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* “Communist” in 1970 would easily qualify as among the most damaging defamatory statements. The label “Communist” has had a checkered history in terms of defamatory meaning. In the first part of the 20th century, such an allegation would clearly be defamatory. Later, applying what might appear a more progressive approach, courts found that accusing an individual of being a Communist—that is, the political ideology—was not defamatory. Perhaps this was too optimistic or idealistic on the court's part. Even these progressive courts would recognize a charge of Communism could carry a defamatory meaning among certain identifiable groups. *See generally* Clay Calvert, *Difficulties and Dilemmas Regarding Defamatory Meaning in Ethnic Micro-Communities: Accusations of Communism, Then and Now*, 54 U. LOUISVILLE L. REV. 16 (2016). Where might such an accusation fall in today's political climate? As Calvert observes, to simply assume the epithet Communist does not carry a defamatory meaning today “vastly oversimplifies a more complicated issue.” *Id.*

¹⁷⁷ *Pate*, 467 P.2d at 302. The Washington Supreme Court wrote: “In granting defendants' motion for summary judgment the trial court held that Mrs. Skiff's remark was protected by *qualified privilege* and that the disposition of the case was governed by the rationale of *Prins*”

¹⁷⁸ *Id.* at 303; Harmon, *supra* note 147, at 28.

duty it was to conduct the ordinary business of the corporation,” and noting that *Prins* did not discuss any qualified privilege.¹⁷⁹ From there, however, perhaps because the plaintiff had argued that the defendant had abused any privilege that may have applied, the appellate court defined a privileged communication as one occurring on an occasion where a statement is made to another who shares a common interest with the speaker.¹⁸⁰ Then, the court went on to explain that slander must be published and that this means it must be communicated to a third person.¹⁸¹ But rather than circling back to the no-publication intracorporate communications doctrine (as might be expected) the court focused instead on whether some members of the group of maids being addressed constituted a third person (that is the persons hearing the defamatory statement who were not the defamed person or the speaker), or whether the group collectively constituted the “person” defamed (in which case there would be no publication).¹⁸² The court reasoned, “If the maids were addressed as a group, then there was no third person to whom the slander was published. On the other hand, publication did occur if the statement referred to the union members alone and was made in the presence of the nonunion members.”¹⁸³ True enough; the court engaged in an accurate discussion of a tricky third-person question raised when a defamatory statement is made to a group. But, it skipped any discussion of whether the absolute protection of the *Prins* no-publication rule applied; neither did it clearly hold whether or not the question should be governed by a qualified privilege analysis. In the end, it (correctly) sent the case back to the trial court, but, at least to this reader’s mind, offering precious little guidance as to where Washington stood on the *Prins* rule.¹⁸⁴

Perhaps as a result of the ambiguity in *Pate*, the Washington court further muddied the waters three decades later when it returned to the question presented in *Gonzaga*. In *Gonzaga*, the court at first seems to have read the

¹⁷⁹ *Pate*, 467 P.2d at 302.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 303.

¹⁸³ *Id.* In dissecting whether the group of maids was collectively the defamed person or not, the court wrestled with the factual question of whether all the maids had unionized or not. If not all had unionized, the non-unionized maids (presumably non-organizers) would constitute the third persons who heard the defamatory allegation of “Communism” aimed at the unionized or organizing maids. All of these questions, the court concluded, were factual questions and so unsuited for determination by the judge pursuant to a summary judgment motion. *Id.*

¹⁸⁴ *See id.*

Pate case as narrowing the *Prins* absolute no-publication rule to apply only when an employee is “acting within the ordinary course of his or her work.”¹⁸⁵ At the start of the opinion, the court did appear to be referring to an absolute privilege—that is, the no-publication rule, but seemed to draw on *Pate* to narrow when an employee would fall into the rule. Referring to the *Pate* precedent, the court noted that because the supervisor in *Pate* was not acting within the ordinary course of her work, the “intracorporate communications are not absolutely privileged.”¹⁸⁶ The court used the *Pate* rule to analyze whether or not the employee, because of her job, fell within the protection of the absolute privilege. Fair enough. But then the court described the protection as a “qualified privilege” that was lost if the employee was acting outside the ordinary course of her work thus collapsing application of an absolute privilege into a qualified privilege.¹⁸⁷ Against this background, the *Gonzaga* court turned to the facts of the case before it—the tangle of communications among the Gonzaga University defendants—and determined that there was sufficient evidence to sustain the findings that the various speakers were acting outside their assigned duties, and so outside the protections of the privilege.¹⁸⁸ But was the court envisioning a qualified privilege or the *Prins* absolute no-publication rule? The opinion is confusing at best. It is not clear whether the court in *Gonzaga* moved Washington from its position on the rampart establishing and defending the no-publication rule, to a position among courts applying only a qualified privilege. This confusion aside, for our purposes, the most important and troubling finding of the court was that Lynch, League and Kyle were *not* acting in the ordinary course of their work (or their roles) for the purposes of either the absolute protection or the qualified privilege. This takes on special significance given the focus of this article, to wit, providing mechanisms to facilitate an institution’s efforts in uncovering wrongdoing, especially sexual assault and harassment. And that is especially troubling as it relates to the court’s finding that League’s questioning of Lynch as part of her initial investigation was outside the any available protection. Indeed, the court’s affirmation that the

¹⁸⁵ *Doe v. Gonzaga Univ.*, 24 P.3d 390, 397 (Wash. 2001) (en banc), *rev’d*, 536 U.S. 273 (2002). It is worth spending time on exactly what the court did in *Gonzaga* because the case represents the essential problem that is the focus of this article—developing a rule that balances the right to protect one’s reputation with the need to address the underreporting of wrongdoing within an entity, especially sexual assault and harassment.

¹⁸⁶ *Id.* at 398.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

key players, Lynch, League and Kyle, in discussing Jane's allegations, were not covered by the protection of either the qualified privilege or the absolute no-publication protection demonstrates the problems with vague, and ambiguous standards that may be applied inconsistently.¹⁸⁹

Lynch was a resident assistant at the time she learned the information, and a member of the community at the time she spoke.¹⁹⁰ League and Kyle were administrators in the teacher education program.¹⁹¹ They were exactly the people who should be encouraged to come forward (whether they eventually told too many people or the wrong people, or failed to ever do a thorough investigation is a separate question). Thus, a serious problem with the *Gonzaga* court's analysis is the conclusion that Lynch, League and Kyle were not members of the corporate community whose reporting and investigation of a possible sexual assault of a student should be protected – either absolutely or conditionally. That said, and in order to move this analysis forward, assume *Gonzaga* was in fact applying a slightly narrowed version of the *Prins* no-publication rule. The standard that emerges offers the protection of the rule only when the person speaking does so in the ordinary course of their work, applied very narrowly.¹⁹² As such, it works to leave out of the protection of the privilege the very people with the relevant information.

By contrast, Alabama applies the no-publication intracorporate communications rule strictly and broadly. The Alabama court originally described the privilege stating “communications among the managerial personnel of a corporation about the company's business do not constitute a publication”¹⁹³ Clear, straight forward: no publication. In a 1988 case

¹⁸⁹ *Id.* at 398. While League and Kyle eventually did speak to many people, especially before confronting John or fully investigating the allegations, to sweep *all* of their communications into unprotected status, seems to go too far. Surely when Lynch, as an administrator and a responsible member of the *Gonzaga* staff, with responsibilities in the teacher education program, became aware of a possible sexual assault by one student against another, it was appropriate for her to question the student making the allegation and to consult others in the program regarding how to proceed. Similarly, it is not clear whether the court, in dismissing protection for Lynch, was focused on the fact that she discussed the matter with another student (perhaps not an unreasonable conclusion) and that she was only an “office assistant” (which seemed to figure largely in the court's conclusion).

¹⁹⁰ *Gonzaga*, 24 P.3d at 393.

¹⁹¹ *Id.*

¹⁹² *Id.* at 398.

¹⁹³ *Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085, 1093 (Ala. 1988) (quoting *Dixon v. Econ. Co.*, 477 So.2d 353 (Ala. 1985)) (internal quotation marks omitted).

the court extended the protection to non-managerial employees when the non-managerial employee's speech falls within the proper scope of that employee's knowledge or duties.¹⁹⁴ In *Nelson v. Lapeyrouse Grain Corp.*, the company was investigating possible thefts of grain by an employee. The speaker was a fellow employee who worked with the suspect at the grain elevator. The court explained, it was reasonable to conclude that the speaker might have had important information about the thefts.¹⁹⁵ Notable in the court's analysis, it found that the speech of the investigator (who presumably implicated the plaintiff) in questioning the employee, and the employee's responses were both protected, as both were necessary to determine the culpability of the suspect employees.¹⁹⁶ Based on this, the court found that both were protected by the rule and their speech did not constitute publications.¹⁹⁷ Drawing on the rationale from a line of Alabama cases, *Nelson* explained that the communications among members of the company were "but [the company] communicating with itself," elaborating that "when officers and employees of a corporation act within the scope of their employment and within the line of their duties, they are not third persons vis-à-vis the corporation."¹⁹⁸ This is a more nuanced rationale than that employed by some courts (and criticized by courts and commentators) that the corporation is a single entity whose component members are fused into a unified identity.¹⁹⁹ It acknowledges the individuals within the entity, but recognizes that the organization can only act through the individuals who make it up. It links acts of the individuals to the entity only when those acts are undertaken in the individual's capacity as proxy for, or more accurately, as a component of the entity. As important, it recognizes that those who must make decisions or respond to situations on behalf of the entity (whether they are upper level management or simply the person whose job it happens to be) can do so only if they have complete and accurate information upon which to base their decisions and actions. And that information in any given situation will necessarily be known by individuals who, by virtue of their jobs within the entity, have access to the facts. Their disclosing or sharing this information with the responsible decision makers is, indeed, the entity gathering information through those who act for it and who have the relevant

¹⁹⁴ *Id.*; *McDaniel v. Crescent Motors, Inc.*, 31 So.2d 343, 345 (Ala. 1947).

¹⁹⁵ *Nelson*, 534 So.2d at 1094.

¹⁹⁶ *Id.* at 1093.

¹⁹⁷ *Id.* at 1094.

¹⁹⁸ *Id.* at 1094–95.

¹⁹⁹ *See supra* notes 132–37 and accompanying text.

information. Under this analysis we see that the no-publication rule operates to clarify that the definition of publication, when it is being used as an element of the tort of defamation, is a *legal* definition rather than a description of real-world facts. It says, for the purposes of satisfying this legal requirement, certain communications from one individual to another *will not* constitute that meaning of “publication” that satisfies a legal element of the defamation cause of action, and this is so for compelling reasons—reasons that reflect how things actually work, and advance important policy considerations. For those who need the information (on behalf of the entity) to get it, those who have the information (because of their role within the entity) must communicate it. That is how it works, and how we want it to work.

Oklahoma also applies a strict and broad no-publication rule for intracorporate communications. Established in 1944 in the case of *Magnolia Petroleum v. Davidson* (in which the Oklahoma supreme court cited *Prins*), the *Magnolia* rule provides that “[c]ommunication inside a corporation, between its officers, employees, and agents is never a publication for the purposes of actions for defamation.”²⁰⁰ In *Magnolia*, a Magnolia employee, sued the company, a department supervisor and the plant foreman for defamation based on conversations accusing the plaintiff of un-American and unpatriotic statements.²⁰¹ The court clarified that there was no need to discuss the qualified privilege because “under the facts and circumstances, the statements...could not be” considered published.²⁰² With respect to the supervisor, he “had a duty to perform in connection with the investigation of the cause of the trouble at the plant...and that duty was to aid the managing and supervising officers or employees in the discharge of their duty to restore order and harmony . . . at the plant. Apparently he performed that duty.”²⁰³ In a more recent case, an Oklahoma court affirmed the rule and distinguished the no-publication rule from the qualified privilege, saying, “Although it is called an “intra-corporate privilege,” this really is a rule that intra-corporate communications, those between a corporation’s officers, employees, and agents, *never reach the point of requiring a privilege, because they are never actually published* if they never go outside the corporation.”²⁰⁴ The Tenth

²⁰⁰ *Angove v. Williams-Sonoma, Inc.*, 70 F. App’x. 500, 509 (10th Cir. 2003) (citing *Thornton v. Holdenville Gen. Hosp.*, 36 P.3d 456, 460 & n.3 (Okla. Civ. App. 2001)).

²⁰¹ 148 P.2d 468, 468–69 (Okla. 1944).

²⁰² *Id.* at 471.

²⁰³ *Id.*

²⁰⁴ *Thornton v. Holdenville Gen. Hosp.*, 36 P.3d 456, 460 (Okla. 2001) (emphasis added).

Circuit, applying Oklahoma law, commented that it was “important to understand the breadth of the *Magnolia* rule,” which, the court explained applied to all internal conversations. The *Magnolia* rule “only requires the speaker and the listener to be employees of [the company] at the time the conversation occurred.”²⁰⁵ The Tenth Circuit had earlier rejected an argument that *Magnolia*’s broad rule should be narrowed by applying a “need to know” approach.²⁰⁶ That is, the doctrine would apply only when the communication is made on a “need to know basis for legitimate business reasons,”²⁰⁷ concluding that such a narrowing of the broad rule was inconsistent with Oklahoma law.²⁰⁸ Indeed the Oklahoma case that the Tenth Circuit cited, *Thornton v. Holdenville General Hospital*, applied the “need to know” language not to narrow the application of the intracorporate communications doctrine, but rather to expand it.²⁰⁹ In *Thornton* the Oklahoma court made it clear that the no-publication rule applies even when communication is made to individuals outside the entity if that communication was necessary to the entity’s business.²¹⁰ Other courts have adopted a similar understanding—that is, extending the protection of the rule to agents outside the entity, using the term “need to know” to *broaden* rather than narrow the application of the rule.

For example, in *Gray v. AT&T Corp.*, the Eighth Circuit found that Missouri law applied the intracorporate communications doctrine’s no-publication rule to agents who were not necessarily within the company if there was a necessity—a need to know that was required to accomplish the entity’s business.²¹¹ The court drew on the language of a Tennessee case, *Woods v. Helmi*: “This proper exchange of information should not be inhibited by the technical nicety that a person or persons who were in the ‘need to know’ channel were employed by different corporate entities. The responsibilities and duties of the particular parties involved take precedent over the corporate entity that pays them their salaries.”²¹²

In *Woods*, the Tennessee court explained the importance of taking this approach to the rule, eschewing the entity-speaking-to-itself rationale, and

²⁰⁵ *Angove*, 70 F. App’x at 509.

²⁰⁶ *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1553 (10th Cir. 1995).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Thornton*, 36 P.3d at 462.

²¹⁰ *Id.* at 460.

²¹¹ 357 F.3d 763, 767 (8th Cir. 2004).

²¹² *Id.* (citing *Woods v. Helmi*, 758 S.W.2d 219, 224 (Tenn. Ct. App. 1988)).

focusing on a functional approach: “While many of the cases denying the existence of a publication speak in terms of corporations communicating to or with itself, it seems to this Court that more essential to the issue is the concept of ‘need to know,’ with the communication flowing through the proper chain of command”²¹³ Continuing, the court pointed out how this approach might quite appropriately include someone not employed by the entity, and exclude someone who was employed—the key is who was appropriate to be included in the conversation given the reason or objective of the communication, explaining. The Tennessee court elaborated:

It could readily be argued that the concept of intra-corporate communications would not apply if, in the case of a review by corporate superiors of the alleged misconduct of a branch manager, the circumstances surrounding his misconduct were communicated also to the corporation’s truck driver or janitor, who obviously would not be in the ‘need to know’ pipeline.²¹⁴

A more recent Tennessee case relied on this explanation but applied it with care. *Alyn v. Southern Land Co.* involved allegations that Alyn, a real estate agent, had behaved unethically.²¹⁵ But they were made by an agent of a competitor firm to a membership organization that had no supervisory duties over Alyn.²¹⁶ The court cited *Woods* and its rationale for the no-publication rule in holding that it should not apply.²¹⁷ In doing so the court resisted the invitation to expand Tennessee’s need-to-know approach to cover any situation where another party might be interested or might benefit from the sharing of information—a situation more suited to the qualified privilege, which the court found did apply.²¹⁸ It held the doctrine to its purpose and so strengthened and illuminated it.

²¹³ 758 S.W.2d at 223.

²¹⁴ *Id.* Outsider entity was the University where the hospital was housed. While a separate entity, the University had oversight responsibility for the medical services offered through its facilities.

²¹⁵ No. 3:15-cv-00596, 2016 WL 7451546, *2, *4 (M.D. Tenn. Dec. 28, 2016).

²¹⁶ *Id.* at *15.

²¹⁷ *Id.*

²¹⁸ *Id.* at *16.

4. The Intracorporate Communications Doctrine Respondeat Superior and the Individual Speaker

Most discussions of the intracorporate communications doctrine (and for that matter, the qualified privilege) focus on protecting the entity (as opposed to the individual speakers) from liability based on allegedly defamatory statements made by employees or other constituent members of the entity.²¹⁹ This liability, of course, is based on the doctrine of respondeat superior.²²⁰ As discussed above, respondeat superior imposes liability on the entity for tortious actions, including defamatory statements, of its employees or agents, but only when they are acting within the scope of their employment.²²¹

But while the entity often will be the choice target for a defamation suit because of its deep pockets, many suits of this kind also (or only) name the individual speakers, often as retaliation for reporting the wrongdoing.²²² As

²¹⁹ See, e.g., *Soto-Lebron v. Fed. Express Corp.*, 538 F.3d 45, 56 (1st Cir. 2008) (involving a defamation suit against employer only, applying qualified privilege); *Huff v. Adidas Am.*, 131 F. App'x 104, 105 (9th Cir. 2005) (involving a defamation suit against employer only, applying qualified privilege); *Gray v. AT&T Corp.*, 357 F.3d 763, 764, 767–68 (8th Cir. 2004) (involving a defamation suit against employer only, applying intracorporate communications no-publication rule); *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1553 (10th Cir. 1995) (involving a defamation suit against employer only, applying intracorporate communications no-publication rule); *Parrish v. Ford Motor Co.*, 909 F.2d 1484 (6th Cir. 1990) (per curiam) (unpublished table decision) (involving a defamation suit against employer only, applying qualified privilege). See also Kraus, *supra* note 9, at 161.

²²⁰ See RESTATEMENT (SECOND) OF AGENCY § 247 (AM. LAW INST. 1958) (explaining a master is subject to liability for defamatory statements made by servant acting within the scope of employment). See also, *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1093 (Ala. 1988) (holding a communication by employee to customer is not privileged so an employee can liable for defamation and the corporation can liable for employee's tort because the employee was operating in the scope of employment).

²²¹ See RESTATEMENT (SECOND) OF AGENCY § 247 (AM. LAW INST. 1958). See also, *K-Mart Corp. v. Pendergrass*, 494 So. 2d 600, 604 (Ala. 1986) (holding employer-entity liable for defamation based on statement made by employee only if “agent was within the line and scope of the agent so acting or employed”).

²²² The plaintiff in *Gonzaga* sued the university and the individual speakers (Lynch, League and Kyle). *Doe v. Gonzaga Univ.*, 24 P.3d 390, 398 (Wash. 2001) (en banc), *rev'd*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The plaintiff in *Woods* sued *only* the individual speakers and did not name the hospital or the university. *Woods v. Helmi*, 758 S.W.2d 219 (Tenn. Ct. App. 1988). See also, *Richardson v. HRHH Gaming Senior Mezz, LLC*, No. 2:13-CV-1913-GMN-CWH, 2016 WL 3545749, at *6 (D. Nev. June 28, 2016), *aff'd sub nom. Richardson v. Mancino*, 689 F. App'x 531 (9th Cir. 2017) (involving a defamation suit against entity-employer and individual entity employee applying qualified privilege); *Malik v. Carrier Corp.*, 202 F.3d 97, 99 (2d Cir. 2000) (involving a defamation suit against entity-employer and individual entity officer applying qualified privilege);

discussed above, entities, which typically do have resources available to respond to such suits (lawyers, insurance, money) fear the specter of defamation suits.²²³ Imagine how the individual within the entity must feel. A perfectly reasonable self-preservation instinct provides a powerful incentive to lie low and keep quiet rather than stick one's neck out and report wrongdoing.

In the context of the intracorporate communications rule, the fact that most discussions focus on protecting the entity and not necessarily the individuals may also result from the structurally-anchored idea of a corporation as a single entity whose component members were fused into a unified and singular identity.²²⁴ If this is the underlying reason, the failure to consider whether the individual is protected may not be mere oversight or a result of the fact that the individuals are not the usual targets (or at least not the primary targets) of defamation suits. Rather, it may evidence an understanding by the court that the protection is needed for and logically applies only to the entity. That is, it is the entity "talking to itself" – and that "self" is what logically needs protection. The individual is metaphorically subsumed. But, of course, as the cases suggest, the individual is not subsumed into the entity in the real world. This leaves the individual at grave risk as an available target. Again, why would a reasonable person speak up in light of such risk? This provides further evidence of the need for a strong, clear intracorporate communications doctrine.

C. A Proposed Intracorporate Communications Rule

The issues involved in the case that inspired this article suggest the need for a legal construct that encourages individuals with information (however imperfect) about wrongdoing within an entity to come forward with the information they have and that encourages organizations to act on that information by engaging in robust investigations and holding wrongdoers accountable. The vexing problem of sexual assault on campus provides a compelling backdrop for considering how to craft such a rule. Statistics indicate that a majority of campus sexual assaults go unreported—to the

Kennedy, *supra* note 21, at 237–38 (explaining employees accused of sexual harassment usually sue employers and some also sue complaining coworkers).

²²³ See *supra* text at notes 163–169.

²²⁴ See *supra* text at notes 106–128.

police or to campus authorities.²²⁵ Because of the nature of the wrongdoing, and where it generally occurs, there are often few sources of information. Often it is only the survivor, and occasionally a witness or bystander to the event, or perhaps someone close to the victim in whom he or she confides, who have the necessary information to permit the institution to undertake an investigation.

Survivors of sexual assault report a broad range of reasons for not reporting.²²⁶ Among the reasons, fear that they won't be believed, fear of the trauma of the process itself and fear of setting a process in action that cannot be controlled.²²⁷ They also report feeling uncertainty about how to report and what might happen.²²⁸ Most important for our purposes, they express fear that the subject of their reports might retaliate.²²⁹ They express confusion about whether what happened even amounts to a reportable incident, as did Jane in the Gonzaga case.²³⁰

The protection offered by the intracorporate communications doctrine cannot address all of these issues, but it can address at least three: fear of

²²⁵ Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 318 (2017) ("Most student victims will not report the sexual assault to law enforcement or their colleges."). Actual numbers vary widely, in part because of the very nature of the question (that is, tabulating unreported sexual assaults requires discovering something that happened but that those involved do not want disclosed), in part because different studies ask different questions and because the studies use different samples and different time frames. However, without landing on one specific number, the studies all indicate that campus sexual assault is significantly underreported. *See, e.g.*, Sofi Sinozich, Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*, U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics (Dec. 2014) (stating for the period 1995–2013, rape and sexual assault victimizations against female students (80%) were more likely to go unreported to police, compared to victimizations against nonstudents (67%)); Cantalupo, *supra* note 18, at 213, *citing* Bonnie S. Fisher et al., *The Sexual Victimization of College Women* 10 (U.S. Dep't of Justice 2000), <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf> (stating 90% or more of sexual assault survivors on college campuses do not report the assault).

²²⁶ *See* Behre, *supra* note 225, at 329.

²²⁷ The interplay of regulations requiring colleges to act on credible reports may start a chain reaction that the reporter (whether survivor or bystander) loses control of one of the reasons cited for failure to report. *See id.* This must be handled through the policies governing and the design and structure of the college's process that respect the autonomy of the individual as well as the need for a comprehensive investigation. While important, full discussion of these difficult issues is beyond the scope or purpose of this article.

²²⁸ *See id.*

²²⁹ *See id.*

²³⁰ *See id.*

retaliation, confusion about the nature of the incident, and fear that the reporter won't be believed or that nothing will be done (so why take the other risks?).

In the *Gonzaga* case, testimony indicates Jane said, "I guess I don't really know what rape is."²³¹ An intracorporate communication rule that protects initial inquiries addressed to individuals within the organization who might help the survivor, as well as witnesses who might have relevant information, would help reduce reluctance caused by uncertainty.

Fear of retaliation, which of course could easily be in the form of a defamation suit, discourages survivors, witnesses, and bystanders from coming forward. A strong intracorporate communications rule would help minimize this concern by limiting the potential exposure of survivors and witnesses who come forward to defamation suits.

In addition to protecting the individuals, the rule will protect the institution from a defamation suit based on statements made by individuals within the organization and attributable to it through the doctrine of respondeat superior. And it will protect the institution from exposure based on its undertaking an investigation. Even asking questions about suspected misconduct of an individual could give rise to a claim for defamation. By protecting the investigative process, the rule will encourage careful but thorough investigations, and will encourage the institution to make procedures available for individuals to inquire about whether a particular set of facts constitute a reportable incident. Freeing the institution to undertake an investigation will help address the assumption that those reporting won't be believed (their reports will at least be given the credibility of requiring inquiry) or that nothing will be done.

While this article focuses primarily on sexual misconduct, in other circumstances where individuals within an organization have information that might indicate wrongdoing by someone within the organization, the intracorporate communications no-publication rule will encourage these individuals to bring that information to a responsible party (even if the information is not perfect, even if the reporter is not exactly sure what it means, and even if the person approached is not exactly the right recipient). Further, this rule will ensure that the entity can digest the information and take appropriate steps, whether that is to undertake further investigation or to

²³¹ *Doe v. Gonzaga Univ.*, 24 P.3d 390, 394 (Wash. 2001) (en banc), *rev'd*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Jane reported that John had threatened to harm her if she said anything.

initiate action to address the problem, without fear of exposure to a defamation suit.²³²

Courts that have adopted a well-crafted, carefully applied intracorporate communications no-publication rule have it right. Such a rule can provide critical protection to individuals who have the information institutions need regarding wrongdoing within the organization. If organizations are to take preventing and punishing such wrong-doing seriously, they need to be able to access and process information.²³³ They need individuals who have relevant information to share that information with responsible decision makers.

However, the scaffolding for the rule should not be the structurally-anchored fiction of a corporation as a single entity whose component members are fused into a unified and singular identity.²³⁴ Rather, the rule should employ an alternate legal fiction—that by operation of the rule the real world fact of actual publication by one individual to another is annulled, at least for the purposes of the publication element of defamation. By operation of the rule there is no publication as defined in defamation law.²³⁵ We deploy this fiction because of a compelling public policy. Under the rule, otherwise actionable speech will not result in legal liability because the important social interest of empowering organizations to discover and address internal wrongdoing outweighs the interest in providing a means to protect reputation.²³⁶ To be sure, the absolute, no-publication rule will operate to foreclose some legitimate claims. But on balance, the gain is worth the sacrifice. Although it ultimately struck the balance the other way,

²³² See, e.g., Kennedy, *supra* note 21, at 241 (advocating protection is needed to ensure private enforcement of Title VII's anti-sexual harassment provisions so employers do not hesitate to fully investigate complaints and individuals do not fear reporting potential problems).

²³³ See, e.g., *Malik v. Carrier Corp.*, 202 F.3d 97, 106–07 (2d Cir. 2000) (applying the qualified privilege instead of the no-publication rule, but emphasizing the importance of an employer being free to engage in an investigation without fear of the consequences of possible misunderstanding or embarrassing facts emerging); *Lovelace v. Long John Silver's, Inc.*, 841 S.W.2d 682, 684 (Mo. Ct. App. 1992) (holding communications among entity personnel are the only way an entity can inform itself).

²³⁴ See *supra* notes 80–93 and accompanying text.

²³⁵ See *Thornton v. Holdenville Gen. Hosp.*, 36 P.3d 456, 460 (Okla. 2001) (“Although it is called an ‘intra-corporate privilege,’ this really is a rule that intra-corporate communications, those between a corporation’s officers, employees, and agents, never reach the point of requiring a privilege, because they are never actually published if they never go outside the corporation.”).

²³⁶ See Kennedy, *supra* note 21, at 237, 253.

rejecting the no-publication rule, the court in *Hagbak* made a compelling argument *for* the rule:

To make an informed decision, corporations need to communicate internally in a free and candid manner. The possibility of litigation may make employees less willing to come forward with truthful statements about sensitive corporate matters. A chilling effect on employee communication may impede a corporation's ability to investigate important subjects like alleged employee misconduct. As a result, the corporation may be less likely to take necessary corrective action, even if in the best interests of the corporation, its shareholders, and the public.²³⁷

And the impact on reputational interests is minimized because protected dissemination of potentially defamatory material necessarily will occur only to individuals within the organization whom the speaker reasonably believes can help, or in very limited circumstances, to someone not actually within the entity but part of a direct supervisory chain of command as in *Woods*.²³⁸ To be sure, that still leaves much room for harm, and *real* harm. As the court noted in *Lutrell*, "damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside."²³⁹ Indeed, it may be more damaging, potentially affecting one's livelihood and close professional relationships. But a balance must be struck. "Defamation law must accommodate competing interests of the employee who lodges a complaint, [the] employer who investigates a charge of harassment, and [the]employee accused of harassment."²⁴⁰ I argue that the proper balance protects the internal communications of an organization seeking to uncover, investigate and address potential misconduct within itself.

²³⁷ 61 P.3d 201, 203 (N.M. Ct. App. 2002).

²³⁸ 758 S.W.2d 219, 222–23 (Tenn. Ct. App. 1988). *See also*, *Alyn v. S. Land Co., LLC*, No. 3:15-CV-00596, 2016 WL 7451546, at *13–15 (M.D. Tenn. Dec. 28, 2016) (narrowly applying Tennessee's need-to-know approach to an outside individual by refusing to extend it to any party who might be merely interested, finding that this would be more suited to the qualified privilege).

²³⁹ 683 P.2d 1292, 1294 (Kan. Ct. App. 1984).

²⁴⁰ *See Kennedy, supra* note 21, at 235.

The rule I propose tracks the more protective formulations of the intracorporate communications doctrine²⁴¹ and draws as well on the Supreme Court's articulation of the scope (and underlying rationale) of the attorney-client privilege in *Upjohn v. United States*.²⁴²

A communication made by a member of an organization, that concerns matters within the line and scope of that individual's role, responsibilities or knowledge, made to another member of that organization who the speaker reasonably believes is an appropriate person to communicate the matter to under the circumstances, will be deemed not a publication for the purposes of a defamation action brought against the entity or the individual speaker. This rule attempts to capture the essential characteristics for an effective internal communications no-publication rule.

1. The rule must operate as a no-publication rule. That is, if the rule applies, then the communication made does not constitute publication within the legal definition of publication as an element of defamation. This represents the most critical requirement. By employing the fiction of no publication, the rule eliminates an essential element of a defamation claim permitting the court to dismiss a suit on a motion for summary judgment.²⁴³ The rule must allow the defendant to avoid the expense of a full-blown trial, and the unpredictability of how a jury might interpret ambiguous legal rules.²⁴⁴
2. The decision of whether the rule applies or not should be a question of law determined by the judge as early in the case as possible. To invoke protection of the rule, the defendant would make a motion for summary judgment seeking dismissal for failure to state a claim

²⁴¹ See, e.g., *Angove v. Williams-Sonoma, Inc.*, 70 F. App'x 500, 509 (10th Cir. 2003) ("Communication inside a corporation, between its officers, employees, and agents is never a publication for the purposes of actions for defamation." (citing *Thornton v. Holdenville Gen. Hosp.*, 36 P.3d 456, 460 (Okla. Ct. App. 2001)); *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1093-94 (Ala. 1988) (holding agents or representatives of corporation making libelous communication to other agents or representatives is not a publication).

²⁴² 449 U.S. 383, 395 (1981).

²⁴³ See *Lovelace v. Long John Silver's, Inc.*, 841 S.W.2d 682, 685 (Mo. Ct. App. 1992) (affirming dismissal on summary judgment upon finding that all statements made fall within the intracorporate communications rule); *Woods*, 758 S.W.2d at 221-22 (affirming dismissal based on defendant's motion for summary judgment invoking no publication because all involved in communication had had managerial, supervisory, or administrative responsibilities and oversight for defendant's internal affairs).

²⁴⁴ See *supra* notes 146-169 and accompanying text.

because of the element of publication is missing by virtue of the intracorporate communications rule.²⁴⁵

3. The protection of the rule must be absolute. The intracorporate communication rule offers absolute protection. It must not be conflated, as some courts have, with a qualified privilege, conditionally granted subject forfeiture upon proof that the speaker acted for the wrong reasons, or made a mistake in terms of the parties to whom the speaker disclosed the information.²⁴⁶ Once the judge determines the rule applies, having taken into consideration to whom the individual spoke to and the reason, the rule must operate to annul publication.
4. The rule must apply to any formally organized entity including unincorporated groups or associations, and not be limited only to legally incorporated entities or partnerships. There must be some structure or formalization of the entity claiming protection by the rule; it will not apply to a group of friends or other loosely affiliated group. The essential rationale for the rule is to allow an entity to take action for internal wrongdoing—if there is no entity, there is no reason for the rule.²⁴⁷ But it should not be limited only to legally formalized corporations, partnerships or LLCs. Again, the essential rationale for the rule is to allow an entity to communicate and investigate. Incorporation holds no special claim to this need.²⁴⁸
5. The rule must apply as long as the speaker does not know the information is false and does not act with reckless disregard for its truth or falsity. This applies a *New York Times v. Sullivan*-like rule for some of the similar reasons. In *Sullivan*, the Supreme Court reasoned that important speech needs some breathing room to avoid self-censorship.²⁴⁹ If the speaker fears she will be required to prove

²⁴⁵ See *supra* notes 146–169 and accompanying text. See also Kennedy, *supra* note 21, at 252 (proposing a qualified privilege in sexual harassment grievance procedures and explaining: “To avoid summary judgment, the accused employee would have to produce affirmative evidence of the employer’s abuse of its privilege.”).

²⁴⁶ See Kraus, *supra* note 9, at 182 (explaining the terms are sometimes used interchangeably).

²⁴⁷ Members of such a group might have the protection of the qualified privilege if their statements were found to be based on the various interests (one’s own, another’s, a common interest, or an intrafamilial interest). See Harmon, *supra* note 147, at 28–29.

²⁴⁸ See *supra* notes 130–132 and accompanying text.

²⁴⁹ 376 U.S. 254, 279 (1964) (“Constitutional guarantees require . . . [a] rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct

that what he or she reports can be verified as true, she will hesitate. Further, she may have information that she is not sure is accurate but that should be investigated. The rule should encourage her to come forward, disclose the information and allow a proper investigation to occur. But the rule should not provide a refuge for malicious false claims.

6. The rule should apply as long as the speaker discloses the information to someone within the organization who the speaker reasonably believes can act on it, or to someone he or she reasonably believes can provide guidance regarding how the speaker should proceed. The key should be who is an appropriate person to speak to given the reason for or objective of the communication.²⁵⁰ Thus, it may protect a communication to another employee who is not necessarily senior or in a position to initiate action, but who the speaker might reasonably believe can help her work out what to do. Often an individual senses something is wrong, or that he has been mistreated, but is not sure or doesn't know what to do or how to report the matter.²⁵¹ In rare instances, disclosure outside the entity may also be protected, such as what happened in *Woods*.²⁵² But this must be carefully circumscribed. And again, the decision regarding whether communication to the outsider should be protected will be made by the judge in determining whether the rule applies. That initial consideration will necessarily include determining whether the speaker engaged in excessive publication, but not as a reason for forfeiting the protection but rather only to determine whether the protection applies to the particular communication—that is, as a way of judging the appropriateness. Finally, the rule should not be invoked to protect reports to law enforcement or government regulators. Those reports carry their own absolute protections.²⁵³

unless he proves that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not.”).

²⁵⁰ See *Woods v. Helmi*, 758 S.W.2d 219, 224 (Tenn. Ct. App. 1988).

²⁵¹ See *supra*, notes 225–228.

²⁵² 758 S.W.2d at 223–24 (involving an outside entity had oversight responsibility for the medical services offered through facilities by entity employer).

²⁵³ See, e.g., *Alyn v. S. Land Co., LLC*, No. 3:15-CV-00596, 2016 WL 7451546, at *15 (M.D. Tenn. Dec. 28, 2016) (holding absolute privilege attaches to statements made in course of a judicial proceeding and to so administrative proceedings before boards or commissions clothed with the authority to take action); 50 AM. JUR. 2D LIBEL AND SLANDER § 275 (2019); *Libel and slander*:

7. The rule must apply to protect anyone within the entity who has information that might be important to the entity, regardless of title, job or role. That is, the protection should turn on whether the individual is in possession of information she or he reasonable believes is of legitimate concern to the organization. This approach applies the reasoning of the United States Supreme Court in *Upjohn v. United States*. Assessing the scope of the attorney-client privilege, the Court explained that the information a lawyer needs to effectively represent a corporation will often be in the hands of employees who are not officers or directors—indeed who may be low-level employees.²⁵⁴ The Court extended the protection of the attorney client privilege to these individuals, reasoning that the lawyer “should be fully informed of all the facts of the matter he is handling.”²⁵⁵ That same rationale supports by analogy extending the protection of the intracorporate communications rule to any individual within the entity who would be in a position to have relevant information. The *Gonzaga* case illustrates this. Lynch, the student whose overheard conversation triggered what became a botched investigation, was a residence advisor when she learned from Jane of the alleged rape. But she was only a secretarial assistant and when she spoke of it.²⁵⁶ The court seized on this role within the university—only a student or at best a part-time clerical employee—to refuse to protect her communication.²⁵⁷ That gets it exactly wrong, especially in the context of campus sexual assault. It will be other students, with or without official roles, who are in the best position to provide crucial information. They must be protected by the rule. And this analysis transfers to wrongdoing in other contexts—a part time intern sees toxic waste being dumped down a sewer; a file clerk notices documents being shredded in advance of a regulatory audit. Regardless of official title, these individuals have crucial information that the entity knows about, and they must be protected.

privilege of communications made by private person or concern to public authorities regarding one not in public employment, 136 A.L.R. 543 (2019).

²⁵⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981).

²⁵⁵ *Id.*

²⁵⁶ *Doe v. Gonzaga Univ.*, 24 P.3d 390, 398 (Wash. 2001) (en banc), *rev'd*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

²⁵⁷ *Id.*

An intracorporate communications doctrine no-publication rule, carefully crafted and clearly applied, will not completely solve the problem of underreporting of sexual assault. Nor will it likely radically alter the willingness of every individual who witness corporate wrongdoing to come forward. But it does help eliminate some of the obstacles that discourage individuals to speak up when they see misconduct. As such, courts should consider adopting this rule.