

1st Amendment

New York Times v. Sullivan

**The Case for Preserving
an Essential Precedent**

An MLRC White Paper

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About MLRC

The Media Law Resource Center, Inc. (MLRC) is a non-profit membership organization dedicated to protecting speech in all media, providing its member organizations and their attorneys with the legal resources they need to defend freedom of expression. The MLRC offers news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues.

MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment, and has evolved in recent years to embrace the diversity of the modern information and communication landscape. Today, the MLRC is supported by nearly 140 media members, including America's leading publishers, broadcasters, cable programmers, digital companies, and media insurance professionals, and about 200 law firms in the United States and around the world that specialize in media defense representation.

Preface

By Floyd Abrams*

On one level, it may seem odd that of all cases decided a generation ago and routinely applied through the years, the Supreme Court’s unanimous decision in *New York Times Co. v. Sullivan*¹ should be newly controversial and even potentially at risk. But so it is, with two Justices of the Supreme Court—Thomas and Gorsuch—publicly seeking its overruling or significant modification.² Other critics as well have weighed in to the same effect.³

The case has never lacked for passionate supporters. From the time it was released and memorably characterized as “an occasion for dancing in the streets” by Amherst College president and First Amendment scholar Alexander Meiklejohn,⁴ it has received a level of exuberant praise that has rarely been exceeded. It has been characterized by the distinguished scholar Timothy Garton Ash as “probably the most influential judgment in modern First Amendment jurisprudence.”⁵ It was described by the great South African attorney Albie Sachs, as he was about to become a judge in the immediate post-apartheid era, as a ruling that “shone like lanterns to illuminate the role that judges should play in keeping society open and strengthening democracy.”⁶ On the 50th anniversary of its release, the *Atlantic Magazine* published an article which observed that “every person who writes online or otherwise about public officials, every hack or poet who criticizes the work of government, every distinguished journalist or pajama-ed blogger who speaks truth to power, ought to bow his or her head today, in a silent moment of gratitude” for the ruling which “means simply that you can make a

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¹ 376 U.S. 254 (1964).

² See *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari); *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 2425 (Gorsuch, J., dissenting from denial of certiorari).

³ See, e.g., Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 Ohio St. L.J. 759 (2020).

⁴ Kalven, *The New York Times Case: A Note on the “Central Meaning of the First Amendment,”* 1964 S. Ct. Rev. 191, 221 n. 125 (quoting Professor Meiklejohn).

⁵ Ash, *Free Speech: Ten Principles for a Connected World* 299 (2016).

⁶ Bollinger & Stone, *The Free Speech Century* 182 (2019) (quoting Judge Sachs).

mistake when writing about a public figure and likely won't get sued.”⁷

Of course, even the most enthusiastic praise of a Supreme Court ruling (and I could cite far more) does not necessarily mean that the case was correctly decided or that its reasoning was flawless. So it is well worth revisiting the ruling and assessing its impact on libel law and First Amendment law more generally. The papers that follow this Preface will do that. By way of introduction, though, I offer the following overview.

New York Times v. Sullivan changed the landscape of libel law in two dramatic ways. First, until the decision, American libel law was not only similar to that in England, but all but identical with it. That meant that the burden of proving truth in a libel case rested firmly on the accused speaker or writer. The party suing who claimed to be falsely described by what had been communicated did not have to demonstrate that the speech was inaccurate or untrue. Put another way, defamatory statements at issue in a libel case were assumed to be false and the speaker or writer who voiced them was obliged to prove that they were true to escape liability. An English textbook on libel characterized that rule as stemming “from the absurd presumption that every defamation is false. Libel trials commence with this (often false) assumption that the claimant has a spotless character and then the media defendant bears the burden of disproving it, and by admissible evidence.”⁸

Based on the First Amendment, *Sullivan* flatly rejected that requirement of proof in American libel cases commenced by public officials. Later cases expanded the category of cases governed by *Sullivan* to ones commenced by other public figures as well.⁹ As regards all those plaintiffs (in *Sullivan* itself, an Alabama sheriff) that meant that when the newspaper published a two-page fundraising appeal that referred to alleged mistreatment of Dr. Martin Luther King, who was in jail for protesting racial segregation, the plaintiff had to demonstrate the falsity of the claims. More than that, the proof of falsity had to be based on “clear and convincing” evidence, a wholesale rejection of American law at the time and English law to this day.

The *Sullivan* case contained as well a second, far better known, deviation from pre-existing law. Liability could only be imposed if the plaintiff proved—again by “clear and convincing” evidence—that false statements had been made with what the Supreme Court inaptly called “actual malice.”¹⁰ That term, as *Sullivan* and later cases made clear, did not mean malicious intent but actual knowledge of falsity or serious doubts by the speaker or writer of what he or she

⁷ Cohen, *Today is the Fiftieth Anniversary of the (Re)birth of the First Amendment*, The Atlantic, Mar. 9, 2014.

⁸ Robertson & Nicol, *Media Law* 109 (2002).

⁹ See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁰ 376 U.S. at 280.

had said.¹¹

Taken together, these two First Amendment rooted rejections of pre-existing libel law to assure more protection for free expression reflected a far different view of how to reconcile the competing interests of protecting unjustly compromised reputation and assuring the protection of free speech than had previously existed in either England or the United States.

A useful example arose when an American author, Rachel Ehrenfeld, wrote a book published in 2003 entitled *Funding Evil: How Terrorism is Financed*. In it, she identified a Saudi billionaire, Khalid bin Mahfouz, as an individual whose charities had engaged in that practice. The charge was supported by statements made by the Federal Reserve Board, a report of a U.S. Senate Committee, the Islamic Human Rights Commission and various books and articles.

Mafouz sued Ehrenfeld for libel in England where a total of 23 copies of the book had been sold. Had the case proceeded to trial there, Ehrenfeld would have had to prove the truth of the charges. Reliance on the published material referenced above would have been unavailing since all the statements, even from credible sources, could not by themselves prove the charges but simply demonstrate why she credited them. As a result of the burden of proof in the case being on her under English law, she could not have prevailed simply based on her good faith belief in what others, however credible, had said. And while American law as articulated in the *Sullivan* case would have protected her since it was clear that she believed the charges which she had published and had no serious doubts as to their truth, English law provided no defense at all of that sort.

Ehrenfeld, on advice of English counsel, did not appear to defend the case and a judgment of approximately \$250,000 was entered against her by an English court. To some extent, English law changed after the case. A greater tie of a case to England is now required: the sale of an American book of which only 23 copies were sold in England would no longer be held to permit litigation in England to proceed there. But the burden of proof in English libel cases remains on the writer and there remains no defense there based on the good faith belief of the writer of what she had written.

The degree to which the *Sullivan* case has become part of American culture as well as law is reflected in what followed after a good deal of publicity about the Ehrenfeld case in the U.S. and what came to be known as “libel tourism”—cases brought in England simply because its libel law is so favorable to libel plaintiffs. In 2010, both the Senate and the House of Representatives unanimously passed legislation named The SPEECH Act, which was signed into law by President Obama.¹² The legislation barred American courts from enforcing foreign libel judgments unless their legal systems offered similar First Amendment-like protection as was set forth in the *Sullivan* case. During the legislative consideration of the law, the *Sullivan* decision was repeatedly referred to on a bipartisan basis as

¹¹ See *Garrison v. Louisiana*, 379 U.S. 64 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

¹² 28 U.S.C. § 4102 (2010).

establishing the sort of legal protection on which all Americans should be entitled to rely.¹³

This was a rare, all but unknown, endorsement by the entirety of the legislative and executive branches of government of a unanimous judicial ruling of over half a century ago. It rests with the Supreme Court of today to determine if, despite all the praise of and reliance on that decision, it will conclude that, after all, it was indefensible.

¹³ See, e.g., S. Rep. 111-224, 111th Cong., 2d Sess. (2010).

Introduction and Executive Summary

On <http://www.uscourts.gov>, the official website of the federal judiciary, there resides a link entitled “[Supreme Court Landmarks](#),” which contains a list and brief description of each of those decisions that, collectively, “have shaped [American] history.” On that list, alongside *Marbury v. Madison*¹ and *Brown v. Board of Education*,² is the United States Supreme Court’s unanimous 1964 decision in *New York Times Co. v. Sullivan*.³

That *Sullivan* would appear in such company is not surprising. Distinguished scholars and jurists have often equated *Sullivan* and *Brown*, describing them (in the words of Judge Robert Bork) as two premier examples of the Court performing its constitutional duty to “apply old values to new circumstances.”⁴ Harry Kalven, Jr., perhaps the preeminent constitutional scholar of his time, pronounced Justice William J. Brennan, Jr.’s opinion for the Court in *Sullivan* to be “the best and most important it has ever produced in the realm of freedom of speech.”⁵ In Pulitzer Prize winner Anthony Lewis’ definitive work on the case, *Make No Law*, he explains how *Sullivan* succeeded in “lay[ing] down the fundamental rules of our national life. It made clearer than ever that ours is an open society, whose citizens may say what they wish about those who govern them.”⁶

What is surprising, however, is that almost sixty years later, two current Justices of the Supreme Court, Clarence Thomas and Neil Gorsuch, would call for *Sullivan* to be reconsidered and, at least in Justice Thomas’ case, overruled. Justice Thomas contends that *Sullivan* cannot be reconciled with the “original intent” of the Framers and therefore constitutes an illegitimate exercise in policy-driven judicial legislating,⁷ while Justice Gorsuch relies largely on what appears to be the opposite contention—that, in the context of the current “media landscape,” *Sullivan* no longer furthers the public policy goals it achieved when it was decided.⁸

Especially in the months since Justice Thomas doubled down on his critique

¹ 5 U.S. 137 (1803).

² 347 U.S.483 (1954).

³ 376 U.S. 254 (1964).

⁴ *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J. concurring) (citing *Brown*).

⁵ Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 S. Ct. L. Rev. 191, 194. Kalven’s contemporary, the equally distinguished constitutional scholar Herbert Wechsler, argued *Sullivan* in the Supreme Court on behalf of the New York Times Company.

⁶ Lewis, *Make No Law: The Sullivan Case and the First Amendment* 8 (1991). See also Levine & Wermiel, *The Progeny: Justice William J. Brennan’s Fight to Preserve the Legacy of New York Times v. Sullivan* (2014).

⁷ *McKee v. Cosby*, 159 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari).

⁸ *Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from denial of certiorari).

of *Sullivan*, this time joined by Justice Gorsuch, there has been much ink (both conventional and electronic) spilled on various op-eds, blogs, editorials and assorted other takes on their published opinions, both pro and con. What has been missing, however, is a detailed, comprehensive analysis of the arguments on which they rely. In this White Paper, MLRC has attempted to fill that gap. It asked multiple experts in the field to examine each of the major contentions that undergird the Justices' calls for *Sullivan* to be revisited. The results of this effort are reflected in the Chapters that follow and are summarized here. Collectively, they make an unassailable case that *Sullivan's* rendition of the First Amendment-based limitations on libel law was correct when the case was decided and that it remains equally correct today.

In **Chapter 1**, Matthew Schafer, the author of several scholarly works documenting the Framers' understanding of freedom of the press generally and its role in delimiting the scope of the law of defamation specifically, examines Justice Thomas' contention that the First Amendment, as drafted, was intended to co-exist with both the criminal law of seditious libel and the common law tort. His exhaustive analysis demonstrates precisely the opposite, specifically:

- Justice Thomas' reliance on the state of the common law of libel prior to the Revolution ignores important liberalizing of that doctrine in the colonies and, eventually, the States. The Founders referred to the English view of *liberty* of the press but drew a distinction between that liberty and the American view of *freedom* of the press. There was a prevailing recognition that the cramped definition advocated in England by William Blackstone, an avowed monarchist, was insufficient to protect the public debate necessary to sustain the representative government adopted in the United States. As a result, early libel cases in this country were the proving ground for freedom of the press and often resulted in relaxing common law rules based on a shared understanding that republican discourse was necessary for a representative democracy to work.
- By the Founding, the idea that libels on public officials were worse than those on private figures had already fallen out of favor in England and was rejected in the states. Indeed, many courts and commentators took the view that a citizen may well have an affirmative obligation to criticize public officials in order to advance republican government.
- Both courts and commentators recognized that public officials assumed the risk of libels when they sought to become public servants and that the remedy for public officials unwilling to suffer libels was to withdraw into private life. Moreover, common law courts extended the requirement that "actual malice" be shown to public figures as early as the nineteenth century, finding that certain individuals who sought public attention and gained public power possessed a "quasi public character."

In **Chapter 2**, Dick Tofel and Jeremy Kutner, who between them have

served in virtually every capacity within a news media enterprise, from working journalist to senior executive to general counsel, probe Justice Gorsuch's assessment of what he describes as the current "media landscape" and the incentives he fears it creates for journalistic malpractice. Their detailed exposition of the realities of both the contemporary news media and libel litigation reveals that, Justice Gorsuch's expressed concerns notwithstanding:

- The news media has, if anything, become more concentrated in recent years, not less as Justice Gorsuch posits, and the evolution of media incumbency—from newspapers to radio, to broadcast and then cable television, to websites and streaming—has not altered the *news* "media landscape" in any relevant sense. While it true in theory that technological change—specifically, the advent of the Internet and social media platforms—permits anyone to disseminate information around the world, it remains the case that very, very few content disseminators in fact reach an audience of any meaningful size.
- What has changed is the role played by social media platforms that act, not as creators of content (including the news), but rather as distributors of content created by others. The ills that Justice Gorsuch rightly condemns—the distribution of irresponsible and often dangerous misinformation—is not a creature of *Sullivan*, but rather of Section 230 of the Communications Decency Act,⁹ which (unlike *Sullivan*) immunizes those platforms from liability arising from the content they disseminate.
- Justice Gorsuch seriously misapprehends how the news media actually functions under *Sullivan*'s legal regime, both historically and today. Historically, news organizations, with the exception of some magazines that enjoy longer deadlines, have never employed "fact checkers," as Justice Gorsuch assumes, and have always relied on the journalists who gather the news and the editors who supervise them to do their best to publish accurate information.
- Today, the optimal legal strategy to avoid defamation liability is not, as the Justice posits, "ignorance is bliss,"¹⁰ but rather purposeful efforts both to confirm the accuracy of reported information *and* to set out the basis for that reporting in the story itself. Doing so not only discourages defamation suits in the first instance, it makes it much more likely that such a case will be dismissed on pre-trial motion, before the burden and expense of the litigation process itself becomes unsustainable.
- Perhaps most significantly, the "actual malice" standard articulated in *Sullivan* rests on constitutional first principles, not on the Court's assessment of the interstices of the technological and economic

⁹ 47 U.S.C. § 230.

¹⁰ 141 S. Ct. at 2428.

dynamics governing the mass media of 1964. One will search Justice Brennan’s opinion for the Court in vain for any discussion of the extent of media concentration, the role of fact checking, or the economic incentives encouraging accuracy that Justice Gorsuch now describes as justification for creation of the actual malice rule.

- Rather, *Sullivan*’s actual malice standard is the result of a judicial exercise in “definitional balancing,” a well-established process of constitutional adjudication that serves to determine what the Constitution and, in this instance, the First Amendment means when it prohibits the enforcement of laws that “abridge[e] the freedom of speech or of the press.” In *Sullivan*, that process required the Court, which had previously held that “libel,” like “obscenity” or “fighting words,” is not “speech” within the meaning of the First Amendment, to decide exactly what the unprotected category of “libel” includes, just as it had previously defined the contours of the unprotected categories of “obscenity,” “fighting words,” and the like.¹¹
- When it comes to speech about public officials (and, later, other public persons), the Court in *Sullivan* determined, the definition of unprotected “libel” must be limited to “calculated falsehoods”—that is, speech that its publisher either knew to be false or about which it harbored serious doubts.¹² That definition serves the need of citizens in a self-governing democracy to monitor and criticize their leaders and inform themselves about public matters, as well as the concomitant necessity of holding those who would pollute public debate through the intentional dissemination of misinformation accountable for doing so. It does not vary with the evolution of, or episodic changes in, the “media landscape.”
- If *Sullivan* is to be overruled, many other important First Amendment precedents would likely have to be abandoned as well, from cases that explicitly rely on its reasoning like *Hustler Magazine v. Falwell*¹³ and *Snyder v. Phelps*,¹⁴ to decisions that similarly reflect both the Court’s longstanding aversion to creating new categories of unprotected speech and its dedication to defining the contours of those categories it has recognized as narrowly as possible, like *United States v. Alvarez*¹⁵ and *United States v. Stevens*.¹⁶

¹¹ See *Chaplinsky v. New Hampshire*, 315 U.S. 563, 571-72 (1942) (fighting words); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity).

¹² 376 U.S. at 280; see *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

¹³ 485 U.S. 46 (1988).

¹⁴ 562 U.S. 443 (2011).

¹⁵ 567 U.S. 709 (2012).

¹⁶ 559 U.S. 460 (2010).

In **Chapter 3**, Michael Norwick, the editor of MLRC’s authoritative *50-State Surveys* of defamation and other staples of media law, reports the results of a comprehensive empirical analysis that MLRC has undertaken for purposes of this White Paper. This analysis, which includes the results of a fresh survey of defamation cases filed against the news media, is especially significant because it comes on the heels of Justice Gorsuch’s reliance on an MLRC study of media *trials* to support the proposition that the actual malice requirement has rendered the news media effectively “immune” from defamation liability in suits brought by public persons.¹⁷ It reveals that Justice Gorsuch’s conclusion, which is based in part on what he describes as a sharp drop in the number of defamation trials since the 1980s,¹⁸ does not withstand reasonable scrutiny because, among other things:

- The supposition ignores the dramatic decrease in *all civil trials* over the past several decades, which is in nearly precise sync with the decline in media libel trials.
- In all civil cases, trials have been largely replaced by settlements, facilitated by expanded mediation and ADR, broader discovery rules, higher litigation costs, and other factors that incentivize the risk-averse strategy of avoiding trials.
- Because the MLRC study on which Justice Gorsuch relies examines only media trials and not the vast majority of media defamation cases that never make it that far, it asked major news media companies to provide data about each of the libel complaints they received since 2009. Out of some 246 cases brought against these companies during that period, and 177 dispositive motions made prior to trial, defendants had a success rate of 75% (including results on appeal), but only 16% of those motions were granted (also including following appeal) on the issue of actual malice, very much challenging the contention that *Sullivan* is responsible for these defense victories.
- There is no evidence that the number of media libel cases has decreased since *Sullivan*. New MLRC research validates the perception of news media companies and their lawyers that the number of cases has actually *increased* in recent years.
- Although libel trials are now rare, settlements have replaced them in many cases, especially in connection with those cases that survive a motion to dismiss, which is typically made on grounds other than actual

¹⁷ 141 S. Ct. at 2424 (July 2, 2021) (revised July 29, 2021). As originally published, Justice Gorsuch relied on an inaccurate description of the MLRC data by David Logan, a professor at the Roger Williams School of Law. See Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 Ohio St. L.J. 759 (2020), *cited in Berisha*, 141 S. Ct. at 2428 (citing MLRC 2018 Report on Trials and Damages). Promptly upon being advised of Professor Logan’s error, Justice Gorsuch corrected his opinion. See the Supreme Court’s website for [a redline document](#) showing revisions.

¹⁸ 141 S. Ct. at 2428; see also *id.* (citing Logan, *supra*, at 808-10).

malice. In other words, settlements are the new trials. This too is consistent with generally available data about *all* civil cases.

In **Chapter 4**, a team of lawyers from Ballard Spahr LLP and Davis Wright Tremaine LLP, which between them represent news media defendants in a significant percentage of the libel actions instituted against them in the United States, drill down and examine many of the actual cases that collectively comprise the data points discussed in Chapter 3. Their independent analysis strongly supports the conclusions drawn from that data. Among their more significant findings:

- *Sullivan* has *not* dissuaded public persons from bringing libel suits; to the contrary, the last decade has seen a palpable increase in such cases.
- Nor does the actual malice standard act as an absolute (or even near-absolute) bar to these kinds of claims getting before a jury. Instead, an extensive review of federal and state cases across the country confirms that many defamation suits brought by public officials and public figures proceed beyond an early motion to dismiss, to summary judgment and even trial.
- Nor is the actual malice standard less necessary now than it was in 1964: it still provides the crucial “breathing space” for speech that is essential to ensuring the public is fully informed. In actual practice, defamation lawsuits by public officials, public figures, and other powerful entities seeking to suppress unwelcome truths are just as pernicious now (if not more so) than when *Sullivan* was decided.¹⁹
- Application of the actual malice standard by courts across the nation rewards sound journalistic practices and, in actual practice, *disincentivizes* the “ignorance-is-bliss” journalism decried by Justice Gorsuch by permitting libel suits to move forward where there is evidence that the defendant willfully ignored the facts or failed to adhere to basic principles of responsible news reporting. At the same time, the actual malice standard rewards journalists who actively take steps to confirm the accuracy of potentially defamatory material before publication.

In **Chapter 5**, Katharine Larsen, Chief Counsel at Reuters, and David Heller, MLRC’s Deputy Director and coordinator of its international initiatives, provide an important international perspective by tracing the evolution of modern defamation law in England, from the time *Sullivan* was decided in the United State to the present day. Their analysis demonstrates that:

- In 1964, and for a significant period thereafter, the law of libel in England, which largely mirrored the law in Alabama when *Sullivan* was decided, provided a haven for public officials and other powerful

¹⁹ See, e.g., Grynbaum & Sullivan, *Trump Attacks The Times, in a Week of Unease for the American Press*, N.Y. Times, Feb. 20, 2019; Gold, *Donald Trump: We’re going to ‘open up’ libel laws*, Politico, Feb. 26, 2016.

persons to weaponize the legal system to stifle and punish criticism of them and their activities, regardless of whether they had sustained any injury to their reputations at all. England became the center of what came to be called “libel tourism,” as foreign officials, oligarchs and celebrities all flocked to its courts even when their connection to the country was as tenuous as the sale of a few books to or a handful of clicks on news reports by its citizens.

- This phenomenon, and its impact on important journalism, has gradually led England to reform its libel laws in multiple respects, both by statute and judicial decision, in a manner that has now moved it somewhat closer to the law established in *Sullivan* and its progeny.
- Even so, because the law in England continues to lag behind the United States, it remains a destination for those who seek to employ its courts to wage “lawfare,” the very same tactic that L.B. Sullivan and other public officials in Alabama hit upon in 1964 and which led the Supreme Court to put a stop to it in *Sullivan*.
- Most significantly, when foreign plaintiffs, who had secured enormous damage awards in England, sought to enforce them in the United States, where the media outlets and others they sued had assets, the United States was obliged to respond. First by judicial decision in courts throughout the country, and then by federal legislation passed *unanimously* by both houses of Congress and signed into law by President Obama, the United States determined that it would *not* enforce such judgments on these shores, precisely because they were secured under a legal regime that does not comport with our fundamental values as reflected in *Sullivan*.

As libel plaintiffs increasingly ask the Supreme Court to revisit and overrule *Sullivan*, it is our hope that this White Paper will serve to expose the weaknesses of their arguments and assist the defendants in those cases in their efforts to preserve a “landmark” decision that has indeed “shaped our history” and defined us as a nation.²⁰

²⁰ www.uscourts.gov (Supreme Court Landmarks, *New York Times v. Sullivan*).

Chapter 1: A Response to Justice Thomas

By Matthew L. Schafer*

I. INTRODUCTION

In the decades since the Supreme Court decided *New York Times Co. v. Sullivan*,¹ litigants rarely questioned it. Beginning about twenty years ago, however, that began to change. Yet, time and again, the Court refused to revisit *Sullivan*.² So when, in 2019, Justice Clarence Thomas in *McKee v. Cosby*³ called on the Court to revisit the case, the public and the bar took notice.⁴ The headline in the *New York Times* was a bold one: “Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling.”⁵ Around two years later, Justice Thomas, this time in *Berisha v. Lawson*,⁶ would revisit that call, writing “[i]nstead 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.”⁷ Justice Neil Gorsuch, for the first time, joined him, questioning “how well *Sullivan* and all its various extensions serve its intended goals in today’s changed world.”⁸ Again, the headline was a bold one: “Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision.”⁹

The question now is whether the next headline will be “Three Justices Say Supreme Court Should Reconsider Landmark Libel Decision” or, even, “Supreme Court to Reconsider Landmark Libel Decision.” For the time being, however, we set that question to one side and focus in this chapter on the argument made primarily by Justice Thomas and endorsed by Justice Gorsuch: *Sullivan* cannot be

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¹ 376 U.S. 254 (1964).

² See, e.g., *McKee v. Cosby*, 139 S. Ct. 675 (2019); *Horne v. WTVR, LLC*, 139 S. Ct. 823 (2019); *Cottrell v. Smith*, 137 S. Ct. 648 (2017); *Knight v. Chicago Trib. Co.*, 558 U.S. 817 (2009); *Gray v. St. Martin’s Press, Inc.*, 531 U.S. 1075 (2001).

³ 159 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari).

⁴ See, e.g., Schulz, [INSIGHT: Justice Thomas Takes Troubling Turn on Landmark Libel Decision](#), Bloomberg Law (Mar. 25, 2020); Smolla, [Look to Bill Cosby case as proof that American defamation law needs a review](#), Delaware Online (Mar. 12, 2019).

⁵ Liptak, *Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. Times, Feb. 19, 2019.

⁶ 141 S. Ct. 2424 (2021) (Thomas, J. dissenting from denial of certiorari).

⁷ *Id.* at 2425. The author was counsel to Simon & Schuster Inc in *Berisha*.

⁸ *Id.* at 2429 (Gorsuch, J., dissenting from denial of certiorari).

⁹ Liptak, *Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision*, N.Y. Times, July 2, 2021.

rationalized by resort to the original understanding of the First Amendment. As Justice Thomas said in *Berisha*, quoting Judge Laurence Silberman of the D.C. Circuit, “This 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.’”¹⁰

Prior to Justice Thomas’ opinion in *McKee*, the question of *Sullivan*’s originalist bona fides had not been mined – at least not at the depths that his argument now requires. As a result, the contemporaneous responses to *McKee* and *Berisha* were themselves conflicting. On the one hand, Professor Cass Sunstein argued that, in devising the *Sullivan* rule, “the Court did not really speak in originalist terms.”¹¹ On the other hand, Professor Josh Blackman asserted that the “constitutional objections to the Sedition Act of 1798 provide some originalist basis to impose a higher bar for libel suits filed by government officials.”¹² Professor Marty Lederman too questioned Thomas’ thesis, calling it not “terribly compelling,” not least because “state common law itself developed in a manner designed to not unduly ‘chill’ truthful speech” and further because “the States had no reason to think they were bound by the Free Speech and Press Clauses until at least 1925.”¹³ First Amendment lawyer Lee Levine and Professor Stephen Wermiel mounted similar attacks.¹⁴

This Chapter provides the missing historical context to assess Justice Thomas’ originalist attacks on *Sullivan*; along the way, it suggests that history, rather than undercutting *Sullivan*, supports the Court’s constitutionalization of the common law of libel.¹⁵ It proceeds in four parts. In the first, it discusses Justice Thomas’ (and Justice Gorsuch’s analogous) attacks on the *Sullivan* rule. In the second, it confronts a preliminary issue that arises in any historical canvassing of a subject: what part of history should be considered? How much history is required to arrive at the originalist answer? Should history matter at all? Having set the table, it then analyzes the animating principles behind early Americans’ commitment to freedom of speech and of the press by reference to three influential cases decided in the early 1800s and a review of eleven nineteenth century legal treatises relating to freedom of the press. It concludes that, early on, a dogged commitment to republican thought gave meaning to empty vessels like “freedom of the press.”

¹⁰ *Berisha*, 141 S. Ct. at 2425 (quoting *Tah v. Global Witness Publ’g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)).

¹¹ Sunstein, [*Falsehoods and the First Amendment*](#) (Harvard Law School),.

¹² Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J. of L. & Liberty 44, 54-55 (2020).

¹³ Lederman, *Justice Thomas’s Attack on New York Times v. Sullivan: Old Originalism in New Originalist Garb*, Balkinization, Feb. 23, 2019.

¹⁴ Levine & Wermiel, *What Would Justice Brennan Say to Justice Thomas?*, 34 Comm. Lawyer 1 (2019).

¹⁵ For treatment in specifics, see, e.g., Schafer, *In Defense: New York Times v. Sullivan*, 82 La. L. Rev. 81 (2021), from which much of this discussion is borrowed.

The subsequent parts move from a general review of historical evidence relating to freedom of the press to a specific review of the historical evidence relating to how those principles did (or did not) manifest in early libel law. First, it reviews case law that pre-dated *Sullivan* to discern whether public officials and public figures faced greater hurdles to recovery in defamation actions in the United States. It demonstrates, contrary to Justice Thomas' assumptions, that they did; for more than 150 years, public officials have faced burdens not faced by other defamation litigants. Finally, it examines Justice Thomas' reliance on English authorities and demonstrates that such reliance is ahistorical. In fact, the Founders expressly disclaimed many of the pre-Revolutionary English sources on which Justice Thomas (and Justice Gorsuch) rely. They did so for a wholly unsurprising reason: we fought a war to, as Thomas Jefferson once said, "emancipate" ourselves from English rule *and* English law.¹⁶

II. THE PETITIONS

A. *McKee v. Cosby*

Kathrine McKee alleged that she was one of comedian Bill Cosby's numerous victims of sexual violence.¹⁷ In response to one of McKee's interviews, Marty Singer, Cosby's lawyer, sent a letter to the news organization "attack[ing] McKee with numerous false allegations, calling her an admitted liar, not credible, unchaste, and a criminal."¹⁸ As a result, McKee filed a defamation lawsuit.¹⁹ The district court dismissed that lawsuit on a number of grounds and the First Circuit affirmed, finding that McKee was a limited purpose public figure who failed to plead actual malice adequately.²⁰

McKee filed her petition for a writ of *certiorari* in April 2018. The petition presented a single question, "Whether a victim of sexual misconduct who merely publicly states that she was victimized . . . has thrust herself to the forefront of a public debate . . . thereby becoming a limited purpose public figure who loses her right to recover for defamation absent a showing of actual malice."²¹ The petition did not otherwise challenge the validity of the actual malice requirement or ask the Court to reconsider it. Instead, it claimed that there was a split in the circuit courts on a more picayune question: what was needed to show that a private figure had become a public one.²²

Cosby waived the right to respond to the petition, but the Court requested

¹⁶ [Letter from Thomas Jefferson to John Tyler](#) (June 17, 1812), in *Founders Online*, Nat'l Archives.

¹⁷ Petition for Writ of Certiorari, *McKee v. Cosby*, 139 S. Ct. 675. (No. 17-1542).

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 6.

²⁰ *Id.*

²¹ *Id.* at i.

²² *Id.* at 7-9.

one.²³ He then argued that the petition should be denied because, among other things, no circuit split existed.²⁴ After receiving McKee’s reply brief, the case was set to be distributed for the justices’ conference to be held on September 24, 2018.²⁵ But the petition’s consideration was rescheduled twelve times.²⁶

The reason for the rescheduling was a mystery at the time. It turned out though that, for six months, Justice Thomas was researching and writing his opinion concurring in the denial of the petition.²⁷ In that opinion, he agreed with the Court’s decision to deny certiorari rather than wade into the “factbound question” of whether McKee was a limited-purpose public figure.²⁸ But he wrote for himself to explain “why, in an appropriate case, [the Court] should reconsider the precedents that require courts to ask it in the first place.”²⁹ According to Justice Thomas, *Sullivan* “and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law” and they should be reconsidered.³⁰ Indeed, he said, the Court “did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified,” and it should leave it to the States to “strik[e] an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.”³¹

Justice Thomas’s ultimate thesis was this: “The constitutional libel rules adopted by this Court in [*Sullivan*] and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.”³² He supported this theory in four ways, focusing on (1) the common law of libel’s treatment of public officials; (2) the Court’s pre-*Sullivan* treatment of libel law; (3) the historical support for the proposition that either state or federal constitutions were intended to displace the common law of libel; and, finally, (4) *Sullivan*’s alleged failure to point to any historical evidence supporting the establishment of the actual malice rule except “opposition surrounding the Sedition Act of 1798.”³³ His factual support for each point came in three kinds: two nineteenth century treatises and Blackstone’s *Commentaries*; pre-*Sullivan* Supreme Court jurisprudence; and a

²³ Waiver, *McKee*, 139 S. Ct. 675. (No. 17-1542).

²⁴ Brief of Respondent William H. Cosby, Jr., *McKee*, 139 S. Ct. 675. (No. 17-1542).

²⁵ Docket, *McKee*, 139 S. Ct. 675. (No. 17-1542).

²⁶ *Id.*

²⁷ See generally *McKee*, No. 17-1542, 139 S. Ct. 675.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 675.

³¹ *Id.* at 682.

³² *Id.* at 678.

³³ *Id.* at 681.

handful of nineteenth century state court libel decisions.³⁴

First, Justice Thomas argued that neither in 1791, when the States ratified the First Amendment, nor in 1868, when they ratified the Fourteenth, did “the common law of libel . . . require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages.”³⁵ A plaintiff in a civil defamation cause typically, he wrote, “needed only to prove ‘a false written publication that subjected him to hatred, contempt, or ridicule.’”³⁶ Malice and injury were presumed, and truth was a defense.³⁷ As to criminal libel at common law, Thomas noted that “truth traditionally was not a defense to libel prosecutions – the crime was intended to punish provocations to a breach of the peace, not the falsity of the statement.”³⁸ These laws, he said, were “widespread” at the Founding, although he admitted that, by the time Congress passed the Fourteenth Amendment, “truth or good motives [served] as a defense to a libel prosecution.”³⁹

Moreover, “Far from increasing a public figure’s burden in a defamation action, the common law deemed libels against public figures to be, if anything, more serious and injurious than ordinary libels.”⁴⁰ Justice Thomas supported this assertion by reference to William Blackstone and an early treatise that explained, “Libel of a public official was deemed an offense ‘most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties.’”⁴¹ He

³⁴ The entirety of the authority Justice Thomas provides in support of his arguments (in order of appearance) are: Folkard, *Starkie on Slander and Libel* (H. Wood ed., 4th Eng. ed. 1877); Blackstone, *Commentaries: With Notes Of Reference, To The Constitution And Laws, Of The Federal Government Of The United States; And Of The Commonwealth Of Virginia* (St. George Tucker ed., Philadelphia, Birch & Small 1803); Newell, *Defamation, Libel and Slander in Civil and Criminal Cases as Administered in the Court of the United States of America* 28 (1890); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Roth v. United States*, 354 U.S. 476 (1957); *Commonwealth v. Clap*, 4 Mass. 163 (1808); *White v. Nicholls*, 3 How. 266 (1845); Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559 (2007); *Dexter v. Spear*, 7 F. Cas. 624 (No. 3,867) (CC RI 1825); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Near v. Minnesota*, 283 U.S. 697 (1931); *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939); Chase, Note, *Criticism of Public Officers and Candidates for Office*, 23 Am. L. Rev. 346 (1889); *Root v. King*, 7 Cow. 613 (N. Y. 1827); *Hamilton v. Eno*, 81 N. Y. 116 (1880); *Lewis v. Few*, 5 Johns. 1 (N. Y. 1809); *Royce v. Maloney*, 58 Vt. 437 (1886); *Wheaton v. Beecher*, 66 Mich. 307 (1887); *Prosser v. Callis*, 117 Ind. 105 (1889); *People v. Croswell*, 3 Johns. Cas. 337 (N. Y. 1804); *Commonwealth v. Blanding*, 20 Mass. 304 (1825); Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot ed. 1876) [hereinafter *Elliot’s Debates*].

³⁵ *McKee*, 139 S. Ct. at 678.

³⁶ *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring in judgment)).

³⁷ *Id.* (citations omitted).

³⁸ *Id.* (citing 4 *Blackstone* *150).

³⁹ *Id.* (citing *Beauharnais*, 343 U.S. at 254-55).

⁴⁰ *Id.* at 679.

⁴¹ *Id.* (citing Newell, *supra* note 34, at 533 (in turn, quoting *Blackstone*)).

also offered as support the medieval English statutes of *scandalum magnatum* that found words “in derogation of a peer, a judge, or other great officer of the realm” to be “*more* heinous” than other libels.⁴²

Second, Justice Thomas argued that “the core private righ[t] of a person’s uninterrupted enjoyment of . . . his reputation formed the backdrop against which the First and Fourteenth Amendments were ratified” and was never viewed by the Court as colliding with these Amendments.⁴³ Before *Sullivan*, he said, the Supreme Court in cases like *Chaplinsky v. New Hampshire*⁴⁴ and *Near v. Minnesota*⁴⁵ “consistently recognized that the First Amendment did not displace the common law of libel.”⁴⁶ Instead, the Court recognized that libel, like obscenity, was one of the “well-defined and narrowly limited classes of speech . . . which have never been thought to raise any Constitutional problem.”⁴⁷ Yet, he asserted, the *Sullivan* Court refused to “repudiate” these earlier cases on its way to the holding in that case, choosing instead to reject merely the “generality of this historic view.”⁴⁸

Third, Justice Thomas wrote that there were “sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompassed an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law.”⁴⁹ There was “[s]cant, if any, evidence . . . that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers.”⁵⁰ Rather, “protection for free speech and a free press” was understood “not [to] abrogate the common law of libel.”⁵¹ In support, he offered seven nineteenth-century cases and asserted that “[p]ublic officers and public figures continued to be able to bring civil libel suits for unprivileged statements without showing proof of actual malice.”⁵² He further pointed to those States that continued to criminalize libel against public officials, citing the Court’s 1952 decision in *Beauharnais v. Illinois*⁵³ and three state courts opinions.⁵⁴ Moreover, he wrote,

⁴² *Id.*

⁴³ *Id.* at 679-80 (quotation marks omitted).

⁴⁴ 315 U.S. 528 (1942).

⁴⁵ 283 U.S. 691 (1931).

⁴⁶ *McKee*, 139 S. Ct. at 680.

⁴⁷ *Id.* at 680 (quoting *Chaplinsky*, 315 U.S. at 571-72).

⁴⁸ *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 386 (1974) (White, J., dissenting)); *Sullivan*, 376 U.S. at 268).

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Gertz*, 418 U.S. at 381; *id.* at 380-88 (White, J., dissenting)).

⁵¹ *Id.* at 681 (citing generally *Chase*, *supra* note 34).

⁵² *Id.* (citing *Root*, 7 Cow. at 628; *White*, 3 How. at 291; *Hamilton*, 81 N.Y. at 126; *Lewis*, 5 Johns 1; *Royce*, 58 Vt. at 447-48; *Wheaton*, 66 Mich. at 309-10; *Prosser*, 117 Ind. at 108-09).

⁵³ 343 U.S. 250, 254-55 (1952).

⁵⁴ *McKee*, 139 S. Ct. at 681 (citing *Croswell*, 3 Johns. Cas. at 377-78, 393-94; *Clap*, 4 Mass. at 169-

multiple Reconstruction Congresses “‘approved Constitutions of ‘Reconstructed’ States that expressly mentioned state libel laws, and also approved similar Constitutions for States erected out of the federal domain.’”⁵⁵

Finally, Justice Thomas turned to *Sullivan* itself, faulting the Court for too brief a historical survey. *Sullivan*, he said, “pointed only to opposition surrounding the Sedition Act of 1798, which prohibited ‘any false, scandalous and malicious writing’ against ‘the government of the United States.’”⁵⁶ This history was not persuasive to Justice Thomas because “constitutional opposition to the Sedition Act – a federal law directly criminalizing criticism of the Government – d[id] not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures.”⁵⁷ And Madison, rather than eschew the common law in his fight against the Sedition Act, “seemed to contemplate that ‘those who administer [the national government]’ retain ‘a remedy, for their injured reputations, under the same laws, and in the same tribunals.’”⁵⁸ In sum, Justice Thomas said, “there appear[ed] to be little historical evidence suggesting that the [*Sullivan*] actual-malice rule flows from the original understanding of the First or Fourteenth Amendment.”⁵⁹

Justice Thomas conceded, nevertheless, “that defamation law did not remain static after the founding.”⁶⁰ He acknowledged that the “common law did afford defendants a privilege to comment on public questions and matters of public interest.”⁶¹ The privilege allowed discussion about the “‘public conduct of public men,’” which was seen as “a ‘matter of public interest’ that could ‘be discussed with the fullest freedom.’”⁶² The privilege was nevertheless limited by its purpose: it did not extend to an official’s private conduct and “applied only when the facts stated are true.”⁶³ On the criminal side, state courts in the nineteenth century began “allow[ing] truth or good motives to serve as a defense to a libel prosecution.”⁶⁴ Eventually, criminal libel “virtual[ly] disappear[ed].”⁶⁵ Yet, these changes were not

70; *Blanding*, 20 Mass. at 311-14).

⁵⁵ *Id.* (citing *Beauharnais*, 343 U.S. at 293-94).

⁵⁶ *Id.* (citing Ch. 74, 1 Stat. 596 (1798); *Sullivan*, 376 U.S. at 273-77).

⁵⁷ *Id.* at 682.

⁵⁸ *Id.* (citing 4 *Elliot’s Debates* 573). “Seemed to contemplate” here is doing a lot of heavy lifting, as the portion quoted by Justice Thomas was from a question Madison was posing, not a declarative statement.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 679 (citing *Starkie*, *supra* note 34, at 237-38).

⁶² *Id.* (citing *Starkie*, *supra* note 34, at 242).

⁶³ *Id.* (citing *Starkie*, *supra* note 34, at 238, 242; *White*, 3 How. at 290).

⁶⁴ *Id.* at 681 (citing *Beauharnais*, 343 U.S. at 254-55 & n.4).

⁶⁵ *Id.* at 682 (citing *Garrison*, 379 U.S. at 69).

the product of constitutional law but “changing policy judgments.”⁶⁶

If the hope had been to get other justices to sign on, it would soon be dashed. Justice Thomas wrote for himself alone. And, while there was a general fear that the new crop of judges appointed by President Trump would be hostile to *Sullivan*, the most recent Supreme Court appointees, Justices Gorsuch and Kavanaugh had enthusiastically endorsed *Sullivan* in opinions as circuit judges.⁶⁷ Other conservatives on the Court appeared equally unlikely to support Justice Thomas’ vision. Justice Alito had previously endorsed the Court’s jurisprudence, explaining that the “constitutional guarantee of freedom of expression serves many purposes, but its most important role is protection of robust and uninhibited debate on important political and social issues.”⁶⁸ “If citizens cannot speak freely and without fear about the most important issues of the day,” Justice Alito wrote, “real self-government is not possible.”⁶⁹

If Justice Thomas was going to find any allies, it appeared Justice Elena Kagan was his best bet. Decades earlier, then-Professor Kagan wrote that “the revolution worked by *Sullivan* in the treatment of public official libel suits appears justified, correct, even obvious.”⁷⁰ But, she added, *Sullivan* “impose[d] serious costs,” the “adverse consequences” of which “do not prove *Sullivan* itself wrong, but . . . force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far.”⁷¹ Later, during her confirmation hearing, Kagan also asserted, consistent with Justice Thomas, that “[t]he Framers of the Constitution did not understand the First Amendment as extending to libelous speech.”⁷² But she did not join either.

B. *Berisha v. Lawson*

In *Berisha v. Lawson*,⁷³ Shkëlzen Berisha, the son of former Albania Prime Minister Sali Berisha, sued the publisher Simon & Schuster and its author, Guy Lawson, for defamation arising out of the book *Arms and the Dudes*, which later was turned into the movie *War Dogs*.⁷⁴ Berisha argued that the book defamed him insofar as it alleged that Berisha was part of the Albanian mafia and involved in a

⁶⁶ *Id.*

⁶⁷ See [Special Report on Supreme Court Nominee Brett M. Kavanaugh](#), Reporters Comm. For Freedom of the Press (July 12, 2018); [Special Report on Supreme Court Nominee Neil Gorsuch](#), Reporters Comm. for Freedom of the Press (Feb. 2, 2017).

⁶⁸ *National Review, Inc. v. Mann*, 140 S. Ct. 344, 346(2019) (Alito, J., dissenting from denial of certiorari).

⁶⁹ *Id.*

⁷⁰ Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & Social Inquiry 197, 205 (1993) (reviewing Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991)).

⁷¹ *Id.* at 205-06.

⁷² Elena Kagan, Senator John Cornyn, Questions for the Record at 11.

⁷³ 141 S. Ct. 2424 (2021).

⁷⁴ *Berisha v. Lawson*, 973 F. 3d 1304 (11th Cir. 2020).

“tragic explosion of an Albanian munitions stockpile” that “killed 25 people.”⁷⁵ The district court granted summary judgment to the defendants on the grounds that Berisha was a public figure who lacked sufficient evidence demonstrating that defendants published with actual malice.⁷⁶ On appeal, the Eleventh Circuit agreed.⁷⁷

In February 2021, Berisha filed a petition for a writ of *certiorari*, which unlike the *McKee* petition, posed the question directly: “The question presented is whether this Court should overrule the ‘actual malice’ requirement it imposed on public figure defamation plaintiffs.”⁷⁸ As in *McKee*, the defendants waived their right to respond to the petition, but the Court requested one.⁷⁹ And, as in *McKee*, once the Court received the response, the case was relisted multiple times. Then, on the last day of the October 2020 term, in the last order list of that term, the Court denied the petition.⁸⁰ Justice Thomas dissented, as did Justice Gorsuch.

Citing his decision in *McKee*, Justice Thomas began: “Berisha . . . asks this Court to reconsider the ‘actual malice’ requirement as it applies to public figures. As I explained recently, we should.”⁸¹ Justice Thomas explained again that “[t]his 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.’”⁸² “In fact,” he wrote, “the opposite rule historically prevailed.”⁸³ And, the “Court provided scant explanation for the decision to erect a new hurdle for public-figure plaintiffs so long after the First Amendment’s ratification.”⁸⁴ He also questioned “why exposing oneself to an increased risk [by becoming a public figure] of becoming a victim necessarily means forfeiting the remedies legislatures put in place for such victims.”⁸⁵ After cataloguing all the “real-world” effects of the rule, he concluded, “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.”⁸⁶

Justice Gorsuch too claimed that the dearth of historical support for *Sullivan*

⁷⁵ *Id.* at 1308.

⁷⁶ *Berisha v. Lawson*, 378 F. Supp. 3d 1145, 1161 (S.D. Fla. 2018).

⁷⁷ *Berisha*, 973 F. 3d 1304.

⁷⁸ Petition for Writ of Certiorari, *Berisha v. Lawson*, 141 S. Ct. 2424 (No. 20-1063).

⁷⁹ Waiver, *Berisha*, 141 S. Ct. 2424 (No. 20-1063).

⁸⁰ 141 S. Ct. 2424 (2021).

⁸¹ *Id.* at 2424 (Thomas, J., dissenting from denial of certiorari).

⁸² *Id.* at 2425 (quoting *Tah v. Global Witness Publ’g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021)).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

merited granting the petition. According to him, “[t]o govern themselves wisely, the framers knew, people must be able to speak and write, question old assumptions, and offer new insights.”⁸⁷ But with this right, came a duty: “those exercising the freedom of the press had a responsibility to try to get the facts right – or, like anyone else, answer in tort for the injuries they caused.”⁸⁸ “This principle,” he said, “extended far back in the common law and far forward into our Nation’s history.”⁸⁹ Citing Blackstone, Justice Gorsuch argued that “[e]very freeman has an undoubted right to lay what sentiments he pleases before the public, but if he publishes falsehoods he must take the consequence of his own temerity.”⁹⁰

In addition, Justice Gorsuch observed that, in the nineteenth century, Justice Joseph Story maintained that “the liberty of the press do[es] not authorize malicious and injurious defamation.”⁹¹ It was this view, Justice Gorsuch said, that was accepted in “this Nation for more than two centuries.”⁹² Thus, from the Founding to 1964 when the Court decided *Sullivan*, defamation law “was ‘almost exclusively the business of state courts and legislatures.’”⁹³ Before *Sullivan*, “all persons could recover damages for injuries caused by false publications about them.”⁹⁴

Justice Gorsuch then added his voice to the “[m]any Members of this Court [who have] raised questions about various aspects of *Sullivan*”—although, unlike Justice Thomas, he did “not profess any sure answers” and was “not even certain of all the questions we should be asking.”⁹⁵ While he did not doubt the Court in *Sullivan* had good intentions – “[d]epartures from the Constitution’s original public meaning are usually the product of good intentions” – he urged that the Court “return[] its attention, whether in this case or another, to a field so vital to the ‘safe deposit’ of our liberties.”⁹⁶

III. THE INADEQUACIES OF ORIGINALISM IN THE CONTEXT OF FIRST AMENDMENT THOUGHT

Justices Thomas and Gorsuch speak with confidence on the historical shortcomings of *Sullivan* in both *McKee* and *Berisha*. They speak in absolutes about

⁸⁷ *Id.* at 2425-26 (Gorsuch, J., dissenting from denial of certiorari).

⁸⁸ *Id.* at 2426.

⁸⁹ *Id.*

⁹⁰ *Id.* (quoting 4 *Blackstone* 151-52).

⁹¹ *Id.* (quoting *Dexter v. Spear*, 7 F. Cas. 624 (No. 3,867) (CC RI 1825)).

⁹² *Id.*

⁹³ *Id.* (quoting *Gertz*, 418 U. S. at 369–70 (1974) (White, J., dissenting)).

⁹⁴ *Id.* (citations omitted). Justice Gorsuch spent the bulk of his opinion cataloguing how different the world in 2021 is than that of 1964. See *id.* at 2427-29. This aspect of Justice Gorsuch’s analysis is explored in Chapters 2-4 *infra*.

⁹⁵ 141 S. Ct. at 2430.

⁹⁶ *Id.*

the state of the law of libel before 1964. They present the history of the common law of libel as if it were a tidy corner of the law where nothing is out of place, where absolutes are unavoidable. They do the same when describing the understanding of the First and Fourteenth Amendments before *Sullivan*, suggesting that, prior to 1964 the Constitution had little impact on the law of libel. But libel in the United States is not now, nor ever was, tidy and the values embodied in the First Amendment, sometimes alluded to, sometimes explicitly referenced, did enter the common law of libel long before 1964.

While this section does not quibble with originalism, it suffices before diving into its historical analysis to note some of the problems with originalism in the context of the First Amendment. One of these problems is foundational: everyone seems to admit that the historical record is incomplete. As Professor Leonard Levy said, “[t]he Congressional debate on the amendment . . . was unclear and apathetic; ambiguity, brevity and imprecision in thought and expression characterize the comments of the few members who spoke.”⁹⁷ Jerome Lawrence Merin, who made an early historical assessment of *Sullivan*, wrote similarly, “[t]he debates in Congress and in the states over the Bill of Rights . . . give us little clue as to what the framers had in mind when they stated that Congress should make no law abridging freedom of the press.”⁹⁸ Even Justice Byron White, who made the first “originalist” attack on *Sullivan* in *Gertz v. Robert Welch, Inc.*,⁹⁹ candidly admitted that “[t]he debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee.”

Precisely because of this, the originalist must resort to historical triangulation. Resort must be made to statements by the Founders, newspaper clippings, the legal academy, and the rest to try and discern what the First Amendment meant to people in 1791 or 1868. This is a dangerous task. Take, for example, a piece of Justice White’s evidence in *Gertz*: “James Wilson suggested a restatement of the Blackstone standard” as the meaning of freedom of the press.¹⁰⁰ This is based on Wilson’s arguments at the Pennsylvania Ratifying Convention in 1787.¹⁰¹ At the time, Wilson was advocating for the adoption of a constitution that was as much his as it was James Madison’s. Demands for a bill of rights risked upending that process. So, his resort to Blackstone is unsurprising, but ultimately incomplete. In the early 1790s, having secured his constitution, Wilson changed his position, advocating for a broader understanding of freedom of the press and

⁹⁷ Levy, *Freedom of Speech and Press in Early American History* 224 (1960).

⁹⁸ Merin, *infra* note 125, at 377; see also Boyce, *Originalism and the Fourteenth Amendment*, 33 Wake Forest L. Rev. 909, 949 (1998) (“The ‘authoritative’ materials are silent: ‘Little can be drawn from the debates within the House on the meaning of the first amendment, nor are there any records of debates in the Senate or the states on its ratification.’” (citation omitted)).

⁹⁹ 418 U.S. 323, 383 (1974) (White, J., dissenting).

¹⁰⁰ *Id.*

¹⁰¹ Wilson, *Commentaries on the Constitution of the United States* 55 (1792).

criticizing the Blackstonian conception.¹⁰² For exactly this reason, proponents of undoing *Sullivan* should remember Justice Scalia’s warning: “the views of one man do not establish the original understanding of the First Amendment.”¹⁰³

Even if the historical record was not wanting, an originalist approach to the First Amendment faces any number of challenges. First, there is the issue of how much history one needs to conclude that he or she has arrived at an originalist understanding. Justice Thomas, for example, has relied on varying amounts of historical evidence to satisfy himself that history is on his side. In *McIntyre v. Ohio Elections Commission*,¹⁰⁴ he cataloged the historical record at length but characterized it as “not as complete or as full as I would desire,” yet good enough to conclude that the Founders intended the First Amendment to protect anonymous speech. In *44 Liquormart, Inc. v. Rhode Island*,¹⁰⁵ he rested on just three post-Reconstruction cases.¹⁰⁶ In *Morse v. Frederick*,¹⁰⁷ he satisfied himself based on a smattering of cases from the 19th and early 20th centuries. Later, in *Mahoney Area School District v. B.L.*,¹⁰⁸ Justice Thomas relied principally on a single pre-Reconstruction case, which earned the response from Justices Alito and Gorsuch that a single case provided “no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech.”¹⁰⁹

There is also the issue of what is to be done with historical evidence that cuts in opposite directions. *McIntyre* highlights this problem. There, Justice Thomas pointed out that early legislatures attempted to unmask the identities of various authors.¹¹⁰ In one vignette, he recounted how, during a sitting of the Continental Congress, Elbridge Gerry “moved to haul the printer of the newspaper before Congress to answer questions concerning Leonidas[’s] [identity].”¹¹¹ The motion was defeated, but one would think that the fact it was even made—by Gerry no less—demonstrates that there was no universal understanding that the First Amendment protected anonymous speech. Justice Thomas tells a similar story of the Upper House of the New Jersey Legislature that was, in turn, defeated by the

¹⁰² 3 Wilson, *The Works of the Honourable James Wilson L.L.D.* 72-75 (1804).

¹⁰³ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 856 (1995) (Scalia, J., concurring).

¹⁰⁴ 514 U.S. 334, 367 (1995) (Thomas, J., concurring).

¹⁰⁵ 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in judgment).

¹⁰⁶ *Id.* at 522 (citations omitted).

¹⁰⁷ 551 U.S. 393, 413–15 (2007) (Thomas, J., concurring).

¹⁰⁸ 141 S. Ct. 2038, 2054 n.14 (2021).

¹⁰⁹ *Id.* at 2054 n.14 (2021) (Alito, J., concurring).

¹¹⁰ *McIntyre*, 514 U.S. at 361–62 (Thomas, J., concurring).

¹¹¹ *Id.* at 361.

Lower House in its attempts to identify an author.¹¹² Despite these conflicts, Justice Thomas offers an unqualified conclusion: “[T]he Framers shared the belief that such activity [of anonymous publication] was firmly part of the freedom of the press.”¹¹³

Third, there is the problem of what history is relevant to the inquiry? In *McKee*, Justice Thomas cited a set of medieval statutes adopted to outlaw certain criticisms of public officials as support for his thesis.¹¹⁴ But he largely ignored that the statutes were rejected after the Glorious Revolution, fell into disuse, and were repealed. In *Rogers v. Grewal*,¹¹⁵ a Second Amendment case, he took the opposite approach. There, Justice Thomas ignored that the statute was adopted, which would have cut in favor of the constitutionality of gun regulations, dismissing it as being adopted “during a time of political transition.”¹¹⁶ Instead, he focused on the statute’s ultimate demise after the Glorious Revolution. And it was this history, Justice Thomas said, that mattered: “[F]or purposes of discerning the original meaning of the Second Amendment, it is this founding era understanding that is most pertinent.”¹¹⁷ These approaches appear to be irreconcilable.

This is to say nothing of whether the relevant historical period should be around 1791, the year the States ratified the First Amendment, or 1868, the year they ratified the Fourteenth. In 1791, there was no national libel law and proponents of the Constitution presumed that Congress could not pass such a law. As Alexander Hamilton observed in *Federalist No. 84*, “[w]hy, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”¹¹⁸ When the Democratic-Republicans won public opinion for the inclusion of a bill of rights, it was purposefully drawn to limit only the federal government’s power, not the States’: “Congress shall make no law . . . abridging freedom of speech, or of the press.”¹¹⁹

This has two implications. Initially, the First Amendment as adopted in 1791 necessarily – by design – did not limit *state* libel law. Far from evidence against *Sullivan* though, this is merely evidence that the First Amendment prior to the ratification of the Fourteenth simply did not apply to *state law at all*.¹²⁰ As such, while perhaps the intentions of the Framers might be relevant to understanding the First Amendment’s interactions with state libel law today, the specifics in which they dealt are not. Second, it suggests that were one to look at history, they should

¹¹² *Id.* at 362.

¹¹³ *Id.* at 367.

¹¹⁴ *McKee v. Cosby*, 139 S. Ct. 675, 682 n.2 (2019).

¹¹⁵ *Rogers v. Grewal*, 140 S. Ct. 1865 (2020) (Thomas, J., dissenting from denial of certiorari).

¹¹⁶ *Id.* at 1869.

¹¹⁷ *Id.* at 1871.

¹¹⁸ *The Federalist No. 84* (Hamilton).

¹¹⁹ U.S. Const., amend. I.

¹²⁰ Cf. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

look to the state of the law around the ratification of the Fourteenth Amendment when the First Amendment's prohibition was extended to the States. As Professor Lawrence Rosenthal has explained, “[i]t may be that the public’s understanding of the Speech and Press Clauses at the time they were made applicable to the states is the appropriate point for assessing [their] meaning . . . on the view that 1868 was the time at which the nation recommitted to constitutional protection for free speech and a free press.”¹²¹

Setting all of these difficulties to the side, there is the grander question of whether history should matter at all.¹²² There are persuasive arguments that, when it comes to questions of speech, an originalist approach is the wrong approach: “[T]he meaning of the First Amendment did not crystallize in 1791.”¹²³ As Zechariah Chafee Jr. observed early in the twentieth century, “[t]he framers would probably have been horrified at the thought of protecting books by Darwin or Bernard Shaw, but ‘liberty of speech’ is no more confined to the speech they thought permissible than ‘commerce’ in another clause is limited to the sailing vessels and horse-drawn vehicles of 1787.”¹²⁴ Freedom of the press, after all, “was far from complete” in the Colonies.¹²⁵

While Justice Thomas would likely argue that this lack of freedom supports his thesis, this history makes his wish for a return to a similar system downright terrifying. Take, for example, the treatment of individuals before and around the Founding. In 1661, the Massachusetts Bay legislature ordered the suppression of a book because it “advocated popular election of officials.”¹²⁶ One author in the colony spent a year in jail after criticizing ecclesiastical authorities.¹²⁷ In 1722, the Pennsylvania Council “barred a printer . . . from publishing without permission anything that had to do with governmental affairs.”¹²⁸ Unsurprisingly, in Revolutionary America, “Tory printers were being harassed by mobs and by the new state legislatures.”¹²⁹ And, by 1778, “every state had some form of sedition law which was broadly interpreted to penalize open denunciation of the patriot cause.”¹³⁰ None of this is something we should be trying to resurrect. Half the country would be in jail.

This approach, if adopted throughout the Court’s First Amendment cannon,

¹²¹ Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 Ind. L.J. 1, 23 (2011).

¹²² Posner, *Reflections on Judging* 233 (2013) (“[O]riginalism is fake.”).

¹²³ Chafee, *Free Speech in the United States* 32 (2d ed. 1967).

¹²⁴ *Id.*; see also *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

¹²⁵ Merin, *The Supreme Court and Libel*, 11 Wm. & Mary L. Rev. 371, 373 (1969).

¹²⁶ *Id.*

¹²⁷ *Id.* at 374.

¹²⁸ *Id.*

¹²⁹ *Id.* at 376.

¹³⁰ *Id.*

would also require throwing out most of the Court’s First Amendment jurisprudence. As Professor Dorf said, “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.’”¹³¹ Justice Thomas, Dorf noted, “joined the majority opinion in every one of the specifically listed cases except *Johnson*, which was decided before he joined the Court.”¹³² It seems unlikely that Justice Thomas would propose to revisit any of these decisions. And, until he can explain the difference in treatment, a full-throated application of originalist interpretation in this corner of the cannon is difficult to justify

IV. REVOLUTIONARY THOUGHT AND ITS EFFECTS ON LIBEL LAW

Setting aside these concerns, Justice Thomas (along with Justice Gorsuch) has advanced “originalist” arguments against *Sullivan*, and, in this section, it is on those grounds that we will defend *Sullivan*. For example, Justice Thomas argued in *McKee* that “[f]ar from increasing a public figure’s burden in a defamation action, the common law deemed libels against public figures to be, if anything, more serious and injurious than ordinary libels.”¹³³ Such libels were deemed “most dangerous to the people.”¹³⁴ For his part, Justice Gorsuch argued in *Berisha* that the common law imposed numerous restraints on speakers and “those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused.”¹³⁵ Neither Justice, as it turns out, is really wrong in their assessments of the historical record, at least at one point in history. But what these assessments fail to account for is the effect that the Revolution had on the common law of libel. Thus, even if Justices Thomas and Gorsuch are correct as a matter of English law, they ignore the complexities of the common law’s development in this country.

One of the first historical events that both Justices ignore is the trial of John Peter Zenger – the defining moment of press freedom in colonial America. In the early 1730s, Zenger, a German immigrant, began publishing the *New York Weekly Journal*.¹³⁶ He ended up on the wrong side of the colonial governor William Cosby

¹³¹ Dorf, *Justice Thomas’s Faux-Originalist Critique of Overbreadth is Radically Underinclusive (and Wrongheaded in Other Ways Too)*, Dorf on L. (May 11, 2020), www.dorfonlaw.org/2020/05/justice-thomass-faux-originalist.html (first citing *Texas v. Johnson*, 491 U.S. 397 (1989); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Snyder v. Phelps*, 562 U.S. 443 (2011)).

¹³² Dorf, *supra* note 131.

¹³³ 139 S. Ct. at 679.

¹³⁴ *Id.* (marks and citation omitted).

¹³⁵ 141 S. Ct. at 2426.

¹³⁶ Newell, *supra* note 34, at 26.

because of his “frequent and somewhat severe attacks” on his administration.¹³⁷ The attorney general charged Zenger on information with criminal libel after he was unable to secure an indictment.¹³⁸ Zenger landed in jail for eight months awaiting trial.¹³⁹ His papers landed in the ash heap at the order of Cosby – although the mass burnings were boycotted by the City and its officials despite being ordered to attend.¹⁴⁰

Andrew Hamilton, the famed Philadelphia lawyer, took up Zenger’s defense for free.¹⁴¹ At the time, truth was no defense to a criminal libel charge; a true libel was a worse libel; in other words, many of the historical elements of the common law of libel that Justice Thomas invokes.¹⁴² Hamilton argued, however, that contrary to the common law (or at least the common law as bastardized by the Star Chamber), truth should matter:

The question before . . . you . . . is not of small or private concern. It is not the cause of one poor printer. No! It may in its consequence affect every free man It is the cause of liberty. And I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny, and . . . laid a noble foundation for securing to ourselves . . . the liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth.¹⁴³

An early New York jury decided Hamilton was right, and it acquitted Zenger. When it came back with the general verdict of not guilty, spectators broke into a cheer of “three huzzas.”¹⁴⁴ And that was just the beginning of the celebration. On Hamilton’s departure from the City, “a salute was fired in his honor on the banks of the Hudson.”¹⁴⁵ The Common Council of New York, the City’s legislative branch at the time, heralded Hamilton’s performance as a “generous defense of the rights of mankind, and the freedom of the press” and even granted him ceremonial citizenship to the City.¹⁴⁶ Gouverneur Morris, the Founding Father who penned the Preamble, later called the victory the “dawn of liberty, which afterwards

¹³⁷ *Id.*

¹³⁸ *Id.* at 26-27.

¹³⁹ *Id.* at 27.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 28.

¹⁴² *Id.*

¹⁴³ Buranelli, *The Trial of Peter Zenger* 131 (1957).

¹⁴⁴ *Id.* at 132.

¹⁴⁵ Newell, *supra* note 34, at 28.

¹⁴⁶ Schuyler, *The Liberty of the Press in the American Colonies Before the Revolutionary War* 50 (1905).

revolutionized America.”¹⁴⁷ Modern day appraisals by the Supreme Court no less are equally rosy: “Zenger’s trial was, with one possible exception, ‘the most widely known source of libertarian thought in England and America during the eighteenth century.’”¹⁴⁸ As Justice Thomas himself wrote in *McIntyre*, the Zenger case “set the colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities.”¹⁴⁹

On that point, Justice Thomas is certainly right. According to Professor Wendell Bird’s account in *The Revolution in Freedoms of Press and Speech*, the “Zenger trial thundered across colonial America in 1735 and brought permanent consciousness of liberties of press and speech.”¹⁵⁰ While the case was in specifics about the King versus Zenger, it was as much about the English law of libel versus American ideas of freedom. Indeed, Hamilton argued for the departure from the common law of libel and the limited role of a jury at common law, while the attorney general’s argument “amounted to a summary of the English law of libel, as applied in colonial America as well as in England.”¹⁵¹

Not only did Zenger win then, so too did those new ideas of freedom to the exclusion of the common law. Accounts of the trial were “widely excerpted in newspapers” and were “reissued fifteen times in the pre-revolutionary years.”¹⁵² Rather than a flash in the pan, the “case was long remembered, being described in 1752 as the time when ‘the liberty of the press [was] actually invaded in this province by the imprisonment of the publick printer’ and being toasted in 1770.”¹⁵³ Thus, some of the earliest and most influential evidence we have of press freedom in colonial America is decisively against the idea that the English common law of libel was simply imported into the colonies and accepted by the colonists. On the contrary, it was rejected early on.

True, despite Zenger, freedom of the press in the colonies left much to be desired, but the story of press freedom from Zenger onward is a story of early republican thought demanding greater press freedom rather than less. After ratification of the First Amendment, after the rejection of English rule, early American courts had to reassess how they would harmonize, among other things, the common law of libel with press freedoms guaranteed in state and federal constitutions. While, of course, there were many such cases, here we review three – two of which Justice Thomas himself relies on and another that, while less influential, shows how early defendants argued that their culpability should be

¹⁴⁷ Hudson, *Journalism in the United States, From 1690-1872*, at 82 (1873).

¹⁴⁸ *Jones v. United States*, 526 U.S. 227, 247-48 (1997) (quoting Levy, *Freedom of Speech and Press in Early American History* 133 (1963)).

¹⁴⁹ 514 U.S. at 361 (Thomas, J., concurring in judgment).

¹⁵⁰ Bird, *The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox’s Libel Act* 225 (2020).

¹⁵¹ *Id.* at 227.

¹⁵² *Id.* at 229.

¹⁵³ *Id.*

measured against their belief in the truth of their publications: *Commonwealth v. Clap*, *People v. Croswell*, and *Lewis v. Few*.¹⁵⁴ These cases, from New York and Massachusetts, demonstrate two things. First, as a doctrinal matter, how early courts grappled with questions about the role of truth and falsity in libel (*Clap*) and questions about the relevance of one's intent (*Croswell* and *Lewis*).

Second, they demonstrate how early state courts struggled to reconcile the brutish nature of English libel law with a new Constitution that guaranteed a "Republican form of Government."¹⁵⁵ In departing from the common law of England, these courts did so precisely because following it would have been incompatible with the government adopted after the Revolution. True, there were no good answers early on. It was hard for the States, and the inherently conservative judiciary, to cleave themselves entirely from the English common law. But, if not cleave, through these cases they whittled away at it, sanded smooth its rough edges, and carved a decidedly *American* law of libel.

Commonwealth v. Clap. Let's start with the 1808 Massachusetts Supreme Judicial Court case of *Commonwealth v. Clap*. In *McKee*, Justice Thomas cited *Clap* to support his assertion that at common law libels against public officials were "most dangerous to the people."¹⁵⁶ But Justice Thomas missed what is most important about *Clap*: its concern about protecting a sphere of public debate from the common law of libel such that the People could criticize their public officials. Indeed, *Clap* is representative of early conflicts between the enforcement of the law of libel and the desire to protect the political debate necessary for a republican form of government. Far from supporting Justice Thomas's thesis, it cuts against him.

In *Clap*, authorities indicted the defendant for libeling an auctioneer, historically a public official, with the charge that he was "a liar, a scoundrel, a cheat, and a swindler."¹⁵⁷ The issue was whether the criminal defendant should be able to offer evidence demonstrating that the charge was true because the auctioneer was a public official.¹⁵⁸ At common law, truth was no defense to a criminal libel charge. As the saying goes: the greater the truth, the greater the libel.¹⁵⁹ All that was required to secure a conviction in front of a jury was a showing that the libel was published.¹⁶⁰

But counsel for *Clap* questioned the application of these rules in a

¹⁵⁴ *Commonwealth v. Clap*, 4 Mass. 163 (1808); *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804); *Lewis v. Few*, 5 Johns. 1 (N.Y. Sup. Ct. 1809).

¹⁵⁵ U.S. Const. art. IV, § 4.

¹⁵⁶ *Clap*, 4 Mass. at 169, quoted in *McKee*, 139 S. Ct. at 679.

¹⁵⁷ *Id.* at 163.

¹⁵⁸ *Id.* at 168.

¹⁵⁹ *Id.*; see also *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

¹⁶⁰ *Clap*, 4 Mass. at 168; see also Chafee, *Freedom of Speech* 19 (1920) (noting that one of the early conflicts in the United States surrounding the law of libel was "first, that the jury and not the judge ought to decide the libellous nature of the writing, and secondly, that the truth of the charge ought to prevent conviction").

republican democracy like the United States. He argued that, to the extent the common law was against him, it “was virtually repealed by the provisions of the constitution of this commonwealth; and he went much at large into the consideration of the right of the citizens of a free elective republic to speak and publish the truth respecting the characters of men in office.”¹⁶¹ The reason for this freedom was simple: “[t]he community have an interest in his integrity, and have a right to be informed what his conduct in office is, that they may judge whether it be safe and discreet to intrust their property to his care and management.”¹⁶² It was, thus, “of much greater importance that this high constitutional privilege be preserved unimpaired, than that a libeller should now and then go unpunished.”¹⁶³

While the solicitor general responded that “he had never known a decision that the truth might be given in evidence” even in cases concerning the libel on a public official, he admitted that “whenever he had had the direction of prosecutions of this kind, he had always yielded to such a defence without opposition.”¹⁶⁴ In fact, he had “even courted” defendants “to attempt a defence of this kind.”¹⁶⁵ The attorney general agreed as well:

As to public men, the measures of government, and candidates for public offices, the Attorney-General said he had always held the people to be their proper and constitutional judges; and he never should, while he held his present office, oppose the giving of the truth in evidence to justify any publications charged as libellous in relation to those objects.¹⁶⁶

It was only in that case that he did not believe the victim of the libel – an auctioneer – should be considered a public official.¹⁶⁷

The court agreed with the attorney general that the auctioneer, as a mere appointed officer, rather than an elected one, was not a public official and thus the point of law argued for by the defendant did not control the case. Truth, the court said, was not under the English law of libel a defense. As the court put it, “it is not considered whether the publication be true or false; because a man may maliciously publish the truth against another, with the intent to defame his character, and if the publication be true, the tendency of it to inflame the passions, and to excite revenge, is not diminished, but may sometimes be strengthened.”¹⁶⁸ Were truth allowed to be proved at trial, the victim of the libel, who in the criminal prosecution for that libel “is not a party,” “the evidence at the trial might more cruelly defame his

¹⁶¹ *Clap*, 4 Mass. at 165.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 167.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

character than the original libel.”¹⁶⁹

But, the court in *Clap* then altered the common law by finding that, in some cases, the truth might still be offered in justification. As the court explained, “the defendant may repel the charge, by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man.”¹⁷⁰ And in this effort to prove that the conduct was justified, the court found that “there may be cases, where the defendant . . . may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame.”¹⁷¹ “Upon this principle,” the court wrote, “a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel.”¹⁷²

Importantly, the court explained why a defendant should not be deprived of the right to prove truth: “when any man shall consent to be a candidate for a public office conferred by the election of the people, *he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office.*”¹⁷³ Departing from the common law, the court then held, “publications of the truth on this subject, with the honest intention of informing the people, are not a libel.”¹⁷⁴ “For it would be unreasonable to conclude that the publication of truths,” the court wrote, “which it is the interest of the people to know, should be an offence against their laws.”¹⁷⁵ Far from reinforcing the common law, the court’s “novel dictum that publication of truth as to the characters of elective officers, or of candidates for such office, was not a libel” was a “judicial enlargement of the freedom of the press.”¹⁷⁶

In *McKee*, Justice Thomas ignores this aspect of *Clap*. He focuses instead on what *Clap* said about *false* charges:

For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offence most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties.¹⁷⁷

But this does not carry Justice Thomas as far as he suggests it does. The

¹⁶⁹ *Id.* at 169.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* (emphasis added).

¹⁷⁴ *Id.* (emphasis added).

¹⁷⁵ *Id.*

¹⁷⁶ Duniway, *The Development of Freedom of the Press in Massachusetts* 152 (1906).

¹⁷⁷ *Clap*, 4 Mass. at 169.

court in *Clap* held that false statements relating to public officials were unprotected “for the same reason” that truthful ones were protected.¹⁷⁸ *Clap* did not find false statements “most dangerous” because of the supposed common law rule that officials were inherently deserving of more protection than others.¹⁷⁹ Rather, it found false statements unprotected because of their tendency to undermine republican debate.

In this way, the court’s logic in *Clap* had one vitally important thing in common with *Sullivan*: the common law of libel must be considered against the backdrop of ensuring republican debate. This notion was nowhere to be found in the English common law of libel; it was a novel *American* way of thinking about it. While reaching different results, both *Sullivan* and *Clap* recognized that speech about public officials was different in kind than speech about private persons. One implicated the public’s interests; the other did not. And, in the case of speech about public officials, both *Sullivan* and *Clap* sought to protect the “free trade in ideas” within “the competition of the market” by easing the rules of the common law of libel. The difference between them was that *Sullivan* aimed to protect inputs (the introduction of new ideas into the system) while *Clap* aimed to protect the outputs (the result of the debate) – while the English law on which Justice Thomas leans so strongly cared about neither.

People v. Croswell. In 1804, the New York Supreme Court – then the State’s highest court – decided an “interesting and celebrated” case on “a very important and much litigated subject of jurisprudence.”¹⁸⁰ Harry Croswell, a New York printer, had published in *The Wasp* allegations that Thomas Jefferson had paid James Callender, a prominent republican printer, to call George Washington “a traitor, a robber, and a perjurer” and for calling John Adams “a hoary-headed incendiary.”¹⁸¹ Croswell asked that the trial be delayed until he could have Callender, who would prove that the allegations were true, travel from Virginia.¹⁸² The judge refused, and, at trial, the jury found Croswell guilty, having been instructed that “it was no part of the province of a jury to inquire or decide on the intent of the defendant; or whether the publication in question was true, or false, or malicious.”¹⁸³ The only question for it was whether Croswell published the allegations in his newspaper.¹⁸⁴

On appeal, as in *Clap*, the issue was again whether “the defendant [may] give the truth in evidence.”¹⁸⁵ A separate issue was whether it was the province of

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804).

¹⁸¹ *Id.* at 337.

¹⁸² *Id.* at 339

¹⁸³ *Id.* at 342.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 338.

the jury to decide both law (i.e., the existence of a malicious falsehood) and the fact (i.e., publication by the defendant).¹⁸⁶ Alexander Hamilton, who, among many things, was one of New York's delegates to the Constitutional Convention, defended *Croswell* in one of the great early examples of American understandings of freedom of the press. He began his argument on *Croswell's* behalf with the question of whether evidence of truth should have been allowed. He argued that it did. The doctrine of greater the truth, greater the libel, he said, "originated in a polluted source, the despotic tribunal of the Star Chamber."¹⁸⁷ Since the earliest days of England, the defendant had been allowed to prove the truth of the charge and, to the extent that later authority was to the contrary, it came from the Star Chamber and could not alter the common law.¹⁸⁸ Even the Sedition Act, Hamilton argued, required that falsity must be proven.¹⁸⁹ Hamilton also argued that "the court cannot judge of that intent."¹⁹⁰ Instead, "the jury must find it."¹⁹¹ The "intent constitutes the crime" in libel cases, because the act of printing itself was not unlawful.¹⁹² On this question, the "time and circumstances" of the alleged libel are "very material."¹⁹³ Thus, a jury must be able to inquire into the context in which the alleged libel was printed.

On reply to the attorney general's arguments, Hamilton proposed a new rule: "The liberty of the press consisted in publishing with impunity, truth *with good motives*, and *for justifiable ends*, whether it related to [public] men or to measures."¹⁹⁴ This, he argued, was necessary in a government where the governors were representatives of the people:

To discuss measures without reference to men, was impracticable. Why examine measures, but to prove them bad, and to point out their pernicious authors, so that the people might correct the evil by removing the men? There was no other way to preserve liberty, and bring down a tyrannical faction. If this right was not permitted to exist in vigour and in exercise, good men would become silent; corruption and tyranny would go on, step by step, in usurpation, until, at last, nothing that was worth speaking, or writing, or acting for, would be left in our country.¹⁹⁵

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 344.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 345.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 352 (emphasis added); see also Schofield, *Freedom of the Press in the United States*, 9 Proc. Am. Soc. Soc'y 67, 89 (1914) ("He professed that he found or discovered this definition in the English common law. But it was not there.").

¹⁹⁵ *Croswell*, 3 Johns. Cas. at 352-53.

Nor did intent stand separate from truth. Instead, “[t]he question how far the truth is to be given in evidence, depends much on the question of intent.”¹⁹⁶ And if the jury must decide intent, as Hamilton argued, it must also be able to pass on the truth of the charge because truth is “a requisite,” a “means to determine intent.”¹⁹⁷ From the Roman Empire forward, he argued, “falsity was an ingredient in the crime,” and the common law continued to require it.¹⁹⁸

New York’s arguments to the contrary, Hamilton said, were derived from the “polluted source” of the Star Chamber.¹⁹⁹ That was not “the court from which we are to expect principles and precedents friendly to freedom.”²⁰⁰ It was the “most arbitrary, tyrannical and hated tribunal.”²⁰¹ Being able to give truth in evidence, on the other hand, was “all-important to the liberties of the people,” because truth was “an ingredient in the eternal order of things.”²⁰² Hamilton, ever the Federalist, thus “felt a proud elevation of sentiment” in the Sedition Act having “established this great vital principle.”²⁰³ He therefore concluded that being allowed a defense of truth was “essential to the preservation of a free government; the disallowance of it fatal.”²⁰⁴

The court split, 2-2, leaving *Croswell*’s conviction in place and no judgment was issued. Morgan Lewis, the chief judge and a Jeffersonian, along with Brockholst Livingston, who would soon become an associate justice on the Supreme Court, would have adopted the common law view that truth was not a defense.²⁰⁵ However, Judge James Kent, a Federalist, and his colleague Smith Thompson, a Republican who would also soon become an associate justice, would have agreed with Hamilton that truth and good motives was a defense to a libel charge.²⁰⁶

Like the opinion in *Clap*, Judge Kent’s opinion in *Croswell* is some of the best evidence of the early debates over the collision of libel law and freedom of the press. More importantly, it is the best evidence of whether and why courts thought a publisher’s *intent* was important. Libel, Kent observed at the outset, “is a defamatory publication, made with a malicious intent.”²⁰⁷ Where the jury found the

¹⁹⁶ *Id.* at 356.

¹⁹⁷ *Id.* at 357.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 358.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 360.

²⁰⁵ *Id.* at 394-411 (Lewis, J.); *id.* at 411-13 (Livingston, J.).

²⁰⁶ *Id.* at 363-94 (Kent, J.).

²⁰⁷ *Id.* at 377.

defendant published the libel, malice was presumed to exist. But, he questioned whether malice should be presumed: “There can be no crime without an evil mind.”²⁰⁸ Thus, he thought the jury should have the chance to decide (1) whether the defendant published the libel and (2) the “particular intent and tendency that constitutes the libel.”²⁰⁹

Judge Kent believed that the jury should be given the chance to decide both questions, because, echoing Hamilton, “[o]pinions and acts may be innocent under one set of circumstances, and criminal under another.”²¹⁰ As he explained:

[W]hat can be a more important circumstance than the truth of the charge, to determine the goodness of the motive in making it, if it be a charge against the competency or purity of a character in public trust, or of a candidate for public favour, or a charge of actions in which the community have an interest, and are deeply concerned?

To shut out wholly the inquiry into the truth of the accusation, is to abridge essentially the means of defence. It is to weaken the arm of the defendant, and to convict him, by means of a presumption [of malice], which he might easily destroy by proof that the charge was true, and that, considering the nature of the accusation, the circumstances and time under which it was made, and the situation of the person implicated, his motive could have been no other than a pure and disinterested regard for the public welfare.²¹¹

When it came to “public libels,” Judge Kent added, falsehood had always been “a material ingredient” in a prosecution.²¹² Agreeing with Hamilton, he said that the civil law (that is, law descending from the Romans as opposed to the common law descending from the English) had long permitted truth as a defense in cases reaching public persons.²¹³ English courts too – despite the Star Chamber – had “occasionally admitted” it.²¹⁴ And, in “this country,” the rule had “taken firmer root”: “in regard to measures of government, and the character and qualifications of candidates for public trust, it is considered as the vital support of the liberty of the press.”²¹⁵

To the extent English law was not in accord, Judge Kent rejected it. The Star Chamber, which denied truth as a defense at the height of its “terrors,” was an

²⁰⁸ *Id.* at 364.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 377-78.

²¹² *Id.* at 379.

²¹³ *Id.* at 383.

²¹⁴ *Id.* at 379.

²¹⁵ *Id.*

outlier.²¹⁶ And its doctrine of the greater the truth the greater the libel was incompatible with political debate in the States: “There be many cases . . . where a man may do his country good service, by libelling; for where a man is either too great, or his vices too general to be brought under a judiciary accusation, there is no way but this extraordinary method of accusation.”²¹⁷ In other words, at times, people might have an affirmative obligation to libel public officials.

Importantly, Judge Kent then disavowed the common law altogether: “But, whatever may be our opinion on the English law, there is another and a very important view of the subject to be taken, and that is with respect to the true standard of the freedom of the *American* press.”²¹⁸ Unlike in England, he wrote, “the people of this country have always classed the freedom of the press among their fundamental rights.”²¹⁹ The first Congress, he pointed out, had placed freedom of the press as one of the “five invaluable rights, without which a people cannot be free and happy.”²²⁰ The importance of the freedom of the press consisted, Congress declared in 1774, “in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, *whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.*”²²¹ In the New York Ratifying Convention of 1788, the delegates declared that “the freedom of the press was a right which could not be abridged or violated.”²²² And, Judge Kent observed, the “same opinion is contained in the amendment to the constitution of the United States, and to which this State was a party,” as were state constitutions, including Ohio and Pennsylvania, which already provided for truth as a defense in criminal cases relating to public officials.²²³ Even the Sedition Act provided truth as a defense.²²⁴

Judge Kent called these acts “the highest, the most solemn, and commanding authorities, that the state or the nation can produce.”²²⁵ And, he said, “[i]t seems impossible that [the Founders] could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press [in England], which may not publish any thing, true or false, that reflects on the character and administration of public men.”²²⁶ Expanding on this

²¹⁶ *Id.* at 385.

²¹⁷ *Id.* at 381.

²¹⁸ *Id.*

²¹⁹ *Id.* at 391.

²²⁰ *Id.*

²²¹ *Id.* (emphasis added).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 392.

²²⁵ *Id.*

²²⁶ *Id.*

sentiment, he added:

And if the theory of the prevailing doctrine in England (for even there it is now scarcely any thing more than theory) had been strictly put in practice with us, where would have been all those enlightened and manly discussions which prepared and matured the great events of our revolution, or which, in a more recent period, pointed out the weakness and folly of the confederation, and roused the nation to throw it aside, and to erect a better government upon its ruins?

They were, no doubt, libels upon the existing establishments, because they tended to defame them, and to expose them to the contempt and hatred of the people. They were, however, libels founded in truth, and dictated by worthy motives.²²⁷

Judge Kent thus adopted, “as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar, that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.”²²⁸

The opinion thus declared inapplicable the common law of libel in England precisely because the United States was based on a different kind of government requiring a different conception of freedom of the press. Kent and Hamilton’s rule ended up being incorporated into several state constitutions – affirmative choices by those states to depart from what the common law had been towards something new.²²⁹ While the rule might seem less than protective today, at the time, it was a giant leap forward and away from what the common law of libel demanded. Hamilton’s rule was “forward-looking then, regressive today, but in the surge of history, understandable.”²³⁰

Lewis v. Few. *Lewis v. Few* is a perfect example of the far reaching consequences that putting intent into play had on the common law of libel.²³¹ In 1809, Morgan Lewis – as it happens, the same Morgan Lewis who voted against Hamilton in *Croswell* – sued after William Few denounced Lewis’ “attempts to destroy the liberty of the press” at a public meeting about the upcoming election for governor and in the *American Citizen* newspaper.²³² (A fact pattern that comes with a healthy dose of irony.) By that time, Lewis had become Governor of New York and Few charged Lewis with “hostility towards the republican cause.”²³³

Among other defenses, Few’s counsel sought an extension of Judge Kent’s observations in *Croswell* about the importance of intent. He argued that, to secure

²²⁷ *Id.* at 392-93.

²²⁸ *Id.* at 393-94.

²²⁹ Hudson, *supra* note 147, at 753-57 (listing provisions of various state constitutions).

²³⁰ Forkosch, *Freedom of the Press: Croswell’s Case*, 33 *Fordham L. Rev.* 415 (1965).

²³¹ *Lewis v. Few*, 5 *Johns. Cas.* 1 (N.Y. 1809).

²³² *Id.* at 4.

²³³ *Id.* at 1.

a verdict in favor of the plaintiff, it must be shown both that the words are false and that they were uttered with malicious intent.²³⁴ He thus carried Hamilton's argument a step forward, by asserting that intent might matter even when the statement at issue is false. Pointing to a strand of the common law of England, counsel drew an analogy between the servant/master privilege that had been developing there and the governors/governed in the United States: "Where the words are spoken, *bona fide*, by a master, concerning the character of a servant, though the specific acts or crimes are charged, and which turn out to be false, yet no action lies."²³⁵ In such cases, "The words must be proved to be malicious, as well as false."²³⁶

In cases like the one before the court where the target of the alleged libel was a public official, Few's counsel argued that consistent with this principle "[t]he people must be regarded as the sovereign or master, and the persons elected as their agents or servants."²³⁷ Continuing that line of reasoning, Few's counsel argued, "It is essential, in an elective government, that the people should be at liberty, *bona fide*, to express their opinions of any public officer, or candidate for office."²³⁸ As such, for Lewis to prevail, he would have to prove both falsity of the charge and that Few acted from bad motives.

Lewis' counsel did not appreciate Few's attempt to import the servant/master privilege into the context of libels on public officials and extend Hamilton's rule even further. As he put it, "the defence now set up," that is, a showing that a charge was both false and malicious, "was never thought of" in *Croswell* and it seemed "to have been reserved for the ingenuity of . . . defendant's counsel here, to suggest this new doctrine for the first time."²³⁹ The People, Lewis' counsel said, "may freely speak, and publish the truth, and the whole truth: but this cannot authorize them to publish *falsehoods* . . . concerning public candidates."²⁴⁰

The court sided with Lewis. Thompson, the judge in *Croswell* who voted with Kent, delivered the opinion.²⁴¹ It was argued, Judge Thompson wrote, that "being the act of a public meeting, of which the defendant was a member, and the publication being against a candidate for a public office, have been strenuously urged as affording a complete justification."²⁴² Essentially, the defendant was asking for a libel-free zone where allegations made against a public official at a

²³⁴ *Id.* at 13-14.

²³⁵ *Id.*

²³⁶ *Id.* at 14.

²³⁷ *Id.*

²³⁸ *Id.* See Chap. 2, *infra*, at 86-87 n.29 (discussing master/servant analogy).

²³⁹ *Lewis*, 5 Johns. Cas. at 20.

²⁴⁰ *Id.* at 20-21.

²⁴¹ *Id.* at 28-37.

²⁴² *Id.* at 35-36.

public meeting “is beyond the reach of legal inquiry.”²⁴³ To this, Judge Thompson said, he could “never yield [his] assent,”²⁴⁴ adding that he could not find “any analogy whatever” to support the argument advanced.²⁴⁵ To be sure, citizens had a “right to assemble, and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinions to others,” but, in doing so, they must not “transcend the bounds of truth.”²⁴⁶

While he did not accept that a false charge uttered *bona fide* could be privileged, Judge Thompson did agree to a degree. He accepted that a false charge shown to have been uttered *bona fide* could mitigate damages – a still nascent idea both in England and in the United States.²⁴⁷ While that issue was not before the court, he added, “[e]very case must necessarily, from the nature of the action, depend on its own circumstances, which are to be submitted to the sound discretion of the jury. It is difficult, and perhaps impracticable, to prescribe any general rule on the subject.”²⁴⁸ Thus, while Few did not win on liability, Thompson opened the door to reduced damages on remand – one of the earliest cases in the States to do so – based on a good faith belief in the charge.

Lewis was a bookend on these early cases. While the rule prevailing at common law was that even truth was no defense to a libel, *Lewis* and these other cases show litigants arguing early on and some courts agreeing that, for a republican government to be successful, the more draconian aspects of English libel law had to be relaxed. Although in a monarchical England it may well have made sense that the common law of libel was enforced with an iron fist when it came to libels on the monarchy and its magistrates, *i.e.*, public men, in the United States where the governors did not rule over the people but were agents of them, such rules made little sense. In this way, these cases remind us of what Justice Joseph Story once said, that the “common law of England is not to be taken in all respects to be that of America.”²⁴⁹ Instead, “[o]ur ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted *only that portion which was applicable to their situation.*”²⁵⁰ In the place of those parts left behind in the law of libel, early courts injected principles like truth and intent – principles that provided play in the joints between the common law’s speech-suppressing tendencies and a republican form of government that requires speech to work.

Of course, *Clap*, *Croswell*, and *Lewis* are just three early cases among many

²⁴³ *Id.* at 36.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 37.

²⁴⁸ *Id.*

²⁴⁹ *Van Ness v. Pacard*, 27 U.S. 137, 144 (1829).

²⁵⁰ *Id.* (emphasis added).

– and *Lewis* did not come out in favor of the defendant. Many courts did impose the common law of libel as adopted in England on the newly minted American citizens. As one commentator lamented, “[o]ur own judges seem to have forgotten that the founders of the government are not distinguished for their reception of the English common law but for their adaptation of the democratic leaning and tendency of the constitutional side of it to a new career of popular freedom and equal justice.”²⁵¹ If anything though, that cases like *Clap*, *Croswell*, and *Lewis* exist demonstrates that there was no unanimity as Justice Thomas suggests there was and, further, that ideas about the significance of intent were not simply created out of whole cloth in *Sullivan*.

True enough, none of these courts adopted *Sullivan*’s actual malice rule – although counsel in *Lewis* essentially argued for it some 150 years before *Sullivan* – more than two hundred years ago now. But you see in these decisions glimmers of the considerations that would come to the fore in *Sullivan* (and, as we will see, long before *Sullivan* too). There is no reasonable argument that it was only the Supreme Court in the last half of the twentieth century that thought a conflict between the common law of libel and freedom of the press existed. The common law of libel and freedom of the press in the United States have always chased each other’s shadows.

For those unconvinced by this sampling of cases, we can turn our attention to the legal treatises of the time that demonstrate the same principles.²⁵² An overarching theme in nineteenth century legal treatises touching on liberty and libel was, as well, the importance of the freedom of the press to a republican form of government.²⁵³ Of course, they recognized the value of reputation, but that had long been understood. Most of their pages, much like those of the decisions in *Clap* and *Croswell*, were occupied by discussions about how to soften the harsh rules of the common law to allow room for republican debate. That the debate raged is evidence alone that the common law of libel was not simply accepted uncritically, as Justice Thomas seems to suggest. (Although even Justice Thomas, in *McKee*, admitted as much before trying to explain it away: “It is certainly true that defamation law did not remain static after the founding.”²⁵⁴) Instead, these pages were the battlefields

²⁵¹ Schofeld, *supra* note 194, at 83.

²⁵² A further analysis of this commentary can be found in Matthew L. Schafer, *Liberty, Libel, and the Legal Academy* (forthcoming).

²⁵³ Some of the most influential treatises included: Wartman, *A Treatise Concerning Political Enquiry, and Liberty of the Press* (1800); Tucker, *Commentaries on the Laws of England* (1803); Dane, *An Abridgment and Digest of American Law* (1823); Rawle, *A View of the Constitution of the United States of America* (1825); Kent, *Commentaries on American Law* (1826); Story, *Commentaries on the Constitution of the United States* (1833); Alden, *The Science of Government in Connection with American Institutions* (1866); Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (1868); Townsend, *A Treatise on the Wrongs Called Slander and Libel* (1868); Kent, *Commentaries on American Law* (O.W. Holmes, Jr. ed. 1873); Merrill, *Newspaper Libel, a Handbook for the Press* (1988).

²⁵⁴ *McKee*, 139 S. Ct. at 682.

for intellectual debates over liberty and libel. The famed judge and commentator Thomas Cooley was then right when he recognized, in the 1860s, that liberty of the press in the United States “as now exercised, is of modern origin” – the history of the meaning of freedom of press in the United States is itself post-revolutionary.²⁵⁵

As such, it is not surprising that Justice Thomas does not rely on these American commentators and their post-revolutionary liberalization of the common law. These commentators had long since moved on from the English law’s cramped approach to liberty and libel because a change in government had intervened. Of the eleven of the most well-known nineteenth century commentators reviewed, only William Rawle adopted the narrow Blackstonian definition of press freedom, i.e., the English definition, without qualification.²⁵⁶ The rest either rejected it or suggested, without outright rejection, that it was incomplete.

Tunis Wortman,²⁵⁷ St. George Tucker,²⁵⁸ James Kent,²⁵⁹ Joseph Story,²⁶⁰ and Cooley²⁶¹ all rejected traditional definitions of freedom of the press at common law in England. The rest, Nathan Dane,²⁶² Joseph Alden,²⁶³ John Townshend,²⁶⁴ and Samuel Merrill,²⁶⁵ each seemed to embrace the traditional, narrow English understanding of press freedom, but they also endorsed the Hamiltonian, American view offered in *Croswell* – providing for truth as a defense in both civil and criminal cases. In other words, just one of the eleven accepted English law unflinchingly.

Moreover, even those commentators who espoused more limited

²⁵⁵ Cooley, *supra* note 253, at 420.

²⁵⁶ Rawle, *supra* note 253, at 120 (defining freedom of the press as freedom from a “previous superintendency of the press”).

²⁵⁷ Wortman, *supra* note 253, at 256 (Blackstone’s definition was “extremely imperfect” and “fallacious to the extreme”).

²⁵⁸ Tucker, *supra* note 253, at 18 (liberty of the press as liberty from prior restraint is “only to be found in the theoretical writings of the commentators on the *English* government”).

²⁵⁹ Kent, *supra* note 253, at 19 (present opinion was against “erecting barriers against any previous restraints,” but also “in favour of the policy that would diminish or destroy altogether every obstacle or responsibility in the way of the publication of truth.”).

²⁶⁰ Story, *supra* note 253, at 731-32 (“the very circumstance, that, in the constitutions of several states, provision is made for giving the truth in evidence, in prosecutions for libels for official conduct, when the matter published is proper for public information, is exceedingly strong to show, how the general law is understood.”).

²⁶¹ Cooley, *supra* note 253, at 421 (“liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him”).

²⁶² Dane, *supra* note 253, at 51-52 (grappling with the right to publish the truth as compared to the Blackstonian definition).

²⁶³ Alden, *supra* note 253, at 200-01 (same).

²⁶⁴ Townshend, *supra* note 253, at 342-43 (same).

²⁶⁵ Compare Merrill, *supra* note 253, at 1, 27 (Blackstonian definition) with *id.* at 209-21 (embracing common law privilege but not recognizing a constitutional dimension).

conceptions of freedom of the press, recognized that as of their writing public opinion was turning or had turned in favor of a more liberal view of press freedom. Kent, while unnerved by this development, admitted that the “tendency of measures in this country has been to relax *too far* the vigilance with which the common law surrounded and guarded character, while we are animated with a general anxiety to maintain freedom of discussion.”²⁶⁶ For his part, Townshend criticized those who maintained that greater freedom of the press should be given to newspaper editors and dismissed as *dicta* language in cases contrary to his views.²⁶⁷ Alden also criticized the “extravagant” contemporary views.²⁶⁸ These observations are consistent with scholarly research, like Wendell Bird’s, that has concluded that early public opinion was strongly against the idea that freedom of the press in the United States was equivalent to that in England.²⁶⁹ As one scholar explained, “[t]he common law meaning, at least of a free press, had been inherited from Blackstone’s England, but that concept never really took root in America.”²⁷⁰

Almost all commentators also rejected many of the strict rules of the common law of libel. They did so not least because defendants were arguing for and courts were adopting new rules or privileges to soften the law of libel. Chief among these was the importance of truth being allowed as a defense in both criminal and civil cases. Wortman said in 1800, “[i]t cannot be said that any Liberty of the Press is established by law, unless the publication of Truth is expressly sanctioned.”²⁷¹ A system that outlawed truth improperly rendered the “political magistrate inviolable” and protected him “from punishment or animadversion.”²⁷² Tucker said critics of public men were bound only “to adhere strictly to the truth; for any deviation from the truth is both an imposition upon the public, and an injury to the individual it may respect.”²⁷³ Kent adopted as “perfectly correct” “that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends.”²⁷⁴ Others, like Story, Dane, Alden, and Townshend, adopted a similar approach. Merrill, the last to write, observed that, “[s]ince the beginning of this century, the common law has been changed in this respect in every State in the Union.”²⁷⁵

Others questioned why harsh and anti-democratic rules of the common law of libel should be considered to have been imported from England into the United

²⁶⁶ Kent, *supra* note 253, at 19-20 (emphasis added).

²⁶⁷ Townshend, *supra* note 253, at 343.

²⁶⁸ Alden, *supra* note 253, at 200.

²⁶⁹ Bird, *The Revolution in Freedoms of Press and Speech* 368 (2020).

²⁷⁰ Rosenthal, *supra* note 121, at 26.

²⁷¹ Wortman, *supra* note 253, at 256-57.

²⁷² *Id.*

²⁷³ 1 Tucker, *supra* note 253, at 29.

²⁷⁴ *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804).

²⁷⁵ Merrill, *supra* note 253, at 230.

States. After reviewing some of these rules, Tucker wrote, “[w]hen we consider the source from whence these doctrines have been brought to us, *the reasonableness of them ought to be examined before we yield our full assent to all of them.*”²⁷⁶ Cooley too doubted that the common law prohibitions on libels on government had been “adopted in the American states.”²⁷⁷ Indeed, Cooley was less concerned with traditions at common law than he was with modern privileges that had since developed “for some reason of general public policy” that he believed to be “constitutional” in nature.²⁷⁸

Consequently, several commentators stressed that, in a republican form of government, public servants assumed the risk of public criticism, thus departing from the common law’s contrary rule. Wortman said that public officials should be made to stand on “the same footing with a private individual.”²⁷⁹ Tucker wrote that statutes like *scandalum magnatum*, which gave special treatment to public officials, had no effect in the United States.²⁸⁰ Kent recognized that libels on public officials might harm both public and private interests, but he argued that it was “equally careful that the liberty of speech, and of the press, should be duly preserved.”²⁸¹ Story criticized the common law’s treatment as an offense “the publication of which now seems important to the . . . proper observation of public officers by those interested in the discharge of their duties.”²⁸² Townshend admitted that “being a candidate for an office or for employment, in many instances affords a license or legal excuse for publishing language concerning him as such candidate.”²⁸³ And Cooley observed that there were “certain cases where criticism upon public officers . . . is not only recognized as legitimate, but large latitude and great freedom of expression” is permitted.²⁸⁴

There was also a slow recognition, especially during the last half of the nineteenth century, that the common law’s tendency to stack the deck against the defendant by presuming the existence of fault was problematic too. Initially, Cooley observed that privileges developed at common law provided that “there were some

²⁷⁶ 1 Tucker, *supra* note 253, at 150 n.19. An earlier assessment of these same common law rules, as described by Lord Coke, was especially critical, observing that Coke borrowed heavily from the civil law even though he was “no great civil lawyer” and questioned importing those rules into the common law. Barrington, *Observation upon the Statutes* 68 (1767).

²⁷⁷ Cooley, *supra* note 253, at 425; *id.* at 229 (“The English common-law rule which made libels on the constitution or the government indictable . . . seems to us unsuited to the condition and circumstances of the people of American, and therefore to have never been adopted in the several States.”).

²⁷⁸ *Id.* at 425.

²⁷⁹ Wortman, *supra* note 253, at 259.

²⁸⁰ 1 Tucker, *supra* note 253, at 149 n.15.

²⁸¹ Kent, *supra* note 253, at 13.

²⁸² Cooley, *supra* note 253, at 418.

²⁸³ Townshend, *supra* note 253, at 202; *see also id.* at 336-38 (discussing same).

²⁸⁴ Cooley, *supra* note 253, at 431-32.

cases to which the presumption [of fault] would not apply.”²⁸⁵ Thus, where the speaker was under some recognized duty to speak, the privilege would “throw upon the plaintiff the burden of offering some evidence of [fault’s] existence beyond the mere falsity of the charge.”²⁸⁶ Holmes would later recognize a line of cases holding similarly that, where a defendant was discharging some public duty in making the allegation, the plaintiff must show malice.²⁸⁷ This included cases of “fair and reasonable comments on matters of public concern.”²⁸⁸ Merrill made similar observations, emphasizing that courts had even begun to find falsity privileged if spoken in good faith and for a proper purpose.²⁸⁹

It was the more liberal commentators during this time who most often stressed that the decidedly republican form of government established in the United States required revisiting traditional rules of liability in the common law of libel and conceptions of freedom of the press in federal and state constitutions. As Wortman explained, intrusion on the right to speak the truth “is to declare open war against Political Enquiry, entirely destroy the responsibility of the Magistrate, and establish the throne of Absolute Despotism upon the ruins of Civil Liberty.”²⁹⁰ Tucker agreed; in a representative government, a constituent could not “be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.”²⁹¹ Or, as Kent put it, “[t]he liberal communication of sentiment . . . in respect to the character and conduct of public men, and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage.”²⁹² According to Cooley, freedom of the press prohibited “any action of the government by means of which it might prevent such free and general discussion of public matters.”²⁹³

Even those who were less liberal in their sentiments, recognized the importance that freedom of the press played in a republican government. Dane said that it was “often difficult in a free country to draw the true line between a libel indictable and a publication to be allowed as a fair investigation of public measures, and of the characters of public men.”²⁹⁴ And Rawle, while embracing Blackstone, admitted that “a free government begins to be undermined when freedom of speech on political subjects is restrained.”²⁹⁵ Townshend, for his part, argued that a

²⁸⁵ *Id.* at 425.

²⁸⁶ *Id.*

²⁸⁷ 2 Holmes, *supra* note 253, at 22-23 n.1.

²⁸⁸ *Id.*

²⁸⁹ Merrill, *supra* note 253, at 213.

²⁹⁰ Wortman, *supra* note 253, at 256.

²⁹¹ 1 Tucker, *supra* note 253, at 297.

²⁹² Kent, *supra* note 253, at 19.

²⁹³ Story, *supra* note 253, at 422.

²⁹⁴ Dane, *supra* note 253, at 51.

²⁹⁵ Rawle, *supra* note 253, at 119.

newspaper “may comment freely on the acts of government, officers or individuals and indulge in occasional mirth and wit, and it is only when the character of the publication is malicious, and its tendency to degrade and excite to revenge, that is condemned.”²⁹⁶ These commentators simply believed that these republican values could survive even in the face of some of harsher rules of the common law.

In sum, contrary to Justice Thomas’ argument, there is a rich history dating back hundreds of years in this country that elevated republican debate over personal reputation. For the same reason, public officials in the United States were not put on the same pedestal they had been in the England. Instead, they had to suffer the roving eye of the public, as discussed at length below. For the time being, it is enough to observe, as Tucker did a decade into the nineteenth century, “if censure be too galling to [a public official’s] feelings, he might avoid it in the shades of domestic privacy.”²⁹⁷ “[I]f flattery is the only music to his ear, or the balm to his heart” then “the indignation of the people ought immediately to mark him, and hurl him from their councils, and their confidence forever.”²⁹⁸

V. PRECURSERS OF THE ACTUAL MALICE RULE

In this section, we dig deeper into whether the law of libel in the early United States treated public officials differently than others and, if so, how so. To deal with that question, we look to two lines of early cases first suggesting rules similar to *Sullivan*’s actual malice standard, which run from the eighteenth century on into the nineteenth. First, there are those cases that found that a defendant’s lack of actual malice might mitigate damages—much like Judge Thompson suggested in *Lewis*. Second, there are those that went further and recognized a privilege in cases involving public official plaintiffs whereby a defendant could escape liability so long as he had reasonable cause to believe an allegation was true—even where it turned out to be false. Each of these lines of cases, while not establishing the actual malice rule as it exists today, are the precursors to it.

A. Absence of Actual Malice in Mitigation

By the late eighteenth century, libel law was rapidly developing in England. In 1792, Parliament adopted Fox’s Act, which gave power back to the jury to issue a general verdict in libel cases. No longer was the jury, even in England, relegated to deciding only whether the defendant published the libel. The changes, however, were not limited to Parliament, as the courts in England also began liberalizing the common law itself. A prime example is *Knobell v. Fuller*.²⁹⁹

In *Knobell*, the defendant was a conservative daily news publication: *The Morning Post*.³⁰⁰ The alleged defamation was that Knobell, along with a co-conspirator, had swindled money from friends and family of felons in exchange for

²⁹⁶ *Id.*

²⁹⁷ 1 Tucker, *supra* note 253, at 16.

²⁹⁸ *Id.*

²⁹⁹ *Knobell v. Fuller* (1796) 170 Eng. Rep. 222, Append. 4, § xcii (UK).

³⁰⁰ *Id.*

securing pardons.³⁰¹ The co-conspirator was charged for the crime, but Knobel was not.³⁰² While the newspaper could not muster proof that the allegations against Knobel were true, it nevertheless sought to offer as mitigating evidence that there were “strong grounds of suspicion against” Knobel.³⁰³ As defense counsel explained, “they might prove facts which showed there was cause of suspicion, and therefore proved that the defendants were not induced to publish this paper by reason of malice against the plaintiff.”³⁰⁴ Instead, the evidence would show that they published “for the purpose of conveying information to the public, this being a concern of a public nature.”³⁰⁵ Such evidence, counsel argued, should reduce the damages—even though it could not absolve the paper of liability altogether.

Chief Judge James Eyre agreed, holding that evidence tending to show a belief in the truth of the allegations could be offered to mitigate damages.³⁰⁶ He admitted the evidence and allowed defense counsel to call two witnesses to demonstrate that Knobel was implicated in the scheme, although he turned out not to be a part of it.³⁰⁷ The jury then found in favor of Knobel and awarded him 200 shillings.³⁰⁸ While the press lost the battle that day, a war was won. *Knobel v. Fuller* established the rule—for the first time—that a journalist’s intent in publishing the news was relevant insofar as it might be offered to reduce damages. The value judgment made sense: there is a material difference regarding culpability as between a defamatory statement that was *mistake* and one that was an outright *lie*.

By 1803, the principle in *Knobel* found its way across the Atlantic. In *Kennedy v. Gregory*, decided by the Supreme Court of Pennsylvania, a schoolmaster sued after being labeled a drunk.³⁰⁹ At the trial court, as in *Knobel*, the defendant attempted to offer evidence that the charge was not fabricated.³¹⁰ Instead, he had been told by another that Kennedy had a reputation for drinking.³¹¹ The court, however, did not permit the evidence, and the jury found in favor of Kennedy.³¹²

The verdict did not survive the appeal though. Rather, two of the three

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at § xciii.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at § xciii–xciv.

³⁰⁷ *Id.* at § xciv.

³⁰⁸ *Id.*

³⁰⁹ *Kennedy v. Gregory*, 1 Binn. 85, 86 (Pa. 1803).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

justices found that the evidence of Kennedy's reputation should have been admitted: it was relevant that the defendant be able to produce evidence that he had been told that Kennedy had a reputation for drinking "to take off all presumption that the charge was a fabrication of his own."³¹³ As the court had in *Knobell*, the Pennsylvania Supreme Court recognized that there was a difference in fault as between a wholly fabricated charge and a charge made in reliance on another source, even if ultimately wrong.

Thereafter, courts in Pennsylvania repeatedly allowed evidence showing that the defendant *believed* the charge even if he was ultimately mistaken. In 1806, a court found that the defendant should be allowed to "give evidence of circumstances which had induced a suspicion of felony" by the plaintiff.³¹⁴ And in 1808, the court agreed with William Duane, the firebrand publisher of the *Aurora*, who had argued for the application of the principle:

Can it be, that like damages should be given against two defendants, one of whom received his information from such sources as were entitled to a certain degree of credit, while the other devised it by his own wicked imagination? I think it cannot. Such evidence certainly goes to the degree of malice³¹⁵

Nor was the principle limited to Pennsylvania. In *Larned v. Buffinton*,³¹⁶ a Massachusetts defendant alleged that the plaintiff had stolen his horses. At trial in 1807, the defense argued that he should be allowed to submit evidence of his belief in the charge to mitigate damages.³¹⁷ The trial court, however, refused to hear it.³¹⁸ As in *Kennedy*, the ruling was reversed on appeal: "When, through the fault of the plaintiff, the defendant . . . at the time of speaking the words . . . had *good cause to believe they were true*, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate the damages."³¹⁹ Likewise, in South Carolina, a defendant could show "a ground of suspicion" for the charge to reduce damages.³²⁰ The same rule was recognized in Connecticut.³²¹ In Ohio, damages could be mitigated by "[a]ny circumstance, therefore, tending to

³¹³ *Id.* at 87.

³¹⁴ *Id.* at 90.

³¹⁵ *Id.*

³¹⁶ 3 Mass. 546, 550 (1807).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 553 (emphasis added).

³²⁰ *Buford v. McLuny*, 10 S.C.L. (1 Nott & McC.) 268, 271 (1818) ("A person may prove, in mitigation of damages, such facts and circumstances as show a ground of suspicion, not amounting to actual proof of plaintiff's guilt."); see also *Root v. King*, 7 Cow. 613, 636 (N.Y. Sup. Ct. 1827); *Gilman v. Lowell*, 8 Wend. 573, 583 (N.Y. Sup. Ct. 1832); *Beehler v. Steever*, 2 Whart. 313, 326 (Pa. 1837).

³²¹ *Stow v. Converse*, 4 Conn. 17, 25 (1821) ("ground of suspicion of their truth, may be proved in mitigation of damages").

show that the defendant spoke the words under a mistake, or that he had some reason to believe they were true.”³²² In Indiana, “general rumors, or a general suspicion of the guilt of the plaintiff of the crime imputed to him by the defendant, may be given in evidence in mitigation of damages.”³²³

The thrust of this early doctrine is remarkably similar to that of today’s actual-malice rule: courts must consider a defendant’s state of mind at the time of publication in order to assess the degree of fault that accompanied the libel. And as the law developed, this idea, paired with a recognition of the social importance of statements about matters of public concern, would transform into a privilege closer to the one we know today, becoming a bar to liability. Justice Thomas, however, did not consider this early case law or the body of precedent that developed shortly thereafter that barred recovery in public official cases, even in cases of falsity, so long as the falsity was the result of an honest mistake.

B. Absence of Actual Malice as a Bar to Liability

Although the court in *Lewis v. Few* rejected Few’s argument in favor of privileged falsity, the analogy that his counsel offered between the master/servant privilege and the governed/governor privilege was hard to shake: If the People are the masters of their government, and their representatives in government are their servants, the People should be privileged to discuss their servants’ conduct just as masters were privileged to make statements about servants.³²⁴ But the idea, however sensible, was also radical. Courts in the early nineteenth century struggled with how or whether they could honor the gaudy relics of the common law that made public discussion about public men dangerous in a system of government reliant on that very discussion.

As with an absence of actual malice admissible in mitigation of damages, the master/servant privilege also came from a leading case in England, *Weatherston v. Hawkins*.³²⁵ In that 1785 case, Hawkins sent his servant, Weatherston, to buy a few books at the local market.³²⁶ Hawkins, “more curious” than he sometimes was, looked over the servant’s account “article by article, and in one, a book [he] well knew the price of, [he] found [the servant] had charged [him] one shilling more than it cost, and that shilling he kept in his pocket.”³²⁷ Hawkins then relayed this assessment in a letter to an acquaintance who was considering hiring Weatherston.³²⁸

Weatherston brought a defamation lawsuit based on the allegations. At trial,

³²² *Wilson v. Apple*, 3 Ohio 270, 271 (1827).

³²³ *Sanders v. Johnson*, 6 Blackf. 50, 54 (Ind. 1841).

³²⁴ See Chap. 2, *infra*, at 86-87 n.29 (discussing master/servant analogy).

³²⁵ *Lewis v. Few*, 5 Johns. 1, 35 (N.Y. Sup. Ct. 1809) (citing *Weatherston v. Hawkins* (1786) 99 Eng. Rep. 110 (KB)).

³²⁶ *Weatherston*, 99 Eng. Rep. at 110.

³²⁷ *Id.*

³²⁸ *Id.*

Hawkins did not attempt to show that the charge was true as, evidently, it was not, despite Hawkins's prior math, and the jury found in favor of Weatherston.³²⁹ On appeal, Lord Chief Justice Mansfield, having heard from Weatherston's counsel, did not even let the defendant's barrister speak. Instead, he said:

I have held more than once that an action will not lie by a servant against his former master for words spoken by him in giving a character of the servant. . . . to every libel there may be a necessary and implied justification Words may . . . be justified on account of the subject-matter, or other circumstances."³³⁰

Where it was a master providing an assessment of a servant in response to another seeking a reference, he thought it should be privileged.³³¹

Although Few's counsel in *Lewis* appears to have been the first in the United States to attempt to draw the analogy, he was not the last. In the 1830s, in *State v. Burnham*,³³² the defendant in a criminal libel prosecution alleged that the lawyer for Strafford County, New Hampshire was "intemperate" and "incompetent to the discharge of the duties of his said office." This was not some offhand remark; the defendant printed two hundred copies of it and sent it to his fellow citizens.³³³ At trial, the defendant argued that, if he made the charges against the lawyer "in good faith, with pure motives, and upon probable grounds" to believe it, then it was irrelevant whether the charge was true.³³⁴

Unlike in *Lewis*, the court accepted the argument. As the Superior Court of Judicature of New Hampshire explained, "it is not expedient that the errors, or foibles, or even the crimes of individuals, should be made the subject of written publication, *except for the purpose of answering some good end.*"³³⁵ Elaborating on the exception, it found that Hamilton's rule—that freedom of press meant the freedom to publish the truth from good motives—was too narrow.³³⁶ Instead, a defendant could excuse his conduct if, "upon a lawful occasion, [he] proceeded with good motives—*upon probable grounds*—upon reasons which were apparently good, but upon a supposition *which turns out to be unfounded.*"³³⁷ In short, the court held for the first time that falsity may be privileged and a lack of actual malice might be a defense.

³²⁹ *Id.*

³³⁰ *Id.* at 112.

³³¹ *Id.*

³³² 9 N.H. 34 (1837).

³³³ *Id.* at 36.

³³⁴ *Id.*

³³⁵ *Id.* at 41 (emphasis added).

³³⁶ *Id.* at 43.

³³⁷ *Id.* (emphasis added).

What were such lawful occasions? They included “removal of an incompetent officer, [preventing] the election of an unsuitable person, or, generally, to give useful information to the community . . . in order that they may act upon such information.”³³⁸ That is, the court sought to protect from liability allegations affecting a republican government. Recognizing that it “would be an idle and vain attempt, to endeavor to reconcile all the discussions in the books upon the subject,” the court expressed its confidence that it had provided “sound practical rules, which, while they give no countenance to defamation, protect all persons in publishing, upon lawful occasions, the truth from whatever motives, *and what they have reason to believe the truth*, if it is done with motives which will bear examination.”³³⁹

Burnham, like *Weatherston* before it, had staying power.³⁴⁰ Some 30 years later, during the Reconstruction, the Superior Court of Judicature of New Hampshire doubled down. In *Palmer v. City of Concord*,³⁴¹ the court explained:

[I]n this country every citizen has the right to call . . . attention . . . to the mal-administration of public affairs or the misconduct of public servants, if his real motive in so doing is to bring about a reform of abuses, or to defeat the re-election or re-appointment of an incompetent officer. If information given in good faith to a private individual of the misconduct of his servant is ‘privileged,’ equally so must be a communication to the voters of a nation concerning the misconduct of those whom they are taxed to support and whose continuance in any service virtually depends on the national voice.

Other state courts adopted similar reasoning based either on the master/servant analogy to *Weatherston* or on a rapidly developing, related privilege in England: “If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications [‘made by a person in the discharge of some public . . . duty, whether legal or moral’] are protected for the common convenience and welfare of society.”³⁴²

To offer just one other example, take the Supreme Court of Texas in *Express Printing Co. v. Copeland*:³⁴³ “Whatever pertains to the qualification of the candidate for the office sought is a legitimate subject for discussion and comment, provided that such discussion and comment is not extended beyond the prescribed limits.” Those limits were that such discussion “must be confined to the truth, *or*

³³⁸ *Id.* at 41-42.

³³⁹ *Id.* at 45-46 (emphasis added).

³⁴⁰ For cases decided from 1837 to 1868, see, for example, *Swan v. Tappan*, 59 Mass. (5 Cush.) 104 (1849); *Reynolds v. Tucker*, 6 Ohio St. 516 (1856); *Gassett v. Gilbert*, 72 Mass. (6 Gray) 94 (1856).

³⁴¹ *Palmer v. City of Concord*, 48 N.H. 211, 216 (1868).

³⁴² *Toogood v. Spyryng* (1834) 149 Eng. Rep. 1044 (KB).

³⁴³ *Express Printing Co. v. Copeland*, 64 Tex. 354, 358 (1885).

*what in good faith and upon probable cause is believed to be true.*³⁴⁴ Elaborating on its rationale, the court explained that, “[i]n our form of government the supreme power is in the people; they create offices and select the officers.”³⁴⁵ It then posed a rhetorical question: “[A]re the people to be denied the right of discussion and comment respecting the qualification or want of qualification of those who, by consenting to become candidates, challenge the support of the people on the ground of their peculiar fitness for the office sought?”³⁴⁶

Courts in Iowa, Vermont, Minnesota, Michigan, Kansas, Rhode Island, Pennsylvania, and South Dakota all adopted similar rules in public official cases.³⁴⁷ That these cases exist, in legions, nonetheless, should not be surprising. *Sullivan* itself noted the existence of a common law “privilege immunizing honest misstatements of fact”—an accurate assessment that belies Justice Thomas’ assertion that the common law privilege “applied only when the facts stated were true” (or Justice Gorsuch’s statement that the controlling view of freedom of the press in the United States was that of Blackstone: “if he publishes falsehoods ‘he must take the consequence of his own temerity’”³⁴⁸).

In *Sullivan*, Justice Brennan discussed at length one such case: the 1908 Kansas Supreme Court decision in *Coleman v. MacLennan*.³⁴⁹ In *Coleman*, the *Topeka State Journal* published an article addressing certain school-funding transactions directed by a commission on which plaintiff, the state attorney general, sat. The Kansas Supreme Court posed the question as one of “utmost concern”: “What are the limitations upon the right of a newspaper to discuss the official character and conduct of a public official . . . ?”³⁵⁰ Noting that the state constitution protected “liberty of the press,” the court observed that “[f]requently it is said that the expression was used in the sense it bears in the common law.”³⁵¹ This begged

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Mott v. Dawson*, 46 Iowa 533, 537 (1877) (county board supervisor) (“if the words were spoken . . . without malice, in good faith, believing them to be true, and having reasonable cause as a prudent, careful man to so believe . . . the defendant is not liable”); *Shurtleff v. Stevens*, 51 Vt. 501, 511-12 (1879) (clergyman) (adopting principle that, “[i]f fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society”); see also *Marks v. Baker*, 9 N.W. 678 (Minn. 1881) (city treasurer); *Miner v. Post & Tribune Co.*, 13 N.W. 773 (Mich. 1882) (police justice); *State v. Balch*, 2 P. 609 (Kan. 1884) (candidate for county attorney); *Kent v. Bongartz*, 22 A. 1023 (R.I. 1885) (police officer); *Briggs v. Garrett*, 2 A. 513 (Pa. 1886) (judge); *McNally v. Burleigh*, 39 A. 285 (Me. 1897) (deputy sheriff); *Boucher v. Clark Pub. Co.*, 84 N.W. 237 (S.D. 1900) (sheriff).

³⁴⁸ Compare *Sullivan*, 376 U.S. at 283 n.21 with *McKee*, 139 S. Ct. at 683 (Thomas, J.) and *Berisha*, 141 S. Ct. at 2425 (Gorsuch, J.).

³⁴⁹ 376 U.S. at 283 (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)).

³⁵⁰ *Coleman*, 98 P. at 283.

³⁵¹ *Id.*

the question though: “The common law at what stage of its development?”³⁵²

“Certainly not,” the court said, when English settlers stepped foot on the eastern shores of the continent in 1607—fifteen years before the first newspaper would be published.³⁵³ At that time, English law was the stuff of the Star Chamber and being “subservient to royal proclamations.”³⁵⁴ Even after the Star Chamber was abolished in 1641, “Parliament assumed the prerogative respecting the licensing of publications.”³⁵⁵ At this point, and through the end of the century, the liberty of the press in England was “more theoretical than actual on account of the harshness of the law of libel.”³⁵⁶

After reviewing the liberalization of defamation in England through the eighteenth century, the court observed:

[T]he English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies.³⁵⁷

The common law of defamation, the court said, “is, as a whole, absurd in theory, and very often mischievous in its practical operation.”³⁵⁸ “The result,” it said, “is that ‘liberty of the press’ is still an undefined term.”³⁵⁹

Still, “[c]ertain boundaries are fairly discernible within which the liberty must be displayed, but precise rules cannot be formulated in advance to govern its exercise on particular occasions.”³⁶⁰ The “constitutional guaranty clearly” meant at least that there shall be no prior restraints and that the press shall be free of court censorship.³⁶¹ Early commentators said the guarantee meant nothing more, but “later commentators and later decisions maintain that it does mean more.”³⁶² Quoting Cooley, the court explained, “it is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions.”³⁶³ The freedom of the press, as Cooley (and the Kansas

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* at 284.

³⁶² *Id.*

³⁶³ *Id.*

Supreme Court) saw it, implied:

a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their . . . scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals.³⁶⁴

But, the court said, there must be an exception when another interest is considered: “Where the public welfare is concerned, the individual must frequently endure injury to his reputation without remedy.”³⁶⁵ Indeed, “[i]n some situations an overmastering duty obliges a person to speak, although his words bring another into disrepute.”³⁶⁶ In the court’s opinion, one such occasion was speech regarding the qualifications of public officials:

Under a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointive, and by becoming a candidate, or allowing himself to be the candidate of others, a man tenders as an issue to be tried out publicly before the people or the appointing power his honesty, integrity, and fitness for the office to be filled.³⁶⁷

While this could inconvenience public officials and occasionally injure their reputations, this injury was outweighed by “[t]he importance to the state and to society” to discuss public officials’ qualifications.³⁶⁸

Turning to the rule to be extrapolated from these principles, the court explained, as so many courts had held before it, “we think a person may in good faith publish whatever he may honestly believe to be true . . . without committing any public offense, although what he publishes may in fact not be true, and may be injurious to the character of others.”³⁶⁹ Without allowing for honestly mistaken statements, the “liberty of press [would] be endangered if the discussion of such matters must be confined to statements of demonstrable truth.”³⁷⁰ Thus, “[i]f . . . the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value.”³⁷¹

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 285.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 286.

³⁶⁹ *Id.* at 287.

³⁷⁰ *Id.* at 289.

³⁷¹ *Id.* at 290.

Coleman was the intellectual capstone of early American cases that had transformed the common law rules in *Knobell* and *Weatherston* into safeguards for republican debate in the United States.³⁷² Together, these cases demonstrate that the common law of libel did consider a lack of actual malice as a defense to a defamation claim by a public official, even for false statements of fact—and did so precisely because of the chilling effect that unrestrained libel lawsuits could have on public discourse about political life. Justices Thomas and Gorsuch are, therefore, mistaken on multiple counts. First, common law privileges “on public questions and matters of public interest” were not “applied only when the facts stated were true.”³⁷³ Second, the common law in the eighteenth and nineteenth centuries did not “deem[] libels against public figures to be, if anything, more serious and injurious than ordinary libels.”³⁷⁴ These cases made it harder for such individuals to recover damages—not easier.

In 1888, *Newspaper Libel, A Handbook for the Press* hit the shelves. At a slim 300 pages, it billed itself as the first “convenient [legal] reference [for] newspaper offices.”³⁷⁵ In the chapter “Political Libels,” the handbook advised its readers that, “[a]mong the various publications which are protected by the law of privilege . . . are those respecting public men and candidates for public office.”³⁷⁶ Based on that, it instructed, “if the charges are based upon some foundation in fact . . . and published in good faith, the publication is privileged, even though it contains false imputations upon the integrity of persons whose conduct is being considered.”³⁷⁷

It is not then true, as Justice Gorsuch wrote in *Berisha*, that there was one “accepted view” of libel for “two centuries” that allowed for the recovery of damages in all cases concerning “false publications.”³⁷⁸ By the end of the nineteenth century, the precursor to the actual malice rule was already a part of desk references for journalists. If anything, *Sullivan* was a product of the common law, a constitutionalization, first suggested by Cooley, of an increasingly important doctrine meant to protect discussion about public officials. That is to say, *Sullivan*’s actual malice rule was a natural extension of what came before it. As the *Handbook for the Press* explained, the privilege was born of the very structure of American government: “When the American colonies united under a republican form of government, the writers for the press in this country considered all restraints

³⁷² Not all courts agreed. See Freedman, *American Libel Law 1825-1896: A Qualified Privilege for Public Affairs?*, 30 *Chitty’s L.J.* 113, 115 (1982) (“Cases were decided each way, and it is difficult to judge which view was more widely held.”).

³⁷³ *McKee*, 139 S. Ct. at 679 (Thomas, J.); *Berisha*, 141 S. Ct. at 2424 (Gorsuch, J.).

³⁷⁴ *McKee*, 139 S. Ct. at 679.

³⁷⁵ Merrill, *supra* note 253, at 3.

³⁷⁶ *Id.* at 208.

³⁷⁷ *Id.*

³⁷⁸ *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J.).

removed”³⁷⁹ Yet, again, for our purposes it suffices to say that *Sullivan* does not “lack . . . historical support.”³⁸⁰

Even acknowledging the ample historical support for putting additional burdens on public officials, there is still the question of whether such burdens should be placed on public *figures* who, the argument would go, lie farther from the republican rationale for an actual malice rule. The petition in *Berisha*, after all, attacked not the actual malice rule under *Sullivan*, but the rule as applied to public figures in cases like *Curtis Publishing Co. v. Butts*.³⁸¹

Yet, as with public officials, there is historical support for extension of the actual malice rule to public figures. In the common law doctrine of fair comment, for example, we see judicial recognition of the flaws in a rule that protects public debate only when it involves discussion of public officials. As Martin Newell’s treatise explained, “[e]very person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose.”³⁸² Traditionally, the doctrine was limited in several respects. It applied only to matters that “invite public attention . . . never attack[] the individual, but only his work . . . never impute[] or insinuate[] dishonorable motives . . . [and] never take[] advantage of the occasion to gratify private malice.”³⁸³

The contexts in which fair comment was allowed, however, tell us what early citizens understood to be topics of discussion that merited additional protection from defamation liability. In these cases, the law spoke neither of public officials nor public figures, but rather *public men* and *public conduct* generally.³⁸⁴ As one nineteenth century treatise said, “[a]ll political, legal and ecclesiastical matters [were] matters of public concern.”³⁸⁵ Simply, “[a]nything that is a public concern to the inhabitants is a matter of public interest within the meaning of the rule.”³⁸⁶ Thus, the doctrine covered: (1) “[m]atters concerning the administration of the government” and (2) “[m]atters pertaining to the administration of public justice,” but also those relating to (3) “the management of public institutions” like “colleges, hospitals, [and] asylums”; (4) “appeals for public patronage,” like “artists, public writers, [and] lecturers”; (5) “the character and quality of public entertainments,” like “theatrical and musical performances”; and (6) “religious bodies.”³⁸⁷

³⁷⁹ Merrill, *supra* note 253, at 210.

³⁸⁰ *Berisha*, 141 S. Ct. at 2425 (Thomas, J.).

³⁸¹ 388 U.S. 160 (1967).

³⁸² Newell, *supra* note 34, at 564.

³⁸³ *Id.* at 567.

³⁸⁴ *Id.* at 572.

³⁸⁵ *Id.* at 575.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 576–90.

With respect to all of these matters, there was a common rationale: by moving into the public eye, one acquiesced to its gaze. As the same treatise explained in the context of public patronage, “a person [who] appeals to the public by writing letters to the newspapers, either to expose what he deems abuses or to call attention to his own particular grievances . . . cannot complain if he gets the worst of it.”³⁸⁸ Another example: if a “medical man brings forward some new method of treatment, and advertises it largely as the best, . . . [h]e may be said to invite public attention.”³⁸⁹ In short, “[w]hoever seeks notoriety or invites public attention is said to challenge public criticism; and he cannot resort to the law courts if that criticism be less favorable than he anticipated.”³⁹⁰

While the doctrine of fair comment was, ostensibly, limited to matters of opinion and did not extend to allegations against a public person’s private character, in several nineteenth century cases, courts extended the doctrine developed in early public official cases to public figures to protect even false statements of fact. In *Press Co. v. Stewart*,³⁹¹ for example, the plaintiff opened a typing school “profess[ing] to be a teacher of short-hand writing, type-writing, and phono-scribing.” The offices he set up were “alluringly placarded with signs, and various devices in the way of circulars were scattered broadcast in the community calling attention to the merits of his system.”³⁹² When an editor’s attention was piqued by the “extravagant nature” of the advertisements, he sent a reporter to the new business.³⁹³

Reversing a lower court’s decision upholding the jury’s verdict in favor of the plaintiff, the Pennsylvania Supreme Court reasoned by analogy to cases adopting privileges in the public official context and held that “a communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause.”³⁹⁴ In such cases, malice would not be inferred. Instead, “[a]ctual malice must be proved before there can be a recovery.”³⁹⁵ Realizing that it was extending the rule, the court said that it might be “asked why *this* article is so privileged.”³⁹⁶ It was privileged not because the plaintiff was a public official (he wasn’t), but “because it was proper for public information.”³⁹⁷ The plaintiff “was holding himself out to the world as a teacher and guide of youth [and] was seeking to attract them to his place by signs, placards,

³⁸⁸ *Id.* at 583–84.

³⁸⁹ *Id.* at 584.

³⁹⁰ *Id.*

³⁹¹ 14 A. 51, 52 (Pa. 1888).

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 53.

³⁹⁵ *Id.*

³⁹⁶ *Id.* (emphasis added).

³⁹⁷ *Id.*

and advertisements, some of them, at least, of an extraordinary nature.”³⁹⁸ As a result, “[t]his gave him a *quasi* public character.”³⁹⁹ It made sense to require such a plaintiff to prove actual malice because “[w]hether he was a proper person to instruct the young” was a “matter[] of importance to the public, and the Press was in the strict line of its duty when it sought such information, and gave it to the public”⁴⁰⁰ The court added, “if that information tended to show that the plaintiff was a charlatan, and his system an imposture, the more need that the public, and especially parents and guardians, should be informed of it.”⁴⁰¹

Courts also extended this doctrine to titans of industry. In *Crane v. Waters*,⁴⁰² an 1882 case out of federal court in Massachusetts, the court found that a newspaper article about a railroad baron was privileged as well. There, the plaintiff alleged that the *Boston Daily Advertiser* had defamed him by suggesting he would run a particular railroad into bankruptcy.⁴⁰³ The defendants, however, argued that the topic of the railroads was

one in which the public has an interest, and that in discussing a subject of that sort a public speaker or writer is not bound at his peril to see that his statements are true, but has a qualified privilege, as it has been called, in respect to such matters.⁴⁰⁴

The court agreed, finding that when the topic of discussion was “the public conduct and qualifications of a public man,” newspapers “are not held to prove the exact truth of their statements.”⁴⁰⁵

In finding that the defendant could prevail by showing that it published the statements believing them to be true, even if they turned out to be false, the court explained, “inasmuch as the project was one which affected a long line of road, as yet only partly built, and the consolidation of several companies, it assumes public importance.”⁴⁰⁶ “For this reason,” it continued, the character of the plaintiff, as a constructor and manager of railroads, seem to me to be open to public discussion when he comes forward with so great and important a project affecting many interests besides those of the shareholders of one road.”⁴⁰⁷ Thus, “the defendants . . . have the qualified privilege which attaches to discussions of public affairs.”⁴⁰⁸

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² 10 F. 619, 619 (C.C.D. Mass. 1882).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 620.

⁴⁰⁵ *Id.* at 620–21.

⁴⁰⁶ *Id.* at 621.

⁴⁰⁷ *Id.* at 622.

⁴⁰⁸ *Id.*

In so holding, the court relied not on the doctrine of fair comment but, like the Pennsylvania Supreme Court in *Stewart*, the analogy to cases adopting an actual malice defense.⁴⁰⁹

In *Struthers v. Peacock*,⁴¹⁰ an 1876 case, the plaintiff was an architect who had contracted with the city to provide certain services. The *Philadelphia Bulletin* alleged that the architect breached its contract with the city by procuring subpar marble for public buildings.⁴¹¹ Instructing the jury, the judge spoke at length about what he called a “public journalists” privilege.⁴¹² Having explained to the jury libel and malice, the judge moved to the issue of “whether these articles . . . are [nevertheless] deprived of malice by being what is called privileged communications, and whether they are within the proper province of the defendants as public journalists.”⁴¹³ Noting that the defendants were “publishers of a public journal,” he explained that it was “their right, and perhaps even their duty, to call attention to and make comments upon the manner in which the public buildings were being erected.”⁴¹⁴ The defendants “were probably doing the public a service in calling attention to the way the work was being done,” and such discussion must “be exercised freely without being subject to a too strict limitation.”⁴¹⁵

Importantly, this privilege applied even if the article at issue was false. As the court emphasized in *Struthers*, such articles do not lose their “privileged character by going at times somewhat beyond the limit of strict truth, or beyond what the writer may be able to prove.”⁴¹⁶ This, the court continued, is because “[e]ditors are not infallible any more than other men, and a fair margin must be allowed to them for want of absolute accuracy, and for the necessities and the circumstances under which journalistic writing has to be done.”⁴¹⁷ That is, some breathing space must be allowed for inquiries by the press into the public affairs of others.

Admittedly, as with cases involving public officials, the courts were not unanimous in their protection of defendants who libeled public figures. In *Smith v. Tribune Co.*,⁴¹⁸ for example, Gerrit Smith brought a libel lawsuit against the Tribune Company for alleging that he faked lunacy in order to avoid criminal charges stemming from his involvement in the raid at Harper’s Ferry. In response,

⁴⁰⁹ *Id.* (citing *State v. Burnham*, 9 N.H. 34 (1837); *Commonwealth v. Morris*, 3 Va. (1 Va. Cas.) 176 (1811); *Commonwealth v. Clap*, 4 Mass. 163 (1808)).

⁴¹⁰ 11 Phila. Rep. 287 (1876).

⁴¹¹ *Id.* at 290.

⁴¹² *Id.* at 290–93.

⁴¹³ *Id.* at 292.

⁴¹⁴ *Id.* at 293.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ 22 F. Cas. 689, 690 (C.C.N.D. Ill. 1867) (No. 13,118).

the Tribune argued that the libel was privileged because Smith “was a public man; that he professed to be a teacher and educator of the public; that he had been in the habit of delivering speeches and lectures from time to time, and made various publications under his own name and of which he was the recognized author.”⁴¹⁹ The court disagreed, noting that the allegations related not to those matters but to feigning lunacy; his public conduct was immaterial.⁴²⁰

Still, we see evidence that public figures in Pennsylvania and Massachusetts, as well as Vermont and Maine, including clergyman, unelected but high-profile political bosses, and those contracting to provide services to the government, were required to carry a heavier burden as defamation plaintiffs than private figures were.⁴²¹ Like *Lewis v. Few* before it, these cases demonstrate that, at least since the mid-1800s, a plaintiff’s involvement in public affairs could affect her burden in a libel case, even if she was not a public official. The idea being that, if her conduct affected public affairs, like a railroad baron’s conduct did, she should have to carry the same burden as a public official. True, in extending the actual malice rule to public figures in *Butts*, the Supreme Court did not, as Justice Thomas says, make “a sustained effort to ground [its] holding[] in the Constitution’s original meaning”—it relied instead on the obvious influence that public figures had over matters of public concern in the mid-twentieth century.⁴²² But that the Court did not rely on history to support its finding does not mean that there is no support in history for it. Thus, while Justice Thomas is not wrong about his characterizations of what the Court wrote in *Butts*, he is wrong in maintaining that the public figure rule “broke sharply from the common law of libel.”⁴²³

VI. JUSTICE THOMAS RELIES ON ENGLISH AUTHORITIES REJECTED BY THE FOUNDERS

In arguing against the actual malice rule, Justice Thomas eschewed this *American* history in favor of an understanding of the English common law *before* the Founding. In *McKee*, for example, Justice Thomas cited Blackstone to demonstrate what a plaintiff traditionally had to prove to maintain a defamation action, the allowed defenses, the existence of criminal libel laws, and that libels against public officials were treated more seriously than other libels at common law.⁴²⁴ He echoed Justice Byron White, who decades earlier said, “[t]he men who wrote and adopted the First Amendment were steeped in the common-law tradition of England.”⁴²⁵ Those men “read Blackstone, ‘a classic tradition of the bar in the

⁴¹⁹ *Id.* at 691.

⁴²⁰ *Id.*

⁴²¹ See, e.g., *Barr v. Moore*, 87 Pa. 385 (1878); *Shurtleff v. Stevens*, 51 Vt. 501, 511 (1879); *Bearce v. Bass*, 34 A. 411 (1896).

⁴²² 139 S. Ct. at 678.

⁴²³ *Id.*

⁴²⁴ *Id.* at 678-80.

⁴²⁵ *Gertz*, 418 U.S. at 381 n.14 (White, J., dissenting).

United States” and “learned that the major means of accomplishing his speech and press was to prevent prior restraints.”⁴²⁶ Justice Gorsuch, too, relies on Blackstone in his dissent in *Berisha*: “[E]very freeman has an undoubted right to lay what sentiments he pleases before the public’ but if he publishes falsehoods ‘he must take the consequence of his own temerity.’”⁴²⁷ It was this principle, Justice Gorsuch wrote, that “extended far back in the common law and far forward into our Nation’s history.”⁴²⁸

But one cannot read Blackstone in a historical vacuum. In his *Commentaries on the Laws of England*, Blackstone maintained that “[t]he liberty of the press . . . consists in laying no *previous* restraints upon publications.”⁴²⁹ But that was hardly the *only* view of the liberty of the press—especially in the United States. Founders like Thomas Jefferson and James Wilson hated Blackstone. And while we focus on them in this section, along with Blackstone’s editor in the United States, St. George Tucker, they were not alone. As James Madison wrote in the *Report of 1800*, the Blackstonian idea that freedom of press means freedom from previous restraints “can never be admitted to be the American idea of it: since a law inflicting penalties on printed publications, would have a similar effect with a law authorizing a previous restraint on them.”⁴³⁰ Additionally, recent exhaustive scholarship has dispelled the assumption that Blackstone’s view of freedom of the press was the prevailing one in the early United States.⁴³¹

While both Justices Thomas and Gorsuch have now invoked Blackstone, neither inquired into whether his view of the freedom of the press was shared by the Founders. There is, after all, a difference between an awareness or even an admiration of an author and agreement with an author. This is especially true where Blackstone’s *Commentaries* attempted to summarize the entire body of the English common law. For exactly that reason, Justice Thomas has recognized that Blackstone should not always be seen as controlling. As he wrote in *Trump v. Mazars USA, LLP*,⁴³² we need not rely on Blackstone if the law he summarized “had been a significant complaint of the American Revolution” and where the American experience “confirmed” a contrary precedent.

On Justice Thomas’ own logic, Blackstone and the English authorities he summarized should not be deemed controlling on the question of freedom of the press in the early United States. Initially, freedom of the press was a significant complaint of the Revolution. As Arthur M. Schlesinger Sr. wrote in *Prelude to Independence*, in the run up to the Revolution, “[b]ristling controversial articles . . .

⁴²⁶ *Id.*

⁴²⁷ 141 S. Ct. at 2426.

⁴²⁸ *Id.*

⁴²⁹ 4 *Tucker’s Blackstone*, *supra* note 34, at *151.

⁴³⁰ Madison, *The Report of 1800* (1980).

⁴³¹ See Bird, *Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798* (2020).

⁴³² 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting).

signaled the change and inevitably brought the patriot prints into head-on collision with the English common law of seditious libel.”⁴³³ As we have already seen, American experience confirmed contrary precedent to that of England—especially when it came to their rejection of common law rules meant to protect public debate.⁴³⁴ Even the Sedition Act, after all, allowed for truth as a defense to a seditious libel charge, unlike in England. As Judge Kent explained, unlike the English, “the people of this country have always classed the freedom of the press among their fundamental rights.”⁴³⁵ Thus, reliance on Blackstone in these matters, who Jefferson said did “more towards the suppression of the liberties of man, than all the million of men in arms of Bonaparte,” is fundamentally misplaced.⁴³⁶

William Blackstone was an Englishman born in 1723. He died in 1780, eleven years before the States ratified the First Amendment. He was a lawyer and a jurist, a politician and a professor.⁴³⁷ During his life he was “described as a failure at the bar at the outset of his career and an inadequate judge at the end,” and as “not a particularly successful politician;” he was “by no means a scientific jurist” and had “only the vaguest possible grasp of the elementary conceptions of law.”⁴³⁸ Nevertheless, his *Commentaries*, a four-volume work summarizing the whole of the common law, secured admiration in life and a legacy after his death. Published between 1765 and 1769 it was, in a word, “revolutionary.”⁴³⁹

Blackstone’s relationship with the liberty of press and libel, and his treatment of the two in the *Commentaries*, is bound up in his political devotion to the Crown and involvement in the colonial crisis of the 1760s.⁴⁴⁰ While the Stamp Act was first a debate about the right and power of Parliament to impose taxes on the Colonies, it also sparked a dialogue about the meaning of the liberty of the press in America. The Act, after all, imposed taxes on newspapers. As John Adams said, it was repugnant not just for its direct effects but also its indirect ones: to “strip us in a great measure of the means of knowledge, by loading the Press, the Colleges, and even an Almanack and a News-Paper, with restraints and duties.”⁴⁴¹

⁴³³ Schlesinger, *Prelude to Independence: The Newspaper War on Britain* viii (1st ed. 1957).

⁴³⁴ See Parts II-III *supra*.

⁴³⁵ *People v. Croswell*, 3 Johns. Cas. 337, 391 (N.Y. Sup. Ct. 1804).

⁴³⁶ [Letter from Thomas Jefferson to Horatio G. Spafford](#) (Mar. 17, 1814), in *Founders Online*, Nat’l Archives.

⁴³⁷ Unable to secure a professorship, Blackstone began informally lecturing students on the common law in 1753. *Letter from William Blackstone to the Earl of Reading*, 32 Harv. L. Rev. 974, 976 (1919).

⁴³⁸ Skinner, *Blackstone’s Support for the Militia*, 44 Am. J. Legal Hist. 1, 1 (2000).

⁴³⁹ Minot, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 Va. L. Rev. 1359, 1371 (2018).

⁴⁴⁰ Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 15 (1996); see also Bird, *supra* note 269, at 25-31 (marshalling evidence demonstrating that Blackstone had political and personal reasons to “manufacture” a definition of the liberty of the press at common law).

⁴⁴¹ Adams, *A Dissertation on the Canon and the Feudal Law*, No. 4, 21 (Oct. 1765).

Parliament adopted the Stamp Act in 1765, a year that Adams said was the “most remarkable Year of my Life;” one that unleashed “the unconquerable Rage of the People.”⁴⁴² As he wrote in December of that year, “[t]he People, even to the lowest Ranks, have become more attentive to their Liberties, more inquisitive about them, and more determined to defend them, than they were ever before known or had occasion to be.”⁴⁴³ The presses, he said, “have groaned, our Pulpits have thundered, our Legislatures have resolved, our Towns have voted, The Crown Officers have every where trembled.”⁴⁴⁴ The result: the conflict over the Act cultivated “ideas of press freedom that were a crucial precedent to the new nation’s First Amendment guarantee of press freedom.”⁴⁴⁵

Blackstone, then a member of Parliament, “exhibited little sympathy for the grievances of American colonists” and he voted for the Stamp Act as an MP.⁴⁴⁶ In response to the crisis and the Stamp Act’s ultimate downfall, Blackstone reissued the first volume of the *Commentaries* to make clear that, whatever might have happened with the Act, the Colonies remained subordinate to the Crown.⁴⁴⁷ He emphasized the importance of the Declaratory Act of 1766, the face-saving measure passed along with the repeal of the Stamp Act: “[T]he [Declaratory Act] expressly declares, that all his majesty’s colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and the parliament of Great Britain.”⁴⁴⁸ In fact, it was Blackstone who brought a motion to expunge colonial resolutions claiming power to the contrary.⁴⁴⁹

Blackstone also used libel to maintain the political status quo, one where the powerful were unimpeachable. In the third book, Blackstone discussed libel as a “private wrong.” According to him, “injuries affecting a man’s reputation or good name are, first, by malicious, scandalous, and *slandorous* words, tending to his damage and derogation.”⁴⁵⁰ Such injuries, he wrote, were especially heinous where the slanderous allegations were made of the peerage – that is, those in power.⁴⁵¹ Thus, even where allegations might not be slanderous at common law if made against “common” persons, the statutes of *scandalum magnatum* protected “high

⁴⁴² Adams, *The Diary of John Adams* (Dec. 1765).

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *The Colonial Virginia Press and the Stamp Act: An Expansion of Civic Discourse*, 38 J. Hist. 74, 83 (2012); see also Schlesinger, *supra* note 433, at viii.

⁴⁴⁶ Alschuler, *supra* note 440, at 15.

⁴⁴⁷ Orth, “*Catch A Falling Star*”: *The Bluebook and Citing Blackstone’s Commentaries*, 2020 U. Ill. L. Rev. Online 125, 126 (2020).

⁴⁴⁸ 1 Blackstone, *Commentaries* *109.

⁴⁴⁹ [“From Benjamin Franklin to David Hall, 26 February 1766.”](#) Founders Online, National Archives.

⁴⁵⁰ 3 Blackstone, *Commentaries* *123.

⁴⁵¹ *Id.*

and respectable characters.”⁴⁵² “A second way,” Blackstone wrote, “of affecting a man’s reputation is by printed or written libels.”⁴⁵³ In such a case, there were two causes that could be pursued: “one by indictment, another by action.”⁴⁵⁴

Blackstone elaborated on libel as a crime in the fourth volume, this time speaking of libels as “public wrongs.” Here, he again focused on the powerful, defining libel as “malicious defamations of any person, *and especially a magistrate*, made public by either printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule.”⁴⁵⁵ Because the wrong was provoking a breach of the peace or sowing discord between the King and his subjects, it was immaterial “whether the matter of it be true or false.”⁴⁵⁶ It was “the provocation, and not the falsity” that was “to be punished criminally.”⁴⁵⁷ As a result, the only elements of the crime were “first, the making or publishing of the book or writing; and, secondly, whether the matter be criminal.”⁴⁵⁸ The punishment for these kinds of public libels was, Blackstone wrote, a “fine, and such corporal punishment as the court in its discretion shall inflict.”⁴⁵⁹

Apparently concerned about republican opposition to his position, Blackstone was quick to add that these punishments did not infringe on liberty of the press as then understood. While he admitted that a free press was “essential to the nature of a free state,” the liberty of the press consisted only in “laying no previous restraints” on publication.⁴⁶⁰ Simply, liberty of the press meant only liberty from prior censorship. It did not foreclose subsequent punishments after publication for what one printed. As such, while “[e]very freeman has an undoubted right to lay what sentiments he pleases before the public,” “if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.”⁴⁶¹

While Blackstone purported to summarize the liberty of the press at

⁴⁵² *Id.* In addition, Blackstone recognized the Star Chamber doctrine of seditious libel. *Id.* at 124 (“Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man.”).

⁴⁵³ *Id.* at 125.

⁴⁵⁴ *Id.*

⁴⁵⁵ 4 Blackstone, *Commentaries* *150.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*; see *id.* at 151 (“in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law”).

⁴⁵⁸ *Id.* at 151.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* Unfortunately, Blackstone did not define liberty of the press in his *Analysis on the Laws of England*, published first in 1756, which would have provided a pre-colonial crisis definition. See generally Blackstone, *An Analysis of the Laws of England* (1756); see also Cook, *William Blackstone: A Life and Legacy Set Apart for God's Work*, 13 Regent U. L. Rev. 169, 174 (2000).

⁴⁶¹ *Id.*

common law, his “definition of liberty of the press had *not* been the English judiciary’s definition before 1769.”⁴⁶² In fact, in 1755, William Murray, who would shortly become the Lord Chief Justice of the King’s Bench (that is, Lord Mansfield), said that “the liberty of the press is that of using your talents in writing, and that it admits of printing everything that don’t offend the laws, and the Crown has no prerogative now to demanded that license.”⁴⁶³ Although Mansfield recognized that England’s system of prior restraint expired at the end of the seventeenth century, “he did not then equate the lapse of licensing with the totality of liberty of the press” as Blackstone did.⁴⁶⁴

In fact, “only a handful of writers had used a definition remotely like freedom from licensing and other prior restraint.”⁴⁶⁵ As Wendell Bird explains in *The Revolution in the Freedoms of Press and Speech*, “[t]he majority of writers addressing the meaning of freedom of press continued to define it in a broad sense, even though Blackstone had just published his narrow definition.”⁴⁶⁶ According to Bird, “[n]ewspaper essays sometimes cited Blackstone on English law, but his definition of freedom of press was conspicuously passed over and indirectly contradicted in most essays citing him during 1769-1775.”⁴⁶⁷ Consistent with Bird’s views, a search for references to “previous restraints” in newspapers or correspondence of the Founders of the time return no results between 1769 and 1788; as far as books from the time, there are just a handful of hits.⁴⁶⁸

The first reference in the Founders’ early correspondence to “previous restraints” is a February 18, 1789, letter to John Adams from William Cushing, who within a year would be appointed to the Supreme Court.⁴⁶⁹ In that letter, Cushing sought Adams’ advice on the meaning of the freedom of press clause in the Massachusetts Declaration of Rights. After reviewing the state of the law in England, Cushing wrote, “[t]he question is – whether it is law now, *here*” (his emphasis). The protection in the Declaration of Rights was “very general & unlimited,” and Cushing questioned what limits could be read into it. Invoking Blackstone, Cushing told Adams, “*That* is, no doubt, the liberty of the press, – as allowed by the law of England. But the words of our Article, understood according to plain English & common sense – make no such distinction, & must exclude *subsequent* restraints – as much as, *previous restraints*.” This must be the case,

⁴⁶² Bird, *supra* note 269, at 23.

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* Mansfield would, however, later adopt Blackstone’s definition, likely for the same political reasons that Blackstone had manufactured the definition to begin with.

⁴⁶⁵ *Id.* at 181.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 182.

⁴⁶⁸ Repositories searched include Hathitrust’s digital library of more than 17 million digitized items, Founders Online, a database hosted by the National Archives that includes more than 120,000 digitized items, and Newspapers.com, which includes digitized editions of 19,482 newspapers.

⁴⁶⁹ [To John Adams from William Cushing](#), 18 February 1789,” Founders Online, National Archives.

Cushing wrote, because “if all men are restrained, by the fear of jails, Scourges & loss of ears, from examining the conduct of persons in administration . . . from declaring it to the public; *that* will be as effectual a restraint, as any previous restraint whatever.”⁴⁷⁰

Blackstone’s definition was also disputed in the United States Congress, especially by Democratic-Republicans engaged in a pitched battle against the Sedition Act. In July 1798, Harrison Gray Otis stood on the floor of the House of Representatives in Philadelphia. Otis, a Boston millionaire and a leading Federalist, had the job of defending the Sedition Act, adopted earlier that year, from attacks by Democratic-Republicans like John Nicholas and Albert Gallatin. One of the main criticisms was that the Act violated the freedom of the press.⁴⁷¹ Otis disagreed and invoked Blackstone’s definition of liberty of the press as evidence that the Sedition Act was constitutional as it only punished speech; it did not restrain it. But Otis added, “[h]e would not . . . dwell upon the law of England, the authority of which it might suit the convenience of gentlemen to question.”⁴⁷² And, indeed, later in the debates, Gallatin rose to attack the Act, saying that it was an “insulting evasion of the Constitution” to say that the freedom of the press was not violated “so long as we do not prevent but only punish your writings.”⁴⁷³

Blackstone’s views on liberty and libel were, early on, subject to substantial criticism. Examples of this criticism abound, and Bird has catalogued many of them. The American Revolution, Bird offered, was a revolution against British rule and, at the same time, a revolution “in rights against British law’s restrictions.”⁴⁷⁴ Among the other rules revolted against in vindication of those rights was “an assertion or exercise of the narrow freedoms of press and speech described by Blackstone.”⁴⁷⁵ In its place, new U.S. citizens argued for “expansive freedoms that allowed denunciation of the British government and monarchy and advocacy of a republican replacement.”⁴⁷⁶ Put differently, “While the revolutionary colonists marched to radical Whig and other dissenting thought, Blackstone . . . [was] nearly the opposite.”⁴⁷⁷

Thomas Jefferson and Blackstone. Thomas Jefferson’s disagreement with Blackstone began as early as 1776. After the Revolution, Jefferson demanded that

⁴⁷⁰ *Id.* These arguments would be echoed years later during the crisis surrounding the Sedition Act by “Hortensius,” i.e., George Hay, a Virginian and federal judge. See, e.g., *The Advertiser* 2 (Feb. 11, 1799) (“If freedom of the press consists in an exemption from previous restraint, Congress may, without injury to the freedom of the press, punish with death any thing actually published, which a political inquisition may chuse to condemn.”).

⁴⁷¹ 8 *The Debate and Proceedings in the Congress of the United States* 2148 (1798-99).

⁴⁷² *Id.*

⁴⁷³ *Id.* at 2160.

⁴⁷⁴ Bird, *supra* note 269, at 8-9.

⁴⁷⁵ *Id.* at 9.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

the then-existing colonial Virginia laws be repealed and “adapted to our republican form of government.”⁴⁷⁸ A compatriot suggested that they adopt Blackstone and purge “what was inapplicable, or unsuitable to us.”⁴⁷⁹ But Jefferson disagreed because the end product would retain the “same chaos of law-lore *from which we wished to be emancipated.*”⁴⁸⁰

While Jefferson won that battle, he did not stem Blackstone’s acceptance in the young country. For years, “Jefferson derided the *Commentaries* as dangerous for its . . . over-simplified view of law.”⁴⁸¹ But more importantly, in Blackstone, Jefferson saw “a retreat from the ideals of the Revolution.”⁴⁸² By 1810, he lamented that young lawyers seemed to believe “that every thing which is necessary is in [Blackstone], [and] what is not in him is not necessary.”⁴⁸³ A year later, he wrote that the country had been filled with “Blackstone lawyers . . . who render neither honor nor service to mankind.”⁴⁸⁴ In 1812, he wrote that a student’s “indolence easily persuades him that if he understands that book, he is a master of the whole body of the law.”⁴⁸⁵ In an 1814 letter, he said that the *Commentaries* had caused “the general defection of lawyers and judges from the free principles of government.”⁴⁸⁶ That same year, he wrote that Blackstone was “making tories of those young Americans whose native feelings of independance do not place them above [Blackstone’s] wily sophistries.”⁴⁸⁷

Jefferson did not fear the loss of liberty from force. But he feared “English books, English prejudices, English manners,” all of which undercut “the principles which severed us from England.”⁴⁸⁸ Months before his death, he wrote to James Madison about plans for the appointment of a law professor at the University of Virginia, where he served as rector: “In selecting of our Law-Professor, we must be rigorously attentive to his political principles.”⁴⁸⁹ Pointing to Sir Edward Coke,

⁴⁷⁸ Jefferson, Ford & Zuckerman, *Autobiography of Thomas Jefferson 1743–1790*, at 66 (Ford ed. 1914).

⁴⁷⁹ [Letter from Thomas Jefferson to John Tyler](#) (June 17, 1812), in *Founders Online*, Nat’l Archives.

⁴⁸⁰ *Id.* (emphasis added).

⁴⁸¹ Minot, *supra* note 439, at 1366.

⁴⁸² *Id.* at 1397.

⁴⁸³ [Letter from Thomas Jefferson to John Tyler](#) (May 26, 1810), in *Founders Online*, Nat’l Archives.

⁴⁸⁴ [Letter from Thomas Jefferson to William C. Rives](#) (Sept. 18, 1811), in *Founders Online* Nat’l Archives.

⁴⁸⁵ [Letter from Thomas Jefferson to John Tyler](#) (June 17, 1812), in *Founders Online*, Nat’l Archives.

⁴⁸⁶ [Letter from Thomas Jefferson to Thomas Cooper](#) (Jan. 16, 1814), in *Founders Online*, Nat’l Archives.

⁴⁸⁷ [Letter from Thomas Jefferson to Horatio G. Spafford](#) (Mar. 17, 1814), in *Founders Online*, Nat’l Archives.

⁴⁸⁸ *Id.*

⁴⁸⁹ [Letter from Thomas Jefferson to James Madison](#) (Feb. 17, 1826), in *Founders Online*, Nat’l Archives.

he said, “a sounder whig never wrote.”⁴⁹⁰ But when

the honied . . . Blackstone became the Student’s Hornbook[,] from that moment that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves, to be whigs, because they no longer know what whiggism or republicanism means.⁴⁹¹

Unsurprisingly then, Jefferson did not ascribe to Blackstone’s limited view of freedom of the press. Take first Jefferson’s transatlantic input on the Bill of Rights. Madison had, in June 1789, proposed to the House a list of amendments that would eventually become the Bill of Rights. One provided: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments”⁴⁹² After Madison sent a copy to Jefferson in France, Jefferson wrote back suggesting several modifications (in *italic*). One related to the freedom of the press:

I like it as far as it goes; but I should have been for going further. For instance the following alterations and additions would have pleased me. Art 4. “The people shall not be deprived or abridged of their right to speak, to write *or otherwise* to publish *any thing but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations.*”⁴⁹³

Although Madison’s proposal was general in nature, Jefferson’s was a specific rejection of the common law of libel and Blackstone’s understanding of it. That specificity reveals Jefferson’s more liberal view of freedom of the press. While Blackstone limited liberty of the press to freedom from prior restraint alone, Jefferson would have gone further and protected true speech from *punishment after publication*—and he would have done so as early as the 1780s.

Jefferson’s fight against the Sedition Act of 1798 confirms his rejection of Blackstone’s views of freedom of the press. In drafting the Kentucky Resolutions, Jefferson argued that the Act was unconstitutional, even though it nominally provided truth as a defense, which was itself more liberal than Blackstone’s views and on its face consistent with Jefferson’s apparent view of the First Amendment. Controversy over the Act boiled down to whether Blackstone’s understanding of freedom of press should be accepted. Federalist supporters in Congress argued that the Act was not a prior restraint and, therefore, not an infringement on the liberty of the press under Blackstone. Jefferson’s supporters, however, disagreed, arguing that freedom of the press in the United States meant something more than

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² [James Madison, *Speech in the House of Representatives*](#) (1789) (partial transcript).

⁴⁹³ [Letter from Thomas Jefferson to James Madison](#) (Aug. 28, 1789), in *Founders Online*, Nat’l Archives, (second emphasis added).

Blackstone's definition of it at common law.

For example, Nicholas, rising in opposition to the Act, argued, "it is a manifest abuse of Blackstone's authority to apply it as it has been here applied [in defending the Act]."⁴⁹⁴ As Nicholas said, "[i]t must be remarked, in [Blackstone's defense], that the nature of their government justifies more rigor than is consistent with ours. . . . [H]is observations on this subject ought to be called a theory, and a theory adapted merely to his own country, and not a definition."⁴⁹⁵ But:

Very different are the circumstances in which his doctrine has been applied here. A restrictive clause of the Constitution of the United States [i.e., the First Amendment], by its application, is made to mean nothing, and when it is clearly the intention of the Constitution to put, at least, some acts of the press out of the control of Congress, by the authority of [Blackstone] all are subjected to their power.⁴⁹⁶

Democratic-Republicans like Nicholas lost that fight. They were outnumbered by their Federalist rivals in Congress who supported the Sedition Act in hopes of securing a second term for John Adams. Yet, after Jefferson won that election, the Act expired on its own terms in 1801, and Jefferson pardoned those convicted under it: "I considered & now consider, that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image."⁴⁹⁷ While the Supreme Court never had the opportunity to assess the Act's constitutionality, it declared some 150 years later that "the attack upon its validity has carried the day in the court of history."⁴⁹⁸

Recent scholarship has confirmed that the Court was exactly right on this point. In *Criminal Dissent: Prosecutions under the Alien and Sedition Acts of 1798*, Wendell Bird provides an exhaustive analysis of prosecutions under the Sedition Act.⁴⁹⁹ According to Bird, the historical evidence does "not support the view, which is the dominant scholarly view . . . , that the founding generation uniformly believed the First Amendment's protections of press and speech were narrow."⁵⁰⁰ The inescapability of Bird's conclusion comes not from his persuasive force as a writer but rather the exhaustive evidence he gathers. The result of Bird's toils in the archives is a definitive account of the life and death of the Sedition Act.

Criminal Dissent has largely put to bed any debate over whether *Sullivan's* reliance on the Sedition Act and its demise was misguided and, more broadly, its identification of the central meaning of the First Amendment. In doing so, it has (or

⁴⁹⁴ *The Debates and Proceedings in the Congress of the United States* 3009 (1851).

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ [Letter from Thomas Jefferson to Abigail Smith Adams](#) (July 22, 1804), in *Founders Online*, Nat'l Archives.

⁴⁹⁸ *Sullivan*, 376 U.S. at 276.

⁴⁹⁹ See generally Bird, *supra* note 431.

⁵⁰⁰ *Id.* at 367.

at least should be viewed as) displacing the Court’s preferred historical reference for the history of the First Amendment, Leonard Levy’s work, *Legacy of Suppression: Freedom of Speech and Press in Early American History*, which provides a molehill of evidence compared to Bird’s mountain.⁵⁰¹ This is to say nothing of Levy’s own *mea culpa* where he would, some twenty-five years after publication of *Legacy of Suppression*, dramatically revise that work to include new evidence. And, perhaps most telling, he would change the work’s title from *Legacy of Suppression* to *Emergence of a Free Press*, admitting “I no longer believe that history supports some of my original conclusions.”⁵⁰² (Unfortunately, the Court or individual justices have relied on the former in at least nine cases⁵⁰³ while citing the latter in just two.⁵⁰⁴)

Bird’s work specifically debunks Levy’s conclusion (one clung to both in *Legacy* and in *Emergence*) that the First Amendment was “boldly stated if narrowly understood” by the Founding generation.⁵⁰⁵ One of Bird’s chief contributions is establishing that historians have dramatically undercounted prosecutions under the Sedition Act. Although it is generally accepted that there were fourteen indictments under the Sedition Act, Bird’s meticulous research increases that number nearly four-fold to 51. But that number, too, hides the breadth of the assault: some of the indictments were issued against multiple defendants causing the “number of defendants [to] increase[] from 14 to 126.”⁵⁰⁶ And it is through the stories behind these prosecutions that Bird shows us who thought what about the freedom of the press in the early United States. Namely, he demonstrates that the Blackstonian definition of freedom of the press was not the universally held understanding of that right or even the prevailing one. Instead, there was – unsurprisingly – a deep vein of republican thought animating early understandings of the scope of the First Amendment.

We see this in some of the stories behind these prosecutions and, most evidently, in what Bird demonstrates is the misunderstood history of the Virginia and Kentucky Resolutions. While Bird’s attack on this history is three-fold, the most powerful one is his counter to the widely accepted view that the Resolutions

⁵⁰¹ Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (1960).

⁵⁰² Levy, *Emergence of a Free Press* vii (1985).

⁵⁰³ See *Braden v. United States*, 365 U.S. 431, 443 (1961) (Black, J., dissenting); *Sullivan*, 376 U.S. at 273; *Time, Inc. v. Hill*, 385 U.S. 374, 410 n.10 (1967) (Harlan, J., concurring); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 149 (1967) (Harlan, J.); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 799 (1978) (Burger, C.J., concurring); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting); *Gertz*, 418 U.S. at 382 (White, J., dissenting); *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 580 (1990) (Brennan, J., concurring); *Citizens United v. FEC*, 558 U.S. 310, 432 (2010) (Stevens, J., concurring in part).

⁵⁰⁴ See *Ward v. Rock Against Racism*, 491 U.S. 781, 808 (1989) (Marshall, J., dissenting); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in judgment).

⁵⁰⁵ Levy, *supra* note 502, at 305.

⁵⁰⁶ Bird, *supra* note 431, at 7.

were “resoundingly rejected by all the other states.”⁵⁰⁷ To be sure, eight states (Maryland, Delaware, Rhode Island, Massachusetts, New York, New Hampshire, and Connecticut) all rejected the Resolutions — some on the Resolutions’ merits, but others solely on the question of whether it was appropriate for a state to declare a law unconstitutional. Only four, Bird points out, contended that the Sedition Act was constitutional.

That left the other half of the states. Contrary to past research finding that the young Tennessee and Georgia simply ignored the Resolutions, Bird shows that Tennessee ordered its federal representatives to “use their best efforts” to “repeal” the Sedition Act.⁵⁰⁸ Georgia took similar action. Other states’ bicameral legislatures split on what to do with the Resolutions. North Carolina’s “state house of commons passed resolutions characterizing the Alien and Sedition Acts as unconstitutional.”⁵⁰⁹ Others, like New Jersey and Pennsylvania, also split. In light of the lack of agreement on what precisely the freedom of the press meant, it should not be shocking that the history of the Virginia and Kentucky Resolutions in opposition to the Sedition Act is, also, more complicated than commonly believed.

Justice Thomas dismisses the controversy over the Sedition Act, maintaining that “constitutional opposition to the Sedition Act—a federal law directly criminalizing criticism of the Government —does not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures.”⁵¹⁰ But surely the pitched battle over the Act, the first true test of the country’s commitment to freedom of the press, must have something to say about whether *Sullivan* is defensible from a historical perspective or not—not least because it demonstrates an early departure from the English law of libel. Notably, Justice Thomas has not suggested that the constitutional opposition to the Sedition Act *undercuts Sullivan*. He could not have gone that far because nothing in the history of the Act disproves the rule adopted in *Sullivan*. As Bird concluded, the battle over the Act “left a number of victims across the nation,” but “ended in victory for freedoms of press and speech.”⁵¹¹ One such victory was that it “spread belief in a broad understanding of . . . freedom[of the press], while vividly demonstrating the dangers from a narrow understanding.”⁵¹²

St. George Tucker and Blackstone. By the time St. George Tucker, a Revolutionary War veteran and “the first modern American law professor,” received a letter from Jefferson in 1793, he was already annotating Blackstone for Americans.⁵¹³ Without time to devise his own text before his first class after his

⁵⁰⁷ *Id.* at 154.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.* at 174.

⁵¹⁰ *McKee*, 139 S. Ct. at 682 (Thomas, J.).

⁵¹¹ Bird, *supra* note 431, at 359.

⁵¹² *Id.*

⁵¹³ Hardy, *Colloquy Essays: The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 Nw. U. L. Rev. 1527 (2009) (citing Klafner, *St. George Tucker: The First Modern*

appointment to professor, he turned instead to repackaging the *Commentaries* “and occasionally to offer remarks upon such passages . . . either because the law had been confirmed, or changed, or repealed, by some constitutional or legislative act of the *Federal Government*, or,” in the case of his students, “of the commonwealth of *Virginia*.”⁵¹⁴

In the end, Tucker’s American edition of the *Commentaries* was the first “uniquely American” analysis of them.⁵¹⁵ His 800 pages of annotations and 1,000 footnotes were not a memorial to Blackstone but “an engagement of it in combat.”⁵¹⁶ Tucker was “troubled not so much by the content of the *Commentaries*,” but “by its jurisprudence and political philosophy.”⁵¹⁷ The Revolution was “justified by the repudiation of two basic British tenets: first, the rejection of British views concerning the nature and locus of sovereignty; second, the rejection of the British Constitution as a near-perfect, or even a relatively good, embodiment of political philosophy.”⁵¹⁸ Although “Blackstone did not create . . . the British orthodoxy of the eighteenth century,” Tucker wrote, “he did embody” it.⁵¹⁹ An American *Commentaries* was thus vital because Americans had shed that orthodoxy through Revolution. The Colonies’ independence “produced a corresponding revolution not only in the principles of our government, but in the laws”—which, as a result, became “irreconcilable to the principles contained in the *Commentaries*.”⁵²⁰

The simplicity of the observation masks its persuasive force. Of course, the *Commentaries* established under one system of government should not control the meaning of a law under an entirely different kind of government. But this was exactly the battle Tucker had to wage. In his view, from the Revolution onward, the *Commentaries* became less important as the United States and the United Kingdom continued their divergence. Instead, they became only “a methodical guide, in delineating the general outlines of the law in the United States, or at most, in apprizing the student of what the *law had been*.”⁵²¹

As to freedom of the press, Tucker wrote that, while the English had acquiesced to the mere absence of licensing laws as the defining characteristic of their freedom of the press, “the people of America have not thought proper to suffer

American Law Professor, 6 J. Hist. Soc. 133 (2006)); Alschuler, *supra* note 440, at 11.

⁵¹⁴ 1 *Tucker’s Blackstone*, *supra* note 34, at vi.

⁵¹⁵ Cover, *Blackstone’s Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 70 Colum. L. Rev. 1475, 1476 (1970).

⁵¹⁶ *Id.* at 1477.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at 1477-78.

⁵¹⁹ *Id.* at 1478.

⁵²⁰ 1 *Tucker’s Blackstone*, *supra* note 34, at iv-v (emphasis added).

⁵²¹ *Id.* at v.

the freedom of speech, and of the press to rest upon such an uncertain foundation, as the will and pleasure of the government.”⁵²² Those early Americans positively ratified a constitutional amendment protecting speech and the press. Rather than rely on the absence of laws infringing speech and press as in England, Americans declared that such laws are unconstitutional. That amendment stood, Tucker said, as a “barrier against the possible encroachments of the government.”⁵²³ This principle could not have been more “strenuously asserted.”⁵²⁴

Writing of the Sedition Act, Tucker observed that the Act “excited more apprehension, and greater indignation in many parts of the U. States . . . than any other measure of the federal government.”⁵²⁵ It was “supposed by many to amount to a most flagrant violation of the constitution.”⁵²⁶ But, Tucker wrote, the Act’s “exposition of the liberty of the press, was only to be found in the theoretical writings of the commentators on the *English* government, where the liberty of the press rests upon no other ground, than that there is now no law which imposes any actual previous restraint upon the press.”⁵²⁷

The English government, however, was much different than that prevailing in the United States, and, as a result, claims about freedom of the press were necessarily different as well:

[I]n the United States, the great and essential rights of the people, are secured against legislative, as well as against executive ambition. They are secured, not by laws paramount to prerogative; but by constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great-Britain; but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensors, but from the subsequent penalty of laws. . . .

[T]he practice in America must be entitled to much more respect: being in most instances founded upon the express declarations contained in the respective constitutions, or bill of rights of the confederated states. That even in those states where no such guarantee could be found, the press had always exerted a freedom in canvassing the merits, and measures of public men of every description, not confined to the limits of common law.⁵²⁸

⁵²² *Id.* at app. at 12.

⁵²³ *Id.* at 13.

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.* at app. at 18.

⁵²⁸ *Id.* at 20–21.

Thus, Tucker's writing shows us that early Americans believed there was a fundamental difference between freedom of the press in England and freedom of the press in the United States. The reason for the difference was clear and echoed early cases on the subject: the republican government established after the Revolution required a broader understanding of freedom of the press to make that government work. Without that latitude, it would be too easy for powerful political actors to weaponize libel law for political battles against opponents. But with it, public discussion about public affairs could occur without the overwhelming fear that participation in a republican government might end in criminal or civil liability.

James Wilson and Blackstone. James Wilson was one of the few Founders who signed both the Declaration of Independence and the Constitution, and he had more of an effect on the latter than anyone but Madison.⁵²⁹ Like Jefferson, he viewed Blackstone as a “great supporter” of “systematic despotism.”⁵³⁰ Indeed, Wilson aspired to replace Blackstone and his Tory ideals and become his American equivalent.⁵³¹ He never succeeded. That distinction is more rightly Tucker's. But in 1790, Wilson delivered a series of lectures much like Blackstone had before him.⁵³² For his first lecture, Wilson stood before students but also the “President of the United States, with his lady—also the Vice-President, and both houses of Congress.”⁵³³

Invoking Blackstone's professorship at Oxford, Wilson posed a question: “Should the elements of a law education . . . be drawn entirely from another country—or should they be drawn, in part, at least, from the constitutions and governments and laws of the United States, and of the several States composing the Union?”⁵³⁴ Put differently, should we be educating British lawyers or American ones? He argued for the latter, for an education based on a government where “the supreme or sovereign power . . . resides in the citizens.”⁵³⁵ Ever the revolutionary, he explained that this sovereignty was embodied in the “constitutions and governments and laws of the United States, and the republics, of which they are formed”—all of which were “materially different” and “materially *better*” than that in England.⁵³⁶

Blackstone's view of the law of England, then, “deserves to be much

⁵²⁹ Hall, *Notes and Documents: James Wilson's Law Lectures*, 128 Penn. Mag. Hist. & Biography 63, 64 (2004).

⁵³⁰ *Chisholm v. Georgia*, 2 U.S. 419, 458 (1793).

⁵³¹ Hall, *Bibliographical Essay: The History of James Wilson's Law Lectures*, in *Collected Works of James Wilson* (Hall & Hall eds., 2007).

⁵³² 1 Wilson, *The Works of James Wilson* (Andres ed. 1896).

⁵³³ [Letter from John Adams to Charles Adams n.2](#) (Dec. 4, 1790), in *Founders Online*, Nat'l Archives.

⁵³⁴ Wilson, *supra* note 532, at 13-14.

⁵³⁵ *Id.* at 14.

⁵³⁶ *Id.*

admired; but []ought not to be implicitly followed” in the United States.⁵³⁷ Blackstone, through no fault of his own, was an intellectual captive of the English theory of things—an *un-American* theory—and, thus, far from “a zealous friend of republicanism.”⁵³⁸ The only experiment in republicanism from which Blackstone could draw was England’s disastrous one under Oliver Cromwell. So it made sense that Blackstone would “feel a degree of aversion, latent, yet strong, to a republican government.”⁵³⁹ And having grown up under one government, it was not surprising that that government “might steal imperceptibly upon [Blackstone’s] mind” and influence him in thinking that a republic is “its rival, and . . . enemy.”⁵⁴⁰

Wilson took this view of Blackstone to the Supreme Court bench. In 1793, in *Chisholm v. Georgia*,⁵⁴¹ he wrote that Blackstone’s views on the unchecked power of the king were an “extensive principle, on which a plan of systematic despotism has been lately formed in England.” Blackstone, he said, was “if not the introducer, at least the great supporter” of this despotism.⁵⁴² Rejecting the “principle . . . that all human law must be prescribed by a superior,” Wilson said the law in the United States was much different: “[L]aws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.”⁵⁴³

Still, it might be argued that Wilson essentially ratified Blackstone’s views on freedom of the press. In debates over the proposed constitution in the Pennsylvania convention, Wilson said:

I presume it was not in the view of the honorable gentleman to say there is no such thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country. What is meant by the liberty of the press is, that there should be no antecedent restraint upon it⁵⁴⁴

We can excuse Wilson’s adoption of the Blackstonian definition of freedom of press, though. In the moment, he stood before opponents of the proposed constitution that was almost as much his as it was Madison’s. Those opponents pressed him on why the new proposal did not contain a protection for the liberty of

⁵³⁷ *Id.* at 20.

⁵³⁸ *Id.* at 19.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 20.

⁵⁴¹ 2 U.S. 419, 458 (1793).

⁵⁴² *Id.*

⁵⁴³ *Id.*

⁵⁴⁴ 2 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787*, at 449 (2d ed. 1901).

the press, and Wilson needed to parry those attacks.

Within a few years after he secured support for his constitution, however, he rejected the central tenants of libel law according to the Star Chamber, as restated by Blackstone. The first, that libels against public officials are necessarily worse than other libels. The second, the same one challenged by Jefferson: that truth, like falsity, could also be punished as libel. In his *Lectures on Law*, Wilson indicted the Star Chamber for “wrest[ing] the law of libels to the purposes of [public] ministers.”⁵⁴⁵ The first rule of law of the Star Chamber had been that “a libel against a magistrate, or other publick person, is a greater offence than one against a private man.”⁵⁴⁶ But, Wilson said, “[t]his, in the unqualified manner here expressed, cannot be rationally admitted.”⁵⁴⁷ Instead, in this country, “[o]ther circumstances being equal, that of office ought to *incline the beam*, if the libel refer to his official character or conduct.”⁵⁴⁸

The Other English Authorities. In addition to Blackstone, Justice Thomas also invoked ancient authorities from England to support his view that the common law treated libels against public officials more severely than others. While this may have been true in medieval England, the flaw in Justice Thomas’s argument is that he failed to credit the very thing that he says matters: the state of the law in England *at the time of the Founding*. When we examine this authority at that time, we discover that even the English had distanced themselves from these medieval statutes. Contrary to Justice Thomas’s contention, these ancient statutes support an argument that, by the time of the Founding, no longer did the common law treat public official plaintiffs different from any other.

The chief authority for Justice Thomas’s representations on this point is tucked away in a footnote in his opinion in *McKee*. There, he wrote, “[i]n England, ‘[w]ords spoken in derogation of a peer, a judge, or other great officer of the realm’ were called *scandalum magnatum* and were ‘held to be still more heinous.’”⁵⁴⁹ According to Justice Thomas, “such words could support a claim that ‘would not be actionable in the case of a common person.’”⁵⁵⁰ *Scandalum magnatum* was “recognized by English statutes dating back to 1275,” but “had fallen into disuse by the 19th century and was not employed in the United States.”⁵⁵¹ Nonetheless, Justice Thomas maintained, “the action of *scandalum magnatum* confirms that the law of defamation historically did not impose a heightened burden on public figures as plaintiffs.”⁵⁵²

⁵⁴⁵ 3 Wilson, *The Works of the Honourable James Wilson* 73 (1804).

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.* at 73–74 (emphasis added).

⁵⁴⁹ 139 S. Ct. at 682 n.2 (Thomas, J.).

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² *Id.*

What is not found in that footnote is a recounting of *scandalum magnatum*'s long history, from its birth under Edward Longshanks to its eventual repeal. *Scandalum magnatum* is really three statutes—one from 1275 (more than 200 years before the arrival of the printing press in England), one from 1378, and one from 1388—all adopted centuries before the Glorious Revolution.⁵⁵³ These statutes were set down during the reigns of kings either attempting to consolidate their power (Edward I) or trying desperately to maintain it (Richard II).⁵⁵⁴ For example, the original statute read: “[N]one be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people or the great men of the realm.”⁵⁵⁵

Under the statutes, certain words that were otherwise not actionable as defamation at common law were subject to criminal prosecution if made against public officials like “prelates, dukes, earls, barons, and other nobles and great men of the realm.”⁵⁵⁶ That is, the statutes protected *the Crown* from criticism by doling out punishment on its behalf, and “set the peerage apart from the rest of English society.”⁵⁵⁷ While the statutes were meant to promote peaceful resolutions to disputes, they were nevertheless barbaric. Once Queen Elizabeth I, desiring that a critic be hanged, instead “had to be satisfied with having one of the man’s hands removed.”⁵⁵⁸ Others would lose their ears.⁵⁵⁹

Up to this point, Justice Thomas is correct that *scandalum magnatum* did treat the peerage differently than private individuals; it applied only to the former, but not the latter. But that is only part of the story. Although the oldest of the statutes dates to 1275, they were rarely used early on. Despite the peerage’s desire to wield *scandalum magnatum* to protect their positions of power, “from the start the courts were determined to prevent the abuse of the law by peers.”⁵⁶⁰ Criminal prosecutions were not often pursued, and the first recorded civil action did not take place until 1497.⁵⁶¹ But there was no rash of cases after that. Active enforcement of the statutes did not come to be for nearly another hundred years beginning in 1580 to the Restoration in 1660—and even then, the number of reported cases was a mere

⁵⁵³ Evans, *A Collection of Statutes Connected with the General Administration of the Law* 201–02 (1836).

⁵⁵⁴ Folkard, *supra* note 34, at 218.

⁵⁵⁵ *Id.* (emphasis not included).

⁵⁵⁶ *Id.*

⁵⁵⁷ Holmes v. Holmes, 64 Ill. 294, 296 (1872); see Lassiter, *Defamation of the Peers: The Rise and Decline of the Action for Scandalum Magnatum*, 22 Am. J. Legal Hist. 216, 216 (1978).

⁵⁵⁸ Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661, 671 (1984).

⁵⁵⁹ Scott, *Publishing False News*, 30 Can. B. Rev. 37 (1952).

⁵⁶⁰ Lassiter, *supra* note 557, at 218.

⁵⁶¹ *Id.*

eighteen.⁵⁶²

True, after the Restoration, the peerage's defensiveness in maintaining its privileges revived *scandalum magnatum* "as a reminder to their inferiors that the old order truly had been restored."⁵⁶³ But the peerage was too bold in their use of the statutes.⁵⁶⁴ Courts began to recognize that the peerage used the "special protection they enjoyed from abusive language . . . [to] serve political as well as purely personal social ends."⁵⁶⁵ As England spun out of control politically from the exclusion crisis aimed at preventing the Catholic James, Duke of York, from taking the throne, so did actions under the statutes.⁵⁶⁶ In response, the House of Commons in 1680 attempted to repeal them, although it is unclear if the motivation was in direct response to their abuse.⁵⁶⁷ The Lords, however, rejected the attempt—not keen, apparently, on giving up their privileges.⁵⁶⁸

Around that time, the future King James II, then the Duke of York, wielded the statutes to suppress political opposition.⁵⁶⁹ He filed no fewer than ten cases against his opponents for outlandish sums of money.⁵⁷⁰ Sir Francis Drake, a defendant in one, thought it best to dispose of his estate and go by sea to another country, "thinking it better to have his liberty in a foreign country than be laid up in his own for £100,000."⁵⁷¹ And while these cases were part of a spike in the abuse of the statutes, they were viewed as "reflect[ing] the growing political disorders which England experienced in the last ten years of the reign of Charles II," rather than a doctrinal shift in the law.⁵⁷²

Thus, in the period before James II ascended to the throne in 1685, the statutes "were used much less frequently."⁵⁷³ James II's reinvigorated invocation of them coupled *scandalum magnatum* "to the Stuart cause."⁵⁷⁴ In the end, *scandalum magnatum* "had become too closely identified with him to survive his downfall [during the Glorious Revolution] unchallenged."⁵⁷⁵ After he was deposed,

⁵⁶² *Id.* at 219–20.

⁵⁶³ *Id.* at 223–24.

⁵⁶⁴ *Id.* at 225.

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.* at 226.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.* at 229.

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

⁵⁷² *Id.* at 225.

⁵⁷³ *Id.* at 230.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

the House of Commons sought to reverse judgments in two cases under the statutes in 1689 and 1690.⁵⁷⁶

And when King George I became King in 1714, “most peers were content to live without the protection of the statutes,” and the House of Lords offered to repeal *scandalum magnatum* altogether.⁵⁷⁷ Even by 1703, “in the eyes of the law, a man’s . . . claim to knightly or noble status . . . was now less and less an acceptable criterion for determining whether he was entitled to damages.”⁵⁷⁸ According to one historian, while a “thin stream of cases can be traced through the eighteenth century,” the last recorded litigation took place in 1773, three years before the Revolution and almost twenty years before the First Amendment would be ratified.⁵⁷⁹

Although Parliament would not formally repeal *scandalum magnatum* until 1887, it was, for all practical purposes, dead letter before the founding of *this* country.⁵⁸⁰ Scholars have martialed a bevy of fatal descriptors: “now in a manner forgotten,”⁵⁸¹ “by lapse of time . . . become unnecessary,”⁵⁸² “obsolete,”⁵⁸³ “long been obsolete,”⁵⁸⁴ *et cetera*.⁵⁸⁵ As one noted, “[t]hough they survived until 1887, the statutes of *scandalum magnatum* belong essentially to that age which accepted ‘degree, priority and place’ (to use Shakespeare’s phrase) as the unquestionable stamp of God’s creation.”⁵⁸⁶

In the early United States, to the extent they were remembered at all, the statutes were invoked as evidence of the Crown’s prior abuses and as repugnant to the new republican form of government created by the Founders. In that government, unlike that in which *scandalum magnatum* first became law, it was the People who were sovereign, not a king. *Scandalum magnatum*, after all, was adopted to protect the sovereign Crown from its subjects. It was meant to quash republican sentiment, not cultivate it. *Scandalum magnatum* then “ha[d] all the crudities of that savage era of monarchical autocracy in which it had its birth, still

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* at 232–33.

⁵⁷⁸ *Id.* at 234 (“the nobility preferr[ed] to waive their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow-subjects.” (quoting 1 Russell, *A Treatise on Crimes and Misdemeanors* 326 (1824)).

⁵⁷⁹ Lassiter, *supra* note 557, at 233, 235.

⁵⁸⁰ Statute Law Revision Act 1887, 50 & 51 Vict. c. 59 (Eng.); Odgers, *The Law of Libel and Slander* 74 (5th ed. 1912).

⁵⁸¹ 3 Stephen, *New Commentaries on the Laws of England* 474 (1844).

⁵⁸² Riddell, *Scandalum Magnatum in Upper Canada*, 4 J. Crim. L. & Criminology 12, 14 (1914).

⁵⁸³ Odgers, *supra* note 580, at 74; see also Adams, *A Judicial Glossary* 603 (1886) (noting that the statutes were “now obsolete”).

⁵⁸⁴ See Holdsworth, *A History of English Law* 410 (3d ed. 1922).

⁵⁸⁵ Holt, *The Law of Libel* 178 (1818); see also Mence, *The Law of Libel* 84 (1824).

⁵⁸⁶ Lassiter, *supra* note 557, at 235.

clinging to it.”⁵⁸⁷ As one commentator explained, the statutes’ “significance was in their anti-democratic tendencies.”⁵⁸⁸

Not surprisingly, therefore, *scandalum magnatum* was abandoned in early America. In Maryland, the “antient statutes . . . of *scandalum magnatum*” did not “extend[] to the province.”⁵⁸⁹ In Virginia, a leading commentator in the 1830s wrote, “this offense is not recognized by our laws.”⁵⁹⁰ Early courts were in agreement. In 1872, the Illinois Supreme Court explained that *scandalum magnatum* was “never recognized in this country.”⁵⁹¹ The North Carolina Supreme Court said in 1887: “[I]n this day and country there is no such thing as ‘*scandalum magnatum*’”⁵⁹² In 1890, the Massachusetts Supreme Judicial Court agreed, finding that the doctrine of *scandalum magnatum* “has never been adopted in Massachusetts.”⁵⁹³ The Eighth Circuit put it best when it said that *scandalum magnatum* was “once the law,” but “[a] revolution intervened.”⁵⁹⁴

Even the treatises that Justice Thomas cites—Starkie and Newell—make clear that *scandalum magnatum* was not adopted in the States, in fact just the opposite.⁵⁹⁵ Newell rejected the idea that public officials were to be treated more leniently than private persons:

In practice a person holding a high office is regarded as a target at whom any person may let fly his poisonous words. High official position instead of affording immunity from slanderous and libelous charges, seems rather to be regarded as making his character free plunder for any one who desires to create a sensation by attacking it.⁵⁹⁶

Newell’s position was the same as Starkie’s before him: “In this country no distinction as to persons is recognized, and in practice, a person holding a high office is regarded as a target at whom any person may let fly his poisonous

⁵⁸⁷ Robbins, Note, *The Action of the Government Against the New York World as a Revival of the Offense of Scandalum Magnatum*, 68 Cent. L.J. 135, 135-36 (1909).

⁵⁸⁸ Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 Comm. L. & Pol’y 433, 446 (2004).

⁵⁸⁹ Kilty, *A Report of All Such English Statutes As Existed at the Time of the First Emigration of the People of Maryland* 4-5 (1811).

⁵⁹⁰ 2 *Tucker’s Blackstone*, *supra* note 34, at 58.

⁵⁹¹ *Holmes v. Holmes*, 64 Ill. 294, 296 (1872).

⁵⁹² *Reeves v. Winn*, 1 S.E. 448, 450 (N.C. 1887).

⁵⁹³ *Sillars v. Collier*, 23 N.E. 723, 724 (Mass. 1890).

⁵⁹⁴ *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 802 (8th Cir. 1993).

⁵⁹⁵ *McKee*, 139 S. Ct. at 682 n.2 (Thomas, J.); see, e.g., Kilty, *supra* note 589, at 45; 2 *Tucker’s Blackstone*, *supra* note 34.

⁵⁹⁶ Newell, *supra* note 34, at 201.

words.”⁵⁹⁷

In the end, as one early-twentieth-century law journal concluded, “the old common law offense of *scandalum magnatum* was left behind when our fathers planted the principles of civil liberty and equality.”⁵⁹⁸ *Scandalum magnatum* had thus given way, in that journal’s estimation, “to the rule . . . that there can be no libel of the government or of government officials as such.”⁵⁹⁹ And no longer was it any “greater wrong to falsely criticise the government than it is to speak evil of a private citizen.”⁶⁰⁰ The law had long since rejected “Anglo-Saxon barbarism [that] affirmed the contrary and the old Tower of London [that] witnessed the suffering of men who dared to raise their voices against the king.”⁶⁰¹

The freedom of the press that Justice Thomas references is not an originalist one; it is a monarchist’s one, predating the Founding and purporting to import into the First Amendment today common law rules long ago rejected by the Founders and early courts. Such an approach violates Justice Thomas’ stated view that what matters for the purposes of an originalist inquiry is the “founding era understanding.”⁶⁰² Indeed, it discounts the reality that there was a Revolution, and that no small complaint of that Revolution was England’s abuses of prosecutions of early American printers. It also ignores everything that happened between 1789 and 1868 when the Fourteenth Amendment made the First Amendment applicable as against the States.

VII. CONCLUSION

At long last, we come back to Justice Thomas’ assertion in *Berisha* 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.’”⁶⁰³ There is plenty one can say about *Sullivan*, the practical concerns raised by Justice Gorsuch in *Berisha*, the empirical reality of contemporary libel litigation, and whether the United States, as compared to other countries abroad, has gone too far in favor of press freedom. Each of those issues is addressed at length in this White Paper. But, as the historical review just ventured demonstrates, history does very little, if anything, to advance attacks on *Sullivan*.

On the contrary, history amply supports what the Court did in *Sullivan*. Far from being out of step with history, *Sullivan* is the obvious next step in what was then more than 150 years of tussling between libel and freedom of the press. Republicanism, freedom of the press, actual malice, the role of public officials and

⁵⁹⁷ Folkard, *supra* note 34, at 217 n.1.

⁵⁹⁸ Robbins, *supra* note 587, at 136.

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

⁶⁰² *Rogers v. Grewal*, 140 S. Ct. 1865, 1871 (2020) (Thomas, J., dissenting from denial of certiorari).

⁶⁰³ *Berisha*, 141 S. Ct. at 2425 (Thomas, J.) (quoting *Tah v. Global Witness Publ’g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)).

public figures – it is all in these dusty pages. It was all there long before L.B. Sullivan sued the *New York Times*.

In fact, what this review demonstrates is that much of how we understand “freedom of the press” today comes not from early First Amendment jurisprudence. Indeed, before the twentieth century there was very little such jurisprudence. Instead, what we know of freedom of the press today is owed to and informed by early debates about the scope of that freedom in early libel cases. The assault on *Sullivan* from a historical perspective is then quite strange. Those early libel cases – even way back when – were just as much about constitutional principles, about our commitment to freedom of the press, than they were about the common law. In a way, the Court in *Sullivan* did not constitutionalize libel law; it recognized that libel law had always been part common law, part constitutional law.

Chapter 2: A Response to Justice Gorsuch

By Richard Tofel and Jeremy Kutner*

In his dissent from a denial of *certiorari* in *Berisha v. Lawson*,¹ Justice Neil Gorsuch calls for reconsideration of a cornerstone of American constitutional law. Despite the absence of credible evidence that *New York Times Co. v. Sullivan*'s² strong protections have degraded journalism, he raises a purported historical question: Does *Sullivan*'s rationale no longer hold because the media landscape that existed in 1964 has evolved (or, rather, devolved)? The premises of that question, however, are incorrect, on both the facts and the law.

I. THE FACTS

With respect to the facts, Justice Gorsuch's reasoning is marked by a series of fundamental misconceptions. First, he confuses one of our periodic historic turnovers in institutional media incumbency with an end to incumbency itself. Next, he conflates issues surrounding content distribution with those of content creation. Then he misapprehends the Court's own role, suggesting the creation of new constitutional rules to address what is clearly a statutory and regulatory question surrounding how information delivery platforms should be treated. Along the way, Justice Gorsuch relies on a series of fundamentally inaccurate assumptions both about how modern journalism works and how those workings interact with the legal

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¹ 141 S. Ct. 2424 (2021) (Gorsuch, J., dissenting from denial of certiorari).

² 376 U.S. 254 (1964).

regime that began with *Sullivan*.

We take up each of these issues in turn.

A. Media Concentration and Incumbency

Justice Gorsuch writes that, at the time of *Sullivan*, “comparatively large companies dominated the press,” while “today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world.”³ He bemoans the decline in viewership for broadcast network evening news shows, and their supplanting by the “rise of 24-hour cable news.”⁴

For someone of Justice Gorsuch’s generation,⁵ such nostalgia may be inevitable, but let’s look at the facts. It is true that the audiences for the three broadcast network evening news shows have shrunk considerably since they peaked fifteen years after *Sullivan*, but those audiences remain considerably larger than viewership for any other source of national news. In fact, the audience for the three network evening broadcasts in 2020 (about 30 million) was roughly 25% higher than that for all daily newspapers in the country combined (24 million).⁶ It is also true that cable news networks are more influential than they once were, especially in Washington DC, where the Court is located. But their average audience, of less than 4.5 million viewers in 2021 (when almost all news sources declined from 2020 levels),⁷ was about one fifth of that for those network broadcast shows whose decline Justice Gorsuch mourns.

What about economic concentration? Today, two hedge funds control more than half of the daily newspapers in the country.⁸ This far exceeds any level of concentration at the time of *Sullivan*. In 1964, two of the three broadcast networks were independent companies; today, they are controlled by huge entertainment enterprises, Comcast, Walt Disney and Viacom. The cable networks are themselves arms of enormous concerns, AT&T, Comcast (again) and the Fox Corporation.

Among newspapers, as the transition to online distribution unfolds—the vast majority of “newspaper” readers now consume the content online—the market leaders nationally are the same as half a century ago, the *New York Times*, *Wall Street Journal* and *Washington Post*.

What to make of all of this? Yes, things are changing with the rise of digital media, just as they changed with the overtaking of radio by television in the fifteen years before *Sullivan*. But just as the leading radio networks, NBC Red, CBS and

³ 141 S. Ct. at 2427.

⁴ *Id.*

⁵ He is a decade younger than one of the current authors.

⁶ Pew Research Center, *Network News Fact Sheet*, July 13, 2021; Pew Research Center, *Newspapers Fact Sheet*, June 29, 2021.

⁷ *Id.*, Cable News Fact Sheet, July 13, 2021.

⁸ Coppins, *A Secretive Hedge Fund is Gutting Newsrooms: Inside Alden Global Capital*, *The Atlantic*, Oct. 14, 2021.

NBC Blue, gave way to the television networks NBC, CBS and ABC (the new name of NBC Blue after its spin-off under FCC mandate), less has changed than it may seem. It is also true, of course, that upstart news organizations have arisen in the current age, ranging from BuzzFeed (winner of a Pulitzer Prize in 2021) to our own ProPublica (winner of six Pulitzers to date). But upstarts are not a novelty of the digital era. The Pulitzer and Hearst newspapers played such a role in the late 19th Century, as did *Time* magazine and *The New Yorker* in the 1920s, *Life* in 1930s, and *USA Today* and CNN in the 1980s.

B. Content Distribution v. Content Creation

Justice Gorsuch’s most significant misapprehension, in this part of his analysis, comes when he posits that “virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world.”⁹ That is true in theory, and we all know of things that have gone viral from previously unknown creators, but it is extraordinarily unusual in practice. Justice Gorsuch asserts that we live “in a world in which everyone carries a soapbox in their hands,”¹⁰ but the median U.S. Twitter user, rather remarkably, has 25 followers, hardly global reach.¹¹ Of the individuals with the 25 largest Twitter followings, not one traces their fame to the Internet itself; rather, two come from politics (President Obama and Indian Prime Minister Modi), two from business (Elon Musk and Bill Gates), four from sports, six from film and television, and nearly half from music.¹² In theory, anyone can reach everyone. In practice, almost no one does.¹³

C. Information Delivery Platforms and Section 230

Next, Justice Gorsuch decries a real problem, but one which seems almost entirely the province of Congress, not the Court, to address. He writes that “our new media environment also facilitates the spread of disinformation” and claims that disinformation “has become a ‘profitable’ business.”¹⁴

The actors in question here are not the press, however, but the technology platforms, most notably Facebook and Google, but also Twitter and a few others. The platforms, from the perspective of the press, are both distributors of their content and competitors (hugely successful, well past the point of oligopolization) for advertising. But these companies are not themselves in the news business.

⁹ 141 S. Ct. at 2427.

¹⁰ *Id.*

¹¹ Pew Research Center, *Key takeaways from our new study of how Americans use Twitter*, April 24, 2019.

¹² [Socialblade.com/twitter/top/100](https://socialblade.com/twitter/top/100), retrieved Jan. 18, 2022.

¹³ Beyond that, a recent survey indicates that one quarter of Twitter users account for 97% of all traffic on the platform, the remaining 75% for just 3% of all tweets. Pew Research Center, *The Behavior and Attitudes of U.S. Adults on Twitter*, Nov. 15, 2021. Even within this group of heavy users, the average tweeter received just 37 “likes” and one retweet from 65 tweets per month. *Id.*

¹⁴ 141 S. Ct. at 2427.

Indeed, there is significant indication that Facebook, the market leader, has sought in recent years to limit its redistribution of news altogether.¹⁵

Disinformation and misinformation are surely important public policy problems, and the platforms' role in this issue is, at the very least, worthy of profound concern. The losses from vaccine hesitancy provide just the latest and most lethal illustration. But there is already federal legislation in this area—Section 230 of the Communications Decency Act¹⁶—and a robust debate about whether it should be amended. That seems self-evidently a debate in which the Court has no role to play. More on this in the pages that follow.

D. The Economics of Reporting the News and Modern Defamation Litigation

Finally, Justice Gorsuch misapprehends how news organizations actually operate under *Sullivan*'s legal regime. He claims that, in 1964, “many major media outlets employed fact-checkers and editors” because that encouraged consumers to pay more for their news.¹⁷ Today, by contrast, he asserts, “[i]t seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy”—to the point where “ignorance is bliss.”¹⁸ This is not only faulty history, it reflects a fundamental misconception of contemporary journalism practice.

First, the history: Fact-checking independent of reporting (that is, as a separate job description) has always been and remains virtually unknown at newspapers, as well as in radio (and, with one or two exceptions) television news. Fact-checkers have long been employed by a few magazines, and remain in place at most of those.¹⁹ Digital news organizations, which, like newspapers and unlike magazines, face quicker deadlines, generally adopted the newspaper practice of placing the responsibility for fact-checking on reporters.

Even more ahistorical are Justice Gorsuch's assumptions about the economics of news publishing in the time of *Sullivan* and today. In that earlier era, comparatively little of news publishers' revenues came directly from consumers, with the bulk of it coming from advertisers. This was even more true of magazines (the bastion of fact-checking, as noted above) than it was for newspapers. For broadcast radio and television news, precisely none of the revenues came directly from consumers. This, of course, has not stopped newspapers from revealing deep and important truths essential to democratic accountability, from the Pentagon Papers to Watergate to secret governmental collection of personal data.

Today, in the opposite of the trend that Justice Gorsuch posits, a

¹⁵ See, e.g., Castillo, *Zuckerberg tells Congress Facebook is not a media company: 'I consider us to be a technology company,'* CNBC, April 11, 2018.

¹⁶ 47 U.S.C. § 230.

¹⁷ 141 S. Ct. at 2427-28.

¹⁸ *Id.* at 2428 (emphasis in original).

¹⁹ See Fabry, *Here's How the First Fact-Checkers Were Able to Do Their Jobs Before the Internet*, Time, Aug. 24, 2017.

substantially larger part—in many cases, the majority—of revenues come directly from readers and viewers. The relative recent prosperity of the *New York Times*, *Washington Post* and *Wall Street Journal* stems from the fact that all have been successful in selling subscriptions, not only in print but also, and in much greater numbers, online. National cable television news is enormously profitable, and not because of advertising nearly so much as because of the fees these channels charge to cable providers, which are passed along to subscribers. Newer digital nonprofit news organizations depend almost entirely on donations from readers, and receive almost no advertising revenues. Even the more successful magazines increasingly depend on subscription revenue, still in print but also in growing measure online.

Justice Gorsuch’s fear that “ignorance is bliss” has become the “optimal legal strategy” in publishing is itself, to borrow his description, ignorant of both the practice in newsrooms and, perhaps more surprisingly, how litigation under the *Sullivan* regime actually works.

It is true that the legal risk to the press in the last 58 years is substantially lower than it was in the previous era. But the economic fortunes of the press are at a much lower ebb than previously. Numerous newspapers and magazines have failed entirely. Nearly all legacy publications that have not failed have seen dramatic declines in profit margins (and often absolute revenues), and have felt compelled to cut back on the resources devoted to newsgathering.

In most cases, these same economic pressures have curtailed investment in all sorts of enterprise (i.e., original) reporting, especially investigative work. To the extent this gap has been filled—and it has been only partially—it has been by newer nonprofits and the leading newspapers whose business model, as noted above, depends on the trust of consumer subscribers/donors. In these cases, the dynamic that Justice Gorsuch incorrectly assumes applied in days gone by—that “the public gain[s] greater confidence that what they read [is] true” and are thus willing to “pay more for the information”²⁰—is actively at work today.

In the realm of litigation, the “optimal legal strategy” for publishers who cannot afford to be sued is, and has been, to be less aggressive in coverage. For those who still can afford it, i.e., can afford rapidly rising libel insurance rates and deductibles, the optimal strategy is to practice journalism in a way that minimizes the combined cost of insurance and litigation itself.

What sort of practices achieve this aim?

First, of course, is not to make mistakes of fact. Even entirely meritless litigation—the sort that does not survive a motion to dismiss—is expensive, in both money for attorneys’ fees and in lost editorial time to help prepare the response. The easiest way to avoid such lawsuits is to publish accurate stories, *and to provide evidence to readers in stories themselves on the most contentious elements of those stories*. This is the farthest thing from “ignorance is bliss.” Above and beyond all of the lawsuits avoided from those who are angry that their misdeeds have been carefully reported, it is worth noting that, in a recent survey of major media

²⁰ 141 S. Ct. at 2428.

companies, nearly 80% of news media defamation actions terminated at the motion to dismiss stage were resolved in favor of defendants on grounds *other* than failure to state a plausible claim of actual malice, including the “substantial truth” of the alleged defamation.²¹

Regrettably, even substantially accurate stories remain vulnerable to a claim that survives a motion to dismiss. In the same study, 35% of all successful summary judgment motions were granted, at least in part, on the ground that the alleged defamation was either substantially true or not provably false. An earlier, 26-year study of more than 1,400 news media defamation actions dismissed at the summary judgment stage revealed that, in nearly 400 cases, the claims were found to be either substantially true or not provably false following discovery.²² We should all be able to agree that such cases constitute an enormous burden on the press in terms of cost and time, a cost to both First Amendment values and the court system incurred in the name of providing an avenue for the vindication of reputations unjustifiably diminished.

Of course, mistakes will occur so long as journalism is being practiced by humans. In some circumstances, cases arising from such mistakes will result in a consideration of fault under any legal test, whether it is as strict as actual malice or as loose as mere negligence. How should newsrooms behave, given their awareness of this? How do they actually do so?

Justice Gorsuch posits that the optimal legal strategy is just to wing it, to publish defamatory articles in ignorance of the facts—because “ignorance is bliss.” Then, with citation only to one secondary source from a non-journalist, he

²¹ See Chap. 3 *infra*, Appendix II, Table II at 132 (in which only 19 of 87 (22%) defense wins on motions to dismiss were at least in part on actual malice grounds). The referenced survey, conducted by the Media Law Resource Center (“MLRC”), reflects the recent litigation experience of 16 leading news organizations, including newspapers, wire services, public radio, local television stations and television networks. See *id.*, Section C.2.a. at 110.

²² See Chap. 3 *infra*, Appendix II, Table II at 132. See also *id.* Section C.2.b. at 111-13 (motions granted based on the common law defenses of, *inter alia*, substantial truth, the fair report privilege, the “of and concerning” requirement, and opinion collectively responsible for far more defense victories than actual malice); Media Law Resource Center, *2007 Summary Judgment Study*, MLRC Bull., Sept. 2007 at 18, table 2, 41, table 16. The last referenced study covered the years 1980-2006, beginning 15 years into the age of *Sullivan*. A total of 1,469 cases were dismissed after summary judgment motions. Of these, fewer than 500 cases (496) were decided in favor of defendants, in whole or in part, on grounds of actual malice, while motions were granted, in whole or in part, on the basis of substantial truth (232), “falsity” (135) or not being provably false (29), which together sum to 396 cases. Other leading grounds for granting motions were lack of defamatory meaning (225) and opinion (224). Some cases were decided on multiple grounds.

An earlier, smaller study of cases decided between 1976 (a dozen years after *Sullivan*) and 1979 found that a narrow majority (51%) of 83 reported appellate decisions in favor of news media defendants were decided on various state law, rather than federal constitutional, grounds. Franklin, *Winners, Losers and Why: A Study of Defamation Litigation*, 1980 Am. Bar Res. Found. J. 455, 493, table 23.

concludes that journalists in fact behave this way.²³ Having worked with four leading newsrooms—at the *Wall Street Journal*, the *New York Times*, NBC News and ProPublica—for more than a combined 25 years, we can say definitively that neither of the authors has ever seen this happen, not even once.

Why? Because, in addition to being journalistically unethical and unprofessional, such behavior would be tactically unwise from a legal perspective.

Once a motion to dismiss has been ruled out or denied, the key objective in the defense of modern media defamation litigation is to prevail on a motion for summary judgment. On such motions, affirmative, undisputed evidence of lack of fault is often critical,²⁴ and the pre-publication process has usually been designed, frequently with significant input from newsroom counsel, to yield such evidence. Indeed, this is precisely why pre-publication review of sensitive stories by newsroom counsel has so significantly expanded over the years. The membership of the industry’s leading committee for counsel whose work includes a focus on pre-publication/pre-broadcast review has tripled in this century to now include more than 100 members, even as the industry itself has notably contracted.²⁵ More than 170 attorneys attended the last pre-pandemic conference on this subject.

Beyond this, if the “ignorance is bliss” strategy that Justice Gorsuch posits is being followed, it is a big secret. Having for years attended many of the three leading annual conferences for press lawyers, one organized by the American Bar Association, another by the Practising Law Institute, the third by MLRC, and having checked with the organizers of all of them, this “strategy” has never been mentioned, much less advocated, at any of them. Nor is it referenced in any of the leading treatises on the subject, the most notable of which is authored by a judge of

²³ 141 S. Ct. at 2428 (citing Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 Ohio St. L.J. 759 (2020)).

²⁴ This has been particularly so in the wake of the Supreme Court’s decisions in cases like *Herbert v. Lando*, 441 U.S. 153 (1979), and *Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), in which it not only authorized broad discovery into the defendant’s newsgathering and editorial process for the purpose, in significant part, of amassing sufficient evidence to create disputed issues of material fact sufficient to survive a summary judgment motion and secure a trial on the issue of actual malice, but also emphasized that such evidence will typically be circumstantial, especially since it is the rare case in which the defendant admits that it published despite entertaining serious doubts about the truth of its reporting. See 441 U.S. at 170 (“plaintiffs will rarely be successful in proving awareness of falsity from the mouth of the defendant himself”). Thus, judicial consideration of summary judgment motions raising the actual malice issue typically require detailed consideration of the editorial process, as illuminated through discovery, rendering it all the more important for a defendant to be able to demonstrate—through undisputed evidence—that it did not publish the challenged statements with the necessary reckless disregard for their truth. Compare, e.g., *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 872-75 (E.D. Va. 2016) (judicial review of evidence amassed through discovery and documenting defendants’ editorial process revealed disputed issues of material fact with respect to actual malice warranting trial) with *Hatfill v. N.Y. Times Co.*, 532 F.3d 312, 324-25 (4th Cir. 2008) (summary judgment granted because undisputed evidence of editorial process demonstrated that plaintiff could not prove actual malice).

²⁵ See resources [here](#).

the Second Circuit Court of Appeals.²⁶

Finally, the published standards of leading news organizations are to the contrary.²⁷ And when these standards are not met, i.e., when published stories fall short of those standards, the extensive self-scrutiny news organizations have undertaken is the farthest thing from “ignorance is bliss.”²⁸ In short, the journalistic world that Justice Gorsuch fears, of legions of disparate reporters letting falsehoods rip without bothering to verify their reporting while media barons count their ad revenue dollars, simply does not exist.

II. THE LAW

Beyond Justice Gorsuch’s faulty factual assumptions is an even more fundamental misconception: *Sullivan*’s protections were not, as he appears to assume, rooted by the Court in a utilitarian analysis of the mid-1960s world of institutional media. They were and remain grounded firmly in the First Amendment itself.

A. *Sullivan*, Seditious Libel and the Common Law

This is because the *Sullivan* and subsequent courts have understood the dangers of the English common law of libel to American democratic freedoms. Under that common law, and the criminal libel laws that accompanied them, courts policed perceived stains on the reputations of powerful people and the State, with probing and informed debate about their conduct deemed secondary to their sensibilities.²⁹ As the Court explained just three years after *Sullivan*:

²⁶ See Sack, *Sack on Defamation: Libel, Slander and Related Problems* (5th ed. 2021); see also Smolla, *Law of Defamation* (2d ed. 2021); Sanford, *Libel and Privacy* (2d ed. 1999).

²⁷ See, e.g., Society of Professional Journalists Code of Ethics; New York Times Newsroom Integrity Statement (1999); ProPublica Code of Ethics (“We strive to identify all the sources of our information, shielding them with anonymity only when they insist upon it and when they provide vital information — not opinion or speculation; when there is no other way to obtain that information; and when we know the source is knowledgeable and reliable. To the extent that we can, we identify in our stories any important bias such a source may have. If the story hinges on documents, as opposed to interviews, we describe how the documents were obtained, at least to the extent possible. We do not say that a person declined comment when he or she is already quoted anonymously.”).

²⁸ See, e.g., Coronel, Coll & Kravitz, *Rolling Stone’s Investigation: “A Failure That Was Avoidable,”* Colum. Journ. Rev., April 5, 2015; Barry, et al., *Correcting the Record: Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. Times, May 11, 2003; Benjamin, *CBS Reports The Uncounted Enemy: A Vietnam Deception: An Examination*, CBS News, 1984.

²⁹ Indeed, as a general matter, an animating principle of the defamation tort at common law was that one simply should not make statements critical of others. An important companion principle was that people were the subjects of the state (which remains true in the United Kingdom today where, at least as a technical matter, the people are subjects of the Crown.). Put differently, the common law of libel proceeded from the fundamental proposition that the Government is the master and the citizen is the subject. At its core, the American Revolution was fought to invert this relationship—in the United States, Government is the servant of the citizen master, a concept radically inconsistent with the premises of the common law tort and accompanying criminal law of seditious libel. See Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Calif. L. Rev. 691, 723 (1986) (“In America,” the Court recognized in *Sullivan*, “government officials are

The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values. Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions and while a proof of truth might prevent recovery in a civil action, this limitation is more readily explained as a manifestation of judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of the publication. The same truthful statement might be the basis of a criminal libel action.³⁰

The *Sullivan* Court knew such a regime would be crippling to the self-government and open democratic discussion that defined the American experiment – especially when applied to public officials. This was a realization born of bitter experience, not judicial whimsy. As the Court explained, the lure of control over private speech proved seductive even to the founding generation. The Sedition Act of 1798 criminalized defaming the party in power or stirring contempt for it among the general public.

Thankfully, while the Sedition Act was of a piece with the traditional treatment of libel at common law, it nauseated many leading Americans. Implementers repudiated their actions; those convicted were pardoned. There was, instead, “broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.”³¹ Indeed, Justice Gorsuch seems to concede as much. Where Justice Thomas apparently longs for a return to a common law world of libel untouched by the First Amendment (and, presumably, would sustain a new Sedition Act), Justice Gorsuch appears to recognize this as a bridge too far.

‘public servants,’ and the people are their masters.’) (“Post I”); see also Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv. L Rev. 605 (1990). As the Supreme Court has repeatedly emphasized, in both *Sullivan* and its progeny, if a citizen of the United States criticizes governmental officials, that citizen is not attacking the master, but exercising the ideal of self-government. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“speech concerning public affairs is more than self-expression; it is the essence of self-government”). Thus, the “essential role” of the First Amendment, as articulated in *Sullivan*, was to require alignment of the common law with the concept of representative self-government in a manner that accurately reflected the inverted relationship the Constitution created between the citizen and the state. Post I, *supra*, at 723 (quoting Kalven, *The New York Times Case, A Note on the “Central Meaning” of the First Amendment*, 1964 Sup. Ct. Rev. 191, 204). Professor Meiklejohn famously said that *Sullivan* was “‘an occasion for dancing in the streets’” because it accomplished precisely that. See Kalven, *supra*, at 221 n.125 (quoting Professor Meiklejohn).

³⁰ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 151 (1967).

³¹ 376 U.S. at 276.

B. Definitional Balancing and the First Amendment

Faced with the obvious deficiencies of a common law inherently hostile to democratic self-government and the First Amendment, the Court in *Sullivan* did what the Supreme Court has done throughout the century since modern First Amendment jurisprudence began to take shape: ask what the First Amendment, not previous historical practice, allows. Here, the Court's path was well-worn. "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."³² In other words, while "libelous" speech, like "obscene" speech, speech that incites "imminent lawless action," or "fighting words," falls outside of the First Amendment's protections "because they are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,"³³ the definition of each such category of unprotected expression is derived from the First Amendment itself.

Thus, in *Sullivan*, the Court undertook to strike the requisite definitional balance, recognizing at the outset that the contours of punishable libel at common law – a cause of action where falsity and injury to reputation are *presumed* and liability is imposed with fault – must be more carefully circumscribed if it is to co-exist with the First Amendment. As the Court explained two decades after *Sullivan*, with respect to each category of unprotected speech, it is the duty of the judicial branch to define "the limits of the unprotected category" through "evaluation of special facts that been deemed to have constitutional significance."³⁴ What then, the Court asked in *Sullivan*, is a First Amendment-compatible definition of constitutionally unprotected "libel"?

As to truth, the traditional common law approach placed the burden of proving it on the publisher, forcing it to prove truth in all its particulars, no matter the subject. In the criminal libel context, truth could be no defense at all, with conviction subject to the arbitrary predilections of judges and juries as to what society should accept (a particular challenge to dissidents and minorities). In a self-governing democracy, the Court recognized, "constitutional protection does not

³² *Id.* at 269.

³³ *Chaplinsky*, 315 U.S. at 572.

³⁴ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984). See Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424, 1434-35 (1962) ("Deciding the scope to be accorded a particular constitutional freedom is different from deciding whether the interest of a particular litigant in freely expressing views which the judge may consider loathsome, dangerous or ridiculous is outweighed by society's interest"); Nimmer, *The Right to Speak from Times to Time; First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Calif. L. Rev. 935, 942 (1968) (*Sullivan* "points the way to the employment of the balancing process on the definitional rather than the litigation or ad hoc level"—i.e., "the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as 'speech' within the meaning of the First Amendment").

turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’”³⁵ Anything less would establish a presumption that “the governed must not criticize their governors.”³⁶ Silence, not free-wheeling democratic debate, would inevitably follow such a rule. That, of course, is what was happening in Alabama at the time of *Sullivan* and, as is demonstrated in Chapter 4 *infra*, it continues to be the likely motivation for a disturbing number of defamation actions to this day. The English may have made their peace with such a system (although, as explained in Chapter 5 *infra*, even the United Kingdom continues to move away from the common law regime), but the First Amendment forbade it.

Nor, the Court explained, did the First Amendment intend to protect from criticism by the citizenry the delicate sensibilities of its leaders. Drawing on prior cases, the Court explained that “criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.”³⁷ While Justice Gorsuch worries that sharp-elbowed discourse discourages “people of goodwill” “from risking even the slightest step toward public life,”³⁸ the *Sullivan* Court recognized that democracies require more of those who aspire to lead such a life and the public trust those roles must uphold.³⁹ As Judge Bork, himself no stranger to the sting of critical scrutiny, explained, “[t]hose who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement and even wounding assessments.”⁴⁰

Most critically, the Court recognized in *Sullivan*, the First Amendment demands protection for public criticism honestly offered. Allowing for liability without knowledge of error in an area as essential as speech about public officialdom would, inevitably, lead to intolerable self-censorship. Just as the Court had concluded that a bookseller could not be held liable for innocently selling obscene material,⁴¹ so too must government critics be free of liability when their statements are not published with knowledge of their probable falsity—i.e., when it comes to speech about public officials, the definition of the kind of “libel” that

³⁵ *Sullivan*, 376 U.S. at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

³⁶ 376 U.S. at 271.

³⁷ *Id.* at 273 (citing *Pennekamp v. Florida*, 328 U.S. 331, 342 (1946); *Bridges v. California*, 314 U.S. 252 (1941); *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

³⁸ 141 S. Ct. at 2429.

³⁹ 376 U.S. at 279.

⁴⁰ *Ollman v. Evans*, 750 F.2d 970, 993 (D.C. Cir 1984) (Bork, J. concurring); see *id.*:

Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments, and with strict avoidance of the ad hominem; better, that is, if the opinion and editorial pages of the public press were modeled on The Federalist Papers. But that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the First Amendment must not try to make public dispute safe and comfortable for all participants. That would only stifle the debate.

⁴¹ 376 U.S. at 278-79 (quoting *Smith v. California*, 361 U.S. 147, 153-54 (1959)).

falls outside the First Amendment’s protection must stop at the “calculated falsehood.”⁴² Put differently, if the definition of unprotected “libel” were expanded to include innocent misstatements about public officials, “would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which ‘steer far wider of the unlawful zone.’”⁴³

The actual malice standard articulated in *Sullivan* thus rests on constitutional first principles, not on the Court’s assessment of the interstices of the technological and economic dynamics governing the mass media of 1964. To be sure, the Court noted the economic impact that the multiple libel lawsuits then pending against the *Times* in Alabama was certain to have on the “uninhibited, robust, and wide-open” debate about public issues that the First Amendment exists to safeguard.⁴⁴ Still, one will search Justice Brennan’s opinion for the Court in vain for any discussion of the extent of media concentration, the role of fact checking, or the economic incentives encouraging accuracy that Justice Gorsuch now describes as justification for creation of the actual malice rule. This is not surprising since *Sullivan* itself concerned an advertisement that had nothing whatever to do with the *Times*’ journalism or its editorial process.

Simply put, *Sullivan* is made of more enduring stuff. The actual malice standard it created is the end-product of an exercise in definitional balancing that was, and remains, essential to our First Amendment jurisprudence. The fears that animated rejection of the Seditious Act are the same ones that undergird the actual malice standard itself. That does not change because individuals can now tweet. Justice Kennedy, in a landmark First Amendment holding not long ago, reminded us that constitutional lines cannot be so casually reshaped. “Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.”⁴⁵

C. *Sullivan* as a Foundational Principle of First Amendment Law

Sullivan remains the bedrock of American free speech and free press law because it announced a rule that upholds the kind of society the First Amendment sought to protect, one in which citizens remain free to scrutinize their elected leaders as well as those who otherwise enter the arena and attempt influence public life. As Chief Justice Warren wrote in *Curtis Publishing Co. v. Butts*:

Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930’s and World War II there has been a rapid fusion of economic and

⁴² *Garrison*, 379 U.S. at 79.

⁴³ 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

⁴⁴ 376 U.S. at 270.

⁴⁵ *Citizens United v. FEC*, 558 U.S. 310, 326 (2010).

political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.⁴⁶

Beyond the obvious impact that judicial rejection of *Sullivan* would have on the law of defamation and its documented history as a tool to suppress public debate, its elimination from our constitutional jurisprudence would have other less obvious, but equally worrisome consequences. As noted, the Court in *Sullivan* undertook the same exercise in definitional balancing as it did (and continues to employ) in other First Amendment cases, defining on a categorical basis what speech falls outside of the First Amendment's protections. By the same token, it has repeatedly emphasized that, if the speech at issue in a given case does *not* fall within the definition of one of the recognized unprotected categories, it is fully protected and cannot be subject to either criminal or civil sanction.

In *Snyder v. Phelps*, for example, the Court held that even truly awful speech – vile anti-gay slurs made outside of a soldier's funeral – could not support a finding of intentional infliction of emotional distress (IIED).⁴⁷ Why? Because, as vile as it was, the speech at issue addressed a topic of public concern and did not fall within any recognized category of unprotected expression. As the Court explained, “[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt.”⁴⁸ And for an IIED claim to succeed in such circumstances, a jury (and ultimately a reviewing court) would have to find the challenged speech to be “outrageous,” a “highly malleable standard with ‘an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’

⁴⁶ 388 U.S. at 163–64.

⁴⁷ 562 U.S. 443 (2011).

⁴⁸ *Id.* at 458.

tastes or views, or perhaps on the basis of their dislike of a particular expression.”⁴⁹

Sound familiar? It is the same reasoning that caused the Court to reject ad hoc balancing in favor of the categorical approach exemplified by *Sullivan*, led it to limit the categories of unprotected expression largely to those catalogued in *Chaplinsky*, and motivated the Court in *Sullivan* to reject the common law definition of actionable libel in favor of a formulation that honored the “central meaning” of the First Amendment.⁵⁰ The decision in *Snyder* was 8-1 (and, of course, cited *Sullivan*).

Similar reasoning was at play in *United States v. Stevens*, where the Court assessed whether the government could criminalize the disgusting practice of publishing videos showing animal cruelty.⁵¹ There again the constitutional principles that mandated the result in *Sullivan* applied, whatever polite society may prefer. Just because the Government says it will use its powers wisely (something the progenitors of the Sedition Act surely thought), such assurances do not override the First Amendment’s protections. In the words of Chief Justice Roberts, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”⁵²

Then there is *United States v. Alvarez*, which invalidated a federal statute that criminalized falsely claiming to have been awarded a military medal.⁵³ What did the First Amendment have to say about such speech, even though it was false and dishonored those who had actually earned such recognition? “The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. . . . And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”⁵⁴

The Court went on: “The American people do not need the assistance of a government prosecution to express their high regard for the special place that military heroes hold in our tradition. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.”⁵⁵ All of this, the Court recognized, flowed directly from *Sullivan* and its recognition that “falsity alone

⁴⁹ *Id.*

⁵⁰ *Sullivan*, 376 U.S. at 275. See Kalven, *supra*, at 194 (*Sullivan* “may prove to be the best and most important” decision the Supreme Court “has ever produced in the realm of freedom of speech”).

⁵¹ 559 U.S. 460 (2010).

⁵² *Id.* at 480.

⁵³ 567 U.S. 709 (2012).

⁵⁴ *Id.* at 728.

⁵⁵ *Id.* at 729.

may not suffice to bring the speech outside the First Amendment;” even where the government’s interest is the time-honored one of protecting individual reputation, the challenged statement “must be a knowing and reckless falsehood.”⁵⁶

So “central” is the First Amendment doctrine articulated in *Sullivan* that Chief Justice Rehnquist, writing for a unanimous Court, imported its actual malice standard to reject a claim against a magazine publisher for a parody depicting a prominent religious figure “engaged in a drunken incestuous rendezvous with his mother in an outhouse.”⁵⁷ Such speech, the Court determined, is simply not so offensive to democratic norms that it should be excepted from the First Amendment. Emphasizing its reliance on (and explicit reaffirmation of) *Sullivan*, the unanimous Court minced no words: “This is not merely a ‘blind application’ of the *New York Times* standard, it reflects our considered judgment that such a standard is necessary to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.”⁵⁸

D. *Sullivan* and Section 230 Revisited

Beyond all of this, as noted above, is the fact that Justice Gorsuch’s call to revisit *Sullivan* rests almost entirely on concerns that have little to do with defamation law. He rightly worries, for example, that our online world “facilitates the spread of disinformation” and that 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.”⁵⁹ Under *Sullivan*, of course, intentional falsehoods remain subject to defamation liability.

But the law of defamation is not Justice Gorsuch’s actual concern. Rather, his stated focus is on the viral spread of misinformation on social media platforms. To repeat, a change in defamation law would do nothing at all to change information flows on Twitter, Facebook or any other platform. That’s because such platforms are immune from suit under Section 230 of the Communications Decency Act.

⁵⁶ *Id.* at 729 (citing *Sullivan*, 376 U.S. at 280).

⁵⁷ *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

⁵⁸ *Id.* See also *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (“It was the overriding importance of that commitment [robust public debate] that supported our holding [in *Sullivan*] that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct. We think it clear that parallel reasoning requires the conclusion that a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”); *National Review, Inc. v. Mann*, 140 S. Ct. 344, 346 (2019) (Alito, J., dissenting from denial of certiorari) (“The constitutional guarantee of freedom of expression serves many purposes, but its most important role is protection of robust and uninhibited debate on important political and social issues. If citizens cannot speak freely and without fear about the most important issues of the day, real self-government is not possible.”) (citing *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

⁵⁹ 141 S. Ct. at 2427.

Of course, there is nothing at all stopping anyone from suing Twitter posters who make false, defamatory claims about them.⁶⁰ Justice Gorsuch appears to assume that courts are not flooded with meritorious libel suits brought by such persons because of *Sullivan*'s iconic actual malice standard. There is, however, simply no evidence to support such a proposition. Much more likely is the fact that the mass of intentionally cruel falsehoods on the Internet are simply not worth pursuing on an individual basis, precisely because they were *not* published by news organizations. Perhaps the posters have no substantial assets worth recovering. Perhaps their individual reach is way too small to register. Perhaps they are far more easily combatted with a social media post of one's own.

At any rate, the entities potentially worth pursuing – the social media companies – depend not at all on *Sullivan* for their litigation free pass, but on Section 230. One can reasonably bemoan the wisdom of this legislative choice but such discontent is properly aimed at Congress, not *Sullivan*.

There is, however, one segment of the body politic that would suffer greatly if *Sullivan* were to be overruled. And it is the same target that was under assault back when the case was decided: responsible journalists. Back then, it was the *New York Times* that was chief among the subjects of coordinated attempts to deter critical reporting. Such political attacks against critical reporting were, and remain, the motivating animus behind calls to “loosen the libel laws,” whether such calls come from former presidents or members of the judiciary.⁶¹ An avalanche of lawsuits isn't coming for random posters on Twitter or Facebook.

If, as the Supreme Court has long emphasized, robust debate and a free press are critical elements of our democracy, it makes no sense to demolish the strongest pillar of their protection.⁶²

⁶⁰ In fact, such suits can be quite successful. See, e.g., Donahue, *Cardi B Wins Million-Dollar Verdict Against 'Malicious' YouTuber*, Billboard, Jan. 24, 2022.

⁶¹ See, e.g., Gold, *Donald Trump: We're going to 'open up' libel laws*, Politico, Feb. 26, 2016; Tah v. Global Witness Publ'g, Inc., 991 F.3d 231, 254 (D.C. Cir. 2021) (Silberman, J., dissenting) (“The increased power of the press is so dangerous today because we are very close to one-party control of these institutions”).

⁶² Indeed, although *Sullivan* itself did not focus on the institutional press (and both its holding and the rule it announced applied equally to the newspaper defendant and the multiple private citizens who had also been sued), there is some ambiguity in subsequent cases concerning whether *their* holdings apply to non-media defendants in defamation actions. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (“To ensure that true speech on matters of public concern is not deterred, we hold that the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a *media defendant* for speech of public concern.”) (emphasis added). Regardless of the abstract wisdom (or lack thereof) of applying a different rule to, for example, social media platforms or individual users of such facilities, the Court has elsewhere repeatedly declined to make such distinctions between “media” and “non-media” speakers. See, e.g., *Citizens United*, 558 U.S. at 326-27; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (“Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to

III. CONCLUSION

Justice Gorsuch laudably seeks rules of law that create a better world, one where committed citizens dedicated to the betterment of the common good debate ideas with sincerity, honesty, and rigor. But the Framers knew that the path to this ideal is not smooth. *New York Times Co. v. Sullivan* stands as a guardian of those who contribute to our public discourse – and who hold the powerful accountable – with, at the least, honestly held beliefs. It has stood, reaffirmed again and again, as one of the clearest legal commitments to the American experiment. Perhaps this, then, is a moment to reiterate, as Learned Hand did, that our constitutional framework “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”⁶³

Justice Gorsuch has previously recognized the central role that *Sullivan* plays in our First Amendment jurisprudence. At his confirmation hearing, he called it a “landmark decision,” one “that has been the law of the land for, gosh, 50, 60 years.”⁶⁴ When he sat on a federal court of appeals, he faithfully applied it and, based on his own words in the opinion he wrote in that case, *Bustos v. A & E Television Networks*,⁶⁵ he did so not simply because he was bound to honor Supreme Court precedent, but because he recognized the necessary role the First Amendment plays in unmooring the laws of England from the “contemporary American law” of defamation.⁶⁶

That was true when the Justice wrote it in 2011, and it remains true today. Whatever the predilections of the American Puritans and their English contemporaries, the First Amendment safeguards robust public debate. In other words, there was a time and place where one could find the kind of limitations on press freedoms that a decision to overrule *Sullivan* would portend. They are (or were) in England, in centuries past. Our forebears made a revolution to forge a different path.

enlarge the audience by publication and wide dissemination.”). But see West, *The Stealth Press Clause*, 48 Ga. L. Rev. 729 (2014).

⁶³ United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

⁶⁴ Johnson, *Trump’s Supreme Court Nominee Cites His Decision in A&E Case in Query Over Libel Laws*, Variety, Mar. 21, 2017 (quoting then-Judge Gorsuch).

⁶⁵ 646 F.3d 762, 764 (10th Cir. 2011).

⁶⁶ *Id.* at 769.

Chapter 3: The Empirical Reality of Contemporary Libel Litigation

By Michael Norwick*

A. Introduction

It is the aim of this Chapter to quantify empirically what happens in defamation cases against the news media in a broader and more complete context than the Media Law Resource Center (“MLRC”) has undertaken in the past and to dispel some misconceptions about what conclusions can be drawn from our previously published trial data. In Justice Gorsuch’s dissent from the denial of certiorari in *Berisha v. Lawson*,¹ questioning *New York Times Co. v. Sullivan* and its impact on libel plaintiffs, he relies in part on an analysis by Professor David A. Logan, which cites to MLRC’s media trial data in support of his theory about *Sullivan*’s long-term impact.² A prominent aspect of the argument advanced by Professor Logan is that a sharp drop in the number of trials against the media between the 1980s and recent years, documented in the MLRC study, demonstrates that “over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability.”³ The evidence, however, shows that there is no cause-and-effect relationship between *Sullivan* and this perceived imbalance. First, the supposition ignores the dramatic decrease in *all civil trials* over the past few decades (hardly limited to defamation cases), which is in nearly precise sync with the decline in media trials. There is abundant scholarship explaining that trials have been largely replaced by settlements, facilitated, in part, by expanded mediation and ADR, broader discovery rules, higher litigation costs, and other factors that incentivize the risk-averse strategy of avoiding trials. Whatever the cause, the dramatic decline in trials is across the board. Next, only some media trials (about half) are tried under the actual malice standard that was prescribed by *Sullivan* and its progeny. The other media trials in MLRC’s 37-year study were tried under a different legal standard, most commonly negligence. Cases tried under the actual malice standard are declining at approximately the same rate as cases tried under a different legal standard. All of this raises the question of how *Sullivan* can be the cause of the reduction in the number of trials in cases where the

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¹ 141 S. Ct. 2424 (July 2, 2021) (revised July 29, 2021). See the Supreme Court’s website for a redline document showing revisions. <https://www.supremecourt.gov/opinions/relatingtoorders/20>

² Logan, *Rescuing Our Democracy by Rethinking New York Times v. Sullivan*, 81 Ohio St. L. J. 759, 808-10 (2020) (citing MLRC 2018 Report on Trials and Damages (“MLRC 2018 Report”)).

³ 141 S. Ct. at 2428; see also *id.* (citing Logan, *supra*, at 808-10).

legal standard it prescribes is not applicable? The plain answer is that there is no evidence that *Sullivan* is impacting the year-to-year declines in *any* media trials.

Critics of *New York Times Co. v. Sullivan* also point to plaintiffs' poor performance defending trial awards on appeal. But media defendants have a good track record in all appeals, and actual malice only plays a role in some of them. Indeed, recent trends from roughly the past two decades show plaintiffs in actual malice cases outperformed their non-actual-malice counterparts defending cases on the appeal of awards. The fact is that there are a wide range of speech-protective elements and defenses to a libel cause of action unrelated to actual malice, that are commonly utilized to defend cases brought against the media. Some of the most common libel defenses⁴ are the fair report privilege, opinion, rhetorical hyperbole, defamatory meaning, the "of and concerning" requirement, and substantial truth. These are not technicalities used by media defendants to escape liability, but rigorous legal requirements that separate free speech from statements that cause unjustifiable reputational harm. Newsroom lawyers across the country counsel reporters on these principles every day to help keep their journalism out of the courtroom in the first place. While journalists who have received training and/or prepublication review from lawyers may still find their work challenged as libelous in a lawsuit – and of course, journalists sometimes make mistakes – it should be no surprise that cases brought against adequately vetted and journalistically sound reporting are often subject to dismissal by motion practice early in the proceedings. Where cases involving quality journalism do make it to trial, resulting in an award, it is not revelatory that damages awards are often reversed or modified on appeal.

Since Professor Logan (and by extension Justice Gorsuch) relies on MLRC trial data, it is essential to point out that, to be included in MLRC's study, cases resulting in a trial⁵ had to have been brought against a "media entity or media-affiliated individual"⁶ as MLRC defines those terms. A "media entity" generally includes: "television, cable and satellite broadcasters; newspaper, magazine and book publishers; and movie and music producers and distributors."⁷ Website operators or bloggers can also be included in the study, but "only where the person or entity sued is a professional in the presentation of the material at issue, and where the site is at least attempting to receive a significant amount of revenue from the site."⁸ With 37 years of data covering 629 trials, we have only to-date included five trials in cases brought against internet companies or sites that have met this

⁴ We use the term "defense" here without regard to which party has the burden of proof on each issue.

⁵ Eighty-eight percent (88%) of the trials in MLRC's study include a defamation claim, but some claims are based upon invasion of privacy theories of liability, such as false light, and other torts claims against the media. See MLRC 2018 Report, at 25.

⁶ *Id.* at 93. Media-affiliated individuals include: "individual journalists, editors, authors and other individuals involved in the creation and dissemination of editorial content." *Id.* at 95.

⁷ *Id.* at 95.

⁸ *Id.*

definition.⁹ Our study does not include trials involving content from personal websites, social media commentary, internet trolls, or “virtually anyone who can publish anything for immediate consumption virtually anywhere around the world,” as Justice Gorsuch describes it.¹⁰ Thus, it is important to point out that most of the concerns that Justices Thomas and Gorsuch express in their dissents in *Berisha* about disinformation on the internet and social media¹¹ are not examined in MLRC’s trial study, and the results do not speak to the issue of whether the law, much less *New York Times Co. v. Sullivan*, is adequately calibrated to address those concerns.¹² The vast majority of the outlets sued in the trials covered by the MLRC study – 92% – fall into just four categories: newspapers, magazines, television broadcasters and radio broadcasters.¹³ One can surmise that a majority of the outlets in MLRC’s trial study employ professional journalists and/or in-house and outside media lawyers, publish news and entertainment content under their own names and have strong financial incentives to avoid content liability and litigation expenses from lawsuits. The trial statistics in MLRC reports speak only to *their* success at trial, and on appeal from trial. Thus, reliance on the MLRC trial study, which quantifies the litigation success among organizations predominantly engaged in journalism, to prove a point about an alleged failure of legal doctrine to tackle falsehood and rumor on social media, would be akin to using a weather report from New York City to prove it’s raining in London.

Because MLRC’s most long-term and up-to-date data relates only to media *trials* and not the vast majority of media cases that never make it to trial, in connection with this report we asked major news media companies to complete a survey about each of the libel complaints they received since 2009.¹⁴ Out of some 246 cases brought against these companies, and 177 dispositive motions prior to trial, defendants had a high win rate of 75% (including results on appeal), but only 16% of the motions were defense wins (also including appeal) on the issue of actual malice, very much challenging the perception that it is *Sullivan* that is the root cause of these defense victories. Moreover, while the number of trials has gone down, there is no evidence that media libel complaints have gone down, either in the long-term since *Sullivan*, or in the short-term, with some evidence that the number of cases went up in the late 2010s. Furthermore, while trials are very rare, among the

⁹ *Id.* at 33 & n.15. Two additional internet trials resulted in hung juries, which are not used in most of the statistical calculations made in our reports.

¹⁰ 141 S. Ct. at 2427.

¹¹ See, e.g., *id.* at 2425 (Thomas, J., dissenting) (citing conspiracy theories on the internet that led an armed gunman to enter a Washington, D.C. pizza restaurant and a *New York Times* story about a man who was smeared by rumors on the internet); *id.* at 2427 (Gorsuch, J., dissenting) (citing a study documenting falsehoods spread on Twitter).

¹² See Chap. 2, *supra*, at 93-94.

¹³ See MLRC 2018 Report, at 31-33, for a full breakdown of the media types covered by our trial study, which also includes books, cable, film, music and internet websites.

¹⁴ The results of this survey are provided in greater detail in Sections C.2.a through E, *infra*, and a methodology is provided in Appendix II, *infra*, at 128-29.

media companies we surveyed, settlements have replaced them in many cases. We discuss those results and some other recently conducted research in more detail below.

B. The Decrease in Media Trials is Unrelated to *Sullivan*

Legal observers have, for some time, been trying to make sense of the cause of what has been called the “disappearing jury trial.”¹⁵ In the federal courts, where case data is most reliable over the decades, the rate of civil trials has declined markedly since the era when *Sullivan* was decided. In “1962, trials still accounted for roughly 12 percent of all civil dispositions in federal court. But 40 years later, the rate of disposition by trial in civil cases had fallen to less than 2 percent, even as the total number of civil dispositions grew dramatically. [By 2017,] approximately 1 percent of all civil cases filed in federal court [were] resolved by trial – the jury trial disposition rate [was] approximately 0.7 percent, and the bench trial disposition rate [was] even lower.”¹⁶ In the federal courts, defamation cases have accounted for approximately three tenths of a percent of civil cases filed since 1970,¹⁷ so it can hardly be said that *Sullivan* or other speech-protective legal doctrines applicable to libel cases have any connection to the overall decline in federal civil trials.

What has been observed since the late 1980s is “not only a continuation in the shrinkage of *percentage* of cases that go to trial, but a shrinkage of the *absolute number* of cases that go to trial.”¹⁸ The overall decline in all civil trials is highly correlated with the decreases in media trials documented in MLRC’s 37-year study of media trials and damages.¹⁹ The full set of MLRC trial data, relied upon by Justice Gorsuch and Professor Logan, is graphed below in Chart 1:

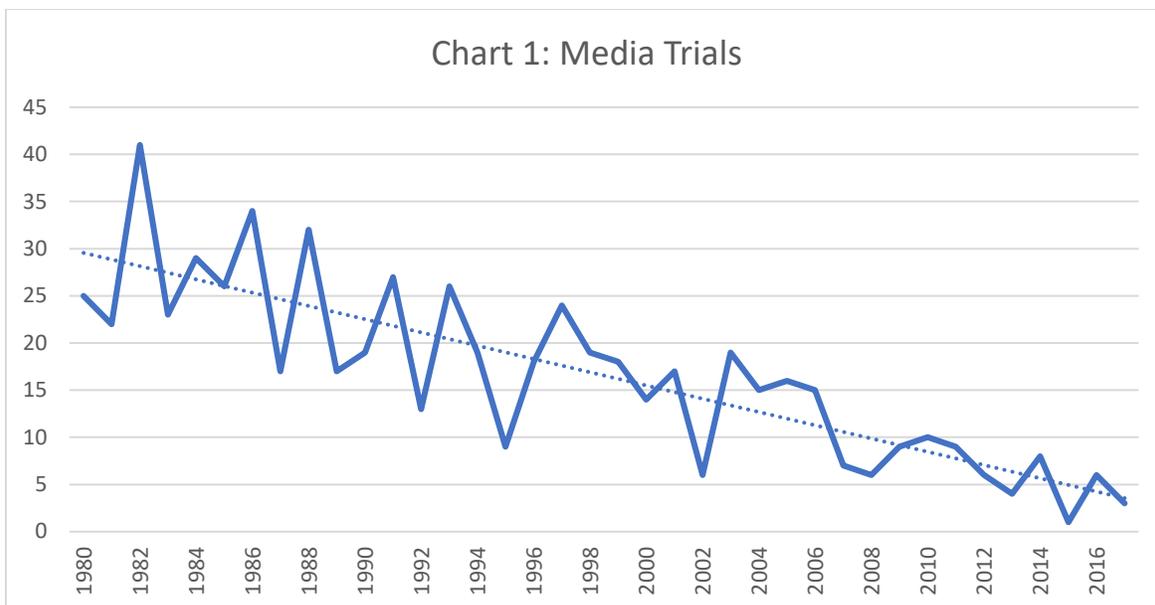
¹⁵ See Diamond & Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 La. L. Rev. 1 (2020) (“Diamond”).

¹⁶ Smith & Macqueen, “*Going, Going, But Not Quite Gone*,” *Judicature*, Vol. 101, No. 4 (Winter 2017) (“Smith”) at 28 (citing Galanter & Frozena, *The Continuing Decline of the Civil Trials in American Courts* 23 (Pound Civil Justice Inst. 2011) (“Galanter II”).

¹⁷ See Federal Judiciary Center, Integrated Database, searched on Jan. 6, 2022 at <https://www.fjc.gov/research/idb>. In the FJC’s records of civil cases filed between 1970 and 1987, only 13,729 cases out of 2,820,279 were coded as 320 (Libel, Slander & Assault). On the records from 1988 to the present, only 23,493 out of 9,474,444 were similarly coded. We say *approximately* 3/10ths of a percent because assault cases are included in this total; moreover, libel claims are sometimes brought under codes specifying personal injury cases or under codes for related claims in a complaint.

¹⁸ Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, *J. of Empirical Legal Studies*, Vol. 1, Issue 3, 459-570, 516 (Nov. 2004) (“Galanter I”).

¹⁹ MLRC’s study on trials and damages includes data from trials in defamation, privacy and/or other related claims stemming from the collection or dissemination of news, information or entertainment that are brought against the media. See MLRC 2018 Report, *supra*, at 93-104 (containing detailed methodology of the MLRC trial study).



A trend line is drawn through the center of the data points to represent the best linear fit for the data.²⁰ In federal court data, the most reliable (and perhaps only) source of trial data²¹ over this 37-year period, civil trials have declined in a remarkably similar fashion, as represented by Chart 2.²² Indeed, if you compare the average number of media trials and federal civil trials in 1980s, and measure their decline by the average number of media trials and federal civil trials in the first seven years of the 2010s,²³ respectively, there is only a small difference in the percentage of decline: 75% in the case of media trials and 70% in the case of federal trials, as described in Table 1 below.

²⁰ The Microsoft Excel “Trend” function finds the linear trend by using the least squares method to calculate the line of best fit for a supplied set of y- and x- values.

²¹ The measure of all federal civil trials used here is the federal Administrative Office’s statistic: civil terminations during or after trial in U.S. district courts. It “is not a count of completed trials but of cases that reach the trial stage.” Galanter I, *supra*, at 461. “Since some cases settle after trial has commenced, these figures overstate the number of completed trials.” *Id.* at 461 n.4. However, one of the leading researchers studying the phenomenon of the decreasing trials in the United States has called this figure: “a plausible if inexact indicator of both the magnitude and year-to-year trends in trial activity.” *Id.* at 461 n.6.

²² A surge in federal case terminations during or after trial in 2007 and 2008, represented by a spike during that time frame (as seen in Chart 2), is explained in a footnote to an Administrative Office table: “These increases resulted from terminations of oil refinery explosion cases in the Middle District of Louisiana.” Judicial Facts and Figures 2010, Table 4.10 (U.S. District Courts – Civil Cases Terminated, by Action Taken). Available at: <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures>

²³ MLRC has only collected and published data on media trials through the end of 2017.

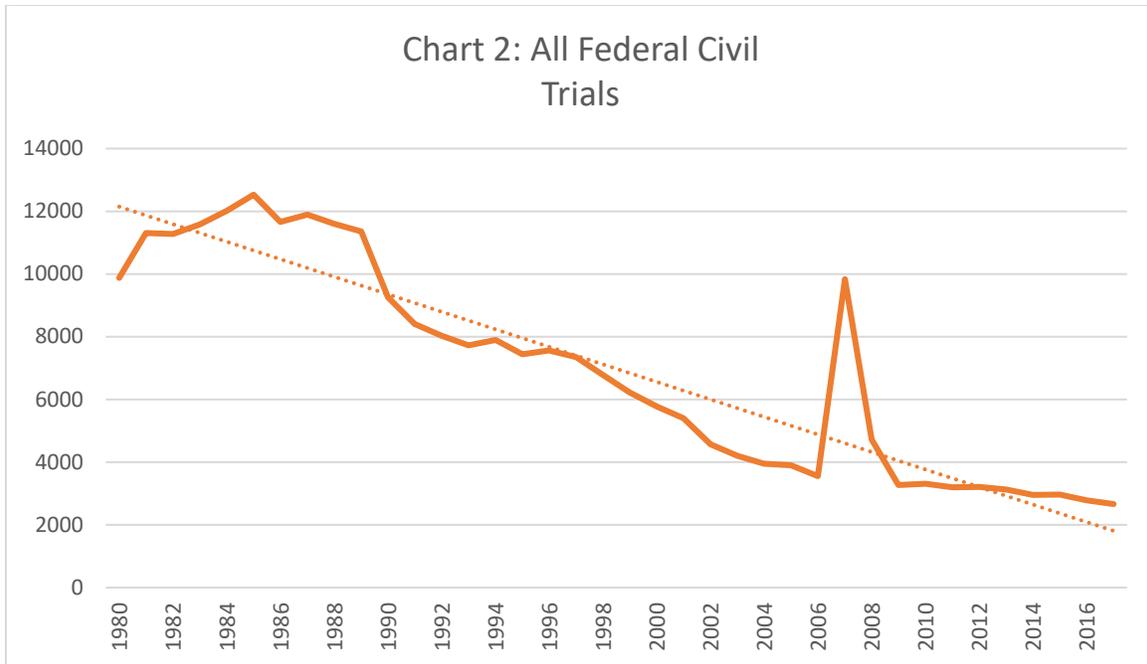
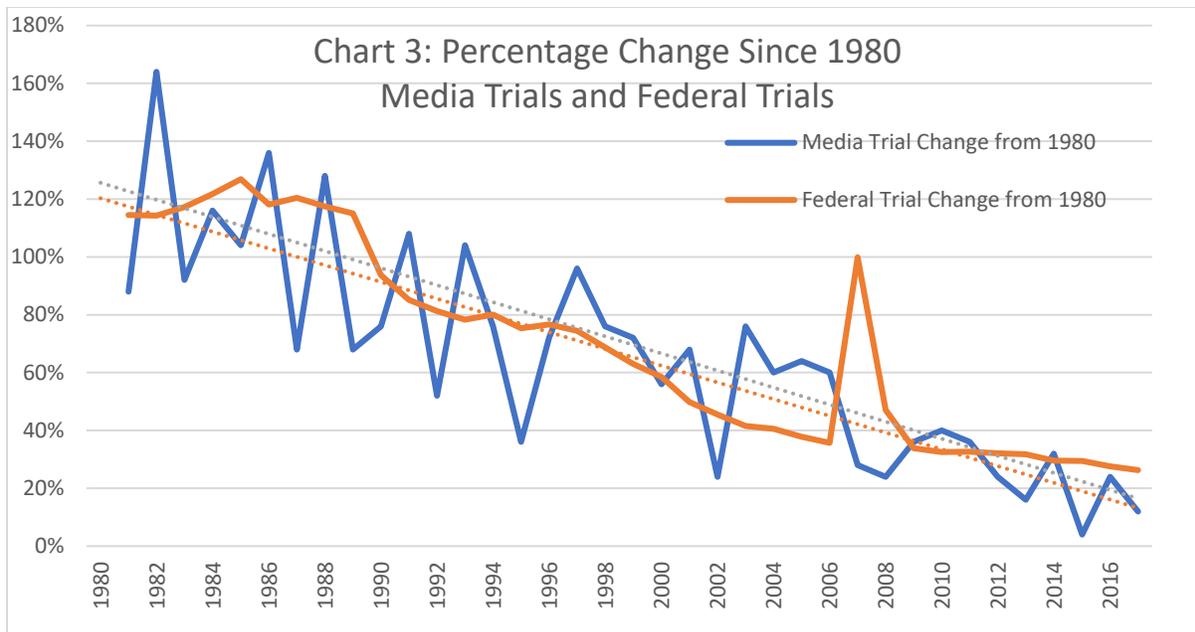


Table 1: Decline in Avg. No. Media Trials vs. Avg. No. Federal Civil Trials - 1980s to 2010s.

	Number of Media Trials	Avg. No. of Media Trials/Year	Federal Civil Trials	Average Fed Civil Trials /Year
1980-89	266	26.6	115,089	11,509
2010-17	47	6.7	23,886	3,412
Decline of decade averages		19.9		8,097
% Decline		75%		70%

When the two graphs of media trials and federal trials are converted to percentage of change since 1980 and superimposed upon one another, the two trend lines run in extraordinary proximity and parallel to one another as depicted in Chart 3 below. The data used to plot Charts 1-3 is included in Appendix I, Table A.²⁴

²⁴ The data for the number of cases terminated during or after trial, from 1980-2000, comes from Galanter I, *supra*, 532-334 (Table A1 & A2). Galanter notes that those figures were drawn from Table C-4 of the annual reports of the Administrative Office of the U.S. Courts. The same data for the years 2001-2017 comes directly from those Table C-4 annual reports of the Administrative Office, available on their website at <https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary>



Although there is less comprehensive state data, similar declines in state trials have been reported. For example, the National Center for State Courts reported that in a study of twenty-four state jurisdictions, trials declined by 47.5% from 2000 to 2009.²⁵ That very much echoes declines in MLRC’s study of media trials, in which all media trials declined from 18 in 2000 to 9 in 2009 (a 50% decline), and state media trials declined from 11 and 14, in 2000 and 2001, respectively, to 6 and 8, in 2008 and 2009, respectively (a 44% decline between 2000-01 and 2008-09).²⁶

MLRC does not have data on media trials prior to the 1980s, including the first 16 years after *Sullivan* was decided in 1964. But given the evidence that the number of media trials, year over year, are highly correlated with changes in the overall number of civil trials, one could certainly make the supposition that media trials were on the increase until the peak in all civil trials in the mid-1980s. One of the leading scholars studying the phenomenon of the declining American trial, Marc Galanter, published the bar graph below (Chart 4) depicting the number of federal civil trials from 1962 to 2010, with a clear peak in 1985.²⁷

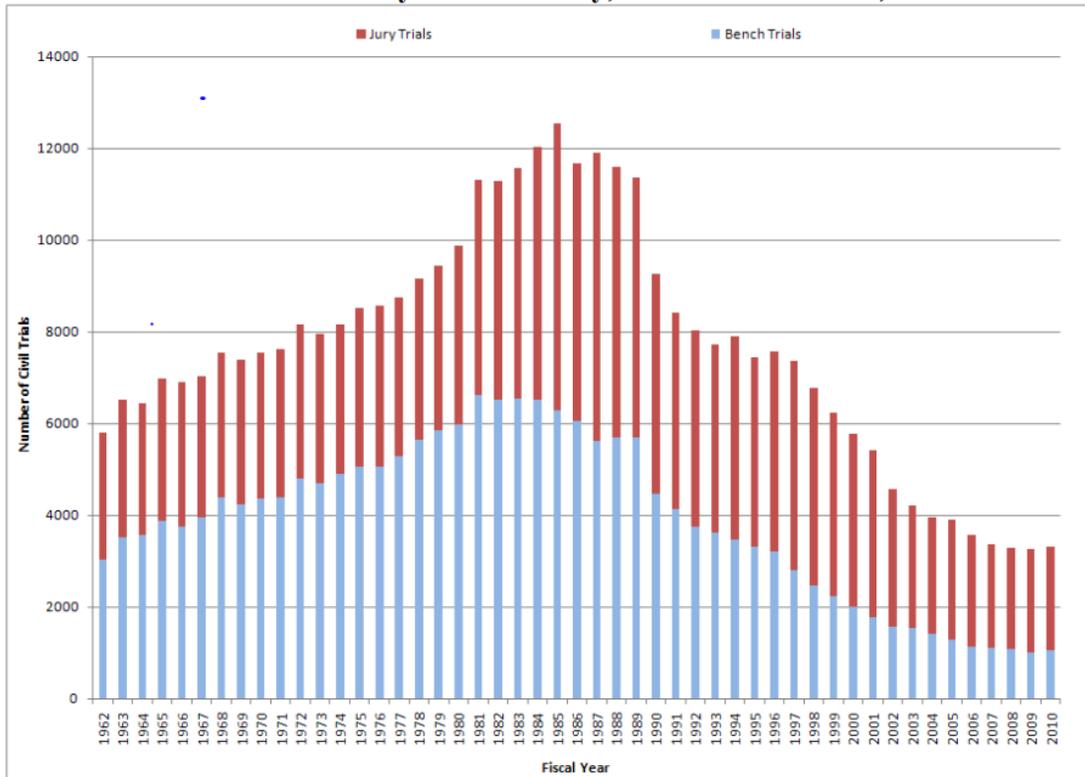
²⁵ See Engstrom, *The Diminished Trial*, 86 Fordham L. Rev. 2131, 2132 (2018).

²⁶ MLRC 2018 Report, *supra*, at 23, Table 1; MLRC 2010 Report on Trials and Damages at 29, Table 4.

²⁷ Galanter II, *supra*, at 8; see *id.* at 6 (citing Administrative Office of U.S. Courts Annual Reports, Table C-4).

Chart 4

Number of Civil Trials by Bench or Jury, U.S. District Courts, 1962-2010



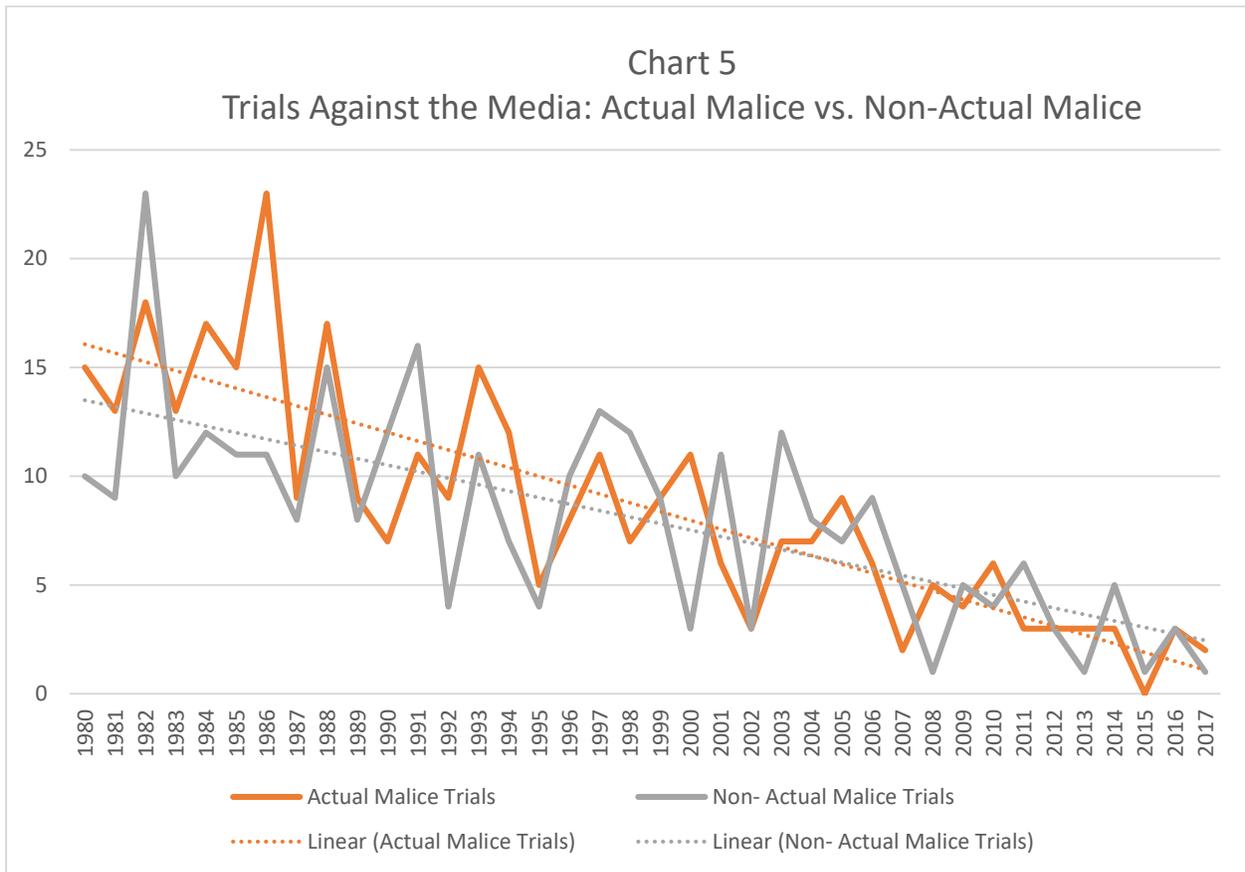
There is certainly no evidence, as one might infer from Justice Gorsuch’s reliance on Professor Logan’s arguments, that media trials were at peak in the 1960s before *Sullivan* and the actual malice standard took root and gradually caused media trials to decline over the next 50+ years. There is some evidence that libel cases, not necessarily trials, did peak in the 1980s – years in which trials in libel cases like those brought by General William Westmoreland²⁸ and then-former Israeli Defense Minister Ariel Sharon,²⁹ were headline news. The number of libel cases against the media seems to have fluctuated in the decades that followed. Data supporting that point is discussed in Section D *infra*.

Even if data pointing to the decrease in media trials were a good benchmark for showing that libel plaintiffs are not receiving a fair shake in court – which it is not – one would expect that *New York Times Co. v. Sullivan* would only cause a decrease in *actual malice* trials, and that other media trials, tried under a different legal standard such as negligence, would not decline as sharply. But this is not the

²⁸ See Abramson, “Westmoreland to Drop Libel Suit Against CBS: General, Network to Make Joint Announcement Today on Ending of \$120-Million Legal Action,” L.A. Times, Feb. 18, 1985.

²⁹ See Hornblower, “Sharon v. Time Magazine In \$50 Million Lawsuit,” Wash. Post, Nov. 14, 1984.

case. It should be noted that nearly half³⁰ of the trials in MLRC’s study are cases in which the actual malice standard does not apply. As demonstrated in Chart 5, over the 37 years covered by MLRC’s trial study, the annual number of cases tried under the actual malice standard has dropped almost in sync with the number of media trials using other legal standards, such as negligence. The data underlying Chart 5 is included in Appendix I, Table B.



Scholars have attempted to ascertain the reasons for the sharp decline in trials and have cited a number of factors contributing to this trend. Professor John Langbein has written extensively about modern pre-trial procedures displacing the need for trial, with a particular emphasis on the evolution of the Federal Rules of Civil Procedure.³¹ He notes that more expansive discovery permitted in civil litigation not only assists litigants in preparing for trial, but that with “such far-reaching disclosure of strengths and weaknesses of each side’s case, discovery often has the effect of facilitating settlement. In such cases, discovery serves to

³⁰ The split is about 48% non-actual malice cases, 52% actual malice. See Appendix I, Table B, *infra*, at 124.

³¹ Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L. J. 522, 524 (2012) (“Langbein”).

displace rather than to prepare for trial.”³² With more extensive discovery, sometimes in the form of one party “seek[ing] costly information of marginal relevance,” comes higher costs, particularly with the increased prevalence of e-discovery.³³ Thus, “[t]he prospect of bearing these costs pressures the parties continually to recalculate the comparative advantages of settlement and trial. The greater the investment that either side has made in pretrial investigation, the greater is the incentive to avoid the risk of total loss that can result at trial.”³⁴

Also, judges have also been increasingly involved in case management from the very beginning of cases and now have an express role in facilitating settlement at pretrial conferences.³⁵ Some have observed a link between a judge’s caseload pressure and court-generated pressure to settle.³⁶ Alternative Dispute Resolution procedures have increased in popularity and, in one survey of civil attorneys and judges, mediation ranked significantly higher than trials and arbitrations in predictability, speed, cost effectiveness, and fairness.³⁷ Further, the dearth of trials has led to fewer litigation attorneys with trial experience, and those attorneys lacking trial skills may be tempted to settle even when a trial would be good for their client.³⁸

There is also evidence that more extensive discovery has led to the greater use of motions for summary judgment, with some litigators believing that “discovery’s primary use is to develop evidence for summary judgment, not to prepare for trial.”³⁹ Certainly, there are commentators who are concerned that the Supreme Court has, in enunciating a plausibility standard for federal pleading in *Ashcroft v. Iqbal*⁴⁰ and *Bell Atlantic Corp. v. Twombly*,⁴¹ and a higher burden for

³² *Id.* at 548. This chapter will discuss settlements in media defamation cases more specifically in Section E, *infra*, 119-22.

³³ *Id.* at 552 (citations omitted).

³⁴ *Id.* (citations omitted).

³⁵ *Id.* at 559 (citing 1983 revision to Fed. R. Civ. P. 16).

³⁶ *Id.* at 560 (citing comments by the late U.S. District Court Judge Jack B. Weinstein); see also Smith, *supra*, at n.96 (citing Bennett, *Judges’ Views on Vanishing Civil Trials*, 88 *Judicature* 306, 308 (2005) (“Judge Mark W. Bennett has suggested that ‘federal trials court judges place far too much pressure far too often on litigants and lawyers to settle their cases,’ thereby resulting in the ‘vanishing civil jury trial.’”)).

³⁷ Diamond, *supra*, at 131-32.

³⁸ Elrod, *Is the Jury Still Out? A Case for the Continued Viability of the American Jury*, 44 *Texas Tech. L. Rev.* 303, 323-24 (2012).

³⁹ *Id.* at 568 (citations omitted).

⁴⁰ 556 U.S. 662 (2009).

⁴¹ 550 U.S. 544 (2007).

federal plaintiffs in the 1986 *Celotex* trilogy,⁴² displaced the role of the jury.⁴³ Professor Langbein has expressed the view that “[a]part from such cases [where pretrial motions reveal a case to be meritless], the main reason that the jury is disappearing is that litigants who are entitled to demand trial decide to settle, either because they no longer need a trial, or because they cannot afford it.”⁴⁴

Another explanation for the general decline in trials is increasing corporate fear of enormous jury awards. In complex cases, the size of potential jury awards and the uncertainty of outcome tends to push risk-averse corporate defendants towards settlement.⁴⁵ And the “prospect of punitive damages also leads defendants, especially corporations, to avoid trials.”⁴⁶ Although it is beyond the scope of this report to analyze fully the reasons behind the general decline in all civil trials,⁴⁷ and the reasons for the declines may vary by practice area, it is the aforementioned concern about enormous and unpredictable jury awards that perhaps most resonates among news media defendants. Page one of the MLRC report cited by Justice Gorsuch and Professor Logan discusses “two major earthquakes” that shook the media bar in 2016 and 2017.⁴⁸ The first was a \$140 million verdict in the invasion of privacy litigation brought by professional wrestler Hulk Hogan against the website Gawker, in *Bollea v. Gawker Media, LLC*.⁴⁹ The award was the second largest ever against a media defendant, forced Gawker into bankruptcy and liquidation of its assets, and ultimately the company settled the case in bankruptcy for \$31 million.⁵⁰

Media defendants take the prospect of devastatingly large verdicts, like the one in *Bollea*, very seriously when weighing whether to settle a case before trial. Lest one need proof of this point, just a year later, ABC entered into a nine-figure settlement in a case involving its reporting on so-called “pink slime,” the slang term for “lean finely textured beef,” a product used by the beef industry.⁵¹ One of the producers of the product, Beef Products, Inc., sued ABC over a 2012 investigative

⁴² This trilogy of Supreme Court decisions, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), redefined the standards applicable to summary judgment motions. Among media defendants, *Anderson v. Liberty Lobby* is considered the most significant because it set the standard for applying actual malice on summary judgment.

⁴³ Thomas, *The Missing American Jury* 32-35 (Cambridge University Press 2016).

⁴⁴ Langbein, *supra*, at 572.

⁴⁵ Smith, *supra*, at 34 (citing Elrod, *supra*, and Rose, *The Reasonable Investor” of Federal Securities Law: Insights from Tort Law’s “Reasonable Person” & Suggested Reforms*, 43 J. of Corp. L. 77 (2017)).

⁴⁶ Smith, *supra*, at 34.

⁴⁷ Not to mention criminal trials, which have been in decline too. See Thomas, *supra*, at 2.

⁴⁸ MLRC 2018 Report, *supra*, at 1.

⁴⁹ Case No. 12-012447-CI (Fla. Cir. Pinellas County, March 21, 2016). MLRC 2018 Report, at 2.

⁵⁰ *Id.* at 2, 12-13.

⁵¹ *Id.* at 2.

report referring to the product as “pink slime,” claiming that the report caused people to believe the product was unsafe, not nutritious, and not real beef.⁵² The case settled three weeks into the trial, which had been scheduled for eight weeks.⁵³ Months later, it was revealed in an ABC quarterly financial report that ABC had paid a \$177 million settlement during the relevant period, and follow-up reporting revealed that insurance company contributions very likely raised the total amount of the settlement significantly higher.⁵⁴ Even at \$177 million, MLRC is not aware of a higher settlement of a defamation or related tort case against the media.⁵⁵

In short, the reality of the decline in all civil trials – whatever its actual causes – is very much disconnected from the legal nuances of libel law. As one scholar put it, ““in American civil justice, we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become “vanishingly rare.”⁵⁶

C. The Actual Malice Standard Helps News Media Defendants in Some Cases, But Not as Frequently as Critics of *New York Times Co. v. Sullivan* contend.

Critics of *Sullivan* point to MLRC data in their attempt to demonstrate that the actual malice standard has evolved into “an effective immunity from liability.”⁵⁷ Its chief academic critic has said that MLRC data shows that “the combination of substantive, remedial, and procedural protections imposed by *New York Times* and its progeny are having the intended prophylactic effect.”⁵⁸ But when one looks behind the data on which such assertions are based, the cause-and-effect relationship between actual malice and the observed phenomenon becomes decidedly attenuated.

1. Trends on Appeal from Trial

While critics of *Sullivan* point to plaintiffs’ relatively low rate of success on appeal, they ignore those awards that are *not appealed* or are *settled* prior to appeal,⁵⁹ scenarios in which the plaintiffs keep their jury award or settle for a

⁵² *Id.*

⁵³ *Id.* at 3.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Langbein, *supra*, at 524.

⁵⁷ See *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting) (citing Logan, *supra*).

⁵⁸ Logan, *supra*, at 810.

⁵⁹ This was a source of error in Professor Logan’s interpretation of an MLRC statistical table showing plaintiffs’ appellate success. The oversight was that the ratio given for awards affirmed on appeal (MLRC 2018 Report, p.47, Table 12A) was divided by all awards that survived post-trial motions, including cases that settled, were not appealed, or were still pending at the time of our 2018 Report. See Logan, *supra*, at 809-10, erroneously citing MLRC data as showing that plaintiffs have a success rate on appeal of damage awards of 9.5%, when the actual statistic of success on appeal at the time our report was published was 33.3%. Justice Gorsuch had originally published Professor Logan’s incorrect statistic in an early version of his dissent, but corrected it in a July 29, 2021

portion of it to avoid the uncertainty of appeal. Between 2000 and 2017, 33 of 70 (47%) of the awards that survived post-trial motions were not appealed or were settled.⁶⁰ Moreover, plaintiffs succeed at a much higher rate than defendants at trial, with plaintiffs winning 58.5% of media trials over the decades.⁶¹ And over the decades, plaintiffs have won media cases tried under the actual malice standard at a rate (56.6%) only slightly lower than those tried under less rigorous standards such as negligence (60.6%).⁶²

Media defendants do well when appealing plaintiffs’ verdicts, but the actual malice standard only helps them some of the time, and the data does not support the notion that actual malice has become a more potent weapon over the decades. Indeed, as seen below in Table 2, in the 1980s and 1990s, plaintiffs that tried their case under the actual malice standard had a significantly lower chance of success on appeal. But this has not been the case in the period between 2000 and 2017, when plaintiffs in actual malice cases did better on appeal than cases tried under negligence and other legal standards.

**Table 2: Plaintiffs’ Success on Appeal of Awards
Actual Malice vs. Non-Actual Malice Trials.**

	% Plaintiff Success on Appeal -- All Cases	% Plaintiff Success on Appeal - Actual Malice Cases Only	% Plaintiff Success on Appeal - Non- Actual Malice Cases Only
1980-89	31.7%	25.4%	38.1%
1990-99	27.9%	15.4%	44.8%
2000-17	43.2%	47.4%	38.9%
1980-2017	32.5%	25.6%	40.0%

While Justice Gorsuch posits that the actual malice standard has “evolved”

revision after the error was pointed out to the Court. See 141 S. Ct. at 2428 (citing the correct statistic that 1 of every 3 jury awards, based upon 2 successful plaintiff’s appeals out of 6 from 2010 to 2017, as of the time of our report). The Supreme Court’s website contains [a redline document](#) showing the revisions. Although MLRC has not updated its trial study with new cases since the 2018 report, we have updated the cases that were then pending appeal but have since completed the appellate process. The revised number of plaintiffs’ damages awards affirmed on appeal (in their entirety) during 2010 to 2017 is 4 in 9, or 44.4%. That revised data is shown in Table C1, Appendix I, *infra*, at 125. It also includes additional columns showing “Completed Appeals” and “Plaintiff’s % Success on Appeal,” for clarity.

⁶⁰ See Appendix I, Table C1, *infra*, at 125.

⁶¹ MLRC 2018 Report, *supra*, at 23, Table 1.

⁶² See Appendix I, Table D, *infra*, at 126 (showing the inverse statistic, defense wins at trial).

into “an effective immunity from liability,” the data shows that plaintiffs have won 9 out of 19 (47.4%)⁶³ appeals of awards under the actual malice standard since the beginning of the 2000s, a far cry from “immunity.”

2. Actual Malice’s Impact in Cases Against Major News Media Entities During the Most Recent Decade.

a. Libel Suits Brought Against Leading News Media Companies Since 2009

In connection with this White Paper, MLRC sought to gather fresh information from major news media companies concerning their success on dispositive motions in libel cases, and more specifically the applicability and success rate of raising the actual malice standard in such motions. We also sought to ascertain the final disposition of those cases that were no longer pending trial or appeal. We sought this data because most of MLRC’s pre-existing data only tracks media trials and not the vast majority of media cases that never make it to trial. For this new study (the “Main Study”), we asked major news media companies to complete a survey about each of the non-*pro-se* libel complaints they had received since 2009.⁶⁴ Most of the companies asked to participate agreed to do so, and 16 companies/news organizations participated: Advance Publications, the Associated Press, Bloomberg News, CBS (CBS News and owned and operated television stations), the *Chicago Tribune*, Dow Jones (publisher of the *Wall Street Journal*), Fox News, Gannett (*USA Today*, the *Arizona Republic*, the *Detroit Free Press* and *Indianapolis Star* only), Hearst, the *Los Angeles Times*, NPR, the *New York Times*, ProPublica, Reuters, Tegna, and the *Washington Post*. In total, we analyzed 246 cases and 177 dispositive motions filed in those cases.

Separately, we sought to gather data on non-*pro-se* libel lawsuits against the five major television and cable news networks through a methodology using mostly publicly available information, as well as material that MLRC has compiled over the years, to identify and analyze cases brought against them since 2011.⁶⁵ For this alternative data set (the “TV News Study”), with help from paid research assistants, we identified and tracked results of cases brought against ABC News/ESPN, NBC News (including MSNBC and Telemundo), CBS News, the news operations of

⁶³ See Appendix I, Table C2, *infra*, at 125.

⁶⁴ After making initial inquiries to a few of the media companies asked to participate in this survey, 2009 was chosen as the earliest date from which those companies could reasonably retrieve case records. However, as more companies were asked to participate, we learned that four media companies were not confident that they were able to locate all records from the earlier years covered by this survey. For this reason, we generally do not try to draw conclusions about trends over time with this data and, where we do, we exclude those four companies from the data, as will be explained in Section D *infra*.

⁶⁵ The source of identifying cases was MLRC’s MediaLawDaily (the “Daily”), a daily email newsletter that the MLRC staff compiles and shares with MLRC members. The Daily includes links to breaking news and generally includes new libel cases brought against the media, as well as related decisions in those cases, when reported in one of dozens of sources that MLRC reviews each day. Due to the limited number of years of the Daily that MLRC has stored, this research was limited to 2011 through 2021.

owned and operated television stations of the aforementioned networks, CNN and Fox News.⁶⁶ For this research method, where a complete picture of the outcome of a case could not be ascertained through publicly available information, such as online dockets like PACER, electronic research services like LexisNexis, and news websites, details regarding cases were occasionally obtained by speaking with lawyers with knowledge of the cases. While identifying the relevant lawsuits against these networks using this research method was not as accurate as surveying the companies directly, we thought it worth examining whether the data obtained in this manner, and focusing on television news, was materially different from the data obtained from the Main Study. We identified and examined 78 libel cases filed against these companies during the 2011 to 2021 timeframe, in which 62 dispositive motions were filed by the news media defendants. In both studies, early-stage motions, particularly motions to dismiss, greatly outnumbered summary judgment motions.⁶⁷ This appears to reflect a trend in which most libel cases are either dismissed or settled in the pre-discovery phase, with fewer cases proceeding to discovery and summary judgment motions.⁶⁸ Final dispositions in our studies are discussed in more detail in Section E *supra*. Relevant findings from both the Main Study and the TV News Study will be included in the discussion below and in additional tables provided in Appendices II & III.

b. Actual Malice Was Decisive in Only a Small Share of the Dispositive Motions Filed.

Out of 177 dispositive motions brought by our sample of news media defendants, they prevailed in 75% of those motions (including results on appeal). But, as shown in Table 3, only 16% of the motions⁶⁹ were defense wins (also including appeal) on the issue of actual malice, very much refuting the view that it is *Sullivan* which is driving these defense victories prior to trial. In fact, defendants in our survey won more often because the plaintiff could not carry its burden of proving falsity and/or the court found that the allegedly libelous statements were substantially true (22% of defense dispositive motions). That is particularly noteworthy in the 10 of 28 (36%) actual malice wins in which the defendant *also* won because of the plaintiff's failure to prove material falsity since, by definition, the plaintiff cannot prove a defendant published despite reckless disregard of the truth, if it cannot establish that the challenged statements were even false. In those

⁶⁶ Although there is overlap in two of the companies that were included in the Main Study and the TV News Study, the information provided by the companies in the Main Study was not used to identify cases for the TV News Study.

⁶⁷ See Appendix II, Table H, *infra*, at 131; Appendix III, Table M1 & M2, *infra*, at 137.

⁶⁸ See *id.*

⁶⁹ For the purpose of our calculations on the number of decisions and wins on dispositive motions for the specific issues of actual malice and falsity/substantial truth, we removed one case in which the defendant successfully moved for summary judgment but, after due diligence, we were unable to determine the basis for the court's decision. This is why Table 4, below, shows only 176 motions, but Appendix II, Table H, *infra*, at 131, shows 177 motions.

cases, the defense wins on actual malice were often superfluous⁷⁰ and, for that reason, the centrality of *Sullivan* as a foil in those cases is even more attenuated. In Table 4 below, we break down motion success by motion type, and include statistics on the instances in which the issue of actual malice and falsity/substantial truth were decided.⁷¹ Defendants did better on dispositive motions in cases that are now final, winning 84% of such motions, including appeals. But again, motion wins on actual malice lag behind, with defendants winning only 18% of dispositive pre-trial motions on the issue of actual malice.

Table 3: Main Study – Detailed Results on Dispositive Motions – Active and Final Cases, Including Appellate Results⁷²

Motion Type	Anti-SLAPP	Motion to Dismiss	Summary Judgment	All Dispositive Motions
Motions filed	32	119	25	176
Defense Wins on Motion	24	87	20	131
Defense Win %	75%	73%	80%	74%
Actual Malice Decided	3	31	11	45
% Motions Actual Malice Decided	9%	26%	44%	26%
Actual Malice Win	2	19	7	28
% Motions Defense Win on Actual Malice	6%	16%	28%	16%
Truth/ Falsity Decided	13	38	10	61
% Motions Truth/ Falsity Decided	41%	32%	40%	35%
Truth/ Falsity Win	11	21	7	39
% Motions Defense Win on Truth/ Falsity	34%	18%	28%	22%
Motions Defense Win on both AM and Falsity	0	6	4	10
% Motions Defense Win on both AM and Falsity	0%	5%	16%	6%

⁷⁰ There may be instances where the court dismissed claims based on falsity with respect to some allegedly libelous statements and dismissed other statements on the grounds of actual malice. The survey questions were not detailed enough to account for this distinction.

⁷¹ In Appendix II, Tables I1 & I2, *infra*, at 132, we show a horizontally oriented version of this table as well as one that includes data only from final cases.

⁷² One case is removed from this table. See note 69 *supra* for an explanation.

In the TV News Study, news media defendants were not as successful, winning only 57% of dispositive motions. But, more importantly, the percentage of motions won on actual malice was similar to the Main Study, with defendants winning only 19% of dispositive motions on actual malice grounds. In this television news data set, 7 of 12 (58%) defense wins on actual malice were accompanied by a win on the issue of substantial truth/material falsity which, for the reasons stated above with respect to the Main Study, further diminishes the impact of the actual malice standard in those cases.⁷³

So, if these defendants are not winning primarily on the issue of actual malice, what grounds are they winning on? In our survey, those grounds included most prominently, in addition to substantial truth (or failure to demonstrate material falsity): the common law fair report privilege, the common law “of and concerning” requirement, the common law and/or constitutional “opinion” defenses (i.e., the challenged statement was not reasonably capable of being proven false or would not be construed by a reasonable reader/viewer as a statement of fact), lack of personal jurisdiction, and statute of limitations defenses.⁷⁴ Indeed, the most commonly used libel-specific defenses, applicable to both private and public figures, collectively protect the freedom of the press and the freedom of speech by narrowly construing what types of content can be deemed actionable, all apart from the actual malice standard.

Under the common law fair report privilege, for example, the “publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.”⁷⁵ It serves to “promote[] our system of self-governance by serving the public’s interest in official proceedings, including judicial proceedings.”⁷⁶

The common law “‘of and concerning’ or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt. To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society.”⁷⁷ Because the requirement serves to

⁷³ See Appendix III, Tables M1 & M2, *infra*, at 137, for more detailed results from the TV Study, including results in final cases. Arguably, whenever the court rules in favor of the defendant on alternative grounds that include actual malice, actual malice did not necessarily control the outcome. However, to keep the scope of our research manageable, we did not seek data on every alternative basis for court decisions.

⁷⁴ To keep the scope of our inquiry manageable for survey respondents, we did not poll on these issues specifically, but these defenses were mentioned in comments made in an optional section where respondents could describe the dispositive motion practice in more detail.

⁷⁵ Restatement (Second) of Torts § 611 (1977).

⁷⁶ *Solaia Tech., LLC v. Specialty Publ. Co.*, 221 Ill. 2d 558, 585 (Ill. 2006).

⁷⁷ *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1044 (1986).

“protect[] the free flow of ideas on matters of public concern” and “to ensure the vigor and . . . the variety of public debate,” it has assumed constitutional proportions as well.⁷⁸

The tenet that speakers cannot be held liable for their *opinions*, as opposed to their false and defamatory statements of *fact*, is almost as American as apple pie.⁷⁹ Courts around the country therefore recognized both a constitutional and common-law-based privilege that protects expressions of opinion from defamation liability.⁸⁰ As Justice Alito explained most recently in his dissent from the denial of certiorari in *National Review, Inc. v. Mann*, the “constitutional guarantee of freedom of expression serves many purposes, but its most important role is protection of robust and uninhibited debate on important political and social issues. If citizens cannot speak freely and without fear about the most important issues of the day, real self-government is not possible.”⁸¹

The point is that, in the interest of free and open public debate, the law robustly protects expressions of opinion, fair and accurate accounts of government proceedings, and generalized criticisms of institutions and government, which are often disseminated through the media by way of news content, investigative journalism, op-eds, and punditry. The targets of these criticisms and investigations often do not like how they are portrayed in the media, and sometimes they sue. While the actual malice standard is essential to provide the press the breathing room to make unintentional, good faith mistakes during the course of reporting about public officials and public figures,⁸² our research of libel cases involving major news media organizations shows that, more often than not, cases against these companies are dismissed on one of the larger array of speech-protective libel defenses (most of which are creatures of the common law) and procedural rules. In these cases, the actual malice standard is sometimes the winning argument, but not in the majority of cases. That does not diminish its importance in safeguarding public debate by providing a measure of protection to the press and other “good faith” critics of public persons when they make honest mistakes, it does put the role and impact of that protection in its proper context.⁸³

⁷⁸ Collins, *Free Speech, Food Libel, & the First Amendment . . . in Ohio*, 26 Ohio N.U.L. Rev. 1, 27 (2000) (citing Berlin, *Of and Concerning*, Libel Def. Resource Ctr. Bull., April 20, 1998, at 43); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). Justices Thomas and Gorsuch do not appear to take issue with this aspect of *Sullivan*. See, e.g., *McKee v. Cosby*, 139 S. Ct. 675, 677 (2019) (Thomas, J., concurring in denial of certiorari) (“This holding was sufficient to resolve the case.”).

⁷⁹ As Senator Daniel Patrick Moynihan famously said, “Everyone is entitled to his own opinion, but not to his own facts.”

⁸⁰ See *Milkovich v. Lorain J. Co.*, 497 U.S. 1 (1990); Dienes & Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 Iowa L. Rev. 237, 265-66 (1993).

⁸¹ 140 S. Ct. 344, 346 (2019) (Alito, J., dissenting from denial of certiorari).

⁸² See Chap. 4, *infra*, Section II.B. at 157-65.

⁸³ 376 U.S. at 279-83.

D. Libel Complaints Against the Media Have Not Gone Down in Recent Years

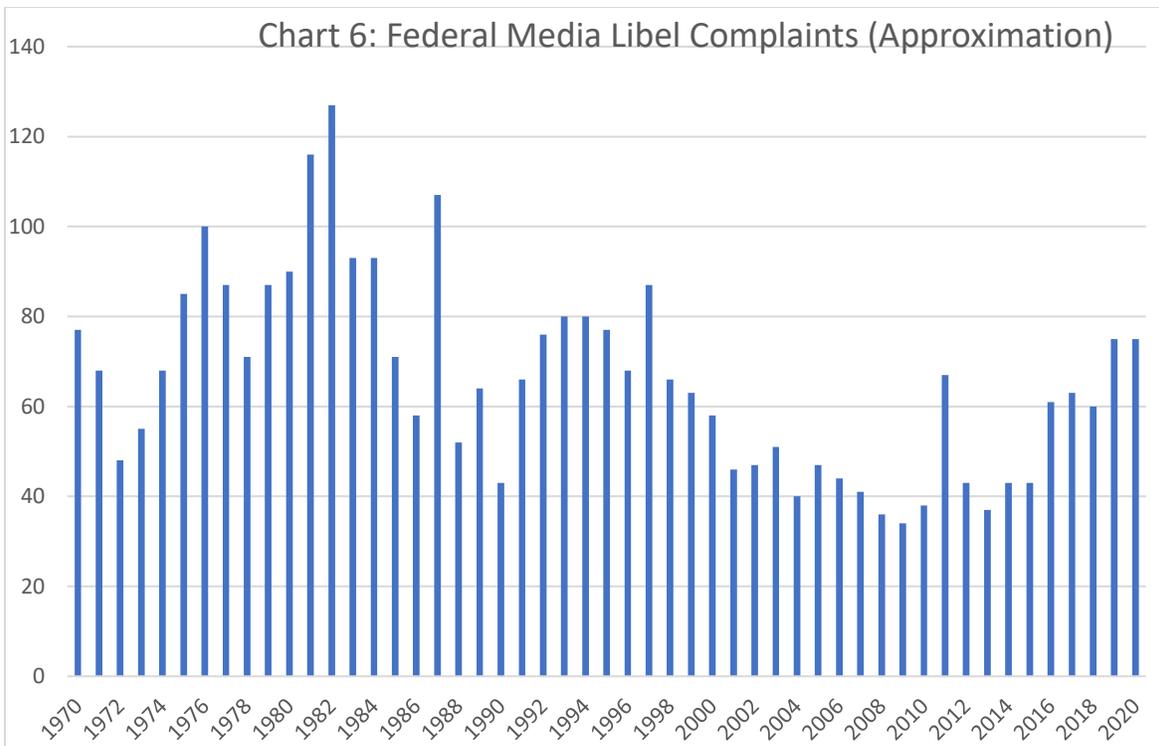
Critics of *Sullivan* seem to assume that the reduction in the number of media trials must necessarily correlate with a reduction in litigation and the number of defamation lawsuits.⁸⁴ However, the available data indicates that the number of libel complaints brought against the media has actually *increased* in recent years. MLRC pursued three methodologies of examining trends in libel cases filed against the media each year.

First, while it is very difficult to find news media case filings in the haystack of state and local courthouses, federal libel cases are usually filed with a Nature of Suit (NOS) Code 320 (Libel, Slander & Assault) entered on a case information form by the plaintiff's lawyer, which somewhat narrows the ballpark where federal claims against the media can be found.⁸⁵ MLRC downloaded all federal civil case records from 1970-2020 from the Federal Judiciary Center's website that bear the 320 NOS code. A comprehensive review of the approximately 37,000 court dockets represented by this data set to confirm the specific nature of each case was not practicable within the limitations of this study. Nevertheless, the MLRC has observed over the four decades of its existence that, in defamation lawsuits against the institutional media, a media organization rather than an individual is most commonly named as the lead defendant. The MLRC therefore reviewed the case name included in each of the approximately 37,000 records and attempted to ascertain whether the named defendant was an identifiable media entity. In this manner, the MLRC sought to develop a subset of records that is representative of the defamation lawsuits included in the overall data set while excluding as many non-defamation cases as reasonably possible. The final data set included 1,871 cases with a known media defendant. We think this data provides a useful proxy for media defamation cases filed, at least in federal court, and year-to-year trends represented by these figures.⁸⁶

⁸⁴ See Logan, *supra*, at 810 (“as an empirical matter, libel actions against media defendants are rarely litigated”).

⁸⁵ This is generally true, although some plaintiffs file defamation suits under personal injury NOS codes.

⁸⁶ There are certainly limitations to this methodology. For example, the lead defendant in a media case might be a reporter's name, and multiple defendant names are not provided in the records. A media company can also be involved in an ordinary commercial or employment dispute involving libel where its publishing function is not at issue, and media companies can also be named as defendants in personal injury assault cases.



As can be seen in Chart 6,⁸⁷ federal media libel cases have had their ups and downs over the decades, with visible spikes in the 1980s. The apparent increase from the early part of the 1970s to the late 70s and early 80s is consistent with what Professor Rodney A. Smolla wrote in 1983, almost 20 years after *Sullivan* and more than nine years after the Supreme Court decided *Gertz v. Robert Welch, Inc.*⁸⁸: “America is in the midst of a rejuvenation of the law of libel. Only a decade ago, the law of defamation appeared to be headed for obsolescence. Yet an astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money.”⁸⁹

Professor Smolla catalogued the libel cases that permeated the headlines in the early 1980s, such as those involving General William Westmoreland, Carol Burnett, Wayne Newton, Elizabeth Taylor, Norman Mailer, Ralph Nader and others. In his article, Professor Smolla theorized about the reasons for the “increase

⁸⁷ A table including the data represented in this chart is included in Appendix I, Table E, *infra*, at 127.

⁸⁸ 418 U.S. 323 (1974).

⁸⁹ Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1 (1983). See also *Ollman v. Evans*, 750 F.2d 970, 993 (D.C. Cir. 1985) (Bork, J., concurring) (describing 1980s phenomenon of “a freshening stream of libel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries” and which therefore “threaten the public and constitutional interest in free, and frequently rough, discussion.”).

in the number and prominence of libel suits”⁹⁰ and a “tremendous increase in the judgments awarded by juries” in the 1980s, attributing it not – of course – to the more restrictive actual malice standard introduced in *Sullivan*, but rather to, *inter alia*, shifts in the culture and developments in other areas of tort law that normalized strict liability and recovery for emotional injuries.⁹¹ If nothing else, if one theorizes – as critics of the actual malice standard seem to – that a decline in libel cases today is caused by *Sullivan*’s lasting impact, it is difficult to square that theory with the apparent rise in libel cases in the 1980s, long after *Sullivan* had made its mark.

More importantly, the data does *not* support a straight line of decline in media libel cases in the most recent decade as *Sullivan*’s critics assume based, it appears, solely on data concerning defamation trials.⁹² After a slowdown in the late 2000s and early 2010s, there seems to have been a resurgence in more recent years after the political climate grew hot during the Trump era. Just like the surge in the 1980s, one need not dig much deeper than recent headlines to document myriad politically charged suits brought during the Trump years, albeit a wave not as large as the one in the eighties. These cases include: at least ten by former Congressman Devin Nunes against various media outlets; suits arising out of a 2019 incident on the national mall in which several students, including one wearing a “Make America Great Again” hat, were filmed standing face-to-face with a Native American activist; suits brought by Trump-aligned former Arizona Sheriff, Joe Arpaio; suits brought by former coal executive, Don Blankenship, who claimed he lost a senate race because he was inaccurately referred to as a “felon” by the media (having only been convicted of a misdemeanor); and suits brought directly by the Trump campaign itself against media outlets that the then-president vocally attacked as “enemies of the people.”⁹³

The federal case research does not stand alone. Next, we examine complaints from 12 of the 16 media entities that participated in our Main Study. We exclude four of the companies in Chart 7 (below) because they told MLRC that they were not confident that they could locate all case files from the earlier years covered by our survey. A table showing a distribution of complaints by year for all 16 media entities as well as the smaller group of 12 are included in Appendix II, Table G, *infra*, at 131. The Main Study, as a whole, consisted of 59% state cases, and 41% federal cases.⁹⁴

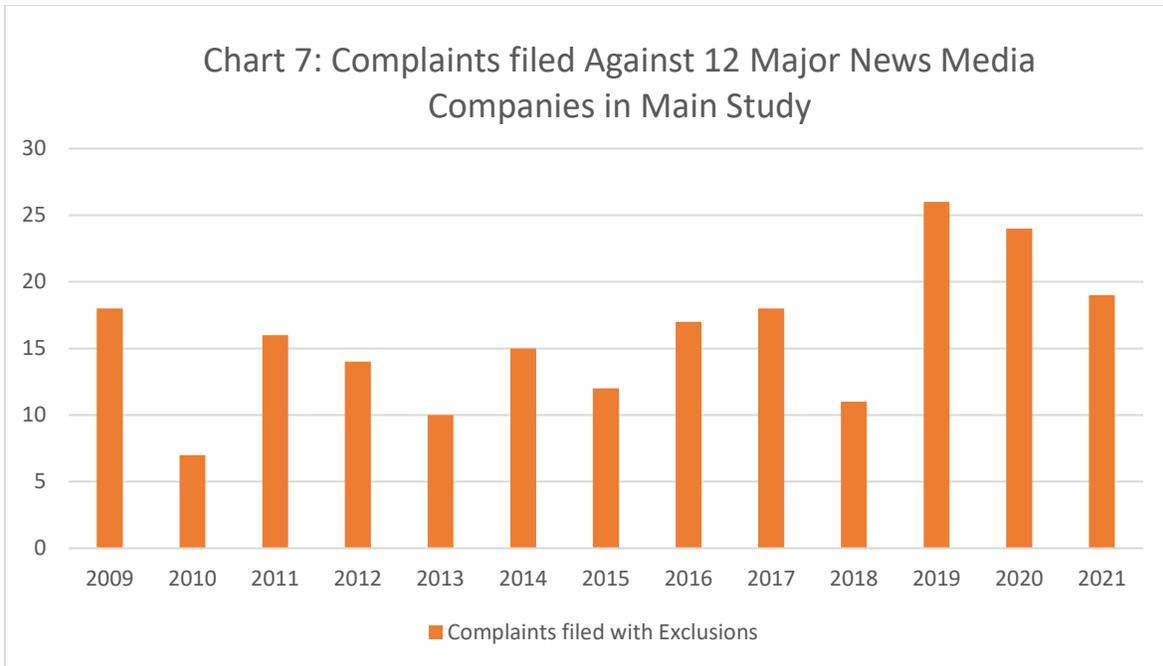
⁹⁰ Smolla, *supra*, at 4 (citing Daniels, *Pre-Complaint Phase: Avoiding Litigation—Preventative Counseling*, in *Libel Litigation 1981*, at 19 (noting “[t]he increasing number of [libel] suits filed”)); see also Smolla, *supra*, at 2-4 & nns. 8-22.

⁹¹ Smolla, *supra*, at 14-35.

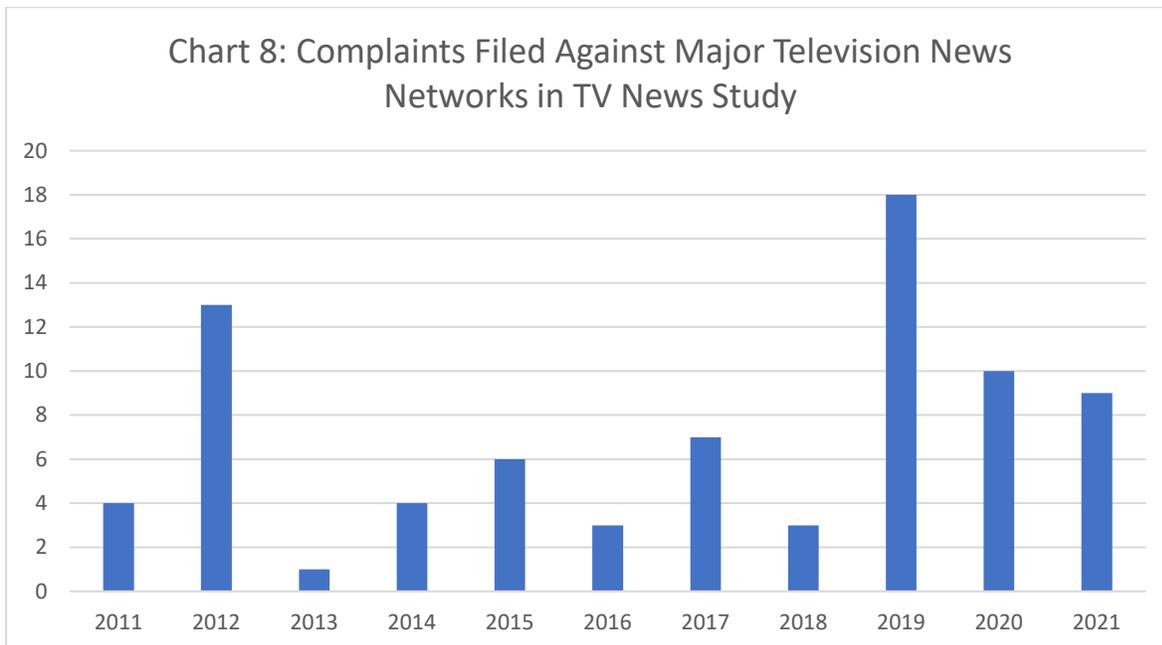
⁹² See Section B, *supra*, at 100-08.

⁹³ See Chap. 4, *infra* (discussing these and other contemporary cases).

⁹⁴ Appendix II, Table F, *infra*, at 129.



Finally, we looked at the distribution of complaints examined in our TV News Study, which is provided in Appendix III, Table L, and depicted below in Chart 8. In the TV News Study, the proportions of state and federal cases were the reverse of those in the Main Study: 59% federal and 41% state.⁹⁵



To be sure, these are imperfect methodologies for estimating trends in the number of media complaints, but it is noteworthy that, in all three data sets, 2019

⁹⁵ Appendix III, Table K, *infra*, at 135.

is the high-water mark for complaints filed during the recent decade. Moreover, the number of complaints in all three sets tended to be higher in the last few years of the decade as opposed to the earlier part of the 2010s. With these three methodologies all pointing in the same direction, we think this evidence is consistent with our observations of more politically driven lawsuits being filed over the last few years, with anecdotal reports from MLRC members that they had seen an uptick in cases during the Trump era. The data is certainly not consistent with a theory that the actual malice standard, established in the 1960s and 1970s, has so frustrated plaintiffs that they do not even bother to sue the news media anymore.

E. Settlements Are the New Verdicts.

In MLRC’s trial study, we have previously documented major shifts over the years in the number of settlements. Plaintiff trial wins, after all appeals, have been relatively stable over the years: 18.9% total wins and 6.7% partial wins over the decades.⁹⁶ The shift has been from total defense wins to settlements such that, while entire defense victories declined from 62.4% in the 1980s to 42.6% in the 2010s, settlements rose from a mere 7.5% of cases in the 1980s to 31.9% in the 2010s.⁹⁷

But, as has been discussed above, trials are increasingly rare because there has been an across-the-board shift in civil litigation in the United States over the decades since *Sullivan* was decided. As one federal district judge put it, “[t]rials have gone the way of landline telephones – useful backups, not the instruments primarily relied upon, if ever they were.”⁹⁸ For all of the reasons explored above in Section B, lawsuits resolved on either dispositive motion or by settlement are now the norm, and trials are the exception.⁹⁹

None of the final cases in the Main Study and TV News Study went to trial; results of these cases are shown in Table 4 & 5 below:

⁹⁶ MLRC 2018 Report, at 62-64.

⁹⁷ *Id.*

⁹⁸ Hornby, *The Business of the U.S. District Courts*, 10 Green Bag 2d 453, 468 (2007).

⁹⁹ See Section B, *supra*, at 105-08.

TABLE 4: Final Disposition – Main Study

	All Final Cases	% All Final Cases	D Loss or Partial Win on MTD	% D Loss or Partial Win on MTD
Win on Dispositive Motion	101	51%	3	19%
Win on Procedural Motion	13	7%	0	0%
Settled	53	27%	12	75%
Voluntarily Dismissed	31	16%	1	6%
All Final Cases	198		16	

TABLE 5: Final Disposition – TV News Study

	All Final Cases	% All Final Cases	D Loss/ Partial Win on Motion	% D Loss/ Partial Win on Motion
Win on Dispositive Motion	27	48%	2	18%
Win on Procedural Motion	1	2%	0	0%
Settled	15	27%	8	73%
Voluntarily Dismissed	10	18%	1	9%
Other	3	5%	0	0%
Unknown	1	2%	0	0%
All Final Cases	56		11	

The final outcomes in the two studies are very similar. The percentage of cases ending with a defense win on a dispositive motion¹⁰⁰ in the Main Study and TV Study, were 51% and 48%, respectively. The next most common outcome was “Settled,” 27% in both of the studies. Plaintiffs voluntarily dismissed their complaints in 16% of the cases in the Main Study and in 18% of the cases in the TV News Study. Less common final dispositions are noted in Tables 4 & 5.

One special tabulation is also shown in the rightmost columns of Tables 4 and 5, which is final dispositions sorted to include only cases where the defendant

¹⁰⁰ In this table, “dismissed on dispositive motion” means the case was dismissed on the merits, while “dismissed on procedural motion” was not on the merits, sometimes for lack of personal jurisdiction. In the tables showing the outcome of dispositive motions (Table 3 *supra*; Table H, I1, and I2, Appendix II; M1 & M2, Appendix III), both on the merits and non-merits procedural dispositive motions are included.

did not fully succeed on a motion to dismiss, i.e., the motion was denied or it was only partially granted. In the vast majority of those cases, the defendant ended up settling the case: 75 % of the time in the Main Study and 73% of the time in the TV News Study. This appears to reflect a new reality among many news media defendants, who see a pre-discovery motion as cost-effective, but the expense, burden and uncertainty of proceeding to discovery and further motion practice outweighed by the benefits of settling the case.

Settlement agreements are almost always confidential and so it is not possible to quantify how much is typically paid or if a payment is part of the settlement.¹⁰¹ When payments are made, we know they run the gamut, from nuisance values to the one jaw-droppingly large settlement in a case that is included in the TV News Study: ABC's settlement with Beef Products, Inc., over ABC News' reporting on so-called, "pink slime," reported to have been \$177 million or more.¹⁰²

When trials were more prevalent and settlements more uncommon, it was possible to give a more meaningful calculation of how often plaintiffs "succeeded" in litigation against the news media. The first studies in this area were done by Professor Marc Franklin, who looked at appeals in reported media cases between 1977 and 1980 and found that plaintiffs succeeded with an award of damages fully affirmed in only 5% of media cases that were appealed.¹⁰³ Otherwise, 66% of the appeals were defense wins, either after dispositive motion or after trial, and 28% of the appeals were remands, in which either side could still prevail in further proceedings.¹⁰⁴ At the time, settlements were thought to be less common or involved small amounts when they did occur.¹⁰⁵ But clearly, even then, plaintiffs succeeded in only a small number of cases against the media.

The MLRC (known as the Libel Defense Resource Center until 2003) continued Franklin's work over the decades, but primarily tracking cases which made it to trial; and MLRC had not, prior to this report, tracked cases from complaint to final disposition. When plaintiffs did succeed at trial, MLRC kept track of the results and calculated the awards of damages, which, after appeals, averaged under a half million dollars in the 1980s and 90s and went up to well over a million dollars after the 2000s.¹⁰⁶

In our Main Study and TV News Study, cases resulted in a settlement in 27% of the cases. One of these settlements was for more than \$177 million, others

¹⁰¹ To head off potential confidentiality issues arising out of our Main Study, respondents were asked only to acknowledge that a settlement had been reached, *regardless of whether payment was involved*.

¹⁰² See Section B, *supra*, at 107-08.

¹⁰³ Franklin, *Suing Media for Libel*, Am. Bar Found. Res. J., Vol. 6, No. 3, 779, 803 (Summer 1981).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 800.

¹⁰⁶ MLRC 2018 Report, at 50.

may have been comparable to average awards at trial, yet many others were likely for nuisance value or other non-monetary consideration. Admittedly, there is much we do not know about these settlements, but since Justice Gorsuch, in his *Berisha* dissent, puts such an emphasis on the assumption that the legal environment has gotten worse for plaintiffs over time, it is worth pointing out that we do not know whether plaintiffs are faring any worse today than they did in the late 1970s, when only 5% of reported media case appeals were an affirmance of a trial award. We know that when a jury does render an award of damages today, the amount is much higher than those awards issued in the late 1970s, but we do not truly know how often plaintiffs “succeed,” however that can be measured. This is because so many “awards” now take the form of confidential settlements. Needless to say, it would be inappropriate to reverse 58 years of constitutional precedent based, in significant part, upon speculative assumptions about plaintiff success rates, especially when the available data cuts against those assumptions.

F. Conclusion

There is no evidence that implementation of the actual malice standard in *New York Times Co. v. Sullivan* and later decisions has led to a reduction in defamation trials against the news media, or that the number of trials is a benchmark for plaintiff success in such cases. Indeed, the number of trials in all civil litigation, including media cases not tried under the actual malice standard, have all declined at roughly the same rate. Moreover, while defendants in news media cases have always had a good success rate on appeals and dispositive motions, actual malice only helps defendants some of the time. In our research on libel litigation involving major news media companies, actual malice was not the predominant reason that defendants were successful on dispositive motions, with other defenses such as substantial truth, opinion, the fair report privilege and the “of and concerning” requirement collectively playing a much larger role in defendant success. Libel complaints against the media have not gone down, and if anything, they have increased in recent years. And, just like in other litigation practice areas, trials in media defamation cases are all but extinct, but plaintiffs often recover – when they have a meritorious case – through settlement.

APPENDIX I: Trial Tables

TABLE A: Total Media Trials vs. Total Federal Civil Trials

Year	Media Trials	% change	Fed. Civil Cases Terminated During or After Trial	% change
1980	25		9,874	
1981	22	88%	11,302	114%
1982	41	164%	11,280	114%
1983	23	92%	11,576	117%
1984	29	116%	12,018	122%
1985	26	104%	12,529	127%
1986	34	136%	11,666	118%
1987	17	68%	11,890	120%
1988	32	128%	11,598	117%
1989	17	68%	11,356	115%
1990	19	76%	9,257	94%
1991	27	108%	8,407	85%
1992	13	52%	8,029	81%
1993	26	104%	7,728	78%
1994	19	76%	7,900	80%
1995	9	36%	7,438	75%
1996	18	72%	7,565	77%
1997	24	96%	7,352	74%
1998	19	76%	6,782	69%
1999	18	72%	6,225	63%
2000	14	56%	5,779	59%
2001	17	68%	4,916	50%
2002	6	24%	4,497	46%
2003	19	76%	4,108	42%
2004	15	60%	4,010	41%
2005	16	64%	3,730	38%
2006	15	60%	3,524	36%
2007	7	28%	9,858	100%
2008	6	24%	4,646	47%
2009	9	36%	3,342	34%
2010	10	40%	3,211	33%
2011	9	36%	3,223	33%
2012	6	24%	3,165	32%
2013	4	16%	3,132	32%
2014	8	32%	2,920	30%
2015	1	4%	2,912	29%
2016	6	24%	2,728	28%
2017	3	12%	2,595	26%
1980-89	266		115,089	
1990-99	192		76,683	
2000-09	124		48,410	
2010-17	47		23,886	
1980-2017	629		264,068	

**TABLE B: Trials Against the Media:
Actual Malice vs. Non-Actual Malice**

Year	Trials	Actual Malice Trials	Non-Actual Malice Trials
1980	25	15	10
1981	22	13	9
1982	41	18	23
1983	23	13	10
1984	29	17	12
1985	26	15	11
1986	34	23	11
1987	17	9	8
1988	32	17	15
1989	17	9	8
1990	19	7	12
1991	27	11	16
1992	13	9	4
1993	26	15	11
1994	19	12	7
1995	9	5	4
1996	18	8	10
1997	24	11	13
1998	19	7	12
1999	18	9	9
2000	14	11	3
2001	17	6	11
2002	6	3	3
2003	19	7	12
2004	15	7	8
2005	16	8	8
2006	15	6	9
2007	7	2	5
2008	6	5	1
2009	9	4	5
2010	10	6	4
2011	9	3	6
2012	6	3	3
2013	4	3	1
2014	8	3	5
2015	1	0	1
2016	6	3	3
2017	3	2	1
1980-89	266	149	117
1990-99	192	94	98
2000-09	124	59	65
2010-17	47	23	24
1980-2017	629	325	304
% Trials		52%	48%

**TABLE C1, C2, C3: Revisions of 2018 Report Table 12A:
Appeals From Verdicts – Defendants
with Actual Malice Only and Non-Actual Malice Breakdowns**

Table C1: Appeals from Trial Verdicts Defendants' Appeals												
Verdicts for P	Awards After Motions	Settled Prior to Appeal	No Appeal	Appeals Pending	Completed Appeals	Award Modified On Appeal	Award Affirmed on Appeal	% Plaintiff Success on Appeal	Disposition Unknown			
1980-89	141	4	11	0	126	84	40	31.7%	2			
1990-99	102	14	20	0	68	44	19	27.9%	5			
2000-09	49	9	12	0	28	16	12	42.9%	0			
2010-17	26	8	4	0	9	5	4	44.4%	0			
2000-17	70	17	16	0	37	21	16	43.2%	0			
1980-2017	313	35	47	0	231	149	75	32.5%	7			
Table C2: Appeals from Trial Verdicts Defendants' Appeals - Actual Malice Cases Only												
Verdicts for P	Awards After Motions	Settled Prior to Appeal	No Appeal	Appeals Pending	Total Completed Appeals	Award Modified On Appeal	Award Affirmed on Appeal	% Plaintiff Success on Appeal	Disposition Unknown			
1980-89	86	1	5	0	63	45	16	25.4%	2			
1990-99	55	5	6	0	39	32	6	15.4%	1			
2000-09	26	2	3	0	14	7	7	50.0%	0			
2010-17	13	3	2	0	5	3	2	40.0%	0			
2000-17	39	5	5	0	19	10	9	47.4%	0			
1980-2017	180	11	16	0	121	87	31	25.6%	3			
Table C3: Appeals from Trial Verdicts Defendants' Appeals - Non-Actual Malice Cases Only												
Verdicts for P	Awards After Motions	Settled Prior to Appeal	No Appeal	Appeals Pending	Total Completed Appeals	Award Modified On Appeal	Award Affirmed on Appeal	% Plaintiff Success on Appeal	Disposition Unknown			
1980-89	79	3	6	0	63	39	24	38.1%	0			
1990-99	57	9	14	0	29	12	13	44.8%	4			
2000-09	31	7	9	0	14	9	5	35.7%	0			
2010-17	13	5	2	0	4	2	2	50.0%	0			
2000-17	44	12	11	0	18	11	7	38.9%	0			
1980-2017	180	24	31	0	110	62	44	40.0%	4			

TABLE D: Media Defense Wins at Trial by Legal Standard

Year	<u>Actual Malice</u>			<u>Non-Actual Malice</u>		
	Verdicts	D Wins	% D Wins	Verdicts	D Wins	% D Wins
1980-89	149	63	42.3%	114	35	30.7%
1990-99	92	37	40.2%	96	39	40.6%
2000-09	56	30	53.6%	63	32	50.8%
2010-17	21	8	38.1%	24	11	45.8%
1980-2017	318	138	43.4%	297	117	39.4%

TABLE E: Federal Media Complaints from 1970-2020 (Approximation)

Year	Federal Media Libel Complaints
1970	77
1971	68
1972	48
1973	55
1974	68
1975	85
1976	100
1977	87
1978	71
1979	87
1980	90
1981	116
1982	127
1983	93
1984	93
1985	71
1986	58
1987	107
1988	52
1989	64
1990	43
1991	66
1992	76
1993	80
1994	80
1995	77
1996	68
1997	87
1998	66
1999	63
2000	58
2001	46
2002	47
2003	51
2004	40
2005	47
2006	44
2007	41
2008	36
2009	34
2010	38
2011	67
2012	43
2013	37
2014	43
2015	43
2016	61
2017	63
2018	60
2019	75
2020	75
Total	1871

Appendix II: The News Media Libel Case Study (Main Study)

METHODOLOGY

We asked major U.S. news media organizations to participate in a survey seeking information on libel lawsuits instituted against them from 2009 to 2021. Most of the companies asked to participate did so and responded to the survey. The sixteen participating media organizations included: Advance Publications, the Associated Press, Bloomberg News, CBS (CBS News and owned and operated television stations), the Chicago Tribune, Dow Jones (publisher of the *Wall Street Journal*), Fox News, Gannett (*USA Today*, the *Arizona Republic*, the *Detroit Free Press* and *Indianapolis Star* only), Hearst, the *Los Angeles Times*, NPR, the *New York Times*, ProPublica, Reuters, Tegna, and the *Washington Post*.

Responding news media companies were asked to provide the following information with respect to each non-*pro se* libel complaint received from 2009 to 2021: year, the forum (including whether the case was in federal or state court), the public/private status of the plaintiff, a description of the results of dispositive motion practice, whether the case was still pending or final and, if final, the disposition. Responses were collected from late December 2021 through mid-January 2022 and updates to active cases were generally not possible once surveys had been collected and tabulated. A few more specifics with respect to the questions follow:

Public/Private Status of Plaintiff – Respondents were asked to identify, if known, the status of the plaintiff as a public official, public figure or private figure. The survey instructed that a response was appropriate if the status was decided by the court or clear or uncontested in the pleadings.

Dispositive Motion Results – Respondents were asked to list each Anti-SLAPP, Motion to Dismiss, and/or Motion for Summary Judgment filed in each case. For each such motion, respondents were asked whether the ultimate outcome of the motion was a win or a loss, if the issues of Actual Malice and/or Falsity/Substantial Truth were decided, and whether the ultimate outcome was a win or a loss (or not applicable) on that issue. Also, for each result, on the entire motion and on the issues of Actual Malice and Falsity/Substantial Truth specifically, the respondent was asked to identify the highest court to decide the issue, i.e., the trial court, an intermediate appellate court, etc. There was extra space provided in the survey form to describe dispositive motion practice more complex than the above. Occasionally, an outcome was described as a “Partial” win on certain issues, but not all of the libel claims were dismissed entirely, and the result was recorded as such. In the results, partial wins are not tabulated as defense wins. If an appellate court reversed and remanded a decision for further consideration by the trial court, that motion was not tabulated in the results, because such outcomes were deemed a nullity in terms of the decision. Moreover, motions that were “pending” did not count as a motion for the purposes of our calculations, but were noted in our records for follow-up in the future.

Final or Pending – Respondents were asked to indicate whether each case

was Final, Pending Trial or Pending Appeal.

Final Disposition – If a case was final, respondents were asked to indicate the final result of the case. The choices provided were: Win on Dispositive Motion, Win on Procedural Motion (e.g., jurisdiction or failure to prosecute), Settled (Regardless of whether payment involved), Voluntarily Dismissed, Defense Win at Trial, Defense Loss at Trial or Other. If the response was “Other,” the respondent was provided an opportunity to include a written explanation.

If a survey response was internally inconsistent, non-responsive as to questions requiring an answer, or was otherwise ambiguous, MLRC either contacted the respondent with follow-up questions to clarify the survey response or, when applicable, reviewed publicly available decisions on a dispositive motion/appeal to clarify an omitted or ambiguous answer.

TABLE F: Main Study Demographics

Venue	No. Cases	%
Federal	102	41%
State	144	59%
Total Cases	246	
Plaintiff Status		
Private Figure	62	25%
Public Figure	52	21%
Public Official	16	7%
Unknown/Not Decided	116	47%
Total Cases	246	
Case Status		
Final	198	80%
Pending Trial	38	15%
Pending Appeal	10	4%
Total Cases	246	

TABLE G: Complaints by Year: Main Study

Year	All Complaints	Complaints Filed With Exclusions
2009	18	18
2010	9	7
2011	17	16
2012	14	14
2013	14	10
2014	18	15
2015	13	12
2016	25	17
2017	24	18
2018	16	11
2019	28	26
2020	28	24
2021	22	19
Total	246	207

Note: The column headed with “All Complaints” shows the distribution by year of all 16 companies/media entities that participated in our Main Study. The column headed with “Complaints Filed With Exclusions” excludes four survey participants who indicated that they were not confident that they could locate all records from the earlier years covered by the survey.

**TABLE H: Defendant Success on
Dispositive Motions (Including Appeal) – Main Study**

Results on Dispositive Motions -- Active and Final Cases			
Motion Type	Motions filed	Defense Wins on Motion	Defense Win %
Anti-SLAPP	32	24	75%
Motion to Dismiss	119	87	73%
Summary Judgment	26	21	81%
All Dispositive Motions	177	132	75%
Results on Dispositive Motions -- Final Cases Only			
Motion Type	Motions filed	Defense Wins on Motion	Defense Win %
Anti-SLAPP	24	20	83%
Motion to Dismiss	95	79	83%
Summary Judgment	23	20	87%
All Dispositive Motions	142	119	84%

TABLE I1 & I2: Detailed Results on Dispositive Motions (Including Appeal) – Main Study¹⁰⁷

Table I1: Detailed Results on Dispositive Motions -- Active and Final Cases, Including Appellate Results													
Motion Type	Motions filed	Defense Wins on Motion	Defense Win %	Actual Malice Decided	% Motions Actual Malice Decided	Actual Malice Win	% Motions Defense Win on Actual Malice	Truth/Falsity Decided	% Motions Truth/Falsity Decided	Truth/Falsity Win	% Motions Defense Win on Truth/Falsity	Motions Defense Win on both AM and Falsity	% Motions Defense Win on both AM and Falsity
Anti-SLAPP	32	24	75%	3	9%	2	6%	13	41%	11	34%	0	0%
Motion to Dismiss	119	87	73%	31	26%	19	16%	38	32%	21	18%	6	5%
Summary Judgment	25	20	80%	11	44%	7	28%	10	40%	7	28%	4	16%
All Dispositive Motions	176	131	74%	45	26%	28	16%	61	35%	39	22%	10	6%

Table I2: Detailed Results on Dispositive Motions -- Final Cases Only, Including Appellate Results													
Motion Type	Motions filed	Defense Wins on Motion	Defense Win %	Actual Malice Decided	% Motions Actual Malice Decided	Actual Malice Win	% Motions Defense Win on Actual Malice	Truth/Falsity Decided	% Motions Truth/Falsity Decided	Truth/Falsity Win	% Motions Defense Win on Truth/Falsity	Motions Defense Win on both AM and Falsity	% Motions Defense Win on both AM and Falsity
Anti-SLAPP	24	20	83%	2	8%	2	8%	10	42%	9	38%	0	0%
Motion to Dismiss	95	79	83%	20	21%	17	18%	28	29%	20	21%	6	6%
Summary Judgment	22	19	86%	9	41%	6	27%	10	45%	7	32%	4	18%
All Dispositive Motions	141	118	84%	31	22%	25	18%	48	34%	36	26%	10	7%

¹⁰⁷ These tables exclude one case in which the basis for the court’s decision is unknown.

TABLE J: Final Disposition – Main Study

**With Special Breakdown of Cases in Which Defendant
Lost or Partially Won a Motion to Dismiss**

	All Final Cases	% All Final Cases	D Loss or Partial Win on MTD	% D Loss or Partial Win on MTD
Win on Dispositive Motion	101	51%	3	19%
Win on Procedural Motion	13	7%	0	0%
Settled	53	27%	12	75%
Voluntarily Dismissed	31	16%	1	6%
All Final Cases	198		16	

APPENDIX III: The TV News Study

METHODOLOGY

The primary distinction in the methodology used to collect data in the TV News Study (as compared with the Main Study) is that media companies did not participate in gathering information for the TV News Study. Rather, data was gathered on non-*pro-se* lawsuits using mostly publicly available information and information that MLRC has compiled over the years. In the TV News Study, MLRC sought the same case information sought in the Main Study but with respect to libel lawsuits brought against ABC/ESPN, NBC News (including MSNBC and Telemundo), CBS News, owned and operated television stations of the aforementioned networks, CNN and Fox News. MLRC, with help from paid research assistants, identified and tracked results of cases brought against these companies since 2011. Cases were identified by searching through the MediaLawDaily (the “Daily”), a daily email newsletter that the MLRC staff compiles and shares with MLRC members. The Daily includes links to breaking news and generally includes new libel cases brought against the media, as well as related decisions in those cases, when reported in one of dozens of sources that MLRC reviews each day. Due to the limited number of years of the Daily that MLRC had stored, this research was limited to 2011 to 2021.

Paid research assistants were utilized to respond to the same survey questions used in the Main Study, but using online dockets like PACER, electronic research services like LexisNexis, and news websites. In occasional instances where a research assistant was unable to determine the answer to all of the survey questions, MLRC contacted lawyers with direct knowledge of the case to acquire the missing information. If a survey form could not be completed accurately, the case was excluded from the TV News Study. Research for the TV News Study was completed by mid-January 2022 and updates to active cases were generally not possible after this time frame.

Once MLRC received the completed survey forms, they were checked for internal inconsistencies, and non-responsive or ambiguous answers. Where such questions arose, MLRC followed up with the research assistant to clarify the survey response, or, when applicable, reviewed the publicly available decision on a dispositive motion/appeal to clarify an omitted or ambiguous answer.

TABLE K: TV News Study Demographics

<u>Venue</u>	<u>No. Cases</u>	<u>%</u>
Federal	46	59%
State	32	41%
Total Cases	78	
<u>Plaintiff Status</u>		
Private Figure	9	12%
Public Figure	16	21%
Public Official	5	6%
Unknown/Not Decided	48	62%
Total Cases	78	
<u>Case Status</u>		
Final	57	73%
Pending Trial	16	21%
Pending Appeal	5	6%
Total Cases	78	

TABLE L: Distribution of Complaints by Year – TV News Study

Year	All Complaints
2011	4
2012	13
2013	1
2014	4
2015	6
2016	3
2017	7
2018	3
2019	18
2020	10
2021	9
Total	78

TABLES M1 & M2: Detailed Results on Dispositive Motions – TV News Study

Table M1: Results on Dispositive Motions -- Active and Final Cases, Including Appellate Results													
Motion Type	Motions filed	Defense Wins on Motion	Defense Win %	Actual Malice Decided	% Motions Actual Malice Decided	Actual Malice Win	% Motions Defense Win on Actual Malice	Truth/Falsity Decided	% Motions Truth/Falsity Decided	Truth/Falsity Win	% Motions Defense Win on Truth/Falsity	Motions Defense Win on both AM and Falsity	% Motions Defense Win on both AM and Falsity
Anti-SLAPP	6	4	67%	0	0%	0	0%	1	17%	0	0%	0	0%
Motion to Dismiss	47	25	53%	15	32%	9	19%	28	60%	14	30%	6	13%
Summary Judgment	10	7	70%	5	50%	3	30%	5	50%	2	20%	1	10%
All Dispositive Motions	63	36	57%	20	32%	12	19%	34	54%	16	25%	7	11%

Table M2: Results on Dispositive Motions -- Final Cases Only, Including Appellate Results													
Motion Type	Motions filed	Defense Wins on Motion	Defense Win %	Actual Malice Decided	% Motions Actual Malice Decided	Actual Malice Win	% Motions Defense Win on Actual Malice	Truth/Falsity Decided	% Motions Truth/Falsity Decided	Truth/Falsity Win	% Motions Defense Win on Truth/Falsity	Motions Defense Win on both AM and Falsity	% Motions Defense Win on both AM and Falsity
Anti-SLAPP	5	3	60%	0	0%	0	0%	1	20%	0	0%	0	0%
Motion to Dismiss	33	21	64%	8	24%	7	21%	20	61%	12	36%	4	12%
Summary Judgment	9	6	67%	4	44%	2	22%	4	44%	1	11%	0	0%
All Dispositive Motions	47	30	64%	12	26%	9	19%	25	53%	13	28%	4	9%

TABLE N: Final Disposition – TV News Study
With Special Breakdown of Cases in Which Defendant
Lost or Partially Won a Motion to Dismiss

	All Final Cases	% All Final Cases	D Loss/ Partial Win on Motion	% D Loss/ Partial Win Motion
Win on Dispositive Motion	27	48%	2	18%
Win on Procedural Motion	1	2%	0	0%
Settled	15	27%	8	73%
Voluntarily Dismissed	10	18%	1	9%
Other	3	5%	0	0%
Unknown	1	2%	0	0%
All Final Cases	56		11	

Chapter 4: The Reality of Contemporary Libel Litigation¹

In recent years, critics of the *New York Times Co. v. Sullivan*² decision—including by two members of the United States Supreme Court—have questioned whether the “actual malice” standard remains necessary or appropriate more than five decades after its adoption in 1964. Their premise is that this constitutional requirement presents a virtually insurmountable burden to public officials and public figures with meritorious defamation claims, and that it creates perverse incentives for journalists to be less diligent (or even careless) in disseminating false information across the globe. Some of these critics acknowledge that *Sullivan* may have been necessary to protect free expression during the tumultuous civil rights battles of the 1960s, but cast doubt on whether its protections are necessary—or even beneficial—in today’s society.

The most prominent expression of this skepticism came in Justice Neil Gorsuch’s recent dissent from the denial of certiorari in *Berisha v. Lawson*, in which he questioned whether the actual malice doctrine has “evolved into a subsidy for published falsehoods on a scale no one could have foreseen [and] it has come to leave far more people without redress than anyone could have predicted.”³ Justice Gorsuch’s sweeping concerns relied heavily on an article in the *Ohio State Law Journal*, which made alarmist claims about the supposed real-world effects of *Sullivan*, without analyzing whether actual cases support the author’s thesis.⁴ Justice Gorsuch’s stated concerns about *Sullivan*—coupled with similar criticisms raised by Justice Thomas⁵—seem to have emboldened public officials and public figures in their defamation lawsuits, some of whom have cited these

¹ This chapter was prepared jointly by attorneys at Ballard Spahr LLP and Davis Wright Tremaine LLP. These two firms handle a significant percentage of the defamation cases brought against journalists and news media companies across the United States each year. Members of the firms’ First Amendment litigation teams who contributed to this chapter are: Tonique Garrett, Mara Gassmann, Max Mishkin, and Lynn Oberlander (Ballard Spahr); and Jack Browning, Sam Cate-Gumpert, Eric Feder, Kelli Sager, Marni Shapiro and Abigail Zeitlin (Davis Wright Tremaine).

² 376 U.S. 254 (1964).

³ 141 S. Ct. 2424, 2329 (2021) (Gorsuch, J., dissenting from denial of certiorari).

⁴ See Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 Ohio St. L. J. 759, 794 (2020) [hereinafter “Logan”].

⁵ See *Berisha*, 141 S. Ct. at 2424-25 (Thomas, J., dissenting from denial of certiorari); *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari) (“[T]here appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original understanding of the First or Fourteenth Amendment.”).

minority opinions in arguing that the protections established by *Sullivan* should be abandoned.⁶

But an analysis of defamation cases over the last twenty-five years demonstrates that these criticisms are unwarranted. *Sullivan* has not dissuaded public officials or public figures from bringing libel suits; to the contrary, in our experience, the last decade has seen a significant number of these kinds of cases. Nor does the actual malice standard act as an absolute (or even near-absolute) bar to these kinds of claims getting before a jury. Instead, an extensive review of federal and state cases across the country shows that many defamation suits brought by public officials and public figures proceed beyond an early motion to dismiss, and even beyond summary judgment.⁷ But by weeding out non-meritorious cases about matters of significant public interest, *Sullivan* preserves the careful balance between protecting free expression as well as individual rights of reputation. In short, contrary to the premises underlying Justice Gorsuch’s query, *Sullivan* has not tipped the scales too far in favor of libel defendants.

⁶ See, e.g., *Blankenship v. Fox News Network, LLC*, 2022 WL 321023, at *15 n.24 (S.D.W. Va. Feb. 2, 2022) (referencing former coal executive and candidate for U.S. Senate and U.S. presidency Don Blankenship) (“Mr. Blankenship notes that he believes that the court ‘is not, and should not be[,] bound by the limits of *New York Times Co. v. Sullivan* in the present circumstances,” and “generally asserts that the heightened standards imposed by *Sullivan* and its progeny on all plaintiffs who qualify as public figures is not in keeping with the First Amendment’s free-speech protections.”); *Nunes v. Lizza*, 12 F.4th 890, 899 (8th Cir. 2021) (in lawsuit filed by former California Congressman and frequent libel plaintiff Devin Nunes) (“On appeal, Nunes suggests that the actual malice standard of *New York Times v. Sullivan* should be reconsidered . . . but of course we are bound to apply it. Under that demanding standard, we agree with the district court that the complaint is insufficient to state a claim of actual malice as to the original publication.”) (internal citations omitted); *Moore v. Cecil*, 2021 WL 1208870, at *1 (N.D. Ala. Mar. 31, 2021) (former Alabama Supreme Court Chief Justice and candidate for U.S. Senate Roy Moore) (“Moore challenges the constitutionality of the *New York Times* actual malice requirement, citing Justice Thomas’s recent statement. . . . Of course, district courts must follow Supreme Court precedent, so this court must apply the *New York Times* actual malice standard.”); *Palin v. New York Times Co.*, 482 F. Supp. 3d 208, 214-15 (S.D.N.Y. 2020) (former Alaska governor and candidate for U.S. Vice President Sarah Palin) (“What plaintiff is really asking, then, is for this Court either to ‘overrule’ *New York Times v. Sullivan* or else to distinguish that case on the facts and refuse to apply the actual malice rule here. To the extent those are, in fact, different requests, the Court declines them both.”) (internal citations omitted).

⁷ In the two most recent cases where the Supreme Court evaluated the actual malice standard in a case involving a media defendant, the Court found that the plaintiff had met its burden. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (reversing grant of summary judgment for failure to establish actual malice where reporter had altered quotes in manner that arguably rendered them to be substantially false); *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657 (1989) (upholding jury verdict that newspaper acted with actual malice).

Nor is the actual malice standard less necessary now than it was in 1964: it still provides the crucial “breathing space” for speech that is essential to ensuring that the public is informed about matters of public significance. Contrary to critics’ assertions, the actual malice standard continues to guarantee the rights of responsible journalists and citizens to engage in political speech, legitimately scrutinize the conduct of public officials, and engage in open debate about the conduct of individuals who wield power or influence in our society. At the same time, application of the actual malice standard by courts across the nation rewards sound journalistic practices, and disincentivizes the deliberate or reckless dissemination of defamatory falsehoods.

Section I of this Chapter deconstructs the myth that, over time, “the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability.”⁸ As discussed in that Section, a review of decisions over more than two decades shows that libel claims brought by public officials and public figures not only regularly survive dispositive motions, but also prevail at trial.⁹ A concern that meritorious claims are foreclosed, or that harms caused by conduct at odds with *bona fide*

⁸ *Berisha*, 141 S. Ct. at 2428 (citing Logan, *supra*, at 808-10).

⁹ Whether a case gets before a jury is not a true means of measuring the “success” of a defamation claim. Given the substantial expense of litigation, and the unpredictability of juries, the pressure to settle may be overwhelming, particularly for smaller publishers and individual journalists. Accordingly, simply surviving a motion to dismiss may be enough for plaintiffs in a defamation case to achieve their goals, whether those are financial awards or retractions, by way of settlement. See Chap. 3 *supra*, at 120-121.

Although criticism of *Sullivan* often ignores the significant expense that results from prolonged litigation, jurists have long recognized its potential chilling effect on First Amendment-protected speech. As then-Judge (now-Justice) Kavanaugh noted in *Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017), “[s]ummary proceedings ‘are essential in the First Amendment area because if a suit entails ‘long and expensive litigation,’ then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.” (citations omitted). See also *National Review, Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari) (“A journalist who prevails after trial in a defamation case will still have been required to shoulder all the burdens of difficult litigation and may be faced with hefty attorney’s fees. Those prospects may deter the uninhibited expression of views that would contribute to healthy public debate.”); *Hatfill v. New York Times Co.*, 427 F.3d 253, 255 (4th Cir. 2005) (Wilkinson, J., dissenting from denial of rehearing *en banc*) (internal citations omitted) (“Even if liability is defeated down the road, the damage has been done. The defendant in this case may well possess the resources necessary for protracted litigation, but smaller dailies and weeklies in our circuit most assuredly do not. The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well. To allow litigation to impose large costs will dull democracy at the local level, because the monetary impacts of litigation for all but the largest media organizations will prove unacceptably high.”).

journalistic practices will not be redressed, is simply untrue. Conversely, the caselaw shows that the actual malice requirement serves as an appropriately “high bar to recovery” in situations where the publisher has made a good faith effort to report the truth—a critical protection against libel plaintiffs who may be actively seeking to deter legitimate criticism of official misconduct.

Section II addresses Justice Gorsuch’s question whether the *Sullivan* standard, as applied in what he describes as “our new world,” “‘cut[s] against the very values underlying the decision’”¹⁰—namely, speech that informs the public about important issues. For Justice Gorsuch (and Professor Logan, whose article also forms the primary basis for this rhetorical question), “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.”¹¹ But contrary to this premise, the experience of this Chapter’s authors, and a review of the cases themselves, make clear that it is simply not true that “publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy” under *Sullivan*.¹² Instead, the actual malice standard *disincentivizes* “ignorance-is-bliss” journalism, by permitting libel suits to move forward where there is evidence that the defendant willfully ignored the facts, or failed to adhere to any basic principles of responsible news reporting. At the same time, the actual malice standard encourages and facilitates “traditional (and expensive) journalistic standards,” by rewarding journalists who actively take steps to confirm the accuracy of potentially defamatory material before publication. In short, the actual malice standard encourages responsible journalism, and provides important protections if an honest mistake is made – which is exactly what it ought to do.

The threat of defamation lawsuits from public officials, public figures, and other powerful entities seeking to suppress unwelcome truths are just as pernicious now (if not more so) than in 1964, when *Sullivan* was decided. Far from being an “ironclad subsidy for the publication of falsehoods,”¹³ the actual malice standard—and its carefully calibrated protection for “erroneous statement[s] . . . inevitable in free debate”—permits the publication of vital news that might not otherwise see the light

¹⁰ *Berisha*, 141 S. Ct. at 2428 (quoting Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & Soc. Inquiry 197, 207 (1993) (reviewing Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991)).

¹¹ *Berisha*, 141 S. Ct. at 2428 (citing Logan, *supra*, at 778).

¹² *Id.*

¹³ *Id.* at 2428.

of day.¹⁴

In sum, decades of experience applying the *Sullivan* standard demonstrates the substantial value it brings to contemporary libel cases brought by public officials and public figures, and the importance of maintaining this protection.

I. THE ACTUAL MALICE STANDARD DOES NOT “IMMUNIZE” THE MEDIA

The suggestion that the actual malice rule leaves courts with no option but to dismiss meritorious libel claims at the earliest opportunity is demonstrably false. In many cases—illustrative examples of which are cited below—libel plaintiffs survive summary dismissal and take their cases all the way to trial. The unsupported assertion by an academic that “[t]he threat that defendants today face from libel litigation is virtually nil,”¹⁵ is simply not borne out by the facts.

Although the *Sullivan* standard requires plaintiffs to identify evidence that the defendant published a falsehood with *knowledge* of its falsity or with a high degree of awareness of its *probable* falsity, in appropriate cases, courts and juries do find sufficient evidence to draw this conclusion. *Sullivan*’s actual malice standard thereby maintains a carefully calibrated balance between freedom of speech and the right to protect one’s reputation.

A. Rightly or Wrongly, Public Official and Public Figure Libel Cases Frequently Survive Dispositive Motions

The premise that actual malice presents an insurmountable bar to defamation cases is simply not true, as illustrated by just some of the recent cases involving public officials and public figures that survived early dispositive motions.

- In *Dershowitz v. CNN, Inc.*, plaintiff Alan Dershowitz sued CNN for libel over its reporting on his answer to a question posed during President Trump’s first impeachment trial.¹⁶ The district court denied CNN’s motion to dismiss, finding that Dershowitz plausibly alleged that CNN had knowingly edited a clip of his answer to create a false impression that Dershowitz had argued that a sitting president could commit illegal acts with impunity if he thought it would aid his reelection.

¹⁴ *Sullivan*, 376 U.S. at 271-72.

¹⁵ Logan, *supra*, at 810.

¹⁶ 541 F. Supp. 3d 1354 (S.D. Fla. 2021).

- In *Butowsky v. Folkenflik*, plaintiff Ed Butowsky sued NPR, its senior media correspondent David Folkenflik, and certain former and current NPR executive editors for libel over NPR’s reporting about the conspiracy theory surrounding the death of Democratic National Committee staffer Seth Rich.¹⁷ The district court denied defendants’ motion to dismiss, concluding that plaintiff’s allegations were sufficient to create a plausible inference that defendants published the challenged reports with actual malice.
- In *US Dominion, Inc. v. Powell*, voting machine company Dominion Voting Systems and related entities sued former federal prosecutor Sidney Powell, former New York City mayor Rudy Giuliani, and pillow company executive Mike Lindell for libel over their statements casting suspicion on Dominion’s conduct during and after the 2020 presidential campaign.¹⁸ The district court denied defendants’ motion to dismiss, concluding that Dominion adequately alleged the challenged statements were made with actual malice.
- In *Nunes v. Lizza*, then-Congressman Devin Nunes sued the publisher of *Esquire* magazine and reporter Ryan Lizza for libel over a report about an Iowa farm owned and operated by Nunes’s family.¹⁹ Although the district court granted defendants’ motion to dismiss (finding in part that Nunes failed plausibly to allege actual malice), the Eighth Circuit reversed that ruling in part, holding that Nunes adequately pleaded actual malice as to an alleged republication of the report after the lawsuit was filed.
- A New Jersey appellate court recently reversed dismissal of libel claims arising from reports that a police officer had engaged in specific sex acts with a prostitute, because the plaintiff plausibly alleged that the source of those allegations never stated that she was a prostitute or had engaged in that sex act with a police officer.²⁰

¹⁷ 2019 WL 2518833 (E.D. Tex. Apr. 17, 2019), *adopted*, 2019 WL 3712026 (E.D. Tex. Aug. 7, 2019).

¹⁸ 2021 WL 3550974 (D.D.C. Aug. 11, 2021), *appeals filed sub nom.* US Dominion, Inc. v. My Pillow, Nos. 21-7103, 21-7104 (D.C. Cir. Jan. 20, 2022)

¹⁹ 12 F.4th 890 (8th Cir. 2021).

²⁰ Pistilli-Leopardi v. MediaNews Grp., Inc., 2020 WL 3967992, at *6 (N.J. Super. Ct. App. Div. July 14, 2020).

These recent cases do not reflect a change in the judiciary's approach to defamation claims; courts regularly have denied early motions seeking dismissal on actual malice grounds in those cases where the plaintiffs plausibly alleged that the defendants knowingly or recklessly published falsehoods. As the Second Circuit noted in 2015, "[i]n practice, requiring that actual malice be plausibly alleged has not doomed defamation cases against public figures. To the contrary, district courts in and out of our Circuit have inferred actual malice at the pleading stage from allegations that referred to the nature and circumstances of the alleged defamation or previous dealings with the defendant."²¹

Similarly, on the other side of the country, a California federal court denied a motion to dismiss a libel claim because the plaintiffs plausibly alleged that the defendants purposefully "altered . . . images and/or video footage so as to falsely portray Counterclaimants as having committed illegal, improper and/or racist acts, and broadcast these altered images."²² Another California federal court denied a dispositive motion in a case challenging the headline "REHAB FOR BLAKE" that accompanied an article reporting concerns about musician Blake Shelton's alleged heavy drinking and suggesting he should seek treatment, concluding there was evidence that the headline was published with actual malice because the publishers knew that Shelton had not, in fact, entered "rehab" and could have published it with an intent to convey a meaning they knew to be false.²³ A New Mexico federal court denied summary judgment for a broadcaster who stated as a fact that a government contractor drove a car purchased with a government credit card, after a government report established that the purchase was cancelled before the car could be delivered.²⁴ And, in another

²¹ *Biro v. Condé Nast*, 807 F.3d 541, 545-46 (2d Cir. 2015) (citing *Tiversa Holding Corp. v. LabMD, Inc.*, 2014 WL 1584211, at *7 (W.D. Pa. Apr. 21, 2014); *Lynch v. Ackley*, 2012 WL 6553649, at *9 (D. Conn. Dec. 14, 2012); *Ciemniecki v. Parker McCay P.A.*, 2010 WL 2326209, at *14 (D.N.J. June 7, 2010)).

²² *Ornelas v. City of Pomona*, 2010 WL 11597412, at *3 (C.D. Cal. Apr. 15, 2010). See also *Ratner v. Kohler*, 2018 WL 1055528, at *9 (D. Haw. Feb. 26, 2018) (denying motion to dismiss because plaintiff, a well-known Hollywood film director/producer, presented sufficient allegations that defendant knew at the time she posted a Facebook post alleging plaintiff had raped her that the rape did not occur); *Colborn v. Netflix Inc.*, 2021 WL 2138767 (E.D. Wis. May 26, 2021) (denying motion to dismiss where defendants allegedly edited footage in a misleading manner); *Chapman v. Journal Concepts, Inc.*, 2008 WL 5381353, at *15 (D. Haw. Dec. 24, 2008) (denying motion to dismiss, finding the plaintiff plausibly alleged that defendants knew their reporting was false and relied on fabricated quotations from doctored audiotapes); *Sharpe v. Landmark Commc'ns*, 2009 Va. Cir. LEXIS 2075 (Cir. Ct. Norfolk Cty. Apr. 9, 2009) (denying motion for summary judgment with respect to defamatory quotations attributed to plaintiff that he alleged he never made).

²³ *Shelton v. Bauer Publ'g Co.*, 2016 WL 1574025, at *11 (C.D. Cal. Apr. 18, 2016).

²⁴ *Anaya v. CBS Broad. Inc.*, 626 F. Supp. 2d 1158 (D.N.M. 2008).

illustrative case, a Georgia federal court denied a motion to dismiss a defamation claim brought by a radio host against his former colleagues, after a broadcast accused him of being fired for misconduct; the court found that the plaintiff plausibly alleged that the defendants “knew, or [were] in a position to know (by virtue of being employed by the station)” that the employee had left the station for reasons unrelated to misconduct.²⁵

Courts also have refused to dismiss cases on actual malice grounds where they found that subjective knowledge of falsity or reckless disregard for the truth could be inferred from the defendants’ reliance on particular reporting or sources of information. For example, in one recent District of Colorado case, the court denied summary judgment for the publishers of an article allegedly criticizing plaintiff’s business as part of a short-selling scheme because there was evidence that defendants employed a “purposefully . . . deficient verification process” prior to publishing.²⁶ Similarly, the Ninth Circuit denied a dispositive motion where the defendant attorneys “chose to publish” a press release accusing casino magnate Steve Wynn of sexual harassment, even “after learning that none of the witnesses [including their client] could confirm that Wynn played any role in [the misconduct] and without considering alternative explanations or investigating further.”²⁷ And a bystander at a counter-protest to the Unite the Right Rally similarly defeated a motion to dismiss by Alex Jones and related media outlets who had accused the plaintiff of being paid hundreds of thousands of dollars by George Soros to participate in a deep state plot, because the plaintiff plausibly alleged that the defendants “‘twisted’ elements of his personal and professional history to fit a pre-conceived narrative that ‘Charlottesville was a Soros-funded false-flag operation.’”²⁸

In sum, there is no shortage of libel claims brought by public officials and public figures that have survived pre-trial motions—contrary to the supposedly impenetrable bar of *Sullivan*’s actual malice rule.

²⁵ *No Witness, LLC v. Cumulus Media Partners, LLC*, 2007 U.S. Dist. LEXIS 83761, at *24 (N.D. Ga. Nov. 13, 2007). See also *Moore*, 2021 WL 1208870 (denying summary judgment in libel case filed by Roy Moore against creators of a political advertisement aired during his campaign to become an Alabama Senator, based on evidence that allegations from two separate incidents were spliced together to create a deliberately false accusation that Moore made sexual advances on a 14-year-old girl). Roy Moore has been a particularly prolific defamation plaintiff, having filed at least three suits over allegations of sexual improprieties with minors when he was a local prosecutor.

²⁶ *Farmland Partners Inc. v. Fortunae*, 2021 WL 1978739, at *2 (D. Colo. May 18, 2021).

²⁷ *Wynn v. Bloom*, 852 F. App’x 262, 264 (9th Cir. 2021).

²⁸ *Gilmore v. Jones*, 370 F. Supp. 3d 630, 678 (W.D. Va. 2019).

B. Public Official and Public Figure Libel Plaintiffs Can and Do Go to Trial.

Further disproving the notion that the actual malice standard provides “effective immunity” from defamation claims, several noteworthy defamation cases have not only survived preliminary motions, but have proceeded to a jury trial. Indeed, the beginning of this year alone has seen at least three high-profile defamation trials.

First, in February 2022, former Alaska Governor and Republican Vice Presidential nominee Sarah Palin brought her defamation case against the *New York Times* before a jury in the Southern District of New York. Palin sued the *Times* for defamation over a 2017 editorial titled *America’s Lethal Politics*. Although the district court initially dismissed Palin’s complaint for failure to allege actual malice plausibly, the Second Circuit reversed, concluding that Palin “met her burden to plead facts giving rise to the plausible inference that [the Times] published the allegedly defamatory editorial with actual malice.”²⁹ The case ultimately proceeded to a jury trial, following which both a unanimous jury and the court itself determined that, in fact, Palin had not carried her burden of proving actual malice.

Second, competing charges of defamation resulting from reporting about alleged sexual misconduct by former Alabama Chief Judge and U.S. Senate candidate Roy Moore went to trial in Alabama in 2022, after an early motion to dismiss was denied. Leigh Corfman sued Moore for denying that he had molested her when she was 14 years old, when Moore was a 32-year old assistant prosecutor for Etowah County. Moore countersued for defamation. Although Moore clearly was a public figure (and former public official), the court found that Corfman also had become a limited-purpose public figure when she told her story to the press in 2017. At trial, the jury found that neither party had been defamed.³⁰

Third, in January 2022, rapper and entertainer Cardi B was awarded \$4 million in actual and punitive damages in her defamation lawsuit against a celebrity YouTuber who had made comments on social media stating that Cardi B was a former prostitute who suffered from sexually-transmitted

²⁹ *Palin v. New York Times Co.*, 940 F.3d 804, 815 (2d Cir. 2019).

³⁰ See Gattis, *Roy Moore Trial: Both sides claim victory after jury says neither party defamed the other*, AL.com (Feb. 2, 2022). This is just one of several defamation suits filed by Moore over the allegations from multiple women that emerged during his Senate campaign. He also sued Sascha Baron Cohen, a PAC that ran advertisements during his campaign, and two other women who alleged sexual harassment by him. Stracqualursi, *Failed Alabama Senate candidate Roy Moore files defamation suit over ads*, CNN (July 25, 2018); Shepherd, *Judge tosses Roy Moore’s \$95 million defamation suit against Sacha Baron Cohen: ‘Clearly a joke’*, Wash. Post, July 14, 2021.

diseases.³¹

These kinds of jury trials in defamation cases are by no means a recent phenomenon. For example, in 2016, a judge in the Western District of Virginia denied summary judgment to Rolling Stone magazine in a defamation case about a 2014 article titled *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, which “contained a graphic depiction of the alleged gang-rape of a UVA student, referred to as ‘Jackie,’ at a Phi Kappa Psi fraternity party.”³² In the weeks that followed its publication, significant questions were raised about the accuracy of Jackie’s central narrative of gang rape. The magazine issued an Editor’s Note “acknowledg[ing] the discrepancies in Jackie’s account, blam[ing] Jackie for misleading [the reporter], and claim[ing] that its trust in Jackie had been ‘misplaced.’”³³ A review of the editorial processes that led to the article by the Columbia University School of Journalism “described the Article as a ‘journalistic failure’ and concluded that defendants ‘set aside or rationalized as unnecessary essential practices of reporting.’”³⁴ Rolling Stone retracted the article in April 2015, and three defamation suits followed.

The first lawsuit was filed by Nicole Eramo, the dean in charge of handling sexual assault cases at the university, against the magazine, its publisher, and the article’s writer, asserting that the article “destroyed Eramo’s reputation as an advocate and supporter of victims of sexual assault” and claiming that she received hundreds of threatening and vicious emails from the public after it ran.³⁵ The district judge found that Dean Eramo was a limited-purpose public figure, but denied Rolling Stone’s summary judgment motion, concluding that a jury could find actual malice given the circumstances of the writer’s and magazine’s investigation and publication.³⁶ “Although failure to adequately investigate, a departure from journalistic standards, or ill will or intent to injure will not singularly provide evidence of actual malice, the court believes that proof of all three is sufficient to create a genuine issue of material fact.”³⁷ At the 2016 trial, the jury found that Dean Eramo had been defamed, awarding her \$3 million

³¹ See *Almánzar v. Kebe*, 2021 WL 5027798 (N.D. Ga. July 8, 2021); Donahue, *Cardi B Wins Another \$3M in Defamation Case Against ‘Malicious’ YouTuber*, *Billboard*, Jan. 25, 2022.

³² *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 867 (W.D. Va. 2016).

³³ *Id.* at 868 (quoting Columbia University Journalism School report).

³⁴ *Id.*

³⁵ *Eramo*, 209 F. Supp. 3d at 868.

³⁶ *Id.* at 869-71.

³⁷ *Id.* at 872.

in damages. The two other lawsuits involving the same article ultimately settled.³⁸

In another case, a police sergeant sued the publisher of the *Milford-Miami Advertiser* after a news report stated that the sergeant had been fired from the Miami Township police and reinstated after an arbitration.³⁹ The district court denied the defendants' summary judgment motion, and the jury awarded the sergeant \$100,000 in damages. The Sixth Circuit affirmed, holding that "[t]here was sufficient evidence in this case for the jury to conclude that Gannett's employees knew that the [challenged] statement . . . was probably false, but nonetheless failed to research further and published it."⁴⁰

These are only some of the libel cases involving public figures or public officials that have proceeded to trial in recent years, again disproving the notion that the actual malice standard provides an "effective immunity" for defamation defendants.

II. *NEW YORK TIMES V. SULLIVAN* REMAINS CRITICAL TO PROMOTING UNINHIBITED, ROBUST AND WIDE-OPEN DEBATE ON PUBLIC ISSUES

Critics of the actual malice standard also assert that the legal doctrine no longer "serve[s] *Sullivan*'s original purposes" of promoting "robust reporting" on matters of public interest.⁴¹ The premise underlying this contention is that the standard's scienter requirement stymies news organizations with "traditional (and expensive) journalistic standards," while giving irresponsible parties a free pass to "disseminate the most sensational information" without fear of liability.⁴² But this premise also is

³⁸ See Gardner, *Rolling Stone Settles Last Remaining Lawsuit Over UVA Rape Story*, *Hollywood Reporter*, Dec. 21, 2017.

³⁹ *Young v. Gannett Satellite Info. Network, Inc.*, 734 F.3d 544 (6th Cir. 2013).

⁴⁰ *Id.* at 550. See also *Ky. Kingdom Amusement Co. v. Belo Ky., Inc.*, 179 S.W.3d 785, 791 (Ky. 2005) (Kentucky Supreme Court reinstated \$4 million jury verdict in favor of amusement park involving a series of reports about an accident on one of the park's roller coasters; the court noted that even though "the burden on a plaintiff in a libel action is significant," the amusement park had "sufficiently demonstrated that there was clear and convincing evidence of actual malice."); *Parson v. Farley*, 800 F. App'x 617 (10th Cir. 2020) (affirming jury award in defamation case filed by candidate for local office against author of letter accusing him of misconduct), *cert. denied*, 141 S. Ct. 116 (2020); *Desmond v. News & Observer Publ'g Co.*, 846 S.E.2d 647 (N.C. 2020); *Tanner v. Ebbale*, 88 So. 3d 856 (Ala. Civ. App. 2011); *Lake Park Post, Inc. v. Farmer*, 590 S.E.2d 254 (Ga. Ct. App. 2003); *Richmond v. Thompson*, 901 P.2d 371, 378 (Wash. Ct. App. 1995), *aff'd*, 922 P.2d 1343 (Wash. 1996).

⁴¹ *Berisha*, 141 S. Ct. at 2429 (Gorsuch, J.).

⁴² *Id.*

demonstrably false. The actual malice standard does not give publishers *carte blanche* to fecklessly publish “the most sensational information” available, because there always have been powerful individuals ready and willing to challenge publishers by threatening or filing libel litigation—a fact that is as true today as it was in 1964.⁴³ Rather than disadvantaging “traditional . . . journalistic standards,” the actual malice standard often is the only thing standing between diligent, well intentioned journalists and the onerous effects of litigation—as both Justice Alito and Justice (then-Judge) Kavanaugh have recognized.⁴⁴

The continuing importance of the actual malice standard is demonstrated by the Eleventh Circuit’s decision in *Berisha* that gave rise to Justice Gorsuch’s dissent. Although some have assumed that the plaintiff in *Berisha* was a random individual who “bec[a]me a limited purpose public figure simply by *defending* himself from a defamatory statement,” that was hardly the case:⁴⁵ Shkelzen Berisha was the son of the former Albanian president—an individual with “one hundred percent name recognition” in that country—and his “supposed role in corrupt arms dealing” had been widely reported in American and international news organizations before the lawsuit was filed.⁴⁶ Among Berisha’s widely reported misdeeds were his involvement in a scheme to defraud the U.S. Government as part of an arms procurement deal; his alleged involvement in a corrupt ammunition decommissioning project that caused a fatal explosion that killed dozens of people; and his alleged involvement in the mysterious death of a potential whistleblower.⁴⁷ In short, the plaintiff was a politically powerful individual who had been implicated in corruption, but who sought to launder his reputation in an American court. That is precisely the type of plaintiff

⁴³ See Section II.A. *supra*; Chap. 2, *supra*, at 83-86.

⁴⁴ National Review, Inc. v. Mann, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari) (“requiring a free speech claimant to undergo a trial after a ruling that may be constitutionally flawed is no small burden”); Kahl v. Bureau of Nat’l Affairs, Inc., 856 F.3d 106, 116 (D.C. Cir. 2017) (Kavanaugh, J.) (“Summary proceedings ‘are essential in the First Amendment area because if a suit entails ‘long and expensive litigation,’ then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.”) (citation omitted). A journalist who ultimately prevails after trial in a defamation case will have been required to shoulder all the burdens of difficult litigation and may be faced with hefty attorney’s fees. Those prospects may deter the uninhibited expression of views that would contribute to healthy public debate. See also Farah v. Esquire Magazine, 736 F.3d 528, 534 (D.C. Cir. 2013); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 485 (1975) (observing that “there should be no trial at all” if the statute at issue offended the First Amendment).

⁴⁵ *Berisha*, 141 S. Ct. at 2429.

⁴⁶ *Berisha v. Lawson*, 973 F.3d 1304, 1310 (11th Cir. 2020).

⁴⁷ *Id.* at 1308, 1311-1314.

Sullivan and its progeny anticipated as threatening a “chilling effect” on free speech.

Concerns about the reach and impact of social media and sensationalist journalism are, moreover, misplaced in light of the facts of *Berisha* itself.⁴⁸ Berisha filed his libel claim against the publishers of a “traditional (and expensive) journalistic” work—namely a full-length non-fiction book by a prize-winning investigative journalist that was published by a major book publisher. The book reported the story of “three young Miami, Florida, men who became international arms dealers during the early 2000s.”⁴⁹ These young men were at the center of a major international scandal—and ultimately were convicted of “defrauding the United States government”—after it emerged that they had fraudulently supplied enormous quantities of Chinese-made ammunition from Albanian depots to the Afghan army as part of the War on Terror.⁵⁰ In explaining the government’s involvement, the book reported that Berisha had attended a meeting of arms dealers in Tirana, Albania and was part of a “mafia” orchestrating the corruption. The report about Berisha was never shown to be false; to the contrary, shortly before the Supreme Court declined to grant certiorari, Berisha and his family were designated *personae non gratae* by the State Department “due to . . . involvement in significant corruption.”⁵¹

The book at issue in *Berisha*, which reported on international government corruption and incompetence, represents the kind of “debate on public issues [that] should be uninhibited, robust, and wide-open.”⁵² The *only* reason the lawsuit was dismissed at summary judgment was because Berisha was unable “to show—well beyond a preponderance of the evidence—that the defendants published a defamatory statement either with actual knowledge of its falsity or with a ‘high degree of awareness’ of its ‘probable falsity.’”⁵³ Without that protection, Shkelzen Berisha’s defamation claim would likely have survived dismissal and gone to trial (with all the expense and uncertainty that entails), or the author might have felt pressured to issue a retraction that he did not believe to be true. The First Amendment “tolerat[es] the publication of *some* false information” in cases such as this because it is “a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not

⁴⁸ *Berisha*, 141 S. Ct. at 2428-29.

⁴⁹ 973 F.3d at 1306.

⁵⁰ *Id.* at 1307-08.

⁵¹ Antony J. Blinken, *Public Designation of Albanian Sali Berisha Due to Involvement in Significant Corruption* (May 19, 2021).

⁵² *Sullivan*, 376 U.S. at 270.

⁵³ *Berisha*, 973 F.3d at 1312.

inadvertently suppressed.”⁵⁴

This need to preserve “breathing space” for speech about public affairs is as vital today as it was when *Sullivan* was decided. Without the protections offered by the actual malice standard, many wealthy or powerful plaintiffs could impose substantial litigation costs on journalists and media companies, merely by asserting that the statements at issue were false. As the Court in *Sullivan* predicted, such a legal landscape would bring down “the pall of fear and timidity . . . upon those who would give voice to public criticism” and create “an atmosphere in which the First Amendment freedoms cannot survive.”⁵⁵

A. The Actual Malice Standard Protects “Robust Reporting” on Subjects that Public Officials and Public Figures Seek to Suppress.

Recent caselaw is replete with examples of public officials and other powerful people seeking to suppress core First Amendment speech, including political commentary and vital news reporting about matters of public interest. In the decisions cited below, the publishers were protected under the actual malice standard—often after the courts involved had rejected other common law defenses, like the fair report privilege⁵⁶ or the opinion doctrine.⁵⁷ Without the actual malice standard, those publishers would be faced with the Hobson’s choice of a protracted and expensive trial, or settling on onerous terms that could include retracting or removing a publication they believed to be true. This “chilling effect” cannot be discounted; without the protections of the actual malice rule, it is not difficult to imagine journalists limiting their reporting because of the fear of expensive litigation and potential liability, with important stories not being published at all. The value of information in a democracy far outweighs the countervailing interest in these cases—which often is nothing more than the plaintiff’s desire to avoid criticism or prevent revelations about serious misconduct. In other words, the actual malice standard continues to ensure—as it did in *Sullivan*—that unintended errors or

⁵⁴ *Berisha*, 141 S. Ct. at 2428 (J. Gorsuch, dissenting from denial of certiorari).

⁵⁵ *Sullivan*, 376 U.S. at 278.

⁵⁶ See, e.g., *Moreno v. Crookston Times Printing Co.*, 2002 WL 4600 (Minn. Ct. App. Jan. 2, 2002) (newspaper’s article about allegations made against police officer during a city council meeting was not protected by fair report privilege because article relied on material extraneous to the meeting; summary judgment granted to newspapers on actual malice grounds).

⁵⁷ See, e.g., *Jankovic v. International Crisis Grp.*, 822 F.3d 576 (D.C. Cir. 2016) (nonprofit’s report about links between Serbian businessman and regime of Slobodan Milosevic was not protected opinion; summary judgment granted to nonprofit on actual malice grounds).

disputes over the truth of an accusation cannot be used to justify suppression of information about matters of public importance.

As a review of case law from around the country (at both the state and federal level) confirms, prominent political figures and government officials with national profiles have not hesitated to bring libel actions against the news media for reporting that criticizes official conduct. These plaintiffs range from sitting Congressmen⁵⁸ and candidates for U.S. Senate⁵⁹ to presidential campaigns.⁶⁰

State and local political figures also routinely assert defamation claims in response to critical reporting about their personal and professional conduct. These include everyone from lieutenant governors⁶¹ and state representatives⁶² to mayors, county commissioners, city managers, and school district officials.⁶³

⁵⁸ See, e.g., *Nunes v. WP Co. LLC*, 513 F. Supp. 3d 1, 7-8 (D.D.C. 2020) (California Representative Devin Nunes sued *Washington Post* over coverage of Trump Administration's investigation of alleged leaks); see also *Harvey v. Cable News Network, Inc.*, 520 F. Supp. 3d 693 (D. Md. 2021) (Rep. Nunes' aide sued CNN over reporting on his alleged involvement in criminal and unethical conduct).

⁵⁹ See, e.g., *Blankenship v. Fox News Network, LLC*, 2022 WL 321023 (S.D.W. Va. Feb. 2, 2022) (former mining executive and U.S. Senate candidate sued dozens of journalists and media companies for reports about his criminal history); *Arpaio v. Cottle*, 404 F. Supp. 3d 80 (D.D.C. 2019) (former Maricopa County, Arizona Sheriff and U.S. Senate candidate Joseph Arpaio sued *New York Times* columnist for a report critical of Arpaio's practices as sheriff); *Arpaio v. Zucker*, 414 F. Supp. 3d 84, 88 (D.D.C. 2019) (Arpaio sued CNN, *Rolling Stone*, and *HuffingtonPost.com* over reporting about his criminal history).

⁶⁰ See, e.g., *Jacoby v. Cable News Network, Inc.*, 2021 WL 5858569 (11th Cir. Dec. 10, 2021) (political operative hired by Kanye West to assist with West's presidential run sued CNN over report alleging that he had a history of engaging in voter fraud); *Donald J. Trump for President, Inc. v. CNN Broad., Inc.*, 500 F. Supp. 3d 1349 (N.D. Ga. 2020) (Donald J. Trump campaign sued CNN over news reporting about alleged attempt to solicit politically damaging information about its opponents from foreign governments).

⁶¹ See, e.g., *Fairfax v. CBS Corp.*, 2 F.4th 286 (4th Cir. 2021) (Former Virginia Lt. Governor Justin Fairfax sued CBS over a report in which two women accused him of sexual assault); *Greenberg v. Horizon Ark. Publ'ns, Inc.*, 522 S.W.3d 183 (Ark. Ct. App. 2017) (former Arkansas state representative brought libel claims against the *Benton Courier* over a series of negative editorials that criticized him for engaging in misleading campaign tactics and potentially violating ethics rules).

⁶² For example, an Indiana county surveyor and his deputy sued WAVE, a Clark County television station, over an investigative series questioning whether the surveyor was improperly using his position to benefit his private engineering and surveying firm, including by using the deputy, who was paid as a county employee, to do the private firm's business. See *Isgrigg v. Love*, 2002 WL 215995 (S.D. Ind. Feb. 7, 2002).

⁶³ See, e.g., *Horne v. WTVR, LLC*, 893 F.3d 201 (4th Cir. 2018) (Virginia school district official sued local TV station for broadcast reporting about her prior felony conviction); *Davidson v. Baird*, 438 P.3d 928 (Utah 2019) (City Manager of Moab, Utah sued Canyon

The news media also regularly face libel claims made by members of law enforcement⁶⁴ and the judiciary⁶⁵—individuals who wield significant power over the ordinary citizens they are tasked with protecting. For example, an Alabama police officer sued the *Huntsville Times* over a well-corroborated report alleging that the officer had racially abused a woman while he was off duty.⁶⁶ A California state judge sued ABC over a news broadcast asserting that he used a “crystal ball” to reach his decisions, that he read periodicals while on the bench, and that he spit, yelled, and screamed in the courtroom.⁶⁷ In these cases, the actual malice standard was critical to protecting news reports about important public issues from legal action.

Public officials in foreign governments also have regularly turned to legal action to seek retribution against journalists who report about their conduct. For example, a senior Venezuelan government official sued the *Wall Street Journal* over a 2015 article reporting that U.S. officials were investigating him for involvement in cocaine trafficking and money laundering.⁶⁸ And several Liberian public officials sued Global Witness, a nonprofit human rights organization, for exploring allegations that the officials had received bribes in exchange for approving an oil license issued

Country Zephyr over reports that he had engaged in improper insider deals with cybersecurity company); *Welch v. American Publ’g Co. of Ky.*, 3 S.W.3d 724 (Ky. 1999) (mayor of Middlesboro, Kentucky, sued Middlesboro *Daily News* over advertisement opposing his re-election); *Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472 (Wis. 1997) (former Wisconsin deputy commissioner of insurance sued Milwaukee *Journal Sentinel* after it published series of articles describing possible ethical violations).

⁶⁴ See, e.g., *Revell v. Hoffman*, 309 F.3d 1228 (10th Cir. 2002) (former FBI officer sued book author and his publisher over books reporting that the officer was involved in extra-judicial killings); *Young v. Wilham*, 406 P.3d 988 (N.M. Ct. App. 2017) (New Mexico reserve police officer sued the *Albuquerque Journal* over reporting that he had exceeded his authority to make arrests and had improperly collected overtime pay); *Moreno v. Crookston Times Printing Co.*, 2002 WL 4600 (Minn. Ct. App. Jan. 2, 2002) (Minnesota police officer sued *Crookston Daily Times* over an article discussing allegations that he was selling drugs).

⁶⁵ See, e.g., *Eisenstein v. WTVF-TV*, 2016 WL 2605752 (Tenn. Ct. App. May 3, 2016) (Tennessee general sessions judge sued WTVF-TV over broadcasts reporting on investigation into whether the judge hired an unlicensed individual to serve as psychologist for a drug court program); *Sikora v. Plain Dealer Publ’g Co.*, 2003 WL 21419279 (Ohio Ct. App. 2003) (recently elected administrative judge sued Cleveland *Plain Dealer* over editorial criticizing the judge’s conduct during the election); *Wilson v. Cowles Publ’g Co.*, 101 Wash. App. 1077 (2000) (Washington judge sued *Spokesman-Review* over article reporting she had been reading a novel while presiding over jury trial).

⁶⁶ *Smith v. Huntsville Times Co.*, 888 So. 2d 492 (Ala. 2004).

⁶⁷ *Dodds v. American Broad. Co.*, 145 F.3d 1053 (9th Cir. 1998).

⁶⁸ *Cabello-Rondon v. Dow Jones & Co.*, 720 F. App’x 87 (2d Cir. 2018).

to Exxon.⁶⁹

Other prominent and powerful persons and entities with substantial influence over and impact on public life also have used threats of defamation actions to attack critical reporting about their public activities. These plaintiffs include those with national public platforms,⁷⁰ as well as those who exercise significant power in their local communities.⁷¹

Powerful *foreign* public figures—many with vast fortunes and deep connections to foreign governments—also have used defamation lawsuits in an effort to muzzle scrutiny of their actions. This includes not only Berisha, himself the son of the Albanian prime minister and president, but also oligarchs from the Caucasus⁷² and Russia.⁷³ In one disquieting

⁶⁹ Tah v. Global Witness Publ'g, Inc., 991 F.3d 231, 235 (D.C. Cir.), *cert. denied*, 142 S. Ct. 427 (2021).

⁷⁰ See, e.g., Turner v. Wells, 879 F.3d 1254 (11th Cir. 2018) (Miami Dolphins head coach sued Paul Weiss attorneys for publishing report about alleged culture of bullying that led a player to quit the team) ; Pippen v. NBCUniversal Media, LLC, 734 F.3d 610 (7th Cir. 2013) (former NBA star Scottie Pippen sued CNBC and other media organizations over reports that Pippen lost some of his fortune to bad investments and had gone bankrupt); Greenberg v. Spitzer, 132 N.Y.S.3d 601 (N.Y. Sup. Ct. 2020) (billionaire Hank Greenberg sued former New York Governor and Attorney General Eliot Spitzer over Spitzer's assertion that Greenberg had committed fraud while head of AIG); Murray v. Chagrin Valley Publ'g Co., 25 N.E.3d 1111 (Ohio Ct. App. 2014) (coal company executive Bob Murray sued *Chagrin Valley Times* for publishing news report, editorial, and editorial cartoon commenting on Murray's firing of 156 employees the day after President Obama's reelection); Murray v. Knight-Ridder, Inc., 2004 WL 333250 (Ohio Ct. App. 2004) (Murray sued Akron *Beacon Journal* over series of articles reporting about air pollution in Ohio); Jackson v. Paramount Pictures Corp., 68 Cal. App. 4th 10 (1998) (Michael Jackson sued news program *Hard Copy* over reports discussing search for and purported existence of videotape showing him engaged in sexual conduct with underage boy). See also VanderSloot v. Foundation for Nat'l Progress, No. CV 2013-532, 2015 BL 462704 (Idaho 7th Dist. Ct. Oct. 6, 2015) (billionaire sued magazine for article reporting he "outed" and "bashed" local reporter; magazine reports spending over \$2.5 million in legal costs before winning on summary judgment).

⁷¹ See, e.g., Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230 (11th Cir. 1999) (Florida real estate moguls sued ABC over broadcast reporting on their exploitation of investors); Lam v. Univision Commc'ns, Inc., 329 So. 3d 190 (Fla. Ct. App. 2021) (Guatemalan megachurch pastor sued Univision over broadcast reporting that he had accepted money from drug trafficker); Kassouf v. Cleveland City Magazines, Inc., 755 N.E.2d 976 (Ohio Ct. App. 2001) (real estate mogul known as the "parking czar" of Cleveland sued *Cleveland Magazine* over article reporting on his indictment on tax-related charges).

⁷² See, e.g., Jankovic v. International Crisis Grp., 822 F.3d 576 (D.C. Cir. 2016) (Serbian oligarch sued nonprofit over report alleging plaintiff profited from his association with ousted Slobodan Milosevic regime).

⁷³ See, e.g., OAO Alfa Bank v. Center for Pub. Integrity, 387 F. Supp. 2d 20 (D.D.C. 2005) (two powerful Russian oligarchs tied to Russian government, and each of their companies, sued the Center for Public Integrity over allegations that they had connections to organized

example, Oleg Deripaska, a Russian oligarch and close confidant of Vladimir Putin, sued the Associated Press over an article implicating him in criminal actions related to the 2016 U.S. presidential election and in connection with assets stolen from Ukraine.⁷⁴

Finally, corporations can be as powerful and influential as public officials, and also are prolific defamation plaintiffs. Issues related to the products or services they sell—from security and penal services to medical equipment,⁷⁵ food,⁷⁶ or even religious salvation⁷⁷—can have a profound and sometimes deleterious effect on people’s lives. Private companies also are often inextricably bound up with government programs that affect the public, like the private security forces that contracted with the government throughout the War on Terror.⁷⁸ They also may bring lawsuits against local activists and organizations that speak out against the impact the companies’ actions have on their community, such as the private prison company who sued residents and an advisory neighborhood commission in Washington, D.C. that was advocating against the placement of a prison in their neighborhood.⁷⁹ The actual malice standard is essential to protect reports

crime and had engaged in drug trafficking).

⁷⁴ Deripaska v. Associated Press, 282 F. Supp. 3d 133 (D.D.C. 2017).

⁷⁵ See, e.g., BYD Co. v. VICE Media LLC, 531 F. Supp. 3d 810 (S.D.N.Y. 2021) (Chinese manufacturer of N95 masks and other equipment sued VICE over article discussing manufacturer’s purported use of forced labor); BYD Co. v. Alliance for Am. Mfg., 2021 WL 3472386 (D.D.C. Aug. 6, 2021) (same manufacturer sued nonprofit organization over blog posts asserting that manufacturer used forced labor, benefitted from links to the Chinese government and military, and that its N95 masks failed federal certification in U.S.), *appeal docketed*, No. 21-7099 (D.C. Cir. Sept. 9, 2021).

⁷⁶ See, e.g., Pegasus v. Reno Newspapers, Inc., 57 P.3d 82 (Nev. 2002) (restaurant owners sued Reno *Gazette-Journal* for publishing negative reviews); Beef Prods., Inc. v. ABC, 2014 WL 12710659 (S.D. Cir. Ct. Mar. 24, 2018) (manufacturers of lean finely textured beef, referred to as “Pink Slime,” sued ABC for series of reports and claimed damages of \$1.9 billion; weeks into trial, case settled for a minimum of \$177 million, according to news reports, making it largest libel settlement in U.S. history; reports were not retracted and remain online); Nord, *ABC settled ‘pink slime’ defamation suit for more than \$177 million*, Chicago Trib., Aug. 10, 2017.

⁷⁷ See, e.g., Church of Scientology Int’l v. Behar, 238 F.3d 168 (2d Cir. 2001) (Church of Scientology sued *Time* over highly critical article asserting the Church was “ruthless global scam” “pos[ing] as a religion”).

⁷⁸ See CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280 (4th Cir. 2008) (private security firm with contract at Abu Ghraib sued radio broadcaster over program alleging that it was responsible for torture and related abuses at the prison).

⁷⁹ See, e.g., Bannum, Inc. v. Citizens for a Safe Ward Five, Inc., 383 F. Supp. 2d 32 (D.D.C. 2005) (private prison company sued community board and local activists based on publication alleging that company circumvented zoning laws and illegally influenced public officials to obtain permits).

about these important public issues, just as it is for protecting reports about misconduct by government actors.

B. Specific Examples Show How The Actual Malice Standard Provides the “Breathing Space” Necessary to Publish Important Journalism on Matters of Immense Public Concern.

The actual malice standard does *not* proceed from the premise that there is inherent value in false and defamatory statements.⁸⁰ But as the Supreme Court has recognized, the common-sense reality is that factual errors are “inevitable in free debate.”⁸¹ To avoid the oppressive “self-censorship” and “cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press” that would result if speakers could easily be held liable for “inevitable” mistakes, the Supreme Court has recognized the need for a rule that “extend[s] a measure of strategic protection to defamatory falsehood” to “assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.”⁸²

A closer look at some of the cases in which courts found speech about public officials and public figures to be protected by the actual malice rule illustrates this principle.

1. Political Campaign Coverage: Don Blankenship v. The Entire Media

Perhaps no category of speech is more central to “the essence of self-government”⁸³ than the “[d]iscussion of public issues and debate on the qualifications of candidates” for public office.⁸⁴ Accordingly, the Supreme Court has held that the “constitutional guarantee” reflected in the actual malice rule “has its fullest and most urgent application precisely to the conduct of campaigns for political office.”⁸⁵ Yet, just as “erroneous statement is inevitable in free debate,” individuals engaged in vigorous and often time-sensitive reporting on political campaigns unavoidably will

⁸⁰ To the contrary, the Supreme Court repeatedly has stated that “the erroneous statement of fact is not worthy of constitutional protection.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). See also *United States v. Alvarez*, 567 U.S. 709, 746 (2012) (Alito, J., dissenting) (“Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”) (collecting cases).

⁸¹ *Sullivan*, 376 U.S. at 271.

⁸² *Gertz*, 418 U.S. at 342; see also *Alvarez*, 567 U.S. at 750 (Alito, J., dissenting) (citing *Gertz*).

⁸³ *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

⁸⁴ *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

⁸⁵ *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

make mistakes. In an important recent decision, a federal district judge in West Virginia recognized that principle, granting summary judgment to a dozen news organizations and journalists on actual malice grounds.

In *Blankenship v. Fox News Network, LLC*, the plaintiff was an unsuccessful candidate for the Republican nomination in the 2018 race for the U.S. Senate seat from West Virginia.⁸⁶ Prior to launching his political career, Don Blankenship was the wealthy CEO of a major mining company who was convicted of conspiracy to violate mine safety standards in the wake of a 2010 explosion at one of his company’s mines that took the lives of 29 miners. Blankenship was sentenced to a year in federal prison—the maximum penalty available under the law for that charge—and fined \$250,000. Almost immediately after his release in 2017—and while still on supervised release—Blankenship announced the launch of his Senate campaign. A billionaire candidate in a pivotal mid-term race who had just been released from prison naturally attracted attention. During the course of Blankenship’s campaign, many reporters and commentators referred to him as a “convicted felon” (or some variation of that phrase). But even though Blankenship served a full year in federal prison, his crime was classified in the U.S. Code as a Class A Misdemeanor. In 2019, he sued more than 100 defendants—including digital and print news publishers, television networks, reporters, commentators and political organizations—for defamation, based on the erroneous reference to him as a “felon.”

The district judge denied early motions to dismiss filed by many of the defendants, made on the grounds that the reports were substantially true, and found that Blankenship had adequately alleged that the inaccuracies were published with actual malice.⁸⁷ After more than a year of discovery, including more than a dozen depositions, the defendants remaining in the case moved for summary judgment on the grounds that there was no evidence to establish they had published the inaccurate description of Blankenship’s conviction with actual malice. This time, the court agreed, granting the motions and dismissing the lawsuit. The evidence presented on summary judgment showed that none of the defendants had deliberately mis-labeled the conviction; some testified that they mistakenly believed a person who served a year-long federal prison term must have been convicted of a felony, while others explained that they were using the term “felon” in the colloquial sense, to refer to someone who was convicted of a serious crime. These errors were not made by journalists reporting on Blankenship’s trial, or in news reports that provided a detailed account of his criminal history. Rather, the references appeared in articles about a high

⁸⁶ 2022 WL 321023 (S.D.W. Va. Feb. 2, 2022).

⁸⁷ *Blankenship v. Napolitano*, 451 F. Supp. 3d 596, 617 (S.D.W. Va. 2020).

profile political race, to highlight for a lay audience an important event in Blankenship’s background that made him, at minimum, an atypical candidate for U.S. Senate.

In granting the defendants’ summary judgment motions, the district court made clear that its ruling was not “an endorsement of the moving defendants’ errors.”⁸⁸ Instead, its order recognized that the purpose of the actual malice standard is to protect the kind of “erroneous statements” that are “inevitable” in the exercise of First Amendment rights, and provide the necessary “breathing space” to the press to perform its vital role in reporting about political campaigns and candidates for public office.⁸⁹ In an ideal world, the news media always would provide precisely accurate information. But in the real world, news organizations are composed of human beings who sometimes make mistakes. The fact that the mistake in this case was made by *hundreds* of journalists and commentators at all ends of the political spectrum, from organizations large and small (including in print, online and on television) illustrated that it was precisely the type of “erroneous statement” that is “inevitable in free debate.”⁹⁰

2. Investigative Journalism: Church of Scientology International v. Behar

Absent the protections provided by *Sullivan* and its progeny, news coverage of powerful and aggressively litigious organizations and individuals would be functionally impossible. If a lower standard of fault were applied, a plaintiff alleging “falsity” might easily evade dismissal—particularly for reports about conduct that is difficult to prove, or about which the plaintiff has control of critical information. In such an environment, enterprise reporting about powerful institutions simply would not be financially viable—the risk would be too great. A case involving the powerful—and famously litigious—Church of Scientology illustrates the point.

In 2001, the Second Circuit’s decision in *Church of Scientology International v. Behar* put an end to nearly a decade of litigation by the Church against *Time* magazine and one of its reporters, arising from a cover story entitled “Scientology: The Cult of Greed.”⁹¹ Not surprisingly, given the title, the Church was unhappy with the article. After a series of decisions from the district court, the case was narrowed to three sets of statements: (1) statements that the Church “survives by intimidating members and

⁸⁸ *Blankenship*, 2022 WL 321023, at *34.

⁸⁹ *Id.* (citing *Sullivan*, 376 U.S. at 271-72).

⁹⁰ *Sullivan*, 376 U.S. at 271.

⁹¹ 238 F.3d 168 (2d Cir. 2001).

critics in a Mafia-like manner,” with critics “find[ing] themselves . . . framed for fictional crimes, beaten up or threatened with death;” (2) statements concerning a former Scientologist who had been convicted of financial crimes and allegedly was instructed by the Church to murder his psychiatrist and commit suicide; and (3) statements concerning the anger of the parents of a young Scientologist who had committed suicide.

The Church’s argument that these statements were published with actual malice was heavily premised on the contention that the author “had a negative view of Scientology and that his bias pervaded his investigation.”⁹² The article certainly reflected poorly on the plaintiff, but the court held that it had not shown that this alleged “bias” caused the author to publish false information or avoid learning facts that could cast doubt on the accuracy of his reporting.⁹³ To the contrary, the challenged statements were based on “extensive research,” including review of affidavits from former Church officials, press coverage, interviews with multiple sources, consulting with experts, and, with respect to statements about retaliation against journalists, the author’s own personal experience.⁹⁴

The Church also attacked the credibility of some of the key sources, claiming reliance on one former Scientologist in particular was reckless.⁹⁵ But the court found that the author “had considerable corroboration” for the challenged statements, including testimony of the psychiatrist at the former Scientologist’s criminal trial and interviews with others involved. Accordingly, even if the author could not be absolutely certain of the truth, he did not report on these incidents “with purposeful avoidance” of it.⁹⁶

Despite what the court described as an “extensive” reporting process, a less rigorous liability standard could easily have resulted in a protracted jury trial, where allegations of personal bias, reliance on purportedly questionable sources, and the failure to chase down every lead might have resulted in a verdict for the plaintiff. It was only because the

⁹² *Id.* at 174.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 175.

⁹⁶ *Id.* The Church similarly attempted to establish “reckless disregard of the truth” by claiming that the author purportedly “omitted” information, including by failing to interview the roommate of the young Scientologist who had committed suicide. The court found, however, that these omissions were “insignificant when viewed against the backdrop of [the author’s] investigation as a whole,” which included interviewing the boy’s parents, friends and teachers, reviewing police records, and attempting to interview the director of the Scientology-affiliated center that the boy was attending. *Id.* The absence of one additional interview, given all these efforts, did not give rise to an “inference of purposeful avoidance of the truth.” *Id.*

actual malice standard requires that the mistakes be based on actual knowledge of falsity—or *purposeful* avoidance of the truth—that this important reporting ultimately was protected.

Over the years, litigious institutions like the Church of Scientology often have been the subject of critical reporting.⁹⁷ Typically, such journalism is carefully thought through, to ensure that the information (and the reporting process) can stand up to any legitimate scrutiny. But without the protection of the actual malice standard, such reporting would rarely see the light of day—the risk of publishing would simply be too great. Regardless of one’s views about the Church of Scientology—or any of the other subjects of critical investigative reporting—the First Amendment is designed to protect this kind of journalism; a libel law framework that effectively prevents that from happening is antithetical to the most basic principles of an informed citizenry that undergirds our democracy.

3. *Covering Companies That Make Products The Public Relies On: BYD Co. v. VICE Media and BYD Co. v. Alliance for American Manufacturing*

Notwithstanding the importance of government officials in a democratic system, people are just as—if not more—directly affected by the actions of the companies that make the products they use in their everyday lives. Because such companies do not hesitate to use libel law to attack journalism that they believe will hurt their profitability, the actual malice standard is critical to protect this reporting and the public interest it serves.

In the early days of the COVID-19 pandemic, BYD Co. Ltd., a Chinese manufacturer that describes itself as one of the world’s “largest producers and suppliers of electric vehicles . . . as well as solar panels, lithium batteries, and protective masks and equipment, among other products,” won a \$1 billion contract to supply California with N95 masks.⁹⁸ When this announcement attracted press coverage—some of it critical—the company responded by filing two libel lawsuits against U.S. publishers.⁹⁹ The company conceded that it was “at least a limited purpose public figure,” especially given its “public role” in distributing supplies during the pandemic and, in both cases, courts dismissed the lawsuits for failure to plausibly allege actual malice on the part of the publishers.

The first suit was filed against the digital news publisher *VICE*

⁹⁷ See, e.g., Wright, *Going Clear: Scientology, Hollywood and the Prison of Belief* (2013).

⁹⁸ *BYD Co. v. All. for Am. Mfg.*, 2021 WL 3472386, at *1 (D.D.C. Aug. 6, 2021), *appeal docketed*, No. 21-7099 (D.C. Cir. Sept. 9, 2021).

⁹⁹ See *id.*; *BYD Co. v. VICE Media LLC*, 531 F. Supp. 3d 810 (S.D.N.Y. 2021).

following the publication of an article entitled *Trump Blacklisted This Chinese Company. Now It's Making Coronavirus Masks for U.S. Hospitals*. BYD objected to the article's reference to a report by an entity called the Australian Strategic Policy Institute ("ASPI"), which included BYD in a list of companies associated with factories that allegedly used forced labor from China's Uyghur community. The article provided a hyperlink directly to the report and included BYD's previous statements denying the allegations, noting that "the company has been called a 'model employer' by labor advocates."¹⁰⁰

The second suit, filed in federal district court in Washington D.C., concerned a series of publications by a nonprofit organization called the Alliance for American Manufacturing, which advocates in favor of American-made products. The Alliance published statements concerning BYD's association with forced labor, based on the ASPI report; it questioned why California had selected an "automaker" that was "controlled by the Chinese State" to produce medical equipment; and it pointed out that BYD issued a \$500 million refund to the state after the masks failed to secure federal certification.¹⁰¹ In addition to denying the forced labor allegations, BYD disputed that it was "controlled" by the Chinese government, maintaining that it is privately owned.

Both cases were dismissed, with the courts finding that the lawsuits contained only conclusory allegations that the defendants published with knowledge of falsity or reckless disregard of the truth. BYD's dispute over the forced labor allegations amounted to the argument that the ASPI report did not actually accuse it of "profiting" from slave labor, because it said only that BYD had business dealings with a company that, in turn, had a subsidiary that allegedly used forced labor.¹⁰² Thus, BYD argued, the defendants knowingly misrepresented what the ASPI report said. But, as both courts recognized, the report expressly identified "83 foreign and Chinese companies directly or indirectly benefitting from the use of Uyghur workers," and included BYD on that list.¹⁰³ As the D.C. court noted, the most that could be said was that the defendant in that case "merely had a

¹⁰⁰ *Id.* at 823. Although BYD was subject to a provision of the 2020 National Defense Authorization Act prohibiting the use of federal funds for purchase certain items from companies owned or subsidized by the Chinese government, including BYD, the company also took issue with the headline's use of the word "blacklist." The court rejected that argument as well.

¹⁰¹ See 2021 WL 3472386, at *1.

¹⁰² *Id.* at *6.

¹⁰³ *Id.*; see also *VICE*, 531 F. Supp. 3d at 824.

different interpretation of the ASPI report.”¹⁰⁴

BYD also alleged that ASPI was not a reliable source because it had “an anti-China agenda.”¹⁰⁵ But BYD did not allege any facts showing that either of the defendants subjectively knew or believed that ASPI was not a credible source and, as the D.C. court pointed out, the ASPI Report included endnotes to support each its claims. As the court explained, “to defeat a defamation claim, the Alliance need not have tracked down and verified that each endnote supports each claim. Because the actual malice standard is subjective, what matters is not whether the endnotes *actually* support the claims in ASPI’s Report but whether the Alliance *thought* they did.”¹⁰⁶

The reporting at issue in these cases—by a news organization and by an advocacy group—raised serious concerns about a foreign company responsible for supplying significant quantities of vital equipment to the United States. Those concerns were supported by a credible report from a reputable think tank founded and funded by the Australian government, and were reflected in major legislation passed by the United States Congress. Yet BYD was prepared to pursue two separate federal lawsuits that appeared designed to deter critical reporting about it. Absent the actual malice standard, BYD’s disagreement with the publishers’ interpretation of the ASPI report and its allegations that the ASPI was biased and unreliable could have subjected the defendants to years of expensive litigation and, potentially, to crippling liability.

4. *Examining Quasi-Governmental Conduct:* *CACI Premier Technology, Inc. v. Rhodes.*

As the Supreme Court explained in *Sullivan*, at a minimum, the actual malice standard “delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”¹⁰⁷ But today, what once may have been unambiguously described as “official conduct” is performed by ostensibly *private* contractors working

¹⁰⁴ *Alliance for Am. Mfg.*, 2021 WL 3472386, at *5; see also *VICE*, 531 F. Supp. 3d at 825 (noting “the parallels between what is stated in the [ASPI] Report and what BYD objects to in the article”).

¹⁰⁵ *VICE*, 531 F. Supp. 3d at 826.

¹⁰⁶ 2021 WL 3472386, at *6. In a similar vein, the statements concerning links between BYD and the Chinese government were extensively catalogued in a report from another organization, among other sources. BYD offered only conclusory allegations that the Alliance should have known that BYD was a private company; moreover, the court found that “[b]eing a private corporation . . . is not exclusive of, or a bar against, being ‘under the control of’ or being an ‘arm of the state.’” *Alliance for Am. Mfg.*, 2021 WL 3472386, at *7 (citation omitted).

¹⁰⁷ 376 U.S. at 283.

for the government.¹⁰⁸ As the Supreme Court has recognized, however, the *Sullivan* rule must also be applied to those “‘public figures’ whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of ‘public officials’ with respect to the same issues and events.”¹⁰⁹ One powerful example of how this rule protects important reporting on governmental activity performed by contractors is *CACI Premier Technology, Inc. v. Rhodes*.¹¹⁰

As the Fourth Circuit described it, “CACI is a U.S. government contractor that provides intelligence services to the military” and, “[i]n the post-invasion phase of the war in Iraq, CACI . . . provided civilian interrogators for the U.S. Army’s military intelligence brigade assigned to the Abu Ghraib prison, near Baghdad.”¹¹¹ In April 2004, CBS News aired “an extended report, with sickening photographic evidence, about U.S. soldiers abusing and humiliating Iraqi detainees at Abu Ghraib,” which included “photographs of naked detainees stacked in a pyramid; a photograph of two naked and hooded detainees, positioned as though one was performing oral sex on the other; and a photograph of a naked male detainee with a female U.S. soldier pointing to his genitalia and giving a thumbs-up sign,” as well as “[a]nother photograph [that] showed a hooded detainee standing on a narrow box with electrical wires attached to his hands,” and “[a] final photograph [that] showed a dead detainee who had been badly beaten.”¹¹² These “abuses stunned the U.S. military, public officials in general, and the public at large.”¹¹³ Other media reports that the court described as essentially contemporaneous with the CBS broadcast revealed “that CACI interrogators at Abu Ghraib had abused detainees and directed or encouraged the abuse of detainees,” relying on “sources [that] included two official military reports, [and] a published interview of the brigadier general formerly in charge of U.S. prisons in Iraq (including Abu Ghraib).”¹¹⁴

In August 2005, radio host and former Air Force service member Randi Rhodes spoke about Abu Ghraib on *Air America*, “a liberal talk radio

¹⁰⁸ See, e.g., Nguyen, *The U.S. government is becoming more dependent on contract workers*, Marketplace, Jan. 17, 2019.

¹⁰⁹ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring).

¹¹⁰ 536 F.3d 280 (4th Cir. 2008).

¹¹¹ *Id.* at 284.

¹¹² *Id.* at 284-85.

¹¹³ *Id.* at 285.

¹¹⁴ *Id.*

network.”¹¹⁵ Rhodes’ commentary addressed “the abuses at Abu Ghraib, the issue of military contractor responsibility for those abuses, and the issue of the Pentagon’s use of military contractors.”¹¹⁶ CACI subsequently sued Rhodes and Air America for defamation, challenging thirteen statements that were broadcast between August 10 and August 26, 2005.¹¹⁷

Following discovery, the district court granted summary judgment the defendants, concluding that none of the statements at issue were made with actual malice, and the Fourth Circuit affirmed.¹¹⁸ In doing so, the Court of Appeals emphasized “the importance of the actual malice standard to a wide-open and vigorous discussion of critical public issues,” and observed that “Rhodes joined in just such a discussion in this instance.”¹¹⁹ The court found that CACI became a public figure when the U.S. Army’s military intelligence branch engaged it “to provide civilian interrogators at Abu Ghraib,” holding that “CACI surely knew when it accepted the interrogation work that it was potentially exposing itself to the inhospitable climate of media criticism.”¹²⁰

The Court then found that Rhodes had not made any of the allegedly defamatory statements with actual malice, because she had relied on and reasonably interpreted reputable prior reporting; it concluded, quoting *Sullivan*, that “[t]his case reminds us that ‘[i]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public [issues], and this opportunity is to be afforded for vigorous advocacy’ that may be caustic and even exaggerated.”¹²¹ Indeed, the court explained, “[t]his essential privilege minimizes the danger of self-censorship on the part of those who would criticize, thus allowing robust debate about the actions of public officials and public figures (including military contractors such as CACI) who are conducting *the country’s* business.” *Id.* The necessity of this kind of reporting cannot be seriously disputed.

C. The Actual Malice Standard Incentivizes Responsible Journalism and Disincentivizes Willful Blindness

Every lawyer who has been involved in defending libel cases would agree that publishing without investigation, fact-checking or editing is *never*

¹¹⁵ *Id.* at 284.

¹¹⁶ *Id.* at 288.

¹¹⁷ *Id.* at 288-92.

¹¹⁸ *Id.* at 292-93

¹¹⁹ *Id.* at 294.

¹²⁰ *Id.* at 295.

¹²¹ *Id.* at 304.

the optimal legal strategy for journalism or any form of expression. There are clear limits to the protection that the actual malice standard provides, and willfully blind publishers run a substantial risk of liability—particularly if they consciously ignore evidence that might disprove their reporting. Caselaw over the last 25 years makes clear that courts will not hesitate to find evidence of actual malice if a publisher knowingly avoids the truth, which is why no legitimate news organization (or lawyer advising it) would agree with the assertion that it will enjoy legal protection from defamation liability so long as it publishes heedlessly and without taking basic reportorial precautions.

To the contrary, the actual malice standard acts to incentivize responsible journalistic behavior. Journalists who take active steps to verify their reporting before publication—e.g., consulting multiple sources, seeking comment from the subjects of their reporting, and running down leads—are protected by the actual malice standard because, as a result, they have confidence in the accuracy of their reporting. Here too, the Eleventh Circuit’s decision in *Berisha* is instructive because, in that case, allegations of actual malice were *disproven* by evidence of the defendants’ sound journalistic practices. As the court noted, the author of the book in *Berisha* “relied on the many prior reports that had similarly accused Berisha of being involved in . . . fraud and in an Albanian criminal underworld”—including a report from the then-U.S. Ambassador to Albania implicating him in corrupt arms dealing.¹²² Moreover, the author also conducted multiple interviews with eyewitnesses, including the Mayor of Tirana.¹²³ In short, the actual malice standard could not be satisfied because the author engaged in sound journalistic practices.

Reviewing the case law simply does not support the suggestions that “ignorance is bliss” is a viable legal strategy. Instead, application of actual malice standard in real-life cases teaches precisely the opposite.

In *Dodds v. American Broadcasting Co.*, for example, ABC News broadcast an investigative report about “judges whose conduct seems downright scandalous,” which included a description of the plaintiff, Judge Bruce Dodds, using a prop crystal ball (which would provide basic answers like “yes” or “no”) to “support his decisions.”¹²⁴ Although it was undisputed that Judge Dodds had a toy crystal ball on his desk and referenced it during court proceedings, he argued “that no one could honestly believe that a sitting judge would use a toy in the context of serious judicial

¹²² *Berisha*, 973 F.3d at 1313.

¹²³ *Id.* at 1313.

¹²⁴ 145 F.3d 1053-61 (9th Cir. 1998).

proceedings.”¹²⁵ Of course, no one could dispositively prove what was in Judge Dodds’ mind when he used the crystal ball, but ABC nonetheless prevailed on summary judgment because the report relied on “numerous sources [who] were personally aware of Judge Dodds’ use of the crystal ball in the manner suggested.”¹²⁶ Moreover, ABC had sought a response from Judge Dodds, who “refused to answer . . . questions or . . . furnish any information at all, as was his prerogative.”¹²⁷ Based on these undisputed facts, the court held that the actual malice standard protected ABC’s reporting: “ABC satisfied any obligation it may have had by checking the information it received with a number of knowledgeable individuals and by providing Judge Dodds with the opportunity to refute the charges and supply any useful evidence he may have possessed, including the names of any favorable witnesses.”¹²⁸ The lesson of this case, and innumerable others, is that actual malice protects those who earnestly follow the basic tenets of journalism—including seeking information from different sources as well as from the subject of the story prior to publication. Similarly, reporters are well advised to practice responsible journalism because, as many reported decisions have taught, diligent efforts to report the truth can protect them against liability for inadvertent mistakes.

Just as *Sullivan* provides positive incentives to engage in rigorous newsgathering prior to publication, the relevant caselaw also offers strong disincentives against the sort of feckless reporting that critics of *Sullivan* fear. Where there are supportable factual allegations of fabrication, evidence that the defendants’ sources could not have backed up their reporting, or where the defendant had access to information that cast doubt on their work, courts have not hesitated to find actual malice, as the numerous cases cited in Section I confirm. Simply put, in reality, the actual malice actively disincentivizes the kind of irresponsible journalism Justice Gorsuch and others have suggested *Sullivan* may promote.

III. CONCLUSION

Though the *Sullivan* rule established a “high bar to recovery” for public official and public figure libel cases, it has not evolved “into an effective immunity from liability.” As the cases described in this Chapter show, *Sullivan* has neither dissuaded public officials or public figures from bringing libel suits, nor prevented those suits from surviving a motion to dismiss or for summary judgment. Rather, the actual malice rule continues

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1063.

¹²⁸ *Id.*

to serve its intended purpose of providing essential “breathing space” for reporting on matters of public concern. Contrary to the conventional wisdom among *Sullivan’s* critics that the rule promotes sensational or careless journalism, the caselaw reflects the opposite. In reality, the *Sullivan* rule incentivizes strong editorial processes and responsible reporting. To protect that kind of journalism and the democratic values it in turn fosters, *Sullivan* and its progeny must be preserved.

Chapter 5: English Libel Law and the SPEECH Act: A Comparative Perspective

By Dave Heller and Katharine Larsen*

American and English libel law were historically written with the same pen, but separated dramatically after the United States Supreme Court decided *New York Times v. Sullivan*.¹ At its heart, the *Sullivan* decision reflects not only the oft-quoted American commitment to “robust” and “uninhibited” debate on public issues, but also a keen awareness that the common law of defamation can be manipulated to punish the press, deprive the public of vital information, and launder the reputation of rogues. As Harry Kalven Jr. wrote at the time it was decided, the facts of *Sullivan* left the inescapable impression that “Alabama pounced on the opportunity to punish the *Times* for its role in supporting the civil rights movement in the South.”²

The Supreme Court’s warnings about the dangers of common law defamation have been proven true over the past half-century in England.³ There was never a single cultural or political moment to mark its start but, in the decades following *Sullivan*, London became the “libel capital of the world” in which the aggressive and costly pursuit of libel claims by powerful people created a vast environment of self-censorship.⁴ Scholars surmised that the common law created a

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¹ 376 US 254 (1964); see Johnson, *Comparative Defamation Law: England and the United States*, 24 U. Miami Int’l & Comp. L. Rev. 1, 4 (2017) (“As late as 1964, American libel law was essentially ‘identical’ to English libel law.”).

² Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 Supreme Court Review 191, 200.

³ The United Kingdom consists of three separate legal jurisdictions: England and Wales, Scotland, and Northern Ireland. This Chapter focuses on the law of England and Wales – England in shorthand – where the bulk of caselaw has developed.

⁴ Robertson QC & Nicol QC, *Media Law* 38 (3d ed. 1992) (As explained by Geoffrey Robertson QC and now-Judge Andrew Nicol, in their authoritative treatise, “[n]o other legal system offers such advantages to the wealthy maligned celebrity. . . . The result is that Britain reads less than other countries, as nervous publishers cut passages critical of the wealthy and powerful from books published locally.”)

“structural chilling effect,” i.e., an environment where certain categories of news reporting – such as accounts of police misconduct – became “no go areas” for fear of suit.⁵ Perversely, what flourished instead was celebrity gossip and scandal which, even if deliberately false, could be paid for out of increased sales. In other words, tabloids could budget for payments of libel damages.⁶ On the other hand, more serious newspapers and book publishers stung by damage awards and legal costs would “often want to sidestep the financial risks altogether by deleting material or ‘spiking’ it. Investigative and polemic writing or broadcasting being the primary victims.”⁷

These “opportunities” to weaponize defamation law were exploited by the legal profession based in London. It was said of notorious plaintiff’s lawyer Peter Carter-Ruck that: “Until Carter-Ruck got his teeth into the libel law, actions were infrequent and inexpensive. But from the 1950s, Carter-Ruck became the leading libel lawyer and clients sought him out. He honed his menacing letters to encourage socialites to sue for imagined slights and fashion a weapon for politicians to suppress hostile stories. . . . He established the idea that libel law was complicated and merited very high fees. In the process he became very rich. ‘I like to bill the clients as the tears are flowing.’”⁸ This created a vicious circle of bad law incentivizing litigation, forum shopping, high damage awards and forced settlements.

Whatever the starting point, the phenomenon was made worse by the advent of online publishing, which subjected a vast number of foreign publications to potential liability if they were read by anyone in England. This provided rocket fuel to the problem of so-called “libel tourism” and sharpened dramatically the clash of constitutional versus common law libel – most notably with respect to enforcement of foreign libel judgments.

During this period, *New York Times v. Sullivan* was not wholly ignored in England. Rather, it was cited and debated, though not adopted.⁹ It served as something of a “directional principle” for those English lawyers, scholars,

⁵ Barendt, Lustgarten, Norrie & Stephenson, *Libel and the Media: The Chilling Effect 192-93* (1997).

⁶ It has also been argued that England’s strict libel laws played a role in encouraging illegal phone hacking by British tabloids as a means of gathering proof of the truth of gossip and rumor and make publication defensible. See *Why Britain’s Strict Libel Laws Actually Encourage Tabloid Antics*, Time, July 13, 2011.

⁷ See Nicol QC, Millar QC & Sharland, *Media Law and Human Rights 64* (2001).

⁸ Hooper, *The Carter-Ruck chill. He did for freedom of speech what the Boston Strangler did for door-to-door salesmen*, The Guardian, Dec. 23, 2002. Notably, the cited article was published on the occasion of Carter-Ruck’s death, when he could no longer bring a libel suit.

⁹ *Derbyshire County Council v. Times Newspapers Ltd*, [1993] AC 534 (government authority cannot sue in libel for words that reflect on its governmental and administrative functions; citing *Sullivan*, the House of Lords observed that “the public interest considerations which underlaid [*Sullivan*] are no less valid in this country”).

politicians and campaigners who recognized that the ancient common law cannon was incompatible with modern democracy – and that reform was necessary.

This Chapter offers a brief survey of these issues – from English libel law at and after the Supreme Court decided *Sullivan*, to the thorny issues of libel tourism, law reform and enforcement of judgments that have brought these issues into sharp focus. Each of these topics could be addressed at much greater length. The modest purpose of this overview is to shed light on an overseas branch of our “legal family tree”—and perhaps glimpse at what our branch could suffer were we to abandon *Sullivan*. It concludes with a discussion of what can only be described as the emphatic rejection of the English approach to defamation law, in the name of *Sullivan* and our own First Amendment, by a unanimous Congress in 2010.

I. LIBEL LAW IN ENGLAND FROM *SULLIVAN* ONWARD

To understand what English defamation law was like in 1964 when *Sullivan* was decided, one could profitably start by reading Justice Brennan’s summary of the instructions given to the Alabama jurors in that case. “Once ‘libel per se’ has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. . . . Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury.”¹⁰ This strict liability instruction was “customary under Anglo-American libel law.”¹¹ Indeed, those jury instructions reflected the then-existing common law of libel in England (and in much of the rest of the United States).¹² As the House of Lords explained in this florid paragraph:

Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those

¹⁰ *Sullivan*, 376 US at 267.

¹¹ *Kalven*, *supra*, at 195.

¹² See *id.* at 196 (citing, e.g., *Peck v. Tribune Co.*, 214 US 185, 189 (1909) (“As was said of such matters by Lord Mansfield, ‘Whatever a man publishes he publishes at his peril.’”). See also Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, *Comm’n L. & Policy*, 13:4, 415, 418 (2018) (“American libel law is peculiarly media-oriented, but prior to *Sullivan* in 1964 it was identical to the still restrictive English common law of libel. This is no surprise, given that U.S. libel law originated with British law. The Anglo-American law of defamation was based on the rule of ‘strict liability.’”).

circumstances he has no defence to the action, however excellent his intention.¹³

A defamatory statement is one that tends to lower someone in the eyes of right-thinking members of society generally or to expose them to hate, ridicule or contempt—a familiar formula, but with broader scope under English law. In 1959, Liberace, the famously flamboyant American entertainer, successfully sued a *Daily Mirror* columnist for calling him a “a deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered heap of mother love.”¹⁴ The judge determined that this critique could bear the defamatory meaning that Liberace was a homosexual which, of course, was true but not something the newspaper could prove. Some years later, a British actor and director sued a *Sunday Times* movie critic for calling him “hideous”—a divided Court of Appeal held his case should go to a jury since it could expose him to ridicule.¹⁵ More recently a British tennis player obtained more than thirty apologies and damages from dozens of publishers for being called the “world’s worst tennis pro.”¹⁶ His string of legal victories was only broken when the *Daily Telegraph* successfully mounted a defense of truth.¹⁷

The main defenses to defamatory statements were truth (justification), fair comment and privilege. In each instance, the defendant had the burden of establishing the defense. The practical impact of allocating the burden of proof of truth in a defamation action in this manner cannot be overstated. This is because there will always be cases where the issue of truth is inconclusive – or ambiguous in light of publication deadlines. Among many notorious cases, in 2004, the *Sunday Times* paid £300,000 in damages to cyclist Lance Armstrong for reporting accurately, but unproveably to the standards of English law, that Armstrong used performance enhancing drugs.¹⁸ In England, the difficulties of proving truth could

¹³ *Hulton (E) & Co v Jones*, [1909] [UK Law Rp AC 57 \(1910\) AC 20](#) (6 December 1909).

¹⁴ Greenslade, *The meaning of ‘fruit’: How the Daily Mirror libeled Liberace*, *The Guardian*, May 26, 2009. The newspaper did not even attempt to prove truth, but sought unsuccessfully to defend the column as fair comment.

¹⁵ *Berkoff v. Burchill* (1997) EMLR 139 (“film directors, from Hitchcock to Berkoff are notoriously hideous-looking people”).

¹⁶ Deans, *Tennis pro labelled world's worst loses libel action against Daily Telegraph*, *The Guardian*, April 28, 2010.

¹⁷ *Id.*

¹⁸ In a pretrial decision addressing the issue of “meaning,” the judge noted that “[s]ome of the particulars pleaded in the defence go back for decades and others even to ancient Greece and Rome.” *Armstrong v. Times Newspapers*, [2004] EWHC 2928 (QB); see *id.* (“The overall effect of the quotations and the events described in the article is to leave readers with the impression that Mr. Armstrong’s denials of drug-taking beggar belief and are to be taken with a pinch of salt. It is not for me to rule on meaning, at least at this stage, but only on whether the words are capable of bearing the pleaded meanings. I am quite satisfied that the words are not capable of conveying merely that ‘a third party has alleged enough to warrant an investigation of the claimant’s activities.’”). After Armstrong’s deceit was revealed, the *Sunday Times* [successfully sued him](#) to recover the 1,000,000 pounds it paid him in damages and costs..

lead to complicated, time-consuming and often head-spinning litigation to determine the “meaning” of the alleged defamation that needed to be proven true.¹⁹

The “fair comment” defense was akin to the defense commonly known in the United States as “opinion based on disclosed facts”²⁰—but significantly narrower. In England, the published “comment” had to be about a matter of public interest and made without malicious motive. Moreover, the “fairness” of the comment had to be determined only with reference to the publication in which it appeared, not in its broader context.²¹ Thus, in *Telnikoff v. Matusевич*, the House of Lords reinstated a libel claim over a letter to the editor, holding that it was an error of law for the trial court and court of appeal to have considered, in determining whether the letter constituted “fair comment,” the initial article that prompted it in response.²²

The “privilege” defense protected accurate republication of statements made in court and other official documents—not unlike the U.S. fair report privilege.²³ However, the privilege would be lost if publication was malicious or if it was deemed contrary to the public interest.²⁴

As it turned out, years later, the concept of “privilege” provided an important doctrinal vehicle to expand the protection of responsible journalism in the public interest. In *Reynolds v Times Newspapers Limited*,²⁵ the House of Lords

¹⁹ Given the strict liability standard in English defamation law, and as defamation cases flourished in the post-*Sullivan* years, the question of “meaning” became a crucial one for defendants as it would determine precisely what they had to prove true, fair or privileged. For example, when reporting an allegation of misconduct, is the alleged defamatory meaning that plaintiff is guilty (difficult to prove); suspected of misconduct (easier to prove) or that grounds exist to inquire into plaintiff’s conduct (the best-case scenario for the press)? For a discussion of the different levels of meaning see, e.g., *Jameel v. Times Newspapers* [2004] EWCA 983 (“The elevation of this taxonomy of meanings into legal categories is recent.”). See also Kenyon, *Defamation Comparative Law & Practice* 23-66 (2006) (discussing the importance of determining meaning).

²⁰ *Restatement of Torts (Second)* §566 (1974).

²¹ See *Telnikoff v. Matusевич*, [1991] 4 ER 817.

²² *Id.* See *Libel in context – a key amendment to the Defamation Bill is put forward as it passes through the House of Lords*, Law Gazette, April 23, 1996.

²³ See, e.g., *Tsikata v Newspaper Publishing Plc*, [1996] EWCA Civ 618.

²⁴ *Id.* (reports of official proceedings that have been “conclusively and publicly discredited thereafter” may no longer be in the public interest as required for the privilege to attach). Compare *Solaia Tech. v. Specialty Publ’g Co.*, 852 NE 2d 825, 843 (Ill. 2006) (“We hold that the fair report privilege overcomes allegations of either common law or actual malice.”). See also Defamation Act 1996 § 15 (“The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to be made with malice.”).

²⁵ [1999] 4 All ER 609; 2 AC 127. The House of Lords noted that effective Oct. 2000 the European Convention on Human Rights was to be incorporated into all U.K. legal jurisdictions. This included the right to freedom of expression (Article 10) and right to respect for private and family life (Article 8). The main impact has been an ongoing development of a European-influenced law of privacy in the U.K. pursuant to Article 8. See, e.g., *Bloomberg LLP v. ZXC* [2022] UKSC 5 (affirming judgment and injunction against American financial news company and holding that “a person under

undertook an extensive examination of English, American and European Court of Human Rights law and recognized that the common law concept of a “duty” to communicate defamatory statements could and should be expanded to protect responsible journalism. The House of Lords, however, rejected a broad privilege for “political speech.”²⁶ Instead, Lord Nicholls set out a list of ten factors surrounding the gathering, preparing and publishing of information to determine whether the journalism was “responsible.” The factors were: 1) The seriousness of the allegation; 2) The nature of the information and the extent to which it constitutes a matter of public concern; 3) The source of the information; 4) The steps taken to verify the information; 5) The status of the information; 6) The urgency of the matter; 7) Whether comment was sought from the plaintiff prior to publication; 8) Whether the article contained the gist of the plaintiff’s side of the story; 9) The tone of the article; and 10) The circumstances of the publication including the timing.²⁷

When it was decided in 2001, *Reynolds* was hailed as a sort of “*New York Times v. Sullivan* lite”—but it never lived up to its promise. Trial level decisions “gave the appearance of wishing to define it out of existence.”²⁸ Trial court judges schooled in the common law not only took a restrained approach to *Reynolds*, they typically treated the ten factors as a mandatory check list, all items of which needed to be satisfied for the privilege to apply, rather than as a set of potentially applicable considerations, any combination of which might, in a given case, give rise to the privilege.²⁹

In 2006, the House of Lords delivered a rebuke to the lower courts in *Jameel v. Wall Street Journal Europe*, a case concerning a *Journal* article about international investigations into Saudi-linked terrorism financing.³⁰ The trial court

criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation”)

²⁶ *Id.* (“Given the procedural restrictions in England I regard the recognition of a generic qualified privilege of political speech as likely to make it unacceptably difficult for a victim of defamatory and false allegations of fact to prove reckless disregard of the truth.”)

²⁷ *Id.*

²⁸ Stephens, Hooper, Mathieson, et al., *MLRC 50-State Survey Media Libel Law* 983 (2005) (“Six years into the defense there has yet to be a successful first instance decision for a defendant on a *Reynolds* defense.”). See, e.g. *Gilbert v. MGN*, [2000] EMLR 680 (privilege did not apply because of inadequate investigation and unreliable source); *Al Fagih v. HH Saudi Res. & Marketing* [2001] EWCA Civ 1634 (trial court ruled that privilege did not apply because of failure to publish plaintiff’s side of the story); *Grobbelaar v. News Group Newspapers* (2001), EWCA civ 33 (privilege did not apply because of overall tone of article).

²⁹ England employs “specialist” libel judges, typically drawn from the ranks of defamation barristers, to preside over virtually all defamation cases brought in the High Court of London. The rationale is that defamation law is so complicated it requires a specialist judge. As can be gleaned from this Chapter, that is certainly an accurate assessment. The upside of this regime is the efficiency of having expert judges. The downside is a natural resistance to innovation and creative thinking otherwise typical of the common law and its evolution.

³⁰ [2006] UKHL 44 (“In this case, Eady J said that the concept of ‘responsible journalism’ was too vague. It was, he said, ‘subjective’. I am not certain what this means, except that it is obviously a

judge (a former media law barrister) found that the newspaper’s defense – if any – should be to prove truth; there was no obvious “social or moral duty” for the newspaper to have published the article when it did (five months after Sept. 11) or in the form it did.³¹ Revisiting the issue of privilege for responsible journalism, the House of Lords reversed, concluding that, “[i]f ever there was a story which met the test, it must be this one.”³² But the Baroness Hale added a caution: “the most vapid tittle-tattle about the activities of footballers’ wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it.”³³ This legal distinction between “what the public is interested in” and “what is a matter of public interest” gives English judges an ongoing and significant role in determining what journalism is protected and, relatedly, what journalism is created.³⁴

On top of these issues, English publishers could take little comfort in the statutes of limitations which, in the United States, tend to be both relatively short (typically one or two years) and subject to a “single publication rule” that starts the “clock” running on initial publication and subsumes all subsequent dissemination of the same material by the original publisher.³⁵ Under the infamous 1849 decision in *Duke of Brunswick v. Harmer*³⁶ (good law until 2014!), a separate cause of action existed for each and every distribution of an alleged libel, no matter the date of first mass publication. In 1849, this meant that a 17-year old newspaper available in the British Library Reading Room was still actionable.³⁷ In the 2000s, it meant potential chaos for publications available online.³⁸ In *Loutchansky v. The Times Newspapers Ltd.*, the Court of Appeal, in an unfortunately shortsighted decision, applied the *Duke of Brunswick* rule to a newspaper’s online archives.³⁹ The Court of Appeal asserted that the “maintenance of archives is a comparatively

term of disapproval. (In the jargon of the old Soviet Union, ‘objective’ meant correct and in accordance with the Party line, while ‘subjective’ meant deviationist and wrong.”).

³¹ [2004] EWHC 37 (QB) (reversed on appeal).

³² [2006] UKHL 44 (“In the immediate aftermath of 9/11, it was in the interests of the whole world that the sources of funds for such atrocities be identified and if possible stopped.”).

³³ *Id.*

³⁴ Foster, *Interesting or in public interest?*, Press Gazette, Aug. 28, 2007 (“between a judge and the general public there is little common ground over what public interest actually means”).

³⁵ Sack, *Sack on Defamation: Libel, Slander, and Related Problems*, § 2.6.4 (5d ed. 2017). See also *Lokhova v. Halper*, 995 F. 3d 134, 142 (4th Cir. 2021) (“Jurisdictions that have adopted the single publication rule are nearly unanimous in applying it to internet publications.”)

³⁶ [1849] 14 Q.B. 185.

³⁷ *Id.*

³⁸ *Berezovsky v. Forbes*, [2000] 1 W.L.R. 1004, 1012 (per Lord Steyn) (under *Duke of Brunswick* multiple publication rule, it is a distinctive feature of English law that each communication is a separate libel).

³⁹ [2001] EWCA 1805.

insignificant aspect of freedom of expression.”⁴⁰ It described the newspaper archive as “stale news,” which could not rank in importance with the dissemination of contemporary material.⁴¹

This is but a thumbnail of English defamation law in place in 1964 and the decades that followed. Alongside the referenced defenses, there stood a complex maze of pleading and procedural rules that, taken together, confounded even the most esteemed judges. As Lord Diplock observed in 1968, “I venture to recommend once more the law of defamation as a fit topic for the attention of the Law Commission. It has passed beyond redemption by the courts.”⁴² A 1996 law treatise pointedly described English defamation law as “absurd, complex and unfair.”⁴³

II. THE RISE OF LIBEL TOURISM—SYMPTOM OF A LARGER PROBLEM

In 1992, Geoffrey Robertson QC and Andrew Nicol (QC, now Judge) noted London’s magnetic pull on aggrieved international politicians, oligarchs and celebrities. Their list included Sylvester Stallone, Armand Hammer, Erica Jong, Bianca Jagger and Greek Prime Minister Andreas Papandreu. Each sued or threatened to sue an American publisher in London.⁴⁴ Over the next decade, more joined the parade, including Roman Polanski, Kate Hudson, and Cameron Diaz, as well as an assortment of Russian oligarchs and Saudi financiers.⁴⁵ The tactic became known as “libel tourism.”⁴⁶

⁴⁰ *Id.* at para. 74 (“We accept that the maintenance of archives, whether in hard copy or on the internet, has a social utility, but consider that the maintenance of archives is a comparatively insignificant aspect of freedom of expression.”).

⁴¹ *Id.* at para. 74.

⁴² *Slim & Others v. Daily Telegraph & Others*, [1968] 2 Q.B. 157, 179.

⁴³ Weir, *A Casebook on Tort* 525, 530 (8th ed. 1996) (The plaintiff “can get damages (swingeing damages!) for a statement made to others without showing that the statement was untrue, without showing that the statement did him the slightest harm, and without showing that the defendant was in any way wrong to make it (much less that the defendant owed him any duty of any kind).”).

⁴⁴ Robertson QC & Nicol QC, *supra*, at 38.

⁴⁵ Brook, *Kate Hudson wins damages from UK Enquirer*, *The Guardian*, July 20, 2006; Wheatcroft, *The worst case scenario: British libel law means our press is vulnerable and the wealthy are shielded from criticism*, *The Guardian*, Feb. 28, 2008 (“The late Telly Savalas was one of the first, winning an action here that he couldn’t even have begun in the US. Roman Polanski was allowed to give evidence from France to London by video link when he sued *Vanity Fair*, a New York magazine.”); Lyall, *Are Saudis Using British Libel Laws to Deter Critics?*, *N.Y. Times*, May 22, 2004; See also Hooper, *Reputations Under Fire: Winners and Losers in the Libel Business* 428 (2000) (“London has become known to many foreign ‘forum-shoppers’ as a Town named Sue—a place where you can launder your reputation on the basis of a few sales in the UK of some overseas publication.”).

⁴⁶ The term “libel tourism” gained currency among English defamation lawyers in the 1990s and early 2000s. See, e.g., Carvajal, *Britain, a destination for “libel tourism,”* *N.Y. Times*, Jan. 20, 2008 (“You’re an investment bank in Iceland with a complaint about a tabloid newspaper in Denmark that published critical articles in Danish. Whom do you call? A pricey London libel lawyer. That is called libel tourism by lawyers in the media trade.”)

The reason was two-fold. First, of course, was the body of law itself—one which combined the presumptions of the common law with a modern costs recovery and damages system that was the highest in Europe.⁴⁷ This legal cocktail worked to the decided advantage of plaintiffs (whether libel tourist or English resident) in extracting damages, apologies and even pulping of published books and magazines.⁴⁸ Not surprisingly given this system, English libel lawyers actively sought out clients in America, touting their chances of success in a London court.⁴⁹

Secondly, as noted above, English law did not limit the exercise of jurisdiction in defamation cases based on considerations of fundamental fairness. In defamation cases, an English court had presumptive jurisdiction over a foreign defendant if there was *any* publication in England and the defendant was properly served. The English law of jurisdiction in libel cases was so solicitous that the House of Lords found it wholly appropriate for a London court to hear a case brought by film director Roman Polanski against the American magazine *Vanity Fair*— even though Polanski was a fugitive from U.S. justice for raping a 13-year old and subject to arrest if he entered Britain.⁵⁰ Polanski was allowed to appear by video-conference. The trial judge noted that, while “the reason underlying the application was unattractive . . . this did not justify depriving Mr. Polanski of his chance to have his case heard at trial.”⁵¹

The Rachel Ehrenfeld case, discussed further below, brought the issue to a head in the United States. For U.S. media lawyers and their clients, it was unfathomable that a serious book, intended for U.S. readers and entirely legal in this country, addressing the most serious issue of the day—international terrorism financing—could be censored and its author hounded by a declaration of falsity issued in absentia by an English court.⁵²

The problem was not limited to American defendants. Campaigners for reform highlighted equally egregious cases brought in London—such as the libel suit by an Icelandic bank, Kaupthing, against the Danish newspaper *Ekstra Bladet*

⁴⁷ A 2008 Oxford University study examining legal fees, cost recovery and damage awards found English defamation cases to be by far the costliest in Europe. See Centre for Socio-Legal Studies, *A Comparative Study of Costs in Defamation Proceedings Across Europe* 180 (2008). With respect to legal fees, the study noted that defamation cases in England had the most lawyers per case, the lengthiest proceedings, and the most expensive legal fees. As for cost recovery, under England’s “loser pays” system, a winning plaintiff is entitled to recovery their attorney fees as costs. *Id.*

⁴⁸ See, e.g., Johnson, *Music critic's book is pulped as Penguin loses defamation case*, *The Independent*, Aug. 28, 2007; Donadio, *Libel without borders*, *N.Y. Times*, Oct. 7, 2007 (“Rather than challenging the accusations, [Cambridge University Press] agreed in August to destroy the remaining 2,300 warehoused copies of the book [*Alms for Jihad*].”).

⁴⁹ In the early 2000s, for example, lawyers at MLRC received a letter from Schilling & Lom in London touting its expertise in bringing defamation suits on behalf of American celebrities.

⁵⁰ *Polanski v. Conde Nast*, [2005] UKHL 10 (“There can be no doubt that, as between Mr. Polanski and Condé Nast, the judge's order was rightly made.”).

⁵¹ [2003] EWCA Civ 1573.

⁵² See Section IV, *infra*, at 181-82 n.79.

over reports critical of the bank's tax advice to wealthy clients.⁵³ In hindsight, the case may have provided some clues to the coming financial crisis that bankrupted Iceland, but it settled before it went to trial, with the newspaper agreeing to pay the bank substantial damages, as well as its legal costs, and carry an apology on its news site for a month.⁵⁴ Other examples include libel suits brought in London by a Ukrainian billionaire against two Ukrainian news organizations⁵⁵ and by a Tunisian sheikh against an Arabic language satellite television network based in Dubai.⁵⁶

The academic and scientific communities were similarly fertile ground for litigation. Thus, for example, a U.S. company, GE Healthcare, sued Danish radiologist Dr. Henrik Thomsen over a 15-minute presentation he delivered at a scientific meeting in Oxford about injuries suffered by kidney patients in Denmark.⁵⁷ Another U.S. company, NMT Medical, sued British cardiologist Dr. Peter Wilmshurt in London for raising questions at a conference in the United States about the effectiveness of a heart implant device.⁵⁸ And in what became the trigger for the Defamation Act 2013, the British Chiropractic Association sued science writer Simon Singh for questioning the benefits of chiropractic treatments and describing some as "bogus."⁵⁹

⁵³ English Pen and Index on Censorship, *The Impact of English Libel Law on Freedom of Expression* 17-18 (2012) ("The Danish tabloid Ekstra Bladet was sued in London by Kaupthing, an investment bank in Iceland, over articles it had published that criticised advice the company had given to wealthy clients about tax shelters.").

⁵⁴ Greenslade, *Banking on libel victories in Britain* (2008) (The Danish newspaper editor sued by the Icelandic bank later stated: "I want to encourage my colleagues in the media industry to be very careful with translating articles to English. A small newspaper might end up folding if it was to pay the legal expenses for such a trial.")

⁵⁵ Peel & Murphy, *English courts in the dock on 'libel tourism,'* Financial Times, April 1, 2008 ("Rinat Akhmetov, a Ukrainian energy tycoon ranked by Forbes magazine as the world's 214th richest billionaire, is no stranger to England's libel courts. He has launched successful actions in London over the past year against Kyiv Post and Obozrevatel, two Ukrainian internet journals.").

⁵⁶ English Pen and Index on Censorship, *supra*, at 19 (The Dubai "programme was broadcast in Arabic, but was available via satellite receivers in this jurisdiction.").

⁵⁷ Gerth, *GE and Muzzled Radiologist End UK Libel Case*, ProPublica, Feb. 18, 2010.

⁵⁸ Ghosh, *NMT libel case intensifies for cardiologist*, BBC News, Nov. 2, 2010 ("A US medical devices company has threatened to step up its libel action against a consultant cardiologist who criticised its clinical trials."). The lawsuit ended when the U.S. plaintiff went out of business. See Boseley, *US company suing British doctor for libel goes out of business*, The Guardian, April 21, 2011.

⁵⁹ The trial court ruled that "bogus" was a factual assertion, not fair comment. *British Chiropractic Ass'n v. Singh*, [2009] EWHC 1101 (QB), but was reversed on appeal, see [2010] EWCA Civ 350 ("It was in our judgment a statement of opinion, and one backed by reasons. We would respectfully adopt what Judge Easterbrook, now Chief Judge of the US Seventh Circuit Court of Appeals, said in a libel action over a scientific controversy, *Underwager v Salter* 22 Fed. 3d 730 (1994): "[Plaintiffs] cannot, by simply filing suit and crying 'character assassination!', silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation. . .

These cases brought the twin issues of libel tourism and defamation reform to a head. The *Singh* case presented a nightmare scenario, even though both parties were English and presumably anticipated being subject to English law, because it illustrated how a writer, scientist or academic can be subject to strained legal interpretations about the “meaning” of published words, which can present an author with the impossible task of proving the truth of a meaning that was neither stated nor intended.⁶⁰

The dangers posed by English libel law were particularly pronounced in the context of online publication. What the U.S. Supreme Court described as the most participatory form of mass speech yet developed⁶¹ was nevertheless subject to the 1849 *Duke of Brunswick* rule in England, which (until 2014) treated every distribution of a publication as separately actionable.⁶² For online publications, this meant there was no effective statute of limitations for the wealth of material they made available to the public. Publishers, academics and scientists all faced the risk of being called to defend the truth of their online statements years after witnesses and memories had faded. As a result, English libel law raised the very real risk that much information would simply be removed and rendered unavailable to the public.

III. THE DEFAMATION ACT OF 2013

The criticisms of English defamation law did not go unheard. A powerful campaign for libel reform began under the leadership of scientists, academics, actors and even comedians. The campaign won the support of both Labor and Tory Prime Ministers. The press took a decided backseat in public, but lobbied behind the scenes for significant but realistic reform.

After many years of lobbying and debate (if not international shaming through the SPEECH Act),⁶³ Parliament approved a host of reforms in 2013. The Defamation Act of 2013 came into force in January 2014.⁶⁴ It is, however, more evolutionary than revolutionary. Shifting the burden of proving truth to claimants was never seriously considered, but the new law introduces a number of both significant and incremental changes that, at least in theory, increase protection for the press and other speakers about matters of public concern. The key changes include: 1) a threshold test that the statements sued on cause “serious harm.”⁶⁵

. More papers, more discussion, better data, and more satisfactory models – not larger awards of damages—mark the path towards superior understanding of the world around us.”).

⁶⁰ *Id.*

⁶¹ *Reno v. ACLU*, 521 U.S. 844, 863 (1997).

⁶² The rule was rejected in the U.S. more than 60 years ago as unworkable in the era of mass communications—circa 1938! See, e.g., *Wolfson v. Syracuse Newspapers, Inc.*, 4 N.Y.S.2d 640 (1938); *Gregoire v G.P. Putnam’s Sons*, 81 N.E.2d 45 (N.Y. 1948) (adopting the single publication rule).

⁶³ See Section IV, *infra*, at 181-90.

⁶⁴ [Defamation Act 2013](#).

⁶⁵ See *id.* § 1 (addressing “serious harm”):

During Parliamentary debate, it was asserted that this provision merely codified prior law disfavoring trivial libel claims, but by its terms there is now room for judges to expand the scope of protection; 2) Companies are required to prove serious financial loss to pursue a defamation claim, although executives can sue in their individual capacity without such limitations;⁶⁶ 3) The law includes a “public interest” defense that replaces and expands the *Reynolds* defense of qualified privilege.⁶⁷ Instead of a checklist of factors as set out in *Reynolds*, the new statutory defense applies to a statement about a matter of public interest where the defendant reasonably believed the statement to be in the public interest;⁶⁸ 4) The law includes a single publication rule that eliminates the *Duke of Brunswick* rule.⁶⁹ The new rule was intended to speak specifically to the advent of the Internet, but it still gives judges discretion to extend the limitations period in the interests of justice;⁷⁰ 5) The Act includes a new defense for websites sued for defamation. Somewhat analogous to Section 230 of the Communications Decency Act in the United States, under this provision websites are not liable for third-party content provided they abide by a new scheme of notice and takedown regulations promulgated in connection with the Act;⁷¹ 6) Finally, the law addresses libel tourism by requiring certain claimants to show that England is the most appropriate jurisdiction for the case to be heard.⁷² This provision applies only to claimants outside of the European Union and other European states who can sue in any member state under applicable European treaties.⁷³

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.

⁶⁶ *Id.*

⁶⁷ *Id.* § 4.

⁶⁸ In *Serafin v. Malkiewicz*, [2020] UKSC 23, the U.K. Supreme Court considered the “reasonable belief” requirement and concluded “the defendant must (a) prove as a fact that he believed that publishing the statement complained of was in the public interest, and (b) persuade the court that this was a reasonable belief. The reasonable belief must be held at the time of publication.”

⁶⁹ Defamation Act 2013, § 8 (“This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.”).

⁷⁰ *Id.* § 6a (noting that the new single publication rule does not affect a court’s discretion to toll a statute of limitations on equitable grounds) (citing Limitations Act 1980 § 32A).

⁷¹ *Id.* § 5 (“It is a defence for the operator to show that it was not the operator who posted the statement on the website. The defence is defeated if the claimant shows that—(a) it was not possible for the claimant to identify the person who posted the statement, (b) the claimant gave the operator a notice of complaint in relation to the statement, and (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.”). Compare 47 U.S. Code § 230 (c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

⁷² Defamation Act 2013, § 9.

⁷³ *Id.* § 17. The Act changed the law of England but none of its provisions applied to Northern Ireland. That means that foreign plaintiffs can still sue there under its defamation law. Indeed, plaintiffs’ lawyers in Northern Ireland and Ireland (with its own strict liability regime) have, like

Thus, while the state of the law in England has plainly improved, it remains a jurisdiction where the “global elite” can and do exert a chilling effect on publishers.⁷⁴ As Floyd Abrams has observed, the differences in legal protections for the press in the United States and England “remain oceanic.”⁷⁵ The Defamation Act 2013 was a significant reform, but in terms of its success in protecting free expression, it deserves a slow dance rather than Alexander Meiklejohn’s exuberance.⁷⁶

IV. PROTECTING *SULLIVAN* FROM GLOBAL ATTACK

In 2010, with bipartisan support, a unanimous Congress enacted the SPEECH Act.⁷⁷ Its acronymic title reflects the legislators’ commitment to “Securing the Protection of our Enduring and Established Constitutional Heritage” by forbidding recognition in U.S. courts of foreign defamation judgments awarded under legal frameworks repugnant to American free speech and press traditions as reflected in *Sullivan*.⁷⁸ Much has been written about how the SPEECH Act was catalyzed by the threat of “libel tourism” in England⁷⁹ Yet, well before 2010, U.S.

their English colleagues, actively sought American clients to sue abroad. See Brennan, *Heavyweight Irish lawyer picks fight with pending U.S. libel legislation*, Hollywood Reporter, April 9, 2009 (“Although every bit the Belfast native, Paul Tweed is no stranger to Hollywood and New York, where his clients have included Harrison Ford, Liam Neeson, Britney Spears, Michael Jackson and Jennifer Lopez. He has become the attorney of choice for actors who want to take on the tabloids in a manner Tweed has made his trademark — and he has not lost a case.”). One tactic these lawyers have employed is to sue simultaneously in London, Belfast and Dublin, on the basis that their clients have a reputation in each of these countries and can choose to litigate separately for injury to reputation in each of them. See Beoiley, *BuzzFeed legal case shows Dublin’s draw for foreign libel claimants*, Financial Times, Dec. 4, 2019 (“One London-based defamation lawyer said Mr. Tweed was ‘the best at arbitrating jurisdictions’, jumping between London, Dublin and Belfast, often suing simultaneously in all three.”). The House of Lords has debated extending the Defamation Act 2013 to Northern Ireland, rightly questioning “[w]hy should the citizens and journalists of Northern Ireland not be afforded the same protection as those in the rest of the United Kingdom, whether they are expressing opinions online or holding government to account?” Hansard Debate, (Lord Lexton), Jan. 11, 2021. And there is now pending a draft libel reform bill in the Northern Ireland Assembly. See Defamation Bill as introduced in the Northern Ireland Assembly on 7 June 2021 (Bill 25/17-22).

⁷⁴ See Section IV.A., *infra*, at 182-85 (addressing modern “lawfare” in the U.K.).

⁷⁵ Abrams, *The Soul of the First Amendment* 9 (2017) (discussing differences in defamation, privacy and hate speech laws in the U.S., U.K. and Europe.)

⁷⁶ Kalven, *supra*, at 221 n. 125 (describing Meiklejohn’s pronouncement that *Sullivan* marked “‘an occasion for dancing in the streets’”). See Johnson, *supra*, at 97 (“Despite the United Kingdom’s passage of Defamation Act 2013, it is still the case that American defamation law is far more protective of free speech and free press than English law.”)

⁷⁷ P.L. 111-223, codified at 28 U.S.C. §§ 4101-4105.

⁷⁸ 28 U.S.C. § 4102(a)(1)(A) (referencing the “protection for freedom of speech and press . . . provided by the first amendment to the Constitution of the United States and by the constitution and law of the [relevant] State”).

⁷⁹ Barbour, *The SPEECH Act: “The Federal Response to ‘Libel Tourism,’”* Cong. Res. Serv., Sept. 16, 2010, at n.1 (defining “libel tourism” and noting that “[b]ecause several high profile-cases have been brought by alleged supporters of terrorist groups for the supposed purpose of dissuading reporters from exposing their terrorist connections, the phrase ‘libel terrorism’ has been used in

courts were already effectively rejecting enforcement of “libel tourist” judgments on public policy grounds, and the SPEECH Act’s text and legislative history reflect a broader Congressional intent. The legislative branch’s expansive concerns and approach reveal the deeper aim of the SPEECH Act extended beyond deterrence of international forum shopping to the more fundamental purpose of defending and empowering American voices as their words travel around the globe. Beyond its prohibition on recognition and enforcement of foreign judgments in libel cases, the SPEECH Act was designed to grant American journalists and other speakers⁸⁰ additional legal tools: recovery of attorney’s fees, the ability to pursue a declaratory action, potential removal to federal court, and confirmation that an entry of appearance in the unsuccessful foreign action is no bar to challenging the judgment anew in U.S. courts.⁸¹ These protections are especially valuable in today’s tumultuous times, when truth and truth tellers are under siege from wealthy and powerful plaintiffs leveraging jurisdictional differences to bury unflattering realities. They offer concrete, and nationally uniform, backing to speakers, including the press, who might otherwise fall to self-censorship from the pressure, fear and financial risks of vigorously exercising their First Amendment rights. At its core, the SPEECH Act functions to combat the chilling effect on American voices and preserve from global attack America’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁸²

A. The Global Context: Truth Tellers Face an Increasingly Perilous World

To place the significance of the SPEECH Act in appropriate context, it is necessary to apprehend the extent to which the world’s essential truth tellers – journalists in particular – face growing risks from all directions. The honest pursuit of facts is challenging in the best of times. Today, this pursuit is further complicated by increasing safety threats, a multi-year pandemic, relentlessly accelerating news cycles, decreasing operating budgets, and expansion of “lawfare” against freedom of speech and of the press – strategic legal threats from the wealthy and powerful

reference to the same phenomenon”). In the United States, the best-known libel tourism action is the default judgment awarded by an English court to Saudi billionaire banker Khalid bin Mahfouz against terrorism financing expert and author Dr. Rachel Ehrenfeld, whose book was intentionally withheld from the U.K. market. Nevertheless, because 23 copies were ordered by English residents via Amazon, the English judge asserted jurisdiction over Ehrenfeld, accepted an *ex parte* presentation of evidence, declared that the statements at issue were false, awarded damages and attorney’s fees, and ordered her to apologize and destroy physical copies of the book. See, e.g., *id.* at 4-5 & nn.26-29; see also *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501 (2007) (describing the English action and holding that New York courts lacked personal jurisdiction over Bin Mahfouz in context of declaratory action pursued by Ehrenfeld); Preface, *supra*.

⁸⁰ This Chapter uses the term “speaker” in its broadest sense, i.e., persons and entities exercising their free speech and free press rights. It is intended to include all types of content creators, from TikTokers and tweeters to journalists, publishing houses and broadcasters.

⁸¹ 28 U.S.C. §§ 4102-05.

⁸² See H.R. Rep. 111-154 (111th Cong., 1st Sess. 2009), 2009 WL 1664629 (June 15, 2009) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

designed to intimidate and silence. At the same time, the global public’s need for accurate and reliable information is greater than ever.

The Committee to Protect Journalists has confirmed that, in 2021 alone, 27 journalists around the world were murdered in direct retaliation for their work, an additional 18 were killed for undetermined reasons, and 293 were imprisoned.⁸³ The 2021 World Press Freedom Index, compiled by Reporters Without Borders (RSF), assessed that only twelve countries—just seven per cent of the 180 evaluated—offered a “good” press freedom environment.⁸⁴ Falling from that group this year was Germany, after RSF documented dozens of journalists physically assaulted while working to document demonstrations against pandemic restrictions.⁸⁵

Over the past decade, and also accelerating during the pandemic, international legal attacks on free speech and a free press have been increasingly pursued from inside and outside government. One approach is the enactment of so-called “fake news” laws, which purport to address disinformation but often – and sometimes intentionally – hinge on loose definitions of falsity that allow for suppression of true but critical information.⁸⁶

Another approach is popularly known as “lawfare” or, in U.S. legal parlance, SLAPP suits—that is, strategic litigation against public participation. Internationally, those with financial resources have increasingly demonstrated their ability strategically to exploit differences in countries’ substantive laws and procedural rules, selectively issuing demands from jurisdictions that allow for greatest intimidation of would-be critics, including lesser protections for speech about matters of public concern, fee-shifting and high defense costs, and the ability to seek *ex parte* injunctions against information gathering and speech.⁸⁷

⁸³ Committee to Protect Journalists, [annotated data](#).

⁸⁴ [Reporters Without Borders](#).

⁸⁵ *Id.*

⁸⁶ See, e.g., Sanders, Jones & Liu, *Stemming the Tide of Fake News: A Global Case Study of Decisions to Regulate*, 8 J. Int’l Media & Ent. L. 203, 213-18 (2019-20) (documenting proposals to define “fake news” as, e.g., content that “causes panic” and noting “harsh criticism . . . because of the chilling effect [such laws] are likely to have on freedom of expression”); Funke & Flamini, [Poynter](#), last updated Aug. 13, 2019 (cataloguing anti-misinformation legislative action around the world while raising concerns about “infringing free speech guarantees” and “muddying the definition of fake news”); Fischer, [“Fake news” laws on the rise globally during the coronavirus pandemic](#), Axios, May 26, 2020 (reviewing recent enactments and noting arguments that broad-based definitions “will inevitably be used to suppress true information”); see also Erlanger, *“Fake News,” Trump’s Obsession, Is Now a Cudgel for Strongmen*, N.Y. Times, Dec. 12, 2017 (documenting spread around the globe of “fake news” allegations by political leaders to attack critics).

⁸⁷ See, e.g., Tobitt, [SLAPP down: David Davis says Putin’s People libel case cost ex-FT journalist £1.5m](#), Press Gazette, Jan. 24, 2022; Sullivan, [Libel Tourism: Silencing the Press through Transnational Legal Threats](#), Report for the Center for International Media Assistance, Jan. 6, 2010, at 24, (“The mere threat of a suit can cause the same damage as an actual suit. It can cost news media money for lawyers to deal with the threat; it can waste staff time Lawyers and media organizations say one of the reasons for these lawsuits is to intimidate media organizations.

Former British cabinet minister and Conservative Party leader David Davis recently sounded alarms about the impact of “lawfare against the freedom of the press,” pointing to litigation by Chelsea FC owner Roman Abramovich and others against Harper Collins and highly regarded journalist and author Catherine Belton over her book *Putin’s People*. After Abramovich’s case was settled with apologies, revisions to the book, and a costs award of £1.5 million against Belton, Davis observed that “[s]ome [English] newspapers hesitate to cover certain topics, such as the influence of Russian oligarchs, for fear of costly litigation.”⁸⁸ Dr. Rachel Ehrenfeld has described how Saudi billionaire banker Khalid bin Mahfouz’s default defamation judgment against her in England “hung over [her] head like a sword of Damocles and kept [her] up at night,” noting that “[i]n nearly forty cases, Mahfouz obtained settlements against his victim, all with forced apologies, by the mere threat of libel litigation.”⁸⁹

At the global news agency Reuters alone, where one of the authors is employed, its journalists have in recent years confronted a broad array of legal threats to their reporting, including:

- Reuters text reporters Wa Lone and Kyaw Soe Oo were framed, convicted on espionage charges and sentenced to seven years in prison in Myanmar after accurately reporting the massacre of ten Rohingya Muslim men by military and police forces. They were still behind bars in 2019 when they won a Pulitzer Prize for their courageous coverage and were ultimately pardoned and released after 511 days in prison.⁹⁰
- Hedge fund manager Brevan Howard Asset Management (BHAM) – one of the largest in Europe, with offices in New York, managing over \$15 billion for 330 institutional investors internationally – successfully obtained an injunction from an English court, which prohibited Reuters from publishing, anywhere in the world, concededly accurate information that BHAM provided to potential investors; BHAM was also awarded attorney’s fees.⁹¹

Threatening media with expensive suits can force them to hold off on stories or remove materials from stories.”).

⁸⁸ *Id.* Ms. Belton was formerly a reporter for the *Financial Times* and is now employed by Reuters.

⁸⁹ See Sullivan, *supra*, at 15.

⁹⁰ Lewis & Naing, [Two Reuters reporters freed in Myanmar after more than 500 days in jail](#), Reuters, May 6, 2019.

⁹¹ [Brevan Howard Asset Mgm’t LLP v Reuters Ltd](#), [2017] EWCA 644 (QB) (Hon. Mr. Justice Popplewell) (abbreviated judgment omitting, rather than redacting, selected text), *aff’d*, [Brevan Howard Asset Mgm’t LLP v Reuters Ltd](#), [2017] EWCA Civ 950. The English trial court stated that it recognized “the public interest in [pensioners and individual investors] having available to them relevant information so as to be in a position to influence and hold to account the institutions whose investment decisions affect their financial welfare” but concluded that it was outweighed by the public interest in “the adequate protection of [financial institutions’] confidentiality.” *Id.*

- At a time of increasing civil conflict in Ethiopia, Reuters video journalist Kumerra Gemechu was arrested in Addis Ababa. Though never charged, he was held in solitary confinement for twelve days. Federal police stated they were investigating allegations he disseminated fake news, communicated with paramilitary groups and breached anti-terrorism laws. Under the public spotlight and in the absence of evidence, police dropped their investigation and Gemechu was ultimately freed.⁹²

While Reuters has a legal team to defend and support its journalists in such circumstances, many American journalists and other speakers have no such luxury, leaving them alone to face the potential emotional, reputational, physical and financial impact of global attacks on their work.⁹³

B. The Background: Non-Enforcement of Foreign Defamation Judgments Prior to 2010

Largely because of *Sullivan* and its progeny, the United States offers legal protection to free speech and press at the highest levels in the world,⁹⁴ and American courts have long been alive to the threat foreign defamation judgments pose to these well-established American values.⁹⁵ Before 2010, in the absence of relevant state or federal legislation,⁹⁶ several American courts declined to enforce such judgements on public policy grounds.⁹⁷ For example, in *Telnikoff v. Matusевич*, the Maryland Court of Appeals rejected the validity of a £ 240,000 English libel judgment because a “comparison of English and present Maryland

⁹² [Ethiopian police release detained Reuters cameraman without charge](#), Reuters, Jan. 5, 2021.

⁹³ Cf. Tobitt, *supra* (quoting David Davis) (“Even if someone defends their case successfully, in this day and age they face material costs so huge that [it] will further deter others from following a story.”).

⁹⁴ See, e.g., Youm, *The “Actual Malice” of New York Times Co. v. Sullivan: A Free Speech Touchstone in a Global Century*, 19 Comm. L. & Pol’y 185 (2014) (documenting “Americans’ extraordinary commitment to free speech” and cataloguing countries that have adopted, in whole or part, the actual malice standard); Rolph, [Splendid Isolation? Australia as a Destination for “Libel Tourism.”](#) Sydney Law School, Legal Studies Research Paper No. 13/51 (July 2013) (comparing Australian, American, and (pre-Defamation Act 2013) English legal standards).

⁹⁵ See, e.g., *Ehrenfeld v. Bin Mahfouz*, 881 NE 2d 830, 834 (N.Y. 2007) (discussing “the use of libel judgments procured in jurisdictions with claimant-friendly libel laws — and little or no connection to the author or purported libelous material — to chill free speech in the United States”) (emphasis added).

⁹⁶ Prior to the enactment of the SPEECH Act, three states – New York, Illinois and Florida – already had statutes blocking the recognition or enforcement of foreign defamation judgments repugnant to state and federal constitutional law. See 2008 N.Y. Laws 66, *codified at* N.Y. C.P.L.R. §§ 302(d), 5304(b)(8) (New York Libel Terrorism Protection Act); 735 ILCS 5/12-6264 (c)(3) (previously found at 5/12-621(b)(7)); Fla. Stat. § 55.605(2)(h) (2009 Florida statute). California procedural rules offered similar protections. See Cal. Civ. Pro. Code § 1716(f) (previously found at § 1716(c)(9), the California code was subsequently updated to reference the SPEECH Act’s standards).

⁹⁷ Barbour, *supra*, at 8 (“state courts have generally declined to enforce foreign libel judgments”).

defamation law does not simply disclose a difference in one or two legal principles [but instead a difference] in virtually every significant respect.”⁹⁸ And in *Bachchan v. India Abroad Pubs., Inc.*, a New York trial court rejected efforts to enforce an English libel judgment because the “protection to free speech and the press embodied in [the First Amendment] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the US Constitution.”⁹⁹ A New York district court followed this same path in *Abdullah v. Sheridan Square Press, Inc.*, noting that recognition of the judgment in that case “would be antithetical to the First Amendment protections accorded the defendants.”¹⁰⁰

Well before the passage of the SPEECH Act, therefore, common law and statutory frameworks on enforcement of foreign judgments authorized their rejection in circumstances in which such enforcement would be “repugnant” to the public policy of the state.¹⁰¹ And courts did not hesitate: multiple scholars have confirmed their inability to identify any published decision in which a challenged foreign defamation judgment satisfied the scrutiny of a U.S. court.¹⁰²

⁹⁸ 702 A.2d 230, 248 (Md. 1997) (on certified question from the D.C. Circuit).

⁹⁹ 154 Misc. 2d 228, 585 N.Y.S.2d 661, 665 (Sup. Ct. N.Y. Cty. 1992) (“English law does not distinguish between private persons and those who are public figures or are involved in matters of public concern. None are required to prove falsity of the libel or fault on the part of the defendant. No plaintiff is required to prove that a media defendant intentionally or negligently disregarded proper journalistic standards in order to prevail.”).

¹⁰⁰ No. 93 Civ. 2515, 154 F.R.D. 591, 1994 WL 419847 (S.D.N.Y. 1994).

¹⁰¹ See, e.g., Anderson, *Transnational Libel*, 53 Va. J. Int’l L. 71, 76-77 (2012) (“The Second Restatement of Conflicts, the Uniform Foreign Money-Judgments Recognition Act, the common law of most states, and various international conventions authorize refusal to enforce foreign judgments . . . if enforcement would be repugnant to the public policy of the state in which enforcement is sought.”) (citations omitted); *Restatement (Second) of Conflict of Laws* § 117, comment c (1971) (“A State of the United States is therefore free to refuse enforcement to [a foreign] judgment on the ground that the original claim on which the judgment is based is contrary to its public policy.”).

¹⁰² Anderson, *supra*, at 77 (“Indeed, so far as I know, no ‘libel tourist’s’ foreign judgment has ever been enforced in the United States; at least I am unable to find any reported case.”); Coyle, *The Speech Act and the Enforcement of Foreign Libel Judgments*, 18 Y.B. Priv. Int’l L. 245, 257 (2016/2017) (“In the years prior to 2010, a number of U.S. court had declined to enforce foreign defamation judgments on public policy grounds. While the SPEECH Act formalized this rule, it did not constitute a departure from existing policy.”); Barbour, *supra*, at 8 (“state courts have generally declined to enforce foreign libel judgments,” including under the SPEECH Act and predecessor state statutes).

C. The Law: The Plain Language of the SPEECH Act

The SPEECH Act provides that a U.S. court, whether state or federal, “shall not recognize or enforce a foreign judgment for defamation”¹⁰³ against a “United States person”¹⁰⁴ unless the court determines that:

- (1) the defamation law of the foreign court “provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the [relevant state] constitution and law,”¹⁰⁵ or
- (2) the American defendant nonetheless “would have been found liable for defamation” in an action before the U.S. court in which enforcement is sought.¹⁰⁶

In either instance, the party seeking to enforce the judgment bears the burden of making the requisite showing.¹⁰⁷

The Act provides four additional tools that American speakers, including most notably defendants in defamation actions arising from speech about matters of public concern, can employ to defend their exercise of First Amendment rights:

- A U.S. person successful in employing the SPEECH Act to defeat the attempted enforcement of a foreign defamation judgment “shall” be awarded “a reasonable attorney’s fee,” “absent exceptional circumstances.”¹⁰⁸
- A U.S. person may proactively bring an action in federal court for “a declaration that the foreign [defamation] judgment is repugnant to the Constitution or laws of the United States,” i.e., would not be enforceable under the SPEECH Act—and does not need to wait for the foreign plaintiff to seek to enforce the judgment in U.S. courts.¹⁰⁹

¹⁰³ 28 U.S.C. § 4102(a)(1). Although not discussed here, the law also requires demonstrated satisfaction of U.S. due process requirements in the context of the exercise of personal jurisdiction over the defamation defendant, as well as, where relevant, consistency with Section 230 of the Communications Act of 1934, 47 U.S.C. § 230. See 28 U.S.C. §§ 4102(b), 4102(c).

¹⁰⁴ A “United States person” is defined as a U.S. citizen or lawful resident, or an entity incorporated or primarily located in the United States. 28 U.S.C. § 4101(6).

¹⁰⁵ *Id.* § 4102(a)(1)(A).

¹⁰⁶ *Id.* § 4102(a)(1)(B).

¹⁰⁷ *Id.* § 4102(a)(2).

¹⁰⁸ *Id.* § 4105. Fee awards are not, however, available in declaratory judgment actions pursued under Section 4104.

¹⁰⁹ *Id.* § 4104(a)(1). The burden of proof in such cases is borne by the party bringing the declaratory judgment action. *Id.* § 4104(a)(2). The law expressly provides that service may be effectuated anywhere in the United States. *Id.* § 4104(b).

- Any action for enforcement of a foreign defamation judgment may be removed to federal court where there is diversity jurisdiction, or where the parties are citizens of different countries.¹¹⁰
- There is no waiver of rights if the American speaker chooses to fight both the action abroad and its enforcement in the United States, that is, the speaker’s appearance in the foreign court is no bar to opposing recognition or enforcement under the SPEECH Act.¹¹¹

On its face, the Act applies broadly to any foreign defamation judgment repugnant to the American free speech tradition articulated in *Sullivan* and its progeny that is obtained against a “United States person.”¹¹² Its prohibition on enforcement makes no assessment of the sufficiency of the parties’ contacts with the foreign jurisdiction, the appropriateness of the plaintiff filing there, or where the American speaker was located at the time of publication.¹¹³ Thus the Act’s plain language makes clear that its impact extends well beyond a prohibition of “libel tourism,” to reach almost all foreign defamation judgments against Americans journalists and other speakers.¹¹⁴

D. The Intent: The Legislative History of the SPEECH Act

The bill that would become the SPEECH Act was passed by unanimous voice vote in the U.S. Senate and without objection by voice vote in the House, on July 19 and 27, 2010, respectively.¹¹⁵ In its findings, the unified members of Congress recognized that greater global protection for First Amendment values was necessitated by the growing tide of defamation suits against the American press and other U.S. voices, seeking to silence them to the detriment of the greater citizenry. The Act takes express note that:

- Freedom of speech and of the press as enshrined in the First Amendment is “is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy.”

¹¹⁰ *Id.* § 4103.

¹¹¹ *Id.* § 4102(d); see also *id.* § 4101 note (stating the sense of Congress that such a declaratory action “shall constitute a case of actual controversy under” 28 U.S.C. § 2201(a)).

¹¹² See Coyle, *supra*, at 249 (“[The SPEECH Act] can and does apply to judgments obtained by individuals who are not libel tourists. . . . All foreign defamation judgments are treated the same, regardless of whether the plaintiff sued at home or sought out a more favourable forum abroad.”).

¹¹³ The SPEECH Act does not, and could not, attempt to preclude enforcement of the foreign judgment in the jurisdiction of issuance, and were the defendant to have assets there, those assets could be attached.

¹¹⁴ See Anderson, *supra*, at 77 (“The SPEECH Act does not aim only at judgment that are repugnant to U.S. public policy; for that purpose, it is superfluous. Its real aim is to discourage all libel suits against American [speakers] abroad.”).

¹¹⁵ [H.R. 2765 — 111th Congress: Securing the Protection of our Enduring and Established Constitutional Heritage Act](#), GOV TRACK. The bill was introduced on June 9, 2009, by Tennessee Rep. Steve Cohen, together with 11 cosponsors. *Id.*

- The act of suing U.S. journalists and other speakers in foreign jurisdictions obstructs free expression and “chills the first amendment . . . interest of the citizenry in receiving information on matters of importance.”
- Fear of such suits pushes speakers, including the press, to self-censor, thereby discouraging critical media reporting on matters of serious public interest.¹¹⁶

Some legal scholars and government researchers critiqued the bill’s efforts “to give American [speakers] the benefit of U.S. constitutional defamation immunities worldwide through indirect extraterritorial application of American interpretations of the First Amendment,”¹¹⁷ and thereby prevent the potential “chilling effect” on speech.¹¹⁸ Congress heard, and rejected, these views,¹¹⁹ adopting a law that pursued this very approach, as confirmed by the statute’s title, to protect America’s “Enduring and Established Constitutional Heritage” for the benefit of American journalists and other speakers around the globe.

In fact, from the outset, members of Congress recognized that the threat to First Amendment values extended beyond circumstances of “libel tourism” to a more fundamental level. As one lawmaker explained:¹²⁰

¹¹⁶ 28 U.S.C. § 4101 note; see also 156 Cong. Rec. H6126-06, 2010 WL 2923638 (July 27, 2010); H.R. Rep. 111-154, 111th Cong. (1st Sess. 2009), 2009 WL 1664629 (June 15, 2009) (stating that those who receive such threats face a dilemma—risk an expensive lawsuit or forego their First Amendment rights— and “[a]ll too often choose the latter option. This self-censorship not only threatens First Amendment rights; it also deprives Americans of important information and insights on matters of national concern.”).

¹¹⁷ Anderson, *supra*, at 75. While Professor Anderson criticizes the SPEECH Act as “unilateral fiat,” his ultimate recommendation is that foreign jurisdictions increasingly adopt U.S. legal rules and standards, and learn from “useful [American] lessons for resolving the problems of transnational libel.” *Id.* at 72 & 90-95.

¹¹⁸ Barbour, *supra*, at 14.

¹¹⁹ See, e.g., Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 Wash. & Lee L. Rev. 467, n.* (2010) (stating that his critique had been submitted to the Senate Judiciary Committee).

¹²⁰ 155 Cong. Rec. H6771-01, 2009 WL 16582221 (June 15, 2009) (Rep. King); see also H.R. Rep. 111-154, 111th Cong. (1st Sess. 2009), 2009 WL 1664629 (June 15, 2009) (“H.R. 2765 is intended to dissuade potential defamation plaintiffs from circumventing First Amendment protections by filing suit in foreign jurisdictions that lack similar protections.”). Early proposals had sought to provide American speakers exceptionally strong legal vehicles to advance and defend the exercise of their free speech rights. See H. Rep. 111-154, at 6 (“Some lawmakers and commentators, while supportive of H.R. 2765, have urged Congress to take a more aggressive approach . . .”); see also S. 449, § 3(a), (b); H.R. 1304, § 3(a), (b) (bills in the 111th Congress collectively known as the “Free Speech Protection Act”). One provision contemplated a federal cause of action to claw back damages and costs, with the potential for trebled damage awards if it were established the foreign defamation proceeding was brought to suppress the exercise of First Amendment rights, but the provisions were pulled back upon recognition of constitutional due process concerns. See Free Speech Protection Act, S. 449, §§ 2(c)(1), 2(d), 3(a) 111th Cong. (1st Session 2009), 155 Cong. Rec. D150 (Feb. 12, 2009); *id.* H.R. 1304 §§ 3(a), 3(c)(1), 3(c)(2), 3(d); see also Rendleman, *supra*, at 467, n.* & 482-87 (detailing earlier bills and urging respect and recognition of foreign substantive

[T]he main threat posed by libel tourism is not just the clever exploitation of foreign courts' libel laws to win financial judgments against American authors. It's not even the risk that Americans are losing their First Amendment guarantee of freedom of speech (although that is quite troubling). The danger is that foreign individuals are operating a scheme to intimidate authors and publishers from even exercising that right. And it's actually scarier because, in many of these cases, the journalists are trying to write on topics of national and homeland security. Therefore it is imperative that Congress address the issue and pass legislation to stop this nefarious activity at once.

The bill's sponsor in the House took note of how its protections had been expanded throughout the course of its consideration.¹²¹ Atop the foundational prohibition on recognition and enforcement, he explained that attorney's fees "would now be required . . . to put more teeth in the bill" and a declaratory judgment remedy was included to lend "an added measure of protection for the free speech rights of American authors and publishers."¹²²

When the bill unanimously passed the Senate—itsself recognized as a "rare achievement"¹²³—its key features were lauded on both sides of the aisle. Senator Patrick Leahy, a Democrat from Vermont, commended the legislation for "provid[ing] a single, uniform standard for addressing . . . foreign libel judgments," describing it as a bill that "combats the chilling effect that [such] judgments are having on American free speech in two significant respects," first through the prohibition on enforcement in U.S. courts and second through the declaratory action mechanism, which empowered speakers "to clear their names even when a foreign party does not attempt to enforce its judgment."¹²⁴ Senator Jon Kyl, Republican of Arizona, emphasized the bill was "necessary to ensure that all Americans are protected by the rights they are afforded under U.S. law," and identified its "important steps toward achieving this goal," including the mandatory award of attorney's fees.¹²⁵

law, stating "[t]he idea, moreover, that a foreign nation's substantive law is 'repugnant' unless it is identical to ours is itself of repugnant one"); Rolph, *supra*, at 90 (same).

¹²¹ H.R. 2765, 111th Cong. (2d Sess. 2010), 156 Cong. Rec. H6126-06 (July 27, 2010).

¹²² *Id.*

¹²³ 156 Cong. Rec. H6126-06, 2010 WL 2923638 (July 27, 2010) (statement of Rep. Cohen).

¹²⁴ S. Rep. 111-224, 111th Cong. (2d Sess. 2010), 2010 WL 2837008 (July 19, 2010); see also 155 Cong. Rec. S2342-43 (Feb. 13, 2009) (statement of Sen. Specter) ("[I]t is the chilling effect and the mere threat of litigation that suffices to silence authors; there is no need to try the cases.").

¹²⁵ S. Rep. 111-224, 111th Cong. (2d Sess. 2010), 2010 WL 2837008 (July 19, 2010). Senator Kyl expressed his disappointment that the bill did not go further: "Congress needs to pass broader measures that permit U.S. citizens accused of libel in foreign courts to force their accusers to pay for legal fees incurred abroad and, in certain cases, additional damages. . . . [T]here is more that can, and should, be done." *Id.*

V. CONCLUSION

Faced with growing global attacks on American free speech values, especially in England, Congress contemplated whether American press and other U.S. speakers around the world should benefit from the constitutional protections articulated in *Sullivan*—from the requirement of convincing proof of “actual malice” in actions filed by public persons to the obligation of plaintiffs to prove material falsity—and unanimously answered with a resounding “yes”. Its legislative response extends beyond the threat of libel tourism. The text, legislative history, background and even the title of the SPEECH Act demonstrate that members of Congress focused on a greater goal: preserving and defending from international threat the free speech and free press constitutional tradition that is embodied in *Sullivan* and is foundational to what America is today. It recognized that increasingly regular demands from London-based solicitors, injunctions, forced apologies for accurate publications, fee-shifting, and even unenforced foreign judgments had caused Americans who would otherwise speak and write about public matters to self-censor and withhold critically important information from the public. The legislation, in Congress’ own words, “represents the strongest policy response”¹²⁶ to defend the “cornerstones of American society”—i.e., the “complementary freedoms of speech and the press enshrined by our founding fathers in the First Amendment” and reflected most prominently in the protections against defamation liability emanating from *New York Times v. Sullivan*.¹²⁷

¹²⁶ 156 Cong. Rec. H6126-06, 2010 WL 2923638 (July 27, 2010) (statement of Rep. Rooney).

¹²⁷ S. Rep. 111-224, 111th Cong. (2d Sess. 2010), 2010 WL 2837008 (July 19, 2010) (statement of Sen. Kyl).

Afterword

By Lee Levine*

Before my retirement from the practice of law at the end of 2020, I had spent more than forty years representing the news media, largely in the defense of libel and related litigation. For better or worse, that experience has left me with a set of perspectives on journalism, the First Amendment, the law of defamation, and the role of the Supreme Court in all those things. Beyond those already reflected in the preceding Chapters, I add the following:

First, at least in our First Amendment jurisprudence, we should be very skeptical of “original intent.” The Framers were, above all else, politicians, and I am not aware of a single politician who does not think the press ought to be restrained when it is critical of him, just as I am unaware of a politician who does not champion the freedom of the press to criticize her opponents.¹

Second, many critics of *Sullivan*, most notably Judge Silberman in his astonishing dissenting opinion in *Tah v. Global Witness Publishing, Inc.*,² paint a picture of an irresponsible and all-powerful press hell bent on recklessly ruining individual reputations for the sake of partisanship and profit. I respectfully dissent. From my perspective, we live—as we often do—in perilous times, times in which the importance of a free press ought to be as apparent as it ever has been. As A.G. Sulzberger, the publisher of *The New York Times*, has written, no one disputes that the “media aren’t perfect,” that it “makes mistakes,” has “blind spots,” and

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¹ Two additional points are worth noting about Justice Thomas’ invocation of original intent. As an initial matter, missing from his discussion is any reference to the John Peter Zenger seditious libel trial in 1735. As Matthew Schafer chronicles in some detail in Chapter 1, the Zenger prosecution was a significant factor in solidifying the Colonies’ antipathy toward the Crown that ultimately led to the Revolution as well as the new nation’s insistence on a Bill of Rights that guaranteed its citizens the freedom of speech and of the press. One would have thought that the Zenger trial, which had “set the colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities,” would be worth at least a mention in Justice Thomas’ assessment of the historical record, especially since the quoted language was written by him in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring in judgment). In addition, Justice Thomas’ fealty to originalism, at least in the context of the First Amendment, appears to be decidedly selective. It is, for example, difficult to imagine that the Framers believed the First Amendment restricted the ability of local governments to enact ordinances regulating outdoor signs displaying non-political messages, yet Justice Thomas wrote an opinion for the Court holding just that in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). One will search that opinion in vain for any discussion of “original intent” of the kind he criticizes *Sullivan* (albeit wrongly) for omitting.

² 991 F.3d 231, 254 (D.C. Cir. 2021) (Silberman, J., dissenting).

“sometimes drives people crazy.”³ That inevitability must not, however, cloud our collective recognition that a “free press is foundational to a healthy democracy and arguably the most important tool we have as citizens.”⁴ It not only “empowers the public by providing the information we need to elect leaders and the continuing oversight to keep them honest,” it also “bears witness to our moments of tragedy and triumph and provides the shared baseline of common facts and information that bind communities together.”⁵ Yes, journalists make mistakes but, at least in my experience, those that I have had the privilege of representing “try to own [their] mistakes, to correct them and to rededicate themselves to the highest standards of journalism.”⁶

Third, based on a professional lifetime of litigating defamation cases brought against the press, I am as certain as I can be (and as Chapters 2 and 3 confirm) that public officials and other powerful people and entities are now instituting libel actions at an unprecedented and deeply troubling rate. From where I sit, the vast majority of these cases has been brought, not to secure compensation for actual injury to reputation, but rather to punish the press for speaking truth to power and to dissuade it from doing so in the future, lest it pay the price of the burdens and enormous expense of litigation, regardless of the merits of the claim. And many of these cases are funded, not by the allegedly aggrieved plaintiff, but by wealthy individuals and institutions with ideological or political axes to grind and scores to settle. Make no mistake, but for *Sullivan* and its progeny, such lawsuits would—as Justice Brennan wrote in *Sullivan*—deter “critics of official conduct . . . from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”⁷ What was true in 1964 remains true today: a libel law regime uncabined by *Sullivan* will inevitably “dampen[] the vigor and limits the variety of public debate,” which renders it profoundly “inconsistent with the First and Fourteenth Amendments.”⁸

In 1984, Justice Byron White, one of the nine members of the unanimous Court in *Sullivan*, announced that he had come to doubt the wisdom of having

³ Sulzberger, *The Growing Threat to Journalism Around the World*, N.Y. Times, Sept. 23, 2019.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* As documented in Chapter 2 *supra*, Justice Gorsuch relies for a contrary position exclusively on a law review article written by a non-journalist and non-litigator. See Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 Ohio St. L.J. 759 (2020), cited in *Berisha*, 141 S. Ct. at 2428. In significant respects, the article, which Justice Gorsuch cites no less than 16 times, reads (to paraphrase then-Justice Rehnquist) “much like a treatise about cooking by someone who has never cooked before, and has no intention of starting now.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 269 (1986) (Rehnquist, J., dissenting).

⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

⁸ *Id.*

joined Justice Brennan's majority opinion in that case.⁹ Three years after he expressed those doubts, the Court decided *Hustler Magazine, Inc. v. Falwell*.¹⁰ In that case, writing for a unanimous Court (although Justice White concurred only in the judgment), Chief Justice Rehnquist took pains to reaffirm and apply *Sullivan* in the face of Justice White's critique, emphasizing that "one of the prerogatives of American citizenship," enshrined as the First Amendment's "central meaning" as articulated in *Sullivan*, "is the right to criticize public men and measures."¹¹ It is very difficult to accept the notion that a decision reached by a unanimous Court in 1964, and then reaffirmed by an eight-justice majority a quarter century later, could somehow have been rendered illegitimate barely two decades after that.

⁹ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring in judgment).

¹⁰ 485 U.S. 46 (1988).

¹¹ *Id.* at 51 (citation omitted).

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The New York Times.

NEW YORK, TUESDAY, MARCH 26, 1964

"The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable. . . . Let Congress heed their rising voices, for they will be heard."

—New York Times editorial
Saturday, March 19, 1964

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold. . . .

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

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as

protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom. . . .

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter. . . . even as they fear the upswelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it is this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance. . . .

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions

of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to beland this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King—spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South. . . .

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the storied history of Freedom when men and women of good will must do more than applaud the rising-tide of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is our America as well as theirs. . . .

We must heed their rising voices—yes—but we must add our own. We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights. . . .

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed . . . NOW !!

Stella Adler
Raymond Foss Alexander
Sally Aspinwall
Harry Van Andate
Harry Belafonte
Jane Kefauver
D. Alton Bledsoe
Walter Rosten
William Rivers
William Branch
Malcolm DeLoach
Alan Rahn Rarke
Dabson Conell
Dr. Alan Knight Chalmers

Joseph Cabot
Richard Cox
Hal King Cole
Cheryl Crawford
Dorothy Dandridge
Ottie Davis
Sammy Davis, Jr.
Ruby Dee
Harry Dolly
Suzie Edmond
Dr. Philip Elliott
Dr. Harry Emerson Fosdick

Anthony Franciosa
Marlow Gorton
Lorraine Hansberry
Rev. Donald Hamilton
Nat Houstaff
James Hicks
Max Hironaka
Van Heflin
Langston Hughes
Mama Jackson
Mahalia Jackson
Paul Jamison
Mandee Johnson
John Kelen

Eartha Kitt
Rabbi Edward Kinn
Hagit Lurie
John Lewis
Yonca Ludlow
David Livingston
William Mitchellson
Carl Murphy
Dino Manay
John Maroney
A. J. Muste
Frederick O'Neal
Peter Onley
L. Joseph Overton

Albert P. Palmer
Gwenne Pickett
Dad Rader
Sabra Polner
Michael Posner
A. Philip Randolph
John Rapt
Eme Rice
Cleveland Robinson
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254 OCTOBER TERM, 1963.
Syllabus. 376 U. S.

NEW YORK TIMES CO. v. SULLIVAN.
CERTIORARI TO THE SUPREME COURT OF ALABAMA.
No. 39. Argued January 6, 1964.—Decided March 9, 1964.*

Respondent, an elected official in Montgomery, Alabama, brought suit in a state court alleging that he had been libeled by an advertisement in corporate petitioner's newspaper, the text of which appeared over the names of the four individual petitioners and many others. The advertisement included statements, some of which were false, about police action allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement; respondent claimed the statements referred to him because his duties included supervision of the police department. The trial judge instructed the jury that such statements were "libelous per se," legal injury being implied without proof of actual damages, and that for the purpose of compensatory damages malice was presumed, so that such damages could be awarded against petitioners; if the statements were found to have been published by them and to have related to respondent. As to punitive damages, the judge instructed that mere negligence was not evidence of actual malice and would not justify an award of punitive damages; he refused to instruct that actual intent to harm or recklessness had to be found before punitive damages could be awarded, or that a verdict for respondent should differentiate between compensatory and punitive damages. The jury found for respondent and the State Supreme Court affirmed. *Held*: A State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. Pp. 265-292.

