



Defamation and Democracy: The Democracy Case for Preserving the “Actual Malice” Standard

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In the United States, the “actual malice” standard in defamation litigation provides vital protection to the free speech culture that anchors our democracy and keeps authoritarianism at bay. In a democracy, the power to govern does not lie with a monarch claiming God’s mandate or an authoritarian enthroned by force. Instead, the people are sovereign, and their will—the public’s opinion—governs. Those to whom the people delegate power must expect and tolerate sharp criticism, for it is that criticism which molds public opinion and holds officials accountable to it. Ultimately, democratic governance and democratic culture depend on robust public debate.

The actual malice standard protects that core democratic speech. It ensures that only those who knowingly or recklessly lie about officials and powerful individuals need to fear liability. It also limits the damages available for unintentional falsehoods about matters of public concern. In doing so, the standard provides necessary slack for inadvertent misstatements, which are inevitable in public debate and do not threaten to cut public opinion adrift from reality. But it holds taut for those who intentionally seek to skew public debate by lying.

The actual malice standard represents a key American contribution to the protection of debate in democracies around the world. Eliminating or significantly reining it in would weaken our democracy, and those who care about that democracy—and about free speech—should unite in support of the standard.

What *is* the “actual malice” standard?

In 1964, the Supreme Court rightly recognized that the First Amendment requires state defamation law to accommodate good faith public debate, resulting in the “actual malice” standard we have today.¹ In *New York Times v. Sullivan*, the Court held that the First Amendment requires public officials who sue for defamation to prove that a defendant published a falsehood about them “with knowledge that it was false or with reckless disregard of whether it was false or not.”² As the Court explained in *Sullivan*, the actual malice standard protects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³

The Supreme Court reaffirmed and refined the standard over the next three decades, extending it to cases involving public figures and placing limits on damages in cases brought by a private figure over matters of public concern.⁴ It also extended *Sullivan’s* protections to other kinds of claims, like intentional infliction of emotional distress and false light, to prevent creative plaintiffs from circumventing those protections.⁵

¹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

² *Id.* at 279–80.

³ *Id.* at 270.

⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

⁵ *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

In any defamation case, a plaintiff must prove that a defendant's statement conveyed facts (as opposed to opinions), that the facts stated or implied were false, that the statement was conveyed to others, and that the plaintiff was harmed. In an actual malice case, a plaintiff must prove even more: that the defendant either knew the statement was false at the time of publication or else published the statement with "reckless disregard" as to its falsity. A plaintiff may demonstrate reckless disregard in various ways, including through evidence that a defendant relied on sources they knew to be unreliable, as well as evidence that a defendant purposefully avoided the truth.⁶ In addition, evidence that a defendant had a preexisting or ulterior motive for publishing the false statement can support a finding of actual malice.



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DEFAMATION AND DEMOCRACY

What are the origins of the "actual malice" standard?

The insight that libel laws must be tempered to protect public debate and democratic governance was an early American innovation. In the run up to the ratification of the Constitution, British libel law "was . . . all about protecting His Majesty . . . from criticism; it was the product of a residually monarchical, aristocratic, and deeply deferential legal and social order."⁷ Not even truth was a defense to libel⁸; in fact, the maxim was, "The greater the truth, the greater the libel."⁹

Colonial Americans began to chafe at this regime well before the Revolutionary War. Most notably, two New York grand juries refused to indict John Peter Zenger for charges of seditious libel for criticizing colonial governor and Crown authority William Cosby. When Zenger was nonetheless charged, his attorney exhorted the jury not to convict, in order to lay "a noble Foundation for securing to ourselves, our Posterity, and our Neighbours, That, to which Nature and the Laws of

⁶ *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

⁷ Akhil Reed Amar, *The Words That Made Us* 439 (2021).

⁸ *Garrison v. Louisiana*, 379 U.S. 64, 67–68 (1964); *De Libellis Famosis Case*, 77 E.R. 250, 251 (Star Chamber 1606) ("It is not material, whether the libel be true or false.").

⁹ Roy Robert Ray, *Truth: A Defense to Libel*, 16 Minn. L. Rev. 43, 43 & n.1 (1931); see also *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

our Country have given us a Right, — The Liberty — both of exposing and opposing arbitrary Power (in these Parts of the World, at least) by speaking and writing Truth.”¹⁰ The jury acquitted Zenger, refusing to punish him for speaking truth to power.¹¹

At the time of the founding, judges and commentators recognized the fundamental incompatibility between repressive libel law and the functioning of a democracy.¹² In 1804, Alexander Hamilton argued and a judge accepted that libel “is a defamatory publication, made with a malicious intent” and opined that American press freedoms convey the right to publish the truth, “with good motives, and for justifiable ends,” about government officials.¹³ As early as 1808, the Massachusetts Supreme Judicial Court held that the “publications of the truth on [the character and fitness of public officials and candidates for office], with the honest intention of informing the people, are not a libel.”¹⁴ Other early cases reflected this American shift in libel law.¹⁵

In the early twentieth century and well before the Supreme Court’s decision in *Sullivan*, many states adopted standards requiring a public official suing for defamation over public acts to prove that the allegations were not only false, but that they were published in bad faith with actual or express malice.¹⁶

Thus, while the Supreme Court’s decision in *Sullivan* was a critical step forward in protecting our democracy, the idea that libel law must be curbed in service of democracy was by no means novel in 1964.

Why is the “actual malice” standard still important?

The need to accommodate public debate while protecting individuals against knowing lies is just as important in 2023 as in 1964, and contemporary cases are showing that the “actual malice” standard still strikes roughly the correct balance in protecting the free press and public debate in our modern media landscape.

While critics claim that the “actual malice” standard effectively prevents any accountability for false statements, that is not the case. In fact, actual malice functions as a fairly good proxy for bad faith rather than as an automatic death sentence for defamation claims to which it applies. Recent

¹⁰ J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 29 (1736).

¹¹ Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 84–85 (1998); Matthew L. Schafer, *Chapter 1: A Response to Justice Thomas*, Media Law Resource Center Bulletin Issue 1 (2022) [hereinafter *A response*], available at https://medialaw.org/chapter-1-a-response-to-justice-thomas/#_ftn154; *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).

¹² See Matthew L. Schafer, *In Defense: New York Times v. Sullivan*, 82 La. L. Rev. 81, 158 (2021).

¹³ *People v. Croswell*, 3 Johns. Cas. 337, 377, 393–94 (N.Y. Sup. Ct. 1804).

¹⁴ *Commonwealth v. Clap*, 4 Mass. 163, 169 (1808); see also Clyde Augustus Duniway, *Development of Freedom of the Press in Massachusetts* 152 (1906); *A response*, *supra* note 11.

¹⁵ See *A response*, *supra* note 11 (discussing *Lewis v. Few*, 5 Johns. 1 (N.Y. Sup. Ct. 1809)).

¹⁶ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 n.20 (1964) (collecting cases).

litigation demonstrates that potentially meritorious cases are proceeding to discovery,¹⁷ while frivolous cases are being filtered out.¹⁸

And, while some have argued that reform is necessary given the recent uptick in the quantity and salience of “disinformation” in our increasingly decentralized information environment, these cases also demonstrate that the standard continues to hold up in that context. “Disinformation,” after all, refers to false information intentionally spread for an ulterior motive—and wherever there is evidence that a speaker published information knowing it to be false, or while recklessly disregarding its falsity including because of demonstrable ulterior motives, plaintiffs can prevail.

The actual malice standard is an American innovation, but it is “one of the most successful exports of U.S. free speech doctrine.”¹⁹ It has influenced jurisprudence in democracies around the world, enabling judges to better protect journalists and others criticizing powerful people and regimes. In Argentina, Brazil, India, and elsewhere, courts have cited *Sullivan* as they seek to preserve press freedom and democratic debate.²⁰

But in democracies where the actual malice standard is absent, public officials can and do use defamation to avoid or impose real costs on the debate and analysis that are so vital to democratic governance. In the U.K., oligarchs use libel litigation to stifle critiques of corruption,²¹ and publishers have often declined to publish books critical of powerful politicians for fear of liability.²² In 2021, French President Emanuel Macron successfully sued the owner of a billboard that depicted him as Hitler,²³ and the Italian anti-mafia journalist Roberto Saviano is defending himself in three lawsuits filed by government officials based on his critiques of them.²⁴ These outcomes shock the conscience from the U.S. perspective.

¹⁷ Opinion of the Court, *Weisenbach v. Project Veritas*, No. 10819-2021 (Pa. C.C.P. July 15, 2022), available at <https://www.documentcloud.org/documents/22419023-weisenbach-v-project-veritas-and-okeefe-10819-2021-preliminary-objections-opinion-and-order>; *Nunes v. WP Co. LLC*, No. 1:21-CV-00506 (CJN), 2021 WL 3550896 (D.D.C. Aug. 11, 2021) (holding that then-Rep. Nunes adequately pled actual malice and refusing to dismiss his defamation claim).

¹⁸ *E.g.*, *McDougal v. Fox News Network, LLC*, 489 F. Supp. 3d 174 (S.D.N.Y. 2020) (holding that McDougal failed to allege actual malice); *Cabello-Rondón v. Dow Jones & Co., Inc.*, No. 16-CV-3346 (KBF), 2017 WL 3531551, at *1 (S.D.N.Y. Aug. 16, 2017) (dismissing for failure to plead actual malice), *aff'd*, 720 F. App'x 87 (2d Cir. 2018); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686 (11th Cir. 2016) (affirming dismissal of claims for failure to plead actual malice).

¹⁹ Jacob Mchangama & Nadine Strossen, *U.S. Conservatives Are Threatening Global Free Speech*, Foreign Pol'y (Mar. 7, 2023), <https://foreignpolicy.com/2023/03/07/republicans-sullivan-defamation-free-speech-de-santis-trump/>.

²⁰ *Id.*

²¹ Jasper Jolly, *Solicitors in UK Warned Not to Act as 'Hired Guns' to Silence Critics of Super-Rich*, Guardian (Feb. 16, 2023), <https://www.theguardian.com/law/2023/feb/16/uk-solicitors-warned-not-to-act-as-hired-guns-to-silence-critics-of-super-rich>; Dave Heller & Katharine Larsen, *Chapter 5: English Libel Law and the SPEECH Act: A Comparative Perspective*, Media Law Resource Center Bulletin Issue 1 (2022).

²² *See, e.g.*, Floyd Abrams, *The Soul of the First Amendment* 50–51 (2017) (describing how a book accusing Vladimir Putin of corruption was not published in England for fear of libel liability, but was published in the United States with no resultant litigation).

²³ Mchangama & Strossen, *supra* note 19 (noting case where “French billboard owner fined €10,000 for depicting Macron as Hitler in poster protesting COVID rules”).

²⁴ Elena Giordano, *Anti-Mafia Journalist “Proud” to be on Trial Accused of Defaming Matteo Salvini*, Politico (Feb. 1, 2023), <https://www.politico.eu/article/italy-anti-mafia-journalist-roberto-saviano-trial-defaming-matteo-salvini/>.



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DEFAMATION AND DEMOCRACY

Because U.S. law provides such superior protection for speech critical of the powerful, the subjects of that criticism have, since *Sullivan*, sought to file suit elsewhere—and in England in particular.²⁵ Internationally prominent individuals ranging from Sylvester Stallone to Greek Prime Minister Andreas Panadreu to Saudi financiers have sued or threatened to sue *American* publishers in London.²⁶ Indeed, the sweep of English defamation law has ensnared U.S. authors. U.S. terrorism financing expert Dr. Rachel Ehrenfeld intentionally withheld her book, which contained statements about Saudi billionaire banker Khalid bin Mahfouz, from the U.K. market. An English judge nonetheless asserted jurisdiction based on 23 copies successfully procured in England through Amazon, entered a default judgment of damages and fees against her, and ordered her to apologize.²⁷

Concern about the impact of libel tourism on U.S. speech, with Ehrenfeld’s experience as a prime example, motivated Congress to pass in 2010 the bipartisan SPEECH Act.²⁸ The Act prohibits U.S. courts from recognizing or enforcing foreign libel judgments unless those judgments were enacted under law at least as protective of free speech as U.S. law. As Sen. Jon Kyl, Republican of Arizona, noted, “Some Americans are falling victim to an international race to the bottom—they are able to write or publish only material that would be allowed in countries with the weakest free speech protections,” in part because “the mere prospect of a meritless foreign libel suit can chill speech.”²⁹

The SPEECH Act was thus a move by Congress to declare wholesale that U.S. speech ought not be chilled by fear of foreign judgments that do not incorporate the actual malice standard. It passed by unanimous voice vote in the U.S. Senate and without objection by voice vote in the House.³⁰

²⁵ See generally Heller and Larsen, *supra* note 21, at 176–79.

²⁶ *Id.* at 176.

²⁷ *Id.* at 181–82 n.79; *Bin Mahfouz*, [2005] EWHC (QB) 1156 at 22, 74–75 (Eng.).

²⁸ Securing the Protection of Our Enduring and Established Constitutional Heritage Act, Pub. L. No. 111-223, 124 Stat. 2380 (2013) (codified as amended at 28 U.S.C. §§ 4101–4105).

²⁹ S. Rep. No. 111-224, at 9, 10 (2010) (Statement of Sen. Kyl),

<https://www.congress.gov/congressional-report/111th-congress/senate-report/224/1>.

³⁰ *Actions Overview: H.R.2765 — 111th Congress (2009-2010)*, Congress.gov, <https://www.congress.gov/bill/111th-congress/house-bill/2765/actions>.

(Shortly thereafter, the U.K. Parliament, also recognizing the libel tourism problem, passed the Defamation Act of 2013—which added some additional speech protections to defamation law in England and Wales.)³¹

Bringing this trend full circle, even the U.K. is now discussing the wisdom of adopting the “actual malice” standard. In 2022, after a series of high-profile defamation lawsuits—including five defamation lawsuits filed by Russian oligarchs against the author of *Putin’s People*, then-Prime Minister Boris Johnson and U.K. regulators openly proposed adopting the “actual malice” standard.³² While the U.K. has not yet adopted the standard,³³ Prime Minister Rishi Sunak’s government indicated that it intended to legislate to guard against abusive defamation litigation.³⁴

What would happen if the Supreme Court got rid of the “actual malice” standard?

Eliminating or significantly paring back the “actual malice” standard would weaken our democracy. It would make it easier for government officials and powerful private individuals to silence their critics with defamation lawsuits and threats of defamation lawsuits. Increasing the threat of liability for criticism of well-funded and litigious public officials would raise the costs of that criticism so that we had less of it—as in the U.K. That might benefit the existing power structure, but it would not benefit democracy or ordinary Americans.

Nor would such a shift cut in favor of commenters of a particular political persuasion. MSNBC and CNN might face increased liability, but so too would Fox, Newsmax, and One America News Network. At the more grassroots level, activists and organizations across the political spectrum could face increased risk of liability and its financial repercussions for criticizing local or state officials—thus causing them to think twice before doing so publicly.

Moreover, eliminating the actual malice standard from federal law would trigger a domestic race to the bottom among states, akin to the international race to the bottom that so worried Congress in 2010. In our nationalized media environment, whichever state was most friendly to defamation litigation would effectively dictate the limits on public debate. That concern is even more

³¹ Defamation Act 2013, c. 26 (U.K.), available at <https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>.

³² Ministry of Justice, Dominic Raab & Boris Johnson, *Government Clampdown on the Abuse of British Courts to Protect Free Speech*, Gov.UK (Mar. 17, 2022),

<https://www.gov.uk/government/news/government-clampdown-on-the-abuse-of-british-courts-to-protect-free-speech>; Jessica Elgot, *UK to Clamp Down on Libel ‘Lawfare’ by the Rich in English Courts*, Guardian (Mar. 17, 2022), <https://www.theguardian.com/law/2022/mar/17/libel-lawfare-english-courts-slapps>.

³³ See Ministry of Justice, *Strategic Lawsuits Against Public Participation (SLAPPs): Government Response to Call for Evidence*, Gov.UK (July 20, 2022),

<https://www.gov.uk/government/consultations/strategic-lawsuits-against-public-participation-slapps/outcome/strategic-lawsuits-against-public-participation-slapps-government-response-to-call-for-evidence#slapps-conclusion-and-plans-for-reform>.

³⁴ Ministry of Justice, *Annual Report and Accounts 2021-22* 11 (Dec. 15, 2022),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1125073/moj-annual-report-and-accounts-2021-22.pdf.

pronounced today than it was in 1964, given the erosion of local media and the fact that the vast majority of news is created for, and consumed by, a national audience.

As Sen. Patrick Leahy (D-VT) and Sen. Jeff Sessions (R-AL) wrote jointly when the SPEECH Act passed, “The First Amendment’s freedoms of speech and press are a cornerstone of our democracy. These freedoms enable vigorous debate and an exchange of ideas that shapes our political process.”³⁵ Paring back the actual malice standard would place that vigorous debate at risk, threatening this cornerstone of our democracy.



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FORMER SENATORS PATRICK LEAHY (D-VT) AND JEFF SESSIONS (R-AL)



Protect Democracy and Law for Truth oppose efforts to eliminate the “actual malice” standard, which plays a vital role in the proper functioning of our democracy. While some questions about precisely when and to whom the “actual malice” standard should apply merit serious debate, broadly speaking, the “actual malice” standard strikes the correct balance. For hundreds of years, some version of this uniquely American free speech protection has guarded against the chilling of legitimate and necessary speech, while still allowing individuals to protect their reputations against knowing and reckless lies. Cutting this mooring line would be a victory for the forces of authoritarianism.

³⁵ Sens. Patrick Leahy & Jeff Sessions, *Protecting American Free Speech*, The Hill (Aug. 3, 2010), <https://thehill.com/blogs/congress-blog/judicial/168071-protecting-american-free-speech-sens-patrick-leahy-and-jeff-sessions/>.