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Warren/Burger Courts Exalted "Free" Expression Over Other American Values

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WARREN/BURGER COURTS EXALTED "FREE" EXPRESSION OVER OTHER AMERICAN VALUES

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Anglo-American defamation law started with a simple condemnation of the sin of evil speaking. Eventually, this value condemning harmful speech was accommodated to the value of speaking the truth, even hurtful truth. A third value of fostering responsible self-government was injected into American defamation law at and around the time of the American Revolution. This value makes it especially important for citizens to freely speak even hurtful truth about their government.

This accommodation of values in tension was upset by decisions during the Warren and Burger Courts that exalted a new value of free expression over these other values. Not only has this made it more difficult to hold people accountable for their words and to protect the reputations of Americans, but it also has made it more difficult to foster a society in which people are able to make informed decisions about their government. The Supreme Court should reconsider its interpretation of the First Amendment to strike a better balance between the value of free expression and the other values that are important to American society.

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I. INTRODUCTION

Four values coexist within American defamation jurisprudence: (1) condemnation of evil speaking, (2) support for truth, (3) self-government, and (4) fostering free expression. The first of these values, condemnation of evil speaking, was the original defamation law value. When I was growing up, my mom frequently reminded me of Thumper's Rule: "If you can't say something nice, don't say nothing at all."[1] Thumper's Rule once provided the background presumption in American defamation cases.[2] A publisher of a statement that "wasn't nice" (was defamatory in nature) ran the risk that if the publication also

1. While parents likely have been urging some version of Thumper's Rule on their children time immemorial, this version comes from the 1942 Disney classic movie, *Bambi*. Shortly after the title character's birth while he is trying to stand on his spindly newborn fawn legs, a young rabbit named "Thumper" observes, "He doesn't walk very good, does he?" Thumper's mother then required Thumper to recite what has since become known as "Thumper's Rule." *See* Staff Reports, *What's Needed in an Uncivil World? Thumper's Rule*, DAILY J. (Oct. 8, 2016), http://www.dailyjournal.net/2016/10/08/whats_needed_in_an_uncivil_world_thumpers_rule/ [https://perma.cc/9AGF-XM7G].

2. *See infra* Part II.

turned out to be false, the publisher would be liable for defamation without regard to whether the publisher was to blame for the fact that the "not nice" statement was false.[3]

A second American value, support for truth, also was incorporated into American defamation law at a relatively early date. Even against the backdrop of condemning evil speaking, a speaker of ill who could prove that his ill words were also the truth was not liable for his defamation.[4] But even though truth was a complete defense to a defamation claim, the truth of the published statement was secondary to its "not niceness"; therefore, if the statement was defamatory, falsity was presumed (along with presumed injury to reputation).[5]

A third American value, responsible self-government, also impacted the development of American defamation law.[6] Unlike defamatory publications about individuals, criticisms of government and of a candidate's qualifications for office have long been especially valued in America. These three values held sway over American defamation law for more than a century.

But the Supreme Court of the United States changed all that in 1964 with its landmark decision in *New York Times v. Sullivan*.[7] *New York Times* recognized for the first time that the United States Constitution protects some defamatory falsehoods.[8] A fourth value, free expression, thus emerged triumphant over the others. Under the rule of *New York Times*, injuring another by publishing a false and defamatory statement no longer necessarily subjects the publisher to *prima facie* liability.[9] The *New York Times* Court absolved publishers from responsibility for false and injurious statements about a public official (and, later, "public figures," broadly defined) unless the victim of the defamatory falsehood can prove that the speaker exhibited "actual malice."[10] Then, in a breathtaking series of decisions following *New York Times*, the Warren and Burger Courts continued to chip away at the original Thumper's Rule until it had layered a complex constitutional jurisprudence of free expression over common law defamation doctrine.[11] When the Court had finished its restructuring of defamation law, much of the common law protections for defamation victims had been displaced.[12] As a result, defamation

3. *See* RESTATEMENT (FIRST) OF TORTS § 613 (AM. L. INST. 1938).
4. *See infra* notes 57–78 and accompanying text.
5. *See* RESTATEMENT (FIRST) OF TORTS § 613 (AM. L. INST. 1938).
6. *See infra* notes 90–95 and accompanying text.
7. 376 U.S. 254 (1964).
8. *Id.* at 256.
9. *Id.* at 279–80.
10. *Id.*
11. *See infra* notes 175–97 and accompanying text.
12. *See id.*

law today is a far cry from Thumper's Rule. Even careless publishers need no longer necessarily fear responsibility for publishing things "not nice" (and not true)—they now are free of responsibility for destructive defamatory falsehoods unless the victim can prove that the publisher was subjectively aware that the defamatory publication probably was false.[13]

A growing chorus of dissatisfaction with what the Supreme Court has done and with its impact on our public discourse includes Justices Clarence Thomas and Neil Gorsuch, first in Thomas' concurrence to the denial of certiorari in *McKee v. Cosby*[14] and then more recently in Thomas's and Gorsuch's dissents from the denial of certiorari in *Berisha v. Lawson*.[15] But the concern with the Court's defamation jurisprudence has not been the exclusive province of legal conservatives on the Supreme Court like Thomas and Gorsuch—"[E]ven some left-leaning scholars note, [that Thomas] may have a point . . . ."[16] This Article will add my voice to the chorus criticizing the *New York Times* actual malice standard, particularly as implemented in the subsequent line of Supreme Court cases, as a fundamentally flawed and unnecessary rule. My focus will be on the *New York Times* decision's fundamental shift in defamation law away from the presumption that publishers ought to be responsible for their harmful words (Thumper's Rule) when those words turn out to be false and substituting instead a presumption that a publisher can publish whatever defamation it likes without responsibility unless the victim can prove that the publisher subjectively doubted whether the statement were true.

After this brief introduction, Part II will summarize the development and status of defamation law before 1964. Part III will then review the Warren and Burger Courts' extreme makeover of defamation law. Part IV will briefly conclude.

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13. *See infra* notes 179–81 and accompanying text.

14. 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari).

15. 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting from the denial of certiorari); *id.* at 2425 (Gorsuch, J., dissenting from the denial of certiorari).

16. Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 465 (2020). Of course, criticism of *New York Times* has not been universal. *See* Media Law Resource Center, Inc., *Introduction and Executive Summary*, *in* *NEW YORK TIMES V. SULLIVAN*: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT 2 (2022) (purporting to make the "unassailable case that *Sullivan*'s rendition of the First Amendment-based limitations on libel law was correct when the case was decided and that it remains equally correct today").

II. AMERICAN DEFAMATION LAW BEFORE 1964

A. *Common Law Defamation*

American defamation law in 1963 was part of torts, and federal constitutional law was all but irrelevant to the subject: "[T]he law of defamation and right of the ordinary citizen to recover for false publication injurious to . . . reputation" were "almost exclusively the business of state courts and legislatures."[17] While there were differences between libel (defamation by sight) and slander (oral defamation), the common law cause of action for defamation in most states was rather simple and victim-friendly, consisting of three essential elements: (1) a defamatory (and sometimes false) communication, (2) which communication was "of or concerning" the plaintiff, and (3) "published" to at least one third-party.[18] Thus, "the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule."[19] No showing of fault was required, and injury frequently was presumed.[20] Therefore, "in many circumstances, a jury could award substantial damages without the plaintiff proving that the offending statement was false, that the defendant was guilty of some degree of fault, or that the misstatement actually caused the plaintiff any harm."[21] Defamation law was thus tilted against the publisher of defamatory statements. Truth became a defense[22], and other privileges also arose, but the publisher of words that violated Thumper's Rule bore the risk that those published words would defame someone, with or without the publisher's fault.[23] The First Amendment was not at issue because "the consistent view" of the Supreme Court for almost 200 years before 1964 "was that libelous words constitute a class of speech wholly unprotected by the First Amendment."[24] Thumper's Rule held sway—publishers of "not nice" statements published at their own risk.

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17. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369–70 (1974) (White, J., dissenting).

18. *See* LOUIS W. HENSLER III, TORTS: CASES, MATERIALS, QUESTIONS, AND COMMENTS FROM A JUDEO-CHRISTIAN PERSPECTIVE 625 (2015); *see also* RESTATEMENT (FIRST) OF TORTS § 558 (AM. L. INST. 1938).

19. *See Gertz*, 418 U.S. at 370 (White, J., dissenting); *accord McKee*, 139 S. Ct. at 678 (Thomas, J., concurring in the denial of certiorari).

20. *See* HENSLER, *supra* note 18, at 625; *Gertz*, 418 U.S. at 370 (White, J., dissenting); *McKee*, 139 S. Ct. at 678 (Thomas, J., concurring in the denial of certiorari).

21. David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 774 (2020).

22. *McKee*, 139 S. Ct. at 678 (Thomas, J., concurring in the denial of certiorari).

23. *See* RESTATEMENT (FIRST) OF TORTS § 613 (AM. L. INST. 1938).

24. *Gertz*, 418 U.S. at 370 (White, J., dissenting); *accord McKee*, 139 S. Ct. at 680 (Thomas, J., concurring in the denial of certiorari).

B. Defamation as Sin

The legal hostility toward defamatory speech that prevailed in the United States until 1964 is consistent with defamation law's roots in the sin of evil speaking.

i. From Ecclesiastical to Common Law Courts

Defamation in medieval Europe was more sin than tort (not that a clear distinction necessarily existed there and then). Before the common law of defamation developed, harmful speech was regulated throughout Europe by the Christian Church, which punished defamation as a sin in the ecclesiastical courts under canon law.[25] Defaming others was seen as a spiritual issue: "Canon law regarded defamation as part of its jurisdictional competence over the 'cure (or care) of souls.' "[26] But the ecclesiastical courts' grip over defamation was waning by the reign of Henry VIII, when the common law courts had begun to enter the defamation field, and by "the end of the sixteenth century the common law courts had absorbed most of the ecclesiastical jurisdiction in these cases."[27]

ii. "Libelling . . . is an offence against the Law of God." – Lord Coke

The shift from the ecclesiastical to the common law courts did not immediately shed defamation of its essentially moral character—defamation law, like the rest of the Anglo-American common law of tort, developed in a self-consciously Christian context.[28] The architects of English common law were intimately familiar with the Bible and accepted it as divinely inspired and legally authoritative: "The most learned, the profoundest thinkers, had recourse

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25. *See* Van Vechten Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 550 (1903); *see also* RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (AM. L. INST. 1977); R. C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 103–06 (1949); Colin Rhys Lovell, *The Reception of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1052–55 (1962); Jeremiah Smith, Jones v. Hulton: *Three Conflicting Judicial Views as to a Question of Defamation*, 60 U. PA. L. REV. 461, 470 (1912).

26. Lovell, *supra* note 25, at 1054.

27. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (AM. L. INST. 1977); *accord* Donnelly, *supra* note 25, at 106.

28. *See* P.J. VERDAM, MOSAIC LAW IN PRACTICE AND STUDY THROUGHOUT THE AGES 15–16 (1959) (asserting that Christianity began to influence private law once its moral and spiritual guidance had established a foothold in the Roman mind); *see also* JONATHAN BURNSIDE, GOD, JUSTICE, AND SOCIETY: ASPECTS OF LAW AND LEGALITY IN THE BIBLE xxv–xxvi (2011) ("[T]he common law of England has been moulded for centuries by judges who have been brought up in the Christian faith.") (quoting LORD DENNING, THE INFLUENCE OF RELIGION ON LAW 19 (1989)); Bird v. Holbrook (1828) 130 Eng. Rep. 911, 916 (CPD) ("[T]here is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England.").

to the Bible on almost all questions, especially on public law and principles of justice."[29] Biblical passages "lay in the minds of" many, "as they handled the . . . disputes of medieval Europe."[30] Thus, the Bible has "been of profound significance in giving shape and color, not only to English law and legal history, but also to Western civilization as a whole."[31]

The development of the common law of defamation was not exempt from this biblical/moral influence. The law of libel in the King's Courts was first set forth in full in 1606 in *The Case de Libellis Famosis*,[32] as reported by Lord Coke, who appeared to be concerned with the potential for breach of the peace should the evil of libel go unpunished by the court.[33] Coke analogized injury by libel to poisoning:

> poisoning may be done so secret that none can defend himself against it; for which cause the offence is the more grievous, because the offender cannot easily be known; And of such nature is libelling, it is secret, and robbeth a man of his good name, which ought to be more precious to him than his life . . . .[34]

Coke immediately concluded: "[L]ibelling and calumniation is an offence against the Law of God."[35] In so holding, Coke cited and discussed at least five passages from the Bible[36], but he could have cited dozens because the Bible favors gentle speech and disapproves destructive speech throughout: "Among the Jews . . . to slander any one . . . was expressly forbidden by the law of Moses."[37]

iii. Lashon Ha-ra

"There is . . . scarcely any offense which is more frequently alluded to in the psalms of David . . . than that of defamation."[38] David wrote in Psalm

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29. George Horowitz, *The Privilege Against Self-Incrimination — How Did It Originate?*, 31 TEMP. L.Q. 121, 137 (1958).

30. CHRISTOPHER N.L. BROOKE, THE MEDIEVAL IDEA OF MARRIAGE 51 (1993).

31. BURNSIDE, *supra* note 28, at xxvi.

32. *See* Veeder, *supra* note 25, at 563; RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (AM. L. INST. 1977); Donnelly, *supra* note 25, at 117.

33. *See* SIR EDWARD COKE, *Reports*, *in* THE SELECTED WRITINGS OF SIR EDWARD COKE 146–47 (Steve Sheppard ed., 2003).

34. *Id.* at 147.

35. *Id.*

36. *Id.* at 147–48.

37. MARTIN L. NEWELL, DEFAMATION, LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES AS ADMINISTERED IN THE COURT OF THE UNITED STATES OF AMERICA 2 (1898); *see also Exodus* 23:1.

38. NEWELL, *supra* note 37, at 2.

34:12–13: "Keep thy tongue from evil, and thy lips from speaking guile. Depart from evil, and do good; seek peace, and pursue it."[39] The word thus translated into English as "tongue" in verse thirteen is the Hebrew noun *lashon*.[40] The word translated as "evil" is the Hebrew *ra*.[41] Adding the Hebrew definite article *ha* produces the phrase *lashon ha-ra* meaning, literally, "the evil tongue" or, more dynamically, "bad speech." Jewish law prohibited such bad speech:

> *Loshon hora* refers generally to various forms of speech prohibited by the *Torah,* and more specifically to derogatory or harmful speech. *Shmiras HaLoshon*, on the other hand, concerns the quality of exercising caution in speech. The two concepts are central to Jewish ideals, embracing the importance of expression, and the view that words can both help and harm.[42]

Rabbinical tradition has had much to say about *lashon ha-ra*. In Hilchot Deot 7:5 of his magnum opus, the Mishneh Torah, the renowned and influential Rabbi and scholar, Moses Maimonides, defined *lashon ha-ra* this way: "Anything which, if it would be publicized, would cause the subject physical or monetary damage, or would cause him anguish or fear, is Lashon Hara."[43] Thus, *lashon ha-ra* is broader than the modern definition of defamation (and closer to the early common law definition),[44] encompassing anything said about another that would cause anguish, without regard to truth.[45]

Professor David Leonard, citing Psalm 34, suggested that one reason to exclude character evidence at trial is that "in our society there are ancient and deeply embedded moral proscriptions against the act of *speaking* ill of others, even when the information being passed along has a basis in fact."[46] In both Jewish rabbinical tradition and Anglo-American common law culture, words were seen as powerful things to be handled with great care. Professor Leonard graphically describes the societal dangers of tolerating *lashon ha-ra*:

> The very act of speech, in fact, is seen as the essential

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39. *Psalm* 34:12–14 (King James); *accord* NEWELL, *supra* note 37, at 2–3.

40. *See* 2 THE INTERLINEAR HEBREW/GREEK ENGLISH BIBLE 1414 (Jay Green ed., Jay Green trans., 1976); JAMES STRONG, STRONG'S EXHAUSTIVE CONCORDANCE TO THE BIBLE 60 (1988).

41. *See* THE INTERLINEAR HEBREW/GREEK ENGLISH BIBLE, *supra* note 40; STRONG, *supra* note 40, at 109.

42. David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1188 (1998).

43. *What is Lashon Hara*?, TORAH.ORG, https://torah.org/learning/halashon-review1/ [https://perma.cc/3R9W-CWHP] (last visited Mar. 22, 2023).

44. *See supra* note 19 and accompanying text.

45. According to Coke, "[i]t is not material whether the Libel be true . . . ." COKE, *supra* note 33, at 146.

46. Leonard, *supra* note 42, at 1188.

> determinant of how people relate to each other in society, recognizing that at the core of virtually every broken friendship, shattered career or divorce is a seed of hatred, a seed usually planted by a hurtful word. Though hurtful speech often seems an innocuous part of human nature; in fact it is not. It is, of course, difficult to control one's hurtful thoughts, but it is the expression of those thoughts that does the real harm.[47]

The Jewish prohibition on *lashon ha-ra* extended even to truthful speech: "Even information that is truthful or accurate can do unwarranted harm. Our petty daily character judgments, when voiced, can be the source of the kind of hatreds that divide us as nations, as cultures."[48] *Lashon ha-ra* hurts everyone in the affected culture:

> To speak ill of others not only hurts the subject, but also the speaker. To demean others is to demean oneself; though there might be momentary gratification in passing along such information, to do so leads ultimately to unhappiness and bitterness in the speaker. For all of these reasons, Jewish law forbids *loshon hora* . . . .[49]

The New Testament also warns repeatedly against speaking ill of others:

> But the tongue can no man tame; it is an unruly evil, full of deadly poison. Therewith bless we God, even the Father; and therewith curse we men, which are made after the similitude of God. Out of the same mouth proceedeth blessing and cursing. My brethren, these things ought not so to be.[50]

Thus, the Judeo-Christian tradition, summarized in the twenty-first century by Walt Disney in Thumper's Rule, was long- and well-established as of 1964.

C. Evolution of the Values Underlying Defamation Law.

i. Truth

In the light of this long Judeo-Christian condemnation of speaking ill of others, the common law of tort unsurprisingly evinced a prejudice against such evil talk (*lashon hara*) without regard to the truth of the defamatory statement. This value condemning evil speaking was the primary value underlying defamation law.[51] Perhaps ironically, a very forceful statement of this value was

47. *Id.* at 1188–89.

48. *Id.* at 1189.

49. *Id.* at 1190.

50. *James* 3:8–10 (KJV).

51. *See* Richard Tofel & Jeremy Kutner, *A Response to Justice Gorsuch*, *in* NEW YORK TIMES V. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT, *supra* note 16, at 79, 86 n.29

penned by early eighteenth century British free speech activists John Trenchard and Thomas Gordon (writing under the pseudonym "Cato"): "A Libel is not the less a Libel for being true. This may seem a Contradiction; but it is neither one in Law or in common Sense: There are some Truths not fit to be told . . . ."[52] Thus, at eighteenth century common law, when a defendant was liable for defamation, that liability was grounded on the defendant's publication of a defamatory statement, not on defendant's publication of a false statement.[53] As the early nineteenth century Massachusetts Supreme Judicial Court explained in *Commonwealth v. Clap*:

> The essence of the offence consists in the malice of the publication, or the intent to defame the reputation of another. . . . [I]t is not considered whether the publication be true or false; because a man may maliciously publish the truth against another, with the intent to defame his character . . . .[54]

Thus, publishing even a true statement that would tend to defame another was presumptively condemned.

Because defamation focused on the intent (through purpose or knowledge) to defame and because truth was no automatic defense, common law liability for publishing a defamatory falsehood required no showing of malice or fault.[55] Publishing something that would injure the reputation of another, not the publication's likely truth, was the primary issue. Common forms of libel and slander *per se* were treated like an intentional tort where the publisher intended (at least through knowledge) to harm the victim. The publisher of a defamatory statement, even if the statement were believed to be true, would know that the publication would harm the target's reputation. Such verbal aggression was presumptively tortious. A mid-nineteenth century American treatise on defamation law made this point: "The act which is the essential element in the wrongs slander and libel, is a wrongful publication of language, and the general prohibition . . . as applicable to those wrongs would be: *No one shall, without legal excuse, publish language concerning another or his affairs which shall*

("[A]n animating principle of the defamation tort at common law was that one simply should not make statements critical of others.").

52. John Trenchard, *Reflections on Libelling*, *in* 1 CATO'S LETTERS; OR, ESSAYS *ON* LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 246 (1737) (cleaned up).

53. *See infra* notes 57–78 and accompanying text.

54. Commonwealth v. Clap, 4 Mass. 163, 168 (1808).

55. *See* RESTATEMENT (FIRST) OF TORTS § 580 (AM. L. INST. 1938) (stating publisher is liable even if "he . . . neither knew nor by the exercise of every possible precaution could have known that it could be" understood as defamatory).

occasion him damage."[56] Because defaming someone was presumptively wrong, *prima facie* liability for defamation, as with intentional torts, was strict, without regard to whether the defamatory statement was true or false.

Thus, truth was not originally a complete defense to a defamation claim—to the contrary, the original rule is reflected in the English maxim, "the greater the truth, the greater the libel," which now has passed into idiom.[57] Whether the publication was true was, at best, secondary to the defamatory nature of the publication.[58]

But like Thumper's Rule against speaking ill of others, the right to speak the truth also is a long-cherished American value. The early American commitment to the right to speak the truth is illustrated by the trial of John Peter Zenger. Zenger had published harsh attacks on New York's colonial governor, William Crosby.[59] Truth was not yet a defense to a libel charge and so was technically irrelevant to the charge against Zenger.[60] Defense counsel nevertheless argued for and obtained what amounted to jury nullification, that the jury should attend to the truth of the alleged libel.[61] Thus, while the value of gentle speech was the primary value underlying American defamation law, the value of speaking the truth began to emerge in American defamation jurisprudence rather early on as a secondary value to be accommodated with the primary value against evil speaking.[62] Zenger's battle for the right to speak the truth, even truth that tended to defame, continued in America until the right to speak the truth finally prevailed in the nineteenth century.[63] *People v. Croswell*[64] may have been a harbinger of the general adoption of truth as a

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56. JOHN TOWNSEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS 68 (1868).

57. *See* J. Ross Harrington, *Truth as a Complete Defence in an Action for Libel*, 4 NOTRE DAME L. 436, 439 (1929). A similar but more modern English idiom is "the truth hurts."

58. *See* COKE, *supra* note 33, at 146 ("It is not material whether the Libel be true . . . .").

59. *See* NEWELL, *supra* note 37, at 26.

60. *Id.* at 27.

61. *Id.* at 27–28.

62. *New York Times* devotees cite the Zenger trial as evidence of early American dedication to the value of free expression, *see, e.g.*, Matthew L. Schafer*, A Response to Justice Thomas*, *in NEW YORK TIMES V. SULLIVAN*: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT, *supra* note 16, at 9, 25, but free expression is not the value underlying the successful argument in the Zenger trial. The argument that prevailed in Zenger reflected the value of immunity for publishing the truth, not the value of publishing whatever one desires without consequence. The commitment to publishing the truth is undermined, not enhanced, by the Supreme Court's defamation jurisprudence, beginning with *New York Times*. *See infra* notes 176–85 and accompanying text.

63. *See generally* CLYDE AUGUSTUS DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS 141–62 (1906) (chronicling the fight over truth as a defense to libel).

64. 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

defense to a defamation claim, at least when that claim was brought by a public official. While the defense of truth ultimately was rejected in *Croswell*, the court was deadlocked on the issue.[65]

Despite the setback in *Croswell*, the truth defense was by no means defeated. Truth as a defense to a defamation claim was suggested again by the defense in *Commonwealth v. Clap*[66] where defendant had been convicted of criminal libel and appealed on the ground that the trial court had not permitted him to introduce evidence of the truth of his publication.[67] While acknowledging in dicta that the truth might be relevant to a privilege that would justify a defamatory statement by showing that there was a good, non-defamatory reason for publishing it (such as providing information on the character of a public official or candidate for public office), the Supreme Judicial Court of Massachusetts nevertheless affirmed Clap's conviction, holding that truth was not a defense as such.[68] Any possible defense of truth would be limited in two ways. First, it applied only to statements about public officials or candidates for public office: "The court agreed with the attorney general that the [defendant], as a mere appointed officer, rather than an elected one, was not a public official and thus the point of law argued for by the defendant did not control the case."[69] And, second, even the limited justification for publishing defamatory statements about public officials or candidates extended only to true statements: "[T]he publication of falsehood and calumny against public officers, or candidates for public offices, is an offence most dangerous to the people, and deserves punishment . . . ."[70] Thus, while the holding in *Clap* affirmed the common law commitment to the value of sanctioning evil speaking (Thumper's Rule), the court's dicta recognized a new value—expressing truth (even defamatory truth), especially about public officials or candidates for public office.[71] This privilege to speak defamatory truth about public officials or candidates for public office was soon confirmed, again in dicta, by the New York Supreme Court of Judicature:

> All that is required, in the one case or the other, is, not to transcend the bounds of truth. If a man has committed a crime, any one has a right to charge him with it, and is not responsible for the accusation; and can any one wish for more latitude than

65. *See id.* at 394.
66. Commonwealth v. Clap, 4 Mass. 163, 168 (1808).
67. *See id.* at 168.
68. *See id.* at 169.
69. Schafer, *supra* note 62, at 27.
70. *See Clap*, 4 Mass. at 169–70.
71. *Id.*

this?[72]

The truth defense finally triumphed throughout America by the early nineteenth century,[73] but even this concession to the publisher who violated Thumper's Rule was controversial.[74] As one commentator put it, "the allowance of truth as a complete defense not only is not of significance in promoting morality, but in fact may even stimulate immorality by granting immunity to those guilty of malicious and morally censurable defamation. The rule enshrines the scandal-monger as a favorite of the law."[75] And even after truth became a defense, the risk of falsehood, until *New York Times*, remained on the publisher—if a publication turned out to be false and defamatory, the publisher was liable even if the defamation resulted from an excusable mistake: "a reasonable but mistaken belief that a communication is not defamatory"[76] or "that the defamatory matter is true"[77] was "not sufficient to make [the publisher] immune to liability."[78] The truth of a defamatory publication was an excuse, not a justification. Only if the defamatory publisher could prove the publication true was the publisher excused from liability for the expected harm wrought by the defamatory publication.

Similarly, the burden of assuring that even a true, but defamatory, statement did not inadvertently defame an unintended target remained on the publisher:

> [The publisher took] the risk that the name or description may be ambiguous and therefore misapplied. Thus, the reasonable belief on the part of the speaker or writer that a person whom

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72. Lewis v. Few, 5 Johns. 1, 36 (N. Y. Sup. Ct. 1809).

73. *See* SAMUEL MERRILL, NEWSPAPER LIBEL: A HANDBOOK FOR THE PRESS 230 (1888); Henry St. George Tucker, *Book III: Of Private Wrongs*, *in* 2 COMMENTARIES ON THE LAWS OF VIRGINIA, COMPRISING THE SUBSTANCE OF A COURSE OF LECTURES DELIVERED TO THE WINCHESTER LAW SCHOOL 58 (1846) ("Thus the defendant may plead that the words spoken were *true*, and if he proves it he is absolved of damages."); *accord* JAMES KENT, COMMENTARIES ON AMERICAN LAW 25–29 (O.W. Holmes, Jr. ed.,1826).

74. *See* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 742 (1833) ("[T]he truth of the facts is not alone sufficient to justify the publication, unless it is done from good motives . . . .").

75. Bertram Harnett and John V. Thorton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425, 437 (1949).

76. RESTATEMENT (FIRST) OF TORTS § 579 cmt. c (AM. L. INST. 1938). "It is immaterial that the publisher honestly and reasonably believes that the language is incapable of a defamatory imputation toward any living person . . . . The publisher takes the risk that there may exist facts capable of turning an apparently innocent statement into a libel or slander." *Id.* § 580 cmt. c.

77. *Id.* § 579 cmt. d. "While the truth of a defamatory publication is a complete defense . . . a mistaken belief in the truth of the matter published, although honest and reasonable, is not a defense . . . ." *Id.* § 582 cmt. g.

78. *Id.* § 579 cmt. d.

> he intends to charge with a crime is sufficiently described or designated by name or otherwise is no defense if another is reasonably understood as intended. The question is not who is intended but who is reasonably understood to be intended; not "who is meant but who is hit."[79]

Thus, the publisher was strictly responsible for the defamatory effect of its publication. "It is quite immaterial what meaning the writer intended his words to convey. Every person is legally presumed to intend the natural consequences of his own acts. The tendency of the publication, the manner in which readers understand it, is alone in issue . . . ."[80]

The well-known English case of *E. Hulton & Co. v. Jones*[81] illustrates this strict character of the common law of defamation. The appellants in the case, E. Hulton & Co. ("Hulton") had published a newspaper article "defamatory of a person described as 'Artemus Jones.' "[82] For purposes of the litigation, the parties accepted as true that Hulton intended the name "Artemus Jones" to be a fictional pseudonym—the author and editor of the article testified they "did not know of the existence of the respondent,"[83] whose name happened to be "Artemus Jones." The jury nevertheless returned a verdict for the very real Artemus Jones, who was inadvertently defamed by defendant's publication.[84] Hulton argued on appeal that there can be no libel "when the writer does not know even of the existence of the person who imagines the language to be directed to himself."[85] But under the rule applied in that case, one who chooses to use defamatory language (to violate Thumper's rule) is strictly liable for any resulting reputational harm:

> A person charged with libel cannot defend himself by shewing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the

79. *Id.* § 579 cmt. a.

80. MERRILL, *supra* note 73, at 155.

81. [1910] AC 20 (HL) 20 (appeal taken from Eng.).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 21.

action, however excellent his intention.[86]

The House of Lords explained that the publisher who would avoid the risk of accidentally defaming someone can "abstain from defamatory words,"[87] in other words, observe Thumper's Rule. The publisher who chooses to fire off defamatory material, even if aimed at nobody in particular, is responsible for any resulting defamation. As for the "heavy" award of damages to the plaintiff in the case, "the jury were entitled to say this kind of article is to be condemned . . . . If they think . . . that the tone and style of the libel is reprehensible and ought to be checked, it is for the jury to say so . . . ."[88] The jury thus was allowed to condemn a violation of Thumper's Rule with a large damages award, even if the defamation was inadvertent.[89] This approach persisted in America until 1964—publishers were strictly responsible for reputational harm caused by their defamatory publications, and any who wanted to avoid the risk of such responsibility could refrain from publishing defamatory material (could observe Thumper's Rule).

ii. Self-Government

A third, perhaps particularly American, value also underlies defamation law as it eventually arose in the United States: participation in self-government. This value distinguishes between publications relating to public governance and those that injure private people. While this value may have come to full flower in America, its seeds were sown in England even before the American Revolution. The pseudonymous early eighteenth century London free speech pamphleteer known as "Cato" distinguished between libel involving a private interest and speaking truth regarding a public matter: "But this Doctrine [that some truths are not fit to be spoken] only holds true as to private and per[s]onal Failings; and it is quite otherwi[s]e when the Crimes of Men come to affect the Publick."[90] Similarly, Thomas Jefferson in 1789 would have exempted from the right of free speech and press "false facts affecting injuriously the life, liberty, property, or reputation of others . . . ."[91] This crucial distinction between sedition against the government, the punishment of which was constitutionally debatable, and defamation of an individual, which was never protected by the

86. *Id.* at 23–24.

87. *Id.* at 24.

88. *Id.* at 25.

89. *Id.* at 20.

90. Trenchard, *supra* note 52, at 246.

91. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789) (in Founders Online, Nat'l Archives), https://founders.archives.gov/documents/Jefferson/01-15-02-0354 [https://perma.cc/U8QS-F7Z5].

First Amendment until *New York Times* and its progeny, has not escaped the attention of Justice Thomas.[92]

Unlike defamatory publications about individuals, criticisms of government and of a candidate's qualifications for office have long been especially valued in America. As already noted, the early nineteenth century Massachusetts Supreme Judicial Court in *Commonwealth v. Clap* discussed how a possible defense of truth applied only to statements about public officials or candidates for public office.[93] Similarly, in the 1809 case of *Lewis v. Few*, Justice Thompson of New York's Supreme Court offered what turned out to be a seminal opinion on the issue:

> That electors should have a right to assemble, and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinions to others, is a position to which I most cordially accede. But there is a wide difference between this privilege, and a right irresponsibly to charge a candidate with direct, specific and unfounded crimes. It would, in my judgment, be a monstrous doctrine to establish, that when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crimes, with impunity. Candidates have rights, as well as electors; and those rights and privileges must be so guarded and protected, as to harmonize one with the other.[94]

Provided they did not falsely defame a particular candidate, electors were privileged to criticize candidates for office. James Kent also expressed an American commitment to free speech about candidates for public office:

> The liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of the United States.[95]

This American value had crystalized as part of the American defamation landscape by the mid-nineteenth century:

> The English common-law rule which made libels on the constitution or the government indictable, as it was

92. McKee v. Cosby, 139 S. Ct. 675, 682 (Thomas, J., concurring in the denial of certiorari) ("[C]onstitutional opposition to the Sedition Act—a federal law directly criminalizing criticism of the Government—does not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures.").

93. *See supra* note 69 and accompanying text.

94. Lewis v. Few, 5 Johns. 1, 36 (N.Y. Sup. Ct. 1809).

95. KENT, *supra* note 73, at 22.

> administered by the courts, seems to us unsuited to the condition and circumstances of the people of America, and therefore to have never been adopted in the several States. If so, it would not be in the power of the State legislatures to pass laws which should make mere criticism of the constitution or of the measures of government a crime, however sharp, unreasonable, and intemperate it might be. The constitutional freedom of speech and of the press must mean a freedom as broad as existed when the constitution which guarantees it was adopted, and it would not be in the power of the legislature to restrict it, except in those cases of publications injurious to private character, or public morals or safety, which come strictly within the reasons of civil or criminal liability at the common law, but where, nevertheless, the common law as we have adopted it failed to provide a remedy.[96]

Under these American constitutional values, the government itself had no interest that would support a defamation action. While individual governors might seek personal redress for defamation, Americans possessed an unfettered right to criticize their government. Both were protected, individual reputations and the ability to criticize the state. As Kent put it, "[T]hough the law be solicitous to protect every man in his fair fame and character, it is equally careful that the liberty of speech, and of the press, should be duly preserved."[97]

D. The First Amendment Did Not Insulate the Defamer from Legal Responsibility.

Before 1964, freedom of speech and press under the First Amendment meant that publishers could not be prohibited from publishing, but it did not mean that the publisher was given a license to defame without responsibility. As my colleague Craig Stern explained, "Until 1964, defamatory speech was thought to be without first amendment protection."[98] The liberty to speak was always paired with responsibility for the speech:

> But the liberty of speech and of the press may be abused, and so may every human institution. It is not to be supposed

96. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 429 (1868).

97. KENT, *supra* note 73, at 22.

98. Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1010 (1994); *see also* The Nomination of Elena Kagan to be an Associate Justice on the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 469 (2010) (response of Elena Kagan, Nominee for Justice of the Supreme Court of the United States) ("The Framers of the Constitution did not understand the First Amendment as extending to libelous speech.").

> that it may be abused with impunity. Remedies will always be found while the protection of individual rights and the reasonable safeguards of society itself form parts of the principles of our government. A previous superintendency of the press, an arbitrary power to direct or prohibit its publications are withheld, but the punishment of dangerous or offensive publications, which on a fair and impartial trial are found to have a pernicious tendency, is necessary for the peace and order of government and religion, which are the solid foundations of civil liberty.[99]

A publisher could not be punished for harmless publications, but was fully responsible for legally harmful ones:

> Conceding . . . that liberty of speech and of the press does not imply complete exemption from responsibility for every thing a citizen may say or publish, and complete immunity to ruin the reputation or business of others so far as falsehood and detraction may be able to accomplish that end, it is still believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.[100]

Likewise, Joseph Story assumed that the liberty to speak protected by the First Amendment was to be tempered by responsibility for the speech:

> That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen.[101]

Thus, the First Amendment prohibited prior restraint of false and defamatory speech or press, but not responsibility after the fact:

> It is plain, then, that the language of this amendment imports no more, than that every man shall have a right to speak, write,

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99. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 119–20 (1825).

100. COOLEY, *supra* note 96, at 421.

101. STORY, *supra* note 74, at 731–32.

> and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation . . . .[102]

While there was some variance of views on freedom of speech and the press, even those who took a broader view of those liberties "found no conflict between those freedoms and laws against the things that later were treated as unprotected by the First Amendment even though they involve words spoken or published: perjury, blackmail and similar threats, fraud, personal defamation, and some concept of incitement to immediate violence."[103]

That this was the American approach to freedom of speech and of the press even before the adoption of the First Amendment is illustrated by the case of Eleazar Oswald. Oswald, the publisher of a paper called the *Independent Gazetteer*, published several anonymous pieces against one "Andrew Browne, the master of a female academy."[104] Browne sued Oswald for libel.[105] On July 1, 1788, "Oswald published under his own signature,"[106] what has been characterized as "a scathing attack upon the Court, charging it with being biased and politically motivated in his case."[107] In response to this scathing publication, "the Court ordered his arrest for contempt."[108] Oswald's arrest led to a dispute with the Court over the scope of freedom of the press in Pennsylvania. Oswald argued that freedom of the press in Pennsylvania gave him the right to criticize the judiciary.[109] But Pennsylvania's Chief Justice Thomas McKean held the contrary opinion that freedom of the press meant the same thing in Pennsylvania's bill of rights that it did in England: "[T]hey give to every citizen a right of investigating the conduct of those who are entrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a licenser."[110] In other words, freedom of the press in Pennsylvania meant no prior restraint on publication, not no responsibility after the fact of publication. For attempting to poison the jury pool in Browne's

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102. *Id.* at 732.

103. WENDELL BIRD, THE REVOLUTION IN FREEDOMS OF PRESS AND SPEECH: FROM BLACKSTONE TO THE FIRST AMENDMENT AND FOX'S LIBEL ACT 4–5 (2020).

104. Respublica v. Oswald, 1 Dall. 319, 319 (Pa. 1788).

105. *Id.*

106. *Id.*

107. *See* David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 176 (2001).

108. *Id.*

109. *See Respublica*, 1 Dall. at 321.

110. *Id.* at 325.

pending libel suit, the Court held Oswald in contempt and sentenced him to a fine and a month's imprisonment.[111]

On September 5, 1788, Oswald wrote a letter to the Pennsylvania General Assembly calling for the impeachment of the justices who had held him in contempt on the ground that the justices had violated the freedom of the press.[112] The Assembly "resolved itself into a committee of the whole, to hear" three days' testimony on Oswald's complaint.[113] After receiving all testimony, William Lewis, who was somewhat awkwardly (to say the least) both a member of the Assembly and Oswald's prosecutor in his contempt proceeding, delivered to the Assembly "a very elaborate argument, in vindication of the conduct of the judges."[114] Opening with a disquisition on liberty in general and liberty of the press in particular, Lewis distinguished between "liberty" and "licentiousness," supporting his argument with long passages from Blackstone, including the following:

> Natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control . . . being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty . . . and, in consideration of receiving the advantage of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. And this species of legal obedience and conformity is far more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrouled power of doing what he pleases: The consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind . . . .[115]

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111. *Id.* at 326–29.

112. *Id.* at 329.

113. *Id.* at 330.

114. *Id.* at 329.

115. GENERAL ASSEMBLY OF PA., DEBATES OF THE TWELFTH GENERAL ASSEMBLY, 3d Sess., at 219 (1788) (cleaned up).

Lewis applied this distinction between liberty and licentiousness to the press: "Writers have lately appeared, who seem to think that *liberty*, from the very meaning of the word excludes all idea of restraint. This is not liberty in its genuine sense, but licentioussness, which is a more dangerous enemy to liberty than tyranny itself."[116] Liberty does not extend to speech or press to the hurt of others. Law protects the property of citizens from such "licentiousness," and that property includes reputational interests:

> [A] man whose virtues had procured him a *good name* has a property in it, which is or ought to be secured by the laws of society: when security is afforded for every other species of property, surely no good reason can be assigned why the laws should be regardless of this, which is of all others the most valuable if it is true . . . that *a man has a property in his good name*, it follows, that every wanton and groundless attack which is made upon it, must be an *injury*. If *it is an injury*, there must be a remedy for and redress of that injury . . . .[117]

Thus, liberty of the press, properly understood, includes the right of those defamed by defamatory publications to recover when they are injured by an abuse of that liberty: "It naturally follows, that although every man is entitled to the free use of his printing press, in like manner with that of other property, he must take care not to exercise this right to the prejudice of his neighbour."[118] Lewis concluded that "liberty of the press" meant putting the printing press on a par with other sorts of property—the owner has a right to use the property free of prior restraint, but will be held responsible after the fact for any use of the property to the detriment of others:

> We have seen that printers have been deprived of the enjoyment of this right [to use their property], by arbitrary proclamations, despotic star chamber decrees, and oppressive statutes. We have seen that the days of high crested prerogative, when royal proclamations controuled the law, have passed away: that the star - chamber is abolished, and that the restraining statutes are expired. We have seen that these proclamations, decrees, and statutes, created the only difference that ever existed between the freedom with which a man might use his press and any other kind of property. We have seen, that as the restraints which they imposed are removed, the press has risen to a level with other property, and as there is nothing in the nature of government, or in the statute or common law, which grants it any greater privilege, there can

116. *Id.* at 234 (cleaned up).

117. *Id.* at 235 (cleaned up).

118. *Id.* at 236 (cleaned up).

be no foundation for a claim to it.[119]

Lewis thus took the position that this equality of the use of the press with other property was the meaning of the liberty of the press both in England and in Pennsylvania, the only difference being that prior restraint of the press could return in England, but the Pennsylvania legislature was constitutionally proscribed from any prior restraint of the press:

> It is admitted that the first of these sections [of the Pennsylvania Constitution] makes a *great and noble* di[s]tinction between the constitution of *England* and that of *Pennsylvania*; but it is denied that it makes any at all between the laws of the two countries. The printing presses in *England* have more than once been subject to arbitrary and dangerous restraints, and there is nothing in the constitution of that country to prevent a corrupt parliament from repeating them; but the legislature of *Pennsylvania* has no such power, because it is restrained by the bill of rights. In this the constitutions of the two countries materially differ; but as the parliament of *England* has never exercised that power since the reign of king *William* the 3d, there is no difference between the laws of the two countries. Should that power be again exercised by the *British* parliament, the law of the two countries would not be alike, because the legislature of *Pennsylvania* could pass no such law. The parliament of *England* is said to be "uncontrolable transcendent and absolute in its power and authority;" but the power and authority of the legislature of *Pennsylvania* is limited within certain bounds by the bill of rights and constitution. Wherever the authority of the one is limited, and the other unconfined . . . the constitutions of the two countries differ, although their laws may be, and very often are the same. The only conclusion that can be fairly drawn from the bill of rights is, that as it disables the legislature from restraining the press, and as the *British* parliament has the power of doing it . . . .[120]

Thus, the difference between England and Pennsylvania regarding liberty of the press was thought to be more theoretical than practical—neither engaged in prior restraint, but England had done so before, still could, and might again, while Pennsylvania could not. Not many years later, Henry St. George Tucker would similarly distinguish English law from American:

> In 1694, the parliament . . . established the freedom of the press in England. But although this negative establishment

119. *Id.* at 247 (cleaned up).

120. *Id.* at 250–51 (cleaned up).

> may satisfy the subjects of England, the people of America have not thought proper to suffer the freedom of speech, and of the press to rest upon such an uncertain foundation, as the will and pleasure of the government. Accordingly, when it was discovered that the constitution of the United States had not provided any barrier against the possible encroachments of the government thereby to be established, great complaints were made of the omission, and most of the states instructed their representatives to obtain an amendment in that respect; and so sensible was the first congress of the general prevalence of this sentiment throughout America, that in their first session they proposed an amendment since adopted by all the states and made a part of the constitution; "that congress shall make no law abridging the freedom[] "of speech, or of the press."[121]

In the end, Oswald failed in his quest to convince the Pennsylvania Assembly to impeach the judges who had held him in contempt.[122] However, Oswald did not so easily give up his fight for a broad version of the liberty of the press that included more than a prohibition of prior restraints. In 1789, his newspaper "began printing daily articles supporting an expansive understanding of freedoms of press and speech, and condemning a narrow understanding while decrying prosecution of press and speech."[123]

Despite the best efforts of dissenters such as Oswald, they remained dissenters. The accepted approach limiting freedom of speech and the press primarily to a prohibition on prior restraint prevailed, even under the United States Constitution, well into the twentieth century.[124] As the Supreme Court

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121. ST. GEORGE TUCKER & WILLIAM BLACKSTONE, 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 12–13 (1803) (citing U.S. CONST. amend. I). At least one free expression fan has misread Tucker to suggest that America differed from England on the essential definition of freedom of the press. *See, e.g.,* Schafer, *supra* note 62, at 68–69. That was not Tucker's point. Rather, he was remarking, as Lewis did in the Oswald matter, that America, unlike England, took away the power of the legislature to infringe freedom of speech and press, whatever those terms may mean.

122. Respublica v. Oswald, 1 Dall. 319, 329 (Pa. 1788).

123. BIRD, *supra* note 103, at 13.

124. *See, e.g.*, JOSEPH ALDEN, THE SCIENCE OF GOVERNMENT IN CONNECTION WITH AMERICAN INSTITUTIONS 200–01 (1866) ("There are extravagant and unsound notions current in regard to the freedom of the press. Some seem to think that it secures impunity in doing every kind of wrong that can be perpetrated by means of the press. Such freedom, or license, for it cannot properly be called freedom, would be incompatible with the existence of a free government. An eminent jurist has remarked that freedom of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."); *see also* COOLEY, *supra* note 96, at 420 ("It is conceded on all sides that the common-law rules that subjected the libeller to

explained in *Near v. Minnesota*, before 1964 the primary First Amendment concern was whether the government could prevent speech before the fact, not whether the speaker could be held responsible for the speech after the fact: "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."[125] On this point, the Supreme Court approvingly quoted Blackstone:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.[126]

Therefore, the *Near* Court held that "the common-law rules that subject the libeler to responsibility . . . for . . . private injury, are not abolished by the protection extended in our Constitutions."[127]

In this regard, Chief Justice Parker of Massachusetts, in *Commonwealth v. Blanding*, analogized liberty of press to the right to keep and bear arms: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction."[128] Publishers had the right to launch their words into the world, but they were responsible for unwarranted reputational destruction those words caused.

In summary, American courts essentially followed Thumper's Rule before 1964. A publisher who said something that "wasn't nice" (was defamatory in nature) ran a risk. If the publication turned out to be false and injured another, the publisher was liable without regard to whether the publisher was at fault. Both the falsity of the defamatory statement and injury therefrom were presumed. The wrong was the evil speaking, not the failure to get the facts straight first. Truth eventually became an excuse from liability for defamation, especially for defamation claims by public officials, but it was up to defendant

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responsibility for the private injury, or the public scandal occasioned by his conduct, are not abolished by the protection afforded to the press in our constitutions.").

125. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

126. *Id.* at 713–14 (cleaned up) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (1770)).

127. *Near*, 283 U.S. at 715.

128. Commonwealth v. Blanding, 20 Mass. 304, 313 (1825).

to prove truth, not merely good faith (or lack of bad faith). The risks of evil speaking were borne by the speaker.

III. THE WARREN AND BURGER COURTS' EXTREME MAKEOVER OF DEFAMATION LAW

Thus, from the founding of the United States until 1964, the cultural value represented by Thumper's Rule was deeply embedded in defamation law even though other values (truth and republican self-government) had made some inroads. Tort law was hard on publishers of defamation. The universal rule throughout the country was that defamatory falsehood was not constitutionally protected and was therefore governed entirely by state common law. Most states made many defamatory statements presumptively actionable without any showing of falsehood, fault, or actual harm.[129] Accordingly, state tort law allowed plaintiffs to be quite aggressive in protecting their reputations against false and defamatory statements, but this state solicitude for reputation was potentially subject to abuse by some plaintiffs.[130]

A. New York Times v. Sullivan *Eliminates Strict Liability for Defamation.*

New York Times v. Sullivan represented a huge cultural shift away from the value exhibited in Thumper's Rule and toward unburdened free expression.

i. *New York Times* Shifted the Paradigm.

It would be difficult to overstate the significance of *New York Times* as a watershed in the defamation landscape. The change in defamation law was "so substantial as to be almost a transformation."[131] With judicious understatement, Justice Thomas recently noted that "[t]he constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel . . . ."[132] More than forty years earlier, Justice White had more colorfully described the Supreme Court's extreme makeover of defamation law as "radical changes in the law and severe invasions of the prerogatives of the States."[133] As White explained, the *New York Times* "Court, in a few printed pages . . . federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50

129. *See supra* notes 55–89 and accompanying text.

130. *See infra* notes 144–45 and accompanying text.

131. RESTATEMENT (SECOND) OF TORTS ch. 23 at 151 (AM. L. INST. 1977).

132. *See* McKee v. Cosby, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring in the denial of certiorari).

133. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 376 (1974) (White, J., dissenting).

States."[134] This federalization was effected through the First Amendment, which the Court used "to rewrite many aspects of the law of defamation."[135] The most fundamental change wrought by *New York Times* was that some defamation plaintiffs "could no longer recover damages absent proof of a high degree of culpability on the part of the publisher"[136] regarding the truth of the published defamation. Thus, the Court reversed the strict protection that states provided to reputational interests against publishers of defamation "and remade defamation law in a dizzying array of ways."[137] The thorough breadth of the Court's transformation of defamation law was not only geographical (applying to all fifty states) but also temporal. "[T]he Court struck down centuries of libel law,"[138] transforming the fundamental nature of the tort of defamation. *New York Times v. Sullivan* was a rejection of Thumper's Rule in favor of a license to harm (public officials, at least) through negligently (and, eventually, sometimes even recklessly) false defamatory publication.

In addition to eliminating strict liability for defamation, the new rule announced in *New York Times* also altered the burden of proof regarding truth. Before 1964, defamatory *per se* statements were presumed false, and it was up to the publisher to excuse the defamatory publication.[139] Truth was a defense only if the defendant could prove that the publication was true.[140] After *New York Times*, the public official (and later public figure) plaintiff must prove that defendant was at least reckless regarding the truth of the statement, which means that the burden of proof on truth or falsity of defamatory statements was effectively shifted to the plaintiff when the plaintiff is a public official (now broadly defined).[141] The Court eventually made this shift of burden explicit, at least for all cases "where a newspaper publishes speech of public concern."[142] And the new requirement to plead and prove fault applies to more than whether the statement is true or false. The defamed victim must also plead and prove that the defamer was at least negligent regarding whether the defamatory statement would be understood as being about the plaintiff:

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134. *See id.* at 370.

135. RESTATEMENT (SECOND) OF TORTS ch. 23 at 152 (AM. L. INST. 1977).

136. *See* Logan, *supra* note 21, at 774; *see also* Reynolds, *supra* note 16, at 467 ("[T]he Supreme Court decided to subject libel law to an unprecedented degree of First Amendment control.").

137. *See* Logan, *supra* note 21, at 774.

138. *Id.* at 772.

139. *Id.* at 774.

140. *See* McKee v. Cosby, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring in the denial of certiorari).

141. John W. Wade, *Defamation, the First Amendment and the Torts Restatement*, FORUM, Fall 1975, at 3, 8.

142. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986).

> The common law position was that if the recipient reasonably understood the communication to be made concerning the plaintiff, the defamer was subject to liability even though he was not at fault either because he intended the reference to the plaintiff or because he was negligent in failing to realize that his communication would be so understood by the recipient. This position is now held to be in violation of the First Amendment to the Constitution.[143]

To summarize, for the many cases of defamation to which the new rule applies, *New York Times* changed defamation from essentially a strict liability tort where truth was a defense to a tort where the plaintiff had to prove that the publisher was at least reckless regarding whether the published statement was false and defamatory. This was a massive doctrinal reversal. *New York Times* thus rejected the values underlying Thumper's Rule that disfavored speaking ill of others. Saying things "not nice" no longer was presumptively condemned but rather now gets rigorous constitutional protection.

ii. The Context of *New York Times v. Sullivan*: Striking a Blow for Civil Rights.

Context is crucial to understanding what the Supreme Court did in *New York Times v. Sullivan*. Scholars who have studied the history of the civil rights movement of the 1960s have concluded that opponents of the movement had used libel suits, as one commentator recently put it, "to chill or banish negative coverage."[144] The Court recognized that the *New York Times* litigation was one such battle in the ongoing civil rights struggle, which is why "Justice Hugo Black called these libel suits a 'technique for harassing and punishing a free press' in his *Sullivan* concurrence."[145] In this context, the Court formed the *New York Times* rule that was designed, at least in part, to blunt a weapon that was being wielded against the civil rights movement. Thus, the *New York Times* conflict was as much political as legal, and the legal policy of the decision got short shrift, as explained by Professor Richard Epstein:

> [T]he decision was, if anything, viewed more as a victory for the civil rights movement, guaranteeing a federal presence to offset the official power structure at the state level, which was an unholy bulwark for segregation and white supremacy in all areas of public and private life. The desire to reach the right result in *New York Times* had as much to do with the clear and overpowering sense of equities arising from the confrontation

143. RESTATEMENT (SECOND) OF TORTS § 564 cmt. f (AM. L. INST. 1977).

144. *See* Reynolds, *supra* note 16, at 468; *accord* Logan, *supra* note 21, at 762.

145. *See* Reynolds, *supra* note 16, at 468.

> over racial questions as it did with any strong sense of the fine points of the law of defamation. The source of many of the modern problems with the law of defamation is that the *New York Times* decision was influenced too heavily by the dramatic facts of the underlying dispute that gave the doctrine its birth. In consequence the decision has not stood the test of time well when applied to the more mundane cases of defamation . . . .[146]

iii. *New York Times*' Overreach.

But even considering the political nature of the litigation, the Court's extreme choice of remedy—altering the fundamental nature of defamation law—is somewhat mystifying. The plaintiff, L. B. Sullivan, was one of the three Commissioners of Montgomery, Alabama, who supervised, among other things, the Police Department.[147] The *New York Times* "printed an error-filled advertisement seeking financial support for the representation of Dr. Martin Luther King Jr., who had been charged with violating Alabama law."[148] The advertisement decried "an unprecedented wave of terror" by opponents of the civil rights movement, largely in response to student protests at the Alabama State College.[149] Among the allegedly libelous statements in the advertisement were the claims that "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus" and that the students' "dining hall was padlocked in an attempt to starve them into submission."[150] At least some of the allegedly defamatory statements were admittedly false. For example, the campus dining hall was never padlocked, and the police never "ringed" the campus.[151]

Nothing in the advertisement mentioned Sullivan by name. Sullivan nevertheless successfully sued the *Times* for libel, and an Alabama jury had awarded Sullivan $500,000.[152] This was a massive sum at the time, and, as the Supreme Court pointed out, "the full amount claimed,"[153] even though Sullivan

146. *See* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong*, 53 U. CHI. L. REV. 782, 787 (1986); *see also* Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 LAW & SOC'Y INQUIRY 197, 205 (1993) ("The paradigmatic case increasingly appears exceptional—or at least far removed from many cases currently equated to it. These cases—and the rules that give rise to them—stand in need of independent justification.").

147. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

148. *See* Logan, *supra* note 21, at 765.

149. *See N.Y. Times Co.*, 376 U.S. at 256.

150. *See id.* at 257.

151. *See id*. at 259.

152. *See* Logan, *supra* note 21, at 766.

153. *See N.Y. Times Co*., 376 U.S. at 256.

proved no actual pecuniary loss. Sullivan likely could prove no pecuniary loss, and a massive remaking of defamation law probably was unnecessary to rectify the outcome, as Professor Epstein observed:

> The *New York Times* had a tiny circulation in Alabama. The references it made to Sullivan were if anything indirect and obscure, and may well have improved his local standing, on the doubtful assumption that they had any effect at all. Yet the Alabama courts were prepared to sustain a judgment of $500,000 (in 1964 dollars) for this plaintiff, with the prospect of similar suits waiting in the wings. . . . The common law was sound; its application was not.[154]

The underlying decision was challengeable on a variety of grounds, and the Supreme Court did not need to remake defamation law to correct the outcome. Because the libelous advertisement did not even mention Sullivan, "the Court could have constitutionalized the 'of and concerning' requirement. . . . To refer generally to the police or even more generally to state authorities or Southern violators is to refer to everyone and no one at the same time, which is what the ad did."[155] The massive damages award also presented a ripe target for the Supreme Court's remedial action: "The $500,000 in general and punitive damages was entered without the slightest showing of any actual damages."[156] But the Court eschewed these incremental remedies, opting instead for a fundamental transformation of defamation law in the teeth of the strong cultural norms condemning defamatory falsehood exemplified by Thumper's Rule.

iv. *New York Times*' Policy Impact: Defamatory Falsehood is Back on the Menu!

Perhaps the most famous passage from the *New York Times* majority opinion states explicitly that the First Amendment protects some less than worthy speech: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[157] Goodbye, Thumper's Rule. The Court's reasoning was at least partially instrumental, citing "fear of damage awards under a rule such as that invoked by the Alabama courts here" as potentially inhibiting free speech.[158] By removing the fear of potential damage awards, the Court hoped

154. Epstein, *supra* note 146, at 790.

155. *Id.* at 792–93.

156. *Id.* at 793.

157. *See N.Y. Times Co.*, 376 U.S. at 270.

158. *See id.* at 277.

to encourage "uninhibited, robust, and wide-open" debate.[159] Thus, the Court explicitly decided to protect some defamatory falsehood to give free speech the "breathing space" that it needs to thrive.[160] Encouraging defamatory falsehood was a feature, not a bug, of the new rule.

This was a decided break with constitutional precedent. To support its new rule, the *New York Times* majority relied heavily on the 1908 Kansas Supreme Court decision in *Coleman v. MacLennan*.[161] In *Coleman*, the Kansas Supreme Court rejected what it frankly acknowledged to be "the greater number of authorities" that held that "the occasion giving rise to conditional privilege [covering discussions of the candidates for office] does not justify statements which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true."[162] The *New York Times* Court promoted this emerging common law minority position to constitutional status, thus mandating the erstwhile minority rule protecting good faith false and defamatory statements about public officials for all American jurisdictions.

But, of course, the instrumental sword cuts indiscriminately—after more than fifty years under the Court's new form of defamation law, it appears that removing the restraining fear of libel judgments may have had the anticipated side effect that publishers are less careful to avoid defamatory falsehood. Richard Epstein described *New York Times*' incentive effects: "Defamation suits impose a price on those who make false statements about others. Repeal of the law of defamation dramatically reduces that price, given that all administrative and injunctive remedies have already been ruled out of bounds."[163] This concern that the Supreme Court's explicit aversion to deterring at least some defamatory falsehood has resulted in too much defamatory falsehood is not limited to well-known Federalist Society favorites like Epstein. His former faculty colleague from the left end of the political spectrum, Cass Sunstein, has shared a similar concern:

> But some kind of chilling effect is not the worst idea, because it reduces the risk that falsehoods will destroy people's reputations. And in this context, the idea of democracy is a double-edged sword. If a speaker lies about a politician, and destroys her reputation in the process, democracy is not exactly

159. *See id.* at 270.

160. *See id.* at 272.

161. *See id.* at 280–82.

162. Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908).

163. Epstein, *supra* note 146, at 798.

well-served.[164]

Put in economic terms, even if some defamatory falsehood is socially tolerable, when publishers can freely externalize the costs of their defamation, society ends up with too much defamation:

> [T]he utter want of any restrictions against defamation does create the classical economic externality (I lie and you suffer) and the consequent misallocation of resources. The party who makes the statement keeps all the benefits and bears part but not all of the costs. The result is that the level of false statements will rise until private benefit equals private marginal cost. The presence of the powerful externality insures that an equilibrium position is reached where marginal social benefit is less than marginal social cost. A world without any protection against defamation is a world with too much defamation, too much misinformation—in a word, too much public fraud.[165]

Not only does the *New York Times* defamation regime thus decline to deter defamatory falsehood, it also positively incents ignorance:

> To recover, the plaintiff must prove that the defendant knew the statement was false or was subjectively certain of its falsity. This puts publishers to a hard choice: publishing without verification is the safest legal route, as an attempt to verify that turns up contrary information before publication can constitute reckless disregard for the truth and support liability. As a result, publishers are incentivized to do little or no fact-checking, confident that the more slipshod their investigation, the less likely they are to be guilty of "actual malice." In short, under an "actual malice" regime, ignorance is bliss.[166]

The *New York Times* Court's definition of "actual malice" broke with the common law definition of the phrase. Common law "malice" did not mean fault. Rather, the term "actual malice" was tied in with the concept of privilege—the presumption of malice that attended a facially defamatory publication could be rebutted by a showing of privilege, as explained in a nineteenth century defamation treatise: "[A] privileged publication is only one the occasion of which rebuts the *prima facie* presumption of malice, and throws upon the plaintiff the burden of proving actual malice or personal ill will."[167]

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164. *See* Cass R. Sunstein, *Clarence Thomas Has a Point About Free-Speech Law*, BLOOMBERG L. (Feb. 21, 2019), https://www.bloomberg.com/opinion/ articles/2019-02-21/clarence-thomas-has-a-point-about-free-speech [https://perma.cc/3JL2-XFSK].

165. Epstein, *supra* note 146, at 798–99.

166. *See* Logan, *supra* note 21, at 778.

167. MERRILL, *supra* note 73, at 206–07.

Thus, one form of publishing with legal malice was publishing in a defamatory (and therefore presumptively malicious) way without the excuse of a privilege. In the case of a privileged defamation, "actual malice" meant the "personal ill will" that a plaintiff had to prove to overcome defendant's showing that his defamatory publication was privileged.[168] As Merrill explained, to be protected by privilege,

> [T]he publication must be made without actual malice; it must be fair and temperate, and the motives and conduct of persons under discussion must not be wantonly impugned. It is no defence that the writer believed his charges to be true, if they were published recklessly and without reasonable grounds . . . .[169]

Thus, before *New York Times*, "actual malice" had to do with the publisher's tone and motivation, not with whether the statement was known to be true or false, as the *New York Times* Court redefined the phrase.[170] To the contrary, courts had assiduously resisted this redefinition frequently proposed by media defendants: "The press has constantly sought to secure greater freedom for itself, in view of the impossibility for reporters and editors to verify all matters of news during the short interval before the paper goes to press; but the courts have resisted all attempts to extend the limits of privilege."[171] With the *New York Times* Court's redefinition of "actual malice," the press won a long-sought immunity for itself—now it could publish what it liked so long as plaintiff could not prove that the publisher acted with "reckless disregard" for truth.[172]

B. Making Matters Worse: "Public Figures" Also Must Prove "Actual

168. *See, e.g.*, Press Co. v. Stewart, 14 A. 51, 53 (Pa. 1888) ("[T]he article in question is privileged, not absolutely, but in a qualified sense; in that sense, however, which makes it the duty of the court to instruct the jury that . . . because of such privilege no presumption, etc., of malice arises from the mere fact of publication, but malice must be proved as a fact in the cause before the plaintiff can recover."). Some have mistakenly concluded that the absence of "actual malice" was a defense to some defamation cases in some states. *See, e.g.*, Schafer, *supra* note 62, at 51. But this misapprehends the nature of actual malice at common law. Its absence did not provide a defense. Rather, in cases of privileged statements, such as statements about public officials or candidates for public office, a showing of actual malice could defeat the privilege. The defamation plaintiff never had to establish actual malice as part of the *prima facie* case absent a privilege.

169. MERRILL, *supra* note 73, at 208.

170. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–81 (1964).

171. MERRILL, *supra* note 73, at 207.

172. *N.Y. Times Co.*, 376 U.S. at 279–80.

Malice."

Even though *New York Times* shifted the paradigm for cases to which it applied, the precise holding in *New York Times* was relatively narrow:

> We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule.[173]

Thus, the Court's extreme makeover of defamation law applied initially only to defamation actions brought by public officials based on claims of defamatory criticism of their official conduct. This narrow holding was consistent with the tertiary value that had been incorporated in American defamation law—responsible self-government.[174] The *New York Times* Court repeatedly emphasized that its holding applied to criticism of public officials for their official conduct, but that limitation was short-lived. In *Curtis Publishing Co. v. Butts*,[175] "public figures" were held to be treated the same as public officials. This quick expansion of the new *New York Times* rule beyond criticism of public officials abandoned any plausible previously adopted American defamation-law value in favor of free expression for its own sake.

C. "Actual malice" Now Means Subjective Doubt About Truth.

"Of the several holdings in *New York Times Co. v. Sullivan*, the most significant one was that the Constitution requires a public official suing for defamation to prove 'that the statement was made with 'actual malice.' "[176] The Court later made that most significant holding even more significant in *St. Amant v. Thompson*,[177] where the Court made the "actual malice" standard an even more daunting hurdle for defamation victims. In *St. Amant*, the Louisiana Supreme Court had cited several reasons for its ruling that defendant "had broadcast false information about Thompson recklessly, though not knowingly": (1) "St. Amant had no personal knowledge of Thompson's activities"; (2) "he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity"; (3) "he failed to verify the

173. *See id.* at 283–84.

174. *See supra* notes 90–95 and accompanying text.

175. 388 U.S. 130 (1967).

176. Wade, *supra* note 141, at 8.

177. 390 U.S. 727 (1968).

information with those . . . who might have known the facts"; and (4) "he gave no consideration to whether . . . the statements defamed Thompson and went ahead heedless of the consequences."[178] The Supreme Court ruled this showing insufficient: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[179] The Court subsequently clarified that the standard is indeed subjective—there must be evidence that the defendant actually had a "high degree of awareness of . . . probable falsity."[180] Thus, unless the victim can prove that the publisher had subjectively doubted the truth of the statement, the publisher's ignorance, even combined with a failure to investigate, does not establish actual malice. In an elegant exemplar of serious understatement, Professor Glenn Harlan Reynolds has noted the difficulty that this new subjective actual malice standard poses for the public official/public figure libel plaintiff: "[I]n order to show actual malice they must be able to demonstrate that the publisher entertained actual serious doubts, something which, as a matter of proof, will often turn out to be difficult."[181]

Proof of such actual malice is difficult indeed. Justice White accurately labeled the "public figure's" burden in a defamation suit as "almost impossible."[182] Professor Reynolds recently demonstrated the accuracy of Justice White's assessment when he, relying on the work of Professor Cornett,[183] showed that for more than a decade, only one libel complaint filed by a public figure reached a circuit court of appeals having plausibly plead actual malice.[184] Similarly, Professor Logan recently concluded that "the most current data suggest . . . the pendulum has swung so far toward defendants that defamation law gives little redress to the victims of falsehoods and provides virtually no deterrence of falsehoods."[185]

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178. *Id.* at 730.

179. *Id.* at 731.

180. Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 667 (1989).

181. *See* Reynolds, *supra* note 16, at 474.

182. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 771 (1985) (White, J., concurring). Justice Gorsuch recently seconded Justice White's assessment. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from the denial of certiorari) ("[T]he actual malice standard has evolved from a high bar to recovery into an effective immunity from liability."); *accord* Logan, *supra* note 21, at 778 ("Proving 'actual malice' is so daunting that it amounts to near immunity from liability and thus a license to publish falsehoods.").

183. *See* Judy M. Cornett, *Pleading Actual Malice in Defamation Actions After* Twiqbal*: A Circuit Survey*, 17 NEV. L.J. 709, 716 (2017).

184. *See* Reynolds, *supra* note 16, at 476 n.67.

185. Logan, *supra* note 21, at 808.

D. Further Erosion of Defamation Law in Gertz v. Robert Welch Inc.

Even the vague "public figure" limitation on which defamation victims must prove "actual malice" did not hold for long. The defamed victim in *Gertz v. Robert Welch, Inc.*[186] was neither a public official nor a public figure. The Court nevertheless took the opportunity to expand the definition of "public figure" into two prongs: (1) "all purpose" public figures who have achieved "pervasive fame or notoriety" and (2) "limited" public figures who "voluntarily injected" themselves or who even are "drawn into a particular" public controversy."[187] The Court not only thus expanded the group of defamation victims who must prove "actual malice" to recover, but also held that even a private figure, like Mr. Gertz, does not get the full protection of common law libel. Rather, when a private citizen like Gertz is defamed, the Supreme Court now prohibits the states from imposing "liability without fault," as state courts routinely had before *New York Times*.[188] The *Gertz* Court also jettisoned the common law presumption that the private defamation victim suffered reputational harm:

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.[189]

Essentially, the Court declared open season on American reputations. Thumper's parents must be spinning in their graves.

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186. 418 U.S. 323 (1974).

187. *Id.* at 351.

188. *See supra* notes 81–89 and accompanying text.

189. *Gertz*, 418 U.S. at 349. The Court further prohibited any award of punitive damages even to the non-public figure defamation victim unless that victim could prove "actual malice" finding:

> [N]o justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. . . . [J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

Id. at 350.

IV. CONCLUSION: DEFAMATION VICTIMS SUBSIDIZE CARELESS PUBLISHERS.

Thus, the Supreme Court fundamentally changed the social norms underlying American defamation law shifting away from a regime of strict responsibility for publishers who falsely harm reputations and toward free expression by insulating publishers from responsibility unless the publisher was at least negligent and very often only when the publisher knew the publication probably was false.[190] As Justice White explained in his *Gertz* dissent, the protection of intentionally harmful publication was a fundamental shift:

> The Court evinces a deep-seated antipathy to "liability without fault." But this catch-phrase has no talismanic significance and is almost meaningless in this context where the Court appears to be addressing those libels and slanders that are defamatory on their face and where the publisher is no doubt aware from the nature of the material that it would be inherently damaging to reputation. He publishes notwithstanding, knowing that he will inflict injury. With this knowledge, he must intend to inflict that injury, his excuse being that he is privileged to do so—that he has published the truth. But as it turns out, what he has circulated to the public is a very damaging falsehood. Is he nevertheless "faultless"? Perhaps it can be said that the mistake about his defense was made in good faith, but the fact remains that it is he who launched the publication knowing that it could ruin a reputation.[191]

American courts used to distinguish between the First Amendment right to speak freely and immunity from responsibility for the consequences of exercising that right. When a defendant chooses to publish a defamatory statement about another, why should the risk of the publisher's mistake regarding truth ever fall on the victim? Both justice and efficiency support the common law's rule that publishers bear responsibility for their own defamatory falsehoods without regard to their fault. By contrast, the Warren and Burger Courts' approach to defamation "offends the sense of justice because it makes innocent persons bear the harms that have been inflicted upon them by other persons, including those who have acted with negligence or even gross

190. This fundamental shift was memorialized in the Restatement (Second) of Torts by the addition of a new defamation element: "fault amounting at least to negligence on the part of the publisher." *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

191. *Gertz*, 418 U.S. at 389–90 (White, J., dissenting).

negligence."[192] The common law held all publishers responsible for harm caused by their voluntary defamatory publications and thereby affirmed the fundamental equality of all. All may speak, but all must make good any harm that their false speech causes.

The same point can be made in economic terms. The key to achieving "efficient" speech (in this case, speech that maximizes the value of beneficial speech less the costs of incidental defamatory falsehood) is the treatment of so-called "externalities." Good speech produces utility, but false and defamatory speech also produces disutility. When a publisher's speech produces disutility that falls on someone other than the publisher, that disutility is an "externality" because the burden of the disutility is born by someone other than the publisher whose voluntary speech generated the disutility.[193] In other words, the actor (the publisher) can foist part of the cost of his voluntary activity onto someone else. Because the burden of the disutility does not fall on the publisher who produces it, the publisher is not disciplined by self-interest to avoid that disutility, if practicable. Law and economics scholars have explained that tort liability can require actors (such as publishers) to take such "externalities" into account when deciding whether and how to act (publish) by holding the publisher liable for the disutility created by his false and defamatory publication.[194] Thus, both justice and efficiency demand that publishers not be allowed to externalize the costs of their false and defamatory publication.

But *New York Times* shifted the entire basis for defamation liability away from responsibility for publishing something harmful about someone else to requiring plaintiff to prove a strong *mens rea* regarding whether the admittedly defamatory statement was true or false.[195] Now mere negligence will not suffice for liability. Neither will traditional recklessness. *St. Amant* made it clear that many plaintiffs now must prove something approaching knowledge to recover for defamation.[196]

Before 1964, all American jurisdictions had determined that defamatory publication should presumptively give rise to tort liability, making the publisher

192. Epstein, *supra* note 146, at 801. (Now) Justice Elena Kagan made this point somewhat more succinctly: "The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other effective remedy." Kagan, *supra* note 146, at 205.

193. Such use of the term "externality" was popularized in James M. Buchanan & Wm. Craig Stubblebine, *Externality*, 29 ECONOMICA 371 (1962).

194. David J. Acheson & Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Suits*, 47 S.W. L. REV. 335, 348–51 (2018).

195. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

196. St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

responsible for the harm the chosen words would do. The *New York Times* majority insisted that "breathing space" for publishers trumped defamation victims' private right to redress for reputational harm inflicted on them.[197] This is unjust. Everyone should bear the consequences of their own choices and should not be allowed to impose the costs of those choices on others without recourse. Thumper's Rule was better than this.

197. *N.Y. Times Co.*, 376 U.S. at 271–72.