
New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest

John Bruce Lewis

Bruce L. Ottley

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

John B. Lewis & Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DePaul L. Rev. (2014)

Available at: <https://via.library.depaul.edu/law-review/vol64/iss1/1>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

**NEW YORK TIMES V. SULLIVAN AT 50:
DESPITE CRITICISM, THE ACTUAL MALICE
STANDARD STILL PROVIDES “BREATHING
SPACE” FOR COMMUNICATIONS IN
THE PUBLIC INTEREST**

*John Bruce Lewis**
*Bruce L. Ottley***

INTRODUCTION

The year 2014 marks the anniversary of three milestones in American legal history. Sixty years ago, on May 17, 1954, the Supreme Court decided *Brown v. Board of Education*,¹ which struck down the “separate but equal” doctrine and ushered in the modern civil rights movement. Ten years later, Congress enacted the Civil Rights Act of 1964,² barring the unequal application of voter registration requirements and prohibiting discrimination based upon race, color, religion, or national origin in public accommodations, public facilities, public education, the workplace, and by agencies that receive federal funds. Finally, on March 9, 1964, the Supreme Court handed down *New York Times v. Sullivan*,³ an opinion that has profoundly impacted defamation law and First Amendment rights.

* Partner, Baker & Hostetler, LLP Cleveland, Ohio. B.A., J.D., University of Missouri - Columbia; LL.M., Columbia University.

** Professor and Interim Dean, DePaul University College of Law. B.A., University of Missouri-Kansas City; M.A., J.D., University of Iowa; LL.M., Columbia University.

The authors wish to thank Dustin M. Dow, Emily Myers, Carrie Valdez, Joseph Falk, Allen Thomas, and Yesenia Perez for their valuable assistance during the preparation of this article.

1. 347 U.S. 483 (1954).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). For two recent discussions of the events leading to the Act, see generally TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 (2014); and CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT (2014).

3. 376 U.S. 254 (1964). For a brief overview of the background of the case and the opinion, see LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN’S FIGHT TO PRESERVE THE LEGACY OF *New York Times v. Sullivan* 1–31 (2014); Kermit L. Hall, *Justice Brennan and Cultural History: New York Times v. Sullivan and Its Times*, 27 CAL. W. L. REV. 339 (1991); and Paul Horwitz, *Institutional Actors in New York Times Co. v. Sullivan*, 48 GA. L. REV. 809 (2014).

In 1984, we examined the background and litigation strategies that led to the Court's *Sullivan* decision.⁴ In the succeeding thirty years, a number of books have shed new light on the participants, the Court's decision, and its progeny.⁵ Benefiting from a fifty-year perspective, this article focuses on three interrelated aspects of *Sullivan*.

First, the case arose out of the emerging civil rights movement of the late 1950s and early 1960s, and was crucially important to that struggle. The lawsuit filed in Montgomery, Alabama in April 1960 by Lester B. Sullivan⁶ against the New York Times was part of a broader strategy by some white Southerners to blunt criticism from the Northern press of their often violent reaction to the demands of blacks for equal rights.

Second, the legal assault on the civil rights movement was a catalyst for the Supreme Court's decision to abandon long-standing common law principles governing defamation. In their place, the Court adopted the actual malice standard as the requirement for recovery in defamation cases brought by public officials. But, that standard is not found anywhere in the Constitution. This Article traces the origins of the actual malice standard from its state court beginnings.

Finally, this Article evaluates the long-term impact of *Sullivan*. The opinion initially was the subject of high praise for its impact on the law of libel and on First Amendment rights, and for protecting the newspaper and the nascent civil rights movement from potentially stifling damage awards. Over the years, critics emerged who asserted that *Sullivan* needlessly ignored common law standards, that it failed to stem the tide of large verdicts in libel cases, and that the actual malice standard operates as a catalyst for the expenditure of even greater defense costs. Despite these concerns, the courts and Congress have applied the actual malice standard not only to the traditional media, but have expanded its scope to protect freedom of expression in a variety of areas not contemplated by the Supreme Court in 1964. The events of the past fifty years reveal that the actual malice standard has

4. Bruce L. Ottley, John Bruce Lewis & Younghee Jin Ottley, *New York Times v. Sullivan: A Retrospective Examination*, 33 DEPAUL L. REV. 741 (1984).

5. See, e.g., KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* (2011); LEVIN & WERMIEL, *SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* (2011); LEVIN & WERMIEL, *SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* (2011); LEVIN & WERMIEL, *SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* (2011). Anthony Lewis, one of the most compelling and best known commentators on the *Sullivan* case, died in 2013. *Anthony Lewis, 1927–2013: Reporter Brought Law to Life, Elevating Supreme Court News*, N.Y. TIMES, Mar. 26, 2013, at A1. His 1991 book provided an exhaustive description of the background of the case and its impact on First Amendment rights. See generally David Cole, *On Anthony Lewis (1927–2013)*, THE NEW YORK REVIEW OF BOOKS, May 9, 2013, at 4; Lyle Denniston, *Anthony Lewis: Pioneer in the Court's Pressroom*, 38 J. SUPREME CT. HIST. 432 (2013).

6. For a brief biographical sketch of Sullivan, see HALL & UROFSKY, *supra* note 5, at 11–15.

proven workable in the multifaceted areas in which it has been adopted. Most importantly, the standard has provided, and continues to provide, what the Supreme Court described as “breathing space”⁷ for a wide variety of communications made in the public interest.

II. *NEW YORK TIMES V. SULLIVAN*: THE CIVIL RIGHTS ORIGINS OF THE CASE

A. *Introduction*

Although the Thirteenth Amendment officially ended slavery in the United States, the economic, political, and social systems of the South in the post-Civil War Era ensured little change for African-Americans.⁸ In 1896, the Supreme Court in *Plessy v. Ferguson*⁹ upheld the constitutionality of state laws requiring racial segregation by creating the “separate but equal” doctrine. Although conditions were “separate,” they were far from “equal” for blacks in education, housing, transportation, and all other aspects of life throughout the United States.¹⁰ The Supreme Court began to strike down specific aspects of segregation in the mid-1940s.¹¹ But, it was not until 1954 in *Brown v. Board of Education (Brown I)*¹² that the Court held that the “separate but equal” doctrine, as applied to public education, was unconstitutional.

7. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

8. The United States in the post-Civil War period and the condition of former slaves are the focus of DOUGLAS A. BLACKMAN, *SLAVERY BY ANOTHER NAME: THE REENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); and ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877* (Henry Steele Commager & Richard B. Morris eds., 1988).

9. 163 U.S. 537 (1896). See generally KEITH WELDON MEDLEY, *WE AS FREEMEN: PLESSY V. FERGUSON* (2003); *PLESSY V. FERGUSON: A BRIEF HISTORY WITH DOCUMENTS* (Brook Thomas ed., 1997).

10. See generally WILLIAMJAMES HULL HOFFER, *PLESSY V. FERGUSON: RACE AND INEQUALITY IN JIM CROW AMERICA* (Peter Charles Hoffer & N. E. H. Hull eds., 2012); JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* (2002); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974).

11. In 1946, the Supreme Court held in *Morgan v. Virginia*, 328 U.S. 373 (1946), that segregation on interstate commercial buses violates the Commerce Clause of the Constitution. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court ruled that judicial enforcement of restrictive racial covenants on property is a violation of the Equal Protection Clause of the Fourteenth Amendment.

12. 347 U.S. 483 (1954). For an analysis of the decision, see generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1975) and JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001). The Southern reaction to *Brown* is discussed in GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 61–74 (2004).

Any hope for a rapid end to school segregation was dashed the following year when the Supreme Court revisited *Brown v. Board of Education (Brown II)*.¹³ In that decision, the Court held that local school authorities had the primary responsibility of devising solutions for implementing the principles of *Brown I*. Chief Justice Earl Warren,¹⁴ writing for the Court, noted that “because of their proximity to local conditions,” courts that initially heard school desegregation cases were in a position to determine whether school authorities were acting in good faith to implement the principles of *Brown I*.¹⁵ He ordered the lower courts to take steps to “admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”¹⁶ But, Chief Justice Warren also permitted the lower courts to take into account a “variety of obstacles” to the elimination of segregation, such as administration, the physical condition of schools, transportation, personnel, and revision of school districts and local laws, and to grant additional time if necessary.¹⁷

After *Brown I* and *II*, many African-Americans were unwilling to wait for their rights to be implemented “with all deliberate speed.”¹⁸ Instead, they challenged not only school segregation, but also every aspect of racial discrimination. Anthony Lewis pointed out that, although it was a fact of life in all parts of the United States, segregation during the 1950s

was different in the South, and far more virulent, because it had the force of law. State law condemned blacks to a submerged status from cradle to grave, literally. The law segregated hospitals and cemeteries. It confined black children to separate and grossly inferior public schools. Policemen enforced rules that made blacks ride in the back of the bus and excluded them from most hotels and restaurants. And blacks had little or no voice in making the law, for in much of the South they were denied the right to vote.¹⁹

The majority of white southerners, however, viewed segregation as a natural part of the “Southern way of life.”²⁰ Believing that African-

13. 349 U.S. 294 (1955). The decision is discussed in MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2006).

14. For a discussion of Chief Justice Warren’s opinion in *Brown II*, see ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 293–300 (1997); and JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* (2006).

15. *Brown II*, 349 U.S. at 299.

16. *Id.* at 301.

17. *Id.* at 300–01.

18. *Id.* at 301.

19. LEWIS, *supra* note 5, at 15–16.

20. STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 53 (1988). For a discussion of the “Southern way of life” in Montgomery, Alabama at the time the *Sullivan* case was filed in 1960, see HALL & UROFSKY, *supra* note 5, at 5–15.

Americans would not, on their own, challenge the system, they blamed the boycotts and demonstrations on Communists, “outside agitators,” and the Northern press.²¹

Much has been written not only about the civil rights movement in the 1950s and 1960s,²² but also about the relationship between that struggle and the media. Scholars have examined how newspapers, magazines, and individual journalists reported on the South, its attempts to cling to segregation, and on the sometimes violent reaction to those efforts.²³ Because television came of age during the 1950s, studies also have focused on its role in shaping attitudes toward race relations and the civil rights movement by bringing the demonstrations and attacks on marchers into peoples’ living rooms.²⁴ The media not only reported, but also interpreted, the events of the civil rights struggle. And, the members of the media became targets of attempts to intimidate and silence them. Lester Sullivan’s 1960 defamation suit, which ultimately became *New York Times v. Sullivan*, is only one example of the responses by the Southern press, officials, and private individuals to media reports on such events in the South. Those responses ranged from criticism of the Northern press for bias and unfairness,²⁵ to threats and violence against reporters and

21. For examples of these accusations, see ROBERTS & KLIBANOFF, *supra* note 12, at 68–69, 194, 212, 216 (2006); WHITFIELD, *supra* note 20, at 36; Andrew S. Moore, *Anti-Catholicism, Anti-Protestantism, and Race in Civil Rights Era Alabama and Georgia*, J. S. RELIGION (2005), <http://jsr.fsu.edu/Volume8/Moore.htm>.

22. The best examination of the Civil Rights Era is Taylor Branch’s trilogy: TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–1963* (1988) [hereinafter BRANCH, *PARTING THE WATERS*]; TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963–1965* (1998) [hereinafter BRANCH, *PILLAR OF FIRE*]; and TAYLOR BRANCH, *AT CANAAN’S EDGE: AMERICA IN THE KING YEARS, 1965–1968* (2006). See also 3 BRUCE ACKERMAN, *The Civil Rights Revolution*, in *WE THE PEOPLE* (2014); HENRY HAMPTON ET AL., *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950s THROUGH THE 1980s* (1990).

23. See, e.g., SIMEON BOOKER & CAROL McCABE BOOKER, *SHOCKING THE CONSCIENCE: A REPORTER’S ACCOUNT OF THE CIVIL RIGHTS MOVEMENT* (2013); DAVID R. DAVIES, *THE POST-WAR DECLINE OF AMERICAN NEWSPAPERS, 1945–1965*, at 63–76 (2006); THE PRESS AND RACE: MISSISSIPPI JOURNALISTS CONFRONT THE MOVEMENT (David R. Davies ed., 2001); ROBERTS & KLIBANOFF, *supra* note 12, at 62–74; Craig Flournoy, *Reporting the Movement in Black and White: The Emmett Till Lynching and the Montgomery Bus Boycott* (Aug. 2003) (unpublished Ph.D. Dissertation) (on file with Louisiana State University), available at http://etd.lsu.edu/docs/available/etd-0611103-164757/unrestricted/Flournoy_dis.pdf.

24. See generally ANIKO BODROGHKOZY, *EQUAL TIME: TELEVISION AND THE CIVIL RIGHTS MOVEMENT* (2012); SASHA TORRES, *BLACK, WHITE, AND IN COLOR: TELEVISION AND BLACK CIVIL RIGHTS* (2003); William G. Thomas III, *Television News and the Civil Rights Struggle: The Views in Virginia and Mississippi*, S. SPACES (Nov. 3, 2004), <http://www.southernspaces.org/2004/television-news-and-civil-rights-struggle-views-virginia-and-mississippi>.

25. See ROBERTS & KLIBANOFF, *supra* note 12, at 211–21; see also WHITFIELD, *supra* note 20, at 60–61; William P. Hustwit, *From Caste to Color Blindness: James J. Kilpatrick’s Segregationist Semantics*, 77 J. S. HIST. 639–70 (2011).

photographers,²⁶ to the filing of criminal indictments and civil lawsuits against journalists and newspapers.²⁷

B. *The Background to a Civil Rights Case*

By March 1960, Dr. Martin Luther King, Jr. had become one of the leaders of the rapidly growing civil rights movement.²⁸ Dr. King came to national prominence when, as president of the Montgomery Improvement Association, he led the campaign to desegregate the Montgomery city buses in 1956.²⁹ As the president of the Southern Christian Leadership Conference, he quickly rose to the forefront of the nonviolent struggle for civil rights in the South. Dr. King became the target of violence and harassment. His home was subjected to both bomb and gunshot attacks.³⁰ In 1956, Dr. King was convicted of violating the Alabama criminal boycott statute because of his efforts in desegregating the Montgomery buses.³¹ That same year he was also arrested for speeding; two years later, he was arrested for loitering.³²

In February 1960, Dr. King again was arrested after he became the first person in Alabama history to be charged with felony tax evasion. The government alleged that King perjured himself by signing his 1956 and 1958 Alabama state tax returns.³³ After the arrest, the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South” was formed in New York, and on March 29, 1960,

26. For a discussion of the threats and attacks on reporters and photographers covering the attempt to integrate Central High School in Little Rock, Arkansas in September 1957 and the freedom rides in Alabama in May 1960, see ROBERTS & KLIBANOFF, *supra* note 12, at 168–70, 176–79, 242–55.

27. See generally LEWIS, *supra* note 5, at 34–45.

28. For biographies detailing Dr. King’s role in the civil rights movement, see generally BRANCH, *PARTING THE WATERS*, *supra* note 22; DAVID J. GARROW, *BEARING THE CROSS* (1986); THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. (Clayborn Carson ed., 1998); and STEPHEN B. OATES, *LET THE TRUMPET SOUND* (1982).

29. There are a variety of accounts of the Montgomery bus boycott. See generally BRANCH, *PARTING THE WATERS*, *supra* note 22, at 143–205; KENNETH M. HARE & JIM EARNHARDT, *THEY WALKED TO FREEDOM 1955–1956: THE STORY OF THE MONTGOMERY BUS BOYCOTT* (2005); MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* (1958); JO ANN ROBINSON, *THE MONTGOMERY BUS BOYCOTT AND THE WOMAN WHO STARTED IT* (David J. Garrow ed., 1987); DONNIE WILLIAMS WITH WAYNE GREENSHAW, *THE THUNDER OF ANGELS: THE MONTGOMERY BUS BOYCOTT AND THE PEOPLE WHO BROKE THE BACK OF JIM CROW* (2006).

30. The January 30, 1956 bombing of Dr. King’s home is discussed in BRANCH, *PARTING THE WATERS*, *supra* note 22, at 164–67.

31. *Id.* at 184.

32. *Id.* at 160–61, 239–42.

33. *Id.* at 276–77, 282. In May 1960, after a week-long trial in Montgomery, Alabama, Dr. King was found not guilty of tax evasion by an all-white jury. *Id.* at 293–311.

the Committee placed an appeal for funds in a full-page advertisement in the *New York Times* entitled “Heed Their Rising Voices.”³⁴

The first paragraph of that advertisement described the actions and goals of “Southern Negro students” demonstrating “in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.”³⁵ It charged that these students were “being met by an unprecedented wave of terror.”³⁶ The second paragraph claimed that when 400 students tried to integrate lunch counters in Orangeburg, South Carolina, they were forcibly ejected, tear-gassed, arrested en masse, and herded into an open barbed-wire stockade. The third paragraph in the advertisement declared:

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 shot-guns 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.³⁷

The fourth paragraph spoke of student activity in “Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte and a host of other cities in the South,” referring to the students as “protagonists of democracy.”³⁸ The fifth paragraph praised Dr. King as a symbol and inspiration to the civil rights movement and stated that the “Southern violators of the Constitution”³⁹ were determined to destroy him. The sixth paragraph stated:

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*.⁴⁰

The remaining four paragraphs called upon “men and women of good will” to add their “moral support” and “material help . . . [to]

34. Advertisement, *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25, [hereinafter *Heed Their Rising Voices*], reprinted in *New York Times v. Sullivan*, 376 U.S. 254, 292–93 (1964). For a discussion of the advertisement, see HALL & UROFSKY, *supra* note 5, at 15–22; and LEWIS, *supra* note 5, at 5–8.

35. *Heed Their Rising Voices*, *supra* note 34, at 25.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.”⁴¹ The names of the sixty-four persons who comprised the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South” appeared directly below the text of the appeal.⁴² The list included the names of A. Philip Randolph, Eleanor Roosevelt, Ertha Kitt, Norman Thomas, Marlon Brando, Harry Belafonte, labor leader Peter Ottley, and (now Congressman) John Lewis.⁴³ Below those names was the statement: “We in the South who are struggling daily for dignity and freedom warmly endorse this appeal.”⁴⁴ Below that statement was a list of twenty other people, primarily ministers who lived and worked in the South.⁴⁵ Among the names were four Alabama residents: Ralph Abernathy, Fred Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery.⁴⁶

On April 12, 1960, the New York Times published a front-page article written by Harrison Salisbury entitled “Fear and Hatred Grip Birmingham.”⁴⁷ In that article, Salisbury reported that, as a result of the climate of racial fear in Birmingham, blacks and whites were afraid to talk freely, telephones were tapped, mail was opened (and some not delivered), and watchmen stood guard at black churches and Jewish temples.⁴⁸ Salisbury quoted blacks, who called Birmingham “the Johannesburg of America.”⁴⁹ The only person specifically named in the article was the Birmingham police commissioner, Eugene “Bull” Conner, to whom a number of unfavorable quotes were attributed.⁵⁰ Con-

41. *Heed Their Rising Voices*, *supra* note 34, at 25.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* See generally John K. Wilson, *Interview with Rev. Joseph Lowery, 50 Years After New York Times v. Sullivan*, ACADEME BLOG (Mar. 8, 2014), <http://academeblog.org/2014/03/08/interview-with-rev-joseph-lowery-50-years-after-new-york-times-v-sullivan/>.

47. Harrison E. Salisbury, *Fear and Hatred Grip Birmingham*, N.Y. TIMES, Apr. 12, 1960 [hereinafter Salisbury, *Fear and Hatred*], at 1, reprinted in *New York Times v. Conner*, 365 F.2d 577 app. at 577–80 (5th Cir. 1966). A second article by Salisbury was published on April 13, 1960. Harrison E. Salisbury, *Race Issue Shakes Alabama Structure*, N.Y. TIMES, Apr. 13, 1960, at 1. For an account of the April 12 article concerning Eugene Conner, see BENJAMIN MUSE, TEN YEARS OF PRELUDE: THE STORY OF INTEGRATION SINCE THE COURT’S 1954 DECISION 261–63 (1964). The case law reflects some apparent confusion regarding the spelling of the name “Conner.” In some cases it is spelled “Conner” while in others it is spelled “Connor.” In order to avoid confusion, this article will use the former spelling.

48. Salisbury, *Fear and Hatred*, *supra* note 47, at 28.

49. *Id.*

50. The Salisbury article made the following statements about Eugene Conner:

By Birmingham custom, persons charged with vagrancy are not admitted to bail. They are held incommunicado for three days. In actual practice, such a prisoner is

ner filed a civil lawsuit for libel against Salisbury and the New York Times⁵¹ and a grand jury in Bessemer, Alabama, indicted Salisbury on forty-two counts of criminal libel.⁵²

On April 8, 1960, the three city commissioners of Montgomery individually wrote to the Times and to the four Alabama ministers demanding a retraction of the statements contained in the March 29 advertisement.⁵³ Counsel for the Times assured them that the assertions were being checked and asked for further explanation as to why the commissioners believed the statements applied to them.⁵⁴ The city commissioners did not reply; instead, on April 19, they filed the first of a series of civil lawsuits in federal and state courts in Alabama against the Times, the four Alabama ministers, the Reverend King, and the Columbia Broadcasting System (CBS).

To the Southern officials, these suits against the Times were a means of striking back at and silencing the outside criticism and pres-

sometimes permitted to make one telephone call. But not always. A person arrested on a vagrancy warrant simply disappears for three days. His friends and family may not know what has happened to him.

This is a favorite technique of Birmingham's Police Commissioner, Eugene Conner. Mr. Conner is a former sports broadcaster known as "Bull" because of the timbre of his voice. He served as Birmingham Police Commissioner for sixteen years in the late Nineteen Thirties and Nineteen Fourties. His administration was a stormy one.

He went into eclipse for several years but made a comeback in 1958, running on a platform of race hate.

Id.

51. Conner sought \$3,150,000 from the New York Times and \$1,500,000 from Salisbury. LEWIS, *supra* note 5, at 22.

52. HALL & UROFSKY, *supra* note 5, at 32. If convicted, Salisbury faced the possibility of twenty-one years in prison. *Id.*

53. For Sullivan's letters to the New York Times and the four Alabama ministers, see Letter from L. B. Sullivan et al., Commissioner of Public Affairs, City of Montgomery, Alabama, to The New York Times Co. (Mar. 8, 1960), *reprinted in* Record from the Circuit Court of Montgomery County, Alabama at 1949, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (Record Press Printers 1963) [hereinafter *Sullivan Record*]; Letter from L. B. Sullivan, Commissioner of Public Affairs, City of Montgomery, Alabama, to Ralph D. Abernathy, minister (Mar. 8, 1960), *reprinted in Sullivan Record* at 1962; Letter from L. B. Sullivan, Commissioner of Public Affairs, City of Montgomery, Alabama, to S. S. Seay, minister (Mar. 8, 1960), *reprinted in Sullivan Record* at 1964; Letter from L. B. Sullivan, Commissioner of Public Affairs, City of Montgomery, Alabama, to J. E. Lowery, minister (Mar. 8, 1960), *reprinted in Sullivan Record* at 1965 and; Letter from L. B. Sullivan, Commissioner of Public Affairs, City of Montgomery Alabama, to Fred L. Shuttlesworth, minister (Mar. 8 1960), *reprinted in Sullivan Record* at 1967.

54. The letter stated in part:

We have been investigating the matter and are somewhat puzzled as to how you think the statements in any way reflect on you. So far, our investigation would seem to indicate that the statements are substantially correct with the sole exception that we find no justification for the statement that the dining hall in the State College was "padlocked in an attempt to starve them into submission."

Letter from Lord, Day & Lord, counsel for New York Times, to L.B. Sullivan, Commissioner of Public Affairs, City of Montgomery, Alabama, *reprinted in Sullivan Record* at 1951.

sure for change mounting against the South.⁵⁵ To many white southerners, the civil rights movement was viewed as part of a Communist-inspired conspiracy.⁵⁶ Articles and advertisements such as those published in the *Times* in the early months of 1960 confirmed the view that outside agitation was the source of these disturbances.

The stakes involved on both sides of the litigation in *Sullivan* were very high. The city commissioners saw themselves as representatives of the South and believed that their power, position, and way of life were under attack. If they won, newspapers would hesitate to publish critical articles out of fear of potential libel suits. Indeed, an editorial in the *Montgomery Advertiser* on May 22, 1960 stated: “The Advertiser has no doubt that the recent checkmating of the *Times* in Alabama will impose a restraint upon other publications which have hitherto printed about the South what was supposed to be.”⁵⁷ They hoped that their suits would create a serious obstacle to those demanding further change. If they lost, the press would be free to circulate critical articles, inevitably increasing the pressure for change.

The issues at stake for the *Times* were broader than simply its defense of a libel action. If it lost, there was not only the threat of a sizeable judgment,⁵⁸ but the media’s ability to criticize government officials would be severely hampered.⁵⁹ This issue was later converted

55. See *The Abolitionist Hellmouths*, MONTGOMERY ADVERTISER, Apr. 17, 1960, reprinted in *Sullivan Record* at 2013; see also LEWIS, *supra* note 5, at 34–45; E. L. Holland Jr., “The Big Lie” Editor—Wonders Where The New York Times Got Its News, MONTGOMERY ADVERTISER, Apr. 15, 1960, reprinted in *Sullivan Record* at 2008.

56. MUSE, *supra* note 47, at 40. For Dr. King’s response to charges that the civil rights movement was led by communists, see OATES, *supra* note 28, at 94.

57. Commentary, *Fall-Out from Ad Error*, MONTGOMERY ADVERTISER, May 22, 1960, reprinted in *Sullivan Record* at 2025.

58. See Horwitz, *supra* note 3, at 36. The total amount of damages sought by the plaintiffs from the *Times* was \$6,100,000. See *infra* note 59. The lawsuits against CBS sought \$1,700,000. See *infra* note 59.

59. A general description of the various libel suits that were brought can be found in HALL & UROFSKY, *supra* note 5, at 31–33. In addition to the four suits filed in Alabama state courts, seven suits were filed in the United States District Court for the Northern District of Alabama in Birmingham. On May 7, 1960, the three city commissioners of Birmingham, James W. Morgan, Eugene Conner, and J. T. Waggoner, individually filed suit against the New York Times and reporter Harrison Salisbury seeking \$500,000 in damages resulting from a series of April 1960 articles written by Salisbury and appearing in the *Times* about the racial tension in Birmingham. See *Suits Filed Against Times*, MONTGOMERY ADVERTISER, May 7, 1960, reprinted in *Sullivan Record* at 2026. On May 27, 1961, the three city commissioners of Bessemer, Jess Lanier, Raymond Parsons, and Herman Thompson, each filed similar suits seeking damages of \$500,000. See News Item, MONTGOMERY ADVERTISER, June 1, 1960, reprinted in *Sullivan Record* at 2035; see also *3 Officials of Birmingham File Times Suit*, ALA. J., May 31, 1960, reprinted in *Sullivan Record* at 2159. On July 20, 1960, a Birmingham detective, Joe Lindsey, filed suit against the same defendants for \$100,000. See *Detective’s Suit Charges Times*, MONTGOMERY ADVERTISER, July 20, 1960, reprinted in *Sullivan Record* at 2041; see also *Birmingham Officer Sues N.Y. Times*,

into a constitutional argument that, despite the state's interest in protecting libeled individuals, the threat of a libel suit in such cases might constitute an infringement of First Amendment rights.⁶⁰

III. *NEW YORK TIMES V. SULLIVAN*: THE COURT DECISIONS

A. *Sullivan v. New York Times*

On April 19, 1960, the three city commissioners of Montgomery, Alabama filed suit individually in the Montgomery County Circuit Court against the *New York Times*, Ralph Abernathy, Fred Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery.⁶¹ They each sought \$500,000 in damages against the defendants.⁶² The identical complaints were based on alleged defamatory statements in the third and sixth paragraphs of the advertisement that had appeared in the *Times* on March 29, 1960.⁶³

The jury trial in *Sullivan v. New York Times* began on November 1, 1960 and lasted three days.⁶⁴ Neither the courtroom environment nor the comments in local newspapers were favorable to the *Times* or the

ALA. J., July 20, 1960, *reprinted in Sullivan Record* at 2168. Finally, five libel suits were brought against CBS for its coverage of the March 29 advertisement and Salisbury's April 12 article in the *New York Times*. Three of those suits, each seeking \$500,000 in damages, were filed by the Birmingham city commissioners in federal district court in Birmingham. *See Suits Filed Against Times, supra*, at 2026.

60. This argument was made by the *New York Times* both in the suit brought by Conner, *New York Times Co. v. Conner*, 291 F.2d 492, 494 (5th Cir. 1961), and in the action by Sullivan, *New York Times Co. v. Sullivan*, 376 U.S. 254, 263 (1964).

61. *See* Arthur Osgoode, *Commissioners Sue Newspaper*, MONTGOMERY ADVERTISER, Apr. 20, 1960, *reprinted in Sullivan Record* at 2003; *see also City Officials Sue N.Y. Times*, ALA. J., Apr. 20, 1960, *reprinted in Sullivan Record* at 2141. Throughout the litigation, the three city commissioners were represented by the Montgomery law firm of Steiner, Crum & Baker. *See Transcript of Proceedings, Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. 1960) *reprinted in Sullivan Record* at 567. The *Times* was represented by its New York counsel, the firm of Lord, Day & Lord, which counted among its members former U.S. Attorney General Herbert Brownell and William P. Rogers. *Id.* at 567, 570. Although the *Times* had difficulty in finding local counsel in Alabama, it was ultimately represented by a Birmingham firm, Beddow, Embry & Beddow, which was a prominent criminal defense firm. *Id.* at 568; *see also Times Challenges Libel Suit Here New York, Newspaper Retains B'ham Firm of Bedlow, Embry, Beddow As Counsel*, ALA. J., May 20, 1960, *reprinted in Sullivan Record* at 2156 (newspaper account of the *Times*'s retention of Birmingham counsel). Eric Embry, who represented the *Times* before the Alabama courts, was later appointed to the Alabama Supreme Court. E. R. Shipp, *T. Eric Embry, Defense Lawyer in Historic Libel Case, Dies at 70*, N.Y. TIMES, Jan. 14, 1992, at B6.

62. Osgoode, *supra* note 61.

63. *City Officials Sue N.Y. Times, supra* note 61.

64. For a transcript of the jury trial in *Sullivan*, *see Transcript of Proceedings, Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. 1960), *reprinted in Sullivan Record* at 567–862. For a discussion of the trial, *see* Hall, *supra* note 3, at 353–55; HALL & UROFSKY, *supra* note 5, at 45–68; and LEWIS, *supra* note 5, at 23–33.

four ministers. The case was tried before Judge Walter B. Jones and an all-white jury from Montgomery County.⁶⁵

Judge Jones made his feelings on segregation and his beliefs concerning the Constitution clear in a statement from the bench in a companion case to *Sullivan*. In the action brought by Montgomery Mayor Earl James against the Times and the four ministers based on the March 29 advertisement, Judge Jones stated in open court: “[T]here will be no integrated seating in this courtroom. Spectators will be seated in this courtroom according to their race, and this is for the orderly administration of justice and the good of all people coming here lawfully.”⁶⁶ He then turned his thoughts to the Fourteenth Amendment:

Much has been said at the Bar, and out of the hearing of the trial jury, as to the supposed requirements of the XIV Amendment directing the Trial Judge of the Court of a sovereign state how he will conduct a trial before a jury in the courts of Alabama.

I would like to say for those here present, and for those who may come here to litigate in the future, that the XIV Amendment has no standing whatsoever in this Court, it is a pariah and an outcast, if it be construed to hold and direct the Presiding Judge of this Court as to the manner in which proceedings in the Court . . . shall be conducted.

. . . .

We will now continue with the trial of this case under the laws of the State of Alabama, and not under the XIV Amendment, and in the belief and knowledge that the white man’s justice . . . will give

65. The case was tried to a jury of twelve white men. *Lawyers Clash at Times Trial*, N.Y. TIMES, Nov. 2, 1960, at 33. Two black members of the panel were stricken by Sullivan’s counsel. *Id.* The courtroom atmosphere became an issue as the trial progressed and was raised again in the appeals filed by the four ministers and in their briefs and arguments before the United States Supreme Court. Brief for the Petitioners, *Abernathy v. Sullivan*, 376 U.S. 254 (1964), reprinted in *Sullivan Record* at 52–62. The black ministers argued that their rights to equal protection, due process, and a fair and impartial trial under the Fourteenth Amendment had been violated. The local media focused its attention on the jurors. Photographers in the courtroom took pictures of all the jurors for Montgomery’s two local newspapers, and television cameras followed the jurors to the door of the jury room. The photographs of the jurors, published in the *Alabama Journal*, are reprinted in the *Sullivan Record* at 951. See also Transcript of Proceedings on Defendant’s Motion for New Trial, reprinted in *Sullivan Record* at 889–90 (offering photographs into evidence during hearing on motion for new trial). The Montgomery newspapers printed the names of the jurors; one paper reported the names on its front page. *Jurors Selected For Times Suit*, MONTGOMERY ADVERTISER, Nov. 1, 1960, reprinted in *Sullivan Record* at 2079–80.

66. Walter B. Jones, Judge, Circuit Court of Montgomery County, Statement Made from the Bench During *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. 1960), in 22 ALA. LAWYER 190, 190–91 (1961) (entitled *Judge Jones on Court Room Segregation*); see also Judith Rushin, *Courtroom Segregated in Times Suit*, ALA. J., Feb. 1, 1961, reprinted in *Sullivan Record* at 2213.

the parties at the Bar of this Court, regardless of race or color, equal justice under law.⁶⁷

Judge Jones's sentiments also were apparent from the manner in which he addressed the various trial lawyers. When he questioned prospective jurors concerning their knowledge of, or relationship with, the attorneys trying the case, he referred to the attorneys for Sullivan and the Times as "mister," but dispensed with this title when he made reference to the ministers' black lawyers.⁶⁸ The Judge spoke of the black attorneys as "Fred Gray of Montgomery" or "V. Z. Crawford of Mobile."⁶⁹ The trial transcript further reflects different forms of identification for the lawyers, with the black attorneys referred to as "Lawyer Gray" or "Lawyer Crawford," while the white attorneys were referred to as "mister."⁷⁰

Newspaper articles, which were critical of the defendants and of the March 29 advertisement in the *Times*, appeared in local papers prior to and during the trial of the case.⁷¹ In an April 9, 1960 article entitled "Not The First Lie About [the] South," the *Alabama Journal* declared:

It must be very disappointing to regular readers of the *New York Times*, one of the world's really great newspapers, to find it has been willing to lend its columns for such a page of falsehood as that published the other day and signed by money-beggars who want to defend such a despicable character as Martin Luther King in the courts and save him from the penalties of his derelictions.⁷²

The April 18, 1960 edition of the same paper was even stronger regarding the advertisement. It stated:

[The *New York Times*] full page advertisement signed by Eleanor Roosevelt, Ralph Abernathy et al[.], to raise \$200,000 for M. L.

67. Jones, *supra* note 66, at 191–92.

68. Transcript of Proceedings, *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. 1960), reprinted in *Sullivan Record* at 568.

69. *Id.*

70. *Id. passim*. On one occasion, Sullivan's counsel, while reading a portion of the March 29 advertisement, mispronounced the word "negro" as "nigra" and "nigger" in the presence of the jury and without admonition by the court. *Id.* at 578–80. Furthermore, in his summation, Sullivan's counsel declared: "In other words, all of these things that happened did not happen in Russia where the police run everything, *they did not happen in the Congo where they still eat them*, they happened in Montgomery, Alabama, a law-abiding community." *Id.* at 930 (emphasis added). Again, Judge Jones made no rebuke for that statement.

71. Among the critical editorials were: *The Abolitionist Hellmouths*, *supra* note 55; *Birmingham Statements Published in the Times*, MONTGOMERY ADVERTISER, May 4, 1960, reprinted in *Sullivan Record* at 2023; Holland, *supra* note 55; *Not the First Lie About South*, ALA. J., Apr. 9, 1960, reprinted in *Sullivan Record* at 2134; (*Reply to N. Y. Times*) *Not a City of Race Terror*, ALA. J., Apr. 22, 1960, reprinted in *Sullivan Record* at 2145; *The Times and Salisbury*, ALA. J., May 7, 1960, reprinted in *Sullivan Record* at 2151; *Will They Purge Themselves?*, MONTGOMERY ADVERTISER, Apr. 7, 1960, reprinted in *Sullivan Record* at 2127.

72. *Not the First Lie About South*, *supra* note 71.

King to defend himself against income tax fraud in Alabama is a pack of lies from beginning to end. Without some sinister purpose, no newspaper would print such libelous and scandalous material without confirming its contents.⁷³

On September 25, 1960, a writer for the *Montgomery Advertiser* expressed sentiments that must have referred to the Times when he reported: "State and City authorities have found a formidable legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama."⁷⁴

The basis of Sullivan's claim was that the third and sixth paragraphs of the March 29 advertisement "Heed Their Rising Voices" were defamatory to him.⁷⁵ As to the third paragraph, dealing with a series of events which occurred at Alabama State College, Sullivan introduced evidence to show that (1) although police were stationed near the campus on three occasions, they did not "ring" the campus; (2) student leaders were not expelled for singing on the Capitol steps but rather for their participation in lunch counter sit-ins; (3) less than the "entire student body" protested by not reregistering; and (4) the dining hall had not been padlocked in an effort to starve the students into submission.⁷⁶ Sullivan also contended that the sixth paragraph was defamatory because Dr. King had been arrested four times instead of seven, and because the police were not responsible for the assaults or bombings against Dr. King.⁷⁷

Sullivan also presented testimony that the statements at issue referred to him specifically.⁷⁸ He called six witnesses who testified that the actions described in the two paragraphs would tend to be associated with the city commissioners generally and with Sullivan in partic-

73. *Unworthy Newspaper Policy*, ALA. J., Apr. 18, 1960, reprinted in *Sullivan Record* at 2139.

74. Rex Thomas, *State Finds Formidable Legal Club To Swing at Out-of-State Press*, MONTGOMERY ADVERTISER, Sept. 25, 1960, reprinted in *Sullivan Record* at 2064.

75. See *Times Libel Suit Opens Here Today*, MONTGOMERY ADVERTISER, Nov. 1, 1960, reprinted in *Sullivan Record* at 2077.

76. Judith Rushin, *L. B. Sullivan Testifies in Times Suit*, ALA. J., Nov. 2, 1960, reprinted in *Sullivan Record* at 2203.

77. *Id.*

78. The basis of Sullivan's claim was the "feeling" that the advertisement "reflects not only on me but on the other Commissioners and the community." Transcript of Proceedings, *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. 1960), reprinted in *Sullivan Record* at 724. Sullivan felt that the statements referring to "police activities" or "police action" were associated with him, impugned his "ability and integrity," and reflected on him "as an individual." *Id.* at 712, 713, 724. He also claimed that the statements in the advertisement, which alluded to the bombing of Dr. King's home, referred to the commissioners, to the police department, and to him because they were contained in the same paragraph as the statements mentioning police activities. *Id.* at 717-18.

ular.⁷⁹ The six witnesses testified that if they had believed the statements in the advertisement regarding the police department's actions, they would have thought that Sullivan was improperly carrying out the duties of his office and would have believed that the police were guilty of serious misbehavior.⁸⁰ Not one of the six witnesses, however, testified that he believed the advertisement.

The Times based its defense on three arguments. First, because neither Sullivan nor any of the Montgomery city commissioners were mentioned by name, Sullivan had not met his burden of proving that the advertisement paragraphs were "of or concerning" him.⁸¹ Second, although Sullivan had the responsibility of supervising the Montgomery Police Department, he was normally not responsible for the day-to-day operations of the department, including those during the demonstrations at Alabama State College.⁸² Because all of these operations were under the supervision of the Montgomery Chief of Police, Sullivan did not show that the advertisement charged him with any official misconduct.⁸³ Finally, even if the jury found that the allegedly defamatory matter referred to Sullivan, the Times maintained that it did not publish the advertisement maliciously and thus was not liable.⁸⁴

Although joined as co-defendants with the Times, the defense strategy of each of the four Alabama ministers was to separate himself from the substantive question of whether the advertisement was defamatory. Leaving that issue to the Times, the ministers completely disassociated themselves from the advertisement by maintaining that they did not sign it, were not members of the committee that published it, were never approached by the committee for permission to use their names, and did not even know that the advertisement was being published.⁸⁵

79. *Id.* at 602–52; see also Arthur Osgoode, *Witnesses Say Ad Reflected on Sullivan*, MONTGOMERY ADVERTISER, Nov. 2, 1960, reprinted in *Sullivan Record* at 2081. The witnesses called by Sullivan were Grover C. Hall, the editor of the *Montgomery Advertiser*; Arnold D. Blackwell, a member of the Water Works Board appointed by the commissioner and a businessman engaged in real estate and insurance; Harry W. Kaminsky, the sales manager of a clothing store and a close friend of Sullivan; H. M. Price, Sr., the owner of a small food equipment business; William M. Parker, Jr., a service station owner who was a friend of Sullivan; and Horace W. White, the owner of a trucking company and a former employer of Sullivan. Transcript of Proceedings, *supra* note 78, at 602–69.

80. See Osgoode, *supra* note 79.

81. Given Charges Requested by the Defendant, *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. 1960), reprinted in *Sullivan Record* at 829–36.

82. Transcript of Proceedings, *supra* note 78, at 703, 720.

83. Given Charges Requested by the Defendant, *supra* note 81, at 834.

84. *Id.* at 836.

85. Transcript of Proceedings, *supra* note 82, at 787–804.

In his charge to the jury, Judge Jones stated that the third and sixth paragraphs of the advertisement were “libelous per se,”⁸⁶ and withdrew from the jury the question of whether the text was defamatory.⁸⁷ He instructed the jury that “[g]eneral damages need not be alleged or proved but are presumed,”⁸⁸ and that Sullivan was entitled to recover both “presumed” and punitive damages if the jury decided that the words referred to him.⁸⁹ Although Judge Jones held that no showing of actual damages was required, under Alabama law, punitive damages could not be claimed unless a retraction had been requested and refused.⁹⁰ Because Sullivan had written to the Times and the other defendants requesting a retraction, and because the retraction was not immediately given, the court allowed the jury to assess punitive damages.⁹¹

After only two hours of deliberation, the jury returned a verdict for Sullivan in the amount of \$500,000.⁹² The amount was not specified as either actual or punitive damages.⁹³ The Times immediately filed a motion for a new trial based on alleged errors made by the trial court and on the ground that the verdict was excessive and violated the Constitution.⁹⁴ In addition, the four ministers claimed that they did not receive a fair trial and that this violated both the Alabama constitution and the U.S. Constitution.⁹⁵ Judge Jones denied the Times’ motion. Finally, he stated that the four ministers had allowed the time for their motions for a new trial to lapse, and thus, he could not consider them.⁹⁶

86. Oral Charge and Exceptions Thereto, *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. 1960), reprinted in *Sullivan Record* at 819, 823–24.

87. *Id.* at 824.

88. *Id.*

89. *Id.* at 825.

90. *Id.* at 821.

91. *Id.* at 821, 824–26.

92. Final Judgment, Jury and Verdict, *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. 1960), reprinted in *Sullivan Record* at 862.

93. *Id.*

94. Motion of Defendant’s, The New York Times Company, a Corporation, for New Trial, *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. filed Dec. 1, 1960), reprinted in *Sullivan Record* at 896.

95. Motion of Defendant, Ralph D. Abernathy for New Trial, *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. filed Dec. 2, 1960), reprinted in *Sullivan Record* at 970.

96. Order of Court Denying Motion of Defendant New York Times Company for a New Trial, *Sullivan v. New York Times Co.*, No. 27416 (Ala. Cir. Ct. entered Mar. 17, 1961), reprinted in *Sullivan Record* at 970. In order to stay the execution of the trial court’s judgment to allow for an appeal to the Alabama Supreme court, the four Alabama ministers were required under Alabama law to post “supersedeas bonds” of \$500,000, which they were financially unable to do. *Abernathy v. Patterson*, 295 F.2d 452, 454 (5th Cir. 1961). When the state began levying on their

B. New York Times v. Sullivan: *The Alabama Supreme Court*

When the federal courts declined to review the Montgomery County Circuit Court decision in *Sullivan v. New York Times* via a collateral injunctive action, the only alternative for the Times and the four Alabama ministers was a direct appeal to the Alabama Supreme Court. In August 1962, that court upheld the circuit court as to its jurisdiction, the merits of the case, and the amount of the damages.⁹⁷

The Alabama Supreme Court first agreed with the trial court's holding that the advertisement was "libelous per se."⁹⁸ It then refuted the Times' argument that there was insufficient evidence to connect the statements with Sullivan, stating:

We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise

property to satisfy the judgment, the four ministers filed a complaint in federal district court seeking injunctive relief. *Id.* The basis of their motion was 28 U.S.C. § 1343, which provides that

[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1343 (3)–(4) (2012). The complaint was directed not only to Sullivan but to the suits filed by the other city commissioners and the suit brought by Alabama Governor John Patterson. *Abernathy*, 295 F.2d at 454–55. Because the request was for equitable relief, the ministers alleged they would suffer irreparable harm and that they had no adequate relief at law. *Id.* On the same day the ministers filed their federal court action, they also moved for a preliminary injunction to prevent the levy upon and sale of their property in satisfaction of the \$500,000 judgments. *Id.* at 455. District Court Judge Frank Johnson denied the request for the preliminary injunction on the ground that the ministers had failed to seek any relief from the Circuit Court of Montgomery County or from any of the defendants. *Id.* When the defendants then filed a motion to dismiss the injunction action, Judge Johnson granted it in an unreported decision. *Id.* at 456. The dismissal was appealed to the United States Court of Appeals for the Fifth Circuit where Judge Richard Rives, writing for a unanimous court, upheld the dismissal on the ground that if the plaintiffs felt their constitutional rights were not adequately protected in the state courts of Alabama, they could appeal the case to the United States Supreme Court. *Id.* at 457–58. Rather than wait for the Alabama Supreme Court to decide their appeal in the *Sullivan* case, the ministers sought review of the court of appeals' dismissal by a petition for a writ of certiorari to the United States Supreme Court. *Abernathy v. Patterson*, 368 U.S. 986 (1962). The petition was denied without comment. *Id.*

97. *New York Times Co. v. Sullivan*, 144 So. 2d 25, 52 (Ala. 1962); see also HALL & UROFSKY, *supra* note 5, at 83–99.

98. *Sullivan*, 144 So. 2d at 37.

or criticism is usually attached to the official in complete control of the body.⁹⁹

The court then summarily dismissed the Times' remaining constitutional arguments on the grounds that "the First Amendment . . . does not protect libelous publications" and "the Fourteenth Amendment is directed against State action and not private action."¹⁰⁰

On the question of damages, the court first held that because the jury found that the words referred to Sullivan, he was entitled to recover without "proof of pecuniary injury[,] . . . such injury being implied."¹⁰¹ The court also held the amount of damages to be appropriate because the newspaper "in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement."¹⁰² Because the Times did not retract the statements as to Sullivan when requested to do so, and did not deny the falsity of the advertisement at the trial, the court concluded that "the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom."¹⁰³

The Alabama Supreme Court's rebuke of the Times was not unexpected. However, while the decision went against the Times, it was tactically favorable because, in upholding the trial court on every ground, it made a successful challenge in the United States Supreme Court possible.

C. New York Times v. Sullivan: *The Supreme Court Decision*

The Supreme Court that heard and decided the *Sullivan* case in early 1964 was both an "activist" court and a divided court. While involved in giving an expanded meaning to the Constitution, the Court was often deeply divided over the role it should play in the political process.¹⁰⁴

99. *Id.* at 39.

100. *Id.* at 40.

101. *Id.* at 41.

102. *Id.* at 50.

103. *Id.* at 51.

104. For an analysis of the Warren Court, see generally MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); and *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* (Mark Tushnet ed., 1993). Some have labeled the court's 1963 October term as the "Second American Constitutional Convention." See, e.g., L.A. Powe, Jr., *October Term 1963: "The Second American Constitutional Convention,"* 38 J. SUPREME CT. HIST. 192, 192 (2013) (citing Anthony Lewis, *The Legacy of the Warren Court*, in *THE WARREN COURT: A RETROSPECTIVE* 398, 398 (Bernard Schwartz ed., 1996)) ("Anthony Lewis passed Solicitor General Archibald Cox a note asking 'How does it feel to be at the second American Constitutional Convention?'").

Philip Kurland, in his foreword to the *Harvard Law Review*'s summary of the 1963 Supreme Court term,¹⁰⁵ referred to that term as the climax of "the egalitarian revolution,"¹⁰⁶ which was characterized by equality as a guide for constitutional decisions and a subordination of the federal system. The decisions of the Court during that term indicate that it was deeply committed to continuing the revolution. Desegregation,¹⁰⁷ reapportionment,¹⁰⁸ and the first of the "sit-in" cases¹⁰⁹ were all issues that came before the Court during the 1963 term.

Although many of these cases were decided by narrow votes with vigorous dissents, the members of the Court all agreed on the *Sullivan* case. The Times was represented by Columbia Law School Professor Herbert Wechsler, the principal draftsman of the petition for certiorari and the newspaper's counsel during oral argument before the Court.¹¹⁰

On March 9, 1964, the Supreme Court unanimously reversed the decisions of the Alabama Supreme Court in both the *Sullivan* and *Abernathy* cases.¹¹¹ In its decision, the Court not only rejected all of Sullivan's arguments, but it also went beyond what the Times had urged in its brief and oral argument.

Sullivan's principal argument, both in his brief and oral argument,¹¹² had been that the advertisement was not protected by the First Amendment. This argument was premised on the narrow ground that the advertisement was "commercial advertising," and on

105. Philip B. Kurland, Foreword, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964).

106. *Id.* at 145.

107. *See, e.g.*, Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964).

108. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

109. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964).

110. Professor Wechsler's arguments based on the history of the Sedition Act of 1798 were "bold" and equated civil damages for injury to individual reputation with criminal punishment for negative statements about the state. LEWIS, *supra* note 5, at 118; *see also* Ottley et al., *supra* note 4, at 766–71. Professor Wechsler went on to be the director of the American Law Institute and died in 2000. Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead at 90*, N.Y. TIMES, Apr. 28, 2000, at C21. The authors are both former students of Professor Wechsler.

111. *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964). *See generally* Anthony Lewis, *The Sullivan Decision*, 1 TENN. J. L. & POL'Y 135 (2004). *Abernathy v. Sullivan*, the companion case to *New York Times v. Sullivan*, was resolved in a footnote in that case. *Sullivan*, 376 U.S. at 264 n.4.

112. For a discussion of oral argument in the *Sullivan* case, *see* BRANCH, PILLAR OF FIRE, *supra* note 22, at 204–08; HALL & UROFSKY, *supra* note 5, at 138–59; and LEWIS, *supra* note 5, at 127–39. "If the [J]ustices wanted a reminder of the potential consequences of [*Sullivan*] as they gathered for oral arguments, they only had to look out into the audience, where Martin Luther King Jr. sat among the spectators." SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 222 (2010).

a broader contention that the First Amendment does not protect libel.¹¹³ Justice William Brennan, writing for the Court, rejected both of these arguments.¹¹⁴ Justice Brennan wrote that the Court did not consider the advertisement “commercial” in the sense used in *Valentine v. Chrestensen*,¹¹⁵ a case involving the distribution of handbills containing a commercial message on one side and a protest against certain government action on the other. Here, the Court said the advertisement in the *Times* “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”¹¹⁶

Although counsel for Sullivan cited numerous cases supporting the proposition that the First Amendment does not protect libel, the Court rejected the analogy to these cases because none dealt with “the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.”¹¹⁷ The Court said that it was thus free of precedent in deciding the question and held that like “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.”¹¹⁸

The Court then looked at the Alabama courts’ application of the rule of libel to the facts in the case. After comparing the Alabama law of criminal libel with its civil counterpart,¹¹⁹ the Court concluded that the state was trying to use its civil law to exact a punishment forbidden by its criminal law.¹²⁰ This, the Court said, violated the First and Fourteenth Amendments. Specifically, the Court articulated an actual malice standard, stating that

[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.¹²¹

113. Brief for Respondent at 28–38, *Sullivan*, 376 U.S. 254 (No. 39).

114. *Sullivan*, 376 U.S. at 266. For an analysis of Justice Brennan’s opinion, see HALL & UROFSKY, *supra* note 5, at 172–79; and LEWIS, *supra* note 5, at 140–52.

115. 316 U.S. 52 (1942).

116. *Sullivan*, 376 U.S. at 266.

117. *Id.* at 268.

118. *Id.* at 269.

119. *Id.* at 277–78.

120. *Id.* at 277.

121. *Id.* at 279–80.

It is this actual malice test that has often been considered the basis of the Court's criteria for recovery by public officials in defamation cases. Although the term actual malice had been used by the Times in its brief,¹²² it was used in the sense of actual intent to cause the harmful result. The Court, however, expanded this meaning to include not only knowledge of the falsity of the statement, but also "reckless disregard" of the truth.¹²³

Because the Alabama courts had not applied this actual malice test to the facts, the Supreme Court reversed the decision of the Alabama Supreme Court and remanded the case.¹²⁴ The Court, however, then took the unusual step of reviewing the facts of the case to determine whether the evidence would support a libel verdict. The Court concluded that while the Times might have been negligent in not discovering the misstatements in the advertisement, the evidence was not sufficient to satisfy the test of actual malice.¹²⁵ As to the four Alabama ministers, the Court found that even if they had authorized the use of their names in the advertisement, there was no evidence to show actual malice on their part.¹²⁶ Thus, even if Sullivan wished to pursue the cases again on remand, the Court effectively precluded it from doing so.

Justice Douglas joined the concurring opinions of Justices Black and Goldberg, arguing that the majority did not go far enough to provide adequate protection for critics of official conduct.¹²⁷ Those three Justices would have created an absolute privilege, whereas the majority created a qualified privilege, which could be overcome by proof of actual malice. Justice Goldberg, however, would have retained an area of private life in which public officials would have the benefits of the ordinary rules of defamation.¹²⁸

122. Brief for Petitioner at 31, 55, *Sullivan*, 376 U.S. 254 (No. 39).

123. *Sullivan*, 376 U.S. at 280.

124. *Id.* at 292.

125. *Id.* at 286.

126. *Id.* Not everyone credits the civil rights movement as the catalyst for the *Sullivan* decision. For example, Bruce Sanford has written,

Some commentators have credited the civil rights movement and the political context of the case with prompting the Court's landmark decision. The observation seems parochial since scrutiny of Justice Brennan's opinion . . . reveals that the Justices' panorama was far broader. In 1964, the Court could not help but be struck by the antiquated nature of the common law of defamation and its hopeless inadequacy in dealing with the semantic excesses of a society undergoing dizzying social, economic and political change, including, for one thing, desegregation.

BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 1.1, at 1 n.1 (2d ed. Supp. 2012).

127. *Sullivan*, 376 U.S. at 293 (Black, J., concurring); *Id.* at 297 (Goldberg, J., concurring).

128. *Sullivan*, 376 U.S. at 301–02.

IV. THE ACTUAL MALICE STANDARD: ITS ORIGINS

In announcing its actual malice standard, the Supreme Court cited what had previously been the minority rule in the law of defamation since the nineteenth century. Before *New York Times v. Sullivan* was decided, only ten states¹²⁹ applied an actual malice test to conditional or qualified privilege cases—those in which the privilege may be overridden or foreclosed.¹³⁰

A. *The Actual Malice Standard: A Product of the Common Law*

In later years, Justice Brennan would recall that his clerks discovered the opinion's "actual malice" language,¹³¹ but in fact, it was contained in Herbert Wechsler's brief.¹³² The *Sullivan* opinion borrowed its reasoning for the actual malice test from a 1908 Kansas case, *Coleman v. MacLennan*.¹³³ In *Coleman*, a state attorney general running for reelection sued the Topeka State Journal for libel after an article suggested misconduct by Coleman in connection with a school fund transaction.¹³⁴ In finding that the article was privileged, Justice Rousseau Burch of the Kansas Supreme Court reasoned that

it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast,

129. Arizona, California, Iowa, Kansas, Michigan, Minnesota, North Carolina, New Hampshire, South Dakota, and West Virginia applied the actual malice test. *See, e.g.*, *Connor v. Timothy*, 33 P.2d 293, 295 (Ariz. 1934); *Snively v. Record Publ'g Co.*, 198 P. 1, 5 (Cal. 1921); *Salinger v. Cowles*, 191 N.W. 167, 174 (Iowa 1923); *Coleman v. MacLennan*, 98 P. 281, 292 (Kan. 1908); *Lawrence v. Fox*, 97 N.W.2d 719, 723 (Mich. 1959); *Friedell v. Blakely Printing Co.*, 203 N.W. 974, 975 (Minn. 1925); *Lafferty v. Houlihan*, 121 A. 92, 95 (N.H. 1923); *Lewis v. Carr*, 101 S.E. 97, 98 (N.C. 1919); *McLean v. Merriman*, 175 N.W. 878, 880 (S.D. 1920); *Bailey v. Charleston Mail Ass'n*, 27 S.E.2d 837, 840 (W. Va. 1943). Four other states recognized a similar privilege, but had not enunciated the standard as clearly: Connecticut, Nebraska, Utah, and Vermont. *See, e.g.*, *Moynahan v. Waterbury Republican, Inc.*, 102 A. 653, 654 (Conn. 1918); *Estelle v. Daily News Publ'g Co.*, 164 N.W. 558, 559 (Neb. 1917); *Williams v. Standard-Examiner Publ'g Co.*, 27 P.2d 1, 2 (Utah 1933); *Posnett v. Marble*, 20 A. 813, 814 (Vt. 1890). *See generally* Deckle McLean, *Origins of the Actual Malice Test*, 62 JOURNALISM Q. 750, 751 (1985). The author stated: "The *Coleman* case . . . is not remarkable among early malice libel cases, and the clarity of the opinion no greater than that of the earlier Kansas opinion in *Balch*, or some other early cases." *Id.*; *see also* *State v. Balch*, 2 P. 609, 614 (Kan. 1884). In *Balch*, the Kansas Supreme Court held that "[m]alice in such cases need not be hatred or ill will, but any reckless or wanton disposition to do a wrongful act without excuse of justification." *Balch*, 2 P. at 613.

130. *See generally* 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 9:1 (4th ed. 2014) (Rationale of Qualified Privilege and General Principles).

131. LEVINE & WERMIEL, *supra* note 3, at 18 (citing STERN & WERMIEL, *supra* note 112, at 224).

132. *See* Brief for Petitioner, *supra* note 122, at 54 n.*.

133. *Sullivan*, 376 U.S. at 281 (quoting *Coleman*, 98 P. at 286); *see also* LEWIS, *supra* note 5, at 120.

134. 98 P. at 281.

and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.¹³⁵

However, the meaning of actual malice varied widely before the *Sullivan* opinion.

In *Coleman*, the Kansas Supreme Court defined “malice” as “evil mindedness,” which is determined from

an interpretation of the writing, its malignity, or intemperance by showing recklessness in making the charge, pernicious activity in circulating or repeating it, its falsity, the situation and relations of the parties, the facts and circumstances surrounding the publication, and by other evidence appropriate to a charge of bad motives as in other cases.¹³⁶

So, like many courts of that time, the *Coleman* court generally extended this privilege only to discussion of the character of candidates for public office, rather than the broader application to “public officials” in *Sullivan*.¹³⁷ The *Coleman* court’s actual malice standard¹³⁸

135. *Sullivan*, 376 U.S. at 281 (quoting *Coleman*, 98 P. at 286).

136. *Coleman*, 98 P. at 292.

137. *Id.* at 281.

138. The *Coleman* court also applied the reasoning of two nineteenth century British cases. The first, *The King v. J. Wright*, (1799) 101 Eng. Rep. 1396 (K.B.) 1398; 8 T.R. 293, 296, was an early case regarding the policy behind the “fair report” privilege in the reporting of judicial proceedings. The fair report privilege grants the right to report defamatory statements made in official or public proceedings without liability, provided the report is fair and accurate. See RESTATEMENT (SECOND) OF TORTS § 611 (1977).

In *Wright*, the court held that defamatory statements made in a judicial proceeding could be published because

[t]hough the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

101 Eng. Rep. at 1399; 8 T.R. at 298. The court thus found that the societal interest in subjecting official actions and statements to public scrutiny outweighs the defamatory harm that would otherwise be actionable. *Id.*

The *Coleman* court also considered the public policy supporting publication as articulated in *Davison v. Duncan*. *Coleman*, 98 P. at 286 (citing *Davison v. Duncan* (1857) 119 Eng. Rep. 1233 (Q.B.) 1233; 7 E1. & B1.229, 231). *Davison* is one of the earlier cases to consider malice as a component of conditional privilege. 119 Eng. Rep. at 1233 7 E1. & B1. at 231. In *Davison*, commissioners discussed the town cemetery and the cemetery chaplain at a town meeting. *Id.* The cemetery chaplain had obtained his cemetery license from the bishop, and the commissioners mentioned that the plaintiff, the bishop’s secretary, helped the chaplain get the license by making misrepresentations to the bishop. *Id.* The defendant, an editor of a newspaper, published a report of the meeting, including the commentary about the plaintiff, and the plaintiff

was based on Kansas case law¹³⁹ and opinions from other American jurisdictions analyzing conditional privilege and the applicable malice standard.¹⁴⁰

American courts continued to grapple with these issues.¹⁴¹ In the nineteenth and early twentieth centuries, courts usually restricted the use of the actual malice test to defamation cases involving candidates for political office or public officials. Courts stressed the idea that an individual running for public office “throws out a challenge to the entire body of voters . . . to canvass his qualifications and fitness for the position.”¹⁴² Emphasizing public policy concerns, courts reasoned that newspapers “are supported by, and are published with a view to the dissemination of useful knowledge among, the people.”¹⁴³ Thus, the fitness and qualifications of a candidate for an elected office may be scrutinized by interested newspapers, and much latitude must be

sued for libel. *Id.* The court, writing in seriatim, found for the plaintiff, holding that “[t]he publication of matter defamatory of an individual is not privileged because the libel is contained in a fair report in a newspaper of what happened at a public meeting.” *Id.* However, in the opinion, the judges began to refine the contours of conditional privilege and malice, considering whether the statement was true; whether the general public had an interest in what happened at the meeting; whether the privilege attached to testimony in court extends to *all* public meetings, or just to judicial proceedings; and whether the newspaper editor acted with malice, and whether that mattered. *Id.* at 1233–34; 7 *El. & Bl.* at 229–32.

These British cases were cited by several other American courts in the late nineteenth and early twentieth centuries as they defined the contours of actual malice in the context of conditional privilege. *See, e.g.,* *Star Publ'g Co. v. Donahoe*, 58 A. 513, 521 (Del. 1904) (citing *Davison*, 119 *Eng. Rep.* at 1233; 7 *El. & Bl.* at 231); *Jones, Varnum & Co. v. Townsend's Adm'x*, 21 Fla. 431, 450 (1885) (same); *Sweeney v. Baker*, 13 W. Va. 158, 183 (1878) (same); *Todd v. Every Evening Printing Co.*, 62 A. 1089, 1090 (Del. 1906) (citing *Wright*, 101 *Eng. Rep.* at 1399; 8 T.R. at 298); *Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377, 383 (1877) (same); *Paducah Newspapers v. Bratcher*, 118 S.W.2d 178, 179 (Ky. 1937) (same); *Johns v. Press Publ'g Co.*, 19 N.Y.S. 3, 4 (N.Y. Sup. Ct. 1892) (same); *Isley v. Sentinel Co.*, 113 N.W. 425, 426 (Wis. 1907) (same); *Scripps v. Reilly*, 38 Mich. 10, 11 (1878) (same).

139. *See, e.g.,* *Redgate v. Roush*, 59 P. 1050, 1050 (Kan. 1900) (holding that when the plaintiff public officer sought damages for defamation, it was his burden to establish actual malice, which could include “vilification, extravagant language, or evidence of a wrong motive”); *Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 384, 391 (1881) (holding that a person acts with actual malice when, “well knowing [a publication's] falsity, [she] maliciously publishe[s] it for the purpose of bringing the plaintiff into public scandal, infamy[,] and disgrace”).

140. Jerome Lawrence Merin, *The Supreme Court and Libel*, 11 *WM. & MARY L. REV.* 371, 392 (1969).

141. *See* Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 *COLUM. L. REV.* 875, 891 (1949).

142. *Briggs v. Garrett*, 2 A. 513, 518 (Pa. 1886) (extending privilege to published statements regarding a judge in an election). *See, e.g.,* *Crane v. Waters*, 10 F. 619, 620 (C.C.D. Mass. 1882) (extending privilege to publication about candidate for director of the railroad); *Carpenter v. Bailey*, 53 N.H. 590, 590 (1874) (same for paymaster of the Navy); *Myers v. Longstaff*, 84 N.W. 233, 234 (S.D. 1900) (same for candidate for mayor); *Express Printing Co. v. Copeland*, 64 Tex. 354, 355 (1885) (same).

143. *Express Printing*, 64 Tex. at 358.

allowed in publishing charges affecting a candidate's fitness, so long as it is done in good faith and in the honest belief that the matter published is true.¹⁴⁴

Courts have also maintained that actual malice means a statement "made for the purpose of inflicting an injury," reasoning that the actual malice test would ensure that the "public station may ever be purified, never vilified."¹⁴⁵ Thus, while the Court's holding in *Sullivan* built upon the minority rule for defamation cases involving conditional privilege, the Court's actual malice standard still marked a significant departure from the nineteenth and early twentieth centuries minority rule.¹⁴⁶

Before *Sullivan*, the majority of courts followed the defamation rule announced by the Sixth Circuit in *Post Publishing Co. v. Hallam*.¹⁴⁷ In that case, the Sixth Circuit held that to escape liability for libel, a critic of official conduct had the burden of proving the truth of the facts he published because "[t]he question in the case was not what the plaintiff intended to charge in the article, but what in fact he did charge, and what the public who were to read the article might reasonably suppose he intended to charge."¹⁴⁸ The reasoning of the *Post Publishing* court directly contradicted the *Coleman* court's logic:

[A] person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy, by due course of law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolable than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation, and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain it.¹⁴⁹

The policy consideration in *Coleman* ultimately triumphed when the *Sullivan* court adopted it as a guidepost.

144. *Myers*, 84 N.W. at 237; see also *Mott v. Dawson*, 46 Iowa 533, 537 (1877) (applying the privilege when the defendant spoke "with the honest purpose of protecting the public from [the] plaintiff's supposed dishonesty").

145. *Shurtleff v. Stevens*, 51 Vt. 499, 519 (1879).

146. See McLean, *supra* note 129, at 750–51. See generally W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *Times v. Sullivan* 47–74 (1989).

147. 59 F. 530 (6th Cir. 1893).

148. *Id.* at 539.

149. *Id.* at 542 (quoting *Post Publ'g Co. v. Moloney*, 33 N.E. 921, 926 (Ohio 1893)).

B. *Pre-Sullivan Actual Malice Was Common Law Malice*

Despite *Coleman*'s foundational role in *Sullivan*, "*Coleman* does not align well with the actual malice rule described in *Sullivan*."¹⁵⁰ The *Coleman* actual malice standard required proof of "evil mindedness."¹⁵¹ "Evil mindedness," or ill will, is the hallmark of common law actual malice.¹⁵² Pre-*Sullivan*, the definition of malice was not fixed, but most definitions "were directly related to the motivation behind the publication of defamatory material—improper motive, hostility in publishing, lack of good faith, and the like."¹⁵³ Thus, while there was no firm definition of actual malice, there was a generic common law concept of actual malice.

The "actual" in common law actual malice stemmed from the evolution of the common law of defamation:

Before 1825[,] proof of "malice," in the sense of spite or ill will, was an essential element of the plaintiff's case. The pleading of malice tended, however, to become a formality. In *Bromage v. Prosser*, the court held that malice would be implied as a matter of law from the speaking or writing of the defamatory words unless the reason for the speaking or writing was prima facie excusable.¹⁵⁴

After *Bromage*, "implied malice" referred to the element of a defamation cause of action "provided by law to the plaintiff for establishing his prima facie case."¹⁵⁵ Actual malice, on the other hand, was "the state of mind which the plaintiff might prove to overcome a conditional privilege (or establish his entitlement to punitive damages)."¹⁵⁶ And, "[i]n the dictionary of the common law 'actual malice' meant spite or ill will."¹⁵⁷ Thus, the primary difference between the generic common law concept of actual malice and *Sullivan* actual malice is ill will: common law actual malice necessarily involves some element of ill will, whereas *Sullivan* actual malice requires no ill will at all.¹⁵⁸ Common law actual malice had "a lower threshold" than *Sullivan* ac-

150. Len Niehoff, *Three Puzzling Things About New York Times v. Sullivan: Beginning the Anniversary Conversation*, A.B.A. COMM. LAW., June 2013, at 10, 13.

151. *Coleman v. MacLennon*, 98 P. 281, 281–82 (Kan. 1908).

152. WAT HOPKINS, *supra* note 146, at 68.

153. *Id.* at 75.

154. Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 n.15 (1975) (citations omitted).

155. *Id.* at 1370.

156. *Id.*

157. *Id.*

158. WAT HOPKINS, *supra* note 146, at 68.

tual malice, since “[t]he burden of proving common law actual malice could be met by showing ill will or hatred.”¹⁵⁹

In addition to this “lower threshold,” common law actual malice and *Sullivan* actual malice can be distinguished based on the attitude of the publisher toward the subject of publication. At common law,

[t]he existence or absence of malice turn[ed] on whether the publisher had ill feelings toward the subject, or whether he had a desire to do harm to the subject. That desire to do harm could be an obtrusive desire, or it could be implied, based upon the bad faith of or abuse by the publisher. [*Sullivan*] Actual Malice is also related to bad faith or abuse of privilege. It is not directly related to the attitude of the publisher toward the subject of the publication. [*Sullivan*] Actual Malice is determined based on the attitude of the publisher to the material he has published—whether he has gathered and published the material in good faith.¹⁶⁰

While the Supreme Court in *Sullivan* did not create the concept of actual malice, it refined it by giving it a set formula, something that the common law concept was missing. After *Sullivan*, the Court clarified that statutes and cases like *Coleman*, which applied the generic common law concept of actual malice, “incorporate constitutionally invalid standards in the context of criticism of the official conduct of public officials.”¹⁶¹

V. THE ACTUAL MALICE STANDARD: ITS SUPPORTERS AND CRITICS

A number of universities and law reviews have marked *Sullivan*’s fiftieth anniversary with symposia focusing on the decision.¹⁶² Newspapers and magazine editorials also noted the occasion, and it is not surprising that many of them took the occasion to praise Justice Brennan’s opinion and the adoption of the actual malice standard.¹⁶³ How-

159. *Id.* The author notes, however, that “some methods of demonstrating ill will were similar to those used in demonstrating Times Rule Actual Malice, the burden for the latter was much greater.” *Id.*

160. *Id.*

161. *Garrison v. Louisiana*, 379 U.S. 64, 77–78 (1964); see also *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam); LEVINE & WERMIEL, *supra* note 3, at 45–46.

162. Among the symposia were Symposium, *The Press and the Constitution 50 Years After New York Times v. Sullivan*, 48 GA. L. REV. 691 (2014); *Breaux Symposium: 50 Years After Times v. Sullivan*, GALLEYWEST ALUMNI NEWS, (La. State Univ., Reilly Center for Media & Public Affairs), Spring, 2014; Univ. of Carolina School of Law, *New York Times v. Sullivan, 50 Years Later*, AM. CONST. SOC’Y (Oct. 12, 2013), <http://www.acslaw.org/events/2013-10-12/new-york-times-v-sullivan-50-years-later>; and Natasha Duarte, *Symposium Will Contemplate 50 Years of Press Freedom*, U.N.C. CENTER FOR MEDIA L. & PAGES (Oct. 11, 2013), <http://media.law.unc.edu/2013/10/symposium-will-comtemplate-50-years-of-press-freedom>.

163. See, e.g., Anna Stolley Persky, *A Weakened Shield? 50 Years After New York Times v. Sullivan*, *Journalists Wonder Whether Courts Still Value Watchdog Role*, A.B.A. J., Mar. 2014, at

ever, that standard has not been without its critics, both academic and judicial, who have focused on what they perceive to be the decision's adverse effect on reputations, defamation litigation, public civility, and the political process.¹⁶⁴

In 1993, Professors Russell Weaver and Geoffrey Bennett asked the provocative question: "Is the *New York Times* 'actual malice' standard really necessary?" and answered in the affirmative after a comparative examination of the American and British approaches to defamation law.¹⁶⁵ In their view, the Court adopted the actual malice standard because it concluded that it was critical for the functioning of the political process and necessary to provide "breathing space" for free and robust debate, which inevitably results in erroneous statements.¹⁶⁶ At the same time, Weaver and Bennett felt that the standard "may no longer provide the breathing space that it once did."¹⁶⁷ The authors offered two pieces of evidence supporting that view: first, the rise in the number of defamation lawsuits after the decision; and second, the increase in litigation expenses resulting from plaintiffs seeking extensive discovery of the editorial decision-making process.¹⁶⁸

57 (calling *Sullivan* the decision that "altered the nation's course on many issues, including the First Amendment"); Editorial, *The Uninhibited Press, 50 Years Later*, N.Y. TIMES, Mar. 9, 2014, at 10 (stating that *Sullivan* "represents the clearest and most forceful defense of press freedom in American history"); Andrew Cohen, *Today Is the 50th Anniversary of the (Re-)Birth of the First Amendment*, ATLANTIC (Mar. 9, 2014, 2:18 PM), <http://www.theatlantic.com/national/archive/2014/03/today-is-the-50th-anniversary-of-the-re-birth-of-the-first-amendment/284311>; Richard Labunski, Opinion, *How Fares Free Speech Half A Century Since Landmark Case?*, PROVIDENCE J. (Mar. 4, 2014, 1:00 AM), <http://www.providencejournal.com/opinion/commentary/2014/0304-richard-labunski-how-fares-free-speech-half-a-century-since-landmark-case.ece> (calling *Sullivan* "a landmark [case] defending our right to vigorously debate public issues without being dragged into court").

164. WAT HOPKINS, *supra* note 146, at 168–97 (detailing four primary criticisms of the actual malice standard).

165. Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153 (1993).

166. *Id.* at 1153–54. For a discussion of the assumptions underlying the *Sullivan* decision, see *id.* at 1157–61.

167. *Id.* at 1154, 1179–82.

168. *Id.* at 1154–55. The litigation statistics, however, have changed in recent years. The 2014 Media Law Resource Center Report shows a significant drop in media libel defamation cases from the 1980s through 2013. MEDIA LAW RES. CENTER, 2014 REPORT ON TRIALS AND DAMAGES (2014); see also Press Release, Media Law Res. Center, MLRC Study Shows Sharp Decrease in Number of Media Trials for Libel and Privacy (Jan. 2014), available at http://www.medialaw.org/images/stories/MLRC_Bulletin/2014/Bulletin2014Issue1/mlrtrialreportrelease.pdf. The number of trials decreased from 268 in the 1980s to 137 from 2000 to 2009, a drop of 49%. MEDIA LAW RES. CENTER, *supra*, at 34–35. The majority of the trials from 1980 to 2013 involved newspapers (54.3%), but trials involving newspapers showed the greatest decline of any media defendant category. *Id.* The cases involving newspapers dropped from 164 in the 1980s to 52 in

In an attempt to understand the potential impact of the absence of an actual malice standard, Weaver and Bennett examined defamation law in Great Britain, a country with a free and vigorous press but without the *Sullivan* standard.¹⁶⁹ They found that the British press was far more timid and much less robust than the media in the United States.¹⁷⁰ This led them to conclude that, despite its drawbacks, the Supreme Court was correct in adopting the actual malice standard.¹⁷¹ Weaver and Bennett supported their view with interviews of journalists and editors in the United States,¹⁷² from which the authors concluded that the actual malice standard does not impose an undue burden on the press and that there is no evidence of “a serious chilling effect” on the media.¹⁷³

In March 2014, Harvard Law School Professor Cass R. Sunstein, the former head of the Office of Information and Regulatory Affairs and now a member of the National Security Agency’s surveillance review board (and thus a “public figure”), wrote an online article about what he considered to be the “dark side of *New York Times v. Sullivan*.”¹⁷⁴ Sunstein began by calling the decision “the most important free speech ruling in the history of the U.S. Supreme Court.”¹⁷⁵ In his view, however, while the Court “granted indispensable breathing space for speakers,” it also created a continuing problem of “public civility” and “democratic self-government.”¹⁷⁶ Sunstein saw “public civility” endangered by the actual malice standard, which he believes “sets an exceedingly high bar” for those seeking to recover for the harm caused by intentionally and negligently false statements.¹⁷⁷ “Those who spread falsehoods often do so unknowingly, and terrible sloppiness need not count as recklessness.”¹⁷⁸ Because of the high standard for recovery, “[e]ven if you’re negligent—that is, you should have known what you’re saying was untrue and defamatory—you are likely to be protected.”¹⁷⁹

the first decade of the 2000s, a 68% decrease, which is much greater than the total decline in trials. *Id.*

169. Weaver & Bennett, *supra* note 165, at 1161–79.

170. *Id.* at 1189.

171. *Id.*

172. *Id.* at 1182–89.

173. *Id.* at 1189–90.

174. Cass R. Sunstein, *The Dark Side of New York Times v. Sullivan*, BLOOMBERGVIEW (Mar. 25, 2014, 9:23 AM), <http://www.bloombergview.com/articles/2014-03-25/the-dark-side-of-new-york-times-v-sullivan>.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

Sunstein also argued that the actual malice standard harms “democratic self-government” by protecting “all sorts of false allegations,” such as those about “birth certificates, drug abuse, sexual misconduct or income tax fraud.” As a result, “those who seek public office put their reputation at immediate risk.” In addition, “[t]alk show hosts, bloggers and users of social media can spread ugly falsehoods in an instant—exposing citizens to lies that may well cause them to look on their leaders with unjustified suspicion.”

Although Sunstein was critical of many of the consequences of the decision and declined to celebrate its anniversary, he concluded that “nonetheless, the [C]ourt got the balance right in . . . *Sullivan*” because “a free society cannot have uninhibited, robust, and wide-open debate without breathing room for falsehoods.”

The Weaver and Bennett and Sunstein articles are examples of critics of the actual malice standard who feel that its benefits make it worth retaining. However, others have argued for abolishing the standard, or at least significantly modifying it. One of the first was Professor Richard Epstein, who posed the question: “Was *New York Times v. Sullivan* wrong?” in a 1986 article.¹⁸⁰ While he has no doubt that the case was decided correctly on the facts, Epstein feels that “as a matter of principle the decision is far more dubious.”¹⁸¹ Instead of clarifying the law of defamation, *Sullivan* made the area more controversial. He cited data from the Libel Defense Resource Center indicating that “the onslaught of defamation actions is greater in number and severity than it was in the ‘bad old days’ of common law libel.”¹⁸²

For Epstein, one of the reasons for the increase in defamation litigation was that, while the *Sullivan* decision was a necessary victory for the civil rights movement, “the decision has not stood the test of time well when applied to the more mundane cases of defamation arising with public figures and officials.”¹⁸³ His solution to that problem is to abandon the actual malice standard and to return to the older common law rules governing defamation.¹⁸⁴ He argues that those rules, “crafted over many centuries,” strike a better balance between claims of freedom of speech and the protection of individual reputation than the actual malice standard which replaced them.¹⁸⁵ For Epstein, the

180. Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

181. *Id.* at 817.

182. *Id.* at 783. But see MEDIA LAW RES. CENTER, *supra* note 168, for the recent media defamation statistics.

183. Epstein, *supra* note 180, at 787.

184. *Id.* at 814–17.

185. *Id.* at 791.

final judgment of the desirability of the actual malice standard rests on the social consequences of the test. Any variation from the common law rules must take into account liability and damages, litigation costs, uncertainty, risk aversion, and reputational effects.¹⁸⁶ In all of those areas, he concludes that the balance of free speech and reputational harm favors the application of the common law rules rather than the actual malice standard.¹⁸⁷

Instead of adopting Epstein's call to replace the actual malice standard with the common law principles of defamation, Benjamin Barron set out "a proposal to rescue *New York Times v. Sullivan* by promoting a responsible press."¹⁸⁸ In his 2007 article, Barron posited that the actual malice standard overprotects speech and underprotects reputation by encouraging irresponsible practices by the media and removing any incentive for journalists to investigate and report stories accurately.¹⁸⁹ Barron argued that the Supreme Court "must amend the actual malice standard to require or encourage responsible journalistic practices."¹⁹⁰ To achieve that goal, he first set forth a proposal for the creation of a declaratory judgment proceeding in which a court could find that specified statements were false. The purpose of such a proceeding is to rectify a plaintiff's injured reputation without imposing damages on the media.¹⁹¹ Barron admitted, however, that if there is no fear of liability in such a proceeding, the media will not have an incentive to produce factual reports.¹⁹² This led him to examine an "elastic ten-factor balancing test" created by the British House of Lords in *Reynolds v. Times Newspapers Ltd.*,¹⁹³ which balances the public importance of the speech's subject matter against the reasonableness of the speaker's conduct.¹⁹⁴ While he felt that the *Reynolds* test would compel newspapers to follow a minimum standard of responsible conduct, he saw two problems with it: first, because of the complexity of the test, it would not reduce litigation costs, which have

186. *Id.* at 803–13.

187. *Id.* at 817.

188. Benjamin Barron, *A Proposal To Rescue New York Times v. Sullivan by Promoting a Responsible Press*, 57 AM. U. L. REV. 73 (2007).

189. *Id.* at 84–93.

190. *Id.* at 104.

191. *Id.* at 106–07.

192. *Id.* at 107.

193. [2001] 2 A.C. 127 (H.L.) 205 (appeal taken from N. Ir.).

194. Barron, *supra* note 188, at 110–14. The ten factors are (1) the seriousness of the allegation; (2) the nature of the information and the extent to which the subject matter is of public concern; (3) the source of the information; (4) 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; (8) whether the article contains the gist of the plaintiff's side of the story; (9) the tone of the article; and (10) the circumstances of publication. *Id.* at 110–11.

a chilling effect on the media; and second, the test is so vague that it does not permit the media to predict the outcome of defamation suits.¹⁹⁵

These two problems led Barron to make his own proposal: a blend of the declaratory judgment proceeding and the *Reynolds* multifactor test. Under his approach, a court in a declaratory judgment proceeding would consider seven factors: (1) the amount of investigation weighed against the public importance of the statement and the magnitude of foreseeable harm to reputation; (2) the degree to which the allegedly defamatory statements were fact-checked, weighed against the reliability of the information's sources; (3) the number of editors involved with the story and the amount of time they spent reviewing it; (4) the time sensitivity of the story relative to its public importance; (5) whether comment was requested from the plaintiff in a timely fashion; (6) whether the newspaper retracted the story and whether the retraction was relative to the prominence of the story's original publication; and (7) whether the evidence suggests that the newspaper was aware of the falsity of the story before publishing it.¹⁹⁶ Barron believes his proposal would give a media defendant the option of obtaining a pretrial determination that it followed responsible journalistic procedures.¹⁹⁷ If successful, the lawsuit would be terminated and the media would avoid liability. But, if the media was unsuccessful, the litigation would proceed under the *Sullivan* actual malice standard.¹⁹⁸

Barron is not alone in scrutinizing *Sullivan's* effect on journalism. In 1993, then-law professor Elena Kagan wrote a review of Anthony Lewis's book on *New York Times v. Sullivan*, which she entitled "A Libel Story: *Sullivan* Then and Now."¹⁹⁹ Kagan (whose appointment to the Supreme Court was confirmed in 2010) praised *Sullivan* as "the Court's strongest statement . . . of core First Amendment values";²⁰⁰ however, she also focused on the problems produced by the actual malice standard. Unlike other authors, questions about the consequences of that standard did not lead Kagan to conclude that *Sullivan* was wrong or to urge that it should be reconsidered. Instead, they caused her to focus on what she called the "questionable extensions"

195. *Id.* at 113.

196. *Id.* at 114–16.

197. *Id.* at 118–19.

198. *Id.* at 114.

199. Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 *LAW & SOC. INQUIRY* 197 (1993) (reviewing ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991)).

200. *Id.* at 216.

of the decision to public figures and to cases which had little connection with the factual situation in *Sullivan*.²⁰¹ She suggested focusing on the underpinning of the decision, limiting the actual malice standard to speech on matters of public importance or cases involving powerful individuals.²⁰²

Kagan was troubled by what she called “the arresting quiet at the center” of *Sullivan*: the failure of the Justices to criticize, debate, or question the actual malice standard during deliberations or in the opinion itself.²⁰³ Like Richard Epstein, Kagan questioned why the Court adopted the actual malice standard rather than constitutionalizing the common law rules of defamation, which she thought would have been sufficient to reverse the decision of the Alabama Supreme Court.²⁰⁴ Although she felt that the Supreme Court’s adoption of the actual malice standard was justified as a response to the attempt by Alabama officials and courts to use defamation law to stifle criticism of public officials, Kagan viewed using that standard in other cases as imposing serious costs to reputation and to the nature and quality of public discourse.²⁰⁵ These consequences raised the question of whether the Court had expanded the decision too far.²⁰⁶

For Kagan, “[t]he obvious dark side of the *Sullivan* standard is that it allows grievous reputational damage to occur without monetary compensation or any other effective remedy.”²⁰⁷ While Anthony Lewis viewed such harm as an unfortunate but necessary consequence of uninhibited comment concerning public officials, Kagan asked: “Is uninhibited defamatory comment an unambiguous social good? That is, does it truly enhance public discourse?”²⁰⁸ She drew attention to the fact that the *Sullivan* decision promotes false statements of fact, which can distort public debate.²⁰⁹ She added that the problem “may go even deeper: it may involve not merely the promotion of false statements but also a more general tendency to sensationalize political discourse.”²¹⁰ That led her to ask, but not answer, whether *Sullivan* bears some responsibility for “increased press arrogance.”²¹¹

201. *Id.* at 208–11.

202. *Id.* at 212–15.

203. *Id.* at 201–02.

204. *Id.* at 202–03.

205. Kagan, *supra* note 199, at 203–05.

206. *Id.* at 204–05.

207. *Id.* at 205.

208. *Id.* at 206.

209. *Id.*

210. *Id.* at 207.

211. Kagan, *supra* note 199, at 208.

Judicial calls for the reexamination of the actual malice standard began in 1985 in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*²¹² In a concurring opinion, Chief Justice Warren Burger agreed with the plurality that the actual malice standard did not apply to a private company when the challenged expression was unrelated to a matter of public concern.²¹³ In his view, the *Sullivan* decision equated “reckless disregard of the truth” with malice. “[T]his should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue.”²¹⁴ However, because the Court did not adopt that language in *Sullivan*, Chief Justice Burger felt that the decision should be reexamined.²¹⁵

Although Justice Byron White joined in the *Sullivan* opinion, he soon came to have doubts about the soundness of the Court’s assumptions underlying the actual malice standard. In the 1974 case *Gertz v. Robert Welch, Inc.*,²¹⁶ Justice White dissented on the ground that the common law remedies for defamation should be retained for private plaintiffs. By the time of his concurring opinion in *Dun & Bradstreet* in 1984, Justice White had become convinced that the *Sullivan* Court struck an unwise balance between the public’s interest in being fully informed about public officials and affairs, and the competing interest of those who have been defamed in vindicating their reputation.²¹⁷ As a result of the actual malice standard, if a person sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof. Justice White disagreed with that outcome because if the plaintiff loses before trial, the public is left to conclude that the challenged statement was true.²¹⁸ The public’s only chance of being accurately informed of the truth or falsity of the statement is the public official’s own ability to counter the lie, unaided by courts. Thus, for Justice White, the actual malice standard has two evils: first, the stream of information about public officials and public affairs is polluted, and often remains polluted, by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts.²¹⁹ In terms of the First Amendment

212. 472 U.S. 749 (1985).

213. *Id.* at 764 (Burger, C.J., concurring).

214. *Id.*

215. *Id.*

216. 418 U.S. 323 (1974).

217. *Dun & Bradstreet*, 472 U.S. at 767 (White, J., concurring).

218. *Id.* at 768.

219. *Id.* at 769.

and reputational interest at stake, Justice White felt those evils were “grossly perverse results.”²²⁰

Instead of adopting the actual malice standard, Justice White argued that the *Sullivan* Court could have achieved its goals of providing “breathing room for speakers” and protecting the media from “the chilling danger of numerous large damages awards” by retaining the common law rules of defamation but limiting the amount of damages that a public figure could recover, or by prohibiting damages entirely.²²¹ Had the Court done so, a public official could prove falsity and attain a judgment to that effect.²²² His reputation would be vindicated, the misinformation would be countered, and the press would not be unduly threatened with damages.²²³

Although Justices Warren E. Burger and Byron R. White called for reconsideration or replacement of the actual malice standard in their concurring opinions in *Dun & Bradstreet*, Justice Antonin Scalia is the only Justice currently on the Court to express support for reversing *Sullivan*. However, he has not done so in the context of a judicial opinion, nor has he indicated whether he favors returning to the common law rules, as does Epstein, or some modified version of them, as proposed by Justice White. In 2007, in a comment published in Norman Pearlstein’s book *Off the Record*,²²⁴ Justice Scalia stated, without elaboration, that he probably would vote to reverse *New York Times v. Sullivan*.²²⁵ Four years later, at the Aspen Institute 2011 Washington Ideas Forum, Justice Scalia interpreted *Sullivan* to mean that

you can libel public figures without liability so long as you are relying on some statement from a reliable source, whether it’s true or not.

Now the old libel law used to be (that) you’re responsible, you say something false that harms somebody’s reputation, we don’t care if it was told to you by nine bishops, you are liable. . . . *New York Times v. Sullivan* just cast that aside because the Court thought in modern society, it’d be a good idea if the press could say a lot of stuff about public figures without having to worry. And that may be correct, that may be right, but if it was right it should have been adopted by the people. It should have been debated in the New York Legislature and the New York Legislature could have

220. *Id.*

221. *Id.* at 772.

222. Justice White also believed that the common law rules should be preserved when the plaintiff is not a public official or public figure. *Id.* at 772.

223. *Dunn & Bradstreet*, 472 U.S. at 771–72.

224. NORMAN PEARLSTEIN, *OFF THE RECORD: THE PRESS, THE GOVERNMENT AND THE WAR OVER ANONYMOUS SOURCES* 77 (2007).

225. *Id.* (“In an interview, Justice Antonin Scalia told me that given the chance, he would probably vote to reverse *New York Times Co. v. Sullivan*.”).

said, “Yes, we’re going to change our libel law.” But the living constitutionalists on the Supreme Court, the Warren Court, simply decided, “Yes, it used to be that . . . George Washington could sue somebody that libeled him, but we don’t think that’s a good idea any more.”²²⁶

In April 2014, Justices Scalia and Ruth Bader Ginsburg were interviewed jointly at the National Press Club on *The Kalb Report*.²²⁷ During the interview, Justice Scalia disagreed with the decision: “It was wrong. . . . [Y]ou cannot sue somebody for libel unless you can prove . . . the person knew it was a lie.” In his view, the framers of the Constitution “would have been appalled” by the decision and the adoption of the actual malice standard for public officials. According to Justice Scalia, the Supreme Court “was revising the Constitution” with its opinion, not interpreting it.²²⁸ Justice Ginsburg disagreed. She felt that if the founding fathers had been around in the 1960s, they would have approved of the decision.²²⁹ Today, she said, the ruling is “well accepted.”²³⁰

VI. THE ACTUAL MALICE STANDARD: ITS APPLICATION

A. *Expanding the Actual Malice Standard*

The criticism directed at *Sullivan* has done little to impede its doctrinal march forward. Over the past fifty years, courts have expanded the scope of the actual malice standard beyond suits for defamation brought by public officials against the media. The Supreme Court has applied the actual malice standard in tort cases based on false light invasion of privacy,²³¹ intentional infliction of emotional distress,²³² and product disparagement.²³³ It has expanded the standard to apply not only to public officials, but also to statements about public figures.²³⁴ Federal appellate courts have applied the actual malice

226. Ken Paulson, *Justice Scalia: Reflections on New York Times v. Sullivan*, FIRST AMENDMENT CENTER (Oct. 11, 2011, 10:37 AM), <http://www.firstamendmentcenter.org/justice-scalia-reflections-on-new-york-times-v-sullivan>.

227. *The Kalb Report: Justices Scalia and Ginsberg on the First Amendment* (C-SPAN television broadcast Apr. 17, 2014), available at <http://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg> (an interview with Justices Ginsburg and Scalia).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

232. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). See generally Boyd C. Farnam, Note, *Free Speech and Freedom from Speech: Hustler Magazine v. Falwell, the New York Times Actual Malice Standard and Intentional Infliction of Emotional Distress*, 63 IND. L.J. 877 (1988).

233. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

234. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967). In *Gertz*, the Court held that private individuals can no longer recover in defa-

standard to cases involving the right of publicity²³⁵ and tortious interference with contract,²³⁶ and to private individuals speaking on matters of public concern.²³⁷ State courts have also adopted the standard in cases involving campaign regulations.²³⁸

With advances in technology, the actual malice standard has been applied in areas never contemplated by Justice Brennan when he wrote the *Sullivan* opinion. In January 2014, the Ninth Circuit applied the standard to a defamation action stemming from a blog post that was critical of a bankruptcy trustee, holding that a blogger was a “journalist” and entitled to First Amendment protection.²³⁹ The opinion demonstrates both the resilience of the *Sullivan* framework and its expanding application to new media.²⁴⁰

In *Obsidian Financial Group, LLC v. Cox*,²⁴¹ the Ninth Circuit considered whether bloggers are entitled to First Amendment protections previously provided to institutional media defendants. The *Cox* case involved Kevin Padrick, a principal of Obsidian Financial Group,

mation by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some “fault,” i.e., at least negligence. 418 U.S. at 347, 350. Even with proof of negligence, damages are not presumed; they have to be proved. *Id.* at 349. In addition, punitive damages are not available without proof of *Sullivan* actual malice. *Id.*

235. See, e.g., *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

236. See, e.g., *Med. Lab Mgmt. Consultants v. ABC, Inc.*, 306 F.3d 806 (9th Cir. 2002); *Jefferson Cnty. Sch. Dist. v. Moody’s Investor’s Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999).

237. See, e.g., *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144 (2d Cir. 2000); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632 (8th Cir. 1986); *Garcia v. Bd. of Educ.*, 777 F.2d 1403 (10th Cir. 1985); *Avins v. White*, 627 F.2d 637 (3d Cir. 1980); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975).

238. See, e.g., *Sharkey v. Fla. Elections Comm’n.*, 90 So. 3d 937 (Fla. Dist. Ct. App. 2012); *McKimm v. Ohio Elections Comm’n.*, 729 N.E.2d 367 (Ohio 2000).

239. *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1292 (9th Cir.), *cert. denied*, 134 S. Ct. 2680 (2014). See generally David L. Hudson Jr., *Blogger Gets Press Pass*, A.B.A. J., July 2014, at 15.

240. Broad application of the actual malice standard, including to blog articles and other new media, will ensure its continued vitality. Unfortunately, the print media directly involved in *Sullivan* has been subject to a continuing decline in members. See PEW RESEARCH CTR., STATE OF THE NEWS MEDIA 2014: OVERVIEW 2–3 (2014) (“[T]otal newspaper advertising revenue in 2012 . . . was down 52% from 2003.”); see also David Carr, *Papers Are Down, and Now Out*, N.Y. TIMES, Aug. 11, 2014, at B1 (“The persistent financial demands of Wall Street have trumped the informational needs of Main Street.”); Christine Haughney, *A News Giant Going It Alone*, N.Y. TIMES, Aug. 4, 2014, at B1 (“The Tribune Company’s publishing unit, including eight newspapers, is being spun off this week, as the future of print remains unclear.”); Christine Haughney & Michael J. de la Merced, *Gannett Plans To Split Up Its Print and Broadcast Businesses*, N.Y. TIMES, Aug. 6, 2014, at B3 (“The splintering of print and television companies in the media industry continued unabated . . .”); Ravi Somaiya, *New York Times Co. Gains Circulation, but Profit Falls 21%*, N.Y. TIMES, July 30, 2014, at B2 (“Increased investments in digital products and a decline in print advertising weighed on the New York Times Company’s second quarter earnings . . .”).

241. 740 F.3d 1284 (9th Cir. 2014).

LLC, a firm that gives advice to businesses in financial distress. When an Obsidian client, Summit Accommodators, Inc., filed for reorganization, the bankruptcy court appointed Padrick as the Chapter 11 trustee. His main task was to gather assets for the firm's clients, whose funds had been misappropriated.

Once Padrick became the trustee, blog publisher Crystal Cox posted on websites she had created "accusing Padrick and Obsidian of fraud, corruption, money laundering, and other illegal activities in connection with the Summit bankruptcy."²⁴² Cox reportedly had made similar allegations in the past, and had sought payments in exchange for retractions.²⁴³ When a cease-and-desist letter from Padrick and Obsidian failed to stop the posts, they sued for defamation. A jury trial involving one blog post resulted in a verdict of \$1.5 million for Padrick and \$1 million for Obsidian in compensatory damages.

Judge Andrew Hurwitz, writing for a unanimous Ninth Circuit panel, considered the level of fault required to establish defamation liability in the case. Much of the analysis centered around *Gertz v. Robert Welch, Inc.*,²⁴⁴ rendered ten years after *Sullivan*. The lawsuit in *Gertz* was brought by a Chicago attorney accused by a John Birch Society magazine of being part of a Communist plot to discredit local law enforcement officials. In *Gertz*, the Supreme Court held that in cases involving a private individual, the First Amendment requires only proof that the publication was false and that there was "fault" on the part of the publisher—at least negligence.²⁴⁵ The Ninth Circuit panel characterized the *Cox* case as involving "the intersection between *Sullivan* and *Gertz*, an area not yet fully explored by this Circuit, in the context of a medium of publication—the Internet—entirely unknown at the time of those decisions."²⁴⁶

While Padrick and Obsidian argued that the *Gertz* negligence requirement applies only to suits against the institutional press, the appellate court found otherwise. It agreed with its sister circuits that the "rules in *Sullivan* and its progeny apply equally to the institutional press and individual speakers."²⁴⁷ But, this did not end the inquiry.

242. *Id.* at 1287.

243. *Id.* (citing David Carr, *When Truth Survives Free Speech*, N.Y. TIMES, Dec. 11, 2011, at B1).

244. 418 U.S. 323 (1974).

245. *Id.* at 347–50.

246. *Cox*, 740 F.3d at 1289–90.

247. *Id.* at 1291. Scotusblog.com filed an amicus brief in *Cox* asserting that "non-traditional news sources, such as blogs, that provide a useful public service by gathering, analyzing, and disseminating information are entitled to the same First Amendment protections as traditional news media even if they cannot make most of the showings outlined by the district court in this

Padrick and Obsidian asserted that they were not required to establish Cox's negligence because *Gertz* involved a matter of public concern and the *Cox* case did not. However, the panel found that even if the holding in *Gertz* is restricted to statements involving matters of public concern, Cox's blog post met that standard. Allegations that an individual is involved in crime generally constitute speech regarding a matter of public concern.²⁴⁸ Thus, the Ninth Circuit held that because Cox's blog addressed a matter of public concern, the jury could not find Cox guilty of defamation unless it found she acted at least negligently.²⁴⁹ In addition, the Ninth Circuit held that the lower court should have instructed the jury that in order to award presumed damages, it must find that Cox acted with actual malice as articulated in the *Sullivan* decision.²⁵⁰

Cox also argued that Padrick and Obsidian were "tantamount to public officials" because Padrick was a bankruptcy trustee.²⁵¹ According to Cox, the jury could find her liable for defamation only if she published the blog with actual malice. The Ninth Circuit disagreed, however, holding that trustees are not public officials by virtue of their appointments, which do not involve a government position or government pay.²⁵²

B. *The Actual Malice Standard and State Courts*

A number of states have expanded the actual malice standard to cover "all defamation cases if the matter published is of public concern, regardless of the status of the plaintiff."²⁵³ Further, the *Restatement (Second) of Torts (Restatement)* requires a plaintiff to show actual malice²⁵⁴ in order to overcome a conditional privilege.²⁵⁵ Consistent with the *Restatement*, the states have increasingly adopted the

case." Amicus Brief of Scotusblog.com in Support of Neither Party at 16, *Cox*, 740 F.3d 1284 (2014) (No. 3:11-cv-00057-HZ).

248. *Cox*, 740 F.3d at 1291.

249. *Id.* at 1292.

250. *Id.*

251. *Id.* at 1293.

252. *Id.* at 1293. Padrick and Obsidian argued on cross-appeal that the trial court erred in granting Cox summary judgment on her other blogs. *Id.* The Ninth Circuit rejected the cross-appeal, finding the blogs did not contain assertions of objective facts. *Id.*

253. William F. Cuozzi & Lee Sporn, Note, *Private Lives and Public Concerns: The Decade Since Gertz v. Robert Welch, Inc.*, 51 BROOK. L. REV. 425, 428 n.12, 454–55 (1985) (noting that various states have adopted the actual malice standard in this context, including Colorado, Indiana, and Michigan).

254. RESTATEMENT (SECOND) OF TORTS § 600 (1977) ("[O]ne who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he (a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity.").

actual malice standard to adjudicate the abuse of conditional or qualified privileges over the last twenty-five years.

The expanded application of the actual malice standard is largely a result of its ability to balance the reputational concerns inherent to defamation law with the need to protect certain communications that serve broad societal interests. Scholars have noted the benefits of the actual malice standard in the conditional privilege context as opposed to traditional common law approaches, which require a showing that the statement was made out of “spite or ill will.”²⁵⁶ The “employer evaluation” conditional privilege²⁵⁷ illustrates the fundamental attributes of the actual malice standard that underlie its expanded adoption among various state courts.²⁵⁸

The emotion that may accompany an employee’s termination renders the traditional common law approach ineffective in distinguishing cases when the conditional privilege should apply from those when a “genuine abuse of the privilege exists.”²⁵⁹ More importantly, the actual malice standard promotes the dissemination of information between employers, which allows them to accurately evaluate prospective employees based on candid discussions of their qualities and qualifications. But, the standard also applies with enough bite to serve “as a legal check against the deliberate or reckless maligning of an employee.”²⁶⁰ Thus, the actual malice standard is sensitive to the broad societal need of open communication between employers and other interested parties in order to stimulate sound business practices and effective hiring of employees, and concurrently provides employees with protection from patently unfounded negative assertions about their abilities and qualifications. In recognition of these bene-

255. *Id.* “A conditional [or qualified] privilege arises to protect a legitimate interest of the publisher, the recipient, or a third person. . . . The privilege also extends to statements made to advance a legitimate common interest between the publisher and the recipient of the publication.” *Ferguson v. Williams & Hunt, Inc.*, 221 P.3d 205, 214 (Utah 2009) (citation omitted) (internal quotation marks omitted); *see also* 1 SACK, *supra* note 129, at § 9:3 (4th ed. 2014).

256. 2 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 15:31 (2d ed. 2013); *see also* 1 SACK, *supra* note 130, § 9:3.1 (“Malice in its common-law sense is spite, ill will, hatred, or the intent to inflict harm, or a direct intention to injure another . . . it has been said to be the equivalent of bad faith.” (internal quotation marks omitted)).

257. The “employer evaluation” conditional privilege “protects an employer’s communication to other . . . interested parties concerning the reasons for an employee’s discharge.” *Ferguson*, 221 P.3d at 214 (quoting *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991)) (internal quotation marks omitted).

258. Parallel state application of the actual malice standard to conditional or qualified privileges provides a level of simplicity to the “complex and chaotic” field of defamation law. *See* 2 SMOLLA, *supra* note 256, § 15:31.

259. *Id.*

260. *Id.*

fits, many states have adopted the actual malice standard in other areas to analyze the abuse of conditional privileges.²⁶¹

In *Ferguson v. Williams & Hunt, Inc.* the Supreme Court of Utah applied the actual malice standard to a defamation claim brought by an attorney against his former partners.²⁶² In 1991, the plaintiff and his partners formed a law firm,²⁶³ where he worked as a trial attorney for approximately fourteen years.²⁶⁴ In 2005, the plaintiff billed far more than his typical number of hours, creating suspicion about his billing practices.²⁶⁵ The defendant partners initiated an investigation and “came to the inescapable conclusion that [the plaintiff] was overbilling.”²⁶⁶ Following the investigation, the defendants terminated the plaintiff and also informed one of the plaintiff’s clients that it could “no longer trust [the plaintiff’s] bills.”²⁶⁷ In response, the plaintiff brought a defamation suit.

The trial court found that the defendant partners had “a conditional or qualified privilege in making the defamatory statement to [the client]” and granted the defendants’ motion for a directed verdict.²⁶⁸ The motion was granted on the basis that no evidence had been presented that the defendants “made the allegedly defamatory statement knowing it was false or that they acted in reckless disregard as to its falsity.”²⁶⁹ The Utah Supreme Court affirmed, because “in balancing the justification for the privilege against the individual’s interests in reputation, the necessity of deeming certain statements privileged

261. See, e.g., *DeNardo v. Bax*, 147 P.3d 672, 679 (Alaska 2006) (holding that when a conditional privilege exists, a plaintiff must show that “the publisher had knowledge or [acted in] reckless disregard as to the falsity of the defamatory matter”); *Miller v. Servicemaster by Rees*, 851 P.2d 143, 146 (Ariz. Ct. App. 1992) (“[A] plaintiff must prove the privilege was abused by proving actual malice or by demonstrating excessive publication. Actual malice is a question of fact for a jury and it can be demonstrated by proving a defendant made a statement knowing it was false or with reckless disregard of its truth.” (citations omitted)); *McIntyre v. Jones*, 194 P.3d 519, 530 (Colo. App. 2008) (stating that when the statement involves a matter of public concern or pertains to a public official or public figure, “the plaintiff . . . must prove that the defendant published the statement with actual malice”); *Ball v. British Petroleum Oil*, 670 N.E.2d 289, 293, 295 (Ohio Ct. App. 1995) (finding that a question of fact existed as to whether the defendant “act[ed] with reckless disregard as to . . . the truth or falsity [of the statements he made]”); *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 772 (Tex. 1994) (“Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true.”).

262. *Ferguson*, 221 P.3d at 212.

263. *Id.* at 209.

264. *Id.*

265. *Id.* at 210.

266. *Id.*

267. *Id.* at 211.

268. *Ferguson*, 221 P.3d at 211.

269. *Id.*

requires some room for honest error, but not for known falsity or recklessness.”²⁷⁰ To achieve this balance, the court adopted the actual malice standard, holding that “a plaintiff can show abuse of a conditional privilege where the defendant (1) made a defamatory statement knowing it to be false or (2) acted in reckless disregard as to its falsity.”²⁷¹ Thus, *Ferguson* demonstrates the actual malice standard’s unique suitability to defamation claims in which communications of broad societal interest are at issue.

Although many states have applied the actual malice standard to claims of abuse of conditional privileges, several states seemingly confuse (or, perhaps more appropriately, conflate) the actual malice standard and the common law “ill will” approach.²⁷² One reason for the confusion is that courts give differing meaning to “malice” as used in *Sullivan* and the “malice” as employed in traditional common law cases.²⁷³ As a result, “courts often fail to make careful distinctions between the two in deciding whether a defendant has forfeited a common[]law conditional privilege.”²⁷⁴ In turn, some courts have used the term actual malice when, in reality, they have applied common law malice.²⁷⁵ For instance, in the Ohio case *Hahn v. Kotten*, which involved an alleged abuse of conditional privilege, the Ohio Supreme Court stated, “In the case of a privileged communication, however, express malice as distinguished from malice in law must be shown; that is to say, if the occasion be privileged, the plaintiff may not recover . . . unless he goes further and shows that . . . defendant was moved by actual malice, such as ill will, spite, grudge or some ulterior motive.”²⁷⁶

Similarly, in *Evelyn v. Carlon Co.* the Ohio Supreme Court stated that

appellant had the burden of showing that appellee acted with actual malice . . .

270. *Id.* at 214.

271. *Id.* at 214–15.

272. *See, e.g.*, *Jacobs v. Frank*, 573 N.E.2d 609, 613 (Ohio 1991) (“Unfortunately, several cases appear to confuse the two standards, and transmute ‘actual malice’ as defined in a public defamation action into the common-law standard.”).

273. Indeed, Justice Brennan “came to regret using the term ‘malice’ as too confusing, especially to juries, who associated the word with the idea of hatred or ill will. Brennan said later he wished he had picked another term for the idea of knowing or reckless falsehood.” STERN & WERMIEL, *supra* note 112, at 227.

274. 1 SACK, *supra* note 130, § 9:3.2. An important distinction between the *Sullivan* actual malice standard and the traditional common law approach is that the former “focuses on the defendant’s attitude towards the *truth*, [while traditional common law standards focus] on his or her attitude towards the *plaintiff*.” *Id.*

275. *Id.*

276. *Hahn v. Kotten*, 331 N.E.2d 713, 721 (Ohio 1975) (internal quotation marks omitted).

. . . appellant had not sustained his burden of proof of malice in the publication of such alleged actionable defamations. In such material there was no showing of any ill will, spite, or some ulterior motive on the part of appellee's officers toward this appellant.²⁷⁷

Thus, while *Ferguson* illustrates effective state adoption of the actual malice standard, it appears that some state courts profess to implement the actual malice standard while actually applying the traditional common law approach.

In other states, confusion arises because courts employ incompatible (and arguably mutually exclusive) standards for conditional privileges and actual malice. This problem was resolved in the Illinois case *Kuwik v. Starmark*, in which the Illinois Supreme Court modified the requirements of a "conditional privilege" to enhance its compatibility with the actual malice standard.²⁷⁸

In *Kuwik*, a physician filed a defamation action against an insurance company because of letters it sent to the physician's patient and to the Illinois Department of Insurance denying payment for the physician's services on the ground that they were "outside the scope of the practicing physician's license."²⁷⁹ In affirming the appellate court's denial of the defendant's motion for summary judgment, the state supreme court resolved "troubling aspects of the current Illinois test" that resulted in confusion among the state's courts.²⁸⁰ Under the test used by the trial court, a defendant was required to show that a statement was made "in good faith" for a conditional privilege to apply (a determination made by the trial court), and then a jury would have to find that the statement was made "in bad faith" to overcome the conditional privilege.²⁸¹

Referring to this conundrum as an "apparent anomaly," the Illinois Supreme Court pointed out that "[t]he two inquiries are too similar to justify two separate determinations, one by the judge as a question of law, and one by the jury as a question of fact. Such a process only serves to add confusion to an already confusing area of law."²⁸² The court adopted the conditional privilege standard espoused by the *Restatement*,²⁸³ which eliminates the "bad faith" inquiry, places the entire determination in the hands of the jury, and offers three unambiguous circumstances which give rise to a conditional privi-

277. *Evely v. Carlon Co.*, 447 N.E.2d 1290, 1293 (Ohio 1983).

278. *Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 619 N.E.2d 129 (Ill. 1993).

279. *Id.* at 130.

280. *Id.* at 134.

281. *Id.* at 133-34.

282. *Id.* at 134.

283. RESTATEMENT (SECOND) OF TORTS §§ 593-99 (1977).

lege.²⁸⁴ The court then held “that to prove an abuse of the qualified privilege, the plaintiff must show a direct intention to injure another, or . . . a reckless disregard of [the defamed party’s] rights.”²⁸⁵ The court ruled that material facts existed as to whether the defendant acted “with reckless disregard as to [the] plaintiff’s rights,” and therefore affirmed the appellate court’s denial of the defendant’s motion for summary judgment.²⁸⁶

While *Hahn*²⁸⁷ and *Evely*²⁸⁸ demonstrate some of the confusion that may accompany state courts’ application of the actual malice standard, *Kuwik* illustrates the proactive measures that state high courts can take to resolve this confusion and allow for the proper application of the actual malice standard. The fact that more states have adopted the actual malice standard demonstrates its recognized advantages in promoting societal interests and the broad utility of its application.

C. *The Actual Malice Standard and Labor Disputes*

The expansion of the actual malice standard has not been limited to lower courts. Shortly after adopting the standard in *Sullivan*, the United States Supreme Court applied it to resolve labor disputes. Although the Court has not applied the test in this context since 1974, many lower federal and state courts have. The continued use of the actual malice standard indicates that the test is workable; it strikes an appropriate balance between important protections afforded by federal labor laws and the states’ interests in protecting individuals against defamatory communications. The case law also demonstrates that courts have applied the test to claims in different industries under

284. *Kuwik*, 619 N.E.2d at 135 (“Under the analysis just adopted, conditionally privileged occasions have been said to be divided into three classes: (1) situations in which some interest of the person who publishes the defamatory matter is involved[;] (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved[; and] (3) situations in which a recognized interest of the public is concerned.”).

285. *Id.* at 135 (citations omitted) (alteration in original) (internal quotation marks omitted). The court further clarified the standard, stating that “an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party’s rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties.” *Id.* at 136.

286. *Id.*

287. 331 N.E.2d 713 (Ohio 1975).

288. 447 N.E.2d 1290 (Ohio 1983).

different labor laws²⁸⁹ and have adjusted the standard's scope as needed to fit the evolving private sector labor context.²⁹⁰

1. *The Adoption of the Actual Malice Standard in Linn and Letter Carriers*

In *Linn v. United Plant Guard Workers of America, Local 114*,²⁹¹ the Supreme Court adopted the *Sullivan* actual malice standard for defamation claims arising from “labor disputes.” Before *Linn*, courts had interpreted the National Labor Relations Act (NLRA) to have a preemptive effect on defamation claims arising out of union organizing campaigns. In *Linn*, the Supreme Court examined the extent to which potentially defamatory statements made in labor disputes lose protection under the NLRA so that a complainant may pursue relief under state defamation laws.²⁹² The Court recognized the importance of achieving a balance between the strong federal interest in uniform labor regulation and the deeply rooted state interest in protecting citizens from defamation.²⁹³

289. There are two primary labor law statutes that apply in the private sector—the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (2012), and the Railway Labor Act (RLA), 45 U.S.C. §§ 151–188 (2012). In *Dunn v. Air Line Pilots Ass’n*, the appellate court applied *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), and *Old Dominion Branch No. 496, National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), to labor strike activity involving an airline covered by the RLA. 193 F.3d 1185, 1191–92 (11th Cir. 1999). See also *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 882 (9th Cir. 2002) (applying *Linn* and *Letter Carriers* under the RLA); *Cain v. Elgin, Joliet & Eastern Ry.*, No. 2:04-CV-347, 2006 U.S. Dist. LEXIS 4373, at *51–52 (N.D. Ind. Jan. 19, 2006) (applying *Linn*, *Letter Carriers*, and the actual malice standard to a defamation claim in the railway context).

290. For a discussion of the application of the actual malice standard to labor disputes, see generally 1 SACK, *supra* note 130, § 5:7; and SECTION OF LABOR & EMP’T LAW, A.B.A., 2 THE DEVELOPING LABOR LAW 2496–99 (John E. Higgins, Jr. et al. eds., 6th ed. 2012).

291. 383 U.S. 53 (1966). The plaintiff, an assistant manager for a security guard company, sued the union for defamation under state law. *Id.* at 55–56. The plaintiff alleged that during the union’s organizing campaign, it distributed leaflets to company employees that contained defamatory statements about management. *Id.* at 56. Upon establishing the actual malice test to govern defamation claims in the labor dispute context, the Court ultimately granted the plaintiff leave to amend his complaint pursuant to the actual malice requirements. *Id.* at 66.

292. *Id.* at 63–65.

293. *Id.* at 57–58. The Brief for the United States as Amicus Curiae in *Linn* (filed by Solicitor General Thurgood Marshall and others) addressed these issues. With regard to the federal interests, the brief commented:

On this point the [*Sullivan*] libel case again provides an instructive analogy. The Court there made clear . . . that damages could constitutionally be awarded a public official in a defamation suit against a critic of his official conduct if actual malice was proved If the interest in free and wide-open debate in the political arena thus stops short of requiring the protection of malicious defamation, it is difficult to justify a rule of complete preclusion in the labor arena. There is, to be sure, always the danger that a particular jury might find actual malice in a case where there was in fact none, with the result that a participant in a representation or organizing campaign was penal-

The Court looked to the NLRA,²⁹⁴ which affords protection to conduct during union organizing activities that could be fairly characterized as fraught with “bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations, and distortions.”²⁹⁵ The National Labor Relations Board (NLRB or Board), the federal agency responsible for interpreting and enforcing the NLRA, provided great latitude to competing parties in organizing campaigns, extending Section 7 protections to cover repulsive and caustic speech.²⁹⁶ The Court held that while the Board tolerated “intemperate, abusive[,] and inaccurate statements” made during union organizing campaigns, the Board did not interpret the NLRA “as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false.”²⁹⁷ The Court concluded that this deliberate and egregious defamatory conduct lost protection under the NLRA.²⁹⁸

The Court also recognized a compelling state interest in protecting citizens from defamatory conduct known to be false. It found that a state’s concern in compensating a victim and enabling him to vindicate his reputation is “so deeply rooted in local feeling and responsibility”

ized for conduct which the [NLRB], had it been the finder of the facts, would have deemed fair and legitimate, indeed federally protected, campaign tactics. But we do not think that this risk is so great as to override the States’ strong interest in providing redress for such aggravated instances of defamatory conduct

Brief for the U.S. as Amicus Curiae at 38–39, *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (No. 45).

294. Section 7 of the NLRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3)

29 U.S.C. § 157 (2012).

295. *Linn*, 383 U.S. at 58.

296. *Id.* at 60–61. The NLRB concluded that epithets common in the labor dispute context, including “scab,” “unfair,” and “liar,” were protected under Section 7 despite their defamatory effect. *Id.* Harking back to *Sullivan*, the Court reasoned that “as we stated in another context, cases involving speech are to be considered ‘against the background of a profound . . . commitment to the principal that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks.’” *Id.* at 62 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

297. *Id.* at 61.

298. *Id.*

that such a victim should not be barred by the vision of a unitary national labor policy.²⁹⁹

To properly balance the open discussion envisioned by the NLRA and a state's deep interest in protecting its citizens, the Court applied "by analogy, rather than under constitutional compulsion," the *Sullivan* actual malice standard.³⁰⁰ The Court held that defamatory statements made in the context of union organizing campaigns are actionable under state defamation law only if the complainant pleads and proves that they were made with actual malice and resulted in injury.³⁰¹ Actual malice, the Court explained, could be demonstrated by the *Sullivan* standard with proof that the defamatory statements were published with knowledge of their falsity or with reckless disregard for the truth.³⁰²

Eight years after *Linn*, the Supreme Court decided *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, which also addressed when a state defamation claim can survive federal labor law preemption in the course of a labor dispute.³⁰³ Although *Letter Carriers* followed the actual malice standard applied in *Linn*, the decision is significant in its own right for two reasons: first, it expanded *Linn* by giving broader meaning to the "labor disputes" that are subject to the actual malice standard; and second, it clarified the actual malice standard and acknowledged its distinction from common law malice.

The *Linn* actual malice test was applied to defamation claims raised in labor disputes. In *Letter Carriers*, the Court concluded that the applicability of the actual malice standard extends beyond disputes between labor and management.³⁰⁴ The dispute in *Letter Carriers* involved two nonunion employees alleging defamation against the

299. *Id.* at 62 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 248 (1959)) (internal quotation marks omitted).

300. *Id.* at 65.

301. *Linn*, 383 U.S. at 65.

302. *Id.*

303. 418 U.S. 264 (1974). While the Court was dealing with an Executive Order governing federal employment rather than the NLRA's protections for private labor disputes, it reasoned that the same accommodation to competing federal and state interests applied. *Id.* at 273. In *Dale v. Ohio Civil Service Employees Ass'n.*, the Ohio Supreme Court cited *Linn* and applied the actual malice standard to a defamation claim arising from a union election involving public sector employment. 567 N.E.2d 253, 257 (Ohio 1991). The court held that

[a] "labor dispute" is any controversy over the terms and conditions of employment, or the representation of employees for collective bargaining purposes, regardless of whether the disputants stand in the relation of employer and employee, and . . . of whether the dispute is subject to the jurisdiction of the [NLRB], the State Employee Relations Board, or some other administrative agency.

Id. at 253.

304. *Letter Carriers*, 418 U.S. at 278.

union for publishing statements in a union newsletter attacking the plaintiffs for resisting union membership.³⁰⁵ In categorizing this controversy as a labor dispute, the Court reasoned that NLRA protections are not limited to defamatory statements made during union election campaigns. Indeed, the applicability of *Linn's* actual malice standard extends to “any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity.”³⁰⁶ Moreover, the Court held that organizing activities that lead to union recognition and organizing activities that follow union recognition are entitled to the same protections.³⁰⁷ Therefore, a union’s postrecognition attempts to achieve 100% membership or to preserve its majority status are NLRA-protected organizing efforts subject to the actual malice standard.

Letter Carriers is also significant because the Court clarified the meaning of actual malice. The Court held that the lower courts erred by defining malice in the common law sense of “hatred, personal spite, ill will, or desire to injure.”³⁰⁸ Malice in the context of defamatory statements made during a labor dispute, the Court explained, is strictly defined as making such statements “with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁰⁹ While reaffirming the definition of actual malice adopted by *Linn*, the Court also explained that before applying the standard there must first be a false statement of *fact*.³¹⁰ The Court distinguished opinions from representations of fact, concluding that the plaintiff in *Letter Carriers* failed to demonstrate that the union had made a false statement of fact. The Court cautioned, however, that there may be situations “where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way as to convey a false representation of fact.”³¹¹

While the Supreme Court has not applied the actual malice standard in the labor context since *Linn* and *Letter Carriers*, those two cases have served as an important foundation for its future use. Indeed, the use of the actual malice test has been marked by a general expansion of what constitutes a labor dispute, a careful distinction be-

305. *Id.* at 266–67.

306. *Id.* at 279.

307. *Id.*

308. *Id.* at 281.

309. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

310. *Letter Carriers*, 418 U.S. at 284 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1973)).

311. *Id.* at 286.

tween assertion of fact and opinion, and a subjective interpretation of the type of conduct that demonstrates actual malice.

2. *Application of the Actual Malice Standard in Cases After Linn and Letter Carriers*

The Supreme Court's expansion of the definition of a "labor dispute" was a hallmark of the *Letter Carriers* decision, extending the reach of the actual malice standard to postrecognition issues.³¹² The definition given to a "dispute" is of great significance because if the parties are not engaged in a labor dispute, then the court is not subject to the federally mandated actual malice standard. A number of decisions have followed *Letter Carriers'* expansive interpretation of what constitutes a labor dispute, thereby broadening the reach of the actual malice standard.³¹³

In *Hughes v. Northern California Carpenters Regional Council*,³¹⁴ however, the California appellate court refused to apply the actual malice standard after determining that the parties were not engaged in a labor dispute within the meaning of *Letter Carriers*.³¹⁵ In *Hughes*,

312. The opinion in *Letter Carriers* reasoned:

[W]hether Linn's partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a "labor dispute"; rather application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.

Id. at 279. Significantly, the NLRA defines a "labor dispute" as "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9) (2012).

313. *See, e.g.,* Seven Bros. Painting v. Painters & Allied Trades Dist. Council No. 2, No. 09-12506, 2011 U.S. Dist. LEXIS 62540, at *9 (E.D. Mich. June 10, 2011) (finding that a non-union painting company and local union were engaged in a "labor dispute" when the dispute centered on the union's claim that the painting company's unionized sister company was routing work through the non-union company to avoid wage and benefit requirements under collective bargaining agreement); Point Ruston, LLC v. Pac. Nw. Reg'l Council of the United Bhd. of Carpenters, No. C09-5232BHS, 2010 LEXIS 95239, at *13 (W.D. Wash. Sept. 13, 2010) (finding that a labor dispute existed between a general contractor and the union when the contractor refused to terminate a contract with the only non-union subcontractor it was using for a project); Murray v. Tarley, No. C2-01-693, 2002 U.S. Dist. LEXIS 28154, at *21-22 (S.D. Ohio Feb. 20, 2002) (finding that a union secretary-treasurers' remarks about a coal company owner fit within the broad definition of labor dispute as they referred to coal owner's unfair, untruthful, and discriminatory treatment of employees, which involved the employees' terms and conditions of employment as defined by the NLRA).

314. No. A112272, 2007 Cal. App. Unpub. LEXIS 4003, at *1 (Cal. Ct. App. May 17, 2007).

315. *Id.* at *17. In another case, the trial court refused to instruct the jury that the plaintiff construction company owner needed to prove that the union acted with actual malice when it circulated handbills containing a limerick that indicated the plaintiff made "crappy" homes. *J. Maki Constr. Co. v. Chi. Reg'l Council of Carpenters*, 882 N.E.2d 1173, 1177, 1181 (Ill. App. Ct.

the defendant union and Hughes, the plaintiff drywall company owner, were initially involved in a labor dispute when the union organized a picket line and claimed that Hughes paid workers less than the established area standard.³¹⁶ Out of feelings of anger and embarrassment, and to convey a message of “piss on you” and “kiss my ass,”³¹⁷ Hughes allegedly exposed himself to the picketers.³¹⁸ The union filed a police report in response to Hughes’ alleged indecent exposure and later distributed flyers, which included a redacted copy of the police report and the message:

On the above date and time, suspect (Blacked out) exposed his penis to victim [union organizer] and made lewd gestures towards him while in public, [a] violation [of Penal Code section] 314 Ask Keith Christopherson (a homebuilder that exclusively subcontracted Hughes) why Christopherson Homes allows Roger Hughes to work near your children. 707-524-8222.³¹⁹

Hughes sued the union for defamation, alleging that the distribution of the flyers caused him significant emotional distress and loss of business.³²⁰ A jury found in favor of Hughes on his defamation claim, concluding that the union acted with malice in distributing the flyers.³²¹ The union appealed, arguing that the trial court erred in instructing the jury that Hughes only needed to prove that the union “failed to use reasonable care to determine the truth or falsity of the statements [before publishing them].”³²² The union contended that the actual malice standard applied because the parties were engaged in a labor dispute, requiring Hughes to prove actual malice.³²³

The appellate court disagreed, citing *Letter Carriers* to support its decision.³²⁴ While *Letter Carriers* stated that preemption of state defamation claims could not be dependent upon some “abstract notion of

2008). The trial court defined malice in the common law sense as “ill will” or having “evil intentions” and instructed the jury that malice meant that the defendant union published “defamatory communication with wanton disregard for Plaintiffs’ rights, with ill will, and with an evil intention to defame and injure Plaintiff.” *Id.* at 1181. On the union’s appeal of the jury verdict in favor of the plaintiff, the trial court found no connection between the quality of the homes attacked by the union in the handbill and the plaintiff’s alleged underpayment of wages and benefits to its employees. *Id.* at 1182. Therefore, the trial court properly determined the handbill was merely the union’s attempt to get the contractor to comply with regional labor standards and not a labor dispute. *Id.* at 1186–87.

316. *Hughes*, 2007 Cal. App. Unpub. LEXIS 4003, at *4.

317. *Id.* at *5.

318. *Id.* at *5–6.

319. *Id.* at *7.

320. *Id.* at *9.

321. *Id.* at *1.

322. *Hughes*, 2007 Cal. App. Unpub. LEXIS 4003, at *9.

323. *Id.* at *10.

324. *Id.* at *4.

what constitutes a labor dispute,” it limited labor disputes to union organizing activities.³²⁵ In *Hughes*, the union was not trying to organize Hughes’ employees and did not distribute the flyers in connection with any organizing activity.³²⁶

Acknowledging that some courts have extended the scope of *Linn* and *Letter Carriers* to conduct outside union organizing activity,³²⁷ the appellate court maintained that the union’s distribution of the flyers was not part of a labor dispute.³²⁸ The dispute between Hughes and the union centered on the union’s contention that Hughes failed to pay his workers the “area standard” rate of pay.³²⁹ The flyers did not mention the area standards or serve any other job-related purpose.³³⁰ The union testified that the purpose of the flyers was to inform the general public about Hughes’ offensive behavior.³³¹ As such, the court found that the flyers were not relevant to any labor dispute that existed between Hughes and the union, or any issue “conceivably subject to the protections of [Section] 7 or the prohibitions of [Section] 8 of the [NLRA].”³³² Accordingly, Hughes was not required to satisfy the heightened actual malice standard to succeed in his defamation claim against the union.³³³

325. *Id.* at *12–13.

326. *Id.* at *13.

327. *Id.* at *13–14.

328. *Hughes*, 2007 Cal. App. Unpub. LEXIS 4003, at *13–14.

329. *Id.* at *14–15.

330. *Id.* The court noted that although the flyer mentioned the picketing and “ongoing dispute,” it did not bring the flyer within the protections and prohibitions of the NLRA. *Id.* at *14 n.6.

331. *Id.* at *14–15.

332. *Id.* at *16 (third alteration in original) (quoting *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 279) (internal quotation marks omitted). What constitutes a “labor dispute” should generally be based on an examination of the underlying facts of the controversy as well as the scope of the labor statute involved. *Compare Oetzman v. Ahrens*, 427 N.W.2d 421 (Wis. Ct. App. 1988) (finding that letters written by a union staff representative about a personnel manager alleging sexual harassment of a union member did not constitute a labor dispute because the conduct had nothing to do with an election, strike, or an issue between labor and management), *with Wallulis v. Dymowski*, 895 P.2d 315 (Or. App. Ct. 1995) (finding that complaints about working conditions occurred during a labor dispute under a broad statutory definition).

333. Courts have spent a great deal of time scrutinizing the distinction that *Letter Carriers* drew between actionable assertions of fact and nonactionable opinions or rhetorical hyperbole. In *Letter Carriers*, the Court explained that before determining whether a defamatory statement was made with knowledge of falsity or reckless disregard for the truth, there must first be a false statement of fact. 418 U.S. at 284 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)). The Court concluded that the use of “loose language” like “traitor,” “unfair,” or “fascist,” reflects an opinion and does not constitute a fact. *Id.* “Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law.” *Id.* The Court cautioned, however, that there may be situations “where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of

Some courts have struggled with constructing a uniform approach for determining whether actual malice is present. *Linn* established that a plaintiff's defamation claim is subject to preemption under federal labor laws unless the plaintiff pleads and proves actual malice—that the defamatory statements were made with knowledge of their falsity or with reckless disregard for the truth.³³⁴ Yet, some recent case law acknowledges this standard but applies it improperly.³³⁵

Creating a uniform approach to determining whether a plaintiff has established actual malice can be difficult because the standard is subjective and requires the court to get inside the defendant's head. In *Chicago District Council of Carpenters Pension Fund v. Reinke Insulation Co.*,³³⁶ the court attempted to do just that and teased out the requirements of proving actual malice. The defendant union suspected that Reinke, the plaintiff contractor, was delinquent in making pension and welfare benefit payments to the union, violating their collective bargaining agreement.³³⁷ Based on the results of a preliminary report supporting the union's suspicion of Reinke's delinquency, the

context and used in such a way as to convey a false representation of fact." *Id.* at 286. For further discussion of opinion and rhetorical hyperbole in defamation actions, see John Bruce Lewis & Gregory V. Mersol, *Opinion and Rhetorical Hyperbole in Workplace Defamation Actions: The Continuing Quest for Meaningful Standards*, 52 DEPAUL L. REV. 19 (2002); and 1 SMOLLA, *supra* note 256, §§ 4.7–4.11.

334. *Linn v. Plant Guard Workers, Local 114*, 383 U.S. 53, 65 (1966).

335. In *Magic Laundry Servs. v. Workers United SEIU*, the court cited *Letter Carriers* and set forth the actual malice standard. No. CV-12-9654-MWF (AJWx), 2013 U.S. Dist. LEXIS 43296, at *1 (C.D. Cal. Apr. 8, 2013). The court recognized that a number of the defendant's statements were false assertions of fact. *Id.* at *14. But when the court analyzed the question of actual malice, it offered only a few conclusory sentences finding that the plaintiff failed to meet this heightened burden. *Id.* at *14–15. Similarly, in *Duane Reade Inc. v. Local 338 Retail, Wholesale, Department Store Union*, the court cited the standards set forth in *Linn* and *Letter Carriers* only to reach a conclusion on actual malice in one sentence, stating that “[b]ased on the facts alleged, Duane Reade cannot demonstrate that the allegedly defamatory statements are maliciously false.” 791 N.Y.S.2d 288, 292 (N.Y. Sup. Ct. 2004). In *Shepard v. Courtoise*, the court denied the defendant union's motion for summary judgment as to statements alleging that the plaintiff supervisor “abused” employees. 115 F. Supp. 2d 1142, 1148 (E.D. Mo. 2000). After concluding that the parties were engaged in a labor dispute and that the statements regarding “abuse” could be construed as false statements of fact, the court considered whether the plaintiff proved actual malice. *Id.* at 1147. To support his claim, the plaintiff provided testimony from two subordinate employees and a colleague, asserting that the plaintiff never abused any employees. *Id.* at 1147–48. Based on this testimony, the court concluded that the plaintiff had “presented clear and convincing evidence to support a finding of actual malice.” *Id.* at 1148. Similar to the cases discussed above, the court offered this conclusion without truly analyzing the defendant's subjective state of mind or relevant knowledge. The court failed to explain how the employees' testimony, which affirmed that the plaintiff never abused his employees, demonstrated that the defendant made the statements with knowledge of their falsity or reckless disregard for their truth.

336. 464 F.3d 651 (7th Cir. 2006).

337. *Id.* at 653.

union picketed Reinke's job sites.³³⁸ Reinke attempted to stop the picketing by presenting the results of its own auditor's report, which concluded that Reinke was not delinquent.³³⁹ The union refused to consider this report.³⁴⁰ Reinke also offered to pay the alleged delinquent amount in exchange for the picketing to cease.³⁴¹ The union also refused this offer.³⁴² Although the picketing eventually ceased, the union later circulated handbills which read, "The **HARD** working employees of Reinke have been cheated on their **MEDICAL** and **RETIREMENT** contributions!"³⁴³ Reinke sued for defamation, maintaining that the union's assertion that Reinke cheated its employees out of benefits was made with reckless disregard for the truth.

To determine whether the union acted with reckless disregard for the truth by circulating the flyers, the court explained that the question was not whether a reasonable person would have accused Reinke of cheating its employees. Instead, the issue was "whether there [was] sufficient evidence to permit the conclusion that the [Union] in fact entertained serious doubts as to the truth of [its] publication,"³⁴⁴ or "whether there is sufficient evidence to show that the Union had a high degree of awareness of . . . probable falsity."³⁴⁵

The court held that a plaintiff is entitled to prove the defendant's state of mind with circumstantial evidence, but cautioned that "courts must be careful not to place too much reliance on such factors."³⁴⁶ The court ultimately concluded that Reinke failed to establish actual malice. While the union's delinquency report was preliminary, nothing suggested it was inaccurate, and the union's reliance on this report did not demonstrate reckless disregard for the truth.³⁴⁷ Similarly, the union's refusal to accept Reinke's internal audit was not evidence of "purposeful avoidance of the truth."³⁴⁸ The court explained that battles of the experts are commonplace and "tend to show a good faith

338. *Id.* at 654.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Reinke*, 464 F.3d at 654.

343. *Id.*

344. *Id.* at 655 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)) (internal quotation marks omitted).

345. *Id.* (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989)) (internal quotation marks omitted).

346. *Id.* (quoting *Harte-Hanks*, 491 U.S. at 668) (internal quotation marks omitted).

347. *Id.* at 656.

348. *Reinke*, 464 F.3d at 656 (quoting *Harte-Hanks*, 491 U.S. at 692) (internal quotation marks omitted).

dispute, not actual malice.”³⁴⁹ Finally, the court found that the union’s refusal to accept Reinke’s delinquency payment did not demonstrate actual malice.³⁵⁰ Reinke’s gesture could just as easily be construed as proof of a guilty conscience as it could be proof of innocence, and the union was not required to give Reinke the benefit of the doubt.³⁵¹

Other courts have offered some guidance on what constitutes actual malice. In *Calop Business Systems v. SEIU, Local 1877*,³⁵² the California Court of Appeals determined that making a false statement of fact upon a mistaken belief of law is negligence at best and insufficient evidence of actual malice. In *Seven Brothers Painting v. Painters & Allied Trades District Council Number 2*, the court held that the plaintiff failed to prove the defendant union acted with actual malice in sending a defamatory email to the plaintiff’s customers. The court noted the importance of timing in determining actual malice. The presence of actual malice must be measured at the time the defamatory statement is made.³⁵³ Because the union sent the disparaging email to the plaintiff’s customers before having knowledge of the factual inaccuracies of the email’s content, the union could not be found to have acted with knowledge of its falsity or with reckless disregard for the truth.³⁵⁴ Courts have also recognized the importance of context in determining whether a statement is made with actual malice.³⁵⁵ In *Delaney v. International Union UAW Local Number 94*, the Iowa Supreme Court rejected the plaintiff’s attempt to show actual malice.³⁵⁶ The plaintiff argued that the grammatical tense used in the defendant’s newsletter demonstrated actual malice.³⁵⁷ However, the court noted that a statement cannot be viewed in isolation and courts

349. *Id.*

350. *Id.*

351. *Id.*

352. No. B242073, 2013 Cal. App. Unpub. LEXIS 4926, at *23–24 (Cal. Ct. App. July 15, 2013).

353. *Seven Bros. Painting v. Painters & Allied Trades Dist. Council No. 2*, No. 09-12506, 2011 U.S. Dist. LEXIS 62540, at *13 (E.D. Mich. June 10, 2011).

354. *Id.*

355. *See, e.g., Point Ruston, LLC v. Pac. Nw. Reg’l Council of the United Bhd. of Carpenters*, No. C09-5232BHS, 2010 U.S. Dist. LEXIS 95239, at *16 (W.D. Wash. Sept. 13, 2010). “The context in which the [alleged defamatory] statement appears is paramount . . . and in some cases it can be dispositive. . . . [C]ourts have instructed that the entirety of the context of the statement must be considered” *Id.* (alterations in original) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1075 (9th Cir. 2005)) (internal quotation marks omitted).

356. *Delaney v. Int’l Union UAW Local No. 94*, 675 N.W.2d 832, 844 (Iowa 2004).

357. *Id.* at 843.

“ought not become the grammar police and thereby chill free speech in this context.”³⁵⁸

Although over forty-five years have passed since the Supreme Court first applied the *Sullivan* actual malice standard to labor disputes, courts are still using the test to achieve a balance between protected speech and the states’ interests in protecting citizens’ reputations. The inquiry directs attention to the factors that can provide protection for speech. Focusing on hatred, personal spite, ill will, or the desire to injure is unworkable in an environment rife with “bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions.”³⁵⁹ While other issues, such as the protection of opinion and rhetorical hyperbole, sometimes overshadow the analysis, the continued usefulness of the standard demonstrates that it does provide the needed breathing space for communications in labor disputes.

D. Actual Malice and the Aviation and Transportation Security Act

Sullivan’s longevity is also reflected in legislation in which Congress has borrowed the actual malice standard to define the parameters of lawful behavior.

The use of commercial airlines to attack the World Trade Center and the Pentagon on September 11, 2001 prompted Congress to enact the Aviation and Transportation and Security Act (ATSA).³⁶⁰ The Act created the Transportation Security Administration (TSA)³⁶¹ and provides immunity from civil liability to any airline employee who makes “a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism” to federal, state, or local law enforcement officials.³⁶² That immunity does not apply, however, if the disclosure was made with “actual knowledge that the disclosure was false, inaccurate, or misleading” or with “reckless disregard as to the truth or falsity of that disclosure.”³⁶³ Congress took this

358. *Id.* at 844.

359. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58 (1966). The use of more aggressive or broadbased tactics by certain labor organizations has made the application of the actual malice standard difficult. *See, e.g., Sutter Health v. Unite Here*, 113 Cal. Rptr. 3d 132, 147 (Cal. Ct. App. 2010) (reversing and remanding so jury could determine whether postcard about health-care laundries was “an unjustified fabrication based on purposeful avoidance of the truth, rather than on a mere negligent and inadequate investigation”).

360. 49 U.S.C. §§ 44901–44945 (2012).

361. 49 U.S.C. § 114.

362. 49 U.S.C. § 44941(a).

363. 49 U.S.C. § 44941(b).

civil liability standard from *Sullivan*. With the enactment of the ATSA in 2001, Congress extended the actual malice standard to plaintiffs who are private individuals and to situations involving public safety.

An important question that remained after the enactment of the ATSA was whether a report of suspicious activities made to the TSA or other law enforcement officials must be “false” in order to be defamatory. In late January 2014, the Supreme Court concluded in *Air Wisconsin Airlines Corp. v. Hoeper*³⁶⁴ that airlines and their employees are entitled to immunity so long as the disclosure is not “materially false.”³⁶⁵ The Court also set out a test for determining when such a statement meets the “materially false” requirement.

1. *A Potentially Dangerous Individual?*

William Hoeper was a pilot with Air Wisconsin Airlines.³⁶⁶ In 2004, the airline discontinued use of the type of aircraft he had flown for many years and required him to become certified on a new airplane that it was introducing into its fleet.³⁶⁷ Hoeper failed the certification test on his first three attempts, and his continued employment was at the airline’s discretion.³⁶⁸ However, the airline agreed to give him one more opportunity to pass the proficiency test.³⁶⁹

On December 2004, Hoeper had this last opportunity. He failed to properly deal with a scenario involving engines “flam[ing] out due to a loss of fuel.”³⁷⁰ When the test instructor told Hoeper that he “should know better,”³⁷¹ Hoeper ended the test abruptly, removed his headset, threw it at the glare shield, and stated in an angry voice: “This is a bunch of shit. I’m sorry. You are railroading the situation and it’s not realistic.”³⁷² When Hoeper told the instructor that he wanted to call the pilot union’s lawyer, the instructor ended the test and reported the situation to the Air Wisconsin manager of the fleet for which Hoeper was seeking to become certified.³⁷³ The manager then booked a flight for Hoeper back to Denver, his home base.³⁷⁴

364. *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014).

365. *Id.* at 861.

366. *Id.* at 858.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Hoeper*, 134 S. Ct. at 858 (alteration in original) (internal quotation marks omitted).

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

Several hours after Hoyer left the Virginia test facility, the Air Wisconsin fleet manager discussed the situation with the airline's Vice President of Operations, the Managing Director of Flight Operations, and the Assistant Chief Pilot. The Vice President of Operations expressed concerns about what Hoyer might do next because he considered Hoyer's behavior in the flight simulator to have been "a fairly significant outburst" of a sort that he "hadn't seen . . . before,"³⁷⁵ and knew that Hoyer's employment with Air Wisconsin would be terminated as a result of his failure to pass the simulator test.³⁷⁶

During the discussion, the Managing Director of Flight Operations mentioned that Hoyer was a Federal Flight Deck Officer (FFDO), a government designation that permits pilots to carry firearms while performing their duties in order to defend their aircraft against violence or air piracy.³⁷⁷ While Hoyer was not authorized to carry a firearm during his trip from Denver to the Virginia training facility because he was not "engaged in providing air transportation," the Denver airport's security procedures made it possible for crewmembers to bypass screening, so Hoyer could have brought his gun with him on the flight.³⁷⁸ The Assistant Chief Pilot later testified that he was aware of an incident in which an Air Wisconsin pilot had come to training with his FFDO weapon.³⁷⁹ Based on that information, the Vice President of Operations concluded that there was no way to be certain whether Hoyer was armed, even though he was not supposed to have his gun with him.³⁸⁰ Finally, the Air Wisconsin officials discussed two prior episodes in which disgruntled airline employees had acted violently.³⁸¹ In light of those considerations, the Vice President of Operations decided that the airline should inform the TSA of the situation.³⁸²

The Air Wisconsin fleet manager called the TSA and told them that Hoyer "was an FFDO who may be armed," that Air Wisconsin was

375. *Id.* at 858 (alteration in original).

376. *Hoyer*, 134 S. Ct. at 858 (alteration in original).

377. *Id.* at 858–59.

378. *Id.* at 859.

379. *Id.*

380. *Id.*

381. *Id.* In one incident, a flight engineer under investigation for misconduct entered the cockpit of an aircraft and began attacking the crew with a hammer before he was subdued. *Id.* (citing *United States v. Calloway*, 116 F.3d 1129, 1131 (6th Cir. 1997)). In another, a recently terminated ticket agent brought a gun onto an airplane and shot his former supervisor and the crew, leading to a fatal crash. *Id.* (citing Eric Malnic, *Report Confirms That Gunman Caused 1987 Crash of PSA Jet*, L.A. TIMES, Jan. 6, 1989, at 29).

382. *Hoyer*, 134 S. Ct. at 859.

“concerned about his mental stability and the whereabouts of his firearm,” and that an “[u]nstable pilot in [the] FFDO program was terminated today.”³⁸³ The TSA responded by ordering Hoepfer’s plane to return to the gate in Washington, D.C.³⁸⁴ Officers boarded the plane, removed Hoepfer, searched him, and questioned him about the location of his firearm.³⁸⁵ When Hoepfer stated that it was at his home in Denver, a federal agent went there and retrieved it.³⁸⁶ Later that day, Hoepfer was released and permitted to return to Denver. Air Wisconsin dismissed him the next day.³⁸⁷

2. *The Colorado Courts: Rejecting Immunity*

Hoepfer filed suit against Air Wisconsin in Colorado state court, making several claims, including defamation. The case ultimately went to trial, and the question of the ATSA’s immunity was submitted to the jury with an instruction that the airline’s immunity would not apply if Hoepfer proved that the Air Wisconsin official made one or more statements to the TSA with (1) “actual knowledge that the disclosure was false, inaccurate, or misleading”; or (2) “reckless disregard as to its truth or falsity.”³⁸⁸

The jury found that the Air Wisconsin fleet manager who called the TSA made two statements. First, he stated that Hoepfer was an FFDO who might be armed. He was traveling to Denver later that day and Air Wisconsin officials were concerned about his mental stability and the whereabouts of his firearm. Second, the Air Wisconsin fleet manager stated that Hoepfer was an unstable pilot in the FFDO program who had been terminated that day.³⁸⁹ The jury returned a verdict for Hoepfer, finding clear and convincing evidence that the two statements were defamatory, and that the Air Wisconsin manager made one or both of the statements “knowing that they were false, or so recklessly as to amount to willful disregard of for the truth.”³⁹⁰ The jury awarded Hoepfer \$849,625 in compensatory damages and \$391,875 in punitive damages. The judge reduced the punitive damages award to \$350,000, for a total judgment of approximately \$1.2 million plus

383. *Id.* (alteration in original).

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Air Wisconsin Airlines Corp. v. Hoepfer*, 320 P.3d 830, 835 (Colo. 2012).

389. *Id.* at 834.

390. *Id.* at 835.

costs.³⁹¹ The Colorado Court of Appeals affirmed,³⁹² as did the Colorado Supreme Court.³⁹³

3. *U.S. Supreme Court's Analysis and Material Falsity*

The United States Supreme Court granted certiorari to decide “[w]hether ATSA immunity may be denied without a determination that the air carrier’s disclosure was materially false.”³⁹⁴ The Court reversed the judgment of the Colorado Supreme Court. Although the Justices were unanimous in holding that ATSA immunity cannot be denied without a finding that the “voluntary disclosure” to law enforcement officials was “materially false,” they were split 6–3 as to the propriety of the Court applying that standard to the facts of the case.

Justice Sonia Sotomayor, writing for the Court, began by examining the basis for the exceptions to civil immunity granted by the ATSA to airline employees who report suspicious activities.³⁹⁵ The Court held that the ATSA immunity mirrors the actual malice standard fashioned by the Court in *Sullivan*.³⁹⁶ It presumed that Congress, in enacting the ATSA, intended to incorporate the *Sullivan* meaning of actual malice into the ATSA.³⁹⁷ Because the Court had long held that actual malice requires falsity, the majority concluded that Congress intended that an airline employee who makes a disclosure under the ATSA is not civilly liable unless the statement is false.³⁹⁸

The Supreme Court’s opinion in *Hooper* examined its decision regarding material falsity in *Masson v. New Yorker Magazine*.³⁹⁹ In *Masson*,⁴⁰⁰ the Court discussed whether a statement was materially

391. *Hooper*, 134 S. Ct. at 860.

392. *Hooper v. Air Wisconsin Airlines Corp.*, 232 P.3d 230, 248 (Colo. App. 2009).

393. *Hooper*, 320 P.3d at 842.

394. *Hooper*, 134 S. Ct. at 861 (alteration in original).

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.* at 862. The Brief of the United States as Amicus Curiae in Support of Petitioner described why the actual malice standard was incorporated ATSA:

Incorporation of the actual[]malice standard, including its material-falsity requirement, furthers that design [of encouraging reporting of suspicious activity] in two ways. First, by repurposing a preexisting legal framework, Congress reduced the possibility that air-carrier threat reports would be chilled based on an insufficiently broad scope of protection or uncertainties as to how the ATSA’s immunity provision would be applied in practice. Second, the actual[]malice standard has itself evolved to solve precisely the same problem Congress found in the ATSA: how to give breathing room for useful speech . . . while preserving the possibility of suits in extreme circumstances.

Brief for the United States as Amicus Curiae in Support of Petitioner at 14, *Air Wisconsin Airlines Corp. v. Hooper*, 134 S. Ct. 852 (2014) (No. 12-315).

399. *Hooper*, 134 S. Ct. at 861.

400. 501 U.S. 496 (1991).

false, holding that that “[m]inor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge can be justified.’”⁴⁰¹ The *Masson* Court stated that falsity is determined by looking at the effect of the statement on the mind of the person who hears it: a “statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’”⁴⁰² Because *Masson* had been in place for over twenty years when Congress enacted the ATSA, Justice Sotomayor presumed that Congress meant to include the “material falsity” requirement when it adopted the actual malice standard for the ATSA immunity exception.⁴⁰³

The majority also analyzed the concept of material falsity.⁴⁰⁴ Justice Sotomayor began by discussing how to determine the “materiality” of a false statement in the ATSA context. A statement is materially false if it “would have a different effect on the mind of the reader [or listener] from that which the . . . truth would have produced.”⁴⁰⁵ In the case of statements made pursuant to the ATSA, the “reader” is not a member of the public but a TSA officer or some other law enforcement official. Thus, what does it mean for a statement to produce “a different effect on the mind of” a security officer from that which the truth would have produced? According to Justice Sotomayor, courts cannot decide whether a false statement produced “a different effect on the mind of” a hypothetical TSA officer without considering whether the officer would consider the information important in determining a response to it.⁴⁰⁶ The TSA analyzes threat reports to determine a proper response to them. So, even if the Air Wisconsin

401. *Id.* at 517 (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (1936)).

402. *Id.* (quoting ROBERT D. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 138 (1980)). For further discussion of *Masson*, see LEVINE & WERMIEL, *supra* note 3, at 343–48; and SANFORD, *supra* note 126, at § 1.8.

403. *Hoeper*, 135 S. Ct. at 861–62. One of the amici briefs recognized the varied applications of the actual malice standard that could be impacted by the Colorado Supreme Court holding that

[i]n addition to providing a baseline protection for speech on matters of public concern, the actual malice standard has been incorporated by courts in many jurisdictions as a test for determining when common[]law conditional privilege is lost. The *Sullivan* standard is also incorporated into numerous other laws, including electoral statutes; trade libel laws; and a law similar to the ATSA Divorcing the falsity requirement from the constitutional malice standard would impair courts’ analysis of these statutes and common[]law principles as well.

Brief of Amici Curiae for the Reporters Comm. for Freedom of the Press et. al. in Support of Respondent at 27–28, *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014) (No. 12-315) (citations omitted).

404. *Hoeper*, 134 S. Ct. at 862.

405. *Id.* at 864 (quoting *Masson*, 501 U.S. at 517) (internal quotation marks omitted).

406. *Id.* at 861.

manager's statement was not entirely accurate, that would not alter the TSA's response: it still would have investigated.⁴⁰⁷ The statements made to the TSA accurately conveyed the "gist" of what had occurred, and consequently, the immunity applied.⁴⁰⁸

A plaintiff seeking to defeat ATSA immunity does not have to show "precisely what a particular official or federal agency would have done in a counterfactual scenario."⁴⁰⁹ The Court considered such a showing "impossible . . . given the need to maintain secrecy regarding airline security operations."⁴¹⁰ A falsehood, however, cannot be material for purposes of ATSA immunity without "a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat."⁴¹¹ According to the Court, that standard "is an objective one, involving the [hypothetical] significance of an omitted or misrepresented fact to a reasonable" security official, rather than the actual significance of that fact to a particular security official.⁴¹²

The opinion also applied the "material falsity" standard to the facts of the case.⁴¹³ The majority concluded that even if a jury were to interpret the facts in a way most favorable to Hoyer, Air Wisconsin was still entitled to ATSA immunity as a matter of law.⁴¹⁴ The Court's analysis begins with the statement of the Air Wisconsin manager that Hoyer "was an FFDO who may be armed."⁴¹⁵ Hoyer did not dispute the truth of that statement: He was an FFDO and, because FFDOs have firearms, any FFDO "may be armed."⁴¹⁶ Yet, Hoyer argued that to avoid misinterpretation, the Air Wisconsin manager should have qualified the statement by adding that he had no reason to think Hoyer was actually carrying his gun during his trip to Virginia since he was not permitted to do so under the ATSA.

Although the Court agreed that the Air Wisconsin manager's statement could have been misinterpreted, it rejected Hoyer's argument for two reasons. First, a reasonable TSA officer, having been told only that Hoyer was an FFDO and that he was upset about losing his job, would have wanted to investigate whether Hoyer was carrying

407. *Id.*

408. *Id.* at 866.

409. *Id.* at 864.

410. *Hoyer*, 134 S. Ct. at 864.

411. *Id.*

412. *Id.* (alteration in original) (internal quotation marks omitted).

413. *Id.*

414. *Id.*

415. *Id.*

416. *Hoyer*, 134 S. Ct. at 864.

his gun.⁴¹⁷ Second, to accept Hoeper's demand for such precise wording would undermine the purpose of ATSA immunity—that is, to encourage airlines and their employees, often in situations where there is little time to fine-tune their report, to provide the TSA with information about potential threats immediately.⁴¹⁸

The Court then considered the statement of the Air Wisconsin manager that Hoeper “was terminated today.”⁴¹⁹ Although, Hoeper had not yet been discharged when the manager made that statement, it was widely known that his firing was almost certainly imminent. Hoeper admitted that his employment was at the airline's discretion after his third failed test, and that his agreement with Air Wisconsin provided that his fourth attempt to pass the certification test would be his final one. For the Court, a reasonable TSA officer would not care whether an angry and potentially armed airline employee had just been terminated or whether he merely knew the employee was about to be terminated.⁴²⁰

The court also analyzed how to interpret the statements that Hoeper was “unstable” and that the Air Wisconsin officials were “concerned about [his] mental stability.”⁴²¹ As to this issue, the Court split 6–3, with Justices Scalia, Thomas, and Kagan taking the position that the Court should not decide, as a matter of law, whether the statements made by the Air Wisconsin fleet manager to the TSA were materially false. Instead, they would have remanded the case to give a jury the opportunity to apply the standard and determine whether the statements were materially false.⁴²²

The majority reasoned that while lawyers and judges sometimes apply the label “unstable” to people suffering from serious mental illness, such an interpretation is not the only way in which the term is used. For the majority, a holding that Air Wisconsin lost its ATSA immunity because the fleet manager was not aware of every connotation of the phrase “mental stability” would destroy the immunity provision.⁴²³

417. *Id.* at 865.

418. *Id.* (“Baggage handlers, flight attendants, gate agents, and other airline employees who report suspicious behavior to the TSA should not face financial ruin if, in the heat of a potential threat, they fail to choose their words with exacting care.”).

419. *Id.*

420. *Id.* at 865–66.

421. *Id.*

422. In a concurring in part, dissenting in part opinion, Justice Scalia dissented from Part III-B of the majority (applying the material falsity standard to the facts of the case) and the disposition. *Id.* at 867–70 (Scalia, J., concurring in part, dissenting in part).

423. *Hoeper*, 134 S. Ct. at 866 (majority opinion) (“If such slips of the tongue could give rise to major financial liability, no airline would contact the TSA (or permit its employees to do so)

The majority noted that it would be inconsistent with the text and purpose of the ATSA to expose Air Wisconsin to liability because its manager could have chosen a slightly better phrase than “mental stability” to articulate its concern.⁴²⁴ Just as “[m]inor inaccuracies do not amount to falsity” in the defamation context, the majority held that “so long as ‘the substance, the gist, the sting, of the libelous charge be justified,’” a statement that would otherwise qualify for ATSA immunity does not lose that immunity because of a minor imprecision so long as “the gist” of the statement is accurate.⁴²⁵ Additionally, the Air Wisconsin fleet manager’s statements to the TSA accurately conveyed “the gist” of the situation. It was irrelevant whether lawyers or judges might have chosen more precise words.⁴²⁶

The Supreme Court’s decision in *Hooper* provided a uniform interpretation of the actual malice standard. Airline employees who report suspicious activities to the TSA cannot lose their civil immunity without a showing of actual malice and the “material falsity” of their statements. In balancing the need to protect individual reputations and passenger safety, the actual malice standard gives airline employees broad leeway to report what they believe may be threats to TSA or other law enforcement officers. And once again, the standard, uniformly interpreted, gives breathing space for communications in the public interest.

VII. CONCLUSION

The decision in *New York Times v. Sullivan* remains one of the most enduring in the Court’s history. The reversal of the Alabama courts not only relieved the newspaper of a potentially devastating \$500,000 judgment, but also assisted the growing civil rights movement by removing the threat of large libel judgments against persons who spoke out against racial segregation in the South. In doing so, it created a jurisprudence that is likely to be widely applied for the next fifty years.

The actual malice standard derived from the *Sullivan* Court’s belief that debate on public issues should be uninhibited. Erroneous statements are inevitable in such debate, but the Court believed they must be protected if freedom of expression is to have the “breathing space”

without running by its lawyers the text of its proposed disclosure—exactly the kind of hesitation that Congress aimed to avoid.”).

424. *Id.*

425. *Id.* (quoting *Masson v. New Yorker Magazine Inc.*, 501 US. 496 (1991)).

426. *Id.*

necessary to survive.⁴²⁷ Despite inevitable criticism, the history of the courts' treatment of defamation cases since 1964 indicates that the *Sullivan* standard has produced a rare and continuing consensus among judges concerning First Amendment protections.

That consensus has permitted the courts to build on what had been the minority rule among the states in defamation cases, and to create standards that govern defamation suits brought by "public officials" and others. The "breathing space" created by *Sullivan* has also extended from the civil rights movement of the late 1950s and early 1960s to investigations and the analysis of situations never envisioned by Justice Brennan. From Internet bloggers to union organizers embroiled in "labor disputes," *Sullivan's* actual malice standard has been a bulwark against speech restriction.

And, in the legislative arena, Congress has borrowed the standard to foster communications about security issues. The 2001 Aviation and Transportation Security Act, adopted against the background of the 9/11 attacks, reflects Congress' belief that the risk of harm to an individual's reputation resulting from an airline employee making an incorrect disclosure of suspicious activity relating to airline security is outweighed by the greater risk to aircraft and passenger safety.

Thus, the Supreme Court's goal of providing "breathing space" for free debate over public issues has expanded well beyond the foundations of the *Sullivan* decision and has protected communications on a wide variety of subjects deemed to be in the public interest.

427. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).