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Why the Actual Malice Test Should Be Eliminated

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WHY THE ACTUAL MALICE TEST SHOULD BE ELIMINATED

JOHN M. KANG*

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INTRODUCTION

Under traditional common law, a plaintiff could recover damages for libel if she could prove that the defendant had published a factual statement about the plaintiff that tended to injure the plaintiff's reputation.¹ The plaintiff, at most, was required to show negligence to recover damages for libel.² While the amount of money that any given plaintiff could recover in damages was uncertain, one thing was clear: the First Amendment would not protect libel. In 1964, in *New York Times Co. v. Sullivan*, the Supreme Court radically upended this received view of libel as unprotected speech.³ According to *Sullivan*, if the plaintiff was a public official and the statement said about him was a matter of public concern, the plaintiff would have to prove "actual malice."⁴ Under *Sullivan's* actual malice test, the plaintiff faced the daunting task of having to prove that the defendant made the libelous statement knowing that it was false or with reckless indifference as to its truth or falsity.⁵ The actual malice test thus afforded extraordinary and unprecedented protection for political speech which was otherwise libelous. While the notion of protecting libel might seem morally

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1. See RESTATEMENT (SECOND) OF TORTS §§ 558-59 (AM. L. INST. 1977).

2. See *id.* § 558.

3. ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 157 (1991).

4. *Id.*; see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-84 (1964).

5. LEWIS, *supra* note 3, at 280, 285, 288.

objectionable, the *Sullivan* Court was adamant that doing so was essential to protect the right of political criticism.⁶ The *Sullivan* Court argued that the actual malice test would quell the fear of self-censorship that speakers would otherwise likely suffer in the absence of the test.⁷ The Court was not alone in its support of the actual malice test. Since its inception in *Sullivan*, the actual malice test has been celebrated as perhaps the most monumental contribution to First Amendment jurisprudence.⁸

Over the years, however, the actual malice test has been met with intermittent skepticism. One prominent scholar wondered in 1986

6. *Id.* at 278-83.

7. *Id.*

8. When the case was decided in 1964, several newspaper articles appeared soon thereafter celebrating the decision. See, e.g., Anthony Lewis, *High Court Curbs Public Officials in Libel Actions*, N.Y. TIMES, Mar. 10, 1964, at 1 (referring to the Court's decision as a "constitutional landmark for freedom of the press and speech"); Editorial, *Free Press and Free People*, N.Y. TIMES, Mar. 10, 1964, at 36 ("It is . . . a vindication of the right of a free people to have unimpeded access to the news and to fair comment on the news."). Since 1964, the approval for the Court's holding in *Sullivan* has scarcely waned. See, e.g., Stuart Taylor, Jr., *Libel Ruling Focus of Parley 20 Years Later*, N.Y. TIMES, Apr. 14, 1984, at 7 (quoting the famous lawyer Floyd Abrams as saying that the Court's opinion is "one of the most extraordinary decisions in American history"); Curtis J. Sitomer, *Libel: More Than Ever, It's a Tightrope for the Press*, CHRISTIAN SCI. MONITOR, May 15, 1984, at 20 ("Some proclaim that the *Sullivan* decision is to freedom of the press what *Brown v. Board of Education*, the famous school desegregation decision of 1954, was to the civil rights cause in America."); William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 258 (1984) ("Justice Brennan's opinion in *Sullivan* represents the highwater mark in judicial recognition of the press' essential role in our constitutional democracy."); Fred D. Gray, *The Sullivan Case: A Direct Product of the Civil Rights Movement*, 42 CASE W. RES. L. REV. 1223, 1228 (1992) ("History should note the role of the civil rights movement in enhancing the rights of every American for generations to come by the legal precepts announced in *New York Times v. Sullivan*."); Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 58 (2005) ("*Sullivan* continues to be a cornerstone of a strong constitutional interpretation of civil rights."); LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 14 (2010) (declaring that *Sullivan* is "[o]ne of the most important First Amendment decisions in the twentieth century, and perhaps of all time"); Roy S. Gutterman, *New York Times Co. v. Sullivan: No Joking Matter—50 Years of Protecting Humor, Satire, and Jokers*, 12 FIRST AMEND. L. REV. 497, 527 (2014) ("The case is central to our body of First Amendment law, considered perhaps the most important First Amendment case ever, one that 'revolutionized' the law."); The Editorial Board, Editorial, *The Uninhibited Press, 50 Years Later*, N.Y. TIMES, Mar. 9, 2014, at 10 (stating that *Sullivan* "represents the clearest and most forceful defense of press freedom in American history"); Andrew Cohen, *Today Is the 50th Anniversary of the (Re-)Birth of the First Amendment*, ATLANTIC (Mar. 9, 2014), <https://www.theatlantic.com/national/archive/2014/03/today-is-the-50th-anniversary-of-the-re-birth-of-the-first-amendment/284311/> [<https://perma.cc/GV3P-9T2G>] (asserting that *Sullivan* "finally gave national force to the lofty words of the First Amendment, that there should be 'no law. . . abridging the freedom of speech, or of the press'" and that "[w]ithout that ruling, and the precedent it has generated since . . . investigative and opinion journalism as we know it today would not exist."); Ruth Marcus, Opinion, *Trump's Attacks on the Press Were Bad. What This Federal Judge Did Was Worse*, WASH. POST (Mar. 21, 2021, 9:00 AM), <https://www.washingtonpost.com/opinions/2021/03/21/trumps-attacks-press-were-bad-what-this-federal-judge-did-was-worse/> [<https://perma.cc/3LCM-ZFS6>] (calling *Sullivan* "an essential bulwark in democracy's defense").

whether alternatives to the actual malice test were available.⁹ Another highly regarded scholar has recently suggested that the actual malice test should not be extended to public figures but restricted to public officials.¹⁰ Yet scholars have generally refrained from arguing that the actual malice test should be jettisoned completely.¹¹ On the other hand, federal judges have been less reluctant. In a lone concurrence from 2019, Justice Thomas urged the Supreme Court to “reconsider” whether the actual malice test should endure at all.¹² He emphasized that “there appears to be little historical evidence suggesting that the [*Sullivan*] actual-malice rule flows from the original understanding of the First or Fourteenth Amendment.”¹³ Similarly, Judge Silberman of the D.C. Circuit Court of Appeals recommended in 2021 that the actual malice test should be rejected in its entirety because it was an attempt to “dress up policymaking in constitutional garb.”¹⁴

Like Justice Thomas and Judge Silberman, this Article calls for the wholesale elimination of the actual malice test. Perhaps because the format of a judicial opinion imposes spatial, structural, and stylistic limitations on its author, neither Justice Thomas nor Judge Silberman developed a sustained critique of the actual malice test.¹⁵ This Article, being liberated from the constraints of a judicial opinion, will furnish such a critique.

Part I summarizes the facts of *Sullivan*. *Sullivan* warned that, absent protection from the actual malice test, speakers, for fear of being

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

10. See Cass R. Sunstein, Opinion, *Clarence Thomas Has a Point About Free-Speech Law*, BLOOMBERG (Feb. 21, 2019, 11:38 AM), <https://www.bloomberg.com/opinion/articles/2019-02-21/clarence-thomas-has-a-point-about-free-speech> [<https://perma.cc/9CVR-LVXA>].

11. Scholars have instead sought to modify the actual malice test. See, e.g., Jeffrey Omar Usman, *Defamation and the Government Employee: Redefining Who Constitutes a Public Official*, 47 LOY. U. CHI. L.J. 247 (2015) (arguing in favor of a more refined notion of who qualifies as a public official under the actual malice test); Alex B. Long, *The Lawyer as Public Figure for First Amendment Purposes*, 57 B.C. L. REV. 1543 (2016) (criticizing the Supreme Court’s approach toward whether lawyers should qualify as public figures under the actual malice test); Matthew D. Bunker, *Corporate Chaos: The Muddled Jurisprudence of Corporate Public Officials*, 23 COMM’N. L. & POL’Y 1 (2018) (criticizing as confusing the Supreme Court’s approach toward corporate public figures under the actual malice test); Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA L. REV. 887 (2005) (criticizing the Supreme Court’s approach to reckless disregard); Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465 (2020) (suggesting modifications to the actual malice test with regard to the pleading stage).

12. *Mckee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring).

13. *Id.*

14. *Tah v. Global Witness Publ’g, Inc.*, 991 F.3d 231, 245, 252 (D.C. Cir. 2021) (Silberman, J., dissenting in part).

15. Worth noting in this regard is the brevity of the opinions authored respectively by Justice Thomas and Judge Silberman. Justice Thomas’s concurrence numbered eight pages. *Cosby*, 139 S. Ct. at 675-82 (Thomas, J. concurrence). Judge Silberman’s dissent numbered fourteen pages. *Tah*, 991 F.3d at 243-56 (J. Silberman, dissenting in part).

sued, would be hesitant to criticize their public officials. *Sullivan*, however, did not rely on the prevention of self-censorship as a standalone justification for the actual malice test. The problem with self-censorship, according to *Sullivan*, was that it undermined the political theory of self-government as well as the philosophy of the Enlightenment, both of which *Sullivan* regarded as undergirding the right of speech. As Part II explains, *Sullivan's* reliance on the political theory of self-government was fatal because the political theory, as presented by the Court, was logically incoherent. Part III shows that *Sullivan's* alternative means to derive the actual malice test from the philosophy of the Enlightenment was also ineffective, not because the philosophy was incoherent, but because the philosophy, as applied to the actual malice test, failed to achieve its aim of helping the public discern political truth from falsehoods. Part IV points to another problem with the actual malice test. Namely, the test empowered speakers to hurl libels—falsehoods, one must remember—that could destroy a public official's reputation. But the *Sullivan* Court never even tried to explain why the right to libel public officials should take precedence over the equally important right of a community to expect that its members treat each other with civility and dignity. Part V argues that even if the preceding criticisms are put aside, *Sullivan's* effort to justify the actual malice test in terms of legal precedent is unpersuasive. Part VI examines a final attempt by the *Sullivan* Court to prop up the actual malice test by turning to the interpretive method of originalism. The *Sullivan* Court claimed that James Madison, the purported Father of the Constitution, had expostulated a theory of political speech that could underwrite the actual malice test. Part VI proves why this bid for originalism was founded on a basic misunderstanding of Madison. Part VII explains why the actual malice test is superfluous as a means to protect the right of speech.

I. THE BIRTH OF THE ACTUAL MALICE TEST

In 1960, a civil rights organization called the Committee to Defend Martin Luther King and the Struggle for Freedom in the South (or, as abbreviated, the Committee to Defend) drafted a newspaper advertisement titled *Heed Their Rising Voices*.¹⁶ In *Heed Their Rising Voices*, the Committee to Defend charged the white policemen in Montgomery, Alabama with severely abusing King and his supporters.¹⁷ The Committee to Defend declared, "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill

16. LEWIS, *supra* note 3, at 6.

17. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 259 (1964).

of Rights.”¹⁸ These students, according to the Committee to Defend, were “being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom.”¹⁹ In the advertisement, the Committee to Defend attributed much of the “wave of terror” to the Montgomery police.²⁰

Some of the statements made by the Committee to Defend in *Heed Their Rising Voices* were false. The Committee to Defend stated that Black students sang *My Country, 'Tis of Thee* on the State Capitol steps, but they had actually sung the National Anthem.²¹ The Committee to Defend stated that “truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus.”²² In truth, the police were deployed near the campus and had never ringed it.²³ The Committee to Defend stated that “the entire student body protested to state authorities by refusing to re-register, [and] their dining hall was padlocked in an attempt to starve them into submission.”²⁴ The campus dining hall, however, was never padlocked.²⁵ So too, only a few students were refused entrance into the dining hall and only because they had failed to register for classes or had failed to request temporary meal tickets.²⁶ The Committee to Defend also claimed that Montgomery’s police had participated in bombing King’s home.²⁷ In fact, the Montgomery police “had made every effort to apprehend those who were [responsible].”²⁸

The Committee to Defend did not explicitly blame any individual for the alleged offenses, but by L.B. Sullivan’s lights, it did.²⁹ As Commissioner of Public Affairs for Montgomery, Sullivan exercised power over the police who were condemned in *Heed Their Rising Voices*.³⁰ Sullivan argued that *Heed Their Rising Voices* imputed to him the alleged misbehavior of the Montgomery police.³¹ Accordingly, he sued for libel four Black clergymen who, as members of the Committee to

18. *Id.* at 256 (quoting Advertisement, *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25 [hereinafter *Heed Their Rising Voices*]).

19. *Id.* (quoting *Heed Their Rising Voices*, *supra* note 18).

20. *See id.* at 257-58.

21. *Id.* at 258-59.

22. *Id.* at 257 (quoting *Heed Their Rising Voices*, *supra* note 18).

23. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 289 (1964).

24. *Id.* at 258 (quoting *Heed Their Rising Voices*, *supra* note 18).

25. *Id.* at 259.

26. *Id.*

27. *Id.* at 257-58.

28. *Id.* at 259.

29. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256-57 (1964).

30. *Id.* at 256.

31. *Id.*

Defend, had authored the advertisement.³² Sullivan also sued the *New York Times* (*Times*) for libel.³³ The *Times* had not authored *Heed Their Rising Voices*, but Sullivan harped on the fact that the *Times* had published it and thus should be held accountable.³⁴ Under Alabama law, a statement was deemed "libelous per se" if it was false and "tend[ed] to injure a person . . . in his reputation" or "[brought] him into public contempt."³⁵ If Sullivan could prove these elements, the only affirmative defense available for the *Times* was to show that the facts at issue were true in their particulars.³⁶ Sullivan, at least to the satisfaction of the Montgomery jury, proved the elements of libel.³⁷ The *Times*, however, could not establish before the same jury an affirmative defense of truth.³⁸ Finding the *Times* culpable for libel, the jury in Montgomery awarded Sullivan \$500,000, the equivalent of over \$4 million today.³⁹ The Alabama Supreme Court affirmed.⁴⁰

The U.S. Supreme Court reversed the Alabama Supreme Court.⁴¹ In doing so, the former fundamentally altered the traditional law of libel along with the substance of the First Amendment.⁴² To appreciate the unprecedented character of the Supreme Court's opinion in *Sullivan*, one must start with the recognition that, prior to *Sullivan*, American libel law, as applied by state courts, reflected its English origins.⁴³ Under English libel law, a plaintiff was "entitled to damages if a false and damaging statement was made about him, even though the defendant published the falsehood innocently."⁴⁴ The only defense that was available for the speaker was to prove that the statement was true.⁴⁵ As it had under British libel law, the burden of proof in the United States rested with the speaker.⁴⁶

32. *Id.*

33. To avoid confusion with the name of the case, the *New York Times* newspaper will be called the *Times* for the rest of this Article.

34. *Sullivan*, 376 U.S. at 256.

35. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964).

36. *Id.*

37. *Id.* at 262-63; see also LEWIS, *supra* note 3, at 32-33.

38. See LEWIS, *supra* note 3, at 32-33.

39. *Sullivan*, 376 U.S. at 256.

40. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 52 (Ala. 1962).

41. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

42. See Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 191.

43. LEWIS, *supra* note 3, at 157.

44. *Id.*

45. *Id.*

46. *Id.*

In *Sullivan*, the Supreme Court drastically modified the traditional law of libel by replacing it, in part, with the actual malice test. The Court defined the actual malice test as follows:

The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, *with knowledge* that it was false or with *reckless disregard* of whether it was false or not.⁴⁷

There are two things worth emphasizing about the actual malice test. First, the burden of proof did not rest with the speaker; it rested with the victim.⁴⁸ It was the victim who had to prove that the speaker made the defamatory statement with actual malice.⁴⁹ Second, as the passage implies, the inartfully dubbed actual *malice* test had little to do with “malice” in the conventional sense as a “desire to do harm to someone.”⁵⁰ Actual malice was rather a standard of care to determine whether the defendant had with knowing falsity or with reckless disregard of the truth published the libelous statement.⁵¹

Because of its aforementioned properties, the actual malice test posed extraordinary challenges for the aggrieved victim. For it was the rare defendant who would be so careless as to make evidence available to the plaintiff that the former had acted with “recklessness” and “knowing falsity.”⁵² Lest the plaintiff nurse a modicum of hope for discovering said evidence, the Supreme Court, just four years after its decision in *Sullivan*, substituted the *objective* person standard for a *subjective* one.⁵³ The latter required the plaintiff to prove that the speaker had *in fact* acted with actual malice.⁵⁴ So fortified, the actual malice test became an even more formidable obstacle for plaintiffs who sought damage awards.⁵⁵ In due course, the Court also extended the actual malice test to public figures. A public figure, as defined by the Supreme Court, was someone who was not employed by the government but who had immersed himself in public discourse and had thereby acquired the status of a well-known person in the community.⁵⁶ The actual malice test was thus more than a standard of

47. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (emphasis added).

48. *Id.*

49. *Id.*

50. CONCISE OXFORD ENGLISH DICTIONARY 864 (Angus Stevenson & Maurice Wiate eds., 12th ed. 2011).

51. *Sullivan*, 376 U.S. at 279-80.

52. *Id.*

53. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

54. *Id.*

55. For further discussion, see *infra* Part VII.

56. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 338-42 (1974).

evidence. In scope and substance, the actual malice test functioned as a juggernaut that undermined at least one hundred years of state libel law by rendering it virtually unavailable for public officials, and later, public figures.

Despite rendering public officials and public figures vulnerable to vicious libels, the *Sullivan* Court held that the benefits of the actual malice test outweighed the disadvantages. Specifically, the Court believed that without the actual malice test, speakers would engage in self-censorship by refraining from vigorously criticizing their public officials.⁵⁷ It was better, the Court asserted, to err on the side of freedom of speech than to permit the government to punish falsehoods.⁵⁸ The *Sullivan* Court declared, "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'"⁵⁹ "Allowance of the defense of truth," added the Court, "with the burden of proving it on the defendant, does not mean that only false speech will be deterred."⁶⁰ "Even courts accepting this defense as an adequate safeguard," the *Sullivan* Court warned, "have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars."⁶¹ "Under such a rule," explained the Court, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."⁶² Instead, "[t]hey tend to make only statements which 'steer far wider of the unlawful zone.'"⁶³

It was clear then that the *Sullivan* Court sought to encourage political criticism by trying to prevent self-censorship. The *Sullivan* Court, however, did not treat the right of political criticism as a self-justifying end. Instead, the Court suggested that the right of political criticism—along with the actual malice test which was designed to protect it—derived logically from both a political theory of self-government and the philosophy of the Enlightenment. Regrettably, neither the political theory of self-government nor the philosophy of the Enlightenment, either standing alone or together, could justify the creation of the actual malice test, as successive sections of this Article will show.

57. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 291-92 (1964).

58. *Id.* at 278.

59. *Id.* at 279.

60. *Id.*

61. *Id.*

62. *Id.*

63. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

II. THE ARGUMENT FROM SELF-GOVERNMENT

When the Court announced its decision in *Sullivan* on March 9, 1964, one observer remarked that it was “an occasion for dancing in the streets.”⁶⁴ The celebratory comment was uttered by an extraordinarily influential scholar: Alexander Meiklejohn.⁶⁵ Meiklejohn was a former president of Amherst College and, for his generation, the foremost American philosopher of the First Amendment.⁶⁶ According to Harry Kalven, himself an esteemed scholar of the First Amendment, the *Sullivan* Court “almost literally incorporated Alexander Meiklejohn’s thesis that in a democracy the citizen as ruler is our most important public official.”⁶⁷ Justice Brennan, the author of the Court’s opinion in *Sullivan*, eagerly affirmed this connection. One year after the publication of his *Sullivan* opinion, Justice Brennan delivered the annual, and tellingly named, “Alexander Meiklejohn Lecture” at Brown University.⁶⁸ In the lecture, Justice Brennan elaborated at length about Meiklejohn’s political philosophy and how it informed his judicial opinion in *Sullivan*.⁶⁹ So admiring was Justice Brennan that he quoted page-length swaths of Meiklejohn’s words.⁷⁰ Here, then, was the Justice who wrote arguably the most important judicial opinion in a First Amendment case acknowledging the influence of arguably the most important American philosopher of free speech on the former’s thinking of libel.

Unfortunately, an examination of this connection reveals something that neither Justice Brennan nor Meiklejohn would ever have wanted to acknowledge: the *Sullivan* opinion was logically incoherent. A careful reader of the Court’s *Sullivan* opinion might be surprised to learn that, instead of prompting “dancing in the streets,” the Court’s opinion lacks the logical foundation to stand on its proffered thesis. The majority opinion in *Sullivan* never mentions Meiklejohn, but the opinion is missing only his name, not his thesis, as Justice Brennan

64. LEWIS, *supra* note 3, at 154.

65. *Id.*

66. See Bidy Martin, President, Amherst Coll., 2017 Convocation Address at Amherst College (Sept. 24, 2017), <https://www.amherst.edu/amherst-story/today/amherst-videos/convocation-2017> [<https://perma.cc/K6WV-YV69>]; see also Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111 (1993) (“The most influential exposition of the collectivist theory of the First Amendment is by the American philosopher Alexander Meiklejohn; his work continues to inspire and guide the theory’s contemporary advocates.”).

67. LEWIS, *supra* note 3, at 154.

68. The lecture was subsequently published in the *Harvard Law Review*. William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

69. *Id.* at 14.

70. *Id.* at 12-13, 14.

intimated in his lecture at Brown University.⁷¹ In his lecture, Justice Brennan praised Meiklejohn's article in the *Supreme Court Review*, which was published in 1961, three years before the Court had decided *Sullivan*.⁷² In that article, Meiklejohn started with the observation that the Constitution was founded on a principle of self-government whereby the people themselves were empowered to determine their political fate. Meiklejohn had turned to the Constitution's Preamble and the Tenth Amendment as chief sources for his conclusion.⁷³ These sources, Meiklejohn argued, suggested that "[a]ll constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic."⁷⁴ The Preamble declares that "*We the People* of the United States . . . do ordain and establish this Constitution for the United States of America."⁷⁵ Serving as a bookend to the Preamble, the Tenth Amendment holds that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to . . . the people."⁷⁶ As made lucid by the Preamble and the Tenth Amendment, the people "are, it is true, 'the governed.' But they are also 'the governors,'" Meiklejohn explained.⁷⁷ In sum, as Justice Brennan quoted him, for Meiklejohn, "[p]olitical freedom is not the absence of government. It is self-government."⁷⁸

Meiklejohn then argued that the First Amendment had to be interpreted in terms of the Constitution's larger commitment to self-government.⁷⁹ It was on the basis of this latter thesis that Justice Brennan for the Court fashioned the actual malice test in *Sullivan*.⁸⁰ "The First Amendment," Meiklejohn clarified, "does not protect a 'freedom to speak.'" ⁸¹ Instead, "[i]t protects the freedom of those activities of thought and communication by which we 'govern.'" ⁸² By inserting the word "govern," Meiklejohn implied that the main task of the First Amendment was to protect the means by which people can make conclusions about political truths. Were the people deprived of such

71. A concurring opinion in *Sullivan* does cite Meiklejohn. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 297 n.6 (1964) (Black, J., concurring).

72. See Brennan, *supra* note 68, at 12.

73. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 253 (1961).

74. *Id.*

75. U.S. CONST. pmbl. (emphasis added). The Ninth Amendment likewise states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* amend. IX.

76. *Id.* amend. X (emphasis added).

77. Brennan, *supra* note 68, at 12 (quoting Meiklejohn, *supra* note 73, at 253-54).

78. *Id.* (emphasis added).

79. Meiklejohn, *supra* note 73, at 255.

80. Brennan, *supra* note 68, at 14.

81. Meiklejohn, *supra* note 73, at 255.

82. *Id.*

means, they could not act as self-governing beings, Meiklejohn feared. Therefore, he argued that the people must be permitted to discuss political matters with each other.⁸³ It was Meiklejohn's belief that with the benefit of such discussion, the people would be able to make political decisions as self-governing beings.⁸⁴

Meiklejohn's belief resonated with those of Justice Brennan in *Sullivan*. Indeed, Justice Brennan suggested that Meiklejohn, in the latter's article, had anticipated something along the lines of the actual malice test.⁸⁵ Meiklejohn, as recounted by Justice Brennan, had proclaimed in his article that if "the same verbal attack is made in order to show unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government."⁸⁶ In his *Sullivan* opinion, Justice Brennan derived from this latter statement the argument that libelous statements about public officials should be "protected by the First Amendment."⁸⁷ Meiklejohn and Justice Brennan, who invoked him, were thus eager to extend protection for libelous statements which were deemed political because said protection was ostensibly required by the logic of self-government in the Constitution. In other words, for Meiklejohn and Justice Brennan, if libels concerning public officials were not protected, the people could not exercise their constitutional powers to fashion their collective political future. Political speech, in this regard, was valuable because it helped people, as self-governing beings, to form ideas and opinions about which political candidates to support and which to oppose.⁸⁸

In his *Sullivan* opinion, Justice Brennan also turned to James Madison's arguments, which as the former presented them, were consonant with those of Meiklejohn.⁸⁹ Quoting Madison, Justice Brennan for the Court declared that "the Constitution created a form of government under which '[t]he people, not the government, possess the absolute sovereignty.'"⁹⁰ For Madison, Justice Brennan explained, "[t]his form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects."⁹¹ Madison tied together the right of speech and its importance for

83. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27 (1948).

84. *Id.* at 7, 22-27.

85. Brennan, *supra* note 68, at 14.

86. *Id.* (quoting Meiklejohn, *supra* note 73, at 259).

87. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 302 (1964) (Goldberg, J., concurring).

88. *Id.* at 281-82.

89. In fact, Justice Brennan's characterization of Madison's arguments was misleading in basic ways. See *infra* Part VI.

90. *Sullivan*, 376 U.S. at 274 (quoting 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569 (2d ed. 1876)).

91. *Id.*

self-government, or so Justice Brennan suggested in *Sullivan*. Justice Brennan in *Sullivan* stressed that Madison had declared, "Let it be recollected . . . that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government."⁹² To that end, Madison, as quoted by Justice Brennan in *Sullivan*, explained, "The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."⁹³ Justice Brennan for the *Sullivan* Court enlisted these preceding quotes from Madison based on the belief that they were supportive of Meiklejohn's proposition that the people themselves were the ultimate authority.

The thesis of self-government and its relation to free speech on offer by Justice Brennan, Meiklejohn, and, arguably, Madison exists, however, in corrosive tension with the logic which they believe underwrites said thesis. To understand why, it is vital to recognize that the argument from self-government proposed by Justice Brennan, Meiklejohn, and Madison is not in essence an argument for political speech; at its heart, theirs is not an argument about speech at all. Their arguments instead should properly be understood as arguments for the right of the people to *participate* in self-government. Under the formulation by Justice Brennan and company, the heightened protection enjoyed by political speech is simply derivative of this larger theory of democracy. Justice Brennan, along with Meiklejohn and Madison, claimed that the purpose of protecting political speech was to empower the people to make their own political decisions as self-governing beings. But the dedication to self-government, rather than shielding political libel with the highest protection, could instead restrict it.

Suppose "the people" or some iteration of them—the democratic collective whom Justice Brennan, as well as Madison and Meiklejohn, would stipulate are the highest sovereign—were exposed to a rich diversity of ideas and opinions concerning a given issue, exactly the sort of diversity of political speech idealized by Justice Brennan, Madison, and Meiklejohn. Suppose further that the people weighed the competing arguments provided by this diversity, and, after much reflection, decided to urge their elected representatives to pass a law that abridged political speech which the people feared was dangerous to stable government. Acting on the wishes of the people, the representatives, let us say, enacted such a law. The argument from self-government advanced by Justice Brennan, Meiklejohn, and Madison would require the Court to accept the decision of the people *regardless* of how the Court felt about the moral substance of the decision.

92. *Id.* at 275 n.15 (quoting 4 ELLIOT, *supra* note 90, at 575).

93. *Id.*

With this constraining principle in mind, revisit the facts of *Sullivan*. A plausible argument can be made that the decisions by the jury, the trial court, and the Alabama Supreme Court were the products of deliberation by the people of Alabama. The jury heard the arguments—the political speech, in other words—delivered in court by the *Times* and by Sullivan. The jury deliberated the competing arguments. Afterwards, the jury awarded Sullivan \$500,000 based on his claim that he had been libeled by the *Times*. As described then, the jury behaved as the quintessential democratic body; it weighed the merits of competing political speech for purposes of adjudication.⁹⁴ The trial judge heard the jury's verdict, a form of political speech in its own right. The trial judge then deliberated whether he should permit the verdict to stand, which he eventually did.⁹⁵ The Alabama Supreme Court subsequently reviewed the arguments by Sullivan and the *Times* and made the decision to let the verdict stand.⁹⁶ The Alabama Supreme Court, like the jury who made the initial decision, weighed the myriad instances of political speech presented in the case—including the arguments by the plaintiff, the arguments by the defendant, and the *Times's* advertisement itself—and then had rendered its decision to uphold the jury's verdict. All three deliberative bodies (the jury, the trial court, and the Alabama Supreme Court) therefore did exactly what they were expected to do in terms of the logic of popular sovereignty advanced by the Court in *Sullivan* and, by extension, Justice Brennan, Madison, and Meiklejohn.

The Court, however, introduced the actual malice test for the purpose of overturning the decisions by *each* of these deliberative bodies—the jury, the trial court, and the Alabama Supreme Court—even though *each* of them, in theory, had performed in accord with the principle of popular sovereignty touted by the Court itself, along with Meiklejohn and Madison. The *Sullivan* Court had formulated the actual malice test in order to enhance opportunities for the people alluded to in the Constitution's Preamble and the Tenth Amendment to make their own political decisions, but the upshot of the actual malice test was to empower *judges* at the expense of the people. This irony

94. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 264 (Henry Reeve trans., 1838). Consider too the Court's words in *Glasser v. United States*:

Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

Glasser v. United States, 315 U.S. 60, 85 (1942) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

95. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 51 (Ala. 1962) ("All in all we do not feel justified in mitigating the damages awarded by the jury, and approved by the trial judge below, by its judgment on the motion for a new trial . . .").

96. *Id.*

revealed itself in the following manner. The Court held in *Sullivan* that if the plaintiff was required to prove that the speaker acted with actual malice, the plaintiff had to satisfy the evidential standard of "clear and convincing proof."⁹⁷ The *Sullivan* Court permitted the jury to make the initial decision regarding whether the plaintiff met this standard of proof.⁹⁸ However, the *Sullivan* Court also held that the judge could review the jury's decision.⁹⁹ Under the holding in *Sullivan*, the judge thus enjoyed the right to overturn the jury's verdict.¹⁰⁰ But the Court in *Sullivan* never explained how the judge should make this determination, opting only to say that actual malice should be proved with "convincing clarity."¹⁰¹ This ambiguity provided the judge a degree of control over the jury's decision about whether the plaintiff had proven actual malice. By empowering the trial judge to overturn the jury's determination that the plaintiff had met the standard of clear and convincing evidence, the Court in *Sullivan* strayed from the traditional rule that jury determinations were not to be set aside unless they were clearly erroneous.¹⁰²

On a related note, the Court in *Sullivan* made in its instant case what was an arguably factual determination about the actual malice test that was best left to the jury. The jury in *Sullivan* made the inference that, while the *Times* did not refer to Sullivan by name, a reasonable person could infer as much.¹⁰³ The Court, however, overturned the jury's conclusion based on the belief that the political advertisement in the *Times* referred only to the local government in Montgomery.¹⁰⁴ To do otherwise, the Court warned, would amount to permitting seditious libel.¹⁰⁵ "The present proposition," the Court insisted, "would sidestep this obstacle by transmuted criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed."¹⁰⁶ While *Sullivan* has been celebrated as a colossal victory for the right of democratic deliberation, the Court's opinion in *Sullivan* contained structural features which could have the effect of thwarting the will of the people.

97. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

98. *Id.* at 262, 285-86.

99. *Id.* at 284-86.

100. *Id.* at 285-88.

101. *See id.* at 285-86.

102. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 495 (1991).

103. *See* N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 44 (Ala. 1962) ("The court had previously made it crystal clear that the jury were to determine to their reasonable satisfaction from the evidence that the words were spoken of and concerning the plaintiff.").

104. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 291-92 (1964).

105. *Id.*

106. *Id.* at 292.

There was yet another way in which the actual malice test chafed against the aims of democratic deliberation, something that the actual malice test was tasked to facilitate. According to the *Sullivan* Court, the rationale for the actual malice test hinged crucially on the assumption that the test was a logical extension of the right of popular sovereignty. The Court sought to arm the people with the actual malice test as a means to criticize and thereby to control their government officials. What the *Sullivan* Court did not realize was that the officials were representatives of the people *themselves*. That is, the officials existed as public servants who had been elected to carry out the wishes of the people; the officials did not necessarily exist as the people's oppressors. So understood, the actual malice test was not necessarily conducive to the people's right of popular sovereignty. For the actual malice test did not empower "the people" in its collective democratic notion to engage in libel; instead, the test empowered a lone individual. That lone individual—unlike the public official whom he libeled—did not speak for the people in any formal way. Instead, the libeler was impugning someone who stood as a representative of the people. The libeler undermined the reputation of someone who had been formally tasked by the people with the democratic mission of serving as their proxy in government. Therefore, the libeler, in a sense, thwarted the democratic wishes of the people rather than aiding them as the Court suggested in *Sullivan*.

III. THE ARGUMENT FROM ENLIGHTENMENT

There was a deep ambivalence that characterized the Supreme Court's support for the actual malice test. On the one hand, the *Sullivan* Court, reflecting the views of Meiklejohn and Madison, argued that the actual malice test was invented in part to honor the political theory of self-government in the Constitution. Therefore, the *Sullivan* Court appeared to be indifferent to whatever conclusions the people would reach through a vigorous exchange of political ideas. But, upon closer review, the *Sullivan* Court was not as nonchalant as it appeared. The Court also scaffolded the actual malice test to the unabashedly optimistic belief that a largely unfettered public discourse, even one teeming with libelous statements, could nevertheless lead to the discovery of not simply *any* political truth, but one worthy of its name. This approach to the First Amendment will be called, in this Article, the argument from the Enlightenment so that the name of the argument may evoke the humanist ideal of moral and political progress that characterized the European Enlightenment of the eighteenth century.¹⁰⁷ Whereas the argument from self-government

107. See PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION, THE RISE OF MODERN PAGANISM* 3, 13 (W.W. Norton & Co. 1995) (1966).

championed by Meiklejohn and Madison had suffered, as has been shown, from logical incoherence, the argument from the Enlightenment, as will be shown, suffered from an inability to accomplish its own ends as a matter of empirical evidence.

In order to justify the creation of the actual malice test, the Court in *Sullivan* had to explain how precisely libel—speech that was concededly false—could help people to discover truth. According to the Court, libelous speech should be protected because it could, in its way, prove essential in helping the public to arrive at better approximations of political truth.¹⁰⁸ For support, the *Sullivan* Court procured the weighty authority of two classic English liberals from ages past: John Stuart Mill and John Milton. The Court quoted Mill's proposition from 1859 that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"¹⁰⁹ As for Milton, the Court did not offer any explicit quotations from the eminent English philosopher. The *page* of Milton's which the Court cited, however, does contain the most iconic statement uttered by Milton.¹¹⁰ That statement reads, "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter[.]"¹¹¹ While well known among legions of college humanities majors, Milton's pronouncement, like Mill's, endures less because its thesis has survived empirical rigor and more because it is has been authored by a figure who enjoys vaunted prestige in the Western canon. Mill and Milton, along with the *Sullivan* Court which cited them, would have us believe that false news will suffer a justly quick and deservedly ignoble death in the lifecycle of public discourse because people will soon see the falsehood for the dross that it is.

During their respective lifetimes, the nineteenth-century Mill and the seventeenth-century Milton lacked the methodological resources to assay whether their stout claims about truth were supported by empirical evidence. We moderns are blessed with such evidence. And the evidence cautions against the sort of rosy predictions on offer by Mill and Milton, and, by extension, those of the *Sullivan* Court. Three scholars at the Massachusetts Institute of Technology—Soroush Vosoughi, Deb Roy, and Sinan Aral—have proven that false news spreads much more rapidly than true news on the Internet, as if there is an insatiable appetite for the former.¹¹² The coauthors examined

108. *Sullivan*, 376 U.S. at 279.

109. *Id.* at 279 n.19 (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell 1947)).

110. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (citing JOHN MILTON, *Areopagitica*, in 2 COMPLETE PROSE WORKS 561, 561 (Yale 1959)).

111. JOHN MILTON, *AREOPAGITICA* 58 (Cambridge Univ. Press 1918) (1644).

112. Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146-51 (2018).

126,000 news stories on Twitter from 2006 to 2017.¹¹³ These stories were tweeted more than 4.5 million times by about 3 million people.¹¹⁴ An analysis of these tweets revealed that “[f]alsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information.”¹¹⁵ Nor could such proliferation be attributable to online robots. As the authors explained, “Contrary to conventional wisdom, robots accelerated the spread of true and false news at the same rate, implying that false news spreads more than the truth because humans, not robots, are more likely to spread it.”¹¹⁶ The authors determined that “false news was more novel than true news, which suggests that people were more likely to share novel information.”¹¹⁷

Especially intriguing was that “[w]hereas false stories inspired fear, disgust, and surprise in replies, true stories inspired anticipation, sadness, joy, and trust.”¹¹⁸ Note the salient point by Vosoughi and his coauthors: stories which inspired “fear, disgust, and surprise” were likely to be circulated most often on the Internet. This propensity has consequences for the proliferation of libel. The more outlandish and the more hurtful the libel—the more “fear, disgust, and surprise” the libel provoked in the reader—the more likely the libel will obtain traction on the Internet. The research by Vosoughi and colleagues suggests that the Internet, indeed, is the *perfect* forum for libels to be circulated all over the world with whiplash speed. And very important for our purposes, it was not *any* kind of libel that was most likely to spread—it was specifically *political* libels.¹¹⁹ The research by Vosoughi and team showed that the circulation of information was “more pronounced for false *political* news than for false news about terrorism, natural disasters, science, urban legends, or financial information.”¹²⁰ Furthermore, because such false political news was circulated on the Internet, libelous statements that would have taken months to spread from one English province to another during the now seemingly ancient lifetimes of Mill and Milton took just minutes to traverse the world online.

The speed with which misinformation circulates online is worrisome in its own right, but empirical research also strongly suggests that misinformation is intractably difficult to dislodge among those who initially embrace it as true. Thomas Wood at Ohio State University and Ethan Porter at George Washington University conducted

113. *Id.* at 1146.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* (emphasis added).

research on 10,100 subjects and concluded that “rather than simply ignoring factual information, presenting respondents with facts can *compound* their ignorance.”¹²¹ Wood and Porter examined whether Americans believed President George W. Bush’s claim in 2003 that Iraq harbored weapons of mass destruction.¹²² President Bush’s claim served as his justification for invading Iraq, but was later discovered to be baseless.¹²³ Wood and Porter found that those who had accepted as true the false information disseminated by the Bush Administration were not inclined to revise their mistaken conclusions upon being told the truth.¹²⁴ If anything, the subjects, once confronted with the truth, demonstrated a “backfire effect” whereby they doubled down on their false beliefs.¹²⁵

Tellingly, neither the great Mill nor the great Milton gave much credence to the grim possibility of a backfire effect. Modern scholars did, however. Like Wood and Porter, Brendan Nyhan of the University of Michigan and Jason Reifler of Georgia State University found “several instances of a ‘backfire effect’ in which corrections actually *increase* misperceptions among the group in question.”¹²⁶ Nyhan and Reifler gave participants articles that “either included or did not include corrective information immediately after a false or misleading statement.”¹²⁷ Afterwards, the participants were invited to answer a series of factual and opinion questions.¹²⁸ It merits emphasis that the participants “read mock newspaper articles containing a statement from a *political* figure that reinforces a widespread misperception.”¹²⁹ The subject matter of the newspaper thus involved issues of public concern about public officials and, accordingly, involved libels which may very well have been protected by the actual malice test. Specifically, Nyhan and Reifler selected newspaper articles about “controversial political issues from contemporary American politics.”¹³⁰ Nyhan and Reifler explained that “[w]hile this choice is likely to make misperceptions more difficult to change, it increases our ability to address the motivating concern of this research—correcting misperceptions in the real

121. Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes’ Steadfast Factual Adherence*, 41 POL. BEHAV. 135, 135 (2019).

122. *Id.* at 139.

123. Dylan Matthews, *No, Really, George W. Bush Lied About WMDs*, VOX (July 9, 2016, 10:00 AM), <https://www.vox.com/2016/7/9/12123022/george-w-bush-lies-iraq-war> [<https://perma.cc/VNE9-8LKF>].

124. Wood & Porter, *supra* note 121, at 136.

125. *Id.*

126. Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 303 (2010).

127. *Id.* at 310.

128. *Id.*

129. *Id.* (emphasis added).

130. *Id.*

world.”¹³¹ The results confirmed a backfire effect.¹³² “We find that responses to corrections in mock news articles differ significantly according to subjects’ ideological views,” concluded Nyhan and Reilfer.¹³³ The researchers elaborated as follows: “As a result, the corrections fail to reduce misperceptions for the most committed participants. Even worse, they actually *strengthen* misperceptions among ideological subgroups in several cases.”¹³⁴ The participants in the study thus demonstrated that their preexisting political preferences were likely to determine whether they would dismiss truthful information. Such empirical evidence indicates that the actual malice test, by protecting false information, may undermine the possibility for discovering political truth, the very truth that the actual malice test pledges to deliver.

Should more evidence be necessary, one need only consult the disturbing reports that a shockingly large percentage of Americans have accepted President Trump’s thoroughly discredited claim that the presidential election was fraudulent. President Trump has recklessly and repeatedly insisted that he would have won the election but for the Democrats having cheated him.¹³⁵ There was no evidence, however, of widespread miscounting of votes.¹³⁶ Nevertheless, a POLITICO/Morning Consult survey found that seventy percent of Republicans do not believe the 2020 election was free and fair.¹³⁷ Among those who dismissed the elections as fraudulent, seventy-eight percent “believed that mail-in voting led to widespread voter fraud” and seventy-two percent “believed that ballots were tampered with—both claims that have made a constant appearance on [President Trump’s] Twitter thread.”¹³⁸ Similarly, a Reuters/Ipsos opinion poll found that “[a]bout half of all Republicans believe President Donald Trump ‘rightfully

131. *Id.*

132. *Id.* at 323.

133. *Id.*

134. *Id.*

135. Tim Elfrink, *After Electoral College Backs Biden, Trump Continues Falsely Insisting He Won: “This Fake Election Can No Longer Stand,”* WASH. POST (Dec. 15, 2020, 4:20 AM), <https://www.washingtonpost.com/nation/2020/12/15/trump-electoral-college-biden/> [<https://perma.cc/CZ6R-5KCJ>].

136. Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html> [<https://perma.cc/8G3F-LJ8J>]. Indeed, in Arizona, the so-called “Cyber Ninjas,” a group hired by supporters of former President Trump, conducted an audit in September 2021, and instead of uncovering a rigged election against President Trump, the Cyber Ninjas discovered that he had lost by more votes than previously believed. Jen Fifield & Robert Anglen, *Hand Count in Audit Affirms Biden Beat Trump, as Maricopa County Said in November*, ARIZ. CENT. (Sept. 24, 2021, 9:29 AM), <https://www.azcentral.com/story/news/politics/elections/2021/09/23/arizona-audit-draft-report-confirms-biden-beat-trump-2020/5835521001/> [<https://perma.cc/R5JD-ZW6P>].

137. Catherine Kim, *Poll: 70 Percent of Republicans Don’t Think the Election Was Free and Fair*, POLITICO (Nov. 9, 2020, 5:00 PM), <https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488> [<https://perma.cc/6SM5-HHUZ>].

138. *Id.*

won' the U.S. election but that it was stolen from him by widespread voter fraud that favored Democratic President-elect Joe Biden."¹³⁹ Consonant results were reported by a Monmouth University poll, which concluded that thirty-two percent of respondents felt that "fraud was the reason Biden won the presidential election, maintaining a trend that has taken hold over the past seven months."¹⁴⁰ The Monmouth poll also determined that sixty-three percent of Republicans or those Republican-leaning attributed the election results to fraud.¹⁴¹ The January 6 insurrection was the culmination of this conspiracy theory. That jarring event also served as a powerful rebuke to those like Mill and Milton who harbored the excessively sanguine faith that truth would conquer falsehoods. In our present-day cultural climate—where misinformation not only thrives but galvanizes conspiracy mongers to overthrow the government—the proposition that the actual malice test serves as a means to discover political truths should inspire keen skepticism.

Consider also the phenomenon of the "Birther Movement." The Birther Movement was organized around the false allegation that Barack Obama was born in Kenya and was therefore ineligible to become President.¹⁴² While the allegation lacked merit, whoever uttered it could seek protection from the actual malice test because the substance of the claim pertained to an all-purpose public official. Notwithstanding its falsity, or because of the lurid possibility that it might be true, the Birthers' allegation captured the public's attention and President Obama found himself having to respond to it repeatedly.¹⁴³ Hoping to quash the controversy, he provided a copy of his longform birth certificate from Hawaii. President Obama attended the disclosure with this response: "At a time of great consequence for this country—when we should be debating how we win the future, reduce our deficit, deal with high gas prices, and bring stability to the Middle East, Washington, DC, was once again distracted by a fake issue."¹⁴⁴

139. Chris Kahn, *Half of Republicans Say Biden Won Because of a "Rigged" Election: Reuters/Ipsos Poll*, REUTERS (Nov. 18, 2020, 6:05 AM), <https://www.reuters.com/article/us-usa-election-poll/half-of-republicans-say-biden-won-because-of-a-rigged-election-reuters-ipsos-poll-idUSKBN27Y1AJ> [<https://perma.cc/CS7W-DUVB>].

140. Max Greenwood, *One-Third of Americans Believe Biden Won Because of Voter Fraud: Poll*, THE HILL (June 21, 2021, 12:03 PM), <https://thehill.com/homenews/campaign/559402-one-third-of-americans-believe-biden-won-because-of-voter-fraud-poll?rl=1> [<https://perma.cc/JUJ2-WYKQ>].

141. *Id.*

142. Adam Serwer, *Birtherism of a Nation*, ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978/> [<https://perma.cc/8WL3-F73H>].

143. The MIT Media Lab found that false stories spread much faster than true ones. See Vosoughi et al., *supra* note 112, at 1146.

144. See Dan Pfeiffer, *President Obama's Long Form Birth Certificate*, OBAMA WHITE HOUSE: BLOG (Apr. 27, 2011, 8:57 AM), <https://obamawhitehouse.archives.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate> [<https://perma.cc/8L25-ZTLC>].

One year after this statement was published online, Donald Trump, prior to his presidential ascension, tweeted in 2012 that “[a]n ‘extremely credible source’ has called my office and told me that @BarackObama’s birth certificate is a fraud.”¹⁴⁵ The then reality-television actor never disclosed the identity of his “credible source,” casting doubt about the existence of the source. Undaunted, in 2014, Trump again challenged the authenticity of President Obama’s birth certificate, but, this time, Trump called upon others to commit a criminal offense to uncover what he claimed was the truth: “Attention all hackers: You are hacking everything else so please hack Obama’s college records (destroyed?) and check ‘place of birth[.]’”¹⁴⁶ Again, no reliable evidence of foreign birth was produced. Nevertheless, the libel at the heart of the Birther Movement found an ardently receptive audience in the general public. In 2016, the *Times* reported that thirty-three percent (down from fifty-one percent earlier that year) of Republican voters refused to accept that President Obama had been born in the United States.¹⁴⁷ That this survey was conducted after President Obama had served nearly *eight* years in the White House lent credence to the thesis that libelous speech can become entrenched as inviolable truth in the public’s mind even after credible evidence has been offered to reveal that the libelous statement was baseless. Tali Sharot at University College London, an expert in neuroscience, attributed such entrenchment to emotions which tend to thwart responsible reflection.¹⁴⁸ According to Sharot, myths, like the Birther myth, “are shored up by how much a person is motivated to believe them, and how well that belief sits with their current worldview.”¹⁴⁹ She posited that Birtherism will persist because it is “bolstered by racism against the first Black [P]resident.”¹⁵⁰ Birtherism will also persist because those who publicly spread it can feel secure knowing that they are fully protected by the legal force of the actual malice test.

Bearing in mind all of the preceding evidence from empirical and public-polling research, let us return to the argument by the Court in

145. @realDonaldTrump, TWITTER (Aug. 6, 2012, 4:23 PM), <https://www.thetrumparchive.com/?searchbox=%22an+extremely+credible+source++%22> [<https://perma.cc/W8NY-P5DW>].

146. @realDonaldTrump, TWITTER (Sept. 6, 2014, 6:06 AM), <https://www.thetrumparchive.com/?searchbox=%22attention+all+hackers%22> [<https://perma.cc/R73E-2WC8>].

147. See Kyle Dropp & Brendan Nyhan, *It Lives. Birtherism Is Diminished but Far From Dead.*, N.Y. TIMES (Sept. 23, 2016), <https://www.nytimes.com/2016/09/24/upshot/it-lives-birtherism-is-diminished-but-far-from-dead.html> [<https://perma.cc/Q4CJ-EFSB>].

148. See Kaleigh Rogers, *The Birther Myth Stuck Around for Years. The Election Fraud Myth Might Too.*, FIVETHIRTYEIGHT (Nov. 23, 2020, 10:10 AM), <https://fivethirtyeight.com/features/the-birther-myth-stuck-around-for-years-the-election-fraud-myth-might-too/> [<https://perma.cc/RZY4-FKYH>].

149. *Id.*

150. *Id.*

Sullivan in support of the actual malice test. Without any hint of self-consciousness, the Court had blithely quoted John Stuart Mill's proclamation from 1859 that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"¹⁵¹ And the Court had also cited to John Milton's famous line from 1644: "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter[.]"¹⁵² In light of the morass of misinformation which overwhelms society today, the unsupported predictions by Mill and Milton about the power of truth to defeat falsehoods seem astonishingly naïve. Indeed, when *Sullivan* was decided in 1964, the Court worried that speech in America would be chilled if the actual malice test were not implemented, but the America we live in today has responded to that prophecy with morbid irony. Far from being chilled, speech that is utterly and deliberately false has permeated every corner of public discourse and found scores of passionate adherents. Under these circumstances, it is scarcely unreasonable to assume that the actual malice test does not function as a tool for those seeking political truth, but as a legal shield for those who wish to subvert it. Put bluntly, the actual malice test tends to upend the avowedly noble aims of the *Sullivan* Court to discern a truth that is worthy of being called enlightened.

IV. THE ACTUAL MALICE TEST AS VIOLATIVE OF CIVILITY AND DIGNITY

Suppose one accepts the actual malice test at face value without regard for whether it achieves its own professed purpose of discovering political truth. The test would nevertheless be objectionable because it empowers speakers to savagely violate a community's yearning to honor the norms of civility and dignity.

If there was one mood that pervaded the Court's opinion in *Sullivan*, it was one of blissful self-congratulation. The *Sullivan* Court reassured the public that, while those like the Alabama Supreme Court threatened to destroy the press, "we [the Supreme Court] 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."¹⁵³ Amidst its complacent rhetoric, the Court never bothered to explain why the right to publish political libel—the right that was protected by the actual malice test—should take precedence over what appear to be equally valuable interests in civility and the protection of

151. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964).

152. *Id.*; see also *supra* notes 109-10 and accompanying text.

153. *Sullivan*, 376 U.S. at 270.

personal dignity. After all, the actual malice test, by empowering speakers to publish libels about public officials with virtual impunity, also empowered the speakers to verbally assault their victims. Shielded by the actual malice test, a speaker enjoyed the constitutional right to publish words about a public official or public figure that were false and appallingly injurious to the official's reputation.¹⁵⁴ Unfortunately, the Court in *Sullivan* did not recognize how the actual malice test was so morally callous. Quoting a state court, the *Sullivan* Court minimized the injuries that could result from the actual malice test as mere "inconvenience."¹⁵⁵ The Court confessed that "at times . . . injury may be great," but these "must yield to the public welfare" in trying to foster an environment in which speech was likely to produce political truth.¹⁵⁶

The Court treated the harms presented by the actual malice test as justified in relation to the First Amendment benefits derived from the test. But some jurists were skeptical. In *St. Amant v. Thompson*, a case decided four years after *Sullivan*, Justice Fortas delivered a poignant dissent. He urged that "[t]he First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities."¹⁵⁷ A nearly untrammelled right to publish libel, warned Justice Fortas, permitted a speaker to assault a person's basic sense of self: "The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season."¹⁵⁸ For Justice Fortas, "[t]he occupation of public officeholder does not forfeit one's membership in the human race."¹⁵⁹ Justice Fortas stressed that "[t]he public official should be subject to severe scrutiny and to free and open criticism[,] [b]ut if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law."¹⁶⁰

Why the latter proposition was issued by Justice Fortas was illuminating. He argued that a victim of libel should be afforded a remedy because it was rooted in a "minimal standard of civilized living."¹⁶¹ While pithy, his statement was suggestive. Justice Fortas characterized libel as not only an attack on the individual, but also the *community* which sought to develop norms of civility whereby its members

154. *Id.* at 279-80.

155. *Id.* at 281 (quoting *Coleman v. MacLennan*, 78 Kan. 711, 723 (1908)).

156. *Id.* (quoting *Coleman*, 78 Kan. at 723).

157. *St. Amant v. Thompson*, 390 U.S. 727, 734 (1968) (Fortas, J., dissenting).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

were expected to treat each other with mutual respect. Further, Justice Fortas noted that the civility which was imperiled in libel cases functioned as a “*minimal* standard of civilized living.” The implication was that without this minimal standard, civilized living was untenable. That such civility is indispensable for any community should be logically evident to the reader who pauses to consider how difficult it is to imagine a community, even as a matter of abstraction, that is devoid of any norms of civility.¹⁶² As implied by its etymological presence in “civilization” and “civil society,” civility is at base an ethic of cooperation, or “the sum of the many sacrifices we are called to make for the sake of living together.”¹⁶³ And living together implies the existence of a community, a connection made lucid in the now forgotten but once tangled semantic origins of “civility” and “citizenship.”¹⁶⁴

Justice Fortas’s comments about civility and dignity were made in his dissent in *St. Amant*, and the import of those comments can be deepened by examining the facts of that case. In 1962, Phil St. Amant, a candidate for public office, made a televised speech in Baton Rouge, Louisiana.¹⁶⁵ In the speech, St. Amant read excerpts from an affidavit made by a member of the Teamsters Union.¹⁶⁶ The affidavit claimed that the local president of the Teamsters, Ed Partin, had stolen union funds and had secretly given them to Herman Thompson, a deputy sheriff.¹⁶⁷ Here, then, was a manifestly damning allegation made unabashedly in public that a police officer had participated in a grave crime.¹⁶⁸ Unsurprisingly, Thompson sued St. Amant for defamation.¹⁶⁹ The trial court ruled that Thompson had satisfied the high burden of the actual malice test.¹⁷⁰ The Louisiana Supreme Court affirmed and held that St. Amant had broadcast false information about Thompson and had done so recklessly.¹⁷¹

St. Amant successfully appealed his case to the U.S. Supreme Court. The Supreme Court ruled that the Louisiana Supreme Court and the trial court had failed to comprehend the substance of the actual malice test.¹⁷² The Supreme Court used *St. Amant* as an opportunity to underscore the extraordinary difficulty of satisfying the

162. See John M. Kang, *The Uses of Insincerity: Thomas Hobbes’s Theory of Law and Society*, 15 L. & LIT. 371 (2003).

163. STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* 11 (1998); see also Kang, *supra* note 162, at 374-75 (making an analogous argument).

164. See 3 THE OXFORD ENGLISH DICTIONARY 256 (2d ed. 1989).

165. *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968).

166. *Id.*

167. *Id.* at 729.

168. *Id.*

169. *Id.*

170. *Id.* at 730.

171. *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

172. *Id.* at 730-33.

actual malice test. According to the Court, “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.”¹⁷³ Instead, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”¹⁷⁴ Stunningly, the Court insisted that “[f]ailure to investigate does not in itself establish bad faith.”¹⁷⁵ With this pronouncement, the Court made clear that it would protect a speaker like St. Amant, a speaker whose libelous statement had destroyed a person’s reputation, a speaker who had *never* bothered to investigate whether the statement was true. It is unclear how such virtually unbridled freedom to libel can be justified when weighed against the harms to dignity and civility, what Justice Fortas called the constituents of a “minimal standard of civilized living.”¹⁷⁶

The theme of civility and its correlates had animated Justice Fortas’s dissent in *St. Amant*, but he was not alone in his apprehension that the actual malice test threatened civility and its related benefits. Justice Fortas’s *St. Amant* dissent was published in 1968. Two years prior, the Court decided *Rosenblatt v. Baer*, a case that affirmed the propriety of the actual malice test.¹⁷⁷ In *Rosenblatt*, Justice Stewart took pains to explain that the right of speech was not the only value worth honoring.¹⁷⁸ Concurring, Justice Stewart cautioned that the actual malice test threatened the equally important values of civility and dignity:

It is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. As the Court says, “important social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.”¹⁷⁹

In the passage, Justice Stewart emphasized that society harbored an ardent interest in protecting the reputation of individuals. By this, he meant that the libeler not only violated the victim’s right to her reputation, but also violated the right of the community to expect that its members should treat each other with civility and dignity. Justice Stewart elaborated in *Rosenblatt*: “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”¹⁸⁰

173. *Id.* at 731.

174. *Id.*

175. *Id.* at 733 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 287-88 (1964)).

176. *Id.* at 734 (Fortas, J., dissenting).

177. *Rosenblatt v. Baer*, 383 U.S. 75, 76-77 (1966).

178. *Id.* at 93 (Stewart, J., concurring).

179. *Id.* at 92 (quoting *Rosenblatt*, 383 U.S. at 86).

180. *Id.*

Justice Stewart once again established a connection between individual dignity and the community. An individual may assert a right to dignity, but dignity, to be felt as real, must be conferred by the community. As Justice Stewart wrote in *Rosenblatt*, the right of dignity is said to derive from “our basic concept.” For him, an individual’s dignity thus operated in a symbiotic relationship with society’s expectation that its members treat each other with civility.¹⁸¹

Against this backdrop, the protection furnished by the actual malice test for libel struck Justice Stewart as a morally barbed enterprise. “We use misleading euphemisms when we speak of the *New York Times* rule as involving ‘uninhibited, robust, and wide-open’ debate, or ‘vehement, caustic, and sometimes unpleasantly sharp’ criticism,” he cautioned.¹⁸² It is more accurate to say that “[w]hat the *New York Times* rule ultimately protects is defamatory falsehood.”¹⁸³ And, lest the reader forget, Justice Stewart reminded that “[t]he destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem.”¹⁸⁴ Justice Stewart’s belief finds support from sociology. The famed sociologist Erving Goffman has shown that “total institutions” such as maximum security prisons, military boot camps, and mental asylums persistently degrade an individual’s sense of dignity and erase any feeling by the individual that his community will honor the norms of civility toward him.¹⁸⁵ Hannah Arendt has likewise described in compelling detail how Nazi concentration camps denied inmates any sense of dignity and completely expunged from them any expectation for civility.¹⁸⁶ In such brutal contexts,

181. Justice Fortas, dissenting, echoed consonant sentiments in *St. Amant*. He rejected the Court’s holding which augmented the actual malice test. In *St. Amant*, the Court required the victim of the libel to prove that the speaker *in fact* entertained serious doubts about the truth of his statement or was reckless about it. Justice Fortas found such protection to be morally appalling. He wrote:

The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassin, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one’s membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. [*Sullivan*] does not preclude this minimal standard of civilized living.

St. Amant v. Thompson, 390 U.S. 727, 734 (1968) (Fortas, J., dissenting).

182. *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring).

183. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

184. *Id.* at 93.

185. See ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961).

186. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951).

verbal abuse, including libelous statements, aid the totalitarian institution in its attempt to eradicate the self-worth of its inmates and, ultimately, to maintain control over them.

Of course, the facts of *New York Times v. Sullivan* were a far cry from such horrific scenarios. Indeed, one suspects that the Court decided to hear the case of *Sullivan* precisely because its morally uncomplicated narrative involved L.B. Sullivan versus Martin Luther King or, in broader terms, white supremacy versus Martin Luther King. The narrative on offer by *Sullivan* was thus ideally suited to ease the public into accepting the ethically sullied properties of the actual malice test. Cases subsequent to *Sullivan*, however, reveal how the actual malice test can be used to severely violate the community's desire for civility and to degrade a person's dignity.

Consider *Buendorf v. National Public Radio*, a 1993 case from the U.S. District Court for the District of Columbia.¹⁸⁷ Like *Sullivan*, *Buendorf* involved a law enforcement official who claimed to have been defamed. But this case did not involve an analogous story of a racist police officer who tried to thwart a plucky troupe of civil rights activists. Larry Buendorf was a Secret Service agent who was assigned to protect President Gerald Ford. Buendorf held a Top Secret Security Clearance, and the federal government treated him as someone who was entirely trustworthy.¹⁸⁸ He was married, had one daughter, and was heterosexual.¹⁸⁹ Back in 1992, the accusation that a person was gay could destroy that person's reputation, something that is less likely to be true today.¹⁹⁰ In 1992, a commentator on National Public Radio (NPR) named Daniel Schorr mistakenly stated on air that Buendorf was, in Schorr's words, "a homosexual."¹⁹¹ Buendorf sued Schorr for defamation. The former claimed that his reputation had been undermined because a Secret Service agent of his standing had to possess a professional reputation as someone who could not be blackmailed.¹⁹² However, if people viewed him as being a surreptitious homosexual, people might view him as someone who could be blackmailed in order to keep his sexual orientation a secret.¹⁹³

The District Court ruled that Buendorf had to satisfy the actual malice test because he was deemed a public official and Schorr's

187. *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6 (D.C. Cir. 1993).

188. *Id.* at 7.

189. *Id.*

190. See Garance Franke-Ruta, *How America Got Past the Anti-Gay Politics of the '90s*, ATLANTIC (Apr. 8, 2013), <https://www.theatlantic.com/politics/archive/2013/04/how-america-got-past-the-anti-gay-politics-of-the-90s/266976/> [<https://perma.cc/58KP-3H5B>].

191. *Buendorf*, 822 F. Supp. at 8.

192. *Id.* at 7, 12.

193. *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6, 12 (D.C. Cir. 1993).

statement related to a matter of public concern.¹⁹⁴ The District Court dismissed Buendorf's case on summary judgment because "there is no genuine issue as to any material fact in this case."¹⁹⁵ Specifically, the District Court determined that Buendorf had failed to demonstrate that Schorr had made his false statements with actual malice.¹⁹⁶ Schorr, the District Court concluded, "made the statement without knowledge that it was false."¹⁹⁷ Further, the District Court explained that "[t]here is no evidence in the record to suggest that the defendants 'entertained serious doubts' as to whether or not Mr. Buendorf was a homosexual."¹⁹⁸ True, the District Court acknowledged, "[t]he evidence shows that the defendants could have been more diligent in their research," but "this error does not rise to the level of 'reckless disregard.'"¹⁹⁹

Why the error, in the Court's view, did not arise to the level of "reckless disregard" offered insight into how the actual malice test could destroy a person's reputation with impunity. Schorr was described by the *Los Angeles Times* in 2010 as "the elder statesman of public radio," and his NPR colleague Scott Simon said of him in 2010 that "[n]obody else in broadcast journalism—or perhaps any field—had as much experience and wisdom."²⁰⁰ For someone of Schorr's professional stature, one would expect that he would conduct his due diligence to discern whether Buendorf was gay, a charge not to be made lightly in the homophobic culture of the early 1990s. Schorr had "instructed his research assistant to 'get [him] the name of that guy who saved President Ford's life.'"²⁰¹ What Schorr had forgotten was that there were *two* assassination attempts that had been made against President Ford.²⁰² In one attempt, a man named Oliver Sipple had saved President Ford's life; Sipple was later revealed to be gay.²⁰³ In another assassination attempt, Buendorf had saved President Ford's life.²⁰⁴ Schorr's research assistant failed to explain to Schorr that there were two such attempts, and Schorr himself had failed to remember that there were two, a jarring mistake by the "elder statesman of public radio."²⁰⁵ The allegations made by Schorr about Buendorf were not

194. *Id.* at 11-12.

195. *Id.* at 13.

196. *Id.* at 12-13.

197. *Id.* at 12.

198. *Id.*

199. *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6, 12 (D.C. Cir. 1993).

200. Claudia Luther, *Daniel Schorr Dies at 93: Controversial CBS and CNN Broadcaster Became Elder Statesman at NPR*, L.A. TIMES (July 24, 2010, 12:00 AM), <https://www.latimes.com/local/obituaries/la-me-daniel-schorr-20100724-story.html> [<https://perma.cc/9HYB-NSTD>].

201. *Buendorf*, 822 F. Supp. at 8.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Buendorf v. Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6, 8 (D.C. Cir. 1993).

time-sensitive. Schorr and his assistant had ample time to check the most mundane of facts to ensure that they did not disparage the reputation of a high-level Secret Service agent. But the District Court did not hold Schorr accountable.²⁰⁶ His hasty error, an error that would seem stunning for a professional like Schorr, a proverbial legend in the field of journalism, was deemed by the District Court not to amount to reckless behavior.²⁰⁷

Anaya v. CBS Broadcasting is another instance in which the norms of civility and dignity seem to have come at the cost of honoring the actual malice test.²⁰⁸ In that case, Lilian Anaya had worked as a purchasing agent for Los Alamos National Laboratory (LANL), a federally-owned facility in New Mexico.²⁰⁹ While Anaya was the purchasing agent, she was not authorized to purchase anything without her supervisor's approval.²¹⁰ One day, Anaya had sought to purchase equipment for LANL and called the phone number for a familiar vendor that she had called in the past.²¹¹ However, unbeknownst to Anaya, the equipment manufacturer had moved and had acquired a new phone number.²¹² The old number had been acquired by a "hot-rod shop called All Mustang."²¹³ That shop tricked Anaya into faxing the order for what she believed was needed equipment at LANL, and subsequently tricked her into sharing her LANL credit card number and, eventually, "sold" her a custom-made Mustang.²¹⁴ Perplexed by the strange purchase, LANL conducted investigations, and, in the end, fully exonerated Anaya of any wrongdoing.²¹⁵ The exoneration occurred in June 2003, and LANL "released the results of its investigation in a report and a press release."²¹⁶ But in October 2003, CBS Broadcasting spread a libelous statement about Anaya.²¹⁷ *Inside Story*, a CBS program, opened with the celebrity news anchor Dan Rather announcing this headline: "Hey, nice car! She bought it and charged it to you, the taxpayer. The Inside Story, tonight."²¹⁸ The District Court noted that "[a]s Rather read the headline, a photograph of an attractive-looking, black Mustang flashed on the screen."²¹⁹ By the time that Rather made this

206. *Id.* at 13.

207. *Id.*

208. *Anaya v. CBS Broad. Inc.*, 626 F. Supp. 2d 1158 (D.N.M. 2009).

209. *Id.* at 1161.

210. *Id.* at 1164.

211. *Id.* at 1170.

212. *Id.*

213. *Id.*

214. *Anaya v. CBS Broad. Inc.*, 626 F. Supp. 2d 1158, 1170 (D.N.M. 2009).

215. *Id.*

216. *Id.*

217. *Id.* at 1171.

218. *Id.* at 1172.

219. *Id.*

pronouncement, *Inside Story* “had access [to] LANL’s report, which presented the wrong-number hypothesis.”²²⁰ The reporter for *Inside Story*, Sharyl Attkisson, presented an interview with Thomas Thompson of All Mustang.²²¹ She reported Thompson saying that Anaya had “wanted a late-model Mustang, black convertible, with, like, black leather interior.”²²²

Anaya sued CBS for defamation. The District Court deemed that she was a limited-purpose public figure because she had voluntarily injected herself into public controversy by trying to sway the public to accept her explanation.²²³ The District Court argued that Anaya, as a public figure, failed to show actual malice by CBS.²²⁴ The District Court took pains to stress that the actual malice test required the plaintiff to prove that the defendant *in fact* knew that the factual assertion was false or that the plaintiff, based on her *subjective* state of mind, entertained a “high degree of awareness of . . . probable falsity.”²²⁵ The District Court also cited the Supreme Court’s opinion in *Harte-Hanks Communications v. Connaughton*, a case from 1989, that inserted more obstacles for plaintiffs in defamation suits.²²⁶ The District Court quoted *Harte-Hanks* for the proposition that the actual malice test requires the plaintiff to fulfill the daunting requirement that the defendant demonstrated a *subjective* intent to “avoid the truth” and that “failure to conduct a complete investigation involved a *deliberate* effort to avoid the truth.”²²⁷ Unsurprisingly, Anaya was unable to satisfy these requirements. CBS therefore escaped civil liability for its allegation that Anaya had violated her employer’s trust and had engaged in theft, a charge that her own employer had refuted.

In *Bartimo v. Horsemen’s Benevolent & Protective Ass’n*, another victim of defamation was denied civility and dignity because of the protection to libel provided by the actual malice test.²²⁸ The Horsemen’s Benevolent and Protective Association (HBPA) was a national organization for racehorse owners, breeders, trainers, and others associated with the horse racing business.²²⁹ Vincent Bartimo was the President and General Manager of Louisiana Downs Racetrack.²³⁰ The HBPA

220. *Anaya v. CBS Broad. Inc.*, 626 F. Supp. 2d 1158, 1172 (D.N.M. 2009).

221. *Id.* at 1172.

222. *Id.*

223. *Id.* at 1198, 1211-12.

224. *Id.* at 1217-18.

225. *Id.* at 1217 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

226. *Anaya v. CBS Broad. Inc.*, 626 F. Supp. 2d 1158, 1218 (D.N.M. 2009) (citing *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657 (1989)).

227. *Id.* (emphasis added) (quoting *Harte-Hanks Commc’ns*, 491 U.S. at 692).

228. *Bartimo v. Horsemen’s Benevolent & Protective Ass’n*, 771 F.2d 894 (5th Cir. 1985).

229. *Id.* at 895.

230. *Id.*

has a publication called *Racing Journal*.²³¹ The first issue of *Racing Journal* contained an article titled *Outrage*.²³² The article described Bartimo's role in the suspension of owner-trainer William Fox from racing privileges at Louisiana Downs.²³³ The article claimed that Bartimo had suspended Fox as retaliation for the latter's testimony in a trial involving the fixing of some horse races in New Orleans.²³⁴ Various claims were made about Bartimo. The article suggested that Bartimo had "alleged mafia connections" with those fixing the races.²³⁵ The article added that Bartimo was an "alleged Mafia Lieutenant," an "alleged Mafia boss," and had a "partnership with convicted felon Charles E. Roamer II."²³⁶ The article concluded with the following charges: "The Mafia has long been known for their ability to 'hit' anyone, usually by gang slayings. If Bartimo gets away with this attempt on 'Billy Fox' his next hit could be—you."²³⁷

Bartimo sued HBPA for defamation. The Fifth Circuit Court of Appeals determined that Bartimo was a public figure and thus required him to show that the *Racing Journal's* assertions were made with actual malice.²³⁸ The Fifth Circuit stressed that the actual malice test is an exceptionally high bar.²³⁹ Specifically, for the Fifth Circuit, "a failure to investigate is not sufficient in itself to establish reckless disregard."²⁴⁰ This was a jarring assertion given that *Racing Journal* was a journalistic medium, and it would not have been difficult for the *Journal* to conduct at least some modicum of research. Nevertheless, quoting *St. Amant v. Thompson*, the Fifth Circuit reiterated that "reckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing' but by whether a particular defendant 'in fact entertained serious doubts as to the truth of [the] publication.'"²⁴¹ According to the Fifth Circuit, Bartimo failed to show actual malice, and his case was dismissed.²⁴²

In this manner, the actual malice test could produce a chilling effect on speech, the antithesis of what the Court sought to do in *Sullivan*.

231. *Id.* at 896.

232. *Id.*

233. *Id.*

234. *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 896 (5th Cir. 1985).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 896-98.

239. *Id.* at 898.

240. *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 898 (5th Cir. 1985).

241. *Id.* at 898-99 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

242. *Id.* at 902.

Writing in 1974, ten years after *Sullivan* was decided, Justice White gave voice to this concern. Dissenting in *Gertz v. Robert Welch*, Justice White penned a disquieting reflection:

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media. If anything, this trend may provoke a new and radical imbalance in the communications process. It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems.²⁴³

That the majority of the *Gertz* Court did not even acknowledge the reasons for Justice White's apprehension is evidence of the morally myopic worldview that gave rise to the actual malice test.

V. A WANT OF LEGAL PRECEDENT

Despite the various objections that have been ushered thus far, a votary of the actual malice test might nevertheless object that my criticisms—with their preoccupation with political theory, philosophy, and morality—are, even if persuasive, irrelevant as a matter of law. The votary might argue that the legitimacy of the actual malice test rests on whether it is justified by legal precedent—and nothing more. There is a facial, if bracingly straightforward, appeal to this position. After all, it is not, formally speaking, the Court's business to solve America's political problems, including the problem of misinformation, a job that is more appropriate for Congress and the President. Nor is it the job of the Court, one might argue, to settle debates about whether the protection for personal dignity should trump the right to criticize public officials, a task that is perhaps better suited for philosophy professors.²⁴⁴ That the problems of policy and philosophy are of no concern to the federal courts was arguably intimated by Chief Justice Marshall when he famously declared in 1803 in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the [J]udicial [D]epartment to say what the law is."²⁴⁵ Or, put conversely, the Chief Justice might be read as saying that it is emphatically *not* the province and duty of the Judicial Department to trouble itself with issues other than the law. According to this belief, as long as the Court is able to justify the actual malice test in terms of legal precedent, the Court has done its job, or so a defender of the actual malice test might argue.

Endeavoring to demonstrate its fidelity to legal precedent, the *Sullivan* Court cited one case after another in a formidably lengthy roster.

243. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 399-400 (1974) (White, J., dissenting) (footnote omitted) (citation omitted).

244. For a sustained argument to this end, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

245. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added).

Unfortunately, the quantity of cases could not hide the fact that the cited cases were woefully bad candidates to underwrite the creation of the actual malice test, a test that was entirely novel. The majority of the cases which the Court cited in *Sullivan* did not even involve libel; sometimes, the cases did not even involve the right of speech.²⁴⁶ To be sure, there is nothing inherently wrong with citing cases which, on their initial reading, seem to be a poor fit with the facts of the case at hand. After all, it is a staple of masterful judicial opinion-writing to deftly stitch outwardly irrelevant cases into an imaginative tapestry of argument that can justify a novel concept like the actual malice test.²⁴⁷ But such craft eluded the Court's opinion in *Sullivan*.

Consider how the *Sullivan* Court cut and pasted from the Court's prior opinion in *Roth v. United States* to convey the dubious impression that it was consonant with the Court's decision to protect libel in *Sullivan*. Quoting from *Roth*, the *Sullivan* Court announced, "The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"²⁴⁸ Excised from the facts which gave rise to them, the words from *Roth* would appear to be compatible with the Court's invention of the actual malice test. Placed in context, however, the statement which the *Sullivan* Court lifted from *Roth* seems inapt. *Roth*, as the Court knew well, involved obscenity, not libel.²⁴⁹

246. Consider, for example, that *Sullivan* favorably cited *Bridges v. California* four times, but *Bridges* did not involve libel. See *Bridges v. California*, 314 U.S. 252 (1941). *Bridges* was about whether a defendant's statements amounted to a clear and present danger. See *id.* at 262, cited in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269, 273, 277, 298 (1964). *NAACP v. Button*, cited favorably six times by the *Sullivan* Court, did not concern the speaker's right to engage in libel, but his rights to express a political opinion and to participate in political association. *NAACP v. Button*, 371 U.S. 415, 429-30 (1963), cited in *Sullivan*, 376 U.S. at 266, 269, 271-72, 298. *United States v. Associated Press*, favorably cited by the Justice, was an antitrust case, not a libel case. *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943), cited in *Sullivan*, 376 U.S. at 270. Justice Brandeis's famous concurrence from *Whitney v. California*, 274 U.S. 357 (1927), was admirably excerpted at length by the *Sullivan* Court. *Sullivan*, 376 U.S. at 270. Regrettably, none of the Justices in *Whitney* discussed whether a speaker had a right to indulge in libel. *Whitney* concerned the right to express a political opinion that could be construed as advocating violent overthrow of the government. *Whitney*, 274 U.S. at 359, cited in *Sullivan*, 376 U.S. at 270. Other cases cited by the *Sullivan* Court also had little to do with libel. *Terminiello v. Chicago* concerned speech which might amount to a breach of the peace. *Terminiello v. Chicago*, 337 U.S. 1, 3 (1949), cited in *Sullivan*, 376 U.S. at 270. *De Jonge v. Oregon*, cited twice by *Sullivan*, discussed advocacy of violent overthrow of the government. *De Jonge v. Oregon*, 299 U.S. 353, 357 (1937), cited in *Sullivan*, 376 U.S. at 270-71, 301. *Speiser v. Randall*, cited thrice by *Sullivan*, was about compelled speech. *Speiser v. Randall*, 357 U.S. 513 (1958), cited in *Sullivan*, 376 U.S. at 271, 279, 285. *Cantwell v. Connecticut*, cited by *Sullivan*, did not even concern the right of speech but the right of religious expression. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), cited in *Sullivan*, 376 U.S. at 271.

247. This description comports with Ronald Dworkin's assertion that the composition of legal precedent is akin to writing chapters in a novel. See Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982).

248. *Sullivan*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

249. *Roth*, 354 U.S. at 479.

This difference matters. As was discussed previously, libel runs the risk of destroying a person's dignity and violating the community's norms of civility.²⁵⁰ Obscenity, while offensive to some, does not necessarily run the risk of doing either. As defined by the Supreme Court, obscenity receives virtually no constitutional protection, not because it is assaultive of a person's dignity or harms a community's devotion to civility, but because it is *aesthetically* offensive and "prurient."²⁵¹ Moreover, obscenity can be indulged in the privacy of one's home, but libel has to be "published," and, hence, has to be made known to the public.²⁵² Obscenity, if enjoyed away from the judgmental eyes of others, cannot offend the community. Indeed, the Supreme Court in *Stanley v. Georgia* stated that there exists a constitutional right to enjoy obscenity in the privacy of one's home.²⁵³ The *Stanley* Court asserted that the right to view obscenity amounted to nothing more than a "right to receive information and ideas, regardless of their social worth."²⁵⁴ Quoting Justice Brandeis, *Stanley* explained that the right to enjoy obscene materials in the privacy of one's home was part of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."²⁵⁵ *Stanley* thus argued that the right of privacy, like the right to civility, was part of what made our collective lives "civilized." By contrast, libel, with its public violation of the community's commitment to protect individual dignity was antithetical to the norms of civilization. Accordingly, it appears wrongheaded, if not disingenuous, for the Court to have attempted in *Sullivan* to recruit *Roth*, a case about obscenity, to underwrite the argument for the actual malice test.

There is a more basic problem with the Court's effort to conscript *Roth*. Namely, *Roth* explicitly *disavowed* any protection for libel. In what appears to be a cynical omission, the Court in *Sullivan* did not mention that the *Roth* Court, far from embracing libel as protected speech, actually reaffirmed the Court's earlier precedent that libel, like obscenity, was undeserving constitutional protection. *Roth* had announced:

Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be

250. See *supra* Part IV.

251. See *Miller v. California*, 413 U.S. 15, 21 (1973).

252. See RESTATEMENT (FIRST) OF TORTS § 558 (AM. L. INST. 1938).

253. *Stanley v. Georgia*, 394 U.S. 557, 567-68 (1969).

254. *Id.* at 564 (citing *Winters v. New York* 33 U.S. 507, 510 (1948)).

255. *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.²⁵⁶

As the passage makes clear, *Roth* did not extend any protection for libel, even though the Court in *Sullivan* used the case to support the proposition that a subset of libel should be afforded virtually unqualified protection.

The Court's other attempts to invoke legal precedent were scarcely more effective. In addition to *Roth*, the *Sullivan* Court quoted from *Stromberg v. California*: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."²⁵⁷ Like in *Roth*, the facts of *Stromberg* were far removed from the issue of libel in *Sullivan*. Yetta Stromberg, a nineteen-year-old female member of the Young Communist League, flew a "camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States."²⁵⁸ For flying the flag, Stromberg was prosecuted under a California law that forbade a person from displaying on his house a "red flag" as a symbol of "opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character."²⁵⁹ Flying a flag of the Communist Party is an expression of one's opinion, not a factually testable claim. In other words, the opinion at issue in *Stromberg* was not a false representation of fact, a prerequisite for libel. *Stromberg*, therefore, was unpersuasive as legal precedent for the actual malice test.²⁶⁰

The most promising case that the *Sullivan* Court adopted was not even from a federal court. But here too there were undeniable problems of fit. According to the *Sullivan* Court, the case that best foreshadowed the Supreme Court's invention of the actual malice test was *Coleman v. MacLennan*, a case from the Kansas Supreme Court that dates back to 1908, fifty-six years prior to the Court's decision in *Sullivan*.²⁶¹ In *Coleman*, the Kansas attorney general, who was running for reelection, sued a newspaper for publishing allegedly libelous

256. *Roth v. United States*, 354 U.S. 476, 486-87 (1957) (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)).

257. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

258. *Stromberg*, 283 U.S. at 362.

259. *Id.* at 361 (quoting CAL. PENAL CODE § 403a (repealed 1933)).

260. It also merits emphasizing that the Soviet flag flown in *Stromberg*, while arguably offensive to some, could not have been construed in any reasonable sense as hurting another's dignity or assaulting the community's norms of civility.

261. *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908).

statements in an article that discussed the candidate's official conduct.²⁶² The Court in *Sullivan* approvingly quoted the following jury instructions, issued by the trial judge in *Coleman*:

[W]here an article is published . . . for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, . . . in such a case the burden is on the plaintiff to show actual malice in the publication of the article.²⁶³

The Kansas Supreme Court affirmed the trial court's ruling, and the *Sullivan* Court quoted from the former as well: "[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages."²⁶⁴

The aforementioned pronouncements were made by the Kansas Supreme Court, and, thus, they were not binding on the U.S. Supreme Court. Yet, even as an illustrative guide, *Coleman* could not be easily recruited to justify the creation of the actual malice test in *Sullivan*. This was so for at least three reasons.

First, the *Coleman* court was not interpreting the U.S. Constitution but the Kansas Bill of Rights.²⁶⁵ This was a crucial distinction. The Kansas Bill of Rights, unlike the federal Bill of Rights, contained an explicit right of the press to be shielded from libel suits under certain circumstances. Section 11 of the Kansas Bill of Rights read: "The liberty of the press shall be inviolate . . . and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."²⁶⁶ The Kansas Bill of Rights thus explicitly protected libel. The Kansas Supreme Court in *Coleman* was interpreting a textual provision that had *already* existed in the state constitution. This was not the case with the Supreme Court in *Sullivan*, which had created the actual malice test in the absence of any explicit textual basis in the First Amendment.

Second, it was not the right of speech that *Coleman* was interpreting, as had the Supreme Court in *Sullivan*, but the right of the press.²⁶⁷

262. *Id.* at 281.

263. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1964) (quoting *Coleman*, 98 P. at 281-82).

264. *Id.* at 281 (quoting *Coleman*, 98 P. at 286). By focusing on the importance of public deliberation of political affairs, these words reverberated Meiklejohn's argument on self-government.

265. *Coleman*, 98 P. at 283.

266. KAN. CONST. Bill of Rights § 11.

267. *Coleman v. MacLennan*, 98 P. 281, 283 (Kan. 1908).

As the *Coleman* Court remarked, the right guaranteed to the press was “not enjoyed in common by all.”²⁶⁸ The *Coleman* Court elaborated:

The basis of the contention for a more liberal indulgence lies in the modern conditions which govern the collection of news items and the insistent popular expectation that *newspapers* will expose, and the popular demand that *they* shall expose, actual and suspected fraud, graft, greed, malfeasance, and corruption in public affairs and questionable conduct on the part of public men and candidates for office without stint, leaving to the people themselves the final verdict as to whether charges made or opinions expressed were justified.²⁶⁹

As the *Coleman* Court explained, there was a special relationship between the press and democracy, and it was this relationship that served as the philosophical foundation for the *Coleman* Court’s decision to grant newspapers a limited right to publish materials that were later deemed libelous. It is not difficult to imagine why. Compared to a lone individual, a newspaper is less likely to utter falsehoods because in order for a newspaper to publish a given article, the article must be approved by a team of editors, all of whom are presumably concerned about protecting the newspaper’s reputation for veracity; moreover, it is likely that the newspaper’s in-house counsel had also vetted the article for accuracy.²⁷⁰ By contrast, in *Sullivan*, the Supreme Court did not mention the uniqueness of the press. As far as the *Sullivan* Court was concerned, anyone, including some random anonymous individual on Twitter operating from a foreign country and who secretly wished to spread misinformation, was entitled to the protection furnished by the actual malice test.

Third, *Coleman*, interpreting the Kansas Constitution, placed stricter limits than did the Court in *Sullivan*, on what kinds of libel would be permitted. *Sullivan* had protected libel if the victim could not prove that it was published with knowing falsity or with reckless indifference to the truth or falsity of the statement.²⁷¹ However, *Coleman* permitted the press—and the press only—a “privilege” to publish a statement that was supposedly libelous but only if the statement was (1) “made in good faith,” (2) “for the *sole purpose* of giving what the defendant believes to be truthful information concerning a candidate for public office,” (3) “for the purpose of enabling such voters to cast their ballot *more intelligently*,” and (4) “the whole thing is done in *good faith*, and without malice.”²⁷² Take note of the formidable restrictions imposed by the Kansas Supreme Court in *Coleman*. There was no

268. *Id.* at 286.

269. *Id.* (emphases added).

270. Certainly, this was true for the *Times* when it decided to publish *Heed Their Rising Voices*. LEWIS, *supra* note 3, at 6.

271. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 262 (1964).

272. *Coleman*, 98 P. at 281-82 (emphases added).

license for recklessness or knowing falsity, as there was in *Sullivan*. In their place, the Kansas Supreme Court required that the press have published their statements in “good faith.” Further, *Coleman* limited its privilege for the press to those libels whose “sole purpose” was providing “truthful information.” *Coleman* thus refused to extend constitutional protection for libels which were motivated by anything other than a desire to enlighten the public. *Sullivan* did not require speakers to be motivated by such civic-minded aspirations.

As the previous analysis suggests, the Court’s efforts in *Sullivan* to draw from legal precedent were not convincing. The next Part addresses the Court’s attempt to underwrite the actual malice test through the interpretive method called originalism.

VI. THE ARGUMENT FROM ORIGINALISM FAILS

The *Sullivan* Court supplemented its effort to justify the creation of the actual malice test by resorting to an originalist interpretation of the Constitution. Originalism is a school of interpretation predicated on the idea that the Constitution’s authoritative meaning derives from what the Framers thought about it.²⁷³ The framer whom the *Sullivan* Court invoked almost exclusively was James Madison.²⁷⁴ Indeed, the reporter Anthony Lewis remarked in his historical account of the *Sullivan* case that the Court’s invention of the actual malice test was the expression of a “Madisonian theory” of free speech.²⁷⁵

The Court’s choice of Madison was understandable. Madison is known by scholarly convention as the “Father of the Constitution” for his singular contributions.²⁷⁶ According to the *Sullivan* Court, Madison, as far back as the early eighteenth century, had envisioned the Constitution as protective of speech that was arguably libelous.²⁷⁷ The principal evidence that the Court marshaled was Madison’s “Report” on the Sedition Act of 1798 (Report).²⁷⁸ A testament to the *Sullivan* Court’s admiration for Madison, the Court quoted more than 260 words from Madison’s Report.²⁷⁹

273. A sustained discussion of originalism is beyond the scope of this Article, but there are some sources which the reader may wish to consult as an initial matter. See Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12 (Grant Huscroft & Bradley W. Miller eds., 2011). For a muted celebration of originalism, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). For a critique of originalism, see Mitchel N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

274. See *Sullivan*, 376 U.S. at 271, 274, 275, 282.

275. LEWIS, *supra* note 3, at 153.

276. See J. William Davis, Book Review, 29 TEX. L. REV. 273 (1950) (reviewing IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800* (1950)).

277. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273-74 (1964).

278. *Id.* at 274-75.

279. See *id.*

How the Court used Madison's Report was problematic in basic ways, however. First, the Court failed to furnish an adequate explanation about the topic of discussion in the Report: the Sedition Act of 1798. Had the Court done so, the Report would have been seen in a very different light than presented by the Court for purposes of the right of speech. Second, the Court did not clarify the political circumstances that prompted Madison to pen the Report. Had the Court done so, its attempt to characterize Madison's Report as a document in support of the actual malice test would have appeared to the reader as highly questionable. Third, the Court omitted substantial portions of Madison's Report, and, by doing so, the Court created a false impression of what the Report signified in terms of the right to criticize public officials. All three of these points will be discussed forthwith.

Said discussion will begin with a review of the historical context in which Madison wrote his Report. The most important event at that time was the French Revolution.²⁸⁰ As Professor Geoffrey Stone remarked, "No single foreign event affected the United States more profoundly in the 1790s than the French Revolution and its social, political, and diplomatic repercussions."²⁸¹ At first, Americans lauded the French Revolution's ideals of "*liberté, fraternité, égalité*," but "[o]ver the next several years . . . France exploded with religious conflict, civil war, and economic chaos."²⁸² Specifically, "[w]ith the executions in 1793 of Louis XVI and Marie Antoinette, France spiraled into the 'Reign of Terror.'"²⁸³ Rather than paving the way for the rights of the individual, the new French republic "sought to suppress dissent, de-Christianize the nation, and impose a rigid system of economic egalitarianism."²⁸⁴ Moreover, French revolutionaries were not satisfied with overthrowing their own regime. After taking over their own government, the revolutionaries, now led by Napoleon, took control in 1797 of modern-day Belgium, the Rhineland, and the Italian peninsula.²⁸⁵ France was now the dominant military power in Europe, and Napoleon set his ravenous sights on Britain.²⁸⁶

Many Americans rightfully imagined with horror that their nascent and frail republic was the next target of invasion by France.²⁸⁷ President John Adams thus asked Congress to set up a provisional army and to increase the size of the navy to protect against potential French

280. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 21 (2004).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. Anthony Lewis misleadingly suggests that the fears of the colonists were "paranoid." See LEWIS, *supra* note 3, at 59.

invasion.²⁸⁸ The apprehension was exacerbated when the French navy captured American seamen and, between 1796 and 1797, seized 316 ships flying American colors.²⁸⁹ Americans feared that some speakers in the United States would publicly support Napoleon or French political ideals with a zealotry that would erode confidence in the fledgling government of the United States.²⁹⁰ There was also the fear that newly-arrived immigrants from France would subversively and publicly denounce the federal government of the United States as part of a campaign to destabilize it.²⁹¹

It was in this fraught setting that the Sedition Act of 1798, the subject of Madison's Report, was passed.²⁹² The Act read, in part, as follows:

That if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, . . . or to excite against them . . . the hatred of the good people of the United States, . . . then such person . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.²⁹³

To modern eyes, the Act may appear unjust. But sedition laws were hardly new in the Anglo-American tradition. They had existed in England since 1275, and their terms were far more oppressive than the American variant.²⁹⁴ Unlike its English counterpart, the American Sedition Act required the government to show that the speaker had acted with malicious intent, and the Act permitted truth as a defense.²⁹⁵ The American Sedition Act, however, was not met with uniform approval. It was passed in Congress by a 44 to 41 vote along party lines.²⁹⁶ President Adams's Federalist Party, with its devotion to a strong central government, supported the Act, while James Madison's Republican Party, with its dedication to states' rights, opposed it.²⁹⁷

Unwilling to accept defeat, Madison composed his grievances against the Sedition Act. These grievances were collected in the Report, the document that the *Sullivan* Court mined for the Court's thesis that the framers anticipated something along the lines of the actual malice test. Unfortunately for the Court, Madison's Report was not mainly a disquisition about free speech but a pointed attack on the Sedition Act and, much more broadly, what Madison saw as

288. STONE, *supra* note 280, at 22.

289. *Id.* at 21.

290. *Id.* at 26-29.

291. *Id.* at 30-31.

292. *Id.* at 43; An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States," (Sedition Act of 1798), ch. 74, 1 Stat. 596 (1798).

293. Sedition Act of 1798, ch. 74, § 2.

294. STONE, *supra* note 280, at 42.

295. *Id.* at 44.

296. *Id.* at 43.

297. *Id.* at 25-29, 43.

overreaching by the federal government. While the *Sullivan* Court excerpted over 260 words from the Report, there was not much in the Court's excerpt of Madison which directly addressed the right of speech. However, such dearth of material about the First Amendment was not owing to lackadaisical research by the Court. Madison simply did not discuss the right of speech at length in the Report. Moreover, the parts that the *Sullivan* Court did excerpt did not necessarily support its endeavor to prop up the actual malice test.

Consider what is, by far, the longest excerpt of Madison's Report that the Court inserted into its opinion in *Sullivan*. While lengthy, the passage deserves to be quoted in its entirety given its importance in the Court's opinion:

[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.²⁹⁸

This whole passage was quoted by the *Sullivan* Court. Unfortunately, the Court failed to unpack its arguments. Such unpacking is warranted, however. In the passage, Madison explicitly connected the right to criticize public officials with the logic of self-government. He argued that the United States was a government founded on the right of the people to determine their collective political fate. They were able to exercise this right by "electing the members of the government." But to make good decisions about candidates, the people, Madison explained, had to be permitted to "examin[e] and discuss[] the[] merits and demerits of the candidates."²⁹⁹ Madison thus seemed to argue that the right of self-government would be impossible if the people were denied the right to publicly criticize their public officials.

298. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 n.15 (1964) (alternations in original) (quoting 4 ELLIOT, *supra* note 90, at 575).

299. *Id.*

While few of us today would challenge the broad outlines of Madison's thesis, the enlistment of Madison by the *Sullivan* Court to justify the creation of the actual malice test lacks support. Placed in historical context, the meaning of Madison's words was more constraining than the Court made them out to be. Notably, absolutely *nothing* in the excerpt quoted by the *Sullivan* Court suggested that Madison would have approved the right to say things that were libelous. He endorsed the much more limited right to examine the "merits and demerits" of public officials and political candidates. At most, Madison embraced the right to publicly say things that would bring public officials into "disrepute or contempt." What Madison supported, therefore, was the right to criticize public officials, not the right to libel them.

One might go so far as to say that Madison's Report was not mainly a defense of the right of speech. A better characterization is that the Report was, in essence, an objection to what Madison perceived as an ominously aggressive federal government. If Madison were truly concerned about the right of political speech, as the *Sullivan* Court suggested, one must wonder why he never spoke out against the common law offense of seditious libel that was then extant in every state—including his own, Virginia—which resembled the federal Sedition Act and was usually *more* repressive.³⁰⁰ Why did Madison reserve his criticism for the Sedition Act alone? The answer was implied in his Report. There, Madison argued that the paramount problem with the Sedition Act was not necessarily its repression of speech, but its encroachment on the rights of states. To better appreciate this aspect of the Report, it is first necessary to clarify that the Report was Madison's attempt to justify an earlier document that he authored for the Virginia Assembly: the *Virginia Resolutions Against the Alien and Sedition Acts* (Resolutions).³⁰¹ The Resolutions were written in 1798, and the Report was circulated in 1800.

If one delves into the substance of Madison's Report, one finds little mention of the right of speech and no reference whatsoever to a supposed right of libel.³⁰² One finds in their stead a sustained attempt to shore up the rights of the states against what Madison feared was

300. The historian Forrest McDonald helpfully observed that by permitting truth as a defense and requiring proof of malicious intent, the terms of the Sedition Act of 1789 "were more lenient than those of the common-law offense of seditious libel that prevailed in every state." FORREST MCDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876*, at 41 (2000). The objection raised by the Republicans in Congress "was not that it limited freedom of the press but that it made seditious libel a federal offense." *Id.* Professor McDonald added, "Jefferson's and Madison's responses to these acts, embodied in the Virginia and Kentucky Resolutions, brought the issue of states' rights back to center stage." *Id.*

301. JAMES MADISON, *Virginia Resolutions Against the Alien and Sedition Acts, December 21, 1798*, in MADISON: WRITINGS 589, 589 (Jack N. Rakove ed., 1999).

302. Anthony Lewis thus makes a misleading suggestion that "[t]he Virginia legislature approved resolutions drafted by Madison making the argument that freedom of speech and of the press were the essential guardians of a republican political system." See LEWIS, *supra* note 3, at 61.

federal encroachment. In the Resolutions, Madison wrote that the Virginia Assembly “views the powers of the federal government as resulting from the compact to which the states are parties.”³⁰³ Not only does this statement complicate the *Sullivan* Court’s endeavor to cast Madison as a champion of free speech, the statement also complicates the received picture of Madison as a champion of constitutional democracy. It was, after all, the Court that had conscripted Madison for the thesis that the right to vigorously criticize public officials, including the right to libel them, was essential for a constitutional democracy where the people themselves should collectively determine their fate.

Instead of bolstering this thesis, Madison’s words, when carefully examined, reveal themselves as subversive of it. Madison seemed to suggest in the Resolutions that the federal government was not created by the people in whose name the Constitution was formally written,³⁰⁴ but by the *states*. Later in the Resolutions, Madison affirmed that all of the powers belonging to the federal government were “granted by the said compact” of the states.³⁰⁵ Because he characterized the Constitution as a compact among the states—rather than as an agreement by the people *per se*—Madison was able to assert that the states were the supreme sovereign, and therefore were not bound by the decisions of the people acting as a national collective in Congress. Madison argued that the “states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.”³⁰⁶ Lest there be any confusion, Madison stressed in the Report that “[t]he [C]onstitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity.”³⁰⁷

Consonant language could be found in another part of Madison’s Report: “The states then being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated”³⁰⁸ Here was an early pronouncement made shortly after the birth of the republic, a pronouncement that unsettlingly anticipated the right of nullification and secession that would be invoked by Southern states as a preface

303. MADISON, *supra* note 301, at 589.

304. U.S. CONST. pmb1.

305. MADISON, *supra* note 301, at 609.

306. MADISON, *supra* note 301, at 589. The Supreme Court begged to differ with Madison. In *M’Culloch v. Maryland*, Chief Justice Marshall for the Court argued that, according to the Constitution, the people—not the states—were the highest sovereign. See *M’Culloch v. Maryland*, 17 U.S. 316, 403-04 (1819).

307. MADISON, *supra* note 301, at 611.

308. *Id.*

to the Civil War.³⁰⁹ Madison summed up in the Report that "as the parties to [the constitutional compact], [the states] must themselves decide in the last resort, such questions as may be of sufficient magnitude to require their interposition."³¹⁰ As Madison's emphasis on states' rights suggested, the Father of the Constitution penned his Report and Resolutions to shore up the rights of the states and, contrary to the interpretation by the *Sullivan* Court, much less so for the purpose of underwriting the argument that libel about political officials deserved the highest protection.

Given his adamant defense of the right of a state to disobey federal laws that the state judged to be unconstitutional, it was no wonder that Madison provoked widespread rebuke from the very generation that the *Sullivan* Court believed Madison spoke for.³¹¹ One must remember that the Sedition Act, whatever its faults, was passed in Congress by a majority.³¹² Those who voted for the Act publicly defended it as necessary to prevent the weak republic from disintegrating in the face of French military invasion.³¹³

But whether the Sedition Act was meritorious is beside the point. What matters is that it was a product of the Founding Generation, the generation that had created the republic and established its regime of constitutional democracy. Much of the Founding Generation, far from rallying around Madison's arguments as the *Sullivan* Court implied, censured them. So intolerable was Madison's Resolutions that nearly every state other than Virginia passed its own resolutions in 1799 condemning Madison's Resolutions as illegal, dangerous, or both.³¹⁴ Condemnations of Madison's Resolutions were expressed by Delaware,³¹⁵ Rhode Island,³¹⁶ Massachusetts,³¹⁷ Connecticut,³¹⁸ New York,³¹⁹ New

309. See generally WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836* (1966).

310. MADISON, *supra* note 301, at 611.

311. Consider that nearly every other state's legislature condemned Madison's Resolution. See STONE, *supra* note 280, at 45.

312. The Act was passed with forty-four for and forty-one against. See *id.* at 43.

313. *Id.* at 25-45.

314. *Id.* at 45.

315. See *Answers of the Several State Legislatures: State of Delaware*, in 4 ELLIOT, *supra* note 90, at 532.

316. See *Answers of the Several State Legislatures: State of Rhode Island and Providence Plantations*, in 4 ELLIOT, *supra* note 90, at 533.

317. See *Answers of the Several State Legislatures: Commonwealth of Massachusetts*, in 4 ELLIOT, *supra* note 90, at 533-36.

318. See *Answers of the Several State Legislatures: State of Connecticut*, in 4 ELLIOT, *supra* note 90, at 538.

319. See *Answers of the Several State Legislatures: State of New York*, in 4 ELLIOT, *supra* note 90, at 537-38.

Hampshire,³²⁰ Vermont,³²¹ Maryland,³²² and Pennsylvania.³²³ New Jersey did not pass a formal resolution, but its legislature in 1799 spoke out against Madison's Resolutions.³²⁴ There were *ten* states, then, out of thirteen, that expressed disapproval for Madison's Resolutions.³²⁵ To be sure, a substantial number of Americans supported the Resolutions. That they did hardly mitigates the irony in the *Sullivan* Court having treated Madison's as the voice of his founding generation when, in reality, Madison's was, by a formal measure, the minority view at the time it was publicly expressed. Because Madison's Report represented the minority view, the attempt by the *Sullivan* Court to conscript it as evidence from originalism for the actual malice test was flawed from the beginning.

VII. THE SUPERFLUITY OF THE ACTUAL MALICE TEST

If the arguments forwarded by this Article thus far against the actual malice test were successful, the reader might wonder what alternatives remain. This Article concludes with the suggestion that the best alternative for the actual malice test was the one that preexisted it: the common law of libel. There is reason to believe that the actual malice test was quite unnecessary in order to protect a flourishing culture of political criticism. Alabama's libel law, like any law, could be misapplied and abused by jury and judge. That it could did not mean that the law itself was defective. If Alabama's libel law had been applied correctly in *Sullivan*, the law would not have imposed any liability on the *Times*. Instead of substituting the Alabama libel law with the actual malice test, the Supreme Court in *Sullivan* could have clarified how the former, if properly applied, was much more protective of the First Amendment than one might have assumed.

320. See *Answers of the Several State Legislatures: State of New Hampshire*, in 4 ELLIOT, *supra* note 90, at 538-39.

321. See *Answers of the Several State Legislatures: State of Vermont*, in 4 ELLIOT, *supra* note 90, at 539.

322. See Report Concurred in and Resolution Adopted by the Maryland House of Delegates, Jan. 16, 1799, and by the Senate, January 19, 1799, reprinted in Frank Maloy Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions II*, 5 AM. HIST. REV. 225, 248 (1899).

323. See *Resolution Adopted by the House of Representatives of Pennsylvania, March 11, 1799*, reprinted in Anderson, *supra* note 322, at 248.

324. The New Jersey Resolution, unlike the resolutions by the other states, was not formally delivered to Congress, and therefore, a record of it does not exist. See Frank Maloy Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions I*, 5 AM. HIST. REV. 45, 52 (1899).

325. See *Answers of the Several State Legislatures*, in ELLIOT, *supra* note 90, at 532-39; Report Concurred in and Resolution Adopted by the Maryland House of Delegates, Jan. 16, 1799, and by the Senate, January 19, 1799, *supra* note 322; Resolution Adopted by the House of Representatives of Pennsylvania, March 11, 1799, *supra* note 323; Anderson, *supra* note 324.

With due humility, the Supreme Court could have simply eschewed the ostentatious originality of the actual malice test and performed the less showy but more usefully stolid work of fleshing out the existing doctrine of common law libel with greater acuity. To that end, the Supreme Court could have rejected the conclusion by the Alabama Supreme Court that Sullivan had proven the elements of libel under the common law. Sullivan, after all, was never named in *Heed Their Rising Voices*. Thus, a fair argument could have been made that he had failed to prove that his reputation had been libeled. Yes, the publication alleged misconduct by groups of police officers, but there was no clear indication that the misconduct was done at Sullivan's urging. The police officers who were charged with misconduct in *Heed Their Rising Voices* could have been acting entirely of their own volition as their passions and prejudices got the best of them, or the officers could have been following the orders of an unnamed commanding officer at the scene, not those of Commissioner Sullivan. The Alabama Supreme Court uncritically accepted the jury's conclusion that it was Sullivan who was being singled out by *Heed Their Rising Voices*, and, frustratingly, the U.S. Supreme Court did not overturn the Alabama Supreme Court for having done so.³²⁶

The arguments of Professor Herbert Wechsler of Columbia, the lawyer for the *Times* on appeal to the U.S. Supreme Court, are useful on this score.³²⁷ During oral argument, Wechsler cast doubt on the view that a sensible jury would have identified Sullivan as the guilty party in *Heed Their Rising Voices*.³²⁸ Wechsler said, "Because the record shows there were 175 policemen, that there was a police chief in addition to the Commissioner, and there is not the slightest bit of a suggestion here, in my submission, that what the police did they were ordered to do by Commissioner Sullivan."³²⁹ Stunningly, the Supreme Court *itself* acknowledged the same, and yet failed to overturn the decision of the Alabama Supreme Court.³³⁰ The Supreme Court in *Sullivan* wrote, "We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent."³³¹

Even if Sullivan could have shown that it was him who was being blamed by *Heed Their Rising Voices*, he could not possibly have been

326. What makes this situation all the more baffling is that the U.S. Supreme Court declared that Sullivan had not been singled out by *Heed Their Rising Voices*, but it refused, nonetheless, to overturn the Alabama Supreme Court on that basis. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 258 (1964).

327. LEWIS, *supra* note 3, at 133.

328. *Id.*

329. *Id.*

330. *Sullivan*, 376 U.S. at 288.

331. *Id.*

able to prove any actual injury, let alone in the amount of \$500,000, and, therefore, his libel case should have been dismissed without resort to the actual malice test. Indeed, Sullivan himself “made *no effort* to prove that he suffered actual pecuniary loss as a result of the alleged libel.”³³² Stunningly, none of the people whom Sullivan called to testify said they believed any of the allegations made against him.³³³ There was another detail that informed the issue of damages in *Sullivan*. By 1964, when the Court had decided *Sullivan*, the topic of racial segregation in the South, particularly Alabama, had been covered extensively by the media.³³⁴ Rare was the American who would have been caught unaware by the proposition that the police in Montgomery had been savagely harassing Black civil rights workers.³³⁵

One of the most iconic events in the history of the civil rights movement had occurred in Montgomery. In 1955, five years before publication of *Heed Their Rising Voices*, a Black seamstress named Rosa Parks had boarded a public bus after work to return home.³³⁶ It was an otherwise mundane act that would prove fateful in the civil rights movement. Parks sat near the front because she was tired and did not wish to walk to the back of the bus.³³⁷ The white bus driver ordered her to leave her seat for white passengers and to go sit in the back.³³⁸ When Parks refused, the driver called the police.³³⁹ The police arrested her for violating Montgomery’s laws which required racial segregation.³⁴⁰ Her arrest galvanized the Montgomery Bus Boycotts.³⁴¹ Leading the boycotts was a twenty-seven-year-old Baptist pastor named Martin Luther King.³⁴²

Two years after the boycott began, Congress passed the 1957 Civil Rights Act, which created the Civil Rights Commission and empowered the Department of Justice to bring suits against Southern states for violating the voting rights of Black people.³⁴³ Black “Freedom Riders” took buses to Alabama to protest racial segregation in bus terminals.³⁴⁴ Afraid that the riders would be pummeled by racists, President John F. Kennedy dispatched federal marshals to protect them.³⁴⁵ Two

332. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 260 (1964) (emphasis added).

333. *Id.*

334. LEWIS, *supra* note 3, at 20.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 20-21.

344. *Id.* at 21.

345. *Id.*

weeks after publication of *Heed Their Rising Voices*, the *New York Times* published *Fear and Hatred Grip Birmingham*.³⁴⁶ The article read, in part, as follows:

No New Yorker can readily measure the climate of Birmingham today. Whites and blacks still walk the same streets. But the streets, the water supply and the sewer system are about the only public facilities they share. . . . Every channel of communication, every medium of mutual interest, every reasoned approach, every inch of middle ground has been fragmented by the emotional dynamite of racism, reinforced by the whip, the razor, the gun, the bomb, the torch, the club, the knife, the mob, the police and many branches of the state's apparatus.³⁴⁷

The journalist Anthony Lewis made this related observation:

When *Brown v. Board of Education* was decided in 1954, most of the country still had a romantic image of the South: *Gone With the Wind*, not sheriffs with attack dogs. But the major newspapers and magazines now devoted increasing resources and space to reporting the reality of white supremacy.³⁴⁸

Such was how the Northerners and the world at large saw the racism in Alabama.³⁴⁹

The average American in 1964 would therefore have been unsurprised to read this quote from *Heed Their Rising Voices*: “As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.”³⁵⁰ That “the whole world knows by now” about the racism in Alabama was made dramatically obvious by the Swedish Nobel Committee.³⁵¹ In the same year that the Court adjudicated *Sullivan*, the Committee awarded the Nobel Peace Prize to Martin Luther King for his nonviolent means to end racial segregation in the South, especially Alabama.³⁵² The international stature of the Nobel Prize forcefully undermined Sullivan's fatuous argument that his reputation had been injured by the allegations in *Heed Their Rising Voices*. Everyone in Montgomery—everyone in the whole world, for that matter—already knew about the police abuse against Black civil rights workers in the South. And rather than lamenting such

346. *Id.*

347. Harrison E. Salisbury, *Fear and Hatred Grip Birmingham*, N.Y. TIMES, Apr. 12, 1960, at 1.

348. LEWIS, *supra* note 3, at 36-37.

349. *See id.* at 39.

350. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (quoting *Heed Their Rising Voices*, *supra* note 18).

351. Tellingly, this information is culled from the Encyclopedia of Alabama. *See* S. Jonathan Bass, *Martin Luther King Jr.*, <http://encyclopediaofalabama.org/article/h-1426> [<https://perma.cc/4SDR-9SCA>] (last updated Mar. 30, 2023).

352. *See id.*

abuse, many whites in Montgomery unabashedly cheered it. It was exceedingly unlikely, therefore, that anyone on the all-white jury box in the *Sullivan* case would have thought any less of Commissioner Sullivan's reputation even if they had believed everything that was said about him in *Heed Their Rising Voices*.

Other factors also suggested that Sullivan's reputation remained intact after publication of *Heed Their Rising Voices*. The trial judge in Sullivan's case was Walter Burgwyn Jones, an unapologetic white supremacist.³⁵³ He presented his racist beliefs for public admiration in his book *The Confederate Creed*.³⁵⁴ One excerpt read:

With unfaltering trust in the God of my fathers, I believe, as a Confederate, in obedience to Him; that it is my duty to respect the laws and ancient ways of my people, and to stand up for the right of my State to determine what is good for its people in all local affairs.³⁵⁵

No guarded racist, this. In Judge Jones's imagination, white supremacy was a lofty amalgam of the divine and the worldly. It was a moral sanction from God that could permit actions that were not permitted by man, and it was also a precious paternity from one's forefathers that had to be courageously protected.

For Judge Jones, white supremacy was more than a philosophical creed. It was the ethos that organized his professional conduct. From 1960 to 1962, Judge Jones issued orders to hobble the civil rights movement.³⁵⁶ The judge who would preside over *New York Times v. Sullivan* in 1960 "forbade the National Association for the Advancement of Colored People to do business in Alabama, barred demonstrations by Freedom Riders against segregation on buses and blocked the U.S. Department of Justice from examining voter-registration records in any county in Alabama."³⁵⁷ During the trial for *New York Times v. Sullivan*, Judge Jones refused to correct the stenographer when she referred to the white lawyers with the honorific "Mr.," as in "Mr. Nachman," while the Black lawyers for the defense were called "lawyer," as in "Lawyer Gray."³⁵⁸ In a separate trial in which the mayor sued the *Times* for libeling him in *Heed Their Rising Voices*, Judge Jones reassured the public his court was governed by "white man's justice, a justice born long centuries ago in England, brought over to

353. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 731 (1986).

354. *Id.*

355. *Id.* (quoting Anthony Lewis, *Annals of Law: The Sullivan Case*, NEW YORKER, Nov. 5, 1984, at 53).

356. LEWIS, *supra* note 3, at 26.

357. *Id.*

358. *Id.* at 27.

this country by the Anglo-Saxon race.”³⁵⁹ As evinced by these public pronouncements, Judge Jones was confident that his fidelity to white supremacy would not undermine his popularity among his fellow white Alabamans; if anything, such professions would bolster his popularity.

The example of Judge Jones suggests that the city of Montgomery, back in 1960, was a place in which white supremacy was celebrated with unalloyed pride. Therefore, it was highly unlikely that a white resident of Montgomery would have thought any less of Sullivan had that resident believed everything that was stated in *Heed Their Rising Voices*. On the other hand, imagine the moral uproar that Sullivan would have provoked had Black civil rights activists claimed that he was *their* ally and had gone out of his way to ensure that they would be permitted to protest racial segregation in the South.

The degree to which Sullivan, and, by extension, Judge Jones, had the support of white Alabamans was made lucid by the fact that the *Times* had trouble finding a local attorney to represent it at the trial.³⁶⁰ The degree of support for Sullivan was also exhibited by the fact that the New York counsel for the *Times* had to register fearfully under an assumed name when he traveled to Alabama for the trial.³⁶¹ Such facts chafe against the Court’s argument that the actual malice test was necessary in order to protect speech that was “vehement, caustic, and . . . unpleasantly sharp.”³⁶² By 1964, the unlawful harassment being perpetuated by Alabama’s officials against King and his supporters was well known and probably no one would have thought assertions to that effect were “caustic, and . . . unpleasantly sharp.”³⁶³

One final thing should be said about Sullivan’s inability to prove that allegations about him being a racist would have hurt his reputation in the eyes of the white jury in Montgomery.³⁶⁴ Concurring in

359. *See id.* at 26. More egregiously, one of Sullivan’s lawyers, Robert E. Steiner III, made this statement in Judge Jones’s court, without any fear of giving offense: “In other words, all of these things that happened did not happen in Russia where the police run everything, they did not happen in the Congo where they still eat them, they happened in Montgomery, Alabama, a law-abiding community.” *Id.* at 123.

360. *See id.* at 24.

361. *See id.*

362. *See supra* note 153 and accompanying text.

363. Professor Harry Kalven’s words from 1964 are apt: “The irony in the *Times* case is that the statements of police brutality and harassment would offend those with the ‘right’ values. What is doubtful is that such allegations did, in fact, offend an Alabama audience, in light of the current exacerbations of the civil rights controversy.” Kalven, *supra* note 42, at 197.

364. Anthony Lewis recounted these details about the jury:

Of a panel of thirty-six potential jurors, two were black. Sullivan’s lawyers struck them from the list, and a jury of twelve white men was chosen. *The Alabama Journal*

Sullivan, Justice Black brought to the fore the history of white supremacy that pervaded Montgomery. As a native Alabaman and a Klansman in his youth,³⁶⁵ Justice Black could issue the following words with authority and knowledge:

Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called “outside agitators,” a term which can be made to fit papers like the *Times*, which is published in New York.³⁶⁶

Justice Black added that “[t]he scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages.”³⁶⁷

The fact that Sullivan had not, as Justice Black noted, “suffered any actual damages at all” afforded the Court, and, for that matter, Justice Black himself, an opportunity to dismiss the case as having failed to satisfy a basic element of libel. There was more than ample opportunity for the Court to so dismiss. At trial, Judge Jones had instructed the jury to find that *Heed Their Rising Voices* was “libelous per se.”³⁶⁸ In other words, he had instructed the jury to find that Sullivan had in fact been injured.³⁶⁹ The only way that the *Times* could have refuted this presumption was by showing that its publication was true in all material respects.³⁷⁰ As discussed, however, the white citizens of Montgomery, steeped as they were in a culture of white supremacy, were unlikely to have found that Sullivan’s reputation had been injured by the *Times*. Other suspect happenings had occurred at trial which merited review by the Supreme Court. Judge Jones, on his own initiative, had removed the issue of falsity from the jury’s deliberations.³⁷¹ Had the Supreme Court decided *Sullivan* on the basis of Sullivan’s failure to show injury, the Court could have underscored what did and did not count as an injury in libel law. Because Sullivan failed to tender any proof of injury, the Supreme Court could have overturned the Alabama

published their names and a front-page picture of the twelve in the jury box—a step that *Times* lawyers protested would put the jurors under local pressure to decide in favor of Sullivan. Judge Jones rejected the complaint.

LEWIS, *supra* note 3, at 27.

365. Erin Berhan, *Revenge Taken: Russian Active Measures and Our Entrenched Racial Divide*, 12 U. MIAMI RACE & SOC. JUST. L. REV. 63, 101 (2021).

366. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 294 (1964) (Black, J., concurring).

367. *Id.*

368. LEWIS, *supra* note 3, at 32.

369. *Id.*

370. *Id.*

371. *Id.* Perhaps in part facilitated by Judge Jones’s narrow instructions, the jury took two hours and twenty minutes to return a verdict for Sullivan. *See id.* at 33.

Supreme Court's award of damages. Had it done so, the Supreme Court could have reaffirmed how the traditional common law of libel was not antithetical to the First Amendment and could coexist with it.

Even if Sullivan had proven injury, there was no reason to resort to the radical remedy that was the actual malice test. The Supreme Court could have, for example, overturned his damage award by concluding that the *Times* had not acted negligently in publishing the advertisement. According to the Alabama Supreme Court, Sullivan had proven that the *Times* had engaged in libel in publishing the advertisement.³⁷² Disappointingly, the U.S. Supreme Court, without explanation, did not bother to address whether the conclusion by the Alabama Supreme Court was correct. The U.S. Supreme Court could have fleshed out the negligence standard for libel as something that was more difficult to satisfy than suggested by the Alabama Supreme Court. The U.S. Supreme Court could have ruled that the *Times* had not acted negligently if it had, say, consulted at least ten bystanders who had corroborated the factual assertions in *Heed Their Rising Voices*. Or assume that the *Times* could have shown at trial that the details in the advertisement were confirmed by a reliable confidential source inside the Montgomery police department. The Supreme Court could have ruled that such corroboration showed that the *Times* had not acted negligently in publishing *Heed Their Rising Voices*. These hypotheticals aside, the Court could have still ruled on a pivotal question about negligence. The *Times* had claimed that *Heed Their Rising Voices* had passed inspection by the advertising acceptability department because the publication had been signed "by a number of people who were well known and whose motives [the *Times*] had no reason to question."³⁷³ Whether or not such in-house approval by the *Times* amounted to negligence was an issue that the Court could have taken up and settled. Had the Court found that the approval was not negligent, the Court could have avoided having to invent the actual malice test.

At this point, the skeptical reader might object: "But what if Sullivan, against all odds, proved the elements of libel to the satisfaction of the U.S. Supreme Court? Would not such a result have bankrupted the venerable *Times* and have imperiled the First Amendment?" In the unlikely event that Sullivan could have proven libel to the satisfaction of the Supreme Court, the Supreme Court could have adopted measures other than the actual malice test in order to protect the First Amendment rights of the *Times*. The Court could have simply substituted the awarding of damages with the requirement for an apology and a retraction by the *Times*, or, if damages were deserved, the damages could have been, depending on the nature of the injury, diminished if accompanied by an apology and retraction by the *Times*. The

372. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 37 (Ala. 1962).

373. LEWIS, *supra* note 3, at 31.

resort to an apology and retraction, in lieu of money damages, could have helped to quell the chilling effects on speech by mitigating or removing the prospect of high damage awards. There is an additional benefit with an apology and retraction that is unavailable with the awarding of damages. An apology and retraction regarding a public official could have contributed to the Court's own professed desire in *Sullivan* to facilitate the discovery of political truth that would have paid homage to the philosophers Milton and Mill. An apology and retraction by the *Times* could have informed the public that some important aspects of the published advertisement were untrue. No one was likely to have believed that the Montgomery police department was a friend to Black civil rights activists in the 1960s, but an apology and retraction could have explained that the advertisement in the *Times* went too far with regard to certain assertions.

The proposal for an apology and retraction may raise concerns about whether it would run afoul of the principle of separation of powers, specifically federalism. Under the concept of federalism, the states and the federal government share dual sovereignty; in theory, one does not dominate the other.³⁷⁴ Traditionally, tort law has been the province of the states, not the federal government.³⁷⁵ An objection might be lobbed, therefore, that the Supreme Court should not meddle in how the states define the tort of libel. This objection, however, would stand on an implausible assumption. For the objection assumes that the states may define libel however they please, including in ways that clearly violate the First Amendment. But in 1925, the Supreme Court ruled that the First Amendment should be applied to the states through the Fourteenth Amendment.³⁷⁶ Accordingly, to permit the states to define libel law however they please would not amount to honoring the principles of federalism. Such unfettered license would entail violating said principles in at least two respects. First, the states, instead of sequestering themselves to their own field of sovereignty, would enjoy the right to violate the First Amendment, and hence, the Constitution. Second, the states would in effect be empowered to ignore the Supreme Court and to act as the authoritative interpreter of what the First Amendment means. Therefore, to give states the exclusive right to define libel would fail to recognize the dual sovereignty between the states and the federal government as federalism would have the Court do; it would be tantamount to collapsing the distinction in favor of the states. A plausible argument can be made, indeed, that it was the Supreme Court's invention of the actual malice

374. The Tenth Amendment affirms one iteration of this relationship: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States . . ." U.S. CONST. amend. X.

375. See Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501 (2009).

376. *Gitlow v. New York*, 268 U.S. 652, 664-67 (1925).

test—a test that was ostensibly created in part to avoid infringing on state sovereignty—which undermined the rights of the states. After all, the test formally forbade the states from regulating libel for public officials in relation to matters of public concern.

Those who fear that the Supreme Court's efforts to interpret state law would run afoul of federalism would also do well to remember that *New York Times v. Sullivan* was not the first instance in which the Supreme Court would have overturned a state court's factual findings in the interest of protecting the First Amendment. In *Fiske v. Kansas*, a case from 1927, the Supreme Court did precisely that.³⁷⁷ In *Fiske*, Harold Fiske was convicted of having violated the Kansas Criminal Syndicalism Act.³⁷⁸ The Act prohibited "criminal syndicalism," which entailed advocating "crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit."³⁷⁹ At trial, Fiske was found to have engaged in criminal syndicalism, and the Kansas Supreme Court affirmed.³⁸⁰ Fiske was a member of the Industrial Workers of the World (the "Wobblies," as they were nicknamed), a labor union, and he claimed that he had no intention of engaging in criminal syndicalism as defined by Kansas.³⁸¹ He explained that the Wobblies "did not teach or suggest that [they] would obtain industrial control in any criminal way or unlawful manner, but in a peaceful manner; that he did not believe in criminal syndicalism or sabotage."³⁸² In spite of his insistence, the jury found that Fiske had indeed violated the Kansas statute.³⁸³ The Kansas Supreme Court affirmed the jury's verdict.³⁸⁴

The U.S. Supreme Court overturned the verdict.³⁸⁵ The Supreme Court explained that "this Court will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it."³⁸⁶ According to the Supreme Court, there "was nothing which warranted the court or jury" concluding that Fiske had violated the Kansas Criminal Syndicalism Act.³⁸⁷ The Court added that, while the Act was constitutional, its application in *Fiske* was "an arbitrary and

377. *Fiske v. Kansas*, 274 U.S. 380 (1927).

378. *Id.* at 381.

379. *Id.* at 382.

380. *Id.* at 384.

381. *Id.* at 383.

382. *Id.*

383. *Fiske v. Kansas*, 274 U.S. 380, 385 (1927).

384. *Id.*

385. *Id.* at 387.

386. *Id.* at 386.

387. *Id.*

unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment.”³⁸⁸ With these words, the *Fiske* Court created precedent for the *Sullivan* Court to review the factual findings of a jury in a state court case.

CONCLUSION

As expressed by the *Sullivan* Court, the aims of the actual malice test were noble. The test was meant to mitigate the harmful effects of self-censorship and to advance the claims of self-government and the search for truth. However, the test, as this Article has suggested, was severely flawed on different fronts. The test was logically incoherent, and, regardless, it failed to fulfill its own promise to help the audience to discover the truth. If anything, the actual malice test has empowered speakers to spread misinformation while violating the norms of civility and a community’s aspiration to protect the dignity of its members. Because of these and other problems, this Article has proposed an alternative means for the Court to respond to libel in relation to the First Amendment.

388. *Id.* at 387.

