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This House would overturn Times vs Sullivan.

Defamation

From Wikipedia, the free encyclopedia

Defamation (also known as calumny, vilification, libel, slander, or traducement) is the oral or written communication of a false statement about another that unjustly harms their reputation and usually constitutes a tort or crime.[1] In several countries, including South Korea,[2] a true statement can also be considered defamation.

Under common law, to constitute defamation, a claim must generally be false and must have been made to someone other than the person defamed.[3] Some common law jurisdictions also distinguish between spoken defamation, called slander, and defamation in other media such as printed words or images, called libel.[4] In the United States, false light laws protect against statements which are not technically false but are misleading.[5]

Libel

Libel is defined as defamation by written or printed words, pictures, or in any form other than spoken words or gestures.[12] The law of libel originated in the 17th century in England. With the growth of publication came the growth of libel and development of the tort of libel.[13] In recent times, internet publications such as defamatory comments on social media can also constitute libel.

Cases involving libel

An early example of libel is the case of John Peter Zenger in 1735. Zenger was hired to publish New York Weekly Journal. When he printed another man's article that criticized William Cosby, who was then British Royal Governor of Colonial New York, Zenger was accused of seditious libel.[14] The verdict was returned as Not Guilty on the charge of seditious libel, because it was proven that all the statements Zenger had published about Cosby had been true, so there was not an issue of defamation. Another example of libel is the case of New York Times Co. v. Sullivan (1964). The U.S. Supreme Court overruled a state court in Alabama that had found The New York Times guilty of libel for printing an advertisement that criticized Alabama officials for mistreating student civil rights activists. Even though some of what The Times printed was false, the court ruled in its favor, saying that libel of a public official requires proof of actual malice, which was defined as a "knowing or reckless disregard for the truth".[15]

Proving libel

There are several things a person must prove to establish that libel has taken place. In the United States, a person must prove that the statement caused harm, and was made without adequate research into the truthfulness of the statement. This is for an ordinary citizen. For a celebrity or public official, one must prove that the statement was made with the intent to do harm or with reckless disregard for the truth,[16] which is usually specifically referred to as "actual malice".[17]

How to Restore Balance to Libel Law

The Wall Street Journal, By Glenn Harlan Reynolds, March 24, 2021

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

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

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

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

The goal was to chill reporting and criticism, and it worked. By the time Sullivan (which involved a political advertisement published in the Times) reached the Supreme Court, news organizations had faced more than $300 million in claims (around $2.5 billion in today's dollars), and the Times's lawyers were quashing factually sound stories of obvious public interest for fear of further libel suits. Times reporters were even discouraged from visiting Alabama for fear that they might spur a lawsuit or be served with papers.

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

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

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

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

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

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

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

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

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

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

I'm guessing there may be five justices who could be persuaded to do that, particularly as Justice Thomas isn't alone on the court in having experienced press unfairness and dishonesty on a personal level during his confirmation hearings. Justice William Brennan, who wrote Sullivan, and his colleagues might have entertained an overly rosy view of journalists and the news media. A majority of their successors may not.

Mr. Reynolds is a law professor at the University of Tennessee.

The Supreme Court Faces a Huge Test on Libel Law

The New York Times, Oct. 22, 2021, By Floyd Abrams

Next Friday, the United States Supreme Court is scheduled to meet to consider whether to hear appeals from two libel cases in which the plaintiffs seek to persuade the justices to reconsider the single greatest First Amendment victory for the press in American history.

Two of the court's justices, Clarence Thomas and Neil Gorsuch, already have expressed a readiness to do just that, a disturbing turn that could weaken speech protections and threaten the country's free and robust press.

Their focus is the court's unanimous 1964 decision in the case of New York Times v. Sullivan, won by the paper in the midst of the civil rights revolution. The purported libel appeared in a full-page advertisement in The Times titled "Heed Their Rising Voices," which criticized a "wave of terror" against civil rights demonstrators in the South led by the Rev. Dr. Martin Luther King Jr.

Most of the assertions in the advertisement were accurate; a few were not. The police commissioner of Montgomery, Ala., L.B. Sullivan, who was not named in the ad, sued The Times, claiming it had in effect falsely accused him of misconduct. He was awarded $500,000 by an all-white jury, a verdict upheld by Alabama's highest court.

For news organizations, the threat the case presented was not only sizable if not crippling libel judgments; it was also that such a result would deter reporting critical of government and public officials.

When the case reached the Supreme Court, the justices applied the First Amendment for the first time in a libel case. The core of the court's ruling in reversing the Alabama judgment was that the First Amendment barred public officials from recovering damages for a "defamatory falsehood relating to his official conduct" in the absence of clear and convincing evidence that the statement was made with what the justices called "'actual malice"— that it was made "with knowledge that it was false or with reckless disregard of whether it was false or not."

Such sweepingly broad protection was required, the court concluded, because the First Amendment embodied a "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 attack on government and public officials."

"Erroneous statement is inevitable in free debate," the court added, and "must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive."

Later decisions by the court expanded the "actual malice" standard to apply to public figures outside government.

If Sullivan is overruled, defendants in libel cases will lose constitutional protections they now have, and the United States could well return to a libel regime akin to England's.

England is the mother country of the United States, a democracy from which America has learned much. But its libel law is at war with First Amendment principles. English law does not provide anything close to the protections of the Sullivan decision. Inaccurate statements about even the most powerful individuals in society receive little legal protection in England; a defendant could be liable for a false statement even if he was unaware that it was false. Moreover, the burden of proof is on the defendant; the defendant must prove that what he said was true. In the United States, the plaintiff must prove it was false.

A return by the Supreme Court to anything like the English approach could significantly chill speech of the most important sort. That has happened disturbingly often in England. In 2014, Cambridge University Press declined to publish a book about connections between President Vladimir Putin of Russia and organized crime because of England's strict libel laws. In a letter to the author, Karen Dawisha, an executive for the publisher, wrote: "The decision has nothing to do with the quality of your research or your scholarly credibility. It is simply a question of risk tolerance in light of our limited resources." The book was ultimately published in the United States. No libel action was filed.

A recent example of the potentially chilling impact of English libel law can be seen in libel litigations brought this year by supporters of Mr. Putin in courts in London against the journalist Catherine Belton and her publisher, HarperCollins, for her widely lauded book, "Putin's People: How the KGB Took Back Russia and Then Took On the West."

The "ruinous" legal action, according to Toomas Hendrik Ilves, a former president of Estonia and a journalist before that, is intended "not just to crush her, but to deter anyone else who dares to investigate the nexus of intelligence, business, organized crime and state power that gave birth to and sustains Russia's ruling elite."

That is, of course, precisely the sort of threat that the Sullivan decision seeks to protect against.

The stark difference in approach between American and English libel law led Congress to unanimously pass legislation, signed by President Barack Obama in 2010, barring state or federal courts from enforcing foreign libel judgments against U.S. defendants that are not consistent with First Amendment protections as set forth in the Sullivan decision.

That law, the Speech Act, was adopted partly in response to a libel suit brought in London by a Saudi billionaire against

an American author, Rachel Ehrenfeld, whose book "Funding Evil: How Terrorism Is Financed and How to Stop It" alleged that he had funded terrorism.

Ms. Ehrenfeld had credible sources for her assertions. But she declined to appear in court and submit to English jurisdiction, noting, as she later explained, that her book "was neither published nor marketed in Britain." Libel law in England "chills free speech through the award of disproportionate damages" and leaves defendants with "a lack of viable defenses," she wrote in The Times.

Should the court agree to hear one or both of the libel cases, that does not mean, of course, that either or both would be overruled. (The Times joined in an amicus brief in support of the defendant in one of those cases when it was before an appeals court.) But it is troubling that at least two of the court's nine justices seem ready to overrule Sullivan. Only four votes are required for the full court to take up cases, and if it does so, a fifth would be needed for any ruling.

When the Supreme Court decided the Sullivan case 57 years ago, Alexander Meiklejohn, a leading First Amendment scholar, exclaimed that it was "an occasion for dancing in the street." If the court agrees to hear one or both of the libel cases before it, that would be an occasion for us all to hold our breath.

Mr. Abrams is a First Amendment lawyer whose many clients have included The New York Times, which he successfully represented in the Pentagon Papers case. His firm represents The Times on occasion.

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Gorsuch Critique of Landmark Libel Case Should Be Taken Seriously

Bloomberg News, By Noah Feldman, July 7, 2021

A conservative Supreme Court justice invokes a liberal colleague to argue that New York Times v. Sullivan is wrong for the social-media age.

In a sign of hard times for traditional free-speech values, U.S. Supreme Court Justice Neil Gorsuch has added his voice to that of Justice Clarence Thomas in calling for a re-examination of the landmark 1964 precedent of New York Times v. Sullivan — the case that makes it extremely difficult for public figures to win libel suits.

Thomas's view, first expressed in 2019, was that the press protections established by Sullivan violated the original intent of the First Amendment. It was inconsistent with his own free-speech jurisprudence, and was therefore unlikely to garner support from other justices.

Gorsuch's opinion last week, in contrast, focused on the up-to-the-minute problem of misinformation in the age of social media. Gorsuch's concerns aren't trivial or ideological. He quoted a 28-year-old old essay in support of them written by his Supreme Court colleague Elena Kagan when she was a law professor. Gorsuch's opinion raises at least the possibility that other justices might be open to rethinking the question of public-figure libel.

In the Sullivan case, the court held that when a public official sues someone for libel, it isn't enough to show that the challenged statement was false and defamatory, which is all that a regular person would have to show in such a lawsuit. The public official has to show that the false and defamatory statement was made with "actual malice," meaning that the person who made it either knew it was false or recklessly disregarded its falsehood. In subsequent cases, the justices extended the Sullivan rule from public officials to all "public figures," a category that the court has never pinned down precisely but that extends well beyond the most famous celebrities.

Needless to say, established news organizations love the Sullivan decision and usually treat it — justifiably — as a landmark of American free-press protection. The case insulates reporters and editors and the companies they work for from being constantly threatened with libel suits by public figures who are annoyed with how they are being covered. Without the precedent, the media would have to be prepared to defend factual assertions in court, a difficult task that could expose anonymous sources, undermine good-faith decision-making and intimidate all but the strongest journalistic institutions. With it, a media defendant in a libel case brought by a public figure can just say plead ignorance of reporting a falsehood, even if it got the facts wrong.

Gorsuch's critique of Sullivan rests on the idea that since 1964, "Our nation's media landscape has shifted in ways few could have foreseen." The decline of legacy media and the rise of social media, Gorsuch argued, has led to a rise in misinformation. Gorsuch pointed out, correctly, that fake news is much cheaper to produce than real news — and that anyone can do it. The editors and fact checkers of legacy media are "disappearing," he wrote.

In this environment, Gorsuch proposed, the Sullivan precedent creates a perverse incentive not to check facts — so that you can later say that you didn't realize what you were saying was false. He threw in the concern that today, everyone is a public figure to some degree or another, making libel suits harder for everybody.

The upshot, for Gorsuch, is that the Sullivan rule no longer serves its original objective of creating an informed public

debate.

In a touch that might sound cute but is actually significant, Gorsuch invoked Kagan. He quoted an essay that she wrote in 1993 while an assistant professor at the University of Chicago, reviewing a laudatory book about the Sullivan decision by the journalist Anthony Lewis. In it, Kagan noted that the actual malice standard might have the unintended effect of promoting not only true but also false statements of fact — "statements that may themselves distort public debate." Thus, Kagan, concluded, "the legal standard adopted in Sullivan may cut against the very values underlying the decision."

The power of Gorsuch's opinion is to suggest that Kagan's concerned prediction from almost 30 years ago has come to pass under the conditions of social media misinformation. Although Kagan did not join Gorsuch last week, she is likely to consider his point germane. The Sullivan rule does have costs and benefits — and that means the court should be considering whether the balance has changed in a new media ecosystem. The fact that Gorsuch could quote Kagan underscored the non-ideological nature of the issue.

Part of the theory behind Sullivan's reasoning was that public figures can overcome false, defamatory statements about themselves relatively easily, even without defamation suits. Today, it has become harder for such stories to be shunted aside. In Thomas's own separate opinion, in which he added some non-originalist concerns, he mentioned as a case in point the 2016 shooting inside a Washington pizza parlor inspired by a fantastical conspiracy theory circulating online.

What's more, non-celebrities who might still be deemed public figures under current law are vulnerable to false, defamatory online attacks. Sullivan makes it very hard for them to vindicate their concerns about their own reputation.

The conclusion is that it no longer seems inconceivable that the court could revisit New York Times v. Sullivan. If that happens, the debate will be fought in terms of whether changes since 1964 mean that the precedent is no longer achieving its own objectives.

Noah Feldman is a Bloomberg Opinion columnist and host of the podcast "Deep Background." He is a professor of law at Harvard University and was a clerk to U.S. Supreme Court Justice David Souter. His books include "The Three Lives of James Madison: Genius, Partisan, President."

The Progressive Case for Libel Reform

The Wall Street Journal, By Jeremy Lewin, April 5, 2021

Judge Silberman is a conservative, but he's right about Sullivan.

Judge Laurence Silberman recently urged the Supreme Court to overturn New York Times v. Sullivan (1964), the landmark decision that severely curtails the ability of public officials and (under later precedents) public figures to secure damages for lies about them.

Judge Silberman is a conservative, but progressives should join him in calling for a reconsideration of Sullivan. Reforming speech law may be our best chance to confront America's escalating crisis of truth as algorithmically charged echo chambers exploit cognitive biases, and the sheer volume of digital content makes fact-checking impossible. As President Obama warned in 2020, we are fast approaching an "epistemological crisis" in which democracy will cease to function and progress on challenges like climate change will prove impossible.

This slide is fueled by the virtual costlessness of lying. Hyperpartisanship and moral decay have reduced the reputational cost of public deceit. Sullivan makes things worse by stripping away nearly all risk of legal liability for lying about public figures or issues. By requiring plaintiffs to prove "actual malice," it bars accountability except on a showing of a conscious intent to lie, or very close to it.

Scrapping Sullivan would increase the risk of huge damage awards for playing fast and loose with the truth, thereby heightening the incentive to be honest. Progressives should eagerly embrace such movement toward a more truthful society.

Curtailing familiar speech protections will seem antithetical to liberal values of free expression. But free expression doesn't require protecting lies. Instead, cracking down on them would leave more room for vigorous public exchange of truthful ideas. As with any regulation, the legal parameters of the "marketplace of ideas" must evolve to keep pace with vastly changed circumstances—especially the digital revolution.

Legal scholars who reflexively venerate Sullivan might also consider how the cost of lies is borne by marginalized groups. Coronavirus misinformation made a pandemic that disproportionately claimed poor, especially black and brown, lives and livelihoods, even worse. Lies about election fraud have fueled attempts to disfranchise black voters. Women in politics and journalism suffer demeaning lies, insinuations and sexualized harassment with alarming frequency.

Nor would such recalibration require returning to the pre-1964 regime in which defamation lawsuits were subject to no

constitutional constraints, and Jim Crow politicians manipulated Southern defamation laws to stifle reporting about segregation. Although much of Europe permits significant no-fault defamation liability, U.S. courts in a post-Sullivan world should instead converge on the settled standard for defamation of less-public figures, which requires proof of negligence, or breach of objectively reasonable care. The risk of abuse is also mitigated by contemporary due-process doctrines, constitutional limits on punitive damages, and anti-Slapp statutes, which punish meritless litigation brought to intimidate.

A negligence standard would bolster rigorous and honest media, since following journalistic customs like double-sourcing would provide a shield against liability for inadvertent misrepresentations. Qualified good-faith protections would thus provide an incentive to integrity and care in reporting and competitive advantages to honest outlets, which have lost ground to rivals that use falsehoods to drive outrage and clicks.

Mr. Lewin is a second-year Harvard law student.

Reconsidering Times v. Sullivan

The Wall Street Journal, By The Editorial Board, March 22, 2021

An influential judge says the 'actual malice' standard needs revision.

Senior Judge Laurence Silberman of the D.C. Circuit Court of Appeals knows how to court media outrage. His gun-control opinion became the template for the Supreme Court's landmark Heller decision that the Second Amendment is an individual right not limited to militias. Now he's caused a stir with a dissent suggesting that the landmark libel ruling, New York Times v. Sullivan, should be reconsidered.

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Judge Silberman's partial dissent comes in a case in which two former Liberian officials sued the authors of a report suggesting they took bribes (Tah v. Global Witness). The majority opinion upheld a lower-court decision dismissing the case on the Times v. Sullivan logic that the report was not written with "actual malice," defined as a reckless disregard for the truth. That's the standard the High Court created in 1964 that makes defamation cases brought by public figures against the press nearly impossible to win—even if the reported facts turn out to be false.

Judge Silberman analyzes the facts and shreds the majority argument on the malice point even under the current Times v. Sulllivan standard. But more provocative is that he goes on to say that the Supreme Court created its actual-malice standard out of whole cloth, with no basis in the Constitution, overturning libel standards that had evolved over centuries in common law.

The judge notes that the Times ruling occurred in unique historical circumstances—to wit, the struggle for civil rights when Southern politicians used defamation law to stifle reporting on and criticism of Jim Crow. But Judge Silberman, whose former clerks include Justice Amy Coney Barrett, says the times have changed and the "actual malice" standard has effectively given the press a status above the Constitution that harms democracy.

As journalists we have an interest in preserving Times v. Sullivan. We correct mistakes. But we've had to defend against baseless defamation suits that were eventually dismissed, and the cost isn't trivial. The Wall Street Journal has resources to defend its writers, but threats against small publications could have a chilling effect on robust journalism. (The British rule that the "loser pays" for the opponent's legal costs would help here.)

On the other hand, it's hard to deny that many in the media have taken a bad turn in recent decades—often under the protection of the actual-malice standard. The public agrees, judging by opinion surveys on collapsing trust in the press.

Think of the way the media trashed the Covington, Ky., high school student for his silence and half smile as he was assailed by an adult after a pro-life rally in 2019. The Washington Post and CNN settled the young man's lawsuits, but would the outlets have shown more caution without the protection of Times v. Sullivan?

Or recall Sarah Palin's suit against the New York Times for claiming in 2017 she had incited the deranged man who shot Rep. Gabby Giffords in 2011. The editorial was clearly false, the editing process was remarkably slipshod, and the Times ran a correction. A judge tossed the suit under the actual-malice standard until the Second Circuit Court of Appeals reinstated it, and it is now headed for trial.

Judge Silberman also has the liberal press in a lather because he called them out for one-sided bias. He says the New York Times and Washington Post "are virtually Democratic Party broadsheets," and that most of the press follows their lead. He says the Journal news section "leans in the same direction," which we think is wrong. The guiding ethic of our reporters is to play the news straight.

The judge cited our editorial pages, along with Fox News and the New York Post, as rare exceptions. But he noted they are controlled by "a single man and his son"— Rupert and Lachlan Murdoch —and that many Democrats are calling for the giant tech platforms to censor news from conservative publications. He says a press so one-sided is dangerous to

democracy.

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As for Times v. Sullivan, Judge Silberman concedes that prospects for overturning it are slim. But Justice Clarence Thomas has called for a similar reconsideration, and who knows who else might agree if the legal facts are presented in the right case. Judge Silberman's opinion points to differences on how to define actual malice that now exist in the Second and D.C. circuits, which would be grounds for the Justices to take Tah v. Global Witness on appeal.

In any case the Silberman opinion ought to inspire some reflection about the low state of the media and its ideological conformity. The survival of a free press depends in part on the First Amendment. But in the long run it also requires support from a public that wants it to be free. A press that violates its privileges with impunity, born of legal protection from a dubious constitutional interpretation, is more vulnerable than righteous journalists think.

Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision

The New York Times, By Adam Liptak, July 2, 2021

Justice Neil M. Gorsuch added his voice to that of Justice Clarence Thomas in questioning the longstanding standard for public officials set in New York Times v. Sullivan.

WASHINGTON — Two justices on Friday called for the Supreme Court to reconsider New York Times v. Sullivan, the landmark 1964 ruling interpreting the First Amendment to make it hard for public officials to prevail in libel suits.

One of them, Justice Clarence Thomas, repeated views he had expressed in a 2019 opinion. The other, Justice Neil M. Gorsuch, offered fresh support for the view that the Sullivan decision and rulings extending it warranted a reassessment.

They made their comments in dissents from the court's decision not to take up a libel case brought by the son of a former prime minister of Albania.

Both justices said the modern news media landscape played a role in their thinking about the actual malice doctrine announced in the Sullivan case. That doctrine required a public official suing for libel to prove that the offending statements were made with the knowledge they were false or with serious subjective doubt about their truth — a stricter standard than is applied to cases brought by ordinary people. The doctrine was expanded in later court rulings to cover public figures, not just public officials.

Justice Thomas denounced the explosion of conspiracy theories and other disinformation. He cited a news report on "the shooting at a pizza shop rumored to be 'the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton'" and a New York Times article on "how online posts falsely labeling someone as 'a thief, a fraudster and a pedophile' can spark the need to set up a home-security system."

"The proliferation of falsehoods is, and always has been, a serious matter," Justice Thomas wrote. "Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires."

Justice Gorsuch wrote that much had changed since 1964, suggesting that the actual malice doctrine might have made more sense when there were fewer and more reliable sources of news, dominated by outlets "employing legions of investigative reporters, editors and fact checkers."

"Large numbers of newspapers and periodicals have failed," he wrote. "Network news has lost most of its viewers. With their fall has come the rise of 24-hour cable news and online media platforms that 'monetize anything that garners clicks.'

"What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets," he wrote, "has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable."

The two justices made their comments in dissenting from the court's denial of review in Berisha v. Lawson, No. 20-1063, a libel case brought by Shkelzen Berisha, the son of Albania's former prime minister. He sued the author and publisher of "Arms and the Dudes: How Three Stoners From Miami Beach Became the Most Unlikely Gunrunners in History," a 2015 book that examined weapons procurement and was the basis of the movie "War Dogs."

Mr. Berisha said the book, written by Guy Lawson and published by Simon & Schuster, falsely linked him to an illicit arms deal.

The U.S. Court of Appeals for the 11th Circuit, in Atlanta, relying on decisions extending the Sullivan case from public officials to public figures, ruled that Mr. Berisha was a public figure.

"The purposes underlying the public figure doctrine apply unequivocally to Berisha: He was widely known to the public, he had been publicly linked to a number of high-profile scandals of public interest, he availed himself of

privileged access to the Albanian media in an effort to present his own side of the story, and he was in close proximity to those in power," Judge Diarmuid F. O'Scannlain, visiting from the Ninth Circuit, wrote for a unanimous three-judge panel.

As a public figure, Judge O'Scannlain continued, Mr. Berisha had to show that what the book had said about him had been published with "actual malice" but had failed to do so.

On Friday, Justice Thomas said the Supreme Court had invented the actual malice rule out of whole cloth.

"This court's pronouncement that the First Amendment requires public figures to establish actual malice bears 'no relation to the text, history or structure of the Constitution,'" he wrote, quoting from a recent dissent from Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit.

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. @adamliptak • Facebook

The Supreme Court's Increasingly Dim View of the News Media

The New York Times, By Adam Liptak, April 19, 2021

A comprehensive look at references to the press in justices' opinions revealed "a marked and previously undocumented uptick in negative depictions."

WASHINGTON — Last month, in a dissent in a routine libel case, a prominent federal judge lashed out at the news media.

"Two of the three most influential papers (at least historically), The New York Times and The Washington Post, are virtually Democratic Party broadsheets," wrote Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit. "And the news section of The Wall Street Journal leans in the same direction."

"Nearly all television — network and cable — is a Democratic Party trumpet," he wrote. "Even the government-supported National Public Radio follows along."

The dissent endorsed a 2019 opinion from Justice Clarence Thomas calling for the Supreme Court to reconsider New York Times v. Sullivan, the landmark 1964 ruling that made it hard for public officials to win libel suits.

"New York Times and the court's decisions extending it were policy-driven decisions masquerading as constitutional law," Justice Thomas wrote. In a dissent in a criminal case a few months later, he wrote, quoting a previous opinion, that "the media often seeks 'to titillate rather than to educate and inform.'"

No other member of the Supreme Court joined Justice Thomas's opinion urging it to revisit the foundational 1964 libel decision, and Judge Silberman's dissent was widely criticized. J. Michael Luttig, a former federal appeals court judge who was on President George W. Bush's short list of potential Supreme Court nominees, called the dissent shocking and dangerous in an opinion essay in The Washington Post last month.

But the negative views from the bench of the news media may not be outliers. A new study, to be published in The North Carolina Law Review, documents a broader trend at the Supreme Court. The study tracked every reference to the news media in the justices' opinions since 1784 and found "a marked and previously undocumented uptick in negative depictions of the press by the U.S. Supreme Court."

The study was not limited to cases concerning First Amendment rights. It took account of "all references to the press in its journalistic role, to the performance of commonly understood press functions or to the right of press freedom." Many of these references were in passing comments in decisions on matters as varied as antitrust or criminal law.

"A generation ago, the court actively taught the public that the press was a check on government, a trustworthy source of accurate coverage, an entity to be specially protected from regulation and an institution with specific constitutional freedoms," wrote the study's authors, RonNell Andersen Jones, a law professor at the University of Utah, and Sonja R. West, a law professor at the University of Georgia. "Today, in contrast, it almost never speaks of the press, press freedom or press functions, and when it does, it is in an overwhelmingly less positive manner."

Compare, for instance, Justice Hugo Black's concurring opinion in 1971 in the Pentagon Papers case, allowing publication of a secret history of the Vietnam War, with Justice Anthony M. Kennedy's majority opinion in 2010 in the Citizens United campaign finance case.

Justice Black wrote that "The New York Times, The Washington Post and other newspapers should be commended for serving the purpose that the founding fathers saw so clearly."

"In revealing the workings of government that led to the Vietnam War," he wrote, "the newspapers nobly did precisely that which the founders hoped and trusted they would do."

Justice Kennedy, by contrast, lamented "the decline of print and broadcast media" and the "sound bites, talking points

and scripted messages that dominate the 24-hour news cycle."

There may be many reasons for the shift documented in the study beyond a change in judicial attitudes. The news media may have become less trustworthy and more ideologically skewed. It has certainly become more various and harder to define. And it has been the subject of relentless attack from politicians, notably former President Donald J. Trump.

"Some shift might be expected," Professor Jones said in an interview. "But the uniformity and degree of it was pretty staggering. On every meaningful measure we could come up with, the current court is significantly less positive about press-related matters."

The study found that conservative justices have always been more apt to write negative things about the press. The new development is that liberal justices now have little good to say about it.

"The press, therefore, seems to be experiencing the double whammy of compounded negativity from the ideological group at the court that has been historically negative (the conservative justices) and a loss of positivity from the ideological group that has been historically positive (the liberal justices)," the study said. "Ideology is simply no longer predictive of positive treatment."

Professor Jones said she was struck by one data point in particular: "There hasn't been a single positive reference to the trustworthiness of the press from any justice on the court in more than a decade," she said.

After examining "more than 8,000 characterizations of the press over the course of 235 years," the study concluded that "there is not a single indicator that bodes well for the press's position before the current U.S. Supreme Court."

"The forecast for press treatment at the U.S. Supreme Court," the study said, "may be dire."

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. @adamliptak • Facebook

Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling

The New York Times, By Adam Liptak, Feb. 19, 2019

WASHINGTON — Justice Clarence Thomas on Tuesday called for the Supreme Court to reconsider New York Times v. Sullivan, the landmark 1964 ruling interpreting the First Amendment to make it hard for public officials to prevail in libel suits.

He said the decision had no basis in the Constitution as it was understood by the people who drafted and ratified it.

"New York Times and the court's decisions extending it were policy-driven decisions masquerading as constitutional law," Justice Thomas wrote.

Justice Thomas, writing only for himself, made his statement in a concurring opinion agreeing that the court had correctly turned down an appeal from Kathrine McKee, who has accused Bill Cosby of sexual assault. She sued Mr. Cosby for libel after his lawyer said she had been dishonest.

An appeals court ruled against Ms. McKee, saying that her activities had made her a public figure and that she could not prove, as required by the Sullivan decision, that the lawyer had knowingly or recklessly said something false. Ms. McKee asked the Supreme Court to review the appeals court's determination that she was a public figure.

Justice Thomas wrote that he agreed with the court's decision not to take up that question. "I write to explain why, in an appropriate case, we should reconsider the precedents that require courts to ask it in the first place," he wrote.

In Justice Thomas's view, the First Amendment did nothing to limit the authority of states to protect the reputations of their citizens and leaders as they saw fit. When the First Amendment was ratified, he wrote, many states made it quite easy to sue for libel in civil actions and to prosecute libel as a crime. That was, he wrote, as it should be.

"We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified," Justice Thomas wrote of the Sullivan decision. "The states are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm."

The events leading to the Sullivan decision test that assertion. The case arose from an advertisement in The Times seeking support for the civil rights movement. The ad contained minor errors.

L.B. Sullivan, a city commissioner in Montgomery, Ala., who was not mentioned in the ad, sued for libel. He won $500,000, which was at the time an enormous sum. It was one of many suits filed by Southern politicians eager to starve the civil rights movement of the oxygen of national attention. They used libel suits as a way to discourage coverage of the movement by national news organizations.

Against this background, and animated by an urge to protect the American public's ability to assess the situation in the South for itself, the Supreme Court unanimously ruled for The Times and revolutionized American libel law.

Justice Thomas's statement came in the wake of complaints from President Trump that libel laws make it too hard for

public officials to win libel suits.

"I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money," Mr. Trump said on the campaign trail. "We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected."

Thanks to the Sullivan decision, it is indeed hard for public figures to win libel suits. They have to prove that something false was said about them, that it harmed their reputation and that the writer acted with "actual malice." That last term is misleading, as it has nothing to do with the ordinary meaning of malice in the sense of spite or ill will.

To prove actual malice under the Sullivan decision, a libel plaintiff must show that the writer knew the disputed statement was false or had acted with "reckless disregard." That second phrase is also a term of art. The Supreme Court has said that it requires proof that the writer entertained serious doubts about the truth of the statement.

Justice Thomas questioned those standards.

"There appears to be little historical evidence suggesting that the New York Times actual-malice rule flows from the original understanding of the First or Fourteenth Amendment," he wrote.

Justice Antonin Scalia, who died in 2016, routinely made the same point in his speeches. But Mr. Trump's two Supreme Court appointees — Justices Neil M. Gorsuch and Brett M. Kavanaugh — have expressed support for broad libel protections in their opinions as appeals court judges.

At his Supreme Court confirmation hearings in March 2017, Justice Gorsuch was asked about the Sullivan decision by Senator Amy Klobuchar, Democrat of Minnesota. She wanted to know whether "the First Amendment would permit public officials to sue the media under any standard less demanding than actual malice."

Judge Gorsuch, reticent when asked about other precedents, seemed comfortable with preserving that one.

"New York Times v. Sullivan was, as you say, a landmark decision and it changed pretty dramatically the law of defamation and libel in this country," he said. "Rather than the common law of defamation and libel, applicable normally for a long time, the Supreme Court said the First Amendment has special meaning and protection when we're talking about the media, the press in covering public officials, public actions and indicated that a higher standard of proof was required in any defamation or libel claim. Proof of actual malice is required to state a claim."

"That's been the law of the land for, gosh, 50, 60 years," he said.

As an appeals court judge, Justice Gorsuch showed no hesitation in applying the line of cases that began with the Sullivan ruling.

Some plaintiffs, he wrote in a 2011 opinion, have reputations so poor that even serious accusations cannot damage them. Libel law, he said, is "about protecting a good reputation honestly earned."

He added that minor inaccuracies in a news report can never serve as the basis for a libel suit, calling that "a First Amendment imperative."

In 2015, Justice Kavanaugh, as an appeals court judge, wrote that posing provocative questions generally cannot be the basis for libel suits, choosing an interesting example.

"Of course," Judge Kavanaugh wrote, "some commentators and journalists use questions — such as the classic "Is the president a crook?" — as tools to raise doubts (sometimes unfairly) about a person's activities or character while simultaneously avoiding defamation liability."