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How to Restore Balance to Libel Law

The Supreme Court can curtail the worst media abuse without overturning its landmark 1964 ruling.

By Glenn Harlan Reynolds

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If a news organization defames you, it's almost impossible to find redress in an American court. In 1964 the Supreme Court began to remake libel law in *New York Times Co. v. Sullivan.* The changes made it harder for victims of defamation to sue media outlets that defamed them, adding a requirement of "actual malice" for public officials seeking to recover damages.

Now there's talk of overturning *Sullivan,* most notably from Justice Clarence Thomas and Senior Judge Laurence Silberman of the U.S. Circuit Court of Appeals for the District of Columbia. They make sound arguments. But federal courts could do a lot to restore sanity to the law of libel without touching the *Sullivan* decision. Most of the legal changes that have made libel recoveries so difficult come from less-famous follow-on cases.

Sullivan grew out of a concerted effort by Southern states to use libel lawsuits as a weapon in a sort of asymmetric warfare. Civil-rights organizers had powerful support from national media organizations, but local judges and juries were sympathetic to segregation. Southern government officials seized on any error in media reporting to claim defamation, file libel suits and haul those organizations into court.

The goal was to chill reporting and criticism, and it worked. By the time *Sullivan* (which involved a political advertisement published in the Times) reached the Supreme Court, news organizations had faced more than $300 million in claims (around $2.5 billion in today's dollars), and the Times's lawyers were quashing

factually sound stories of obvious public interest for fear of further libel suits. Times reporters were even discouraged from visiting Alabama for fear that they might spur a lawsuit or be served with papers.

The justices responded by rewriting the law of defamation. Before *Sullivan,* lawsuits for slander and libel hadn't been understood as implicating the First Amendment at all. Now the court held that the press freedom required public officials suing for libel to show "actual malice"—meaning that the publisher knew the information was false, or published it with "reckless disregard"—before they could recover damages.

Later decisions quickly expanded *Sullivan* in ways that suggest the justices were more interested in protecting the institutional press than in reining in the excesses of politicians. First, they expanded *Sullivan*'s coverage. In 1967, "Public officials" were replaced, in *Time Inc. v. Hill* and *Curtis Publishing v. Butts,* by "public figures." A precedent designed to protect coverage of political wrongdoing suddenly made it hard for celebrities to sue over falsehoods about their personal lives.

In *Gertz v. Robert Welch Inc.* (1974) and *Time Inc. v. Firestone* (1976), the category of public figures was further expanded to include ordinary citizens who "thrust" themselves into the debate. Anyone, however obscure, who spoke out would lose traditional protection against libel and slander. The term "thrust" suggests it is vaguely inappropriate for ordinary citizens to take part in public affairs; at any rate, the price for doing so was to make your reputation fair game, a tax of sorts on speech.

Meanwhile, "actual malice" had also been adjusted, to the detriment of plaintiffs. In *St. Amant v. Thompson* (1968), the justices held that a plaintiff had to show that the defendant "entertained serious doubts" about the story's truth. It wasn't enough that any "reasonably prudent man" would have had doubts.

Establishing that became even more difficult decades later because of two procedural decisions, *Bell Atlantic Corp. v. Twombly* (2006) and *Ashcroft v. Iqbal* (2009). These precedents allow a case to be dismissed before the plaintiff can engage in discovery unless the plaintiff can demonstrate—not merely allege—actual malice. The plaintiff has to prove the defendant's state of mind before being authorized to gather evidence.

These precedents don't protect only journalists, none of whom were a party to the case that prompted Justice Thomas's critique of *Sullivan.* In 2014 the New York Daily News reported on Kathrine McKee's allegation that Bill Cosby had raped her four decades earlier. Mr. Cosby's lawyer Marty Singer wrote a letter to the paper threatening legal action. Ms. McKee sued Mr. Cosby, alleging that Mr. Singer had defamed her on the comedian's behalf.

The fact of having accused a famous person of rape was enough to make Ms. McKee a "limited-purpose public figure," which doomed her lawsuit. When the Supreme Court declined to hear her appeal in 2019, Justice Thomas filed a lone dissent calling for *Sullivan* to be overturned. Even left-leaning law professor Cass Sunstein thought he had a point. "It is hardly obvious that the First Amendment forbids rape victims from seeking some kind of redress from people who defame them," he wrote.

Judge Silberman joined the call in a dissent last week, noting that the kind of wide-open and robust media debate on which *Sullivan* relied as a means of arriving at the truth no longer exists now that the press has become a one-party monoculture.

Justice Thomas and Judge Silberman make a good argument, but the high court is unlikely to go as far as they urge. Overturning *Sullivan* would be momentous and controversial. When Justice Thomas suggested it, he was accused of wanting to "crush the free press" and impede "the public's right to know," and even of declaring war on "the very idea of a free press." These criticisms were nonsensical unless one believes that the U.S. lacked a free press prior to 1964. But are four other justices willing to endure such opprobrium?

Fortunately, they don't have to. *Sullivan*—limited to public officials rather than public figures and allowing for a milder version of "actual malice" and more-open discovery, isn't the source of most of the excessive protections media defendants get in libel cases today. The justices could overturn or limit their subsequent rulings while leaving *Sullivan* intact. Nobody but media lawyers and their clients would get upset.

I'm guessing there may be five justices who could be persuaded to do that, particularly as Justice Thomas isn't alone on the court in having experienced press unfairness and dishonesty on a personal level during his confirmation

hearings. Justice William Brennan, who wrote *Sullivan*, and his colleagues might have entertained an overly rosy view of journalists and the news media. A majority of their successors may not.

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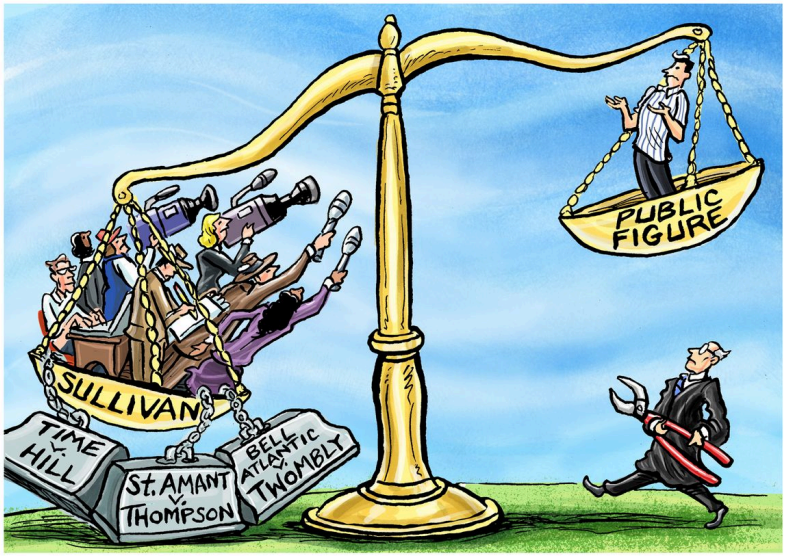

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