MLRC Media Law Conference
Sept. 29-Oct. 1, 2021
Lansdowne Resort Hotel, Leesburg, VA

PLENARY 2 – September 29th 7:30-9:00pm

The Attack of the Supreme Court on Times v. Sullivan. A panel discussion about whether Justice Thomas’ and Gorsuch’s dissents are legally sound, if the votes are there to overturn Sullivan, what might replace it, what we should do about the situation, and whether celebrities should have to meet the same high standards as public officials.

Panelists: Professor RonNell Andersen Jones, University of Utah Law School; Tom Hentoff, Williams & Connolly; Prof. David Logan, Roger Williams School of Law; Elizabeth McNamara, Davis Wright Tremaine; Prof. Jonathan Turley, George Washington Law School. Moderator: Amy Howe, Scotusblog

* Will Justice Thomas and Gorsuch’s dissents gain further supporters on the Court?
* Does the new media landscape justify a change in the actual malice standard?
* Has the actual malice standard made winning defamation cases too hard?
* Should the Supreme Court revive the Rosenbloom standard?
* Can the Court define a “public interest” standard?
* Is the public figure concept still coherent in the age of social media?
* Does the actual malice standard undermine public confidence in the press?
* How should media defendants respond to cert. petitions seeking to overturn or limit Sullivan?

**Berisha v. Lawson, 141 S. Ct. 2424 (July 2, 2021)**

<https://scholar.google.com/scholar_case?case=7223071108797999248>

**Berisha v. Lawson Petition for Cert.**<https://www.supremecourt.gov/DocketPDF/20/20-1063/167810/20210201150758875_40588%20pdf%20Katriel%20br-1.pdf>

In July 2021, the Supreme Court [denied a petition for certiorari](https://www.supremecourt.gov/DocketPDF/20/20-1063/167810/20210201150758875_40588%20pdf%20Katriel%20br-1.pdf) in Berisha v. Lawson, a seemingly ordinary defamation case against a book publisher. The Eleventh Circuit had affirmed summary judgment for the publisher, holding that the public figure plaintiff, the son of a former Albanian prime minister, failed to provide sufficient evidence of actual malice.

Plaintiff, inspired by Justice Thomas’s 2019 criticism of *New York Times v. Sullivan*, asked the Supreme Court to overturn the landmark case, at least as it applies to public figures. Citing to Thomas’s dissent from cert. in *McKee v. Cosby*, the petition began by quoting his statement that “*New York Times* and the Court’s opinions extending it were policy-driven decisions masquerading as constitutional law.”

The petition, however, went on to focus on the extension of Sullivan beyond the public official category to all public figures. “Reexamination now of Sullivan’s unbridled expansion far beyond its initial limited application only to public officials is particularly timely. Today’s world of ubiquitous social media postings risks tagging anyone as a ‘public figure,’ thereby subjecting them to the nearly insurmountable ‘actual malice’ standard and imposing an unjustified constitutional barrier to defamation actions at large.”

Focusing on the extension of the actual malice standard from public officials (Sullivan) to public figures (Curtis Publishing), plaintiff argued:

“The Court took a wrong turn when it so readily transposed Sullivan’s treatment of ‘public official’ defamation plaintiffs as raising a First Amendment concern onto the treatment to be accorded any defamation plaintiff deemed a ‘public figure’ (whether a football coach—as in Curtis Publishing—or a demonstrator at a college campus as in the companion case, Associated Press v. Walker, 389 U.S. 28 (1967)). It has continued down that incorrect path by thereafter holding that even full ‘public figure’ status is no longer a requirement; a mere ‘limited’ or even ‘involuntary’ public figure (whatever that may entail) suffices to graft Sullivan’s “actual malice” standard onto these defamation claimants.”

The Court denied the petition with two dissents. Justice Thomas reiterated his position that the “Court's pronouncement that the First Amendment requires public figures to establish actual malice bears no relation to the text, history, or structure of the Constitution.” But he added a new gloss to his criticism – the outrage over dangerous misinformation, such as a notorious Pizzagate incident.

Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be "the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton." Or consider how online posts falsely labeling someone as "a thief, a fraudster, and a pedophile" can spark the need to set up a home-security system. Or think of those who have had job opportunities withdrawn over false accusations of racism or anti-Semitism. Or read about Kathrine McKee— surely this Court should not remove a woman's right to defend her reputation in court simply because she accuses a powerful man of rape. The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires. I would grant certiorari.

To the surprise of many Justice Gorsuch dissented as well, delivering a broad policy-based critique of New York Times v. Sullivan.

Justice Gorsuch’s Dissent for Denial of Certiorari

* + Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. Back then, building printing presses and amassing newspaper distribution networks demanded significant investment and expertise. See Logan, Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan, 81 Ohio St. L. J. 759, 794 (2020) (Logan). Broadcasting required licenses for limited airwaves and access to highly specialized equipment. See ibid. Comparatively large companies dominated the press, often employing legions of investigative reporters, editors, and fact-checkers. See id., at 794-795. But "[t]he liberty of the press" has never been "confined to newspapers and periodicals"; it has always "comprehend[ed] every sort of publication which affords a vehicle of information and opinion." Lovell v. City of Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938); see also Sentelle, Freedom of the Press: A Liberty for All or a Privilege for a Few? 2013 Cato S. Ct. Rev. 15, 30-34. And thanks to revolutions in technology, today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world. Logan 803 (noting there are 4 billion active social media users worldwide).
	+ The effect of these technological changes on our Nation's media may be hard to overstate. Large numbers of newspapers and periodicals have failed. See Greico, Pew Research Center, Fast Facts About the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy (Feb. 14, 2020), http://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/. Network news has lost most of its viewers. Pew Research Center, Network Evening News Ratings (Mar. 13, 2006), https://www.journalism.org/numbers/network-evening-news-ratings/. With their fall has come the rise of 24-hour cable news and online media platforms that "monetize anything that garners clicks." Logan 800. No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation. Id., at 804. A study of one social network reportedly found that "falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper ... and doing so more quickly than accurate statements." Id., at 804, n. 302; see Vosoughi, Roy, & Aral, The Spread of True and False News Online, Science Magazine, Mar. 9, 2018, pp. 1146-1151. All of which means that "the distribution of disinformation"—which "costs almost nothing to generate"—has become a "profitable" business while "the economic model that supported reporters, fact-checking, and editorial oversight" has "deeply erod[ed]." Logan 800.
	+ It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate." Brief in Opposition 22. But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands. Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation. Logan 794-795. In that 2428\*2428 era, many major media outlets employed fact-checkers and editors, id., at 795, and one could argue that most strived to report true stories because, as "the public gain[ed] greater confidence that what they read [wa]s true," they would be willing to "pay more for the information so provided," Epstein, 53 U. Chi. L. Rev., at 812. Less clear is what sway these justifications hold in a new era where the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing.
	+ These questions lead to other even more fundamental ones. When the Court originally adopted the actual malice standard, it took the view that tolerating the publication of some false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. See Sullivan, 376 U.S., at 270-272, 84 S.Ct. 710. But over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability. Statistics show that the number of defamation trials involving publications has declined dramatically over the past few decades: In the 1980s there were on average 27 per year; in 2018 there were 3. Logan 808-810 (surveying data from the Media Law Resource Center). For those rare plaintiffs able to secure a favorable jury verdict, nearly one out of five today will have their awards eliminated in post-trial motions practice. Id., at 809. And any verdict that manages to make it past all that is still likely to be reversed on appeal. Perhaps in part because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations de novo, it appears just 1 of every 10 jury awards now survives appeal. Id., at 809-810.
	+ The bottom line? It seems that publishing without investigation, fact-checking, or editing has become the optimal legal strategy. See id., at 778-779. Under the actual malice regime as it has evolved, "ignorance is bliss." Id., at 778. Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards —and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth. See ibid. What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable. Id., at 804. As Sullivan's actual malice standard has come to apply in our new world, it's hard not to ask whether it now even "cut[s] against the very values underlying the decision." Kagan, A Libel Story: Sullivan Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993) (reviewing A. Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)). If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?
	+ Other developments raise still more questions. In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs. Here again, the Court may have thought that allowing some falsehoods about these persons and topics was an acceptable price to pay to ensure truthful statements vital to democratic self-government were not 2429\*2429 inadvertently suppressed. Perhaps the Court weighed the costs and benefits similarly when it extended the actual malice standard to the "pervasively famous" and "limited purpose public figures."
	+ But today's world casts a new light on these judgments as well. Now, private citizens can become "public figures" on social media overnight. Individuals can be deemed "famous" because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most. See, e.g., Hibdon v. Grabowski, 195 S.W.3d 48, 59, 62 (Tenn. App. 2005) (holding that an individual was a limited-purpose public figure in part because he "entered into the jet ski business and voluntarily advertised on the news group rec.sport.jetski, an Internet site that is accessible worldwide"). Lower courts have even said that an individual can become a limited purpose public figure simply by defending himself from a defamatory statement. See Berisha v. Lawson, 973 F.3d 1304, 1311 (CA11 2020). Other persons, such as victims of sexual assault seeking to confront their assailants, might choose to enter the public square only reluctantly and yet wind up treated as limited purpose public figures too. See McKee v. Cosby, 139 S.Ct. 675, 675, 203 L.Ed.2d 247 (2019) (THOMAS, J., concurring in denial of certiorari). In many ways, it seems we have arrived in a world that dissenters proposed but majorities rejected in the Sullivan line of cases—one in which, "voluntarily or not, we are all public [figures] to some degree." Gertz, 418 U.S. at 364, 94 S.Ct. 2997 (Brennan, J., dissenting) (brackets and internal quotation marks omitted).
	+ Again, it's unclear how well these modern developments serve Sullivan's original purposes. Not only has the doctrine evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted. And the very categories and tests this Court invented and instructed lower courts to use in this area—"pervasively famous," "limited purpose public figure" —seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation. At least as they are applied today, it's far from obvious whether Sullivan's rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life.
	+ "In a country like ours, where the people... govern themselves through their elected representatives, adequate information about their government is of transcendent importance." Dun & Bradstreet, 472 U.S. at 767, 105 S.Ct. 2939 (White, J., concurring in judgment). Without doubt, Sullivan sought to promote that goal as the Court saw the world in 1964. Departures from the Constitution's original public meaning are usually the product of good intentions. But less clear is how well Sullivan and all its various extensions serve its intended goals in today's changed world. Many Members of this Court have raised questions about various aspects of Sullivan. See, e.g., McKee, 139 S.Ct. at \_\_\_ (opinion of THOMAS, J.); Coughlin v. Westinghouse Broadcasting & Cable, Inc., 476 U.S. 1187, 106 S.Ct. 2927, 91 L.Ed.2d 554 (1986) (Burger, C. J., joined by Rehnquist, J., dissenting from denial of certiorari); Gertz, 418 U.S. at 370, 94 S.Ct. 2997 (White, J., dissenting); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) 2430\*2430 (Harlan, J., dissenting); id., at 78, 91 S.Ct. 1811 (Marshall, J., dissenting); Rosenblatt v. Baer, 383 U.S. 75, 92-93, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring); see also Kagan, 18 L. & Soc. Inquiry, at 205, 209; Lewis & Ottley, New York Times v. Sullivan at 50, 64 De Paul L. Rev. 1, 35-36 (2014) (collecting statements from Justice Scalia). Justice THOMAS does so again today. In adding my voice to theirs, I do not profess any sure answers. I am not even certain of all the questions we should be asking. But given the momentous changes in the Nation's media landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the "safe deposit" of our liberties.

**Commentary and Analysis**

Times v. Sullivan, Rosenbloom, and Justice Gorsuch: Where is SCOTUS Heading?

By George Freeman, MLRC

MediaLawLetter August 2021

First, Justice Gorsuch makes the argument that Sullivan incentivizes bad journalism. If you can only be liable if you have serious doubts as to the truth of your publication, once you establish the basic facts to support your premise, why do any further research or newsgathering – more facts might give rise to contrary information which might create doubts as to your original thesis. Theoretically, there would be some validity to this construct. But in reality, the problem really does not exist. In over 30 years of working with journalists, I have never – never – seen an instance where a reporter would close his notebook prematurely, thinking that he would legally be better off by doing no more research. First, reporters simply don’t think about legal niceties or consequences when working on a story. Second, their training compels them to dig for more and more information – and, perhaps more important, the likely questioning by their editors, their bosses, impels them to get all the facts. So the they will “bury their head in the sand” argument just has no practical resonance. Gorsuch writes, “Under the actual malice regime as it has evolved, ‘ignorance is bliss’”. That’s not what goes on in newsrooms. Such legal strategizing does not take place.

Indeed, neither does calibrating a reporter’s work depending on whether his subject is a public official/figure or private figure. I never saw a reporter say – or an editor allow the thought- that “I can be negligent because I’m writing about a public official, and so negligence won’t be my legal test”. At our legal newsroom seminars, we would usually discuss the differing standards pertaining to public and private figures, but we would often add that they shouldn’t think about that in their work since obviously they should be responsible and professional no matter whom they are writing about. The reaction I received was that I was ridiculous in even saying that, so I tended, in later years, to drop that from my repertoire.

Second, much of Justice Gorsuch’s discussion of the media environment really works against his thesis. His dissent notes that a large number of newspapers and periodicals have failed, and quoting Prof. David Logan (who will be joining our plenary panel on this subject at our upcoming Virginia Conference), writes that “the economic model that supported reporters, fact-checking and editorial oversight” has “deeply eroded.” While, to a limited degree the latter notion might contain a modicum of truth, the main point is that local journalism is under severe financial pressure, and that local newspapers have in large numbers gone out of business or deeply cut staff and coverage.

The diminution of investigative reporting and coverage of local governmental institutions cuts directly against what Justice Brennan found to be so important and was a basis for the Sullivan Court’s actual malice ruling. Thus, the Court wanted to incentivize the press to cover local city councils and the like, not be chilled from reporting about their possible foibles and abuses because of the fear of losing libel suits and the costs of defending them – costs which, of course, have skyrocketed since 1964. As Gorsuch recognized, the Sullivan Court “took the view that tolerating the publication of some false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed.”

Gorsuch tries to argue that this balance no longer pertains because Sullivan has by now created “an effective immunity from liability”. But he doesn’t explain how Sullivan is the cause for the recent alleged lack of success of libel plaintiffs when Sullivan has existed for nearly 60 years and seems not to have had that effect in the first 50. More to the point, at a time when the ecosystem has already resulted in a cutback on local coverage, this would seem to be the worst possible time to add increased legal risk for media barely hanging on; in their current precarious position, why would they expend the resources and risk legal jeopardy in assigning investigative stories about governmental and corporate institutions? Such lack of oversight clearly runs counter to Justice Brennan’s very premise, that our democracy needs vigorous coverage and monitoring of – and robust and wide-open debate about - the powerful.

On the other hand, Justice Gorsuch’s main critique is much more tenable. He emphasizes not a lower standard for reports about public officials, but a greater chance for libel recoveries by public figures. If this were a negotiation, I would swap the continuation of the actual malice test for public officials for a change to eliminate the public figure categorization and replace it with the Rosenbloom test which lasted just a few years in the early 1970’s: that actual malice would be the test depending not on whether the subject of the defamation was a public figure, but on whether the topic was of legitimate public interest.

Recall that Brennan’s underpinning for the serious doubts test – I hate using the terms actual malice and reckless disregard since those terms actually are inconsistent with the term’s legal meaning – dealt with the importance on reporting on government and public affairs, not on the need to know more about the sex or drug lives of celebrities. Hence, doesn’t it make sense to apply the serious doubts test to not only public officials, but to any matters of legitimate public interest, but perhaps not to gossip and private information about famous people in whose private lives we have merely a prurient interest.

By the numbers, I think such a change would be close to a wash. The media would lose Sullivan protection in libel suits brought by celebrities about their private lives, but would gain Sullivan protection in reporting on matters of public concern even if the person libeled was a private figure. And by agreeing to, or accepting, such new criteria, we might well be solidifying the principle that reporting on government and other powerful institutions really deserves Sullivan protection.

**Supreme Court Denies Cert Petition Asking Court to Overrule Public Figure Doctrine**

By Matthew Schafer and Jack Browning
MediaLawLetter (July 2021)

**Problems in Search of a Solution**

In the end, neither Thomas nor Gorsuch’s opinions in *Berisha* were really about *that* case or even about the actual malice rule. Instead, Thomas and Gorsuch are more concerned with what they see as a corrupted marketplace of ideas – where lies are peddled like knockoff Gucci handbags, in broad daylight on the public street corner. While it is difficult (and ill advised) to dismiss their concerns about market failure, it is not clear that abrogating actual malice would fix any of these problems.

First, they suggest that actual malice proliferates falsehoods online. For instance, Thomas included as examples of the “real world effects” of actual malice the “pizzagate” hoax, social media harassment and Ripoff Report-style sites that profit from perpetuating inflammatory falsehoods about innocent people. And Gorsuch complained about legal and technological incentives for “those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.” But they never explained how actual malice is responsible for those structural problems. And they ignored the much more likely culprit: broad interpretations of the immunity online platforms enjoy under Section 230 of the Communications Decency Act.

Second, they lament the proliferation of “lies” and “disinformation,” *i.e.*, false information intended to mislead, on or offline. But again, this is a lot to throw on the back of the actual malice. As Richard Hofstadter explained in *Anti-intellectualism in American Life* the year before *Sullivan*, the United States' aversion to facts and science "is, in fact, older than our national identity, and has a long historical background.” At any rate, actual malice does not protect lies and conscious or reckless disinformation; it protects honest mistakes about false facts. Nor, of course, does libel law apply to insidious disinformation that does not attack an individual’s reputation.

It’s also doubtful that revisiting *Sullivan* would actually rein in abuse. Overturning *Sullivan* would probably worsen matters, chilling reputable news organizations by making it easier for powerful individuals, like Berisha, to shut down critical reporting. It would also, ironically, make it more difficult to report on disinformation peddlers -- like the “King of Bullshit News” who sued BuzzFeed for uncovering his massive fake news operation. Conversely, it would do little to deter bad actors who don’t care about the law (or the truth) and are determined to cause trouble online.

Still the media bar should also be wise to arguments that shy away from asking the Court to overturn *Sullivan* outright,but rather ask to prune it back under the guise of addressing societal problems. We see at least three primary avenues to the steps of the Court that defense attorneys should be on the lookout for. The first is what the petitioner attempted in *Berisha*: Berisha and not ask the Court to repeal *Sullivan* entirely. Instead, Berisha offered the Court a way to preserve *Sullivan* but limit its application by rolling back its subsequent extension to public figures in cases like *Curtis Publishing Co. v. Butts*.

The second is along the lines of *McKee* and a 2016 petition in *Armstrong v. Thompson*, where petitioners ask the Court not to overturn *Sullivan* nor *Curtis Publishing Co.* but to revisit who qualifies as a public figure or public official. These petitions, leaning on observations in cases like *Gertz v. Robert Welch, Inc.*, *Rosenblatt v. Baer*, and *Hutchinson v. Proxmire*, maintain that whether or not *Sullivan* and its progeny were right, lower courts have been too expansive in who counts as a public official or public figure.

Third, is the most recent iteration in a [petition in Tah v. Global Witness Publishing, Inc](https://www.supremecourt.gov/DocketPDF/21/21-121/184903/20210726124624148_Christiana%20Tah%20v%20Global%20Witness%20Petition%20for%20Writ%20of%20Certiorari.pdf). In that case Rodney Smolla argues that procedure is the problem, not *Sullivan*. He argues that the mix of *Sullivan* and the heightened pleading standards in *Iqbal* and *Twombly* has caused disastrous results*.* As Smolla puts it, “Two medications prescribed by a physician may each, considered alone, promise positive results. The unintended consequence of prescribing those two medications in combination, however, may create severely injurious or even lethal consequences as the two medications interact.”

The problem with these kinds of piecemeal approaches is that it’s hard to isolate these subtle arguments from *Sullivan* itself -- and even peripheral changes risk bringing the whole house down. Were the Court to overrule *Curtis Publishing*, for example, does *Philadelphia Newspapers, Inc. v. Hepps* and its rule that a private figure plaintiff must plead and ultimately prove falsity fall too? And what about *Gertz*’s holding that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”

Nor are the implications limited to libel law. If originalism is the interpretative tool the Court adopts to cabin or overrule *Sullivan* or *Curtis Publishing*, it is far from clear that otherFirst Amendment doctrines would be safe, or, if they would be, why? (On this point, there’s some internal inconsistency in Gorsuch’s opinion; on the one hand, he argues that *Sullivan* is not originalist; on the other hand, he argues that the Court should take into account modern changes in technology in revisiting *Sullivan*.)As Professor Dorf wrote, “First Amendment doctrine is pervasively nonoriginalist.... If an originalist wanted First Amendment doctrine to track Founder Era judicial reasoning, the Supreme Court’s decisions in *Texas v. Johnson*, *Boy Scouts of America v. Dale*, *Citizens United v. FEC*, and *Snyder v. Phelps*, among many, many others, would likely have to go.” In other words, a Court that decides cases based on what they believe was in the minds of the framers of the constitution in 1789 may struggle to justify First Amendment protection for a host of important categories of speech – like flag burning, scurrilous satire, deliberately inflammatory religious rhetoric and unlimited political campaign donations.

**Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan**

By Professor David Logan

<https://moritzlaw.osu.edu/oslj/wp-content/uploads/sites/117/2021/01/08.Logan_.pdf>

A functioning, let alone thriving, democracy requires a number of fundamental characteristics that are increasingly elusive in our country: that people are telling the truth most of the time, that truth is distinct from falsehood, and that we can tell the difference. These assumptions are not holding up under the assault in our “post-truth” society in which many citizens are convinced that there is no such thing as impartial, consensual facts and truth is increasingly being defined as “a matter of subjective feeling and taste.”

To be sure, our dysfunctional public square is not solely the result of Supreme Court decisions. The Court didn’t cause the technological revolution of recent decades, which has altered not just the news business, but the very ways in which citizens interact. Congress has also played a crucial role in the diminished quality of public debate by passing the Communications Decency Act (CDA), which shields internet service providers from responsibility for what appears on their platforms, making the mass circulation of falsehoods virtually risk-free, but with both Congress and newly-elected President Joe Biden favoring significant narrowing of its protections, there may soon be legislative changes that would amplify the rollback of defamation law that is urged in this Article.

But the fact that there are multiple aspects to the problem does not mean that the Court should be unwilling to revisit constitutional doctrines that it created and that have facilitated our dysfunctional public square. The Court’s many constitutional protections made sense in the 1960s, when libel judgments threatened hard-hitting reporting done by major news organizations, but there is scant evidence suggesting that that is a risk in the current environment. In short, these sweeping constitutional protections are harming our democracy rather than protecting it, as the New York Times Court hoped.

The Court could start with the low-hanging fruit by narrowing the range of victims of defamation who must satisfy the daunting “actual malice” requirement. For example, the Court could make it clear that a person is not a “public figure,” and thus has to prove “actual malice,” without proof of a truly “voluntary” and meaningful effort to engage public attention. A broader and more meaningful reform could be a return to the seditious libel justification for New York Times, by imposing stiff scienter requirements only when the plaintiffs are high enough up in government that they make, rather than implement, public policy.

The Court might bolster the search for truth, and thus our democracy, by revisiting the array of procedural modifications that the Court has imposed, changes that upended longstanding practices respecting the role of juries as fact finders and that have created a complicated and expensive appellate regime. The Court could consider reforms promoted by knowledgeable observers, like the Annenberg Center, that would allow a plaintiff to secure a judgment of falsehood in return for giving up a claim for damages. Such a change would allow defamed individuals to vindicate their reputations at far less cost to the parties (and to the civil justice system), while lessening the chill to free speech that the common law of defamation represents.

And finally, the most significant step would be revisiting the daunting “actual malice” requirement itself. For example, the Court should consider replacing “actual malice” with a less demanding standard, like proof of a defendant’s “highly unreasonable conduct.”

See also Tah v. Global Witness (dissent from Judge Silberman)
<https://scholar.google.com/scholar_case?case=12911762782670805994&hl=en&as_sdt=6&as_vis=1&oi=scholarr>

After observing my colleagues' efforts to stretch the actual malice rule like a rubber band, I am prompted to urge the overruling of New York Times v. Sullivan. Justice Thomas has already persuasively demonstrated that New York Times was a policy-driven decision masquerading as constitutional law. See McKee v. Cosby, 139 S. Ct. 675, 203 L.Ed.2d 247 (2019) (Thomas, J., concurring in denial of certiorari). The holding has no relation to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 380-88, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (White, J., dissenting). As with the rest of the opinion, the actual malice requirement was simply cut from whole cloth. New York Times should be overruled on these grounds alone.

Nevertheless, I recognize how difficult it will be to persuade the Supreme Court to overrule such a "landmark" decision. After all, doing so would incur the wrath of press and media. See Martin Tolchin, Press is Condemned by a Federal Judge for Court Coverage, New York Times A13 (June 15, 1992) (discussing the "Greenhouse effect"). But new considerations have arisen over the last 50 years that make the New York Times decision (which I believe I have faithfully applied in my dissent) a threat to American Democracy. It must go.

….

I readily admit that I have little regard for holdings of the Court that dress up policymaking in constitutional garb. That is the real attack on the Constitution, in which— it should go without saying—the Framers chose to allocate political power to the political branches. The notion that the Court should somehow act in a policy role as a Council of Revision is illegitimate. See 1 The Records of the Federal Convention of 1787, at 138, 140 (Max Farrand ed., 1911). It will be recalled that maintaining 253\*253 the Brezhnev doctrine strained the resources and legitimacy of the Soviet Union until it could no longer be sustained.

Admittedly, the context of the Times opinion made the Court's decision attractive as a policy matter. The case centered on a full-page advertisement soliciting donations for the civil rights movement and legal defense of Dr. Martin Luther King, Jr. 376 U.S. at 256-57, 84 S.Ct. 710. The advertisement claimed that civil rights proponents faced an "unprecedented wave of terror" from "Southern violators" denying constitutional guarantees to African Americans. Id. at 256, 84 S.Ct. 710. It described "truckloads of police armed with shotguns and tear-gas" that "ringed" a college campus in Montgomery, Alabama. Id. at 257, 84 S.Ct. 710. It further asserted that state authorities padlocked the dining hall "in an attempt to starve [the students] into submission." Id. Various claims in the ad were inaccurate, and The Times eventually published a retraction. Id. at 261, 84 S.Ct. 710.

Sullivan sued, alleging the advertisement's false statements libeled him because, as commissioner of public affairs, he supervised the police department. Id. at 256, 262, 84 S.Ct. 710. After just two hours and twenty minutes of deliberation, an Alabama jury awarded Sullivan $500,000 (the largest libel judgment in Alabama history), and the state Supreme Court affirmed. Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment 33, 45 (1991).

When the Supreme Court reversed, its decision was seen as a "triumph for civil rights and racial equality." E.g., Geoffrey Stone, New York Times Co. v. Sullivan, in The Oxford Companion to the Supreme Court of the United States 586-87 (1992). The point of these suits had less to do with repairing reputations and more to do with deterring the northern press from covering civil rights abuses. Southern officials, as Anthony Lewis succinctly explains, had thus twisted "the traditional libel action... into a state political weapon to intimidate the press":

The aim was to discourage not false but true accounts of libel under a system of white supremacy: stories about men being lynched for trying to vote, about cynical judges using the law to suppress constitutional rights, about police chiefs turning attack dogs on men and women who wanted to drink a Coke at a department-store lunch counter. It was to scare the national press—newspapers, magazines, the television networks—off the civil rights story.

Lewis, Make no Law at 35.

Indeed, the day after the Alabama court's verdict, the Alabama Journal (a Montgomery paper) celebrated the result. An editorial trumpeted that the case would cause the "reckless publishers of the North ... to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns." Id. at 34. "The Times was summoned more than a thousand miles to Montgomery to answer for its offense. Other newspapers and magazines face the same prospect." Id. Even before the Supreme Court issued the Times decision, a second suit filed by a mayor—based on the same ad—had already resulted in another $500,000 verdict against The Times. Id. at 35. And three additional suits remained pending. Id. CBS had similarly been sued for $1.5 million over a televised program that depicted the difficulties of African Americans in registering to vote. Id. at 36. By 1964, southern officials had filed almost $300 million in libel suits against the northern press. Id.

One can understand, if not approve, the 254\*254 Supreme Court's policy-driven decision.[7] There can be no doubt that the New York Times case has increased the power of the media. Although the institutional press, it could be argued, needed that protection to cover the civil rights movement, that power is now abused. In light of today's very different challenges, I doubt the Court would invent the same rule.

As the case has subsequently been interpreted, it allows the press to cast false aspersions on public figures with near impunity.[8] It would be one thing if this were a two-sided phenomenon. Cf. New York Times, 376 U.S. at 305, 84 S.Ct. 710 (Goldberg, J., concurring) (reasoning that the press will publish the responses of public officials to reports or accusations). But see Suzanne Garment, The Culture of Mistrust in American Politics 74-75, 81-82 (1992) (noting that the press more often manufactures scandals involving political conservatives). The increased power of the press is so dangerous today because we are very close to one-party control of these institutions. Our court was once concerned about the institutional consolidation of the press leading to a "bland and homogenous" marketplace of ideas. See Hale v. FCC, 425 F.2d 556, 562 (D.C. Cir. 1970) (Tamm, J., concurring). It turns out that ideological consolidation of the press (helped along by economic consolidation) is the far greater threat.[9]

Although the bias against the Republican Party—not just controversial individuals —is rather shocking today, this is not new; it is a long-term, secular trend going back at least to the '70s.[10] (I do not mean to defend or criticize the behavior of any particular politician). Two of the three most influential papers (at least historically), The New York Times and The Washington Post, are virtually Democratic Party broadsheets. And the news section of The Wall Street Journal leans in the same direction. The orientation of these three papers is followed by The Associated Press and most large papers across the country (such as the Los Angeles Times, Miami Herald, and Boston Globe). Nearly all television —network and cable—is a Democratic Party trumpet. Even the government-supported 255\*255 National Public Radio follows along.

As has become apparent, Silicon Valley also has an enormous influence over the distribution of news. And it similarly filters news delivery in ways favorable to the Democratic Party. See Kaitlyn Tiffany, Twitter Goofed It, The Atlantic (2020) ("Within a few hours, Facebook announced that it would limit [a New York Post] story's spread on its platform while its third-party fact-checkers somehow investigated the information. Soon after, Twitter took an even more dramatic stance: Without immediate public explanation, it completely banned users from posting the link to the story.").[11]

It is well-accepted that viewpoint discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 387, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). But ideological homogeneity in the media—or in the channels of information distribution—risks repressing certain ideas from the public consciousness just as surely as if access were restricted by the government.

To be sure, there are a few notable exceptions to Democratic Party ideological control: Fox News, The New York Post, and The Wall Street Journal's editorial page.[12] It should be sobering for those concerned about news bias that these institutions are controlled by a single man and his son. Will a lone holdout remain in what is otherwise a frighteningly orthodox media culture? After all, there are serious efforts to muzzle Fox News. And although upstart (mainly online) conservative networks have emerged in recent years, their visibility has been decidedly curtailed by Social Media, either by direct bans or content-based censorship.

There can be little question that the overwhelming uniformity of news bias in the United States has an enormous political impact.[13] That was empirically and persuasively demonstrated in Tim Groseclose's insightful book, Left Turn: How Liberal Media Bias Distorts the American Mind (2011). Professor Groseclose showed that media bias is significantly to the left. Id. at 192-197; see also id. at 169-77. And this distorted market has the effect, according to Groseclose, of aiding Democratic Party candidates by 8-10% in the typical election. Id. at ix, 201-33. And now, a decade after this book's publication, the press and media do not even pretend to be neutral news services.

It should be borne in mind that the first step taken by any potential authoritarian or dictatorial regime is to gain control of communications, particularly the delivery of news. It is fair to conclude, therefore, that one-party control of the press and 256\*256 media is a threat to a viable democracy. It may even give rise to countervailing extremism. The First Amendment guarantees a free press to foster a vibrant trade in ideas. But a biased press can distort the marketplace. And when the media has proven its willingness—if not eagerness— to so distort, it is a profound mistake to stand by unjustified legal rules that serve only to enhance the press' power.