RETHINKING LIBEL FOR THE TWENTY-FIRST CENTURY

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INTRODUCTION

Today, many institutional arrangements reached in the mid-twentieth century are being rethought and renegotiated. One such arrangement involves libel, and the responsibility of publishers for harm they cause via defamation. In his recent concurrence to the denial of certiorari in the case of *McKee v. Cosby*,[1] Justice Clarence Thomas called for the Supreme Court to revisit the constitutional protections for publishers of libelous material, arguing that the existing arrangement, dating to *New York Times Co. v. Sullivan*[2] and its progeny, is out of date and unsupported by the Constitution.[3] As even some left-leaning scholars note, he may have a point, and it seems likely that the Supreme Court will revisit the issue of libel in the near future.[4]

In this short Essay, I will discuss Thomas's critique, the broader problem of fairly adjudicating libel cases in an era of widespread publishing and social media, and the impact of the *Sullivan* regime over the past half-century. I will then suggest some remedies to the problems identified—remedies that fall short of overturning *Sullivan*, but that would still represent a significant change in current law—and I will explain why the Supreme Court is more likely to follow such an approach than to overturn *Sullivan* outright.

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1. 139 S. Ct. 675 (2019) (Thomas, J., concurring).
2. 376 U.S. 254 (1964).
3. *McKee*, 139 S. Ct. at 676–78.
4. *See infra* note 71 and accompanying text.

I. BACKGROUND: THE *SULLIVAN* PRINCIPLES

Under the common law of libel, which was applied throughout the United States with minor variations prior to the *Sullivan* decision, publishers were liable for damages for publishing material that was false and defamatory (i.e., tending to injure the subject by lowering him or her in the opinion of society or of peers).[5] This was true across the range of speakers and of subjects, whether it was newspapers writing about the president or publications regarding private citizens.[6] Public figures did not have to satisfy any sort of heightened standard for liability, malice was presumed unless some common law privilege or right applied, and both general and special damages were recoverable, plus punitive damages upon a showing of malice.[7] Truth was a defense, but if the publication was false, a plaintiff was entitled to at least nominal damages even if he or she could show no actual injury.[8] At common law, false and defamatory stories about public figures were seen as actually more damaging, because of their targets' roles in the community, than libels of private figures.[9]

Protection of reputations was seen as very important. In an era before credit scores and online background checks, reputational capital was an essential part of social and financial relations, especially among the elite.[10] People were thus willing to go to great lengths to preserve reputations, as the prevalence of the custom of dueling around the time of the framing of the U.S. Constitution

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5. *McKee*, 139 S. Ct. at 678.

6. *See id.* at 679.

7. *Id.* at 678 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *150 (1765) and HENRY COLEMAN FOLKARD, STARKIE ON SLANDER AND LIBEL (H. Wood ed., 4th ed. 1877)). *But see* Coleman v. MacLennan, 98 P. 281, 285–86 (Kan. 1908) (cited by the *Sullivan* Court as an instructive example already articulating the rule it ultimately adopted).

8. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 372 (1974) (White, J., dissenting).

9. *See McKee*, 139 S. Ct. at 679 ("Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man." (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *124)).

10. *See, e.g.*, Lindsay Konsko, *The Origin of the Credit Score*, NERDWALLET (Aug. 12, 2014), https://www.nerdwallet.com/blog/finance/origin-credit-score-history/ (detailing the history of the credit score and noting that before the system was created, reputational capital was generally built by asking others to vouch for one's character); Sean Trainor, *The Long, Twisted History of Your Credit Score*, TIME (July 22, 2015, 7:00 AM), https://time.com/3961676/history-credit-scores/ (same).

illustrates[11]—one who was insulted but did not issue a challenge, or who refused a challenge, was likely to face ostracism, resulting in social and financial disaster at the very least. In fact, one bit of fallout from the famed Hamilton/Burr duel was an effort, initially unsuccessful, to persuade the defamed to seek their remedies in court via libel actions, rather than on the field of honor.[12]

By the twentieth century, for better or worse, the libel action had taken the place of pistols at dawn as a way of seeking redress for reputational harm, and the common law of libel managed to coexist with a free press quite handily, and with little perceived conflict. That all changed with *New York Times Co. v. Sullivan*, when the Supreme Court decided to subject libel law to an unprecedented degree of First Amendment control.[13] The Court had its reasons for doing so, and they were not bad ones, but the state of current libel law suggests that the changes that have been made far outstrip the justifications for the *Sullivan* ruling.[14]

The Sullivan lawsuit was an action brought by a government official against an out-of-town newspaper, to be tried in a local court before a sympathetic local jury.[15] This was not an isolated event. Unhappy with northern news organizations' coverage of segregation and civil rights marches, southern officials had formulated a plan of asymmetric warfare: while civil rights marchers had the sympathy of powerful national media organizations, those organizations were subject to the jurisdiction of local courts and juries in the south, courts and juries that could be expected to be unsympathetic toward hostile out-of-state media.[16] Sullivan's was just one of many such lawsuits filed against national news outlets, and the strategy was, until the *Sullivan* decision, a highly successful one.

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11. *See generally* Glenn Harlan Reynolds, *Hamilton, Hip-Hop, and the Culture of Dueling in America*, *in* THE LAW OF HAMILTON: AN AMERICAN MUSICAL (Lisa Tucker ed., forthcoming 2020) (discussing the culture of dueling).

12. *Id.*; *see also* Benjamin J. Barton, *Hamilton, Burr, and Defamation*, *in* THE LAW OF HAMILTON: AN AMERICAN MUSICAL (Lisa Tucker ed., forthcoming 2020).

13. *See McKee*, 139 S. Ct. at 677.

14. *See* Roy S. Gutterman, *Actually . . . A Renewed Stand for the First Amendment Actual Malice Defense*, 68 SYRACUSE L. REV. 579, 592–93 (2018).

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

16. *See* David A. Anderson, *Wechsler's Triumph*, 66 ALA. L. REV. 229, 237, 247–49 (2014); James Maxwell Koffler, *The Pre-*Sullivan *Common Law Web of Protection Against Political Defamation Suits*, 47 HOFSTRA L. REV. 153, 156 (2018); Howard M. Wasserman, *A Jurisdictional Perspective on* New York Times v. Sullivan, 107 NW. U. L. REV. 901, 904 (2013).

The Court recognized this reality. Justice Hugo Black called these libel suits a "technique for harassing and punishing a free press" in his *Sullivan* concurrence.[17] He explained:

> There is no reason to believe that there are not more such [suits] lurking just around the corner for the Times or any other newspaper which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press . . . can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.[18]

By 1964, when the *Sullivan* case came before the Court, "government officials had filed at least $300 million in libel actions against newspapers, news magazines, television networks, and civil rights leaders."[19]

These lawsuits were intended to chill or banish negative coverage. As Anthony Lewis wrote, the libel campaign was a "state political weapon to intimidate the press. The aim was to discourage not false but true accounts of life under a system of white supremacy . . . . It was to scare the national press—newspapers, magazines, the television networks—off the civil rights story."[20] A private communication between Birmingham Commissioner J.T. Waggoner, a plaintiff in another libel suit, and his attorney James A. Simpson "casts some doubt on whether Waggoner felt defamed personally. Simpson told Waggoner the suit would help deter newspapers such as the Times from committing 'ruthless attacks on this region and its people. I am sure this is the primary motive which has prompted you to embark on this troublesome litigation.'"[21]

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17. *Sullivan*, 376 U.S. at 295 (Black, J., concurring).
18. *Id*. at 294–95.
19. AIMEE EDMONDSON, IN SULLIVAN'S SHADOW: THE USE AND ABUSE OF LIBEL LAW DURING THE CIVIL RIGHTS STRUGGLE 101 (2019).
20. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 35 (1991).
21. EDMONSON, *supra* note 19, at 976 (citation omitted).

And, until the *Sullivan* opinion was handed down, this approach worked. As Harrison Salisbury wrote, news media outlets had to "think twice about reporting the facts, harsh and raw as they often were."[22] And the *Montgomery Advertiser* called the libel suits a "formidable club to swing at out-of-state press," and observed that "[t]he recent checkmating of the *Times* in Alabama will impose a restraint on other publications."[23] Lawyers for the *Times* went as far as encouraging reporters to avoid Alabama, to avoid generating more libel suits or risking being served with a subpoena.[24] Stories were even killed for fear of these suits:

> On the advice of their lawyers, *Times* editors killed a Sunday story Sitton wrote in late 1962 about a change in the Birmingham city government that might "depose Commissioner Eugene (Bull) Connor, whom negroes regard as one of the South's toughest police bosses." Times lawyer Tom Daly advised editors that the story "might indicate malice" in the pending Sullivan suit before the Supreme Court. It did indeed appear that "public officials had achieved their objective, [and] Jim Crow could return to its good old days, operating with virtually no scrutiny."[25]

Against this background of a concerted effort to encumber or impair First Amendment rights through strategic litigation—aimed at affecting the behavior of the news industry as a whole, rather than compensating a discrete injury—the Supreme Court created what Andrew McClurg denotes as a "right to be negligent,"[26] by limiting libel claims against public officials and public figures to cases where the plaintiff could show "actual malice."[27] The Court concluded that otherwise, the tort system might be used by powerful interests to undermine the First Amendment, an important part of the Bill of Rights.[28]

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22. HARRISON E. SALISBURY, WITHOUT FEAR OR FAVOR: THE NEW YORK TIMES AND ITS TIMES 384 (1980).

23. EDMONDSON, *supra* note 19, at 98 (quoting Grover Hall, *Checkmate*, MONTGOMERY ADVERTISER, May 22, 1960, at 15).

24. *Id.*

25. *Id.* (citations omitted).

26. Andrew J. McClurg, *The Second Amendment Right to Be Negligent*, 68 FLA. L. REV. 1, 1 (2016).

27. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280, 283 (1964).

28. *Id.* at 285, 292.

In drafting the *Sullivan* opinion, the Court was very conscious of the local officials' use (abuse?) of what lawyers call "home cooking" to disadvantage out-of-state media defendants. The solution was to substantially rewrite the law of libel. As Anthony Lewis writes,

> Commissioner Sullivan's real target was the role of the American press as an agent of democratic change. He and other Southern officials who had sued the *Times* for libel were trying to choke off a process that was educating the country about the nature of racism and was affecting political attitudes on that issue. Thus in the broadest sense the libel suits were a challenge to the principles of the First Amendment. But making a legal argument to that effect faced an enormous obstacle. Libelous utterances had always been regarded as outside the First Amendment, an exception to the "freedom of *speech*" it guarantees. The Supreme Court had repeatedly said that libelous publications were not protected. . . . Libel, the Court said, was not "within the area of constitutionally protected speech."[29]

Turning this around was not easy for Justice William J. Brennan, writes Lewis, who reviewed the multiple draft opinions and notes of the justices' clerks:

> Justice Brennan had great difficulty marshaling a majority and holding it. He wrote eight different drafts of the opinion. Until the last moment there was a real possibility, even a probability, that it would not command a majority. Not until the evening of March 8, the night before Justice Brennan announced the decision, did Justice Harlan agree to join him without reservations.[30]

The eventual formula which, according to Lewis, Harlan joined as much out of a desire to maintain the Court's institutional authority as because he was intellectually persuaded,[31] is the one we have all come to know: to recover for libel, a public official must show actual malice,

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29. LEWIS, *supra* note 20, at 42–43.
30. *Id.* at 164.
31. *See id.*

that is, publication of information that the publisher knows to be false, or which they published with reckless disregard as to its truth or falsity.[32]

One may suggest—as Justice Thomas's recent remarks did—that this departure from prior law was motivated more by political concerns than by constitutional doctrine or history.[33] As written, the *Sullivan* decision was a comparatively narrow response to an entirely novel litigation campaign. But subsequent decisions suggested that the Court was more concerned with protecting the institutional press in general than with merely reining in the excesses of a cabal of segregationist politicians.[34]

The first evidence of this concern involves the replacement of the comparatively narrow and limited "public official" category with the much larger and less well-defined category of "public figure." And in very short order, the Court left the "public official" limitation behind.

In *Time, Inc. v. Hill*,[35] the plaintiffs were a family that had been held hostage by escaped convicts.[36] A television dramatization of their experience suggested, falsely, that the father had been beaten and the daughter threatened with "a verbal sexual insult."[37] The original draft of Justice Abe Fortas's majority opinion contained very strong language about the damage done by such false characterizations, but Justice Hugo Black responded that large libel judgments (though this one was only $30,000) would make the press too cautious in general.[38] Fortas lost his majority, and the opinion wound up being authored by Justice Brennan, who made clear that protecting the institutional press was the top priority.[39] As to having false and defamatory things written or broadcast about us? Brennan essentially argued that we assume the risk by participating in society.

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32. *See Sullivan*, 376 U.S. at 280.

33. *See* McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring). Justice Hugo Black also seems to have felt this way—but to have approved of the departure—in a note written to Justice Brennan in which he observed: "Most inventions even of legal principles come out of urgent needs. The need to protect speech in this area is so great that it will be recognized and acted upon sooner or later. The rationalization for it is not important; the result is what counts . . . ." LEWIS, *supra* note 20, at 175.

34. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

35. 385 U.S. 374 (1967).

36. *Id.* at 377–78.

37. *Id.* at 378.

38. LEWIS, *supra* note 20, at 185–86.

39. *Hill*, 385 U.S. at 388.

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.[40]

The issue is no longer public officials' collusion against a free press; instead, it is the supremacy of press freedom over other issues, such as privacy. The traditional role of libel law, in fact, was precisely to demonstrate that in a civilized society there are limits to the "exposure of the self."[41]

Justice Harlan made these very points in his opinion, noting that public officials have thick skins and access to the press, something that ordinary citizens like the Hills did not.[42] But he did not carry the day. In keeping with Justice Brennan's emphasis on protecting the press, the Court in *Curtis Publishing Co. v. Butts*[43] drastically expanded the *Sullivan* rule to protect the press not merely from lawsuits for defamatory statements regarding public officials, government authorities wielding the power of the state, but also from lawsuits filed by a new category of plaintiff, the "public figure."[44]

What is a public figure? As the newspaper attorney in the motion picture Absence of Malice observes, "If I knew that I should be a judge. They never tell us until it's too late," adding, "I must admit I'd be more comfortable if he were a movie star or a football coach—football coaches are very safe."[45] Well, yes. It also seems to be about thrusting.

In *Gertz v. Robert Welch, Inc.*,[46] the scope and effect of public figure status was expanded.[47] Writing for the Court, Justice Lewis Powell quoted Justice Brennan's plurality opinion in *Rosenbloom v.*

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40. *Id.* at 388–89.
41. *Id.* at 405–11 (Harlan, J., concurring in part and dissenting in part).
42. *Id.* at 408–10.
43. 388 U.S. 130 (1967).
44. *Id.* at 155.
45. ABSENCE OF MALICE (Columbia Pictures 1981), https://www.youtube.com/watch?v=2SGe-IywHXg.
46. 418 U.S. 323 (1974).
47. *Id.* at 342–45.

Metromedia, Inc.:[48] "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[49] As Donald Magnetti comments, "In *Rosenbloom*, the seed of New York Times had grown into a veritable protective thicket surrounding the media. Although the phrase 'matter of public interest' was left undefined, what purpose is there for the media to publish something that is of no interest to the public?"[50]

The Court found, however, that private figures retained a right to actual damages without showing "actual malice," and to punitive damages if such a showing of actual malice could be made.[51] Mr. Gertz, the Court found, was a private figure, as he "did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."[52]

Sullivan was a response to government officials' use of friendly local courts to harm out-of-state publishers, in the name of promoting free speech. *Gertz*, however, essentially approved a sort of "tax" on free speech—if you "thrust" yourself into a public debate (a phrasing that suggests that there is something vaguely inappropriate about your involvement somehow), then you pay a price: People may now libel you with much less fear of consequences. Rather than protection for free speech, the *Gertz* formulation looks more like an admonition to the peasantry to know its place. The "thrust" language from *Gertz* was echoed in *Time, Inc. v. Firestone*,[53] where Justice William Rehnquist held that people do not count as public figures unless they have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[54] Nice reputation you've got there. Shame if something were to happen to it.

"Public official" is tolerably clear. There may be minor government employees whose status as "officials" might be questioned, but in general it should be easy for speakers to know when they are criticizing a public official versus a citizen. The "public figure" question is much less clear—particularly in today's era of social

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48. 403 U.S. 29 (1971).

49. *Gertz*, 418 U.S. at 337 (quoting *Rosenbloom*, 403 U.S. at 43).

50. Donald L. Magnetti, *'In The End, Truth Will Out' . . . Or Will It?*, 52 MO. L. REV. 299, 314 (1987).

51. *Gertz*, 418 U.S. at 350.

52. *Id.* at 352.

53. 424 U.S. 448 (1976).

54. *Id.* at 453 (quoting *Gertz*, 418 U.S. at 345).

media, when sudden and often unsought fame via viral videos or tweets is common—but the Court's treatment seems more like an admonition to keep your head down.

Sullivan's legacy was not improved by the Court's opinion in *St. Amant v. Thompson*,[55] where the Court declined to apply a reasonable-person test to publication: Actual malice, it held, can be found only where the publisher entertained serious doubts that the publication was true.[56] A failure to investigate, absent those subjective doubts, could not be evidence of actual malice.[57]

The upshot is that most likely libel plaintiffs will be public figures who must show actual malice, and in order to show actual malice they must be able to demonstrate that the publisher entertained actual serious doubts, something which, as a matter of proof, will often turn out to be difficult. And even private figures must show actual malice to collect punitive damages.[58] When a University of Virginia Dean sued *Rolling Stone* over a fraudulent report of a gang rape at a party, she was able to demonstrate actual subjective doubts because an independent investigation by the *Columbia Journalism Review*, which the *Rolling Stone*'s lawyers must surely have regretted, made such doubts plain.[59] Few future plaintiffs will be so lucky.

Proving actual malice is made even more difficult by two procedural decisions from the Supreme Court, *Bell Atlantic Corp. v. Twombly*[60] and *Ashcroft v. Iqbal*.[61] These cases (sometimes combined as *Twiqbal* by commenters) set a high pleading standard for cases involving actual malice. The *Sullivan*/*Gertz* line of cases require actual malice to be proved by clear and convincing evidence;[62] the *Twiqbal* cases require that facts showing malice be shown at the pleading stage, prior to discovery.[63]

As Judy Cornett writes:

> According to the *Twombly* Court, the district court was not required to draw the inference of illegal agreement. Rather, it was up to the plaintiffs to plead

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55. 390 U.S. 727 (1968).
56. *Id.* at 731.
57. *Id.* at 733 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 287–88 (1964)).
58. *See Gertz*, 418 U.S. at 350.
59. Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 871–72 (W.D. Va. 2016).
60. 550 U.S. 544 (2007).
61. 556 U.S. 662 (2009).
62. *Gertz*, 418 U.S. at 342; *Sullivan*, 376 U.S. at 285–86.
63. *Iqbal*, 556 U.S. at 686–87; *Twombly*, 550 U.S. at 556.

> facts that would "nudge[] their claims across the line from conceivable to plausible."
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> . . . .
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> In *Iqbal* the Court held that the new plausibility pleading standard applies to all cases. The Court also clarified how lower courts should go about applying the new standard. First, the court must identify allegations that "are no more than conclusions." Second, setting aside these conclusions, the court should peruse the "well-pleaded factual allegations, . . . assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[64]

This makes pleading actual malice very difficult for libel plaintiffs, since it requires proof of a subjective doubt about the truthfulness of the publication. In the absence of an objective standard based on, say what a "reasonably prudent person" would or would not have published, plaintiffs must prove state of mind—and under *Twiqbal* must make their case *before* discovery can produce things like emails or internal memos that might be evidence of such doubts.

As Professor Cornett notes, prior to *Twiqbal* it was enough to plead that the defendant "knew" the statement was false, or "acted with reckless disregard as to its truth or falsity" or "entertained serious doubts."[65] But now that is not enough:

> Now, however the publisher's state of mind must be plausibly pleaded in order to avoid dismissal. Under the *Twiqbal* regime, it is no longer enough to plead that the defendant made the allegedly libelous statements with knowledge of their falsity or with reckless disregard as to their truth or falsity. Such general statements are now branded as conclusions. Instead, facts must be pleaded to "nudge" the claim "across the line from conceivable to plausible."[66]

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64. Judy M. Cornett, *Pleading Actual Malice in Defamation Actions After* Twiqbal*: A Circuit Survey*, 17 NEV. L.J. 709, 713–14 (2017) (internal citations omitted) (quoting *Iqbal*, 556 U.S. at 679).

65. *Id.* at 715.

66. *Id.* at 715–16 (citations omitted).

It is difficult to overstate the difficulty this standard poses: "So far, no libel complaint filed by a public figure that has reached a Circuit Court of Appeals has succeeded in plausibly pleading actual malice."[67]

It is, as noted, not impossible to prove actual malice on the part of a publisher—it is merely extremely difficult and requires unusual facts. Nicole Eramo, a University of Virginia Dean vilified in a fraudulent story about campus rape published in *Rolling Stone*, secured a jury verdict for $3 million.[68] But she was able to do so essentially because the *Columbia Journalism Review*, which *Rolling stone* had brought in to do a post-mortem review, had in essence done the discovery for her, producing numerous emails and interviews that showed the editors' dubious mental state and decision to go ahead and publish anyway.[69]

It is unlikely that this sort of inquiry will often be repeated, especially given how it worked out for *Rolling Stone*. And in the absence of some sort of record of doubt that can be obtained outside of the discovery process, the *Twombly/Iqbal* doctrine stands as an almost insuperable barrier to libel plaintiffs pleading malice:

> Because discovery is not available under *Twiqbal* until the 12(b)(6) hurdle is surmounted, the use of the plausibility standard in public-figure libel actions works a grave injustice to plaintiffs. Faced with a substantive standard [actual malice] that, for good reason, is higher than normal, they are also faced with a pleading standard that is insurmountable, for reasons that are unclear at best.

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67. *Id.* at 716. Note, however, that after Cornett's piece was published, former Governor and presidential candidate Sarah Palin did succeed in showing plausibility before the Court of Appeals for the Second Circuit, after a district judge had found otherwise. *See* Palin v. N.Y. Times Co., 940 F.3d 804, 817 (2d Cir. 2019). The circumstances again were somewhat unusual, including a defendant editor who had previously edited—and thus had actual knowledge of—articles demonstrating that the central claim of the *New York Times* editorial regarding Palin was false. *Id.* at 808–09.

68. *See* Doreen McCallister, *'Rolling Stone' Settles Defamation Case with Former U.Va. Associate Dean*, NPR (Apr. 12, 2017, 4:32 AM), https://www.npr.org/sections/thetwo-way/2017/04/12/523527227/rolling-stone-settles-defamation-case-with-former-u-va-associate-dean. *See generally* Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862 (W.D. Va. 2016).

69. *See* Cornett, *supra* note 64, at 723–27; *see also Eramo*, 209 F. Supp. 3d at 871–72.

> . . . [T]he plausibility standard bars plaintiffs from discovery whether or not discovery in the particular case might prove to be overly burdensome or expensive for the defendant. And in cases where the defendant's state of mind must ultimately be proven by the plaintiff—like public figure libel cases—the bar to discovery puts plaintiffs in a catch-22 situation. The plaintiff must allege facts from which knowledge of falsity or reckless disregard of truth or falsity must be inferred, but the plaintiff has no access to the tools of discovery with which to learn these essential facts.[70]

We are thus in a situation where public figures—or private figures who want to collect more than actual damages—face nearly insuperable hurdles stemming from a variety of doctrinal changes. Although *New York Times Co. v. Sullivan* gets the blame, it is only part, and perhaps not the largest part, of the problem. Which brings us back to Justice Thomas's suggestion that *New York Times Co. v. Sullivan* should be scrapped.

II. A POST-*SULLIVAN* WORLD?

Even Cass Sunstein, a Harvard professor and Obama-era appointee, not generally on the same page as Thomas, agrees that the constitutional foundations of the *Sullivan* case are weak.[71] Noting that the case in question, *McKee v. Cosby*, involved a libel suit against Cosby by his rape accuser, Kathrine McKee, Sunstein observes:

> Because McKee was involved in a public controversy, she counted as a public figure. Under New York Times v. Sullivan, decided in 1964, she could not win unless she could demonstrate that Cosby's lawyer had "actual malice," which means that he knew he was lying, or that he acted "with reckless indifference" to the question of truth or falsity.
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> It's really hard to demonstrate that, so McKee's lawsuit was bound to be dismissed.

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70. Cornett, *supra* note 64, at 727–28 (citations omitted).

71. *See* Cass R. Sunstein, *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.

> Thomas is an "originalist"; he believes that interpretation of the Constitution should be settled by reference to the "original public meaning" of its terms. Thomas offers considerable evidence that at the time of ratification, those who wrote and ratified the Bill of Rights were comfortable with libel actions—and that they did not mean to impose anything like the "actual malice" standard.
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> A defamed individual (including a public figure) needed only to prove that a written publication was false and that it subjected him to hatred, contempt or ridicule. And for 170 years, the Supreme Court never held that the First Amendment forbids the states from protecting people from libel.
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> Thomas concludes that New York Times v. Sullivan, and the many subsequent decisions implementing it, were "policy-driven decisions masquerading as constitutional law."[72]

Sunstein adds: "There are strong objections to originalism, of course. But whatever your theory of constitutional interpretation, it is hardly obvious that the First Amendment forbids rape victims from seeking some kind of redress from people who defame them."[73] But that is in fact the logic of existing caselaw: By accusing someone—especially someone famous—of rape, one automatically becomes a public figure, and by becoming a public figure, one becomes virtually ineligible for protection against defamation. Worse yet, thanks to Google, such defamation becomes near-permanent. Where once a defamatory headline on a Tuesday was wrapped around fish by Thursday, now it remains, evergreen, to be recalled whenever the defamed's name is searched.

One solution, as advocated by Justice Thomas, would be to simply overturn *New York Times Co. v. Sullivan*.[74] As both Thomas and Sunstein point out, the structure of public versus private figures, the actual malice test, etc., are not readily derivable from the First and

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72. *Id.*

73. *Id.*

74. *See generally* McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring) (arguing that *Sullivan* was "policy-driven" and should be reconsidered).

Fourteenth Amendments.[75] Indeed, it is easy to read *Sullivan* and its progeny, and the history of the case as recounted by Anthony Lewis, as evidence that the Court was moved more by a class-solidarity with members of the chattering classes than by constitutional doctrine.[76]

Overturning *Sullivan* would effectively return us to the pre-1964 era of libel law, in which public officials and private figures were treated alike and "actual malice" was not required. This prospect produced considerable agitation in some quarters when Thomas wrote his concurrence: Thomas was accused of wanting to "crush the free press,"[77] or of impeding the "public's right to know,"[78] or even of declaring war on "the very idea of a free press."[79] But these criticisms are basically nonsense. To argue that overturning the *Sullivan* opinion would end the free press in America is to argue that the press in America, prior to the *Sullivan* opinion, was unfree, which seems rather extreme. The *Sullivan* opinion was a response to a particular set of facts, which had not obtained in the past and which are unlikely to obtain in the future. Indeed, from the harshest of legal-realist standpoints one could justify overturning *Sullivan* today on that basis alone. To quote Justice Black: "The rationalization for it is not important; the result is what counts . . . ."[80]

One doubts, however, that there are five members of the Court who partake of such an unwatered form of legal realism (and even Justice Black required some window-dressing for his desired result). But if overturning *Sullivan* is not the solution to our present doctrinal tangle, is there something less drastic that might achieve greater justice?

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75. *See Id.* at 678–80; *see also* Sunstein, *supra* note 71.

76. *See* GLENN HARLAN REYNOLDS, THE JUDICIARY'S CLASS WAR 31–33 (2018) (discussing the Warren Court's First Amendment doctrine in light of class conflict, as effectively a subsidy to the institutional press and a weakening of juries—the only non-credentialed part of the judicial process).

77. Will Bunch, *Clarence Thomas Wants to Crush the Free Press Just Like Southern Segregationists of the 1960s*, PHILA. INQUIRER (Feb. 21, 2019, 2:00 PM), https://www.inquirer.com/opinion/commentary/clarence-thomas-libel-law-sullivan-new-york-times-free-press-alabama-segregation-20190221.html.

78. *See* John Diaz, *Clarence Thomas vs. Public's Right to Know*, S.F. CHRON. (Feb. 23, 2019, 9:20 AM), https://www.sfchronicle.com/opinion/diaz/article/Clarence-Thomas-vs-public-s-right-to-know-13638284.php.

79. Ian Milhiser, *Clarence Thomas Declares War on the Very Idea of a Free Press*, THINKPROGRESS (Feb. 19, 2019, 1:18 PM), https://archive.thinkprogress.org/clarence-thomas-declares-war-on-free-press-9bb7391925e7/.

80. LEWIS, *supra* note 20, at 175.

Professor Sunstein suggests "new and creative thinking," allowing those who are defamed to require retractions, or to receive "appropriate (and appropriately limited) monetary compensation."[81] Such remedies could be imposed by the Court of course—as Justice Brennan himself famously said, "with five votes, 'you can do anything around here,'"[82]—but the Court has consistently struck down legislative efforts in the way of required retractions or reply, and in our world, "appropriately limited" monetary compensation is normally simply the monetary compensation that a jury finds appropriate.[83]

Instead of overturning the famous linchpin of current doctrine, though, a more cautious Court (and they are all more cautious than Justice Thomas!) might well choose to target some of its descendants. And there are a number of promising targets.

One possibility would involve simply eliminating the "public figure" concept and returning to the "public official" language of the *Sullivan* opinion. This approach would undo most of the harm to plaintiffs, while retaining the rationale for the original decision, which was inspired by a cabal of state officials trying to avoid media scrutiny.

Likewise, overturning or tightening *St. Amant*, or applying a "reasonable person" standard for investigating potentially defamatory claims before publication would substantially change the balance of power, and in a way that would be unlikely to raise a fuss. The "reasonable person" standard is widely deployed in tort law and should be readily understood by courts and juries. To the extent that standard good practices of journalism help to demonstrate reasonableness, such a change would encourage news organizations to adopt—and adhere to—those sorts of practices, something that would redound to the benefit of both journalists and those whom they cover.

Even an opinion to the effect that the *Twombly*/*Iqbal* doctrine does not apply in libel cases would, at this point, work considerable change, and in a way that only media lawyers would be likely even to notice. As noted above, requiring plaintiffs to prove actual subjective malice by a clear and convincing evidence standard is a very high burden already. Requiring them to also demonstrate plausible factual support

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81. Sunstein, *supra* note 71.

82. Adam D. Chandler, *How (Not) to Bring an Affirmative-Action Challenge*, 122 YALE L.J. F. 85, 106 (2012) (citing H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008)).

83. *See* Sunstein, *supra* note 71.

at the pleading stage, before any discovery, is to make that burden almost insuperable.[84] Rather than return libel law to its pre-1964 stage, such a ruling would merely return things to their state a decade or so ago.

CONCLUSION

My own prediction is that the Court will take this more cautious approach, and there is precedent. During the oral argument in *McDonald v. Chicago*,[85] in which plaintiff's attorney Alan Gura was arguing for the incorporation of the Second Amendment against the states via the Fourteenth Amendment's privileges and immunities clause, rather than the standard approach of incorporation via the due process clause, there was an interesting interchange between Gura and Justice Antonin Scalia.[86] After hearing Gura make his case for incorporation via privileges and immunities, Scalia commented:

> Well, I mean, what you argue is the darling of the professoriate, for sure, but it's also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have—even I have acquiesced in it. (Laughter.).[87]

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84. As the Second Circuit noted in its Palin decision:

> We conclude by recognizing that First Amendment protections are essential to provide "breathing space" for freedom of expression. But, at this stage, our concern is with how district courts evaluate pleadings. Nothing in this opinion should therefore be construed to cast doubt on the First Amendment's crucial constitutional protections. Indeed, this protection is precisely why Palin's evidentiary burden at trial—to show by clear and convincing evidence that [NY Times editor] Bennet acted with actual malice—is high. At the pleading stage, however, Palin's only obstacle is the plausibility standard of *Twombly* and *Iqbal*. She has cleared that hurdle.

Palin v. N.Y. Times Co., 940 F.3d 804, 816–17 (2d Cir. 2018) (citations omitted).

85. 561 U.S. 742 (2010).

86. *See generally* Transcript of Oral Argument at 7, *McDonald*, 561 U.S. at 742 (No. 08–1521), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/08-1521.pdf.

87. *Id*. at 7.

Even if one believes—as in fact Justice Thomas did with privileges and immunities in *McDonald*, and as he seems to believe with regard to *Sullivan*—that a drastic shift in precedent is justified by doctrine, there is powerful pressure to make the changes as small, and as consistent with existing doctrine, as possible. Though there may be five justices who are willing to alter the *Sullivan* regime substantially, the likelihood is that any alterations will be made in a less exciting fashion than Justice Thomas desires. Nonetheless, as I hope I have demonstrated, there are numerous less-drastic ways to make libel law more sensible.