Missouri Law Review

Volume 88 | Issue 3 Article 5

Summer 2023

Untangling Defamation Law: Guideposts for Reform

Lyrissa Lidsky

Untangling Defamation Law: Guideposts for Reform

Keynote Address by Professor Lyrissa Lidsky, Raymond and Miriam Ehrlich Chair in U.S. Constitutional Law.[*]

ABSTRACT

This article, which is based on a keynote address given at the 2023 Missouri Law Review Symposium, addresses the past and predicted future of defamation law in hopes of galvanizing needed reforms. As a necessary backdrop, this article explains why today's defamation law remains so complex, tracks reforms over the last half-century, and explains why the common law of defamation has not adapted adequately to the challenges posed by cheap speech in the digital era. The article then turns to assessing the complaints of defamation law's most prominent would-be reformers and finds them to rest on an incomplete understanding of how defamation law's complex pieces contribute to the whole. Finally, after identifying some important barriers to defamation law reform, the article provides guideposts for the reform process.

[*]This piece is adapted from Professor Lidsky's Keynote Address at the Missouri Law Review Symposium on March 10, 2023. Some of the ideas here are also developed in her article, Lyrissa Lidsky, *Cheap Speech and the Gordian Knot of Defamation Reform*, 3 J. FREE SP. L. 79 (2023). A video and audio of the address is available at: https://www.facebook.com/UniversityofMissouriLaw/videos/504235011925954/ (last visited Aug. 3, 2023).

TABLE OF CONTENTS

I. INTRODUCTION

When Alexander the Great marched into the city of Gordium[1], he entered the temple of Jupiter. There, he found an old wagon tied with a knot or "yoke, which was made fast by a great number of thongs, closely tangled with one another and concealing their interfacings."[2] Legend had it that the person who untangled the knot would become the ruler of Asia. Alexander struggled with the complex knot for a time, becoming more and more frustrated. He finally withdrew his sword and sliced through the knot with a single stroke.

The Gordian Knot was a complex puzzle composed of many interweaving strands. Alexander simplified the problem of untangling it by cutting through to its heart. Defamation law today is like the Gordian Knot, composed of complex strands of tort law, statutory law, constitutional law, and, in some cases, even criminal law. The challenge for defamation reformers is: how do we untangle the Gordian Knot? Unfortunately, the answer for defamation law reform is not so simple as cutting through the complexity with a simple stroke of our pens. Instead, our only option is to unravel the problem thread by thread.

The Restatement (Third) of Defamation offers a once-in-a-generation opportunity to do just that. Think, for a moment, about the Restatement (Second) of Torts. The Restatement (Second) was drafted by legendary scholars, William Prosser and John Wade. For me, Prosser is the closest thing to an oracle of tort law that exists: when I started teaching, I used to sleep with his Torts hornbook by my bedside, and I had whole sections of it embedded in my memory. Nonetheless, the last ink on Prosser and Wade's draft of the defamation provisions of the Restatement was dry in 1977. A lot has changed since 1977, and even the legendary Prosser and Wade could not have foreseen these changes.

In 1977, the seeds of a communications revolution were just beginning to sprout: Microsoft was two years old, and Apple was just one year old. Since then, the communications environment has undergone radical change. The so-called "cheap speech revolution" has enabled each of us to carry massive computing power in our back pockets. Via social media, we can access a global, mass audience at any time with our most profound or most trivial observations. These developments have had dramatic effects on defamation's "repeat players" within the news industry. In 1977, the news media was highly profitable and highly

[1] Gordium was an ancient Anatolian city in what is now Turkey.

[2] QUINTUS CURTIUS RUFUS, THE HISTORY OF ALEXANDER, III 69 (J.C. Rolfe, trans., 1946).

trusted. This is not true today.[3] Cheap speech has changed the competitive environment dramatically. The advertising revenue model that underpinned traditional news outlets collapsed as classified advertising shifted to online outlets and tech platforms profited from news content without sharing the advertising revenue it generated. Subscription revenue could not make up the deficit, especially in an online world that conditioned consumers to believe that content should be free. One might assert that the cheap speech revolution decimated newsrooms, but the word "decimated" technically means that only 10% is gone. A far higher percentage of talent and expertise has been drained from newsrooms:[4] in fact, a quarter of the newspapers in the United States disappeared between 2004 and 2019.[5] In light of these revolutionary changes, one would expect that the decades since 1977 would have seen a high number of common law reforms to defamation law, but that is not what happened.

Below, this article addresses the reasons today's defamation law remains so complex, explains why the common law has played only a minor role in reforms of defamation law since 1977, evaluates some of the complaints of defamation law's critics, and identifies barriers to and provides guideposts for reform.

My thoughts on these issues have been shaped, and are being reshaped, by my work as a co-reporter on the new Restatement of Defamation. Being asked to work on this Restatement is probably the highest honor of my career, and it has been exciting to survey the common law landscape of defamation at this pivotal point. My co-reporter Robert Post and I, our Board of Advisors, and ultimately the membership of the American Law Institute must anticipate issues emerging from

---

[3] Jeffrey Gottfried, *Republicans Less Likely to Trust Their Main News Source If They See It as "Mainstream"; Democrats More Likely*, PEW RSCH. CTR. (July 1, 2021), https://www.pewresearch.org/short-reads/2021/07/01/republicans-less-likely-to-trust-their-main-news-source-if-they-see-it-as-mainstream-democrats-more-likely/ [https://perma.cc/G3LRCRRA] ("About two-in-ten adults (18%) express a great deal of trust in the accuracy of the political news they get from national news organizations (though a majority – 64% – have at least *some* trust).").

[4] Liz Smith, *Wayne Barrett, Donald Trump, and the Death of the American Press*, TABLET (Feb. 22, 2017), https://www.tabletmag.com/sections/news/articles/trump-american-press [https://perma.cc/GWH9-PF9B] (observing that, as a result of the responses of the traditional press to the economic challenge of the Internet, including giving away free content, "[e]ntire papers went under, and even at places that survived, the costliest enterprises, like foreign bureaus and investigative teams, were cut. An entire generation's worth of expertise, experience, and journalistic ethics evaporated into thin air").

[5] Gregory P. Magarian, *The Revealing Case of a Kansas Judge and a Search Warrant*, N.Y. TIMES (Aug. 20, 2023), https://www.nytimes.com/2023/08/20/opinion/kansas-press-freedom.html [https://perma.cc/PZ4L-2HAZ].

revolutionary communications technologies, changing business practices in the media industry, and changing practices and norms concerning reputation and the boundaries of public discourse. As we draft the Restatement, I am very cognizant that the finished product needs to provide a definitive restatement of the common law that does not sound completely obsolete 50 years from now. The Restatement (Second) still speaks of the law of telegraphs. I hope I can discern which of today's technologies will look like telegraphs tomorrow.

II. WHY IS DEFAMATION LAW SO COMPLEX?

The American Law Institute ("ALI") specifies that the purpose of a Restatement is to provide "clear formulations of common law and its statutory elements [or variations], and reflect the law as it presently stands or might appropriately be stated by a court."[6] The ALI also specifies that the Restatement's role is to "to simplify unnecessary complexities" as well as to "promote [] changes which will tend better to adapt the laws to the needs of life."[7] Simplifying unnecessary complexity requires understanding how defamation law came to be as complex as it is today.

Defamation law comes by its complexity honestly. As one scholar wrote in 1903, it is a "mass that has grown by aggregation" over its long history, developing "meaningless and grotesque anomalies" in the process.[8] Some complexities were grafted into defamation law before it ever left British soil to make its way into the common law of the United States. At least since the Thirteenth Century, defamation, in the form of slander, was punishable by ecclesiastical courts as a sin.[9] Secular courts in the Middle Ages got in on the act, too, granting an action for money damages in those cases deemed most likely to cause temporal rather than spiritual harm.[10] And then, as if the law were not already complex enough, defamation concerning the monarch or peers of the realm became a crime punishable in the Court of Star Chamber. By the Seventeenth Century, when common-law courts consolidated jurisdiction over defamation, each of these historical events had marked the law with arcane doctrines that remain to this day, [11] such as the damages rules applicable to slander

[6] *How the Institute Works*, AM. L. INST. (2023), https://www.ali.org/about-ali/how-institute-works/ [https://perma.cc/LJK5-AK8F] (last visited Aug. 4, 2023).

[7] *About ALI*, AM. L. INST. (2023), https://www.ali.org/about-ali/ [https://perma.cc/7877-C33F] (last visited Aug. 4, 2023).

[8] Van Vechten Veeder, *The History and Theory of the Law of Defamation. I*, 3 COLUM. L. REV. 546, 546 (1903).

[9] LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 72 (2007).

[10] *Id.* at 69.

[11] *See* Colin R. Lovell, *The "Reception" of Defamation By the Common Law*, 15 VAND. L. REV. 1051 (1962) (outlining historical background of libel and slander and explaining reasons for division of defamation into two actions).

versus slander per se, or the difference in treatment of printed defamation versus spoken defamation.[12]

For hundreds of years, learned commentators on both sides of the Atlantic have lamented the complexity, and often the illogic, of the common law of defamation. Yet in the United States, the most significant modern reform of the common law magnified that complexity. Beginning

[12] The distinction between libel (written defamation) and slander (spoken defamation) is a primary example of the lingering influence of history on defamation law. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 7 (2003). In early libel cases, proof of damages was not required and truth was not a defense; this rule appears to have originated with the punishment of libels against high public officials as crimes in the Court of Star Chamber. *Id.* (noting that "the Star Chamber ruled in 1606 that truth or falsity was not material, because a true statement that damages the reputation of the government or an official is the more dangerous to the public peace"). "Presumed damages" remain a part of libel law today, but presumed damages are only available in certain categories of slander cases—those denoted "slander per se." Plaintiffs suing for slanders that do not fall into the category of slander per se must prove concrete, out-of-pocket losses. This special treatment of a subcategory of slander cases appears to stem from a jurisdictional battle between ecclesiastical and secular courts in the Middle Ages. Secular courts originally limited their jurisdiction to those cases in which plaintiffs alleged "temporal" (that is, monetary) harm; the "slander per se" category described those cases treated as almost certain to cause temporal harm. The remaining cases, those that appeared to involve merely spiritual offenses, remained under the jurisdiction of the ecclesiastical courts. PAUL MITCHELL, THE MAKING OF THE MODERN LAW OF DEFAMATION 4 (2005).

In 1812, Chief Justice Mansfield decried the absurdity of the law's more punitive treatment of libel versus slander: if "the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken." Thorley v. Lord Kerry, 128 Eng. Rep. 367, 371 (1812). In 1843 a prestigious reform commission chaired by Lord Campbell "asserted that the distinction between libel and slander did not have any solid foundation and recommended that 'wherever an injury is done to character by defamation there ought to be redress by action.'" MITCHELL, *supra* note 12, at 10 (quoting *Report from the Select Committee on the Law of Defamation and Libel*, 1 LAW TIMES 341, 341 (1843)). Frederick Pollock's 1894 treatise decried the dichotomy as one of defamation law's "minute and barren distinctions." FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 288–89 (1894). U.S. courts, similarly, have referred to the libel-slander distinction as "technical" and "hairsplitting" and indicated that law "clings to" it only "[f]rom habit." Grein v. La Poma, 340 P.2d 766, 767–68 (Wash. 1959) (en banc) (noting that "[f]or well over a century, legal scholars have ridiculed the common law distinction between written and spoken defamation," calling "the hodgepodge of the law of slander . . . the result of historical accident for which no reason can be ascribed," and concluding that "[t]here ought not to be any distinction between oral and written defamation"). Other courts have called the distinction "silly," an "anachronism," an "historical accident . . . not sensibly defensible today" even while retaining it. *See* Holtzscheiter v. Thomson Newspapers, Inc., 506 S.E.2d 497, 512 (S.C. 1998) ("silly"); Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 308 (Mo. 1993) (en banc) (an "anachronism"); Matherson v. Marchello, 473 N.Y.S.2d 998, 1001 (N.Y. App. Div. 1984) ("historical accident").

in 1964, the United Supreme Court fundamentally reshaped the tort by interpreting the First Amendment to provide special protections against liability in cases involving public officials, public figures, and matters of public concern.

III. REFORMS SINCE THE SECOND RESTATEMENT

The cornerstone of constitutional reform was the Supreme Court's decision in *New York Times v. Sullivan*.[13] There, the Court held that public officials could not recover for defamation absent proof, by clear and convincing evidence, that the person who defamed them had knowingly or recklessly disregarded the falsity of the defamatory communication.[14] The Court portrayed the limits it set in *Sullivan* as a necessary measure to prevent state tort law from chilling uninhibited, robust, and wide-open commentary about government officials acting in their official capacity, and rightly so. The *Sullivan* case itself involved an Alabama police commissioner weaponizing defamation law to deter reporting on the Civil Rights Movement.[15] The Supreme Court correctly saw the fate of the Civil Rights Movement as hanging in the balance of its decision, which partly explains why it engaged in "independent review" in concluding there was insufficient evidence of the newly recognized constitutional element of actual malice rather than sending the case back down to Alabama judges and juries.[16]

Sullivan revolutionized defamation law, but it was just the beginning of a roughly 30-year period in which the Supreme Court systematically constitutionalized almost every aspect of the tort. Most famously, the Court expanded the actual malice standard beyond public officials to encompass people whom we would today call influencers, but were then called public figures.[17] Not content with this intervention, the Court also

---

[13] 376 U.S. 254 (1964).

[14] *Id.* at 280.

[15] *See Sullivan*, 376 U.S. at 277–78 (noting that state libel actions could bring newspapers such large judgments that "those who would give voice to public criticism" would be effectively silenced). *Sullivan* also involved several non-media defendants in addition to The New York Times, and the logic of the decision applied equally to them all. *See id.* at 279–80.

[16] *Sullivan*, 376 U.S. at 265. For discussion of the relation of the case to the Civil Rights Movement, *see generally* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 14 (1991); SAMANTHA BARBAS, ACTUAL MALICE: CIVIL RIGHTS AND FREEDOM OF THE PRESS IN *NEW YORK TIMES V. SULLIVAN* (2023).

[17] Public figures who sue for defamation must, like public officials, prove actual malice and falsity. Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (extending actual malice rule to public figures). *See* Steve Zansberg, *How Best to Explain "Actual*

created distinct standards for cases involving matters of public concern.[18] By the early 1990s, the Supreme Court had modified, at least in some types of defamation cases, the elements of fault, falsity, damages, and identification, and had made clear that defamatory statements cannot be actionable unless they imply assertions of fact.[19] Since that time, however, there has been almost no movement on the constitutional front, other than adaptation and occasionally broadening of the scope of the constitutional protections in the lower federal courts. For a couple of decades afterward, defamation law seemed like a lazy backwater of law, at least from the perspective of media law attorneys, whose clients mostly reported on public figures and public officials and, at the time, arguably took enough pains to get the facts right that they could rest easy under the mantle of the actual malice standard. The Supreme Court's seeming disinterest in defamation cases made it appear as though the balance between reputation and free expression was relatively fixed, and, understandably, common law courts seemed reluctant to tinker even with those aspects with which they could.

Indeed, the most important reforms to defamation law from the early 1990s until today have been statutory. One of the most important of these reforms has been the passage of legislation designed to prevent powerful actors from weaponizing defamation actions to silence ordinary citizens. These statutes, known as anti-SLAPP statutes, were the brainchild of professors George Pring and Penelope Canan.[20] They documented the rise of a type of defamation lawsuit they labelled SLAPP ("Strategic Lawsuits Against Public Participation"). Pring and Canan used the term SLAPP to refer to meritless defamation suits brought by powerful local actors, such as real estate magnates, to stifle the civic participation of ordinary citizens in forums such as zoning board meetings. Pring and Canan's work showed

---

Malice" to Juries? For Starters, Don't Use Those Words, ABA (June 9, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-summer/how-best-explain-actual-malice-juries-starters-dont-use-those-words/?utm_source=sfmc&utm_medium=email&utm_campaign=MK20CNTT&utm_term=MKCONTENT1&utm_id=702126&sfmc_id=46314526 [https://perma.cc/3FBZ-TQWN].

[18] *Compare* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (discussing constitutional standards applicable to cases involving private figures and matters of public concern), *with* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (discussing constitutional standards applicable (or inapplicable) to cases involving private figures and matters of private concern).

[19] With regard to the requirement that defamatory statements must imply assertions of fact in order to be actionable, *see* Milkovich v. Lorain J. Co., 497 U.S. 1 (1990).

[20] Their 1996 book documents their work on this topic going back to the 1980s. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 3 (1996).

how strategic defamation suits may violate both First Amendment rights to free expression and the right to petition governments for redress of grievances. What Pring and Canan recognized is that the rich and powerful can easily sue for defamation any time they attract public criticism. That does not mean that it is easy for them to win, but sometimes winning is not the point. When a rich and powerful person sues an individual of modest means, the intimidation factor is high, not to mention the burden imposed by legal costs. The chilling effect on further public criticism often achieves the aims of the powerful plaintiff, whether or not the defamation action ever proceeds to trial. The public attention Pring and Canan brought to this dynamic galvanized more than half of state legislatures to reform defamation law.[21] Most jurisdictions now have some variation of an anti-SLAPP statute, which will typically allow defamation defendants to obtain early dismissal of meritless libel suits. These anti-SLAPP laws, especially those passed in their strongest forms, deter weaponization of defamation actions and are one of the most significant developments in U.S. defamation law of the last fifty years.

Another important statutory provision, Section 230 of Communications Decency Act, immunized Internet service providers and website operators from liability for defamatory communications posted by their users. This immunity provisions stemmed from Congress's dissatisfaction with the common law's attempt to apply traditional defamation law principles to Internet service providers. Courts interpreted these immunity provisions broadly: not only does Section 230 bar treating tech platforms and other Internet service providers as if they are the publishers of content posted by their users, but it also bars distributor liability for these actors. In other words, even when notified that a user of its service has posted defamatory content, an Internet service provider is not legally responsible for failing to remove it. Insulating Internet service providers even from notice-and-takedown liability helped fuel the growth of the Internet as an economic engine by precluding those defamed online from accessing Big Tech's (and smaller Tech's) deep pockets. Defamation victims may still sue the person who posted the defamatory statement—though sometimes such a suit would be unavailing, even if the defamer can be found. Immunity under Section 230 has had a dramatic effect in protecting online intermediaries and shaping the nature of today's online discourse; it also has limited the role of the common law in adapting defamation-law principles to Big Tech practices.

As this account highlights, the most important defamation law reforms of the last fifty years have been constitutional and statutory, with

[21] The Public Participation Project maintains a website with a list of states that have adopted anti-SLAPP laws. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#reference-chart [https://perma.cc/8RR7-8EJW] (last visited Aug. 4, 2023).

the common law playing an important but secondary role. There have been some noteworthy common law adjustments to the changing nature of media and public discourse. For example, courts have labelled most online speech as libel rather than slander, have grappled with the interpretation of hashtags and emojis, and have contemplated how to handle defamation by algorithm. Common law courts have even adapted equitable remedies to handle the growing number of libel defendants who may not be deterred by orders to pay money for their transgressions.

Still, common law courts (and the reporters of the new Restatement) can only do so much to reform defamation law. Common law is inherently incremental because of its reliance on precedent. Moreover, the pervasive constitutionalization of the tort of defamation leaves little room for courts to recalibrate the balance between reputation and free expression.

IV. EVERYONE'S A CRITIC: IS REFORM NECESSARY?

This account of defamation law's history and major reforms to U.S. defamation law over the past 60 years or so forms a necessary backdrop for anyone contemplating reform. And many people are.

Perhaps most famously, former president Donald Trump promised, while campaigning in 2016, to "open up" libel laws.[22] At the time, scholars like me scoffed, because it is not within the presidential power to alter either state common law or federal constitutional law. But we should not have been so smug.

President's Trump's complaints were taken up by Justice Clarence Thomas in what most people thought at the time was a quixotic concurrence in the Supreme Court's denial of certiorari in a defamation case in 2019. That case, *McKee v. Cosby*, had been brought against actor Bill Cosby by a woman who had accused him of sexual assault. Cosby claimed the woman's accusations were lies. Justice Thomas asserted that the Court should reexamine "whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual malice standard for public figures or otherwise displaces vast swaths of state defamation law."[23] Justice Thomas dissented from denial of certiorari in two more defamation cases, in which he called for the Court to revisit (and roll back) *Sullivan*'s constitutional protection.[24] Justice Thomas's primary argument against *Sullivan* is that it is a "policy-driven decision

[22] Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 [https://perma.cc/T29X-S3ZS].

[23] McKee v. Cosby, 139 S. Ct. 675, 680 (2019) (mem.) (Thomas, J., concurring in denial of certiorari)

[24] *Id.*; Berisha v. Lawson, 141 S. Ct. 2424 (2021) (mem.) (Thomas, J., dissenting from denial of certiorari); Coral Ridge Ministries Media v. S. Poverty L. Ctr., 142 S. Ct. 2453 (2022) (mem.) (Thomas, J., dissenting from denial of certiorari).

masquerading as constitutional law" that lacks any relation to the "text, history, or structure of the Constitution."[25] Scholar Matthew L. Schafer has persuasively pointed out the flaws in Justice Thomas's originalist critique of *Sullivan*, though I cannot resist pointing out that the Justice refers, seemingly approvingly, to the historical relationship between defamation law and *scandalum magnatum*. *Scandalum magnatum* is associated with the discredited Court of Star Chamber; it was an action the British monarch and "great men of the realm" (members of the peerage) brought to criminally punish those who criticized them. Referring to *scandalum magnatum* approvingly is like pretending the American Revolution, which vested sovereignty in the people rather than a monarch, never happened.

Regardless, the Justice's opposition is not just originalist; he's opposed to *Sullivan*'s actual malice regime on policy grounds, as well. Indeed, Justice Thomas asserted that *Sullivan* has "allowed media organizations and interest groups 'to cast false aspersions on public figures with near impunity.'"[26] He further accused *Sullivan* of unleashing those who "perpetrate" lies, conspiracy theories, hoaxes, and online character assassination to pollute public discourse by insulating them from accountability.[27] That's a lot to put on the shoulders of one precedent and its progeny, especially since defamation actions are only available for defamatory falsehoods that harm individual reputation, which means that defamation simply does not cover most of the lies, conspiracy theories, and hoaxes that pollute public discourse.

Be that as it may, when Justice Thomas first began criticizing *New York Times v. Sullivan*, he appeared to be a voice crying out in the wilderness. *Sullivan* is probably the most famous case in all of First Amendment Law. But Justice Thomas is the king of opening the Overton Window and making what may be unthinkable in public discourse today, thinkable tomorrow. Justice Thomas's complaints about *Sullivan* generated public debate and scholarly and popular articles, not to mention petitions for certiorari and at least one state libel reform bill.

More significantly, Justice Thomas's complaints may have inspired Justice Neil Gorsuch to join his shadow docket campaign to get the Supreme Court to take on libel reform. In *Berisha v. Lawson*,[28] Justice Gorsuch joined Justice Thomas in dissenting from the denial of certiorari

---

[25] *Coral Ridge Ministries Media*, 142 S. Ct. at 2455; For a superb critique of the historical misunderstandings manifested by Justice Thomas's originalist argument against Sullivan, *see* Matthew L. Schafer, *In Defense:* New York Times v. Sullivan, 82 LA. L. REV. 81 (2021).

[26] *Coral Ridge Ministries Media*, 142 S. Ct. at 2455 (citing Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 254 (D.C. Cir. 2021)).

[27] *Id.*

[28] *Berisha*, 141 S. Ct. at 2424.

and critiquing *Sullivan* and its progeny. Justice Gorsuch's critique is more nuanced than Thomas's criticisms. Justice Gorsuch nods to originalist concerns, but his primary critique of *Sullivan* is what we teach law students to call a "changed circumstances" argument. This is a classic legal argument that says when circumstances change in society in a way that undermines a legal rule's ability to serve the purpose for which it was adopted, the rule itself should also change.

The Justice's changed circumstances argument proceeds in several steps. First, he asserts that the internet has been a boon in many ways: more people can speak, more people can participate in public discourse, and thus "virtually anyone in this country" can "publish virtually anything for immediate consumption virtually anywhere in the world."[29] So far, so good. Justice Gorsuch realizes we citizens have more access to information than ever before, and more ability to cross barriers to discuss that information with one another. But, as he correctly asserts in the second step of his argument, not all of the changes wrought by the cheap speech revolution have been positive. He then advances the proposition that the negative effects on our information ecosystem and "our Nation's media landscape" may outweigh the benefits.

He contends that although the Framers understood the importance of press freedom, they believed that press freedom came with corresponding duties. One of those duties was "to try to get the facts right—or, like anyone else, answer in tort for the injuries they cause."[30] Gorsuch implies that at the time *Sullivan* was decided, the press tried to get the facts right, but now things are different.

As Justice Gorsuch highlights, the economic underpinning of the media industry has shifted seismically over the last 25 years. This model, according to the Justice, once gave those in the media industry professional and economic incentives to strive for accuracy; it also provided them with the resources necessary to invest in the reporters, editors, and fact-checkers necessary to deliver accurate information. Now, however, the media find themselves competing against free content, with neither the incentives nor the resources "to try to get the facts right." He blames the "new media environment"[31] for the spread of disinformation, which financially rewards its creators, "costs almost nothing to generate,"[32] and spreads more effectively than real news.

Many of us share the Justice's critique of the sorry state of the information ecosystem, but Justice Gorsuch lays part of the blame for this state of affairs at the feet of *Sullivan* and its progeny. According to Justice

---

[29] *Id*. at 2427.

[30] *Id.* at 2426.

[31] *Id.*

[32] *Id.* (citing David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 800 (2020)).

Gorsuch, the actual malice rule only made sense in an era when the media had professional and economic incentives to publish accurate information. Absent those "other safeguards" protecting public discourse from "defamatory falsehoods and misinformation," *Sullivan*'s actual malice rule no longer makes sense.

Justice Gorsuch claims that actual malice has evolved "from a high bar to recovery into an effective immunity from liability,"[33] a claim that would surely be questioned by the lawyers involved in recent libel cases successfully brought by plaintiffs in *Gibson Bros. v. Oberlin College*,[34] and *Depp v. Heard*,[35] which involved judgments after trial, and *Dominion v. Fox News*[36] and *Sandmann v. Wash. Post*,[37] which involved large settlements. In a pending case, libel defendant Rudy Giuliani conceded, "for purposes of [ ] litigation," that he had made "false" and "actionable" statements, which suggests he did not view the actual malice barrier as insurmountable in his case.[38] Regardless, Justice Gorsuch claims that the actual malice standard encourages journalists to publish sensational news items "*without* investigation, fact-checking, or editing," just so they can assert they did not know the truth. From a media lawyer's standpoint, it is a lot easier to prove one's client did not act with reckless disregard to the truth when one can point to the steps that the client took to ascertain the truth before publishing.[39] Even if Justice Gorsuch overstates the difficulty

---

[33] *Id.*

[34] *Oberlin College Finishes Paying $25M Judgment in Libel Suit*, AP (Dec. 16, 2022, 3:31 PM), https://apnews.com/article/business-education-ohio-lawsuits-racism-0408eb2557dcc16749cf2115bcef3a2d [https://perma.cc/2T3Y-8RQT].

[35] Kalhan Rosenblatt, *Johnny Depp and Amber Heard Defamation Trial: Summary and Timeline*, NBC (Dec. 19, 2022, 9:55 AM), https://www.nbcnews.com/pop-culture/pop-culture-news/johnny-depp-amber-heard-defamation-trial-summary-timeline-rcna26136 [https://perma.cc/28PH-MKB8].

[36] Complaint, US Dominion, Inc. v. Herring Networks, Inc., No. 1:21-CV-02130 (CJN) (D.D.C. Nov. 7, 2022); Complaint, US Dominion, Inc. v. Newsmax Media, Inc., No. N21C-08-063 EMD (Del. Super. Ct. Aug. 10, 2021).

[37] Paul Farhi, *Washington Post Settles Lawsuit with Family of Kentucky Teenager*, WASH. POST (July 24, 2020, 1:10 PM), https://www.washingtonpost.com/lifestyle/style/washington-post-settles-lawsuit-with-family-of-kentucky-teenager/2020/07/24/ae42144c-cdbd-11ea-b0e3-d55bda07d66a_story.html [https://perma.cc/F25U-7G53].

[38] Jaclyn Diaz, *Rudy Giuliani Concedes he Made False Statements Against 2 Georgia Election Workers*, NPR (July 26, 2023, 12:03 PM), https://www.npr.org/2023/07/26/1190173929/rudy-giuliani-georgia-election-workers [https://perma.cc/V533-A6GC].

[39] Thirty years ago, distinguished defamation scholar David Anderson complained that high-profile mistakes by the press created an "exaggerated impression in the minds of some potential plaintiffs and lawyers that the press is impervious to public-plaintiff libel suits" when in fact, that is not the truth. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 523 (1991).

plaintiffs face in proving actual malice—at least when defendants make no effort to "get it right"—his critique of our information ecosystem will surely resonate with many.

Justice Gorsuch targets also the extension of the actual malice rule from public officials to public figures, and the broadening of the latter category to include almost anyone. The Justice notes that "private citizens can become 'public figures' on social media overnight."[40] Surely, as he points out, this is not a result the Court could have envisioned when it held that public figures must prove actual malice. Nor could the Court have appreciated how expansively lower courts would interpret its precedents defining the public figure category. Thus, he concludes, "At least as they are applied today, it's far from obvious whether *Sullivan*'s rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life."[41]

Justice Gorsuch's analysis makes a number of assumptions with which I disagree. Actual malice is difficult to prove, but not impossible. Mainstream media actors still have professional incentives to get facts right, though the economic landscape has affected the depth and breadth of journalistic expertise, especially at local levels. Most disinformation is not coming from mainstream media actors, and defamation law can only combat disinformation that harms individual reputation; thus, reconsidering *Sullivan* probably will do relatively little to combat the rise of disinformation and lies that Gorsuch decries. Moreover, he ignores the potential chilling effect that libel actions still exert on the publication of truthful information, perhaps blinding him to possible reforms other than the two he identifies: altering the actual malice rule and the public-figure doctrine. Regardless of these disagreements, Justice Gorsuch is right to focus on the larger questions of whether current defamation rules support "informed public debate," "democratic self-governance," or deter people of good will from entering public life. This inquiry is surely worth noting.

First, though, we should look at the overall aim of defamation law. If the law is not doing a good job of delivering what it is supposed to, we should first be clear about what the law's aims are. Defamation law reflects society's "basic concept of the essential dignity and worth of every human being."[42] The tort is supposed to protect reputation by providing vindication for reputational injury and compensating injured individuals for dignitary, relational, and economic harms that flow from reputational injury. True to its character as a tort, defamation law is designed to reflect society's norms of the boundaries of civilized discourse. A successful tort

[40] Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (mem.) (Thomas, J., dissenting from denial of certiorari)

[41] *Id.*

[42] Rosenblatt v. Baer, 375 U.S. 75, 92 (1966) (Stewart, J. concurring).

action is supposed to represent society's assertion that certain speech violates our norms of propriety. As a byproduct, the tort of defamation can help guarantee that our discourse is anchored in truth, rather than defamatory falsehood. The tort must achieve all these ends without unduly constricting the free flow of information—particularly information that is essential to democratic self-governance, informed decision-making, or participation in the formation of public opinion. It is a difficult balance to achieve. How well does current defamation law achieve this balance?

As a tool for vindicating wrongfully damaged reputation, defamation law is not especially satisfactory.[43] It is expensive and time-consuming to litigate a defamation claim, and every potential defamation plaintiff must carefully consider whether suing for defamation will expose them to more reputational harm than simply ignoring the defendant's defamatory publication. The complexity of the fault determination required by the constitutionalized tort—with its focus on what the defendant knew and when he knew it—contributes to the expense of litigation. Although successful defamation plaintiffs may recover for dignitary harms and provable economic losses, and punitive damages are available in some cases to punish the most egregious kinds of wrongdoing, plaintiffs rarely receive public, authoritative declarations that what was said about them was false. That kind of authoritative statement is often what plaintiffs most want, but defamation law is simply not designed to provide it. Moreover, the plaintiff can easily lose a defamation lawsuit, even if what was published about the plaintiff was indeed damaging and false.

If defamation law often fails on the vindication front, what about deterring disinformation? Here, the picture is not so bright, but not necessarily because of any defects in *Sullivan*. Much of the disinformation about which Justices Thomas and Gorsuch complained about does not emanate from sources that can be deterred by defamation lawsuits. The sources of disinformation include (but unfortunately are not limited to) "state actors exploiting the power of social networks to undermine social stability or pursue other political ends; rogue actors creating fake news for profit; people using social media to voice their delusional conspiracy

[43] Plaintiffs bring libel actions to restore reputation, correct falsehoods, and exact vengeance for character assassination. *See* Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 (1985). Because being defamed is deeply personal, striking at the core of one's dignity and status within the community, defamation suits are often driven by "emotion, rather than money." BRUCE W. SANFORD, LIBEL AND PRIVACY 609 (Prentice Hall, 2d ed. 1991); Remedies such as declaratory judgment, nominal damages, or even apologies might provide vindication, particularly if such remedies were available quickly. Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RSCH. J. 455, 462 ("The defendant's solvency is probably not central to the decision to sue because the plaintiff's reputation is at issue and thus an apology or a small recovery may vindicate the plaintiff.").

theories; partisans primed to believe only the information they want to believe and pass it along to others; lawyers determined to represent clients using whatever 'facts' are expedient, ethics rules be damned; and, finally, journalists who fail to adequately investigate, edit, or verify the information they publish—perhaps because of pre-existing biases."[44] Of these sources, not all can be deterred through litigation, either because they are unreachable or impecunious. More significantly, the only kind of disinformation that defamation law can reach is disinformation about individuals that is both untrue and implies the assertion of facts. In other words, the information must be both false and of a factual nature in order to be actionable. Defamation law simply cannot address the main sources or types of disinformation; to the extent it polices truth within public discourse, it does so only at the margins, by reminding some actors, sometimes, that falsity occasionally has consequences.

Defamation law is far more successful when it comes to fostering robust coverage of public officials and public figures. In *New York Times v. Sullivan*, the Supreme Court protected the news media from defamation liability despite the fact they made trivial errors in their coverage of unjust treatment of Dr. Martin Luther King, Jr., and other civil rights activists by Alabama police and public officials. The Court recognized the important watchdog role played by the *New York Times* and other media outlets during the Civil Rights Movement, and the Court also recognized that plaintiff L.B Sullivan and other public officials were attempting to use defamation law to defang that watchdog. The actual malice rule adopted by the Court enables the media to exercise a checking function on government malfeasance by giving the U.S. media more freedom than the media in any other place in the world to publish information about presidents, governors, congressional leaders, city commissioners, judges, and other influential public officials. The media covers consequential matters concerning public officials, and inconsequential ones, too, without seeming unduly timorous. The Supreme Court's extension of *Sullivan*'s actual malice rule to public figures also helps protect media when they publish newsworthy information about celebrities, businesspeople, and other so-called "influencers." Unfortunately, coverage of the powerful and prominent seems less robust at local levels, but economics seem to be responsible for that deficit, rather than the law itself. *Sullivan* recognized that the media needs "breathing space" for the "inevitable errors" they make in reporting newsworthy events. Without that breathing space, the media—especially those segments that are most economically vulnerable—might be unduly cautious in performing their watchdog role.

Regardless of the fault standard, the chilling effect of defamation law stems in part from high litigation costs and unpredictable damages. I previously mentioned that the expense of libel litigation deters some

[44] *See* Lidsky, *supra* note *, at 97.

plaintiffs from bringing suit, but it also may chill some defendants from speaking. Unlike other common law countries, U.S. law permits juries to assess presumed damages for almost any amount, and punitive damages can magnify awards until they reach over a billion dollars. For example, a judge recently ordered conspiracy theorist Alex Jones to pay over $1.4 billion to the families of Sandy Hook shooting victims, whom Jones had accused of faking their children's death.[45] Meanwhile, Fox News agreed to the largest defamation settlement in history in a case brought by one of the voting machine companies Fox's hosts and guests falsely accused of vote-rigging in the 2020 election. While both of these cases involved egregious misconduct and bald-faced lies deployed for profit, it is somewhat absurd that defamation lawsuits now involve lottery-like damages untethered to any conception of actual harm.

V. SOME BARRIERS TO REFORM

Justices Gorsuch and Thomas are right. Defamation law *does* need reform. But what are the barriers to reform, and would rolling back either the actual malice rules or public figure doctrine help?

One barrier to reform via tort law is the inherent incrementalism of the common law. Revolutionary changes in communications may justify holistic reforms, but tort law is constrained by precedent and the requirement of adjudicating individual cases. Tort law is simply not a vehicle for comprehensive, revolutionary reform. It is, however, a vehicle for careful, step-by-step adaptation of underlying principles to changed circumstances.

However, tort law is barred from making some of those adaptations at present by the First Amendment limitations imposed on defamation law. *Sullivan* and its progeny have effected a sort of practical preemption of common law reform. The constitutional law creates a floor that neither tort law nor statutory law can go below. Tort law and statutory law can provide more protection for free expression than First Amendment principles dictate, but states cannot provide less. Thus, the enmeshed Gordian Knot of laws that comprises defamation is itself a barrier to comprehensive re-examination of whether defamation law is serving its intended purposes, and there's no way to recalibrate the balance between reputation and free expression without attacking all strands of the knot at once.

Jettisoning actual malice will upset the balance, certainly, but it is unlikely to deliver a significant quantum of more responsible and reliable

[45] Elizabeth Williamson & Emily Steel, *Sandy Hook Families Are Fighting Alex Jones and the Bankruptcy System Itself*, N.Y. TIMES (Mar. 18, 2023), https://www.nytimes.com/2023/03/18/us/politics/alex-jones-bankruptcy.html [https://perma.cc/5ABT-L752].

journalism. Nor is it likely to drive disinformation from public discourse, for the reasons suggested above. Even if the Court jettisons the actual malice standard, most states now require some degree of fault as a matter of common law. Shifting to a negligence standard in most defamation cases might improve public trust in the media, although this prediction is speculative.[46] It might also allow jurors to punish unpopular media more readily, a concern that is heightened by our hyper-partisan environment in which many believe the "other side's" media are the enemy. Shifting to a negligence standard might allow a few more plaintiffs to brave the gauntlet of libel litigation and achieve victory. But the litigation is likely still costly and time-consuming, and the defendant's actions (rather than the truth) are still likely to take center stage in the litigation.

Likewise, narrowing the constitutional category of public figures might make it easier for some plaintiffs to sue without having to prove actual malice. When one examines the Supreme Court cases defining public figures, it is clear the Court meant the category to be narrow. It is the lower courts that have broadened the category beyond recognition. But signaling to the lower courts that they have gone too far will not significantly narrow the number of plaintiffs who litigate the issue of actual malice, because many plaintiffs who are not currently *required* to prove actual malice still choose to do so. The reason? Proving the higher fault standard gives them access to presumed and punitive damages. Many defamation cases are brought by lawyers charging their clients contingency fees, and these lawyers may not be willing to risk bringing a suit that is likely to be complex, protracted, and costly absent the prospect of receiving large damages awards at the end. Thus, changing the public figure category, standing alone, is unlikely to affect significantly the incentives driving plaintiffs to prove more than the law technically requires. Any narrowing of the public figure doctrine should consider this practical aspect of its operation.

The existence of presumed and punitive damages shapes an aspect of defamation law that Justices Thomas and Gorsuch overlooked: the problem of libel bullies. A majority of states allow defamation plaintiffs to recover presumed damages—damages available without proof of loss. Historically, the justification for allowing presumed damages in libel actions is that reputational harms can occur through subtle and indirect means not susceptible of easy proof, and juries can assess damages by assessing the natural and probable consequences of a defamatory

[46] Shifting back to strict liability (if common law courts chose to do so) would fundamentally recalibrate the reputation/free expression balance, particularly in an era of runaway damages and litigation costs. Imposing strict liability would be devastating for an economically beleaguered media and for the many ordinary individuals engaging in free expression online. If this were to happen, defamation law would have to develop (and quickly) many more ameliorative doctrines and defenses in order to blunt the chilling effect on public discussion and debate.

statement from the statement itself. The Supreme Court limited the recovery of presumed damages in *Gertz v. Robert Welch*, holding that private-figure plaintiffs involved in matters of public concern may not recover these damages without proving actual malice.[47] Presumed damages, however, help lend a defamation lawsuit an *in terrorem* effect on defendants. Because presumed damages are untethered by any constraints of proof, they can be almost any amount. Add punitive damages to the mix, and it is not surprising that defendants must stand in fear of even seemingly meritless defamation claims.

Partly because of how damages for defamation operate, it is easier for plaintiffs to sue and recover for defamation risks. Thus, it is easier for plaintiffs to use libel law to punish, delegitimize, or silence newsworthy and truthful criticism. *New York Times v. Sullivan* involved a libel bully who obtained the then-largest libel verdict in history ($3 million) from civil rights leaders and a northern newspaper without ever attempting "to prove that he had suffered actual pecuniary loss."[48] Had the Supreme Court allowed the verdict to stand, newspapers would have faced a choice between economic survival and covering one of the most important news events in our Nation's history. Justices Gorsuch and Thomas failed to acknowledge the extent to which the Supreme Court's conversion of defamation law from a no-fault regime to a largely fault-based regime, together with the shift to a regime in which plaintiffs suing for stories involving matters of public concern must prove falsity, was driven by the need to prevent libel bullying.

This need is still present. Wealthy people still sue their critics for defamation, even when they are unlikely to prevail, because it is a relatively easy way to punish existing critics and make would-be critics think twice. Politicians still sue the media as part of a public relations campaign to defend their "truths" and to punish journalists for their temerity in playing their watchdog roles. Although the media is by no means the only target of libel bullies, suits targeting the media deserve special attention given their constitutionally-assigned role in supporting an informed citizenry. Simply overturning *Sullivan*, without first understanding the practical operation of the intersecting strands of defamation law, would make a weakened and unpopular press a more vulnerable target for those who despise them and the critical role they play in our democracy. If the goal is to ensure that informed democratic debate does not suffer, it is hard to see how jettisoning the actual malice standard or the public figure doctrine accomplishes it, unless it is replaced by a series of complex doctrinal reforms. The robust coverage of public

[47] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[48] N.Y. Times v. Sullivan, 376 U.S. 256, 260 (1964) ("Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.").

officials and public figures that we have come to take for granted might very well be chilled.

VI. SELECTED GUIDEPOSTS

What, then, should be some guideposts on the path to defamation reform? As I have contended up until this point, any reform of defamation law must be holistic. Any reform and recalibration must look at all strands of the law simultaneously and appreciate how they work together to protect and vindicate individual reputation, ground our public discourse in truth, hold speakers accountable for reputation-damaging falsehoods, provide breathing space for free expression and watchdog journalism, and deter libel bullying.

A non-exclusive list of guideposts for reformers should, at a minimum, include the following:

First, simplify. Any libel reform should be cognizant of U.S. defamation law's complexity: common law doctrines, some of which were first laid down in the Middle Ages, intertwine with constitutional doctrines developed in the Twentieth Century, not to mention statutory modifications of the last thirty years. The goal of understanding this complexity should be to simplify it, not to add to its tangled nature. For example, simplification could be achieved, by eliminating doctrines that may have outlived their usefulness, such as those stemming from jurisdictional battles between ecclesiastical and secular courts that entered the law and never left it even after their raison d'être long evaporated.

Second, modernize. Any reform should consider how to adapt defamation-law principles to address new communications practices and technologies. Here is just a taste of some of the questions that reformers should contemplate: how much "endorsement" in conjunction with providing a hyperlink turns hyperlinking into republication of a defamatory statement? Is "liking" a defamatory statement a republication of that statement? If Section 230 of the Communications Decency Act is repealed or limited, should Internet service providers or tech platforms be treated as publishers? What about distributors? Common carriers? How should defamation by algorithm or by ChatGPT be handled? Which elements are affected by publication by algorithm? How should the law address defamation by deep fake? All these questions must be answered carefully by adapting precedent and principles from the print era to the post-print landscape.

Third, consider the role of remedies. Any defamation reform should look closely at defamation remedies. Defamation law should not provide windfall damages for the fortunate few but instead be refocused to compensate the actual harms—both economic and dignitary—that defamation causes. Defamation law should also consider additional remedies to set the record straight and more directly deliver vindication.

A declaratory judgment action might be one way to give plaintiffs what they most want, particularly if the judgment could be rendered relatively early in the litigation process.

Fourth, realign incentives for accuracy for media and non-media defendants alike. Defamation law should provide incentives for journalists to adhere to professionally developed standards for getting the facts right. Although the actual malice standard provides incentives to engage in journalistic best practices, it might be possible to tweak the fault standard to provide a more clearcut safe harbor for journalists who adhere to professional standards. But realigning incentives for professionally trained journalists is insufficient to increase information quality and deter character assassination, because most defamatory statements are published by ordinary citizens rather than professional journalists. Few of these citizens employ elaborate fact-finding procedures before publishing via social media, and some of them appear to have little concern for accuracy. Some may even believe their own defamatory falsehoods despite overwhelming evidence of their falsity. The Supreme Court based *Sullivan*'s actual malice standard on the practices of professional journalists,[49] not on the practices of the ordinary social media users. Any reform of defamation law should consider what incentives might encourage accuracy, without deterring the vitality and vibrancy of widespread public participation in the marketplace of ideas.

Finally, deter weaponization of defamation law. Since at least 1275,[50] the "peers of the realm" have used law to silence their critics. Deterring powerful government officials from doing so was an animating rationale of *New York Times v. Sullivan*. While it may be time to reconsider some aspects of *Sullivan*'s regime as they relate to the common law, the problem *Sullivan* attempted to solve still persists, and any changes to defamation law must realize that recalibration of the balance between reputation and expression must consider both sides of the scale.

---

[49] *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[50] Michael Hanrahan, *Defamation as Political Contest During the Reign of Richard II*, 72 Medium Aevum 259, 259 (2003) (citing 3 Edward I, c. 34, *Statutes of the Realm*, vol. I (London, 1810), p. 89: "It is commanded, that from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people, or the great men of the real.").