

## CHASING MALICE: THE NEED FOR DEFAMATION LAW REFORM

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Imagine that you are an undecided voter in a hotly contested election for United States Senate. Down the stretch, only a week before voting day, one candidate unleashes a scathing campaign commercial against his opponent, making the powerful allegation that “this man is a racist and unjustly terminated several black employees from his company.” As a member of the electorate, you are forced to filter this information and its negative connotations. On one hand, the accusation made, if true, exercises critical influence on your ability to make an informed decision. The revelation that your potential representative, your voice in government, behaves in a bigoted manner is essential information in public debate. On the other hand, you know there exists the possibility that untruths will be proffered in order to gain a competitive advantage during the campaign process. A false allegation on an issue as significant as racism will likely result in unjustified harm to the reputation and political career of the individual accused, as well as skewing the election results. From this example, the two competing interests in the field of defamation are revealed: protecting political speech in accord with the First Amendment and protecting individual reputation.

The malice standard is a legal standard applied by the United States judicial system to defamation actions brought by public officials or public figures. In order to achieve victory in such a case, plaintiffs must prove that the fact-based statement of the defendant is false, and that he or she made it with actual malice, defined as either knowledge of its falsehood or reckless disregard for its truth or falsity. Reckless disregard has come to be defined as a “high degree of awareness of probable falsity” (*St. Amant v. Thompson*, 3). Under such a standard, it would be difficult for the aforementioned Senate candidate accused of racism to achieve legal redress for the statement made about him by his rival candidate, even if the sources of the information had in fact been dismissed from employment, along with a number of white employees, for excessive absence from work and made their accusations of racism simply to achieve some modicum of revenge against their former employer. Once the defendant claims he had no reason to doubt the truth of the information provided to him, a finding of actual malice is almost

always precluded (Anderson 3). As a result, the malice standard encourages the dissemination of important information that cannot be confirmed in a timely manner and would not be released under a standard that would make recovery for defamation less difficult—affording a great degree of protection to the First Amendment interest of political debate. However, in serving this aim, the malice standard concurrently encourages an individual not to discover the falsity of accusations, since “as long as the sources of libelous information appear reliable, and the defendant has no doubts about its accuracy, a public figure or official will lose a lawsuit even if a more thorough investigation might have prevented a defamatory error” (Rosini 80). This condition in public plaintiff defamation law forces us to question whether the Supreme Court left too little protection for the reputations of honest people and granted too much latitude to First Amendment speech in the creation of the malice standard in 1964 and its extension in the years following the original decision.

#### *First Attempts at Defining Defamation Law*

After the abolishment of the Sedition Laws in and prior to the institution of the malice standard by the Supreme Court in states were free to apply distinct legal standards of their own in defamation actions brought by public officials. The 1893 case of *Post Publishing Co. v. Hallam* is an ideal illustration of the standard the majority of states chose to apply prior to federal mandate (Lawhorne 129). Theodore F. Hallam, a candidate for Democratic nomination to the United States House of Representatives, brought this action for libel against *Post Publishing Company*, the entity responsible for “composing, printing, publishing, and circulating a daily newspaper called the *Cincinnati Post*” (*Post Publishing Co. v. Hallam*, 2). Hallam claimed that the defendant published an article in the paper entitled “Berry Paid Expense of Theo Hallam in the Sixth (Ky.) District Contest for the Nomination of a Democrat for Congress,” in which he was falsely accused of trading the votes of his supporters to a rival candidate, Albert S. Berry, for monetary compensation (*Post Publishing Co. v. Hallam* 2).

The evidence at the trial supported the conclusion that this allegation was without any foundation. However, the general manager of the paper testified “that the article had been submitted to him by the editor who prepared it with the assurance that it truly stated the facts as developed after a thorough investigation, and that he thereupon approved its publication because it was news of much public interest” (*Post Publishing Co. v. Hallam* 6). In addition, the editor later testified that he “had heard, from several sources, rumors that Hallam had transferred his support to Berry for a money consideration” (*Post Publishing Co. v. Hallam* 7). In his instructions to the jury,

the trial judge charged that false allegations of fact are not privileged and are legally protected against a finding of guilt on the part of the defendant in a defamation case, even if made in good faith (*Post Publishing Co. v. Hallam* 8). On these grounds, the jury returned a \$2,500 verdict in favor of Hallam against *Post Publishing Company*.

On appeal that privilege should be granted for false statements made in good faith, the Sixth Circuit Court of Appeals emphasized that it is in the “deepest interest to the public that they should know facts showing that a candidate for office is unfit to be chosen” (*Post Publishing Co. v. Hallam* 8). Likewise, the Court acknowledged that the press is in fact responsible for informing the public of these issues; nevertheless, it did not assent to giving the press the privilege of pursuing this goal devoid of liability for untrue statements, even if they are made in good faith: “If the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation...whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground” (*Post Publishing Co. v. Hallam* 8). Therefore, the Court reasoned that “the privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed” (*Post Publishing Co. v. Hallam* 8). In the Court’s view, the possibility that worthy men would choose not to enter the field of politics and public service in order to avoid the defamation of their character “outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof” (*Post Publishing Co. v. Hallam* 9). The Court concluded that denying privilege from liability for false statements of fact made in good faith posed no threat to the freedom of the press, because it still left abundant leeway for the criticism of conduct. Essentially, a dividing line was drawn between accusations of fact, unprotected speech, and commentary—this being protected critique essential to democratic governance (*Post Publishing Co. v. Hallam*, 10). As a result, “publishers in libel suits, under this rule, were held strictly accountable for the truth of factual statements” (Lawhorne 127). Using this maxim, the Court affirmed the judgment of the circuit court, including the damage award.

While the methodology of the Sixth Circuit Court of Appeals in *Post Publishing Co. v. Hallam* was employed in the majority of states, a standard closely resembling what would become the federal standard of actual malice in 1964 began to develop concurrently in a small number of states (Lawhorne 124). The 1908 case of *Coleman v. MacLennan* is frequently noted as the landmark case from which the malice standard arose. In this case, the plaintiff, the attorney general for the State of Kansas, brought a libel action against the defendant, owner of the *Topeka State Journal*, for alleged-

ly false, defamatory, and malicious statements in an article that charged corruption in the performance of his official duties. At trial, the Court instructed the jury that it must find for the defendant if the statements contained in the article, while factually untrue, were made without malice, defined as an “intent to willfully wrong and injure [the] plaintiff” (Coleman v. MacLennan 2). On these terms, the jury returned a verdict in favor of the defendant, and the plaintiff was granted no damage award (Coleman v. MacLennan 3).

Arguing that the privilege granted to the newspaper overstepped the boundaries of the free press, the plaintiff appealed to the Kansas Supreme Court. Finding its duty to be in striking the proper balance between the interests of private reputation and public welfare, the Court acknowledged that an individual’s reputation “ought to find guarantees of protection in the fundamental law”; nevertheless, it stressed that when issues are of public concern, “the individual must frequently endure injury to his reputation without remedy” (Coleman v. MacLennan 6). In accord with this premise, the Court discarded the claim in *Post Publishing Co. v. Hallam* “that honorable and worthy men will be driven from politics” if the standard for recovery of damages in defamation actions brought by public officials is heightened to protect false statements made in good faith (Coleman v. MacLennan 10). Instead, the Court argued that such a standard existed in Kansas for years, and “men of unimpeachable character from all political parties continually present themselves as candidates in sufficient numbers to fill the public offices and manage the public institutions, and the conduct of the press is as honest, clean, and free from abuses as it is in states where the narrow view of privilege obtains” (Coleman v. MacLennan 11). Therefore, the Court concluded that the stringent standard applied throughout Kansas posed no legitimate threat to the quality of political leadership (Coleman v. MacLennan 11).

In contrast, the Kansas Supreme Court viewed the standard propagated by *Post Publishing Co. v. Hallam* as a potentially crippling influence on the freedom of the press. The Court argued that “the beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy...[and] to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value. It would be better to restore the censorship of a despotism” (Coleman v. MacLennan 11). In the Court’s opinion, “the importance to the state and to society of such [political] discussions is so vast and the advantages derived are so great they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of the individuals must yield to the public welfare” (Coleman v. MacLennan 7). The Court viewed political critique to be essential to the American ideal of democracy, of greater value than the

inevitable risk to personal reputation one runs by entering the public sphere. Therefore, the Court concluded that erroneous statements of fact should be privileged in defamation actions brought by public individuals or concerning matters of public concern, unless malice can be proven by the plaintiff (Coleman v. MacLennan 6). With this decision, the Kansas Supreme Court not only upheld the previous judgment in favor of the defendant, but also lay the groundwork for what would become the federal legal standard of actual malice a half-century later.

### *The Road to Actual Malice*

*Post Publishing Co. v. Hallam* and *Coleman v. MacLennan* typify the two methods with which states chose to handle defamation cases brought by public officials. With no prior uniformity in the application of the law, the United States Supreme Court’s 1964 decision in *New York Times Co. v. Sullivan* created a federal standard to be applied in all states and “brought order and cohesion to an area of libel jurisprudence that had long suffered from dissonance” (Lawhorne 213). L.B. Sullivan, Commissioner of Public Affairs and Supervisor of the Police and Fire Departments in the City of Montgomery, originally brought this civil libel action against *The New York Times* in response to a full-page paid advertisement published on March 29, 1960. The advertisement, entitled “Heed Their Rising Voices,” did not mention Sullivan specifically by name; however, it did contain statements falsely implying his involvement in discriminatory acts (*The New York Times Co. v. Sullivan* 4-5). The manager of *The New York Times*’ Advertising Acceptability Department “testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false” but admitted that “neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement” (*The New York Times Co. v. Sullivan* 7). The Montgomery County circuit court judge instructed the jury that since the allegations were false and therefore libelous under Alabama law, it was their responsibility to determine whether they were made with malice, a veritably undefined standard necessary to be met for the awarding of punitive damages; the judge “refused to charge...that the jury must be ‘convinced’ of malice, in the sense of ‘actual intent’ to harm or ‘gross negligence and recklessness’” (*The New York Times Co. v. Sullivan* 7). The jury returned a \$500,000 verdict in favor of Sullivan. On appeal, the Alabama Supreme Court affirmed the ruling, stating that “malice could be inferred from the Times’ ‘irresponsibility’ in printing the advertisement” (*The New York Times Co. v. Sullivan* 7).

The United States Supreme Court reversed the judgment and held that “the rule of law applied by the Alabama courts is constitutionally deficient for

failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct” (The New York Times Co. v. Sullivan 8). In the Court’s view, the ruling in Alabama would run counter to the First Amendment goal of allowing the widest latitude possible for both the discussion of matters of public concern and public officials themselves (The New York Times Co. v. Sullivan 9). The Court believed that this constitutional free speech safeguard “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” an essential ingredient in holding the American government and its representatives accountable to its citizens (The New York Times Co. v. Sullivan 11). At the same time, the Court was cognizant that the “profound national commitment” to uninhibited public debate would lead to “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” (The New York Times Co. v. Sullivan 11). In the Court’s opinion, such a sacrifice is inherent in the First Amendment (The New York Times Co. v. Sullivan 11).

The Supreme Court found that any law that would put the burden of proving truth on the defendant in a defamation action would be unconstitutional, as misstatements of fact are inevitable in free debate (The New York Times Co. v. Sullivan 11). Considering the history of the Sedition Laws, the Court reasoned that “a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self censorship.’ Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred” (The New York Times Co. v. Sullivan 15). Under a standard that fails to protect misstatements of fact made in good faith, critics of public officials may choose not to voice pertinent issues, fearing that they will be unable either to prove them in a court of law or to finance such a trial. The standard promulgated in Alabama likewise “dampens the vigor and limits the variety of public debate,” contrary to the First and Fourteenth Amendments (The New York Times Co. v. Sullivan 15). Preventing state courts from creating and utilizing standards that do not align with the United States constitution, the Court created a federal standard for recovery in defamation actions brought by public officials (Lawhorne 228).

Using *Coleman v. MacLennan* as a model, the Court developed a standard that “prevents a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not” (The New York Times Co. v. Sullivan 15). If a factual statement is spoken or published about

a public official without actual malice, then it is privileged regardless of its truth or falsity. However, when a factual statement is false, it is the burden of the plaintiff, generally the public official in question, to prove actual malice on the part of the defendant in making the speech or publishing the text (The New York Times Co. v. Sullivan 16). The Supreme Court, therefore, reversed the Alabama court’s judgment and remanded the case for reconsideration under the newly created federal malice standard (The New York Times Co. v. Sullivan 17).

### *After Sullivan*

Following the Supreme Court’s ruling in *New York Times Co. v. Sullivan*, several cases were brought before the Court in which the malice standard was clarified and expanded (Kane 6.) In the 1967 case of *Curtis Publishing Co. v. Butts*, the issue to be decided was whether the burden of proving malice was applicable to defamation actions brought by public figures, in addition to public officials. The plaintiff, athletic director of the University of Georgia, brought this libel action against the defendant, publisher of the *Saturday Evening Post*, in reference to an article entitled “The Story of a College Football Fix” (*Curtis Publishing Co. v. Butts* 7). In the article, the defendant accused the plaintiff of “conspiring to ‘fix’ a football game between the University of Georgia and the University of Alabama” (*Curtis Publishing Co. v. Butts* 7). At trial, the “jury returned a verdict for \$60,000 in general damages and for \$3,000,000 in punitive damages. The trial court reduced the total to \$460,000” (*Curtis Publishing Co. v. Butts* 9). The Court of Appeals for the Fifth Circuit affirmed the judgment, and the Supreme Court then accepted the case “to consider the impact of that decision on libel actions instituted by persons who are not public officials, but who are ‘public figures’ and involved in issues in which the public has a justified and important interest” (*Curtis Publishing Co. v. Butts* 7).

Essentially, in deciding whether public figures are obligated to prove malice in accordance with the *New York Times* standard, the Supreme Court was declaring whether public officials and public figures were to be viewed in the same light in the context of defamation actions. The Court first reasoned that a “distinction ‘cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of policy will be less important to the public interest than will criticism of government officials’” (*Curtis Publishing Co. v. Butts* 13). While such a distinction may have previously been appropriate, the Court recognized that “in many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations,

some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large” (Curtis Publishing Co. v. Butts 21). Therefore, the Court concluded that public figures’ “views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of ‘public officials’ with respect to the same issues and events” (Curtis Publishing Co. v. Butts 20). In the Court’s view of the Butts case, “the public interest in the circulation of the materials here involved, and the publisher’s interest in circulating them, is not less than that involved in *New York Times*” (Curtis Publishing Co. v. Butts 16). In accord with this principle, the Court concluded that the malice standard should be applied in the same manner for defamation actions brought by public figures as it is for those brought by public officials (Curtis Publishing Co. v. Butts 17). Finding the evidence in the case to support such a finding of actual malice, the Supreme Court affirmed previous judgments in favor of the plaintiff (Curtis Publishing Co. v. Butts, 20). With this ruling, the applicability of the malice standard was enlarged from merely encompassing public officials to also including public figures.

While the Supreme Court had created a standard by which all defamation cases involving public officials could be adjudicated in *New York Times Co. v. Sullivan*, malice standard cases were often fraught with confusion and error in the years following its inception due to the unclear wording of the standard. The Supreme Court chose to hear the case of *St. Amant v. Thompson* in 1968 in order to clarify its intentions and language in the *New York Times Co. v. Sullivan* opinion (Lawhorne 253). The plaintiff, Thompson, an East Baton Rouge Parish deputy sheriff, brought suit for defamation against the defendant, St. Amant, a candidate for public office, claiming that he had been slandered in a televised speech the defendant made in Baton Rouge. In the speech, the defendant allegedly implicated the plaintiff in the theft of a safe by reading a series of answers to questions he had put to a member of the local Teamsters Union. The case was originally decided in favor of the plaintiff for \$5,000 by the trial judge, but the ruling preceded *New York Times v. Sullivan*. On appeal, the Court found the ruling in *New York Times v. Sullivan* to be no barrier to the judgment already entered (*St. Amant v. Thompson* 2). However, upon further appeal, the Louisiana Court of Appeals reversed the \$5,000 damage verdict, as no proof existed showing that the defendant acted with actual malice. Nevertheless, the Supreme Court of Louisiana reinstated the verdict, declaring that “there was sufficient evidence that St. Amant recklessly disregarded whether the statements about Thompson were true or false” (*St. Amant v. Thompson* 2). The

contradictory history of this case clearly indicated to the Supreme Court that the malice standard, as defined in *New York Times v. Sullivan*, was too vague to be consistently applied and, as such, needed refinement (Lawhorne 253).

The United States Supreme Court concurred with the Louisiana trial and supreme courts in making a finding of fact that the defendant’s speech falsely accused the defendant, a public official, of criminal conduct. However, the Court disagreed with the trial court and Louisiana Supreme Court’s ruling that the defendant’s false statements were made with actual malice, because the evidence was insufficient to prove reckless disregard for the truth (*St. Amant v. Thompson* 2). The Court acknowledged that since reckless disregard “cannot be fully encompassed in one infallible definition,” “its outer limits will be marked out through case-by-case adjudication” (*St. Amant v. Thompson* 3). The Court relied on its 1967 ruling in *Curtis Publishing Co. v. Butts* to place the burden upon the plaintiff to prove the defendant either made the false statement deliberately or with a “high degree of awareness of probable falsity” for a finding of reckless disregard (*St. Amant v. Thompson* 3). In the view of the Court, “these cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice” (*St. Amant v. Thompson* 3).

In its opinion, the Court conceded that this rule encouraged ignorance and irresponsibility on the part of speakers and publishers in discovering misstatements of fact. The Court also recognized that the reckless disregard rule tended to make recovery increasingly difficult; nevertheless, the Court maintained its view that the rule adhered to the standard set forth in *New York Times v. Sullivan* (*St. Amant v. Thompson* 3). The Supreme Court reversed the verdict in favor of the plaintiff, finding no awareness of probable falsity on the part of the defendant (*St. Amant v. Thompson* 4).

In the 1974 case of *Gertz v. Robert Welch, Inc.* it was the question of who was a public figure that was in dispute (Gillmor 32). The plaintiff, a lawyer representing the family of a murder victim in a civil action against his convicted killer, a Chicago policeman named Richard Nuccio, brought this libel action against the plaintiff, owner and publisher of the magazine *American Opinion*, for an article entitled “FRAME-UP: Richard Nuccio And The War On Police.” The article not only alleged that the plaintiff was responsible for framing Nuccio in his criminal trial, but also claimed that he had a criminal record and was a member of the communist party; all these assertions were found to be false in their entirety. At trial, the managing editor of the *American Opinion* admitted to making “no effort to verify or sub-

stantiate the charges.... Instead, he appended an editorial introduction stating that the author had ‘conducted extensive research into the Richard Nuccio Case’” (*Gertz v. Robert Welch, Inc.*, 4). Likewise, the editor denied knowledge of the falsity of the statements, stating that he “relied on the author’s reputation and on his prior experience with the accuracy and authenticity of the author’s contributions to *American Opinion*” (*Gertz v. Robert Welch, Inc.*, 5). In adjudicating the case, the district court concluded that the standard enunciated in *New York Times v. Sullivan* “protects media discussion of a public issue without regard to whether the person defamed is a public official...or a public figure (*Gertz v. Robert Welch, Inc.*, 2). Therefore, the Court ruled in favor of the defendant, because the plaintiff “failed to prove knowledge of falsity or reckless disregard for the truth” (*Gertz v. Robert Welch, Inc.*, 3).

On appeal, the plaintiff contested the applicability of the malice standard to his case as derived from *New York Times v. Sullivan*. The Court of appeals ruled that the malice standard’s application is required for “any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed” (*Gertz v. Robert Welch, Inc.*, 6). Thus, the appeals court upheld the verdict of the district court in favor of the defendant. In accepting the case, the Supreme Court set out to formulate a definitive procedure to handle the problematic issue of “whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official or a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements” (*Gertz v. Robert Welch, Inc.*, 7). While the malice standard “defines the level of constitutional protection appropriate to the context of defamation of a public person...who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office,” a less stringent standard for private individuals to obtain compensation for injury to their reputations was appropriate in the view of the Court (*Gertz v. Robert Welch, Inc.*, 12). The justices reasoned that since public officials and figures inherently possess greater access to the media than private persons, they “have a more realistic opportunity to counteract false statements than private individuals normally enjoy” (*Gertz v. Robert Welch, Inc.*, 12). The Court also argued that public officials and public figures attain a position of prominence and power within society by their own action, making inquiry into their attributes part of public debate; however, “no such assumption is justified with respect to a private individual. He has not accepted public office or assumed an ‘influential role in ordering society’.... Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery”

(*Gertz v. Robert Welch, Inc.*, 13). Therefore, the Court determined that the situation of private individuals demands a correspondingly greater level of protection against defamations.

In making this judgment, the Court developed a test by which to determine whether an individual was in fact a public figure or a private individual. The Court argued that an individual must achieve some semblance of general fame in his or her community in order to be considered a public figure and that “a citizen’s participation in community and professional affairs” did not render him as such for all aspects of his or her life (*Gertz v. Robert Welch, Inc.*, 16). The Court also emphasized that “it is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation” (*Gertz v. Robert Welch, Inc.*, 16). Thus, cases in which an individual involuntarily injects himself or herself into public controversy should be few. The Court concluded that the extension of the malice standard to private individuals even in matters of public concern would be unconstitutional (*Gertz v. Robert Welch, Inc.*, 13).

As a result of this ruling, the Supreme Court instituted the less stringent standard of negligence for defamation actions brought by private individuals, mandating that states must restrict damage awards for private individuals “who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury” (*Gertz v. Robert Welch, Inc.*, 15). Actual injury in the view of the Court consisted of out-of-pocket loss, impairment of reputation, injury to standing in the community, personal humiliation, and mental anguish and suffering. Nevertheless, in order to recover punitive damages, the private individual was still obligated to carry the burden of the *New York Times v. Sullivan* malice standard, since “punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions” (*Gertz v. Robert Welch, Inc.*, 15). Applying these principles to the case at hand, the Court reversed the judgment of previous courts that the plaintiff became a public figure by representing his clients in a civil action against a police officer, stating that such a “suggestion would sweep all lawyers under the *New York Times* rule” (*Gertz v. Robert Welch, Inc.*, 15). The case was remanded for consideration under the lesser standard of negligence for a finding of actual damages as applicable to defamation actions brought by private individuals” (*Gertz v. Robert Welch, Inc.*, 16). For the first time, the Supreme Court placed the rights of private persons above those of public officials and figures in the field of defamation.

The 1979 case of *Herbert v. Lando* followed debate over the malice standard after the Supreme Court’s decision in *Gertz v. Robert Welch, Inc.* The petitioner, “a retired Army officer who had extended wartime service in Vietnam and who received widespread media attention in 1969-1970 when

he accused his superior officers of covering up reports of atrocities and other war crimes,” brought this libel suit against the defendant, both a television producer for CBS and writer for Atlantic Monthly Magazine (Herbert v. Lando 4). The defendant allegedly circulated false and malicious statements both on television and in print that accused the plaintiff of being a “liar and a person who had made war-crimes charges to explain his relief from command” (Herbert v. Lando 4). The plaintiff acknowledged that he was a public figure under the precedent propagated in *Curtis Publishing Co. v. Butts* and, as such, was obligated to prove malice on the part of the defendant (Herbert v. Lando 4). In order to sustain such a burden in court, the plaintiff deposed the defendant “at length and sought an order to compel answers to a variety of questions to which response was refused on the ground that the First Amendment protected against inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process” (Herbert v. Lando 4). While the district court rejected the claim of privilege, the Court of appeals overruled, arguing that the “First Amendment lent sufficient protection to editorial processes to protect Lando from inquiry about his thought, opinions, and conclusions with respect to the material gathered by him and about his conversations with his editorial colleagues” (Herbert v. Lando 5).

In its decision, the Supreme Court “concluded that the Court of Appeals misconstrued the First and Fourteenth Amendment” and reversed the judgment as such (Herbert v. Lando 5). The Court argued that since “New York Times and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant,” it would be completely unreasonable to foreclose direct inquiry into these factors (Herbert v. Lando 6). The Court reasoned that foreclosing access to the editorial process from a plaintiff would make proving malice nearly impossible. In the Court’s view, if a “defendant’s reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions, and conclusions of the publishers, but could be proved only by objective evidence from which the ultimate fact could only be inferred,” then the plaintiff would be critically inhibited in his or her ability to legally redress defamatory statements (Herbert v. Lando 12). Affording privilege to the internal communications between colleagues involved in the editorial process would only further cripple such actions, making virtually all information generated in the reporting process constitutionally protected. The Court argued that all direct or indirect evidence relevant to the state of mind of a defendant in attempts to overcome a claim of conditional privilege has traditionally been considered; evidence relating to the editorial process of the press has been subject to similar scrutiny and has not been considered constitutionally objectionable (Herbert v. Lando 9). Specifically, the Court in the case of

*Gertz v. Robert Welch, Inc.* placed “the state of mind of the editor...at issue...requiring proof of some degree of fault on the part of the defendant” (Herbert v. Lando 11). Therefore, the Court concluded that “accord[ing] an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of the standard expressed in *New York Times*” (Herbert v. Lando 12).

The Court rejected the argument that providing a plaintiff with direct access to a media defendant and his or her collaborators would have a chilling effect on public debate contrary to the aims of the First Amendment and *New York Times Co. v. Sullivan*. Quite the opposite the Court argued: “If the claimed inhibition flows from fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment (Herbert v. Lando 13). Therefore, the Court overturned the Court of Appeals ruling and granted the plaintiff access to not only the media defendant but also to those involved in the editorial process in order to meet the evidentiary burden of actual malice (Herbert v. Lando 14).

In its opinion, the Supreme Court acknowledged that the cost of defamation actions brought by public officials or public figures would likely skyrocket as a result of its ruling. With the standard of malice being so difficult to prove, “plaintiffs in consequence now resort to more discovery,” with “the cost and other burdens of this kind of litigation” escalating for the plaintiff (Herbert v. Lando 15). Thus, it was revealed in *Herbert v. Lando* that the *New York Times* standard may inhibit public officials and public figures ability to redress defamations due to the likely economic burdens of proving the stringent standard of malice.

While the Supreme Court held in *New York Times Co. v. Sullivan* that “actual malice must be shown with ‘convincing clarity’” in defamation actions brought by public officials, which was later extended to encompass public figures as well, no precedent had yet been promulgated on the issue of whether the “clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment” when the 1986 case of *Anderson v. Liberty Lobby, Inc.* came before the Court (*Anderson v. Liberty Lobby, Inc.* 7). The plaintiff, a not-for-profit citizens’ lobby, brought this libel action against the defendant, publisher of the magazine *The Investigator*, in reference to three articles that described the plaintiff’s lobby as being neo-Nazi, anti-Semitic, racist, and Fascist. Following the discovery period, the defendant filed a motion for summary judgment, supported by an affidavit of the articles’ author claiming that he believed and continued to believe the sources of his information to be truthful (*Anderson v. Liberty Lobby, Inc.* 7). After the district court granted summary judgment, the

Court of Appeals reversed this decision, holding that “to defeat summary judgment respondents did not have to show that a jury could find actual malice with ‘convincing clarity’ (Anderson v. Liberty Lobby, Inc. 8). The Supreme Court accepted the case to determine if the “Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this New York Times case need not be considered for the purposes of a motion for summary judgment (Anderson v. Liberty Lobby, Inc. 8).

The Court’s analysis in determining the applicability of the convincing clarity evidentiary standard to summary judgment focused primarily on the proper role of the judge. Relying on Rule 56 of the Federal Rules of Civil Procedure, the Court reasoned that “there is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party” (Anderson v. Liberty Lobby, Inc. 10). While this procedure is normally interpreted to view all evidence in the light most favorable to the party opposing summary judgment, the Court concluded nonetheless that such an inquiry “implicates the substantive evidentiary standard of proof that would apply at the trial...the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury would reasonably find for the plaintiff” (Anderson v. Liberty Lobby, Inc. 11). As a result, the judge must decide solely from the evidence presented in affidavits and preliminary hearings “whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not (Anderson v. Liberty Lobby, Inc. 12).

Since the Court of Appeals did not apply the convincing clarity evidentiary standard, the Supreme Court remanded the summary judgment motion for consideration under the proper guidelines; however, it is the broader implications of Anderson v. Liberty Lobby, Inc. that carry the most weight (Anderson v. Liberty Lobby, Inc. 13). In essence, the Supreme Court’s decision made it such that the plaintiff had to prove its entire case in the summary judgment phase to simply earn the right to a jury trial. The result has been a dramatic upturn in the number of defamation actions resulting in dismissal on summary judgment, with figures suggesting that it may be as high as 80% (Anderson 9). Thus, the pathway to legal redress for defamation of public officials and public figures became further obstructed.

### *Analysis of the Actual Malice Standard and Proposals for Improvement*

As the cases discussed have displayed, the history of libel law has certainly been written in the midst of heated debate. The Supreme Court’s 1964 effort to promulgate a uniform standard of malice in *New York Times Co. v. Sullivan* has done little to assuage those on either side of the argument; the malice standard “has failed to deal adequately with the strains between the reputations of the powerful and the celebrated and the right of others to speak publicly about those reputations” (Gillmor 36). The result of the struggle has been a complex and often contradictory case history that has clouded defamation law to a point that many legal scholars question its success in protecting freedom of the press, reputation, or the political process itself (Anderson 25).

In his article entitled “*New York Times v. Sullivan Reconsidered: Time to Return to ‘The Central Meaning of the First Amendment’*,” published in the *Columbia Law Review*, Anthony Lewis applauds the Supreme Court for its creation of the malice standard in *New York Times v. Sullivan*. Lewis argues that the Court’s ruling in the case enabled the American press to continue covering controversial issues of the greatest political significance without fear of retaliation (Lewis 2). Indeed, for several years following the 1964 case, “there were virtually no recoveries by public officials in libel actions” (Lewis 3-4). Lewis contends that the creation of the malice standard effectively foreclosed the use of the defamation suit as “a weapon in a political struggle” (Lewis 2). In his view, this effect is mandated by the First Amendment aim to protect “political expression: the right of Americans to write and speak as they will about politics and public affairs” (Lewis 2).

Despite its early success in protecting First Amendment interests, the malice standard is ripe for reform in Lewis’s view due to its failure to continue to do so. Lewis argues that the cost of defending libel suits under the malice standard is too high, “not only in money but in time and in the psychological burden on editors and reporters” (Lewis 4). He believes that the amorphous characterization of actual malice mandates “intensive, prolonged, enormous discovery,” a fact acknowledged in the case of *Herbert v. Lando* (Lewis 4). Worse yet, while actual malice “remains a very useful defense before judges” in the summary judgment phase, it is of little protection before juries at trial (Lewis 7). Lewis argues that juries are unable to apply appropriately the complicated and complex terms of the malice standard as charged to them. Instead, their antagonism to the institutions that are typically defamation defendants, media outlets, prompts erroneous findings of actual malice (Lewis 6). As a result, the malice standard “may discourage the voicing of criticism that is believed to be true and may indeed be true” (Lewis 7). Therefore, Lewis contends that the malice standard fails to provide ade-

quate protection to First Amendment political speech.

In order to counteract the First Amendment failures of the malice standard, Lewis proposes a multi-faceted reform policy. He first suggests that damages be limited to provable financial losses in order to forestall against enormous jury verdicts that exact a chilling effect on political debate. In Lewis's view, the true purpose of defamation law, to protect individual reputation, "does not require colossal damage verdicts" (Lewis 7). Secondly, he proposes a greater degree of judge involvement in the jury process. In addition to making a finding on the presence of actual malice and determining a damage verdict if present, juries would be required to answer a series of more specific questions in order to expose the potentially "faulty basis of jury deliberations" (Lewis 8). In addition, he argues that appellate courts should be prepared to analyze jury verdicts in defamation suits with a greater degree of skepticism (Lewis 8). Lewis concludes that "time has shown that the [malice] test does not work well enough," and "critics of official conduct" should not be forced to "wait for general reforms in our law to get relief from the burdens that induce self-censorship" (Lewis 12).

In his article entitled "Malice, Lies, and Videotape: Revisiting *New York Times v. Sullivan* in the Modern Age of Political Campaigns," published in the *Rutgers Law Journal* in Thomas Kane makes the argument that the "central goal of modern [political] campaigns is to 'tarnish' the personality of opposing candidates" (Kane 2). He theorizes that defamation has essentially become the currency of politics, and the malice standard of *New York Times Co. v. Sullivan* is the paper on which this currency is printed (Kane 2). Kane sees the thirty-five years following the case as a period in which the scope of *New York Times* was broadened, the scope of malice was more narrowly defined, and further legal protections afforded defamers until there was no longer any deterrent to campaign slander (Kane 3). He identifies *Curtis Publishing Co. v. Butts* and *Gertz v. Robert Welch, Inc.* as two cases that dramatically altered the application of the malice standard, expanding its usage to encompass not only public officials but also public figures. This amorphous distinction allowed the *Gertz* court to declare: "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts" (Kane 6). In making such a declaration, Kane believes the Supreme Court abandoned the rationale it used to develop the malice standard originally, to protect against the legacy of the Sedition Laws and encourage political debate (Kane 6). Nevertheless, for Kane, it was the Supreme Court's ruling in *St. Amant v. Thompson*, where actual malice was construed as reckless disregard, which had the greatest effect on the defamations of public officials. He contends that "like all subjective standards, it forces the plaintiff to prove a fact about the defendant's state of mind without reference to the proclivities of a reasonable per-

son...often an insurmountable obstacle for plaintiffs in campaign slander cases" (Kane 7). Similarly, Kane views the "clear and convincing" evidentiary standard of *Anderson v. Liberty Lobby, Inc.* as a block to redress of defamations for public officials and figures, as "plaintiffs in *New York Times* cases must jump a higher summary judgment hurdle than other plaintiffs" (Kane 7). Despite his belief that "*New York Times* and its progeny have effectively blocked attempts to regulate defamatory speech in political campaigns," Kane believes that there "is still room left under *New York Times* for a meaningful and constitutional vindication of the truth" (Kane 10).

Kane presents a reform proposal known as the Campaign Slander Action Plan. In this plan, the "defamed candidate would be asking the Court to make a factual finding that the publication in question was inaccurate, and to enter that finding in the public record"; however, there would be no monetary damages assessed and the malice standard would be discarded (Kane 12). Kane argues that this would enable the candidate a much more efficient legal redress to reputational harm than the present standard affords (Kane 12). He is quick to refute the argument that the Campaign Slander Action is not a practical tool against those who claim candidates would not go through the costly litigation process without the possibility of a monetary award, placing a political candidate's reputation as foremost given its weight on the likely outcome of an election (Kane 13). Kane also rebuts those who argue that Campaign Slander Actions would be unable to be considered by the judicial system in a timely fashion, comparing them to temporary restraining orders and preliminary injunctions; any failure to handle the actions in an efficient manner would not be a flaw of Campaign Slander Acts but of the Court system itself (Kane 13). In addition, he contends that the rising costs of litigation would be a sufficient deterrent to potential defamers, as legal fees often exceed monetary damages today. In Kane's view, the continued proliferation of hefty legal expenses would certainly not be unfavorable to Campaign Slander Act reform, as the Supreme Court in *Herbert v. Lando* already recognized rising litigation costs due to lengthy discovery as a necessary evil under the malice standard, with less discovery being necessary to simply prove truth or falsity under Campaign Slander Action (Kane 15).

As Kane argues, Campaign Slander Action discards the complex and contradictory aspects of the malice standard and makes public correction of false accusations timely. In this manner, the wrongs of defamations against candidates are corrected in an efficient manner not possible under the *New York Times* standard (Kane 3). Those who made the comments will be shown to have made false comments in order to gain a competitive advantage, and their reputations will be correspondingly tarnished. Meanwhile, the reputations of those defamed will be restored to their earlier condition as best as possible (Kane 15). Defamation will carry with it the threat of penal-

ties with increased likelihood. This increased potential for legal redress under the Campaign Slander Action Plan will add strength to defamation law where the malice standard left impotency. As a result, defamation will no longer be the focus of political debate, and First Amendment speech privilege will be returned to its true value, protecting meaningful political debate (Kane 16). Thus, Kane concludes that in “an era where political candidates lie with impunity,” Campaign Slander actions are in fact consistent with the First Amendment and the Supreme Court’s ruling in *New York Times*, since the absence of monetary damages will not chill speech, and will concurrently provide a more efficient and practical redress to reputational damage to public officials as a result of defamations (Kane 20).

In an article published in the *North Carolina Law Review* in entitled “Of Libel, Language, and Law: *New York Times v. Sullivan* at Twenty-Five,” Sheldon W. Halpern also recognizes that since the creation of the malice standard in the legal system “has witnessed the application of an increasingly complex gloss to the comparatively simple proposition with which the Court dealt in *Sullivan*” (Halpern 2). For Halpern, “the movement from the strong *Sullivan* consensus that a public official must carry a heavy burden in basing a defamation action on criticism of his or her official conduct to the Court’s fragmentation in *Butts*...and *Gertz*, when the character of the plaintiff and the nature of the utterance changed, is indicative of the highly charged and difficult balancing problems presented” by the malice standard (Halpern 6). In the Supreme Court’s attempts to measure the constitutional interest in public debate against the individual’s reputational rights, Halpern believes that it has placed “an increasingly tight procedural rein on the defamation plaintiff” (Halpern 9). In Halpern’s view, this abstract balancing act has left the current laws of defamation in shambles: “The actual malice standard essentially has served to undercompensate the injured victim of defamation while unduly burdening the entire litigation process. It has produced ‘grossly perverse results’” (Halpern 21). He, therefore, seeks to propagate a system of reform that will extricate the reputational interests of the defamed plaintiff from the weighty burdens of actual malice (Halpern 16). While recognizing plans like Campaign Slander Action as a step in the right direction, Halpern sees that “there is little reason to believe that the limitation of sanctions to a form of reprimand would not serve as a license to defame” (Halpern 19). Thus, he contends that an “effective law of defamation must contemplate redress in the form afforded other tort victims—money damages” (Halpern 19).

However, like Kane, Halpern does not wish to discard the Supreme Court’s ruling in *New York Times Co. v. Sullivan*. Quite to the contrary, Halpern sees its “constitutional grounding of defamation action on both falsity and fault” as essential: “It is the change from absolute to faulted-based

liability, rather than choice of a particular degree of fault, that is the essence of *Sullivan* and the source of its enduring value” (Halpern 21). Therefore, Halpern’s quest is to replace malice with a different fault standard, namely professional negligence, defined as “conduct conforming to the normal, usual, and reasonable standards of one situated as is the defendant” (Halpern 22). Those who argue that such a standard affords too little protection for the press do so in the face of a legal history in which “negligence has served as the paradigmatic fault standard” for both medical and legal malpractice claims (Halpern 22). Thus, professional negligence simply asks that a journalist “who purports to be a professional behave professionally” (Halpern 23). In addition, the Supreme Court declaration in *Gertz* that negligence was not a standard “equivalent to absolute liability or an undue burden on a free press” in defamation actions brought by private figures would invite a universal application to all individuals, practically eliminating the haze now surrounding the usage of the malice standard (Halpern 22).

In these changes, Halpern can see no contradiction with the values of free speech and public debate: “First Amendment concerns are met by a workable and comprehensible schema of liability for the infliction of harm by defamatory speech when that harm is the product of a clearly and convincingly proven failure to adhere to the reasonable standards of the publishers profession. Only the most hypersensitive of reportorial skins could feel a chill from such a system” (Halpern 23). Since innocent error goes unpunished under the falsity and fault approach utilized by the Supreme Court in *New York Times* and advocated by Halpern, “our societal concern for the free dissemination of ideas and criticism, the breathing space necessary to an effective freedom of speech,” is left largely untouched (Halpern 23). Meanwhile, the interest of an individual’s reputation is given significantly more consideration than under the malice standard. Thus, Halpern’s standard of professional negligence would adhere to *New York Times Co. v. Sullivan*’s falsity and fault principle, while “not encumbered with matrices of liability and damages revolving around the status of the parties or the nature of the utterance” (Halpern 23).

While legal scholars may not agree as to the best method by which to reform defamation law, the option of leaving it intact to continue under the malice standard of *New York Times v. Sullivan* appears to have detrimental effects on public officials, public figures, and the media. In his article “Is Libel Law Worth Reforming?” published in the *University of Pennsylvania Law Review* in David A. Anderson argues that both the media and the political process experience detrimental effects as a result of the malice standard. Anderson recognizes that even the odds being weighted in favor of the media in *New York Times* cases does little to reduce the chill on political debate that punitive damages cause. While there may be a significantly higher probabil-

ity of a media defendant winning a defamation suit than a public plaintiff, there certainly are no guarantees. Defendants must engage in lengthy and expensive litigation processes that often tax their budgets as much as an actual punitive damage award. Additionally, even when large punitive damage verdicts are overturned by higher courts, as they often are, Anderson believes they still exact a large financial penalty. Defendants in the midst of the lengthy appeals process are unable to secure financing and are constantly burdened with a looming catastrophe on their balance sheet. Thus, the possibility of punitive awards under the malice standard still makes its force felt on the media, dampening the vigor of public debate (Anderson 10).

Anderson sees the most ominous threat of leaving the malice standard in place to be the effect it has on the quality of public officials. He argues that the “malice rule obviously deters participation in public life. No rational person can fail to take into account the reputational consequences of this rule when deciding to run for public office” (Anderson 16). In instances where individuals choose not to run in order to prevent disclosure of some past misdeed, the malice standard surely serves its aim, encouraging discovery and publication of relevant political information; however, the sweeping strokes through which it is applied makes this singular effect impossible to achieve. Indeed, individuals who have nothing to hide but “fear false accusations about matters in which they are blameless” may choose simply not to run, because “they have no stomach for a life in which they know they and their families will have to endure scurrilous aspersions” (Anderson 16). Anderson contends that those who do choose to participate in the political arena will likely be of a different integrity from those who choose to stay on the sidelines, attracting “personality types who relish the combat of personal attack...while other types are repelled” (Anderson 16). This effect appears to be what Kane was identifying when he described modern politics as the politics of personal attack, crippling the public’s faith in the political process. However, as Anderson argues, this effect is not only felt in the realm of politics, since the malice standard also applies to public figures. He believes that “a person who is deeply disturbed by defamatory falsehood may find it hard to survive at the highest and most visible levels of sports, business, religion, or education” (Anderson 16). Therefore, in Anderson’s view, the malice standard effectively discourages the most desirable individuals from success in their chosen field, in order to avoid the likely attacks of the media and their less scrupulous peers.

Lastly, Anderson contends the malice standard leads to the “deprecation of truth in public discourse” (Anderson 17). He argues that the fact the malice standard grants a very high degree of protection to falsehoods has encouraged the distribution of scandalous and lurid information without effort to corroborate its truth or falsity. An effect of this has been that the public

increasingly places less and less credence in the truth of public debate, devaluing it substantially (Anderson 17). Anderson’s contention is supported by a 2002 Fox Broadcasting Company poll of registered American voters in which 61% believed negative ads “are usually full of lies and try to mislead people rather than provide voters with information” (Fox Broadcasting Company 2000). Anderson believes that what the malice standard has essentially done is build a dividing wall of skepticism between the public and those that disseminate information, the antithesis of the Supreme Court’s motives in *New York Times Co. v. Sullivan*. He suggests that “if the public knows the press is legally accountable for defamatory falsehoods, it may infer that the press must have some evidence that a defamatory accusation is true” (Anderson 17). Thus, Anderson concludes that the Supreme Court’s adoption of a standard that would make legal redress for defamation of public plaintiffs easier while eliminating the threat of punitive awards would actually be a step up from what he considers a devalued currency of public information, ultimately benefiting First Amendment interests.

### *Conclusions*

The First Amendment of the United States Constitution guarantees Americans the right to freely express their beliefs and opinions, whether in written or verbal form. The language of the text clearly states, “Congress shall make no law...abridging the freedom of speech, or of the press” (United States Constitution, First Amendment). While this statement leaves little room for further legislation in the realm of free speech, it does allow for the creation of law in this area through jurisprudence, as the cases discussed have shown. As a result, freedom of speech has never been absolute, open to any and all communication an individual or group wishes to utter (Lawhorne 40). Instead, First Amendment defamation jurisprudence has placed limits on free speech with the intention of protecting Americans from unfair and slanderous attack. Thus, when the Supreme Court created the standard for defamation actions brought by public officials in it sought to counterbalance this concern for reputation against the First Amendment interest in protecting political speech (Lewis 3). Nevertheless, in the period following the decision in *New York Times v. Sullivan*, the degree of protection for the reputations of public plaintiffs began to dissipate case by case. This trend is supported by a study of defamation cases recorded in the *Media Law Reporter* from 1982 to 1988 that revealed actual malice was only found in nine percent of the cases in which it was addressed. Worse yet, this figure decreased to less than five percent once the appeals processes had been concluded (Gillmor 7). This slight chance for legal redress supports the conclusion that the malice standard fails to adequately protect individual reputation.

Despite the fact that the malice standard has proven to be successful in granting the First Amendment extensive protection in the Courtroom, it still remains deficient in representing the interest of political speech, as Anthony Lewis argued in his article. While defamation suits brought by public plaintiffs might have little chance of succeeding, they still abound, since the threat of bringing a suit is perhaps the only weapon public plaintiffs still possess to combat defamation. As a result, defendants are forced to pour massive monetary and psychological efforts into defending these suits at an often-comparable toll to a finding of actual malice against them (Lewis 4). The desire to avoid being dragged into a defamation suit causes self-censorship that the malice standard was designed to avoid. Thus, the malice standard appears to also undervalue First Amendment speech.

As the legal scholars discussed have demonstrated, the demand to counteract these tendencies with reform is certainly present in the legal community; however, the Supreme Court has thus far chosen to leave New York Times and its progeny intact. Perhaps it is the public at large that needs to coalesce to make such change a reality; statistics reveal that such is the wish of American society. In the same year the Supreme Court passed down its ruling in *Anderson v. Liberty Lobby, Inc.* 89% of Americans polled supported the adoption of a standard of liability that would make the press subject to libel suits purely on the basis of false statements. In the same survey, 75% of those polled agreed that libel laws should be the same for public officials and private citizens (The Times Mirror Company 1989). Nevertheless, the Supreme Court chose to further burden the public plaintiff in that year by applying the “clear and convincing” evidentiary standard to the summary judgment phase of a defamation action, a declaration that has relegated nearly 80% of media libel cases dismissed by defendant motions for summary judgment (Anderson 9).

Perhaps the discrepancy between public opinion on the proper liability standard in defamation actions and the malice standard can be traced to citizens’ discontent with the quality of their representation in government. Indeed, in its 1893 decision in *Post Publishing Company v. Hallam*, the Sixth Circuit Court of Appeals had forewarned that the application of a fault standard as stringent as malice would discourage capable individuals from political involvement. Almost a century later, David Anderson was making the very same argument, only his conclusion was not speculative but rather the product of observation; it appears that the malice standard has in fact deterred ideal candidates from running for political office. A 1999 Los Angeles Times poll revealed that 72% of registered voters agreed with the statement that “the most capable and talented people who would consider running for president will not run because of the scrutiny their private lives would undergo in the media and elsewhere (Los Angeles Times 1999). Five

years earlier, in 64% of Americans believed that qualified people being reluctant to go into politics was a problem with the government (Times Mirror for The People & The Press 1994). These results indicate that the public does not believe the individuals it would consider ideal politicians are choosing such a career path. This belief is supported by a 1993 U.S. News and World Reports survey showing 57% of male students and 74% of female students at Ivy League universities said that they would not even consider running for office (U.S. News & World Report 1993). When individuals who attend America’s premier institutions choose to shun political involvement at such a rate, the fears of a nation appear to be at least somewhat substantiated. If the quality of political leadership has decreased to the point that the American public considers it to be a serious problem within the government, then it appears necessary to reevaluate whether there may be causal correlation to the malice standard, a correlation that was previously denied in *Coleman v. MacLennan*.

The rationale behind a qualified and capable individual’s choice not to run for office is often predicated upon the sparse chance for legal redress for defamation that the malice standard affords public plaintiffs, further substantiating the argument for reform. As previously noted, actual malice was found in less than five percent of cases in which it was addressed in a six-year study of defamation cases recorded in the Media Law Reporter (Gillmor 7). With little chance of legal redress for defamation, political campaigns are increasingly filled with false attacks on the reputations of competing candidates, a factor certain to discourage political participation. In a 2002 Fox Broadcasting Company poll of registered American voters, 61% believed negative ads “are usually full of lies and try to mislead people rather than provide voters with information” (Fox Broadcasting Company 2000). Similarly, a 2002 poll of registered voters in California asked whether political radio or television commercials had generally been informative or misleading during the election; more than two to one, the public found against the character of the ads, with 55% finding them to be misleading and only 22% finding them to be informative (Los Angeles Times 2002). Thus, as Thomas Kane discussed, the currency of politics has become defamation and that currency is printed upon the New York Times malice standard. If the foremost aim of the Supreme Court in the creation of the malice standard was to protect public debate in order to ensure good government, then it would be logical to conclude that inferior government as a result of the malice standard would signal the need for change.

Meanwhile, the media continues to strive to unearth the most scandalous and lurid stories on the lives of politicians, often at the expense of truth. The malice standard rewards the negligent journalist as it encourages apathy to fact-checking, since under the Supreme Court’s ruling in *St. Amant*

v. Thompson, malice cannot be found without a defendant's knowledge of the probable falsity of a statement. In this vein, 73% of Arizona residents found in a 1998 poll that the media goes too far "in investigating the private lives of elected officials" (Behavior Research Center of Arizona 1998). The segments of the media sector that engage in defamation have little reason to fear repercussions for their actions, because, as legal scholars have shown, *New York Times* and its progeny make legal redress for public plaintiffs exceedingly difficult. Thus, we should not be surprised when 86% of Americans polled in a 1997 survey by the Center for Responsive Politics considered "good people being discouraged from running for office by the amount of media attention given to candidates' personal lives" to be a problem with the federal political system (Center for Responsive Politics 1997).

The malice standard is ultimately detrimental to the credibility of the media as well, with public skepticism of the media casting an ominous shadow over political debate. The public's discontent with current journalistic practices suggests that the malice standard has provided too much room for media intrusion. This opinion is reflected in a 1986 poll in which 89% of Americans supported the adoption of a standard of liability that would make the press subject to libel suits purely on the basis of false statements (The Times Mirror Company 1989). While a defamation standard that would hinge purely on truth would likely inhibit speech, the response of the public is still in line with that of many legal scholars in demanding a standard that will lead to increased accuracy and professionalism on the part of the media, with the theory being that a less stringent standard would make legal redress for public plaintiffs easier and thereby encourage greater professionalism in the journalistic community. The anticipated result would be not only to increase the value of the media in political debate but also to encourage the most capable individuals to run for political office, where they had previously chosen not to, benefiting the political system where the malice standard diminished it.

Under the malice standard, the purest goal of defamation actions, to vindicate truth and repair reputation, is virtually ignored. In defamation actions brought by public plaintiffs, the majority of time is spent focusing on the state of mind of a defendant during the formation of the alleged slander or libel. Little time is spent determining the truth or falsity of the alleged statement, since this factual issue can usually be easily decided by the Court in the summary judgment phase of the trial. As a result, public plaintiffs that have been unjustly defamed have little chance of the public recognizing that what was said or written about them was false; at best, all they can receive is a monetary award. Such a resolution, however, fails to consider that some forms of harm are perhaps above monetary compensation and should be corrected in a more appropriate manner. A progressive reform policy would

incorporate a greater focus on the truth or falsity of alleged defamations. A finding of falsity alone, regardless of fault, would result in a mandatory and visible retraction of the statement in the defendant's publication or public speech. In this manner, a public plaintiff who cannot prove fault on the part of a defendant can at least achieve some modicum of repair to their reputation that suffered as a result of a false statement. Such a policy would shift a greater focus to the statements at issue themselves, vindicating truth in a manner the malice standard ignores.

The malice standard, as it currently stands, still chills political debate for responsible media outlets and politicians due to its allowance of punitive damages. As David Anderson argued, while there may be a significantly higher probability of a defendant winning a defamation suit than a public plaintiff, there are certainly no guarantees. In order to escape massive damage awards, defendants must funnel their finances into traditionally lengthy litigation processes that often tax them as much as an award of damages. Since the malice standard is required for any finding of damages in defamation actions brought by a public plaintiff, whereas it is only required for a punitive damage award in cases involving a private plaintiff, a jury finding of actual malice usually carries with it a punitive damage award in favor of a public plaintiff. As a result, higher courts frequently reduce large punitive damage verdicts; nevertheless, they still exact a financial penalty comparable to those affirmed. Defendants in the midst of a lengthy appeals process are often unable to secure financing and are constantly burdened with liens against their finances. Thus, the possibility of punitive awards under the malice standard still makes its impact on the vigor of public debate. In a reform of defamation law, elimination of the possibility of punitive damages would both remove the chill from political speech and open a leeway for the lowering of the fault standard from actual malice. If damages were purely limited to actual damages, consisting of out-of-pocket losses resulting from impairment of reputation, then the potential fiscal penalty of defamatory speech would be significantly less. With less fear of the monetary penalties associated with such speech about public officials and figures, one would assume that defamations would proliferate more than ever. In order to counteract this negative effect, which would only lessen already fleeting reputational protection, a lowering of the fault standard to be met by plaintiffs would be necessary.

With 80% of defamation cases brought by public plaintiffs being dismissed on summary judgment and a finding of actual malice only occurring in 5% of cases that went on to trial between 1982 and it appears that malice as applied through the rules of *New York Times* and its progeny is an exceedingly difficult fault standard to prove, considering that negligence was found in approximately 20% of media related defamation cases brought by private

individuals during the same time period (Gillmor 2006). The Supreme Court's ruling in *Anderson v. Liberty Lobby, Inc.* made it such that plaintiffs were essentially obligated to prove malice by the "clear and convincing" evidentiary standard in the summary judgment phase of the trial, fast-forwarding the action dramatically. Thus, the extensive discovery required to determine a speaker's or writer's state of mind at the time of a statement must be performed without any guarantee of even a jury trial. The enormous expense that this requires effectively forecloses many defamation actions even before they start, due to the financial impracticality. In addition, malice is an amorphous fault standard that is exclusively used in the field of defamation; however, its application is not even applied universally. The complications created by applying malice to public officials and public figures and negligence to private individuals are significant. Questions must be continually answered as to the status of plaintiffs and whether the alleged defamatory comment constituted a matter of public debate. Therefore, a reform measure that would adopt the professional negligence standard as advocated by Halpern would be ideal. This fault standard would correlate to the clear and concise standard that has been successfully implemented in medical and legal malpractice actions. Transient and virtually unprovable issues such as a defendant's state of mind would be cast aside. In addition, its application would eliminate the encumbrances of the malice standard by placing all individuals under its universal application.

In essence, it simply requires an answer to the question: did the defendant act in accord with the professional standards of his occupation? For those individuals who are accused of defamation but fall outside the realm of a professional occupation, the question would shift to whether they acted in accord with the standards of the forum in which the defamation occurred. As a result, more latitude would be granted to sources such as tabloids and similar internet sites, since they are generally not taken as legitimate sources and have correspondingly less influence on individual reputation. Similarly, a private individual who chooses to make defamatory statements at a town meeting for example, a serious government forum, would be held to a standard of conduct used in such meetings. In theory, a finding of professional negligence would be found at a much higher percentage in defamation actions brought by public plaintiffs in light of false statements, affording greater opportunity for legal redress. As Anthony Lewis argued, the defamation suit, as it exists under the malice standard, is little more than a weapon to combat libel, forcing defendants to expend the large sums of time and money necessary to defend against a finding of actual malice. The greater opportunity for legal redress of defamation a professional negligence standard offers would, in turn, decrease the number of illegitimate suits brought by public plaintiffs, since they would have a more realistic tool to combat libel.

Therefore, professional negligence would better serve the competing interests of First Amendment speech and individual reputation.

Under a reform policy that would result in retraction for a finding of falsity and an award of actual damages upon a showing of professional negligence by a plaintiff, we now turn to analyzing how this reform would engender differing results from that of the malice standard. We have already seen that under the malice standard, our hypothetical Senate candidate would have no redress for false accusations of racism. In contrast, under the reformed standard, the defendant would be required at a minimum to publicly retract his comments. This would go a great distance in repairing the reputation of the plaintiff. However, since the opposing candidate made no effort to corroborate the truth or falsity of the accusations of racism, he would likely be found to have not conducted himself in a manner appropriate for a politician running for Senate. The defendant would be liable to the plaintiff for actual damages, including reputational harm and other forms of suffering; nevertheless, these damages would surely pale in comparison to punitive damage awards under the malice standard. While the opposing candidate would still be monetarily liable, his speech would not be chilled to the extent it would be if the threat of a finding of punitive damages were still in place. Indeed, the reform policy would only encourage him to act more professionally; in this example, all that he would have to do is corroborate the truth of the information his sources provided. If the truth of a powerfully damaging allegation like racism cannot be verified, then it is likely speech that deserves censor. Unsubstantiated accusations that can cause irreparable harm and have no basis in reality strike the heart of defamation law, as the Supreme Court acknowledged in *Gertz v. Welch* "that there is no Constitutional value in false statements" and deserve limited censure (*Gertz v. Robert Welch, Inc.* 10).

While at its inception, the malice standard appeared to strike a delicate compromise between protecting the First Amendment interest of political debate and private reputation, it has been largely unsuccessful in this balancing act. The complex and contradictory progeny that followed the Supreme Court's landmark decision in *New York Times Co. v. Sullivan* served to undervalue both the First Amendment interests of free speech and reputational protection along the way. The reform policy I propose will return these values to their proper position in American society and concurrently engender an increased faith in the political system.

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