THE PRE-*SULLIVAN* COMMON LAW WEB OF PROTECTION AGAINST POLITICAL DEFAMATION SUITS

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New York Times v. Sullivan *altered the course of U.S. defamation laws by demanding that public officials filing libel or slander suits based on their official acts meet tests emanating from the First and Fourteenth Amendments to the U.S. Constitution. This framework has favored defendants in defamation suits brought by public officials and candidates for public office. Lost in the loud majestic music of the opinion in* Sullivan *is the trend evinced in the soft lyrics of lower court common law decisions in the decades preceding 1964 where judges ruled against political plaintiffs filing defamation suits. A survey of hundreds of judicial decisions from 1870-1964 shows the existence of an informal common law web constraining political libel and slander cases. Three filaments of that web are highlighted: court decisions limiting what was defamatory and what were considered special damages; the qualified privileges of common interest and fair comment; and judicial modification of damage awards. This Article further argues that lower courts deciding the weaponized libel suits of the civil rights movement in the 1960s ignored this common law web and that the U.S. Supreme Court's decision in* Sullivan *was defensible. This Article concludes that*

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courts today should apply the common law web based in state law and adopt the common law web as part of state constitutional common law to guard against any potential curtailments of the Sullivan *framework.*

I. INTRODUCTION: THE FORGOTTEN MAN (IN THE MIRROR)[1]

New York Times Co. v. Sullivan[2] has a checkered reputation.[3] Many Americans celebrated and continue to laud the decision as protective of the national press and the right of individuals (even large groups) to state (maybe chant) rationales for why government swamps need draining.[4] Many Americans critique the decision, in whole or in part, for a variety of constitutional and policy reasons: *Sullivan* depleted the pool of respectable Americans willing to run for public office; the public figure doctrine is flawed; the actual malice standard is unworkable and/or gives the press a license to lie.[5]

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1. MICHAEL JACKSON, *Man in the Mirror*, *on* BAD (Epic Records 1988).

2. 376 U.S. 254 (1964).

3. *See infra* notes 4-5 and accompanying text; *see also* Jeffrey Abramson, *Full Court Press: Drawing in Media Defenses for Libel and Privacy Cases*, 96 OR. L. REV. 19, 20 (2017) ("In this Article, I reluctantly argue that the free speech promise of *New York Times v. Sullivan* has been lost due to the ruling's overextension." (footnote omitted)).

4. *See, e.g.*, John Bruce Lewis & Bruce L. Ottley, New York Times v. Sullivan *at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Space*, 64 DEPAUL L. REV. 1, 2-3 (2014) (arguing that the actual malice standard adopted in *Sullivan* has "proven workable"); Editorial, *The Uninhibited Press, 50 Years Later*, N.Y. TIMES, Mar. 9, 2014, at 10 SR ("Today, our understanding of freedom of the press comes in large part from the Sullivan case."); Andrew Cohen, *Today Is the 50th Anniversary of the (Re-)Birth of the First Amendment*, ATLANTIC (Mar. 9, 2014), https://www.theatlantic.com/national/archive/2014/03/today-is-the-50th-anniversary-of-the-re-birth-of-the-first-amendment/284311; Jonathan Peters, Opinion, *The Newspaper Ad That Changed Everything*, CNN, http://www.cnn.com/2017/11/20/opinions/new-york-times-v-sullivan-impact-opinion-peters/index.html (last updated Nov. 20, 2017) (praising *Sullivan*); Leslie Savan, *What's Going to Save Journalism?*, NATION (Dec. 15, 2017), https://www.thenation.com/article/whats-going-to-save-journalism (mentioning *Sullivan* and the actual malice standard). Most praise of *Sullivan* by legal scholars is nuanced, with a degree of fault found in the decision according to the academic's area of expertise. *See, e.g.*, Ashley Messenger, *Reflections on* New York Times Co. v. Sullivan, *50 Years Later*, 12 FIRST AMEND. L. REV. 423, 446 (2014) ("Although *Sullivan* did indeed give speakers great protection when commenting on public officials and is important for that reason, the underlying logic of the case is somewhat flawed and fails to protect valuable and expressive speech in all cases."); Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 744-46 (2014) (criticizing the lack of a robust press clause).

5. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 996-97 & n.1 (D.C. Cir. 1984) (Bork, J., concurring) (criticizing *Sullivan* for failing to live up to its promise: "Instead, in the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit"); ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 205-07 (1991) (reporting that Richard Nixon warned that *Sullivan* would diminish the quality of the pool of political candidates); Abramson, *supra* note 3, at 35-36, 49-54 (critiquing the public figure

More recently, libel laws were thrust into the national discourse as part of the presidential campaign of Donald Trump. At a February 2016 rally, Trump promised his base of forgotten men and women that libel laws would be "open[ed] up," so that "we can sue [the press] and win lots of money."[6] Trump then promised reporters covering the rally that "we're going to have people sue you like you've never got[ten] sued before."[7] This was just one of many episodic libel proposals he made during that campaign and his first two years as president.[8]

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doctrine and the extension of *Sullivan* to protect the private acts of public officials); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 817-18 (1986) ("Now that the exigencies of the immediate case and of the segregation crisis that brought it to the fore have passed, the sensible constitutional conclusion is to abandon the actual malice rule in *New York Times*. In its institutional sense, *New York Times v. Sullivan* was wrongly decided."); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *In Its Proper Place*, 101 HARV. L. REV. 1287, 1287, 1289-90, 1293-95 (1988) (critiquing the "mislabeled 'actual malice'" standard); Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 8 COLUM.-VLA ART & LAW 1, 14, 20-22 (1983) (critiquing *Sullivan* for not holding that the First Amendment prohibited libel actions based on criticism of the official conduct of public officials); *cf.* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488, 510 (1991) ("The actual malice rule of *New York Times v. Sullivan* does not adequately protect the press, so courts have imposed many other constitutional limitations on the libel action." (footnote omitted)).

6. Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 (quoting Donald Trump during a campaign rally in Texas in February 2016).

7. *Id.*

8. *See id.* (quoting Donald Trump as saying "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. 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," during a political rally in Texas in February 2016); *see also* Josh Dawsey, *Trump Says Administration Will Take 'Very Strong Look' at Stricter Libel Laws*, WASH. POST (Jan. 10, 2018), https://www.washingtonpost.com/politics/trump-says-administration-will-take-very-strong-look-at-stricter-libel-laws/2018/01/10/9a1f68de-f633-11e7-91af-31ac729add94_story.html?utm_term=.41d856cbde4f (quoting Donald Trump as calling U.S. libel laws a "sham and a disgrace" at a televised January 2018 meeting of his Cabinet at the White House); Post Ops. Staff, Opinion, *A Transcript of Donald Trump's Meeting with the Washington Post Editorial Board*, WASH. POST (Mar. 21, 2016), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/03/21/a-transcript-of-donald-trumps-meeting-with-the-washington-post-editorial-board/?utm_term=.17b0eba17658 (quoting Donald Trump as saying: "I want to make it more fair from the side where I am, because things are said that are libelous, things are said about me that are so egregious and so wrong, and right now according to the libel laws I can do almost nothing about it because I'm a well-known person you know, etc., etc." during an interview with the Washington Post); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 9, 2016, 3:36 AM), https://twitter.com/realdonaldtrump/status/796315640307060738?lang=en ("Such a beautiful and important evening! The forgotten man and woman will never be forgotten again. We will all come together as never before . . . ."). *But see* Eugene Volokh, Opinion, *White House Chief of Staff Reince Priebus on Changes to Libel Law*, WASH. POST (May 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/01/white-house-chief-of-

Perhaps this esoteric campaign promise has its roots in Trump's failure to win large verdicts in defamation suits against the press.[9] Regardless of reason, President Trump finds these laws "disgrace[ful]," and believes that *someone* should do *something* to fix them.[10]

Except for chaotic periods in American history (e.g., Red Scares, declared wars, and the Civil Rights Movement), the heyday of the political defamation plaintiff did not exist—at least not to the extent that President Trump appears to desire.[11] U.S. courts did not make a habit of making it rain for political defamation plaintiffs. The closest one comes to finding a precedent for the defamation regime that Trump appears to want is the state courts of the Deep South in the 1960s, where weaponized libel suits were filed against media outlets and civil rights activists with the intention of chilling coverage of and participation in the Civil Rights Movement and threatening to bankrupt national press outlets.

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staff-reince-priebus-on-changes-to-libel-law/?utm_term=.88730f4f222b (arguing that the lack of specific proposals to reform libel laws shows that the Trump Administration is unserious about this). Defamation suits also arose as an issue during Donald Trump's campaign when Trump promised to sue all the women accusing him of various degrees of sexual misconduct. Rebecca Morin, *Trump: Accusers 'Will Be Sued After the Election Is Over'*, POLITICO (Oct. 22, 2016, 1:09 PM), https://www.politico.com/story/2016/10/trump-accusers-will-be-sued-after-the-election-is-over-230186.

9. *See, e.g.*, Trump v. Chicago Tribune Co., 616 F. Supp. 1434, 1434, 1438 (S.D.N.Y. 1985) (dismissing libel suit against architecture critic for criticizing Trump's idea to build the "tallest building in the world" on Manhattan island); Trump v. O'Brien, 29 A.3d 1090, 1092-95, 1103 (N.J. Super. Ct. App. Div. 2011) (affirming summary judgment for defendant in defamation suit filed against the author and publishers of TRUMPNATION, THE ART OF BEING THE DONALD for lowballing Trump's net worth); *cf.* Makaeff v. Trump Univ., 715 F.3d 254, 258 (9th Cir. 2013) ("No one would deny that Donald Trump, the real estate magnate, television personality, author, and erstwhile presidential candidate, cuts a celebrated, if controversial, public figure."); Roffman v. Trump, 754 F. Supp. 411, 413, 419-20 (E.D. Pa. 1990) (denying summary judgment for defendant-Trump in a defamation suit brought by an "apprais[er] of the Atlantic City, New Jersey casino industry").

10. *See supra* note 8. Aside from *Sullivan* and its progeny, there is not much substantive role for the federal government in defamation law; thus, we can assume that *Sullivan* is the source of Trump's ire. *See supra* note 8. As president, Donald Trump can try to alter U.S. libel laws by appointing federal judges—district and circuit court judges could prune *Sullivan*, while U.S. Supreme Court Justices could overrule *Sullivan*.

11. *See infra* Parts III.A.2.b–c, III.A.3, IV. The weaponized defamation suits of the Civil Rights Movement were not about defamation. *See infra* note 15. Defamation was a vehicle that southern plaintiffs, courts, and polities hoped would chill the speech of the national press outlets through reportage on resistance to and effects of segregation and white supremacy.

This Article is not a story about the First Amendment;[12] though First Amendment principles provided background music for some pre-*Sullivan* decisions that ruled against political defamation plaintiffs. Rather, judges used the lyrics of the common law to curtail the ability of public officials, candidates, and political figures to file (much less win) political defamation suits.

This Article is structured as follows. Part II provides a brief history of defamation that leads to a presentation of what the elements of and defenses to a cause of action for defamation were prior to 1964.[13] Part III details three strands of the common law web that constrained political defamation suits prior to 1964: narrowing what was defamatory and what would be accepted as special damages; the qualified privileges of common interest and fair comment; and judicial scrutiny of damage awards.[14] Part IV presents Alabama's common law of libel at the time the weaponized political libel suit,[15] *Sullivan v. New York Times*, was decided (in 1962) and argues that the broad ruling by the U.S. Supreme Court in 1964 reversing Alabama's Supreme Court was (and remains) justifiable on constitutional grounds.[16] Part V urges state institutions to enshrine their own versions of the common law web into their state constitutions, legislation, and/or common law—if they have not done so already—in case *Sullivan* is curtailed if not overruled.[17]

II. THE STORY OF U.S.[18] DEFAMATION LAWS: A PRE-*SULLIVAN* PRIMER

Defamation laws were plaintiff-friendlier prior to 1964, particularly in political cases. Recent scholarship has focused on the history of defamation in a post-*Sullivan* world. Valid reasons for this exist: the importance of the constitutional rules of *Sullivan* and its progeny, the temporal distance scholars now enjoy, and 2014's fiftieth anniversary of

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12. To the extent that the First Amendment itself applies, it is only because of its twentieth century incorporation through the Fourteenth Amendment. *See infra* note 27; *see also infra* Part IV (discussing *Sullivan*). Fair comment is closely linked with the goals of the First Amendment, yet, fair comment was a right adopted from British law in the 1800s. *See infra* Part III.B.2.a–b. State courts in the late 1800s, when articulating or adopting the minority view of fair comment, began citing free speech and press provisions of state constitutions to strengthen the rationales of their opinions. *See infra* Part III.B.2.c.

13. *See infra* Part II.

14. *See infra* Part III.A–C.

15. Weaponized defamation suits are libel or slander suits filed with the aim to chill coverage of a newsworthy subject or bankrupt a press outlet for other reasons; they are not aimed at compensating plaintiffs for any damages sustained. *See infra* note 441.

16. *See infra* Part IV.

17. *See infra* Part V.

18. TAYLOR SWIFT, *The Story of Us*, *on* SPEAK NOW (Big Machine Records 2010) ("And the story of us looks a lot like a tragedy now. The end.").

Sullivan. However, viewing 1964 as a reset date for defamation does not convey the rich legal and historical foundations that undergird the tort and can be seen in U.S. defamation laws as of 2018.

This Part overviews the history and legal structure of the torts of defamation. Subpart A traces the history of Anglo-American defamation law.[19] Subpart B provides a skeletal primer on what the elements of and defenses to a cause of action for defamation were between 1870 and 1964.[20] Subpart C concludes that state defamation laws differed around the edges but not at the core.[21]

A. Historical Primer: "You Can't Just Go Around Slandering Somebody's Reputation"[22]

The legal, moral, and religious roots of the tort of defamation are millennia old.[23] The underlying concept expanded from defamation as an offense against God, to an offense against the monarch, the nobleman, and a person history forgot. In Renaissance England, the Star Chamber claimed jurisdiction over all defamation, but focused on libels of a political nature. Slander and petty libel suits were filed in common law courts, while petty slander fell to religious bodies that lacked power to award monetary damages.[24] After the 1641 abolition of the Star Chamber, common law courts gained jurisdiction over libel *and* slander but retained the distinction in the metropole, which was then exported to England's American colonies.[25]

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19. *See infra* Part II.A.

20. *See infra* Part II.B.

21. *See infra* Part II.C.

22. *The Real Housewives of Beverly Hills: Don't Cry Over Spilled Wine* (Bravo television broadcast Dec. 19, 2017) (spoken by Lisa Vanderpump); *see also* Max Berlinger, *A 'Real Housewives' Star Dishes at Tea*, N.Y. TIMES, Jan. 28, 2018, at SR 6, 7 (discussing Lisa Vanderpump's flirt with a run for Governor of California).

23. *See, e.g.*, *Psalm* 101:5 (King James) ("Whoso privily slandereth his neighbour, him will I cut off: him that hath an high look and a proud heart will not I suffer."); Cristina Carmody Tilley, *Reviving Slander*, 2011 UTAH L. REV. 1025, 1039-41 (2011) (discussing "communicative injuries" that could be compensated for or criminally punished during and throughout the Roman Empire and throughout Western Europe and England during the Middle Ages).

24. *See* Tilley, *supra* note 23, at 1042-45; *see also* David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 774 (1984) ("The ecclesiastical courts took cognizance of slander to protect the soul of the slanderer. Slander was the cousin of blasphemy, and was proscribed for similar reasons. Libel actions were created primarily as a means of protecting government from the power of the printing press. Its purpose was evident from its name: libel derives from the French term for a political tract, which in turn comes from the Latin word for book." (footnotes omitted)).

25. William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 841-42 (1960); Tilley, *supra* note 23, at 1048-51, 1053-54.

The Federal Constitution of 1787 did not delegate the power to promulgate civil laws of defamation to Congress.[26] The ratification of the Bill of Rights seemed to further clarify that enacting civil defamation laws was not a federal power: The First Amendment ate away at a religious foundation as the basis for defamation law;[27] the Tenth Amendment confirmed that states retained the power to make their own laws on defamation.[28]

Domestic tranquility provided justification for maintaining robust civil defamation laws. States, seeking to replace duels, encouraged people to seek monetary damages in courts, rather than blood satisfaction at ten paces.[29] Civil defamation laws existed as a means to

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26. *See* U.S. CONST. art. I, § 8 (enumerating Congress's powers).

27. *See* U.S. CONST. amend. I (establishment and free exercise clauses). A qualification is necessary here as these clauses of the First Amendment were not enforceable against the states until the twentieth century. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (incorporating the Free Exercise and Establishment Clauses of the First Amendment into the Due Process Clause of the Fourteenth Amendment); *see also* Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

28. *See* U.S. CONST. amend. X. The power to promulgate defamation laws was not expressly delegated to the Federal Government nor prohibited to the states, thus was reserved to the states.

29. *See* JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 27 (2001) [hereinafter FREEMAN, AFFAIRS OF HONOR] ("Where political combat and personal reputation were so intertwined, duels were a constant threat."); *see also* McNatt v. Richards, No. 6987, 1983 WL 18013, at *1 (Del. Ch. Mar. 28, 1983) ("I also note that defendant's offer to waive its counterclaim on the condition that plaintiff accept a challenge of trial by combat to death is not a form of relief this Court, or any court in this country, would or could authorize. Dueling is a crime and defendant is therefore cautioned against such further requests for unlawful relief."). *But see* GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 84 & 422 n.30 (Vintage Books 2007) (2006) (detailing how a suit for libel failed to prevent a physical altercation where the defendant claimed to have subsequently caned his $25,000 out of the plaintiff, though the verdict was reportedly $12,000); *but cf.* JOANNE B. FREEMAN, THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR 89 (2018) [hereinafter FREEMAN, FIELD OF BLOOD] ("When it came to slander, [Rep. Henry Wise (Whig-VA)] noted, 'The law cannot restrain it—a pistol sometimes will.'"); FREEMAN, AFFAIRS OF HONOR, *supra*, at 172 ("[C]aning conveyed the inferior status of the victim."). For recent scholarship on insults, sectional strife, and party differences that contributed to a fatal congressional duel, and many threatened political duels in the Mid-Nineteenth Century, see generally chapter three in FREEMAN, THE FIELD OF BLOOD, *supra*, at 75-111. For an examination of political dueling in the Early Republic, see generally chapter four in FREEMAN, AFFAIRS OF HONOR, *supra*, at 159-98 (discussing political dueling and the culture of honor present in the 1790s and 1800s United States through the prism of the illegal 1804 duel where then-Vice President Aaron Burr killed Alexander Hamilton. Throughout American history, the primary purposes of a political duel, according to the various codes of honor, was not to achieve bloodshed, but to achieve "satisfaction" for a perceived transgression and participate in a ritual that reclaimed the reputation and recognized the social status of the aggrieved party, as only social equals could duel. *See id.* at

keep peace or quiet,[30] and were governed mostly or wholly by the states until 1964[31] with two notable federal intrusions: the Sedition Act of 1798[32] and a nascent power to make federal common law of defamation.

Enacting the Sedition Act of 1798 and prosecuting under its authority was the deepest federal foray into defamation law. Under that Act, much criticism of nearly all federal officials became a federal crime.[33] The Act was seen as an attempt to stifle political speech of critics of the Adams Administration, led by then-Vice President Thomas Jefferson.[34] Truth was a complete defense to a Sedition Act prosecution,[35] yet truth was often impossible to prove, especially when the statement was given as an opinion.[36] The Act expired in 1801 and is generally agreed to have been unconstitutional.[37]

For over a century, federal courts hearing defamation cases brought under diversity jurisdiction[38] could create common law.[39] However,

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178 (discussing in the context of why Burr, after losing the New York gubernatorial election of 1804, challenged Hamilton to a duel).

30. Viewing civil and criminal defamation laws as a mechanism of social control enforcing hierarchical status within American societies is likely also correct.

31. *See, e.g.*, Eric M. Freedman, *Libel Law and the Preservation of the Republic 1787-1825*, 30 CHITTY'S L.J. 176, 177 (1982) ("[M]ost of the libel law in this period was developed on the state level."); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283-84, 292 (1964).

32. Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

33. *Id.* (exempting the Vice President from federal protections under the Sedition Act).

34. Prosecutions were overtly political—against Democratic Republicans. BRUCE A. RAGSDALE, FED. JUDICIAL CTR., THE SEDITION ACT TRIALS 3-4, 5-7 (2005), https://www.fjc.gov/sites/default/files/trials/seditionacts.pdf (discussing the prosecution of Republican Congressman Matthew Lyon of Vermont and muckraker James Callender).

35. In civil libel suits, truth was not as liberal as it would become in the late nineteenth and twentieth centuries.

36. *See, e.g.*, CHARLES SLACK, LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON, AND THE MISFITS WHO SAVED FREE SPEECH 149-51 (2015) (discussing Luther Baldwin of Newark, New Jersey whose liquor-induced lewd comment about wanting a cannon to be fired into John Adams' arse turned into a prosecution under the Sedition Act).

37. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273-77 (1964) (discussing the constitutionality of the Sedition Act); *id*. at 298 n.1 (Goldberg, J., concurring) ("[T]he Act would today be declared unconstitutional."); Robert Sack, New York Times Co. v. Sullivan—*50-Years Afterwards*, 66 ALA. L. REV. 273, 276 (2014) (arguing that by the time *Sullivan* was decided in 1964 it had been settled that the Sedition Act violated the First Amendment); *Virginia Resolutions, 21 December 1798*, *Founders Online*, NAT'L ARCHIVES, http://founders.archives.gov/documents/Madison/01-17-02-0128 (last modified June 13, 2018) (arguing *inter alia* that the Sedition Act was unconstitutional under the First and Tenth Amendments); *see also* FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 57-58 (2017) (criticizing the Sedition Act of 1798 as an example of "free speech crumbling in times of crisis . . . . [which] led to the jailing of more than twenty newspaper editors and was the single greatest frontal attack on freedom of speech in the nation's history.").

38. 28 U.S.C. § 1332(a) (2012) (giving federal courts jurisdiction over civil suits involving parties from different states where the amount in controversy exceeds $75,000).

39. *See, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842) (holding that state common law is not binding law in federal court).

federal courts routinely looked to state law for guidance.[40] The power to create substantive federal common law on defamation ended with the 1938 decision in *Erie Railroad v. Tompkins*,[41] holding that federal courts hearing diversity suits *must* apply the substantive common law of the state controlling the litigation.[42]

When the Court decided *Sullivan* in 1964, over fifty American bodies of laws of defamation existed. Each state defined its own defamation laws, and the substance of those defamation laws went unsupervised by federal courts.

B. Legal Primer

From 1870 to 1964, the legal principles of the States' governing defamation were largely similar. Subpart 1 discusses the distinction between libel and slander.[43] Subpart 2 breaks down the elements of defamation.[44] Subpart 3 discusses the privileges and defenses available to defendants.[45]

1. Libel and Slander: "Say it? Forget it. Write it? Regret it."[46]

In 1960, William Prosser wrote, "[of] all of the odd pieces of bric-a-brac upon exhibition in the old curiosity shop of the common law, surely one of the oddest is the distinction between the twin torts of libel

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40. *See, e.g.*, Post Publ'g Co. v. Hallam, 59 F. 530, 541-42 (6th Cir. 1893) (adopting the narrow view of fair comment, Judge Taft quoted approvingly from an Ohio Supreme Court opinion arguing that if false statements of fact were privileged, it would "drive reputable men from public positions" (quoting Post Publ'g Co. v. Moloney, 33 N.E. 921, 926 (Ohio 1893)). Where no state law existed, federal courts appeared to have made common law. *Compare* Nev. State Journal Publ'g Co. v. Henderson, 294 F. 60, 62-63 (9th Cir. 1923) (adopting the majority view of fair comment), *with* Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 896-97, 897 n.106 (1949) (reporting that Nevada had not opined on the issue of whether misstatements of fact are constitutionally privileged).

41. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938) (holding state substantive common law binding on federal courts and thus overruling *Swift*, 41 U.S. (16 Pet.) 1).

42. *Id.* at 78; *see, e.g.*, Sweeney v. Schenectady Union Publ'g Co., 122 F.2d 288, 289 (2d Cir. 1941) (noting that the plaintiff filed suits in multiple jurisdictions and that "[d]ecisions in other jurisdictions, however, are not only conflicting but are for us inconclusive since they have turned on the application of the libel law of states other than New York while here we must be governed by the law of the State of New York" (citing *Erie R.R. Co.*, 304 U.S. 64)), *aff'd*, 316 U.S. 642 (1942).

43. *See infra* Part II.B.1. *Compare* Prosser, *supra* note 25, at 848 (noting that Louisiana, given its history as a civil law jurisdiction, did not distinguish between libel and slander), *with* Tilley, *supra* note 23, app. at 1081 ("[M]ost states continue to adjudicate libel and slander as two distinct torts . . . .").

44. *See infra* Part II.B.2.

45. *See infra* Part II.B.3.

46. *The Real Housewives of New York City*: *War and P.O.S.* (Bravo television broadcast Apr. 25, 2018) (spoken by Dorinda Medley).

and slander."[47] This distinction began as a jurisdictional quirk of Renaissance England, but was retained to differentiate between methods of publication. If a method was capable of permanence and/or wide dissemination it was more akin to libel than slander. While jurisdictions differed in what they classified as libel or slander, generally the following rules applied regarding that classification and the impact of that classification.

Libel was, generally, a written publication of a defamatory statement: letters, books, and newspapers (and, more recently, tweets).[48] In most states, when libel was alleged damages could be presumed. This presumption was premised on the belief that written publications evinced thought, and were capable of permanence and wide dissemination.[49] Debates over what publications could be classified as libel started with litigants wrangling in courts for procedural advantages: libel was friendlier to plaintiffs than slander. These legal disputes often turned into lobbying efforts by competing special interest groups in state legislatures aimed at designating messages communicated via new technologies as either libel or slander for financial purposes, resulting in legislative edicts on classification unmoored from whether a method of publication required sustained thought or was capable of permanence and wide-dissemination.[50]

Libel per se was a publication that on its face met the statutory and/or common law definition of defamatory and required no extrinsic evidence to prove the sting of its charge.[51] This was inclusive of but not limited to publications that fell into categories of slander per se.[52] The

47. Prosser, *supra* note 25, at 839.

48. *See, e.g.*, Adeline A. Allen, *Twibel Retweeted: Twitter Libel and the Single Publication Rule*, 15 J. HIGH TECH. L. 63, 68, 80-81 (2014) ("Because tweets are written and not spoken, it is libel, as opposed to slander, that seems to be the appropriate designation for the type of defamation that takes place through a tweet."). *But see* Tilley, *supra* note 23, at 1074-76 (suggesting that social media posts of limited exposure be treated as slander).

49. Prosser, *supra* note 25, at 842-43.

50. *See, e.g.*, CAL. CIV. CODE § 46 (West 2007) (including oral defamatory statements captured by radio or film as slander). *Compare* Charles Parker Co. v. Silver City Crystal Co., 116 A.2d 440, 443 (Conn. 1955) (holding that reading from a prepared manuscript on the radio was libel), *with* Briggs v. Garrett, 2 A. 513, 516-17, 524-25 (Pa. 1886) (affirming dismissal of a *libel* suit based on the public reading of a letter).

51. Prosser, *supra* note 25, at 839-40; *see, e.g.,* CAL. CIV. CODE § 45a (West 2007) ("A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.").

52. *See, e.g.*, Sweeney v. Beacon Journal Publ'g Co., 35 N.E.2d 471, 472 (Ohio Ct. App. 1941) (defining libel per se as "[m]atters which would bring him into ridicule, hatred or contempt" (citations omitted)); Sanderson v. Caldwell, 45 N.Y. 398, 405-06 (1871) (holding that a libel of slanderous per se content needs no proof of special damages).

determination that a publication was libelous per se lay with the trial judge.[53] The classification of a publication as libelous per se frequently meant that a plaintiff could collect damages without proving them specially.[54]

Libel per quod was a defamatory publication requiring extrinsic evidence to prove the sting of the charge and/or proof of special damages. The former requirement made the factfinder decide whether pairing the words in the publication with outside evidence "make the publication libelous."[55] The latter requirement treated libel per quod like many slander suits[56]: a pecuniary loss must be proven or the suit would be dismissed for failure to state a claim.[57]

Generally, slander was a defamatory statement communicated orally by a defendant to a third party.[58] The main impact of the distinction between libel and slander was that slander required plaintiffs to plead and prove special damages.[59] The rationales for this rule were that verbal attacks could be made in haste, lacking the thought put into and the potential permanent form of a written charge.[60] Special damages would be presumed if the charge was slanderous per se.

Slander per se was a charge of substance so certain to injure one's reputation that damages were legally presumed. Categories of slander per se vary with cultural changes and across jurisdictions; defining those

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53. Baker v. Warner, 231 U.S. 588, 594 (1913) ("Where words are libelous per se the judge can so instruct the jury, leaving to them only the determination of the amount of damages.").

54. *See, e.g.*, David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II: The United States*, 42 COLUM. L. REV. 1282, 1293-94 (1942).

55. *Baker*, 231 U.S. at 594 ("In [defamatory per quod] cases the jury must not only determine the existence of the extrinsic circumstances, which it is alleged bring to light the concealed meaning, but they must also determine whether those facts when coupled with the words, make the publication libelous.").

56. *See* Prosser, *supra* note 25, at 840, 848-49.

57. *See infra* Part III.A (discussing defamation per se and special damages).

58. Duquesne Distrib. Co. v. Greenbaum, 121 S.W. 1026, 1027 (Ky. 1909) (defining slander as an "oral utterance of defamatory matter").

59. *See* Prosser, *supra* note 25, at 844. Libel and slander suits could invoke different procedural and substantive rules. Tilley, *supra* note 23, app. at 1081 ("[M]ost states continue to adjudicate libel and slander as two distinct torts, each with its own rules of evidence, damages, state of mind, and even statutes of limitations.").

60. Prosser, *supra* note 25, at 842-43. Permanence is important: The world might little note what President Lincoln said at the November 1863 dedication of a Soldier's Cemetery had no written version been made. However, hasty messages can be permanent. For an example of this, see Emily Yahr, *CMA Awards: Brad Paisley, Carrie Underwood Make Fun of President Trump in Monologue*, WASH. POST (Nov. 8, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/11/08/cma-awards-brad-paisley-carrie-underwood-make-fun-of-president-trump-in-monologue/?utm_term=.ef1482bae59d (quoting Brad Paisley and Carrie Underwood as referencing President Trump when singing "maybe next time he'll think before he tweets" (emphasis omitted)).

categories continues to remain the dominion of the states.[61] Traditionally, four categories of slander per se existed: (1) charging that a person has a loathsome disease; (2) charges impugning the chastity of a woman; (3) charging a person with a serious crime; and (4) charges injuring one's trade, business, or profession.[62]

The first category of slander per se was charging that a person has a loathsome disease. This allegation would subject a person to scorn, imply moral failure, and cause others to avoid him.[63] This category has withstood centuries of American judicial scrutiny and medical science due to the continued prevalence of venereal diseases.[64]

The second category of slander per se was impugning the chastity of a woman. This charge could cause grievous harm to a woman's marital prospects.[65] The category has since morphed

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61. *Compare* Yonaty v. Mincolla, 945 N.Y.S.2d 774, 776 (App. Div. 2012) ("Given this state's well-defined public policy of protection and respect for the civil rights of people who are lesbian, gay or bisexual, we now overrule our prior case to the contrary and hold that such statements are not defamatory per se."), *with* Matherson v. Marchello, 473 N.Y.S.2d 998, 1105 (App. Div. 1984) (noting while holding slanderous per se: "In short, despite the fact that an increasing number of homosexuals are publicly expressing satisfaction and even pride in their status, the potential and probable harm of a false charge of homosexuality, in terms of social and economic impact, cannot be ignored."). Whether courts of other states should come to the same conclusion argues for states determining what is defamatory per se. For example, see Samantha Allen, *Alabama Governor Says Lesbian Accusation is 'Disgusting Lie'*, DAILY BEAST (May 17, 2018, 8:13 PM), https://www.thedailybeast.com/alabama-governor-says-lesbian-accusation-is-disgusting-lie?ref=home, noting that, "In a state like Alabama, being outed as LGBT during the middle of a re-election campaign would be potentially catastrophic."

62. *See, e.g.*, Prosser, *supra* note 25, at 844; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 372 (1974) (White, J., dissenting) (listing the four slander per se categories). *But see* Shields v. Booles, 38 S.W.2d 677, 680 (Ky. 1931) (replacing want of chastity of a woman with "acts which might tend to disinherit him.").

63. *See, e.g.*, Kaucher v. Blinn, 29 Ohio St. 62, 63-64 (1875) (holding that charging a person as having any venereal disease is slander per se); Watson v. McCarthy, 2 Ga. 57, 59 (1847) (holding that saying: "You are a clappy d—d son of a bitch, and have been rotten with the clap this two or three years," was slander per se as tending to exclude plaintiff from "good society").

64. Nolan v. State of New York, 69 N.Y.S.3d 277, 285 (App. Div. 2018) ("Since it can still be said that ostracism is a likely effect of a diagnosis of HIV, we hold that the defamatory material here falls under the traditional 'loathsome disease' category and is defamatory per se. Further, to the extent that certain medical conditions such as HIV unfortunately continue to subject those who have them to a degree of societal disapproval and shunning, we decline to entertain the State's argument that the entire 'loathsome disease' category is archaic and has no place in our jurisprudence."); *see* Letter from Eric Paul Leue, Exec. Dir., Free Speech Coal., to Donald Trump, President, U.S., *Re: The Difference Between HPV and HIV* (May 18, 2018), https://www.freespeechcoalition.com/blog/2018/05/18/an-open-letter-to-president-trump-on-the-difference-between-hiv-and-hpv (detailing differences between STIs in letter prepared by the Adult Film Industry).

65. Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 416 (2004). Imputing a want of chastity to a woman or girl remains harmful in the twenty-first century. *See, e.g.*, TAYLOR SWIFT, BETTER THAN REVENGE (Big Machine Records 2011) ("She's not a saint and she's not what you think; she's an actress, she's better known for the things that she does on the mattress."). *But see* Roger Ebert, Review of *Easy A* (Sept. 25, 2010),

into ascribing sexual deviance or irregularity to a plaintiff regardless of gender.[66]

The third category of slander per se was charging a person with commission of a serious crime, such as a felony or a crime of moral turpitude.[67] Alleging that a candidate for public office amassed multiple traffic violations would not likely be slander per se; alleging that the candidate paid off a police officer to make multiple traffic tickets disappear would be slander per se. Judges looked at the words the defendant spoke to decide whether the charge amounted to a crime, even if no allegation of a specific criminal act (e.g., bribery, rape) ever crossed the defendant's lips.[68]

In *Wood v. Plackey*, the trial court dismissed a slander suit for failing to allege special damages.[69] Wood alleged that during his candidacy for town chairman of York, Wisconsin, York's town clerk, Plackey, told others: "Wood went to Lake the printer and tried to get Lake to make an illegal change of the names on the ballot so as to get an advantage at the polls."[70]

Wisconsin's Supreme Court reversed and reinstated Wood's complaint, as the alleged acts, if true, meant that Wood violated a criminal statute carrying a jail term of up to three-years.[71] The court stated: "in so far as the slanderous words complained of . . . charged that the plaintiff 'tried' or 'endeavored' to have Lake wrongly print the ballots, they in substance charged plaintiff with advising the commission of a felony, and thus, in effect, . . . *charged plaintiff with the commission of a felony also*."[72] The charge of acts that would constitute a felony

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https://www.rogerebert.com/reviews/easy-a-2010 (discussing *Easy A* where the main character lies to her friend about having lost her virginity, and "in having lost one reputation, she has gained another. Previously no one noticed her at all . . . . Now she is imagined to be an experienced and daring adventuress, and it can be deducted that a great many in the student body envy her experience").

66. Some states have switched the operative gender. *See, e.g.*, CAL. CIV. CODE § 46 (West 2007) ("Imputes to *him* impotence or want of chastity . . . ." (emphasis added)); *cf.* N.D. CENT. CODE § 14-02-04(4) (2014) ("Imputes to the person impotence or want of chastity . . . .").

67. *See, e.g.*, Shields v. Booles, 38 S.W.2d, 677, 680 (Ky. 1931) ("the commission of a crime involving moral turpitude for which, if true, the accused might be indicted and punished"); *cf.* Bays v. Hunt, 14 N.W. 785, 786 (Iowa 1882) (holding that one candidate stating to another candidate, "I believe you will steal" is an opinion about future conduct and not actionable as slander per se).

68. *See, e.g.*, Weinstein v. Rhorer, 42 S.W.2d 892, 892-93, 895 (Ky. 1931) (remanding suit for retrial on slander per se imputation of *graft*); *see also* Devany v. Quill, 64 N.Y.S.2d 733, 735-36 (Sup. Ct. Bronx Cnty. 1946) (charging a candidate as "[t]he agent of Hitler in America" during declared war with Germany was slander per se, imputing *treason* and violations of Espionage Act and Foreign Agent Registration Act).

69. Wood v. Plackey, 232 N.W. 564, 564-65 (Wis. 1930).

70. *Id.*

71. *Id.* at 565.

72. *Id.* (emphasis added).

forgave the failure to plead special damages because damages were presumed from the publication's charge.

The fourth category of slander per se pertains to statements injurious to one's trade, profession, or business. The merchant class were proponents of English common law courts gaining jurisdiction over slander, so that monetary damages could be awarded.[73] Mercantile and professional concerns were also salient in the American colonies-turned-United States. In some political defamation cases, persons working in the political sphere who were attacked by politicians would bring defamation suits against politicians for attacking their professional reputation.[74] A typical use of this category of slander per se in political defamation cases was when an attack on one's candidacy was pled as an attack on one's professional reputation as an attorney.[75]

In *Pattangall v. Mooers*,[76] Mooers, a voter in Maine's Third Congressional District, told other voters in that district that candidate Pattangall lobbied to pass a workmen's compensation bill while concomitantly accepting hundreds of dollars to defeat that bill.[77] Pattangall, Maine's former Attorney General, sued Mooers, alleging that the charge damaged his professional reputation as a lawyer.[78] A jury

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73. Tilley, *supra* note 23, at 1044-45, 1047.

74. Brailey Odham, candidate for the Democratic nomination for Governor of Florida, disputed a poll conducted by Joe Abram indicating Odham "appear[ed] to be slipping badly." Abram v. Odham, 89 So. 2d 334, 335 (Fla. 1956) (en banc). At a political rally, Odham stated: "Joe Abram is a phony and his poll is a phony." *Id.* Odham also published a handbill alleging that Abram offered to produce a poll that had Odham "making a good showing[,]" if Odham paid Abram $1500. *Id.* at 338. Abram brought defamation suits against Odham for attacking Abram's profession as a pollster and against a newspaper for publishing remarks made at Odham's rally. *Id.* at 335-36. The Supreme Court of Florida affirmed the dismissal of the suit against the newspaper as the article was qualifiedly privileged as fair and accurate reportage of Odham's remarks. *Id.* at 335-36, 338. The court reversed the dismissal of the complaint against Odham as the allegation in the handbill was a factual assertion that Abram's poll was phony, and a jury could have found that Odham made the statements at the rally with malice that defeated any qualified privilege that existed. *Id.* at 338; *cf.* Jacobus v. Trump, 51 N.Y.S.3d 330, 333-35, 344 (Sup. Ct. 2017) (dismissing defamation suit filed by political strategist against then-candidate Donald Trump who tweeted that she begged for a job and was a "dummy"), *aff'd*, 64 N.Y.S.3d 899, 899 (App. Div. 2017) (mem.) (affirming as nonactionable and lacking evidence tweets disparaged profession); Dan Zak, *The Curious Journey of Carter Page, the Former Trump Adviser Who Can't Stay Out of the Spotlight*, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/lifestyle/style/the-curious-journey-of-carter-page-the-former-trump-adviser-who-cant-stay-out-of-the-spotlight/2017/11/15/f240cc40-c49e-11e7-afe9-4f60b5a6c4a0_story.html?utm_term=.83d64f290cc9 (reporting on events leading Trump Campaign Foreign Policy Adviser Carter Page to file a defamation suit).

75. *See* Pattangall v. Mooers, 94 A. 561, 561-64 (Me. 1915) (slander); *see also* Otero v. Ewing, 110 So. 648, 649-50 (La. 1926) (libel); Walsh v. Pulitzer Publ'g Co., 157 S.W. 326, 327-28 (Mo. 1913) (libel).

76. 94 A. 561 (Me. 1915).

77. *Id.* at 561-62.

78. *Id.*

found for Pattangall, awarding $279.25 in damages.[79] The Supreme Judicial Court affirmed, noting that the verbal charge was actionable per se because it attacked the plaintiff's professional reputation as an attorney.[80]

These categories were considered to embrace some of the most damaging charges one could make about another person, political figure or not. If the trial judge determined the words complained of were slanderous per se, malice and damages would be presumed as a matter of law.

2. Elements of a Defamation Claim

From 1870-1964, whether a defamation suit was for libel or slander, five elements needed to be alleged: (1) the defendant published to a third party, (2) a statement of fact, (3) "of and concerning the plaintiff," (4) that was "defamatory," and (5) caused the plaintiff damages.[81] In practice, many plaintiffs were able to rely on legal presumptions that shifted the burden to the defendant to disprove elements that were initially the plaintiff's burden.

The first element was publication to a third party. Publication was any act that disseminated content to persons other than the plaintiff.[82] The method of publication determined whether the civil action would be for libel or slander. Re-publication was treated different than publication: A re-publisher of a defamatory statement was only liable for the damages that the republication caused; the original publisher was responsible for all foreseeable damages that the defamatory statement caused, including damages from republication by others.[83]

The second element was that the defendant's statement be one of fact: whether or not the statement made, implied, or was based upon an assertion that could be proven true or false.[84] If the statement was one of

79. *Id.* at 562.

80. *Id.* at 562, 566.

81. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 262-64, 267 (1964).

82. If a person composes a defamatory letter and burns it before showing it to another person, the composer of the letter has not published the letter and no libel has occurred. *See* Sourbier v. Brown, 123 N.E. 802, 803 (Ind. 1919).

83. *See id.* at 803-04 (holding re-publisher of defamatory circular liable for damages flowing from copies he produced, but not for the original publication).

84. A fact is that President Trump tweeted: "The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!" Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), https://twitter.com/realDonaldTrump/status/832708293516632065. Whether *The New York Times* is an "enemy of the American People," is an opinion. *Id.*; *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (discussing fact and opinion).

pure opinion, it was not usually actionable.[85] If the opinion was based on a fact or set of facts, the fact(s) relied upon could be subject to the test above to impose liability on the speaker for the opinion.[86] In some jurisdictions, a false statement of fact or misstatement of fact honestly believed to be true could be protected.[87]

The third element was that a statement be "of and concerning" the plaintiff. This requirement, also known as colloquium, placed the burden on the plaintiff to prove that the audience to the publication would reasonably understand that the person or persons allegedly defamed included that plaintiff. For example, the charge, "You're so vain, you probably think this song is about you," without more, could not reasonably be understood to be about a specific plaintiff.[88] This requirement limited the realm of potential plaintiffs when a publisher defamed a political party, a government body, or made oblique reference to an unnamed person or group of people.[89] Although courts could, and at times did, liberally construe colloquium,[90] in political suits colloquium usually insulated critics of institutions.[91] Yet, groups such as a slate of candidates, a legislative committee, or a town council could be small

85. *See, e.g.*, Walsh v. Pulitzer Publ'g Co., 157 S.W. 326, 329 (Mo. 1913) (holding that an editorial stating that a candidate had no proper motive for running for circuit attorney was an opinion and not defamatory).

86. *See infra* Part III.B.2 (discussing the defense of fair comment).

87. *See infra* Part III.B.2.c (discussing minority view of fair comment).

88. *See* CARLY SIMON, *You're So Vain*, *on* NO SECRETS (Elektra Entm't 1972). *But see* EMINEM (FEAT. ALICIA KEYS), LIKE HOME (Aftermath Records 2017) ("Someone get this Aryan a sheet. Time to bury him, so tell him to prepare to get impeached. . . . This chump barely even sleeps. All he does is watch Fox News like a parrot and repeats. While he looks like a canary with a beak. Why you think he banned transgenders from the military with a tweet?").

89. *See, e.g.*, Noral v. Hearst Publ'ns, Inc., 104 P.2d 860, 861-62, 863 (Cal. Ct. App. 1940) (affirming dismissal of libel suit where no "ascertainable person" was identified by a newspaper reporting that officials of the Workers' Alliance of California "divert their membership dues to further Communist agitation under direct order from the Third Internationale headquarters in Russia").

90. *See, e.g.*, N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 43-44, 48 (Ala. 1962) (allowing the jury to decide whether the terms "police" and "Southern violators" applied to Commissioner Sullivan), *rev'd*, 376 U.S. 254, 288, 292 (1964).

91. *See, e.g.*, Ewell v. Boutwell, 121 S.E. 912, 912-14, 916 (Va. 1924) (affirming grant of defendant's demurrer in libel suit because the words did not "point directly to the plaintiff individually, nor to him as a member of a group or class"). Ewell was a member of the General Assembly running for reelection on the "one issue" of his bill to reform state pilotage laws. *Id.* at 912-13 (emphasis omitted). The Virginia Pilots Association's newspaper published an advertisement during Ewell's campaign claiming that "New York Money [was] Against the Pilots" and funded efforts to pass the "Ewell Bill," which would yield the "Destruction of the Pilots and Wholesale Smuggling of Whisky and Dope." *Id.* at 913-14. Despite the use of Ewell's name in reference to his bill and Ewell's membership in Virginia's General Assembly, the court ruled that the ad did not identify Ewell individually as to be of and concerning him. *See id.* at 916.

enough to provide causes of action for any or all members of that body, group, or class.[92]

The fourth element is that the statement be defamatory. Most states had broad definitions of what was defamatory, including but not limited to: exposing another to shame, hatred, contempt, aversion, ridicule, obloquy, or causing a loss of confidence among right-thinking persons.[93]

The final element was damages. Assessing monetary damages in defamation cases with any sense of accuracy is impossible.[94] Defamation is a trespass against one's intangible reputation, and damages are not as readily assessable as with other torts.[95] Medical bills are quantifiable and diminished value of real property is assessable, while damage to a person's reputation is amorphous. Complicating the quantification problem is the fact that quite often no amount of monetary damages could recompense a plaintiff for public loss of face or a persistent pernicious rumor.[96]

There were three types of damages in defamation cases: special, general, and punitive. In suits alleging libel or slander per se, damages

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92. *See, e.g.*, Wofford v. Meeks, 30 So. 625, 625-26, 628 (Ala. 1901) (holding article concerning the Commissioners of Etowah County gave a libel cause of action to all the Commissioners individually).

93. *See, e.g.*, Tonini v. Cevasco, 46 P. 103, 104-05 (Cal. 1896) ("Our Code defines 'libel' as follows: 'Libel is a false and unprivileged publication by writing, [printing,] pictures, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.' This definition is very broad and includes almost any language which upon its face has a natural tendency to injure a man's reputation either generally, or with respect to his occupation." (quoting CAL. CIV. CODE § 45 (West 1872)); *see also* Byram v. Aikin, 67 N.W. 807, 808 (Minn. 1896) (reversing trial court's grant of demurral in libel suit based on defendant's article charging that the plaintiff befriended and liquored up a third party out of selfish political motives: "It is perfectly plain that the writer, from start to finish, intended to charge the plaintiff with conduct that was calculated, not only to expose him to ridicule, but also to beget contempt for, and an evil opinion of, him, in the minds of all right-thinking people.").

94. *See, e.g.*, Kennedy v. Item Co., 34 So. 2d 886, 895-96 (La. 1948) (reversing grant of defendant's motion to dismiss and remanding the case with instructions to award the plaintiff $7500, while the three-justice panel disagreed about whether to award the plaintiff $25,000, $7500, or nothing).

95. *See, e.g.*, Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693-99 (1986) (discussing reputation as property).

96. *See* Paulette Perhach, *It's Cash. But It Feels Tainted*, N.Y. TIMES, Nov. 18, 2018, at F7 (grappling with the question of "How should people handle financial gain, a supposed symbol of freedom and power, when it derives from events that made them feel trapped or powerless?"). Relatedly, the inability to quantify reputational damage has led to outrageous claims for damages evincing hope that "All of this pain and me cursing your name would just turn into dollar signs." MAREN MORRIS, *Rich*, *on* HERO (Columbia Nashville Records 2016). Some litigants view a large damage claim as indicating their conviction in the merits of their case.

were presumed; implicit in presumed damages is a recognition that many plaintiffs would be unable to provide concrete proof of damages.[97]

Special damages were pecuniary losses traceable to the defamatory publication.[98] In suits for defamation per quod special damages were required to be pled and proved. Special damages included: lost wages, lost salary, and lost business deals. Political defamation plaintiffs generally could not claim lost emoluments from an elected office, nor could they claim that their candidacy was a business or profession.[99] Failing to plead special damages, if required, led to dismissal.[100] If special damages were presumed or proven, general and punitive damages could be awarded.

General damages included pecuniary and non-pecuniary harms the plaintiff incurred traceable to the defendant's defamatory publication. General damages included lost salary, lost business, loss of good-will in the community, and physical and emotional distress.[101]

Punitive damages were "awarded [in tort cases] only when the defendant's behavior resulted from an evil state of mind, such as spite,

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97. *See* Anderson, *supra* note 24, at 764 ("If judges believe there are many cases of serious but unprovable harm to reputation, they are not likely to abandon the presumed harm rule."). *But cf.* Trump v. O'Brien, 29 A.3d 1090, 1099-100, 1102 (N.J. Super. Ct. App. Div. 2011) (noting that "under generally accepted accounting principles, reputation is not considered a part of a person's net worth").

98. *See* Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17, 22-25 (2011). An interesting modern argument might be made if a plaintiff alleged special damages for the cost of removing a false and defamatory charge from the internet. Scrubbing the internet requires great skill, money, and connection to the tech world. *See* JON RONSON, SO YOU'VE BEEN PUBLICLY SHAMED 263-68 (2015) (describing application of an algorithm that overwhelms search engines with non-offensive hits about a person to hide damaging content).

99. *See infra* Part III.A. The term "professional candidate" is used as a pejorative to describe perennial losing candidates for office. *See* Ed Mazza, *GOP Congressional Hopeful Dan Bongino Launches Profanity-Laced Tirade Against Politico Reporter*, HUFF. POST (Aug. 23, 2016, 1:32 AM), https://www.huffingtonpost.com/entry/dan-bongino-tirade_us_57bb9c66e4b00d9c3a19bbd9 (during a heated exchange with Dan Bongino—a then-candidate for Congress—*Politico* reporter Marc Caputo called Bongino a "professional political candidate who loses"); *cf.* Lukaszewicz v. Dziadulewicz, 225 N.W. 172, 173 (Wis. 1929) (noting while granting defendant's demurral in libel suit: "It appears that he had been a candidate for this same office on numerous occasions, and the article criticizes his persistent candidacy and commends the good judgment of the voters of the Fourteenth ward for his defeat upon prior occasions."). The term professional candidate may be ripe for reexamination. *See* Ben Geier, *5 Ways Donald Trump Is Making Money Off His Own Campaign*, FORTUNE (Aug. 24, 2016), http://fortune.com/2016/08/24/donald-trump-campaign (detailing how a candidate owned business profited from a presidential campaign).

100. Lynch v. Lyons, 20 N.E.2d 953, 954, 955 (Mass. 1939) (dismissing suit against mayoral candidate for failure to plead special damages when publication was not slanderous per se); *see infra* Part III.A. (discussing special damages).

101. *See, e.g.*, Van Norman v. Peoria Journal-Star, Inc., 175 N.E.2d 805, 808, 813 (Ill. App. Ct. 1961) (permitting wife and son to testify as to the changes they observed in plaintiff's mental and emotional state after publication of allegedly libelous articles mentioning a subsequently dismissed charge of assault with a deadly weapon filed against the plaintiff in 1952).

ill-will, or recklessness"—malice.[102] These damages were not to compensate a plaintiff for his injury but to punish that defendant and deter others from committing similar torts.[103] If a state limited the availability of punitive damages, a jury could return a large general damage award that could go undisturbed by courts reviewing the award due to the inherent inability to quantify reputational harm.

State laws or court rules often required that the existence of special damages and the amounts awarded for general and punitive damages be reported separately, to facilitate judicial review.[104] If parts or all of the award were illegal or improper, a trial or appellate court could eliminate a category of damages or otherwise modify the award.[105] Failing to separately report the amount of each type of damage hindered judicial review: an award could be viewed as resting entirely on punishing the defendant's conduct rather than compensating the plaintiff's injuries.[106]

3. Defenses and Privileges

Prior to 1964, at least three types of affirmative defenses existed in defamation suits:[107] truth, absolute privilege, and qualified or conditional privilege.

When Herbert Wechsler, attorney for The New York Times Co. in *Sullivan*, began researching libel law in the early 1960s he was "surprised" that many jurisdictions presumed falsity.[108] Not only was falsity presumed, but the defense of truth was often unreliable, risky, and only invoked in limited cases and to a limited extent.

Attempting to justify a defamatory publication by proving truth could backfire in many ways. In some jurisdictions, the defense could be

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102. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957).

103. In political defamation cases, the rationale for imposing punitive damages could be that if a well-funded political candidate or operative used his vast amounts of money to defame a political opponent, a large punitive damage award would deter that defendant from continuing to defame political opponents, and chill others who would commit similar torts. *Cf.* TAYLOR SWIFT, I DID SOMETHING BAD (Big Machine Records 2017) ("They say I did something bad; Then why's it feel so good? . . . And I'd do it over and over and over again if I could.").

104. *See* John M. Leventhal & Thomas A. Dickerson, *Punitive Damages: Public Wrong or Egregious Conduct?: A Survey of New York Law*, 76 ALB. L. REV. 961, 962-66 (2013); *infra* Part III.C.

105. *See infra* Part III.C (discussing judicial scrutiny of damage awards in political defamation cases).

106. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284 (1964) ("Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned.").

107. Defendants could and did file motions to dismiss and answer with general and/or specific denials.

108. LEWIS, *supra* note 5, at 105-07.

used as an admission of publication.[109] In some jurisdictions, proving truth was treated like republication of a defamatory statement, which could then be used by a jury to infer a defendant's malicious intent and/or motivate the jury to increase the damage award.[110] In some jurisdictions, asserting truth as a defense required defending the exact words used in the original publication; thus, a defendant proving a plaintiff a horse thief at trial would be insufficient if the defendant's charge at issue was that the plaintiff stole cattle.[111]

Many states adopted an alternative to proving truth, allowing defendants to introduce evidence "tending but failing to prove the truth" of the charge to negate malice and mitigate damages.[112] Many courts also grew uneasy about the presumption of falsity and found ways to ameliorate, if not negate, its effects.[113] Some courts would temper this presumption by reading into an applicable statute a requirement that a plaintiff provide some evidence of falsity.[114]

Federal and state constitutions, statutes, and common law privileged many defamatory statements. Constitutional protections immunized the speech and debate of legislators.[115] Statutes or common law precedent protected statements made by witnesses in legislative or judicial proceedings, statements of parties in a judicial proceeding,[116]

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109. Freedman, *supra* note 31, at 182-83.

110. *See id.* at 180-83.

111. *Id.* at 182-83 (citing Andrews v. Vanduzer, 11 Johns. 38, 38-39 (N.Y. Sup. Ct. 1814)).

112. *See, e.g.*, Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 445, 450, 453, 461 (Ala. 1960) (quoting Crane v. N.Y. World Telegram Corp., 126 N.E.2d 753, 757 (N.Y. 1955)) (holding that evidence tending to prove truth mitigated damages from $67,500 to $45,000 in libel suit). Of course, if a defendant introduced convincing evidence of reason to believe the truth of the statement in mitigation of damages or to rebut the presumption of malice, the effect could be that the plaintiff would be awarded nominal damages, if any.

113. *See, e.g.*, Cooper v. Romney, 141 P. 289, 291-92 (Mont. 1914).

114. *See, e.g.*, *id.* (reading state statutes governing libel per se and qualified privileges to put the burden on the plaintiff to provide some evidence of the falsity of the charge of graft). For decades, states differed with respect to whether plaintiffs (as a class or individually) had to plead and provide evidence that the statement was false or the defendant had to plead and prove truth as a defense. The U.S. Supreme Court decided that the former was required by the First and Fourteenth Amendments. *See* Phila Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986).

115. *See* U.S. CONST. art. I, § 6; *see also* Hutchinson v. Proxmire, 443 U.S. 111, 117, 123, 134-36 (1979) (holding Speech or Debate Clause did not immunize Senator Proxmire's mailers publicizing his "Golden Fleece Award"). The Court noted that the Senator was free to speak his mind on the Senate floor if he wished to avoid answering "in any other place." *Hutchinson*, 443 U.S. at 123. *But see* FREEMAN, THE FIELD OF BLOOD, *supra* note 29, at 93 (noting that the privilege of Speech or Debate did not immunize congressmen from street violence, threats, and challenges to duel on and off the House or Senate floors for affairs of honor catalyzed by comments made on either floor).

116. Riesman, *supra* note 54, at 1286-87; *cf.* Sibley v. Obama, 866 F. Supp. 2d 17, 19, 23 (D.D.C. 2012) (dismissing constitutional challenge to Barack Obama's eligibility to run for or serve as President of the United States because he was not a natural born citizen and alleging fraud

and statements made by government officials in performance of official duties.[117] So long as publication occurred in one of these forums *and nowhere else*, the speaker would have an absolute privilege and accurate reports of what was said in those forums could be published by media outlets that were likely shielded by a qualified privilege.[118]

Qualified privileges were designed to facilitate communication of facts and ideas. Economic and political rationales supported various qualified privileges, but courts had a self-interest in maintaining well-defined qualified privileges as they chilled defamation lawsuits. The two qualified privileges focused on in this Article are common interest and fair comment.[119] The defendant bore the burden of proving the existence of the privilege, while the plaintiff could defeat the privilege by proving that the defendant acted with the requisite type of malice.[120]

C. Conclusion

Through 1964, American civil laws of defamation were governed almost exclusively by the states. States largely shared similar elements of libel and slander, the distinction between defamation per se and per quod, and privileges and defenses. Defamation laws were plaintiff-friendlier prior to 1964 than they are now, particularly in political cases. Part III details how judges, nevertheless, frequently trapped political defamation suits in an expanding web of constraining precedents.[121]

III. THE COMMON LAW WEB CONSTRAINING POLITICAL DEFAMATION SUITS

Judges claim to strive to avoid the political thicket; yet courts have generally been the only institutions with jurisdiction to hear defamation suits, including ones filed by or against political figures.[122] The paradox of judges needing to rule on defamation suits stemming from the

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regarding his birth certificate).

117. *See* Barr v. Matteo, 360 U.S. 564, 569-70, 574 (1959) (holding that statements made by Executive Officials within the scope of their work are absolutely privileged).

118. *See* Riesman, *supra* note 54, at 1286-87. Section 315 of The Federal Communications Act of 1934, 47 U.S.C. § 315 (1934), foreclosed many suits against radio and television broadcasters in the mid-twentieth century. *See, e.g.*, Farmers Educ. & Cooperative Union of Am. v. WDAY Inc., 360 U.S. 525, 526-27, 535 (1959) (holding broadcaster immune from suits for defamatory statements made by candidates for public office when made on air).

119. *See infra* Part III.B (discussing common interest and fair comment privileges).

120. *See infra* Part III.B (discussing qualified privileges).

121. *See infra* Part III.

122. *See supra* Part II.A.

political process many sought to avoid, may have contributed to judges spinning threads that would become parts of the common law web.

This Part focuses on three strands of this web: narrowed definitions of defamatory and special damages,[123] the common interest privilege and defense of fair comment,[124] and judicial modification of damages.[125] This structure reflects the timing in litigation that each potential anti-political plaintiff limitation was introduced.[126] A plaintiff was required to allege in her complaint the element that a publication was defamatory and often that it caused special damages. If a plaintiff perfected her complaint, the defendant could claim in his answer a privilege of common interest and/or defense of fair comment. If the plaintiff won at trial, any damage award was monitored by trial and appellate judges. Taken together, these filaments formed an imperfect yet comprehensive common law web of protection against political defamation suits.

A. Defining Defamation Down: Defamatory and Special Damages

By the 1940s, leading scholarship on what this Article terms political defamation noted that courts limited what was defamatory and what was accepted as proof of special damages in cases involving political candidates and public officials.[127] This Part focuses on the development of the anti-political plaintiff trend in one state before presenting the national trend.[128] Subpart 1 looks at the development of those rules in Kentucky.[129] Subpart 2 expands the analysis to show that rules narrowing what was defamatory and what could be claimed as special damages were a national norm.[130]

1. Kentucky Common Law

Kentucky's Court of Appeals dismissed political defamation suits for failing to state a claim in cases where the plaintiff acted upon a mistaken belief that they pled defamation per se, and/or alleged special damages in a suit per quod.[131] The following cases highlight common

123. *See infra* Part III.A.

124. *See infra* Part III.B.

125. *See infra* Part III.C.

126. Not all courts would use each of these threads to limit political defamation suits.

127. *See, e.g.*, Noel, *supra* note 40, at 900-01 (discussing "Use of the Doctrine of Libel Per Se to Restrict Liability" (emphasis added)); Riesman, *supra* note 54, at 1293-98.

128. *See supra* note 127.

129. *See infra* Part III.A.1. Kentucky was focused on, in part, because it had only one appellate-level court until 1975.

130. *See infra* Part III.A.2.

131. *See, e.g.*, Taylor v. Moseley, 186 S.W. 634, 636-37 (Ky. 1916); Field v. Colson, 20 S.W. 264, 264-65 (Ky. 1892).

law rules, built over decades, which made it difficult for many political plaintiffs in Kentucky courts to maintain a cause of action for defamation that occurred during a political campaign.

In 1892, the Court of Appeals faced the question of whether a lost candidacy for political office was a compensable injury.[132] Henry Field ran for the Kentucky State Legislature against "one Howard," when Field "abandoned the contest."[133] Field ran again for that legislative seat facing Mr. Colson. Gillis Colson, "an active partisan" in his brother's campaign, alleged that Field quit the earlier race to accept a $300 bribe from Howard (Field's former opponent).[134] After Field's defeat, Field sued Gillis Colson (the candidate's brother) for slander alleging that Colson's charge that Field accepted a bribe to abandon the race damaged Field's reputation and cost him the "emoluments of the office."[135] At trial, a jury found for Colson.[136] Field appealed.[137]

The court first needed to decide whether the publication was slanderous per se. If so, damages would be presumed; if not, special damages needed to have been alleged in the court below. In *Field*, the categories of slander per se available were imputing the commission of a crime and injuring one's professional reputation.[138] The court rejected both theories.[139]

The court noted that accepting a bribe to quit a political race would not "constitute an indictable offense."[140] The court held that Field's profession was not attacked, "unless his candidacy can be so regarded[.]"[141] Candidacies for public office generally were not held to

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132. *Field*, 20 S.W. at 264-65.

133. *Id.* at 264. Howard's first name is omitted. *See id.*

134. *Id.* at 264-65.

135. *Id.*

136. *Id.* at 265.

137. The trial court instructed the jury that if Colson's words were the reason for Field's defeat the jury could award Field "damages he sustained by the loss of said office." *Id*. If the trial court construed these damages as special damages, the Court of Appeals did not clearly state that the instruction was incorrect. *See id.*

138. *See id.*

139. *See id.*

140. *Id.* In a suit for slander where the meaning of the word "rob" was unclear, Kentucky's Court of Appeals reversed a $500 verdict for the plaintiff and remanded the case for a new trial. Deitchman v. Bowles, 179 S.W. 249, 249-50 (Ky. 1915). The defendant, who was running against the plaintiff for Trustee of the Village of Highland Park, said at a speech: "This man [the plaintiff] is a great booster of Highland Park. He robbed his sister-in-law of three hundred dollars, and caused her to have to send her children to an orphans' home." *Id.* at 249. The court remanded for jury determination whether the passage considered in the context it was made was "reasonably calculated to cause the persons who heard it to . . . understand" that the defendant was charging the plaintiff with the crime of robbery as opposed to using the word "rob" in a colloquial sense which would not have been slanderous per se. *Id.* at 250.

141. *Field*, 20 S.W. at 265.

be professions,[142] and Field could not have claimed elected office as his profession as he never previously served in any elected office. Since the words were not slanderous per se, Field was required to have pled special damages in the court below.

Field alleged in his complaint that Colson's words cost him the salary of the state legislative seat for which he was running for.[143] The court did not view this claim of prospects of a salary as a special damage or even a compensable harm.[144] The court held that "even if [the words were] actionable by averring special damage, the damage alleged is too remote, uncertain, and speculative."[145] While the court left open the possibility that some political candidate might be able to claim a lost salary from a political office that they failed to win election to as special damage, the court held that Henry Field, who had never served in a political office, could not.[146]

The two-page opinion in *Field*, void of citation, became the foundation for a series of anti-political plaintiff rulings from the Court of Appeals. *Field* implied that courts should read slander per se categories narrowly in political defamation cases and that special damages did not include prospective emoluments from a political office the plaintiff lost at the ballot box.

In *Taylor v. Moseley*,[147] the Court of Appeals considered whether an incumbent could claim as special damage the salary he would have earned had he been re-nominated and reelected to political office.[148] In 1913, E.P. Taylor ran for re-nomination in the Democratic primary for his job as Daviess County Clerk.[149] During the campaign, rumors circulated that Taylor made anti-Catholic remarks. Two weeks before the primary election, Taylor was speaking at a political event where he denounced the rumors as slanderous.[150] At the event, Taylor refused to cede any time to a Democratic candidate for state legislature, Mr. Mullican, who claimed possession of an affidavit written by C.J. Moseley detailing one conversation where Taylor allegedly made

142. *See supra* note 99 (discussing the use of "professional candidate" as a pejorative term for a perennial loser).

143. *Field,* 20 S.W. at 265.

144. *Id.*

145. *Id.*

146. *Id.*

147. 186 S.W. 634 (Ky. 1916).

148. *Id.* at 635.

149. Democratic nominations for public office in the post-Reconstruction Era throughout the former border and Confederate states were tantamount to general election victories. *See* Otero v. Ewing, 110 So. 648, 650 (La. 1926) ("[W]hile a democratic nomination in this state is equivalent to an election, still, the rule is not without exception.").

150. *Taylor*, 186 S.W. at 634-35.

disparaging remarks about Catholic voters.[151] The day before the primary, Moseley composed a second affidavit charging that Taylor made anti-Catholic remarks; this latter affidavit was shown to "certain voters on the day of the election."[152]

Moseley's affidavits recounted a conversation between Moseley and Taylor, two years prior, regarding whether J.H. Elder or R.M. Stuart should be the Democratic nominee for a state legislative seat.[153] Moseley thought that Catholic voters would appreciate Elder on the ticket as Stuart was related to Kentucky's Governor who was then being accused of using a political rival's Catholicism to force the rival from the race.[154] Taylor allegedly stated that he was considering a run for that seat himself but, "he had been pandering to Catholics any way as long as he was going to. He further stated that if he did run again, however, he could give the priests $10 for their picnics and they would see to it that he got all the votes."[155]

Moseley's affidavits were not published in newspapers; however, Taylor composed his own affidavit that was published in the morning papers on primary day.[156] Taylor's affidavit called Moseley's second affidavit a late attack on Taylor's candidacy, "prepared by crafty politicians with the designing and malicious purpose of defeating [Taylor] for the office of county clerk."[157] Newspapers published Taylor's affidavit along with a reply by Moseley.[158] Neither Taylor's affidavit nor Moseley's reply discussed the allegation that Taylor made anti-Catholic remarks.

Taylor lost the Democratic primary by forty-three votes (2675 to 2632).[159] Taylor sued Moseley for libel claiming $25,000 in damages.[160] The complaint alleged that Taylor was the elected County Clerk with good prospects for re-nomination and re-election when the second Moseley affidavit was published and disseminated with the design to lower Taylor's reputation in the community, specifically among the

151. *Id.* at 635.
152. *Id.*
153. *Id.* (quoting affidavit of C.J. Moseley).
154. *Id.* (quoting affidavit of C.J. Moseley).
155. *Id.* (quoting affidavit of C.J. Moseley).
156. *Id.*
157. *Id.* (quoting affidavit of E.P. Taylor).
158. *Id.* (quoting public statement by C.J. Moseley). Moseley's reply contained a collateral attack on Taylor's veracity, arguing that because Taylor denied that he was disarmed by the Sheriff at a meeting of the fiscal court, Moseley was "not surprised that he should deny the truth of the facts [the alleged anti-Catholic remarks] in my affidavit." *Id.*
159. *See id.* (stating in the opinion that Weir "obtain[ed] a majority of 43 out of a total vote of 5,307").
160. *Id.*

1500 "legal Democratic voters in the county that belonged to the Catholic church . . . ."[161] Taylor alleged that had the affidavit not been maliciously published and disseminated by Moseley, Taylor would have received the votes of more Catholics, winning the primary and general elections, thus keeping his job and salary.[162] Taylor claimed lost emoluments from the office of County Clerk totaling $5000 per year as special damages.[163] The trial judge struck these allegations, and a jury returned a verdict for Moseley.[164]

Much of the Court of Appeals' focus was on Taylor's contention that the trial court erred in striking the allegation of "special damages based upon the loss of the office."[165] The question was framed as whether an incumbent candidate for re-nomination could claim the emoluments from an office that he lost in a primary election as special damages. The court, relying on *Field*, held: "We think the trial court was right in holding that special damages for the loss of the office had no proper place in this case, for the reason that the damages specially alleged were *too* remote and speculative to justify serious consideration."[166]

The court noted: "We have been cited to no case in which it has been held that failure of election to an office could be shown to authorize a finding of special damages. The loss of the office cannot be said to be the natural, immediate, and legal consequence of the [defamatory] charge and due exclusively to it."[167] The court seemed to fault Taylor for drawing attention to Moseley's charges by running his affidavit in the morning papers the day of the election.[168] The court seemed to view Taylor as partly responsible for his electoral loss and the special damages claimed.[169]

Taylor affirmed *Field* and extended its applicability from general to primary elections, and from challengers to incumbents who once earned the salary claimed as special damage. Although the court noted that Taylor cited no case supporting the position that the loss of political

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161. *Id.* at 636.

162. *Id.* This assertion that the allegedly libelous publication was a systematic effort to destroy Taylor's reputation among Catholics is credible. At trial, the person who prompted Moseley to draft his affidavits testified that he gave the two copies of Moseley's affidavit to Catholic voters in Daviess County, one of whom was a Catholic priest. *Id.*

163. *Id.*

164. *Id.* at 635.

165. *Id.* at 635-37.

166. *Id.* at 637 (emphasis added) (citing Field v. Colson, 20 S.W. 264, 264-65 (Ky. 1892)).

167. *Id.*

168. *Id.* at 635, 637.

169. *Id.* at 637.

office was a pecuniary loss, it was a more complex case than *Field*. Field had never been a state legislator; whereas Taylor claimed to receive $5000 per year for his work as County Clerk, which would have been a sizable source of income, akin to the "loss of profitable employment" the court noted was "sufficient to show special damages."[170]

A secondary rule of the case involved the alleged libel that Taylor was anti-Catholic. The court held that the publication was not libelous per se, with the implicit holding that stating that a person made bigoted remarks (with the inference that he is a bigot) is not defamatory per se.[171]

In another case, B.F. Shields and W.W. Booles both ran for the Democratic nomination for a state senate seat in 1929.[172] During the primary, a false statement on the front of a local paper alleged that in 1920, then-Representative Shields voted against repealing a pari-mutuel law and "in favor of legalized gambling," continuing that Booles "never cast a vote in favor of the pari-mutuels law."[173] Shields lost the primary then sued Booles for libel and slander.

The libel cause of action was based on the charge published on the newspaper. The slander allegations were opaque. Shields alleged that the Booles campaign conspired with Kentucky's gaming industry to fund a whisper campaign distorting the public positions and voting records of both candidates on the issue of gaming laws.[174] Shields's complaint alleged no special damages. The circuit court dismissed the action; Shields appealed.[175]

The Court of Appeals considered whether "falsely charging that a candidate for office is misrepresenting his official acts and does not believe in the principles he openly espouses [is] . . . actionable per se . . . ."[176] Because Shields did not plead special damages in his

170. *See id*. at 636-37 (citing *Field*, 20 S.W. at 265).

171. *Id*. at 635-37. In this respect, *Taylor* is similar to the Syndicate cases, where it was reported that Rep. Martin Sweeney opposed a judicial nomination because the nominee was a foreign-born Jew. *See infra* Part III.A.2.c (discussing Syndicate cases).

172. Shields v. Booles, 38 S.W.2d 677, 677 (Ky. 1931).

173. *Id*. at 678. Pari-mutuel is defined as "a betting pool in which those who bet on competitors finishing in the first three places share the total amount bet minus a percentage for the management." *Pari-mutuel*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pari-mutuel (last visited Nov. 10, 2018).

174. *See Shields*, 38 S.W.2d at 678 (quoting Petitioner's amended complaint). The complaint also alleged that this network paid cash bribes to secure voter support for Booles; however, the court, assuming defendant's voters were bribed, determined that such bribes would not be an injury to the plaintiff's reputation. *Id.* at 678-79.

175. *Id.* at 678.

176. *Id.* at 679. On appeal, Shields argued that the trial court erred in dismissing his complaint because he stated a cause of action for tortious conspiracy to deprive him of an electoral victory through a defamatory campaign that effectively deprived him of the right to run for office. *Id.* at

complaint,[177] if the court answered this question in the negative, dismissal of the slander claim would be required.

Under Kentucky law, a statement imputing "unfitness to perform the duties of an office" was slanderous per se.[178] While the precise words used in the whisper campaign were not before the court, the substance was the false charge that Shields voted against repealing the pari-mutuel law in 1920. The court held that this statement if conveyed orally would not have been slanderous per se as voting against the repeal of a gaming law does not imply that Shields was unable or unfit to perform the duties of a state legislator.[179]

To be libelous per se, a publication, "must be of such a nature that the court can presume as a matter of law that [the words] do tend to disgrace and degrade the person, or to hold him up to public hatred, contempt, or ridicule, or to cause him to be shunned and avoided."[180] That the defendants knowingly lied about the plaintiff's voting record did not make the lie defamatory. The court noted that legislators and citizens of well-regard existed on both sides of the gaming issue and that "[the false] statement had no inherent tendency to affect his character or reputation, since such a vote was within the province of any representative confronted with the problem."[181]

The court affirmed the dismissal of the complaint,[182] and by focusing on defamation's aim of protecting an individual's reputation, the court avoided confronting the political salience of lying about a politician's record. *Shields* held that "misrepresentation [of how legislators vote on a measure], however reprehensible, is not libelous per se."[183] This decision is logical but could be criticized for giving political actors a limited license to lie.[184]

678-79.

177. *Id.* at 680 ("Since no special damages of a recoverable nature are alleged, the issue is reduced to a determination of the character of the spoken and written words alleged as constituting defamatory charges actionable per se.").

178. *Id.* This was an extension of the category of slander per se applicable to professional reputation explained in Part II. The category of imputation of criminal conduct would not have fit plaintiff's case, and as the charges included in judicial documents are absolutely privileged, the defendants in this case could not sue Shields for imputing the crime of bribery to them in his amended complaint. *Id.* at 681.

179. *Id*. at 680-82. In fact, voting either yea or nay showed capability to perform the duties of a state legislator.

180. *Id.* at 681.

181. *Id.* at 682.

182. *Id.* at 678, 683.

183. *Id.* at 683.

184. A Kentucky statute allowed for imposing a penalty against persons spreading false rumors against candidates for public office "of a slanderous or harmful nature," but that statute did not expand a plaintiff's ability to sue for defamation nor suspend the requirement of pleading special

These cases evince an anti-political plaintiff trend in Kentucky's common law of defamation. *Field* held that plaintiffs could not claim lost emoluments from a failed candidacy for public office as special damages.[185] *Taylor* extended the rule in *Field* to candidates in primary elections and to incumbents claiming lost emoluments due to failure to be re-nominated.[186] *Shields* held that lying about a candidate's voting record is not defamatory per se.[187] These rules constrained the ability of political plaintiffs to plead a cause of action for defamation in Kentucky, which was an anti-political plaintiff trend that extended beyond the Bluegrass State.

2. National Trends Narrowing Defamatory and Special Damages

Narrowing what was defamatory and what were special damages, were anti-political plaintiff trends not confined to Kentucky. Federal and state courts nationwide articulated similar rules prior to 1964.[188] This Subpart looks at decisions, outside Kentucky, that illuminate these anti-political plaintiff filaments of the common law web.[189]

a. Garbled Statements

In *Manasco v. Walley*, the Supreme Court of Mississippi, deciding a suit based on a statute giving a limited private right of action for defamation, viewed favorably Kentucky's Court of Appeals decision

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damages. *Id.* at 681. The court noted that though the Commonwealth might have cause to investigate the Booles campaign for criminal acts, that did not confer a private right of recovery for Shields in a civil defamation suit for damages. *Id.* at 679.

185. Field v. Colson, 20 S.W. 264, 265 (Ky. 1892).

186. Taylor v. Moseley, 186 S.W. 634, 634-35, 636-37 (Ky. 1916).

187. *Shields*, 38 S.W.2d at 680-82. This type of lie is fake news. *See* David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, J. INTERNET L., Apr. 2017, at 1, 6-7 (defining fake news as the "publication of intentionally or knowingly false statements of fact" and discussing defamation in this context). Fake News has taken on other meanings. *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (May 9, 2018, 4:38 AM), https://twitter.com/realDonaldTrump/status/832708293516632065 ("The Fake News is working overtime. Just reported that, despite the tremendous success we are having with the economy & all things else, 91% of the Network News about me is negative (Fake). Why do we work so hard in working with the media when it is corrupt? Take away credentials?"); *cf.* Natalie Jarvey, *SXSW: CNN's Jake Tapper Says His Son Has Adapted "Fake News" Line From Trump*, HOLLYWOOD REP. (Mar. 10, 2017, 3:45 PM), http://www.hollywoodreporter.com/news/sxsw-cnns-jake-tapper-says-his-son-has-adapted-fake-news-line-trump-985318 ("Tapper noted that even his 7-year-old son has picked up on the phenomenon, explaining with a laugh that he 'now does an impression where whenever I'm bothering him he says, "fake news."'").

188. *See, e.g.*, Manasco v. Walley, 63 So. 2d 91, 96 (Miss. 1953); Vinson v. O'Malley, 220 P. 393, 394, 395-97 (Ariz. 1923) (holding that verbal abuse of public officials is not generally slanderous per se).

189. *See infra* Part III.A.2.a–c.

that mischaracterizing a legislator's voting record is not defamatory per se.[190] Unlike *Shields*, where the defendant allegedly lied about the plaintiff's vote,[191] *Manasco* involved an arguably ill-informed editorial in a local paper criticizing a legislator's vote on a particular measure.[192]

The Greene County Herald published an editorial criticizing State Representative Ben Walley for a vote in favor of a highway bill.[193] The editorial warned that the bill would hinder efforts to have the state repair local sections of the state highway system by taking them off a "priority list" (that did not exist).[194]

During the Democratic primary while running for re-nomination to his legislative seat, Walley filed a libel suit based on a Mississippi statute that created a cause of action for charges "reflect[ing] upon the honesty or integrity or moral character of [a] candidate."[195] Walley alleged that the editorial's charges were false and damaging to his reputation for honesty and morality, that the newspaper denied him space to reply, and that he incurred pecuniary harms for time spent away from his law practice and the cost of printing handbills to correct the false impressions left by the editorial.[196] Walley sued for $25,000.[197] The jury found for Walley;[198] Manasco appealed.

Mississippi's Supreme Court reversed the judgment.[199] The court held that the statute was inapplicable because, assuming the bill did take a local road off of a priority list (which was false), that did not "reflect" on Walley's "honesty, integrity, or moral character"—the statute's

190. *Manasco*, 63 So. 2d at 93-95 (citing *Shields*, 38 S.W.2d at 681-82). Though the cause of action in *Manasco* was based on a statute, the decision ventured into common law defamation. *See id.* at 94-96.

191. 38 S.W.2d at 678.

192. 63 So. 2d at 92. Reporters and historians would note that "the state of journalism was not highly developed" in Mississippi. *See* ROBERTS & KLIBANOFF, *supra* note 29, at 272, 277.

193. *Manasco*, 63 So. 2d at 92.

194. *Id.*

195. *Id.* at 92, 94-95; *see also* MISS. CODE ANN. § 23-15-877 (2018) (imposing a $500 penalty or damages proven in excess, if a newspaper fails to publish a reply to an editorial circulating in the state during a campaign that reflects upon the "honesty or integrity or moral character of any candidate [for public office]," giving that statutory right to candidates and former candidates). The court held that it was the legislature's purpose to limit the statute's applicability to defamatory publications bearing on these qualities. *Manasco*, 63 So. 2d at 94-95. While the opinion could have been one of only statutory interpretation, a fair reading of the opinion is that it used common law precedent and created some limited common law precedent.

196. *Manasco*, 63 So. 2d at 92, 93-94. Walley, pursuant to statute, asked the publisher to run a reply. *Id.* at 92, 94-95. Only after the publisher declined to publish the reply did Walley begin his on-the-ground efforts to correct the record and file suit. *Id.* at 92, 93-94.

197. *Id.* at 92.

198. *Id.* at 94.

199. *Id.* at 96.

operative words.[200] Though the defendant was impolite to refuse Walley space to respond, a reply was not required by the statute as the editorial did not reflect upon Walley's "honesty, integrity, or moral character."[201] If the editorial cast a false light on Walley's legislative record, that resulted from disagreement about what the bill did, not a charge of dishonesty.

The opinion in *Walley* held, under the auspices of the operative statute, that the editorial was ignorant, but not defamatory.[202] It was negligent of facts, but not defamatory.[203] It was riddled with "garbled statements," but not defamatory.[204] In short, this defendant badly and wrongly described the terms of legislation and then accused the legislator of voting against local interests by supporting the bill as erroneously described; though the editorial was false (and the charge that the vote harmed local interest at least questionable), insofar as it was comprehensible, it did not charge Walley with dishonesty.[205]

Though the court decided *Manasco* on the grounds that the editorial did not reflect upon Walley's "honesty, integrity, or moral character" and that the editorial was too garbled to be defamatory,[206] the court was skeptical of Walley's proof of damages. Walley alleged that he incurred "heavy expenses" printing handbills responding to the editorial and necessitated that Walley spend time traveling his district refuting the editorial, rather than devoting that time to his private law practice.[207] The court noted that the highway bill was a matter of public concern, and Walley's actions were ones that incumbent candidates would make to publicly defend their votes.[208] A reader can infer from the court's opinion that the justices viewed the types of damages alleged, as expenses that any competent politician would have incurred in the course of a campaign, whether or not an erroneous editorial was ever written.[209]

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200. *Id.* at 94-95.

201. *Id.*

202. *Id.* at 95.

203. *Id.*

204. *Id.* at 94, 95 ("The editorial complained of . . . shows very clearly that the writer of the editorial had only an imperfect understanding of the program of highway legislation [which was voted for by the plaintiff and adopted by the legislature] . . . ."). The court was confined in its decision to the mandate of the statute; however, the court appeared to view the statute as authorizing employment of common law defamation. *See id.* at 95, 96.

205. *See id.* at 95-96.

206. *Id.* at 94, 95.

207. *Id.* at 93-94.

208. *See id.* at 95-96.

209. *See id.* at 94-96. The Supreme Court of Mississippi was elected; thus, one could argue that the justices were qualified to assess what a competent politician would spend money on in the

This case illuminates a few principles about political defamation, even if qualified as a decision under the limited operability of the statute. The lucidity of a publication impacts whether the publication can be understood as defamatory or understood at all. False statements about a candidate's voting record and policy stances are not defamatory per se. Lastly, the court, in dicta, appeared to disfavor attempts to transmogrify routine campaign expenditures into damages.[210]

b. Safe Words: Unfit, Unqualified, and Pejoratives

Prior to 1964, many state and federal courts ruled that certain descriptions of candidates were not defamatory per se or not otherwise actionable as defamation.[211] The less specific a charge was the less actionable it was, and the distinction between libel and slander per se could provide an added layer of protection for defendants speaking pejoratively about political figures.[212]

The most basic charge against candidates was that they were unfit or unqualified for the office they sought.[213] Courts routinely held such charges as not defamatory or otherwise not actionable.[214] Judicial opinions often stated that by offering oneself for public office, a person became a public man, submitting questions about his fitness and qualifications for office to the press and the public.[215] Thus opinions

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course of a campaign.

210. *See id.* at 93-96.

211. *See, e.g.*, Noel, *supra* note 40, at 896-900, 901-02.

212. *See, e.g.*, Deitchman v. Bowles, 179 S.W. 249, 250 (Ky. 1915) (remanding for jury determination whether "rob" was meant to convey a commission of that crime); *cf.* Nelson v. Musgrave, 10 Mo. 648, 648-49 (1847) (holding that the charge that the plaintiff was "thought no more of than a counterfeiter [and] a horse-thief" was libelous per se, but suggesting that it would not have been slander per se had it been uttered). If slander and libel were condensed to one tort of defamation, and the rules of libel were adopted for all defamation suits, many of the suits noted below could have been decided differently, with plaintiff-friendlier laws and judgments.

213. Claiming that a candidate was unfit or unqualified for office was distinct from the actionable per se charge that a current public official was unfit to discharge the duties of office. *See* Shields v. Booles, 38 S.W.2d 677, 680 (Ky. 1931).

214. *See, e.g.*, Knapp v. Post Printing & Publ'g Co., 144 P.2d 981, 983, 985 (Colo. 1943) (holding not libelous per se the opinion that Knapp was "Not Qualified" for Governor); Otero v. Ewing, 110 So. 648, 649, 651-52 (La. 1926) (holding not libelous the charge that the plaintiff "possessed neither the ability, nor the qualifications, for said judgeship"); Walsh v. Pulitzer Publ'g Co., 157 S.W. 326, 328, 330 (Mo. 1913) ("Walsh, *a man manifestly unfit*, will receive the nomination. . . . He has no qualifications for the place." (emphasis added)); Gilbert v. Field, 3 Cai. 329*f*, 329*g*-30 (N.Y. Sup. Ct. 1805) (holding charge of "unfit and unqualified" not slanderous).

215. Briggs v. Garrett, 2 A. 513, 518 (Pa. 1886) ("When Judge Briggs accepted the nomination as a candidate for re-election to the judicial station which he then filled, he threw out a challenge to the entire body of voters of the county of Philadelphia to canvass his qualifications and fitness for that position."); *see Walsh*, 157 S.W. at 330 ("[I]t is the right and duty of a newspaper to discuss his fitness for the place he seeks in such a manner as to present the full facts to the electors . . . .").

about the candidate's qualifications and fitness for office were solicited by candidates themselves, and negative answers were protected by various qualified privileges as well as courts holding that the charge was not actionable in the first place.

In 1821, the Supreme Court of South Carolina noted in dicta, "that actions for words spoken in heat, ought not to be encouraged . . . ."[216] Thus, gratuitous insults constituting verbal abuse, and offensive pejoratives were not defamatory themselves;[217] although, a defendant's prior verbal abuse of and hurling of pejoratives at the plaintiff could be evidence of malice that defeated a qualified privilege or justified a punitive damage award.[218]

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216. Atkinson v. Hartley, 12 S.C.L. (1 McCord) 203, 205 (1821); *see also* Vinson v. O'Malley, 220 P. 393, 394 (Ariz. 1923) (holding that verbal abuse of public officials is not generally slanderous per se).

217. *See, e.g.*, Sweeney v. Baker, 13 W. Va. 158, 169, 191-92, 229 (1878) (holding "confessed ignoramus" not libelous per se while affirming $8000 verdict on other grounds); Hoar v. Ward, 47 Vt. 657, 661-62, 665-66 (1875) (discussing how the term "bastard" implies fault to the parents of the "bastard" not the child); *Atkinson*, 12 S.C.L. (1 McCord) at 203-05 (holding not actionable the charge "you [are a] damned mulatto looking son of a bitch" uttered in the heat of passion (emphasis omitted)); *see also* Rawlins v. McKee, 327 S.W.2d 633, 635-36 (Tex. Civ. App. 1959) (holding "radical" not libelous per se); Torres v. Huner, 135 N.Y.S. 332, 333-34 (App. Div. 1912) (holding "God damn son of a bitch" not slanderous per se). *But see* Belknap v. Ball, 47 N.W. 674, 674-75, 676 (Mich. 1890) (remanding for trial suit filed in which the defendant through writing in the plaintiff's name insinuated that the plaintiff was too ignorant to be a Congressman, a charge that was libelous per se). Writings and drawings unflatteringly comparing a person to an animal could be libelous per se. *See, e.g.*, Moley v. Barager, 45 N.W. 1082, 1082 (Wis. 1890) (holding drawing of plaintiff as a jackass was libelous per se); Solverson v. Peterson, 25 N.W. 14, 14-15 (Wis. 1885) (holding libelous per se the comparison of the plaintiff to a swine); *cf.* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN. ST. L. REV. 539, 568 (2006) (briefly mentioning the 2005 Strauss Caricature Decision in which the German Constitutional Court held that a magazine publishing cartoons depicting a political figure as a pig deprived that person of human dignity). The values of honor and human dignity recognized in some European courts are distinct from reputational value litigated about in defamation suits in American courts. *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1287-312 (2000) (describing differences between European and American tort laws and the absence of a law of insult and regard for the concept of honor in the American bodies of law); FREEMAN, AFFAIRS OF HONOR, *supra* note 29, at xx to xxii (discussing how "*Honor* was reputation with a moral dimension and an elite cast[,]" while noting that the concept could seem contrary to principles of a nascent egalitarian democratic-republic in the Early Republic); *cf.* FREEMAN, THE FIELD OF BLOOD, *supra* note 29, at 71, 86, 88-89, 322 & n.49 (describing conflicting and irreconcilable concepts of honor in mid-Nineteenth Century America, with Southerners more amenable to public defenses of honor featuring violence, while Northerners would defend honor through wars of words and public shaming); *see also* FREEMAN, AFFAIRS OF HONOR, *supra* note 29, at 168-69 (noting that Northerners and Southerners were familiar with codes of honor in the Early Republic but dealt with affairs of honor differently, with Northerners less inclined to let an affair culminate in a duel).

218. *See, e.g.*, Hammersten v. Reiling, 115 N.W.2d 259, 264-65 (Minn. 1962); *cf.* FREEMAN, AFFAIRS OF HONOR, *supra* note 29, at 67, 73 (noting that in the Early Republic, "Effective purveyors of gossip [inclusive of slander] obeyed [the] rule: *show no malice while gossiping*. Conspicuous hostility was bad politics, making the accuser seem petty and indiscreet, and reducing the credibility of the claim"). For an examination of the art of political gossip, see generally chapter

The real peril for critics of candidates was when they made more specific charges than unfit or unqualified, or ventured into giving the factual bases behind not actionable conclusory statements. Thus, defendants found themselves in trouble when they made charges capable of being construed as charging the plaintiff with a crime,[219] with committing criminal or civil defamation,[220] or being a member of a temporally disfavored group.[221]

c. Syndicate Cases: The Congressman and the Foreign-Born Jew

The Pearson and Allen Syndicate cases ("Syndicate cases")[222] highlight the national trends of narrowing what was defamatory and using the requirement of special damages to dismiss defamation per quod suits. Most Syndicate cases were decided in the early 1940s, after the decision in *Erie*, and showcase the broad similarities and subtle variances of the substantive law of defamation among jurisdictions.[223]

The Syndicate cases were scores of libel suits filed by Ohio Congressman Martin Sweeney against the publishers of a syndicated column authored by Drew Pearson and Robert Allen. The article at issue reported that Sweeney, doing the congressional bidding for Father

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two (*Slander, Poison Whispers, and Fame: The Art of Political Gossip*) in *id.* at 62-104 (looking at the informal rules of political gossip in the Early Republic).

219. *See supra* notes 67-72 and accompanying text (discussing criminal act slander per se); *see also Gilbert*, 3 Cai. at 329*g*-30 (holding charge of drunken behavior not slanderous as not charging public intoxication).

220. McKillip v. Grays Harbor Publ'g Co., 171 P. 1026, 1027-28 (Wash. 1918) (holding libelous per se to accuse a political opponent of "[engaging in] a campaign of *slander* and *lies*" under a state libel law); *see also* Jenkins v. Taylor, 4 S.W.2d 656, 660 (Tex. Civ. App. 1928) ("It has been repeatedly held that to falsely charge one with uttering a slander or publishing a libel is in itself libelous per se."); *cf.* Zervos v. Trump, 74 N.Y.S.3d 442, 444-46, 449 (Sup. Ct. 2018) (denying motion to dismiss a slander suit against Donald Trump for charges he made at political rallies and presidential debate that the women accusing Trump of sexual assault were liars sent by his opponent to hurt his campaign: "at a Pennsylvania rally, defendant declared: 'Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened. Never. All of these liars will be sued after the election is over.'" (citation omitted)).

221. *See, e.g.*, MacLeod v. Tribune Publ'g Co., 343 P.2d 36, 40-42 (Cal. 1959) ("Whatever the rule may have been when anti-communist sentiment was less crystalized than it is today, it is now settled that a charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face." (citations omitted)).

222. *See infra* note 223.

223. *See, e.g.*, Sweeney v. Schenectady Union Publ'g Co., 122 F.2d 288, 290-91 (2d Cir. 1941) (reversing dismissal), *aff'd*, 316 U.S. 642 (1942); Sweeney v. Phila. Record Co., 126 F.2d 53, 54-55 (3d Cir. 1942) (affirming dismissals); Sweeney v. Patterson, 128 F.2d 457, 457-59 (D.C. Cir. 1942) (affirming dismissal); Sweeney v. Capital News Publ'g Co., 37 F. Supp. 355, 356-57 (S.D. Idaho 1941) (granting dismissal); Sweeney v. Beacon Journal Publ'g Co., 34 N.E.2d 764, 764 (Ohio 1941) (per curiam) (dismissing appeal); Sweeney v. Newspaper Printing Corp., 147 S.W.2d 406, 406, 407 (Tenn. 1941) (affirming dismissal); Sweeney v. Caller-Times Publ'g Co., 41 F. Supp. 163, 165-69 (S.D. Tex. 1941) (granting dismissal).

Coughlin,[224] opposed the nomination for federal district judge of Emerich Freed because Freed was a foreign-born Jew.[225] Sweeney argued that the article intended to convey that "[Sweeney] was guilty of un-American racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer and to hold this plaintiff in contempt in the eyes of his constituents [as a Congressman] and his clients [as a lawyer]."[226] Sweeney did not provide any extrinsic evidence proving innuendo[227] nor allege special damages.[228] One researcher put the amount of damages Sweeney cumulatively prayed for at $7.5 million.[229] Sweeney argued that the article was libelous per se because the article injured his reputation as a lawyer, injured his reputation as a congressman, and lowered his standing in public esteem.[230]

The Ohio Court of Appeals considered whether the article defamed Sweeney as an attorney. Under Ohio law, an attack on one's professional reputation was libelous per se, resulting in a presumption of damages.[231] The court held that the article did not refer to, much less attack, Sweeney in his capacity as a member of the Ohio Bar, only in his capacity as a politician and congressman.[232] Similar reasoning was employed by other

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224. Father Coughlin was an anti-Semitic Catholic Priest who was popular on the radio in the 1930s and 1940s. *See, e.g.*, Linette Lopez, *Here's What Happened the Last Time America Had a Steve Bannon*, BUS. INSIDER (Nov. 20, 2017, 12:55 PM), http://www.businessinsider.com/steve-bannon-father-charles-coughlin-2017-11 (describing Father Charles Coughlin's political power, anti-Semitism, and mastery of new media). *But see Newspaper Printing Corp.*, 147 S.W.2d at 407 ("We can not take judicial notice of derelictions on the part of Father Coughlin, if he has been guilty of such.").

225. *See, e.g.*, Noel, *supra* note 40, at 882 ("Representative Sweeney brought seventy-five or more actions against Pearson and Allen, their syndicate, and the papers carrying the column throughout the country."). Many of these cases were dismissed. *See, e.g.*, Riesman, *supra* note 54, at 1298 n.67 ("It appears that more than thirty cases were dismissed, mostly for lack of prosecution; at least five were settled.").

226. *See, e.g.*, *Newspaper Printing Corp*., 147 S.W.2d at 406-07.

227. *See, e.g.*, *Capital News Publ'g Co*., 37 F. Supp. at 357 ("We cannot, under the law of libel, insert into the article words or innuendoes as to who Father Coughlin is and his animus, if any he has, against a Jew, because it is too well settled that when one rests his case, as here, solely upon the contention that a recovery is to be had because the article is libelous per se, the court must look to the words in the article, and their tendency, and cannot go beyond that and apply other words by innuendo to support the conclusion that the article is libelous per se. The literal meaning of the term 'per se' is: 'by itself' or 'in itself.'"); *see also Newspaper Printing Corp*., 147 S.W.2d at 406, 407.

228. *See, e.g.*, *Schenectady*, 122 F.2d at 289 ("No special damages were alleged . . . ."); *Capital News Publ'g Co*., 37 F. Supp. at 355-56 ("No special damages are alleged . . . ."); Sweeney v. Beacon Journal Publ'g Co., 35 N.E.2d 471, 477 (Ohio Ct. App. 1941) ("The petition does not plead special damage[s] . . . ."); *Newspaper Printing Corp*., 147 S.W.2d at 406 ("The declaration contains no innuendo and avers no special damages.").

229. Noel, *supra* note 40, at 882 n.42.

230. *See Newspaper Printing Corp*., 147 S.W.2d at 406-07.

231. *See Beacon Journal Publ'g Co.*, 35 N.E.2d at 472.

232. *Id.* at 473.

courts holding the article did not libel Sweeney's professional reputation as a lawyer.[233]

Sweeney's argument that the article damaged his reputation as a congressman was also dismissed by numerous courts. Members of Congress have both official duties and political responsibilities. As seen in *Shields* and *Manasco*, lying about how a legislator voted on a bill or wrongly describing what they voted for was not usually defamatory.[234] The Southern District of Texas in its Syndicate case echoed those principles when applying Texas common law asserting: "It is never libel to charge that one is opposed to, or in favor of, legislation on which the citizenship of the state may take opposite views," and it would be difficult to prove what factor motivated a legislator to vote a particular way.[235] Tennessee's Supreme Court argued that Sweeney could not claim damage in his capacity as a member of the House, as Sweeney had no formal role in the "appointment or confirmation" of federal judges.[236]

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233. *See, e.g.*, Sweeney v. Caller-Times Publ'g Co., 41 F. Supp. 163, 165-67 (S.D. Tex. 1941) (quoting *Beacon Journal Publ'g Co*., 35 N.E.2d at 479 (Ohio Ct. App. 1941)); *see also* Sweeney v. Phila. Record Co., 126 F.2d 53, 54 (3rd Cir. 1942); ("Under the law of Pennsylvania the words published do not constitute a libel per se upon a member of the bar."); *Schenectady*, 122 F.2d at 289-90 ("We are not concerned, however, with any libel upon the plaintiff as a lawyer since no reference was made in the publication to that profession of his."); *cf.* Pattangall v. Mooers, 94 A. 561, 561-62, 566 (Me. 1915) (affirming verdict for plaintiff for slander per se attacking reputation as an attorney during congressional campaign).

234. *See supra* notes 182-84, 202-05 and accompanying text (discussing *Shields v. Booles* and *Manasco v. Walley*).

235. *Caller-Times Publ'g Co.*, 41 F. Supp. at 167-68 (citing Brown v. Hous. Printing Co., 255 S.W. 254, 255-56 (Tex. Civ. App. 1923)). The District Court discussed the public official rule, which required that for a publication to be libelous per se when discussing the acts of a public officer, the charge must be such that it would warrant removal from office. *Id.* at 167. In *Jenkins v. Taylor*, Texas's Court of Appeals appeared to suspend that rule when applied to the members of the State Legislature where removal was a political question. 4 S.W. 656, 659 (Tex. Civ. App. 1928) (holding that the public official rule did not bar recovery for a candidate for the legislature and indicating that recovery might be had where a legislator might be subject to disciplinary action). Sweeney, similarly, could only be removed from Congress by political processes of expulsion or losing an election.

236. Sweeney v. Newspaper Printing Corp., 147 S.W.2d 406, 407 (Tenn. 1941) ("A member of the House of Representatives has no part in the selection of a federal judge, either by way of appointment or confirmation. The most that he can do is to recommend. It appears that the plaintiff is a Democrat. If for reasons purely political he opposed the appointment of a foreign-born citizen, or a Jew, or a Catholic, or a Protestant to the federal bench, such action would not indicate personal, professional, or official delinquency."); *see also Phila. Record Co.*, 126 F.2d at 54-55 (finding that Sweeney had "no duty to perform in recommending candidates for federal judicial appointments"); *Caller-Times Publ'g Co.*, 41 F. Supp. at 167 (finding that Sweeney had "no duty in connection with the appointment of [district court judges]"). Sweeney would have had a stronger argument if he were a U.S. Senator voting on confirmation of federal judges; there, he could have argued the article alleged that he was violating the Constitution's prohibition on religious tests for federal officials when exercising advice and consent. U.S. CONST. art. II, § 2, cl. 2; *id.* art. VI, cl. 3; *see Caller-Times Publ'g Co.*, 41 F. Supp. at 167.

Finally, most states had a capacious statutory or common law definition of libel per se. Ohio's provision was simple: "Matters which would bring him into ridicule, hatred or contempt."[237] New York's definition included "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society."[238]

The article was found not to be libelous per se under the laws of many states, including Ohio. The Court of Appeals wrote: "We merely hold that to publish of a man that his opposition to a proposed appointee for office is based on religious grounds and the fact that the candidate is of foreign birth, is not libelous as a matter of law—i.e., per se."[239]

The only court in a published opinion to find the article libelous per se was a panel of the Second Circuit; reversing the grant of a motion to dismiss by the Northern District of New York.[240] The divided panel held that charging that Sweeney opposed a judicial nominee for being a foreign-born Jew would cause "a noticeable part of many who read [the article] . . . to hate, despise, scorn or be contemptuous of the person concerning whom the false statements have been published."[241]

Judge Chase's majority opinion noted that while decisions of other courts were "conflicting," under *Erie* the case was governed by the substantive law of New York.[242] Chase framed the question presented as whether "right-thinking people" would deem Sweeney "unworthy of public trust and confidence" and hold him in contempt for his alleged bigotry.[243] Chase, joined by Judge Learned Hand, held that Sweeney adequately pled libel per se because, "those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt."[244] Chase appeared influenced

237. *Beacon Journal Publ'g Co.*, 35 N.E.2d at 472.

238. *Schenectady*, 122 F.2d at 290 (quoting Kimmerle v. N.Y. Evening Journal, Inc., 186 N.E. 217, 218 (N.Y. 1933)).

239. *Beacon Journal Publ'g Co.*, 35 N.E.2d at 474, *appeal dismissed*, 34 N.E.2d 764 (Ohio 1941).

240. *See Schenectady*, 122 F.2d at 289-91.

241. *Id.* at 290.

242. *Id.* at 289. Chase emphasizes this point, perhaps, in response to Clark's dissent which noted that only two unreported opinions of the Northern District of Illinois agreed with the majority. *Id.* at 291 (Clark, J., dissenting).

243. *Id.* at 290 (citing *inter alia* RESTATEMENT (FIRST) OF TORTS § 559 & cmt. e (AM. LAW INST. 1938)).

244. *Id.* Chase's opinion implies that "right-thinking people" are those who would hold bigots in contempt. *See id.*

by the rise of fascism and the link that readers might draw from the publication between Sweeney and then-German leader Adolf Hitler.[245]

Judge Clark, in dissent, was unpersuaded. Though Clark believed that the dismissals of Syndicate cases by other courts were "persuasive,"[246] Clark argued that the article was not libelous per se under New York law.[247] New York precedents only addressed what was libelous per se in the context of commenting upon the official acts of public officials accused of corruption or incompetence, not the bigotry at the crux of this case.[248]

Clark was alarmed by the "disturbing" nature of the law the majority applied, because, by holding the article libelous per se, falsity was presumed.[249] He believed the majority's position was "naive" for creating a fictitious world where the law could presume allegations of bigotry as false.[250] This logic, Clark warned, suggested that, "what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity."[251] This doctrine was "dangerous" as any newspaper expressing a political opinion would be open to suit as "an appreciable number of readers [would] hate or hold in contempt the public official commented on," for different political, religious, or racial views.[252]

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245. *See id.* at 290-91 ("And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included largescale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this country the publication of statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers."). A panel for the U.S. Court of Appeals for the Third Circuit ruling on Pennsylvania law found the Syndicate article not libelous per se with an interesting rationale deserving of full context. *See* Sweeney v. Phila. Record Co., 126 F.2d 53, 55 (3d. Cir 1942) ("At the most the appellant is charged with being a bigoted person who, actuated by a prejudice of an unpleasant and undesirable kind, opposed a foreign-born Jew for a judicial appointment. Let us assume that it was stated in the alleged libel that the plaintiff opposed the appointment of a candidate simply because he was an Eskimo born above the Arctic Circle. We think that this example makes obvious the absurdity of the plaintiff's position. Eskimos are not being persecuted. Jews are being widely persecuted. We think that it is the connotation of persecution, which when carried into the matter published concerning the plaintiff, gives it the fallacious aspect of being libelous per se. The libel does not allege that Congressman Sweeney persecutes foreign-born Jews. It states nothing more than that he opposes one for an important federal office on the grounds stated.").

246. *Schenectady*, 122 F.2d at 291 (Clark, J., dissenting) (citing state and federal opinions dismissing Sweeney's suits).

247. *Id.* at 291 (Clark, J., dissenting) ("The decision herein seems to me not in accordance with New York law . . . .").

248. *Id.* (Clark, J., dissenting).

249. *See id.* (Clark, J., dissenting).

250. *Id.* (Clark, J., dissenting).

251. *Id.* (Clark, J., dissenting).

252. *Id.* at 291-92 (Clark, J., dissenting).

Clark would have required proof of special damages to protect political discourse.[253] This dissent was similar to the opinion of the U.S. Court of Appeals for the D.C. Circuit, which held: "it is not actionable to publish erroneous and injurious statements of fact and injurious comment or opinion regarding the political conduct and views of public officials, *so long as* no charge of crime, corruption, gross immorality or gross incompetence is made *and no special damage results*."[254]

Clark had mixed views on the effectiveness of defenses to libel in this case. The tenor of Clark's dissent suggests that he expected that the district court upon remand would find that the defense of fair comment protected the newspaper.[255] Conversely, Clark found cold comfort in the defense of truth, as the "public official will always regard himself as not bigoted, and will so testify, sincerely enough."[256]

3. Conclusion

Kentucky exemplified a trend that discouraged political plaintiffs. The doctrine that losing candidates could not claim lost emoluments from the office sought as special damages likely chilled potential political plaintiffs from filing defamation suits. By denying a right to recover in cases where a defendant lied about a politician's voting record or policy position, judges deprived political plaintiffs of defamation causes of action that could not have been privileged.[257]

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253. *Id.* (Clark, J., dissenting) (arguing that special damages be required where the charge is not one of "definite impropriety in office"). Clark does not expound upon what might be proof of special damages in Sweeney's case.

254. Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942) (emphasis added). The D.C. Circuit noted that had Sweeney alleged that the statements in the article caused him economic damages by the loss of business as an attorney or that he lost his seat in Congress, he "might be entitled to relief." *Id. But see supra* Part III.A.1–2 (discussing cases holding that lost emoluments from failure to be elected to political office are not special damages).

255. *See Schenectady*, 122 F.2d at 291-92 (Clark, J., dissenting) ("The decision herein seems to me not in accordance with New York law, where the *right of comment* on a public official has been safeguarded . . . ." (emphasis added)).

256. *See id.* at 292 (Clark, J., dissenting) (implying that juries assessing the truth of a statement that a politician was bigoted might either believe the politician when he denies the charge, or the jury would agree with the bigotry and accept the politician's denial with a wink and a nod); *see also* Anne Gearan, *Trump Says 'I'm Not a Racist' and Denies 'Shithole Countries' Remark*, WASH. POST (Jan. 14, 2018), https://www.washingtonpost.com/news/post-politics/wp/2018/01/14/trump-says-im-not-a-racist-and-denies-shithole-countries-remark/?utm_term=.625ee5dc30b7 (reporting that President Donald Trump, facing accusations of racism, including allegedly stating a preference that immigrants be from Norway rather than poor nations that are home to persons of color, replied to the accusation by stating to reporters: "I'm the least racist person you have ever interviewed.").

257. A legislator voting yes or no on a given bill is a fact. If a defendant knowingly lies about a plaintiff's specific vote, no privilege protects that falsity; rather, it is the view that upright citizens can be on both sides of legislative measures that makes it not libelous per se to misrepresent or incorrectly state a legislator's voting history, which effectively denies a legal remedy to the plaintiff

By the mid-twentieth century, narrow interpretations of what was considered "defamatory" posed a hurdle to plaintiffs alleging defamation per se nationwide. By paring down what special damages could consist of to prove defamation per quod, the courts could and did dismiss many political defamation suits. In the Syndicate cases, it was implied by numerous courts that even if the article was libelous per se, the article would have been privileged.[258] It is to the qualified privileges of common interest and fair comment that this Article now turns.[259]

B. Qualified Privilege: Common Interest and Fair Comment

Complaints for defamation surviving attacks on the prima facie case were subject to affirmative defenses, usually pled in the defendant's answer.[260] Subpart 1 discusses the common interest privilege, routinely invoked by citizen defendants communicating statements of fact.[261] Subpart 2 details the defense of fair comment, routinely invoked by media defendants writing on newsworthy issues.[262] Subpart 3 concludes that qualified privileges were an important part of the common law web against political defamation suits in all jurisdictions, though the power of each privilege varied among the jurisdictions.[263]

If a court deemed a publication qualifiedly privileged under common interest or fair comment, the legal presumption of malice would be suspended and the plaintiff would have to prove malice as a matter of fact. Most jurisdictions held that the desire to defeat a candidate for office, without more, was insufficient to prove malice.[264]

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for the lie. *See* Shields v. Booles, 38 S.W.2d 677, 681-83 (Ky. 1931); *see also* Sweeney v. Caller-Times Publ'g Co., 41 F. Supp. 163, 167-68 (S.D. Tex. 1941) (suggesting it is not libelous); *cf. supra* note 187 and accompanying text (discussing fake news).

258. *See* Sweeney v. Beacon Journal Publ'g Co., 35 N.E.2d 471, 472-74 (Ohio Ct. App. 1941); *see also Schenectady*, 122 F.2d at 291 (Clark, J., dissenting) (implying that the article would be privileged as "comment on a public official").

259. *See infra* Part III.B.

260. Depending on the jurisdiction, a defendant might include in the answer: a demurrer, plea of the general issue (a denial), or plea of justification (truth); and/or assert a qualified privilege, including common interest, fair comment, and neutral reportage. For an example of neutral reportage, see Abram v. Odham, 89 So. 2d 334, 337 (Fla. 1956) (describing a news story as "a routine report of what went on at a political rally in the midst of a heated gubernatorial campaign in which there was wide public interest, and apparently quoted only the milder portions of the defendant [candidate]'s remarks concerning the plaintiff[,]" and holding that where the newspaper running the story did not evince "express malice," the qualified privilege of neutral reportage was not defeated).

261. *See infra* Part III.B.1.

262. *See infra* Part III.B.2.

263. *See infra* Part III.B.3.

264. *See, e.g.*, Clancy v. Daily News Corp., 277 N.W. 264, 268 (Minn. 1938) ("Malice cannot be established by merely showing defendants' purpose was to prevent plaintiff's election."); Egan v.

Thus, a political plaintiff needed to provide evidence that the defendant was motivated by personal animus, or, in some jurisdictions, that the defendant lacked a good-faith honest belief in the truth of the allegedly defamatory statement.

1. Common Interest Privilege

Common interest is an expansive privilege that reaches far beyond cases of political import.[265] This Subpart looks at application of this privilege to communications among voters and among persons having an interest in the governance of a municipality or state.

In 1877, in *Mott v. Dawson*, the plaintiff alleged that the defendant uttered words that were slanderous per se.[266] Mott was running for County Board of Supervisors when Dawson told other voters "shortly before" the election that Mott had fraudulently sold cattle.[267] This charge could be understood as constituting the crime of "cheating by false pretenses."[268]

Iowa's Supreme Court affirmed a verdict for the defendant on the grounds that the charge conveyed between voters in the district was privileged.[269] The court held, "if the words were spoken by defendant without malice, in good faith, believing them to be true, and having reasonable cause as a prudent, careful man to so believe, and with the honest purpose of protecting the public from plaintiff's supposed dishonesty, the defendant is not liable."[270] Common interest among voters was limited in that it applied to persons with a vote in the upcoming election involving the candidate who was supposedly defamed, but expansive in that it protected assertions of fact and not mere comment.[271]

Dotson, 155 N.W. 783, 788 (S.D. 1915) (same).

265. *See, e.g.*, Hamilton v. Eno, 81 N.Y. 116, 124 (1880) ("The occasion that makes a communication privileged is when one has an interest in a matter, or a duty in regard to it, or there is a propriety in utterance, and he makes a statement in good faith to another who has a like interest or duty, or to whom a like propriety attaches to hear the utterance."). Common interest protected potentially defamatory statements made in good faith and believed to be true among persons needing a free-flow of information. *See* Johnson v. Gerasimos, 225 N.W. 636, 636, 638 (Mich. 1929) (holding statements made by employee of a corporation (defendant) to the corporation's auditor raising concerns that the plaintiff was embezzling corporate money was privileged under common interest).

266. 46 Iowa 533, 533-34 (1877).

267. *Id.* at 533, 537.

268. *Id.* at 534-35.

269. *Id.* at 533, 537.

270. *Id.* at 537.

271. If the alleged defamatory charge was published to voters outside that electorate, the plaintiff could try to defeat the qualified privilege by alleging malice from excessive publication. *See* Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 449-50 (Ala. 1960) (admitting circulation

The common interest in "good governance" was more expansive than the common interest among voters because the privilege enlarged the sphere of protection to a greater number of defendants than voters residing in a specific electoral district. A defendant could raise the "good governance" common interest privilege if he had some defined interest that would be affected by the governance of the entity holding the election. *Weinstein v. Rhorer* showcases the breadth of what this privilege could protect.[272]

Herman Weinstein, a former resident of Middlesboro, Kentucky, opposed Arthur Rhorer for reelection as Middlesboro's prosecuting attorney. Although Weinstein had moved to Cincinnati, Ohio, he retained ownership of "considerable" properties in Middlesboro (including one building where Arthur Rhorer had been a tenant for about nineteen years).[273] Prior to the election, Weinstein made negative remarks about Rhorer's candidacy to Middlesboro residents.

Rhorer sued Weinstein for slander, praying for $2900 in damages.[274] According to Rhorer, a sample of the charges Weinstein made included: "You can't afford to vote for Arthur Rhorer. . . . He is a whore-hopper, a drunkard and a grafter[;]" "[Rhorer] is dishonest . . . [;]" "Arthur Rhorer . . . works for such a small salary he had to graft."[275] In his answer, Weinstein pled truth and qualified privilege.[276] The trial court granted a demurrer to Weinstein's answer, disallowing both defenses.[277] The jury awarded Rhorer $1500 ($750 in punitive damages); Weinstein appealed.[278]

Kentucky's Court of Appeals reversed the judgment and remanded the case.[279] The court held that the only charge sufficiently pled by Rhorer was the slanderous per se charge of graft; Rhorer failed to sufficiently plead that the non-slanderous per se charges of whore-hopping, dishonesty, and being a drunk were made with malice.[280]

Although the charge of graft survived, the Court of Appeals held that the trial court erred in disallowing the defendant's claim of qualified

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numbers of national magazine to prove malice).

272. *See* 42 S.W.2d 892 (Ky. 1931).

273. Weinstein v. Rhorer, 73 S.W.2d 25, 26 (Ky. 1934) (involving termination of rental agreement); *Weinstein*, 42 S.W.2d at 893.

274. *Weinstein*, 42 S.W.2d at 892-93.

275. *Id.*

276. *Id.* at 893.

277. *Id.*

278. *Id.*

279. *Id.* at 895.

280. *Id.* at 893.

privilege.[281] The court stated that the qualified privilege of common interest protected Weinstein's remarks in the context of the campaign, where "discussion of a candidate's conduct and moral fitness, if made in good faith, without actual malice and with good grounds for believing them to be true, would be privileged communications."[282] On remand for trial on the charge of graft, Rhorer needed to prove that the charge was made with ill-will malice or with no grounds for believing its truth to defeat the qualified privilege attached to a statement made by a "considerable" landowner of Middlesboro property with an interest in protecting the governance of the entity holding the election from graft.[283]

It is necessary not to overstate the importance of the privilege applied in *Weinstein*. The good governance common interest privilege if extended beyond *Weinstein* may well have lacked a limiting principle.[284] The privilege recognized in *Weinstein* was simply that a current landowner and one-time resident had an interest in the good governance of a community where he retained properties, as well as business and personal ties.

The common interest privilege protected some political speech prior to 1964.[285] The privilege among voters in an election protected most bar room of coffee house conversations about politicians from civil defamation suits. The *Weinstein* precedent could theoretically privilege any speaker with property or business interests in that municipality. Whether that privilege would extend to statements made by corporate media entities or journalists acting as conduits for disseminating information to the public is better addressed by the defense of fair comment.

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281. *Id.* at 892, 894-95.

282. *Id.* at 894-95. For a similar test, see *infra* Part III.B.2.c (discussing the minority view of the defense of fair comment).

283. *See* Weinstein, 42 S.W.2d at 894-95.

284. *Cf.* Post Publ'g Co. v. Hallam, 59 F. 530, 540, 542 (6th Cir. 1893).

285. *But see* Upton v. Hume, 33 P. 810, 812 (Or. 1893) (disapproving *Mott v. Dawson*, 46 Iowa 533 (1877)).

2. Fair Comment: 'Nattering Nabobs of Negativism'[286]

This Subpart sketches out the defense of fair comment:[287] Subpart A traces its origins;[288] Subpart B delves into the majority view of fair comment;[289] Subpart C details the minority view;[290] Subpart D concludes, noting that the applicable view of fair comment in a jurisdiction may have impacted the content of political endorsements by newspapers.[291]

a. A Brief History of Fair Comment

First articulated in England in 1808, the defense of fair comment shielded comment on matters of public concern.[292] In *Carr v. Hood*, Lord Ellenborough dismissed a libel suit brought by author Sir John Carr against a critic who panned his book.[293] The court held, "[i]f the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate *right*."[294]

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286. Robert Mitchell, *'Nattering Nabobs of Negativism': The Improbable Rise of Spiro T. Agnew*, WASH. POST (Aug. 8, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/08/08/nattering-nabobs-of-negativism-the-improbable-rise-of-spiro-t-agnew/?noredirect=on&utm_term=.896aa4dd5200 (reporting on Vice President Agnew's use of the phrase 'Nattering Nabobs of Negativism' to describe critics of the Nixon Administration. Agnew would resign the vice presidency in 1973 after pleading no contest, "to a single charge of tax evasion stemming from bribes he pocketed as governor.").

287. Fair comment is described as either a defense or a privilege; "defense of fair comment" is used to distinguish it from the privilege of common interest.

288. *See infra* Part III.B.2.a (tracing the development of the defense of fair comment).

289. *See infra* Part III.B.2.b (expounding the majority view of fair comment, as adopted by prominent jurists such as Taft, that interpreted the defense narrowly in order not to preclude the best men from running in public elections).

290. *See infra* Part III.B.2.c.

291. *See infra* Part III.B.2.d. Many newspapers were owned by persons whose money enabled their politics to direct its editorial content if not reporting. Some politicians would purchase papers to promote themselves while assailing political rivals.

292. The determination that the defense of fair comment applied to a given statement was a question of law for judges, not a question of fact for a jury. *See* Noel, *supra* note 40, at 877 n.13.

293. Carr v. Hood (1808) 48 Geo. 355, 355, 356, 359 (Eng.).

294. *Id.* at 358 (emphasis added). In *Carr*, the defendant lampooned a series of books authored by Carr. *Id.* at 355-56. The allegedly libelous publication was intended to bring Carr's work into contempt and lower his reputation as an author by suggesting that Carr's work was overwrought. *Id.* at 355-56, 357 (describing a picture from the allegedly libelous publication depicting Carr collapsing under the weight of three of his books). A passage from one of Carr's books:

> Our master of the house was both cook and waiter. At dinner, amongst several other dishes, we had some stewed beef, I requested to be favoured with a little mustard, our host very solemnly replied, "I am very sorry, citizen, but I have none, if you had been fortunate enough to have been here about three weeks since, you might have had some." It was more than I wished, so I ate my beef very contentedly without it. With our desert we had a species of cake called brioche, composed of egg, flour, and water; it is in high estimation in France.

JOHN CARR, THE STRANGER IN FRANCE: OR, A TOUR FROM DEVONSHIRE TO PARIS 36-37 (1803).

This defense would be adopted by every American jurisdiction and expanded beyond literary critiques.[295]

American fair comment developed to protect many areas of speech including but not limited to the following: caustic commentary on and criticism of newsworthy issues; the official acts of public officers; and the qualifications, records, and physical and mental fitness of candidates for public office.[296] By the turn of the twentieth century, fair comment protected good-faith criticism of the true acts, ideas, statements, and records of public men, thus fostering political debate, and informing the community about persons interested in serving as repositories of the public's trust.

The defense of fair comment was limited. First, the defense would not protect comment on the private character of public men.[297] Second, the defense might not protect comment that was particularly harsh, as the nastiness of the words used when commenting could be taken as evidence of malice with which to defeat the defense.[298] Finally, a factual assertion could not be presented to a court as mere comment.[299] The substance of the defense and its application to a particular case were questions of law decided by the trial judge, subject to de novo appellate review.

In the mid to late 1800s, a schism developed over whether commentary formed in whole or in part on misstatements or false statements of fact that a publisher honestly believed to be true could

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Ellenborough noted that "[r]idicule is often the fittest weapon" for "exposing the follies and errors of another." *Carr*, 48 Geo. at 357; *see, e.g.*, Alexandra Petri, *How to Survive on $5 a Day and Millions of Dollars of Inherited Wealth*, WASH. POST (July 18, 2018), https://www.washingtonpost.com/blogs/compost/wp/2018/07/18/how-to-survive-on-5-a-day-and-millions-of-dollars-of-inherited-wealth/?utm_term=.ce2b0a7d6c52 (ridiculing You, *A Week in New York City on $25/Hour and $1k Monthly Allowance*, REFINERY29 (July 15, 2018, 12:30 PM), https://www.refinery29.com/money-diary-new-york-city-marketing-intern-income (journaling expenses of a twenty-one year-old intern who babysits as a side hustle, while parents pay for her rent, education, health insurance, etc.) by writing a money diary for Bruce Wayne as an intern at Wayne Enterprises with a side hustle as Batman).

295. *See* Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1207-09 & nn.7-26 (1949) (listing matters of public interest to which fair comment was applied).

296. First-time candidates for public office would often lack official acts to assess, raising questions about how to report on or campaign against candidates without a record of public service.

297. *See, e.g.*, Taylor v. Hungerford, 217 N.W. 83, 83-84 (Iowa 1927) (holding that publication of an article charging that a "low-browed, ignorant, hard-boiled" town marshal was "the most ungentlemanly specimen of white trash we have ever come across" and "a repulsive specim[e]n of humanity" was not fair comment as the charges attacked the private character of the public official rather than his official acts).

298. *See, e.g.*, Putnam v. Browne, 155 N.W. 910, 913 (Wis. 1916) (holding the comparison of the plaintiff to Judas Iscariot was "not fair criticism of any type; hence it is not privileged").

299. *See Fair Comment*, *supra* note 295, at 1213; *see infra* text accompanying note 329.

remain privileged under fair comment.[300] While the defense of fair comment and the qualified privilege for misstatements of fact were distinct,[301] some courts synthesized the two.[302] The mixture of the privileges may have been caused by: the muddling of fact and comment, common in the media and society generally;[303] and/or the development of a nascent national press corps reliant on new technologies, like radio and wire services, which created faster and greater access to information at the cost of an increased risk of errors in reporting.[304]

b. Majority View: The Best Men

The majority view of fair comment clung closely to Ellenborough's rule that "[i]f the commentator does not . . . introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right."[305] If a publication relied on a false statement or misstatement of fact, or a false or unverified rumor, it introduced a fiction and the defense failed.[306] This narrow view was applied by a majority of American jurisdictions through 1964.[307] Reasons for adopting this view included the ease in applying the rule and well-regarded jurists Oliver Wendell Holmes and William Howard Taft adopting and developing the view.[308]

In *Burt v. Advertiser Newspaper Co.*, a New York City customhouse official sued *The Boston Daily Advertiser* for libel for printing articles accusing the official of participating in a fraud

300. Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y. L. SCH. L. REV. 81, 92-94 (2005-2006).

301. Noel, *supra* note 40, at 878, 890-91, 896-900.

302. *See, e.g.*, Charles Parker Co. v. Silver City Crystal Co., 116 A.2d 440, 445 (Conn. 1955).

303. *Id.* at 445-46 ("It is often impossible to differentiate between what is comment and what is a statement of fact.").

304. *See, e.g.*, Bailey v. Charleston Mail Ass'n, 27 S.E.2d 837, 844 (W. Va. 1943) (discussing the moral and social responsibilities of the modern media in attempting to ascertain the truth of public acts on which they report). The concerns evinced by this decision were not unique to the mid-Twentieth Century. *See, e.g.*, FREEMAN, THE FIELD OF BLOOD, *supra* note 29, at 184, 192, 198 (discussing technological developments, the growth of the independent press in the mid-Nineteenth Century, and, anecdotally, false reports of a congressional duel); Matthew Ingram, *Fake News is Part of a Bigger Problem: Automated Propaganda*, COLUM. JOURNALISM REV. (Feb. 22, 2018), https://www.cjr.org/analysis/algorithm-russia-facebook.php (discussing Twenty-First Century journalistic and national security challenges posed by technological leaps at social media companies, which allow disinformation campaigns to be run on their sites).

305. *See* Carr v. Hood (1808) 48 Geo. 355, 358 (Eng.).

306. If a plaintiff sued based on reporting that included an unverified rumor, the presumption of falsity would work to presume that a fiction had been introduced. *See* Post Publ'g Co. v. Hallam, 59 F. 530, 540-41 (6th Cir. 1893).

307. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 n.30 (1964) (holding that "the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact").

308. *See infra* notes 309-28 and accompanying text.

scheme.[309] The articles, which contained factual errors, charged Burt and other "sugar people" with undervaluing the commodity in the customhouse, thus pilfering money from the public.[310] In 1891, the Supreme Judicial Court of Massachusetts, vacating a judgment for the plaintiff, adopted a view of fair comment offering broad application but narrow protection.[311]

The court, per Holmes, held that the defense applied to commentary on and critique of all public officials and "private persons affecting [the] administration."[312] However, this defense did not extend to false statements or misstatements of fact. Holmes cautioned, for remand, that parts of the articles containing comment that relied on verified facts should be protected, but a false statement would not be protected even if the "defendant had reasonable cause to believe its charges to be true. . . . A person publishes libelous matter at his peril"[313] because "what the interest of private citizens in public matters requires is freedom of discussion rather than of statement."[314]

In 1893, Circuit Judge Taft crafted the leading opinion adopting the narrow view.[315] In *Hallam v. Post Publishing Co.*, Taft articulated a philosophical justification behind the legal rules laid out in *Burt* and applied that narrow view to the political arena.[316]

Post Publishing Company owned the *Cincinnati Post* and *Kentucky Post*; both papers published versions of the article "Berry Paid Expenses of Theo. Hallam in the Sixth (Ky.) District Contest for the Nomination of a Democrat for Congress."[317] The article alleged that candidate Theodore Hallam incurred debt by providing lavish boat transportation for his supporters attending the local Democratic nominating convention.[318] The article, based on seemingly unverified rumors,

309. Burt v. Advertiser Newspaper Co., 28 N.E. 1, 1, 4 (Mass. 1891).

310. *Id.* at 1-4.

311. *See id.* at 4.

312. *Id.*

313. *Id.* at 4-5. The newspaper proffered evidence that its writers had a good-faith reason to believe the truth of the facts underlying their comment. *See id.* at 1-4. This evidence was likely proffered in the hope that the court would adopt the minority view of fair comment and protect the entirety of the series of articles.

314. *Id.* at 4.

315. Post Publ'g Co. v. Hallam, 59 F. 530, 534 (6th Cir. 1893). The ruling by Judge Taft, who had already served as Solicitor General of the United States, was given increasing notoriety due to his service as President of the United States (1909 to 1913), and, of course, Chief Justice of the U.S. Supreme Court (1921 to 1930). *See* Starks v. Comer, 67 So. 440, 442 (Ala. 1914).

316. *See Hallam*, 59 F. at 539-42.

317. Hallam v. Post Publ'g Co., 55 F. 456, 457 (C.C.S.D. Ohio), *aff'd*, 59 F. 530 (6th Cir. 1893); *see Hallam*, 59 F. at 534-35.

318. *Hallam*, 55 F. at 457-58 (quoting a delegate as saying: "Why, the champagne flowed off the decks so much that even the Henrietta [boat] was swimming in it"). Hallam was known to have

reported that a rival candidate, Berry, earned Hallam's support by promising to pay the costs of transporting Hallam's supporters to the Convention via the champagne laden ship *Henrietta*.[319]

Hallam, possibly thinking, "My yacht may have sailed, but my ship is comin' in,"[320] sued Post Publishing for libel, winning a $2500 judgment in the Southern District of Ohio.[321] Post Publishing appealed, and a panel of the Sixth Circuit affirmed.[322] Taft viewed the insinuation that Hallam sold his support to Berry as a "disgraceful" act of a public man; and such an assertion could not be predicated on an unverified rumor, despite a good faith belief in its truth.[323] Taft argued that privileging such mistakes on logical leaps would result in a more licentious press, chilling the best men from running for elected or serving in appointed office.[324]

Burt and *Hallam* held that if a publication is capable of a defamatory meaning, fair comment would not privilege a misstatement of fact or charge predicated on an unverified rumor.[325] The rule tried to temper the press,[326] by imposing a judicial standard for journalism. Future President Taft viewed this rule as a means by which to encourage the best men to hold or run for public office.[327] A majority of jurisdictions would adopt this narrow view of fair comment on this logic.[328]

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financial problems, yet contracted with a company to provide a boat to transport him and his well-fed supporters to the convention. *Id.* As a deadlock loomed at the convention, Hallam spoke privately with his rival candidate, multimillionaire Albert Berry. *Id.* at 458. After that conversation, Hallam told his supporters to support Berry (who went on to win the nomination and general election). *Id.*

319. *Id.* at 458.

320. *The Real Housewives of New York: The B is Back* (Bravo television broadcast Apr. 7, 2015) (spoken by Sonja Morgan).

321. *Hallam*, 55 F. at 457-58. Hallam filed two suits (one in the Southern District of Ohio against *Cincinnati Post*; and one in the District Court of Kentucky against *Kentucky Post*,) against one corporate defendant. *See Hallam*, 59 F. at 531, 534.

322. *Hallam*, 59 F. at 531, 542.

323. *Id.* at 540-41.

324. *Id.* at 541 ("[T]he danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters 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.").

325. *Id.* at 539-41; Burt v. Advertiser Newspaper Co., 28 N.E. 1, 4-5 (Mass. 1891).

326. *See Hallam*, 59 F. at 541 (noting the rule adopted was the majority rule and arguing that the press is not known for sheepishness).

327. *See id.*

328. *See, e.g.*, Putnam v. Browne, 155 N.W. 910, 912 (Wis. 1916); Starks v. Comer, 67 So. 440, 441-42 (Ala. 1914). For a list of cases that adopted the majority view as of 1949, most of which cite to or state an iteration of *Hallam*, see sources cited in Noel, *supra* note 40, at 896-97 n.102.

Newspapers in majority view jurisdictions often wrote endorsements based more on opinion than fact. This makes sense as majority jurisdictions allowed the defense "only where the alleged libel is an honest expression of opinion concerning a matter of public interest, reasonably warranted by facts which must be truly stated."[329] These restrictions on the defense allowed the charges of unfit and unqualified to flourish as they were safe either as opinion or a non-defamatory per se charge.[330]

For example, the *St. Louis Post-Dispatch* endorsed William Connett for the Democratic nomination for Circuit Attorney.[331] The endorsement, in a four-way race, was less for Connett than it was against Henry Walsh.[332] The paper endorsed Connett to avoid a split in the vote that could allow Walsh to eke out the nomination. The paper deemed Walsh "manifestly unfit" for the office,[333] continuing:

> The mere candidacy of such a person as Walsh for such an office should fill the city with alarm. He has no qualifications for the place. His sponsors and his associates are survivors of the most degraded régime that St. Louis ever knew. He can have no proper motive in aspiring to the place.[334]

Walsh sued the paper for libel claiming that the article damaged his reputation as an attorney, his candidacy for office, and brought him into "contempt and hatred of the public."[335] Walsh prayed for $25,000 in general and punitive damages.[336]

The trial court granted the paper's motion to dismiss, and the Supreme Court of Missouri affirmed.[337] The court considered whether the article, in its entirety or in part, was libelous per se.[338] The assertion that the city should be alarmed by Walsh's candidacy was not defamatory as it was confined to Walsh's lack of qualifications for the

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329. Note, *Libel Actions Brought by Public Officials*, 51 YALE L.J. 693, 697 (1942).

330. *See supra* Part III.A.2.b. One could be unqualified for an office by virtue of not meeting professional, residency, or citizenship requirements, and in that sense unqualified could be a non-defamatory statement of fact. *See, e.g.*, Bysiewicz v. Dinardo, 6 A.3d 726, 740-43, 747 (Conn. 2010) (holding that then-Secretary of State had not met a statutory requirement of "ten years' active practice at the bar of this state" to be qualified to run for Attorney General (quoting CONN. GEN. STAT. § 3-124 (2017))).

331. Walsh v. Pulitzer Publ'g Co., 157 S.W. 326, 327–28 (Mo. 1913).

332. *Id.* at 328.

333. *Id.*

334. *Id.* at 327-28 (quoting *Connett for Circuit Attorney*, ST. LOUIS POST-DISPATCH, July 22, 1908).

335. *Id.*

336. *Id.*

337. *Id.* at 327, 330.

338. *Id.* at 329-30.

position of Circuit Attorney. The charge that Walsh had the support of "survivors of the most degraded régime" was not libelous per se as it did not impute any criminality to Walsh.[339] There the court used the innocent construction rule to hold that charging that a lawyer who defends unseemly clients does not make him "birds of a feather" with those clients.[340] The court then held that the paper's comment that Walsh had "no proper motive" to run for the position was an opinion for the voters to judge.[341] As Walsh alleged no special damages and the editorial was not libelous per se, dismissal was affirmed.[342]

As *Walsh* exemplifies, papers published in majority jurisdictions did not run into problems when they maligned a candidate. Rather, papers ran into legal problems when they laid out an intricate factual predicate explaining the basis for their scorn for a candidacy. The *Walsh* opinion shows that a safe space existed from libel, in electioneering and the press, when stating an opinion light on or devoid of factual predicate.[343] This view paradoxically encouraged publishing political opinions while it chilled providing the factual basis for those opinions.

c. Minority View: The Best Men?

The minority view of fair comment developed at the turn of the twentieth century and was primarily adopted in the West. Western states were politically, socially, and constitutionally more democratized than eastern states; and as people migrated west, some had reason to try to draft new backstories or even shed their sordid pasts.[344] It is unsurprising that these western and prairie states were receptive to a view of fair comment that encouraged warnings about dangers posed by swamps and

339. *Id.* at 329.

340. *Id.* at 329-30. *But see* TWENTY ONE PILOTS, HEATHENS (Atlantic Records 2016) ("It looks like you might be one of us."). The innocent construction rule "holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law." John v. Tribune Co., 181 N.E.2d 105, 108 (Ill. 1962).

341. *Walsh*, 157 S.W. at 329.

342. *Id.* at 330. The court noted that special damages were not alleged, and had Walsh lost the primary and felt that the article "contributed to his defeat" he could have pled that as a special damage. *Id.* It is unclear if the court would have held that lost emoluments were special damages, or that the court thought that Walsh could claim that the loss of the election could be proof of his diminished reputation among the electorate.

343. If the reporting was accurate, or quotation correct, any criticism based on those facts was fair comment.

344. *Cf.* Panic! at the Disco, *High Hopes on* PRAY FOR THE WICKED (Fueled by Ramen LLC 2018) ("Mama said . . . manifest destiny . . . burn your biography, rewrite your history . . . ."); *see also infra* notes 365-78 (discussing Egan v. Dotson, 155 N.W. 783, 785-86 (noting that a South Dakota gubernatorial candidate moved to the state to avoid disbarment in Iowa after being accused of raping two women)).

strangers.

The most cited expression of the liberal view of fair comment is the 1908 opinion of the Supreme Court of Kansas in *Coleman v. MacLennan*.[345] However, *Coleman* was not the first case to articulate a conception of this view. Cases as early as the 1880s held that the defense of fair comment applied where a false statement or misstatement of fact occurred, so long as a publisher acted without malice and with a good faith honest belief in the truth of the statement.[346]

The Supreme Court of Pennsylvania applied a nascent form of the minority view prior to *Coleman*.[347] In 1886, in *Briggs v. Garrett*, the court privileged the public reading of a letter opposing the reelection of one judge based on a ruling written by a different judge.[348] In *Jackson v. Pittsburg Times*,[349] the court held that an article reporting on the conduct of a national guardsman that included misstatements of fact was protected:

> The plaintiff was at the time a public officer, actually on duty in performing a very grave and serious public service. Such persons are amenable to public criticism in the newspapers, without liability for libel, if there was probable cause for their comments and no proof of express malice, even though the statements are not strictly true in all respects.[350]

These pre-*Coleman* cases lacked the clarity and scholarship that came with the later opinion by the Supreme Court of Kansas.[351]

Coleman became widely cited because the case involved press coverage of a candidate for public office, serving as a foil for Taft's opinion in *Hallam*. During Attorney General Coleman's reelection campaign, *The Topeka State News* published an article that drew a potentially false inference that Coleman mismanaged the state's school funds.[352] Coleman sued for libel, alleging that the article was false, defamatory, and "the fruit of malice."[353] The jury was instructed that if

345. 98 P. 281 (Kan. 1908); *see, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-82 (1964) (discussing *Coleman*).

346. *See infra* notes 347-51 and accompanying text; *cf. infra* note 361 and accompanying text.

347. *See* Briggs v. Garrett, 2 A. 513, 521 (Pa. 1886).

348. *Id.* at 516-17, 524 (privileging letter read at a meeting of Philadelphia's Committee of One Hundred in opposition to the candidacy of Judge Briggs in a judicial election when the misstatement of fact was that the official act complained of was not committed by Briggs, but by Judge Fell).

349. 25 A. 613 (Pa. 1893).

350. *Id.* at 616.

351. The opinion in *Briggs* can be read as common interest in an election or the privileging of a misstatement of fact.

352. Coleman v. Maclennan, 98 P. 281, 281 (Kan. 1908).

353. *Id.*

they found that the article was published with the aim to inform voters "and that the defendant made all reasonable effort to ascertain the facts before publishing the [article], and that the whole thing was done in good faith, and without malice toward [the] plaintiff," they should find for the defendant.[354] The jury found that the article was published without malice, that Coleman sustained no damages, and found generally for the defendant.[355] Coleman objected to the jury instructions at trial and appealed to the Supreme Court of Kansas.[356]

The court, affirming the trial court's instructions, acknowledged that it was adopting a minority view.[357] The court justified its divergence on three main grounds: a state constitutional provision, state common law, and public policy.[358] The opinion cited protections in Kansas's Bill of Rights for the liberties of speech and the press,[359] as a reason to go beyond the protection fair comment provided in majority jurisdictions.[360] The court extended a common law rule applied in criminal libel cases privileging information believed in good faith to be true and shared for the benefit of voters, to this civil case.[361] The court then disputed the policy rationales of the majority view, arguing that Kansas's common law privilege protecting misstatements or false statements of fact when commenting had not led to "yellow journalism" nor deprived Kansas of fine men to run for office. The court defended the minority view, noting, "[t]he liberal rule offers no protection to the unscrupulous defamer and traducer of private character."[362]

Jurisdictions adopting the minority view of fair comment

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354. *Id.* at 282.

355. *Id.*

356. *Id.*

357. *Id.* at 288. The opinion provided citation to other state and federal courts that privileged publications where a defendant acted without malice and with a good faith belief in the truth of the facts used to comment. *Id.* at 286-88 (citing decisions from Iowa, Minnesota, New Hampshire, Pennsylvania, South Dakota, Texas, Vermont, and Maine).

358. *Id.* at 284-88, 291.

359. *Id.* at 283 ("The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." (quoting KAN. CONST. Bill of Rights § 11)).

360. *Coleman* was decided decades before the incorporation of the First Amendment's protections of speech and the press, only discussing that amendment in passing. *Id.* at 283; *see supra* note 27. Other states based adoption of the minority view on state constitutional protections of speech and press. *E.g.*, Charles Parker Co. v. Silver City Crystal Co., 116 A.2d 440, 445 n.2 (Conn. 1955) (citing free speech provision (quoting CONN. CONST. art. I, § 5)).

361. *Coleman*, 98 P. at 287 (discussing *State v. Balch*, 2 P. 609 (Kan. 1884)); *cf. supra* Part III.B.1 (discussing *Weinstein v. Rhorer*, 42 S.W.2d 892 (Ky. 1931) and the common interest in good governance privilege).

362. *Coleman*, 98 P. at 291-92.

recognized that honest mistakes happen in the course of good faith efforts to report and/or comment on newsworthy topics including politics.[363] If a writer published a charge that he lacked an honest good faith belief in its truth, he acted with reckless disregard for the reputational rights of another.[364] This recklessness would prove actual malice, defeating the defense of fair comment and justifying punitive damages.

The minority view appears to have enabled newspapers to be more detailed in their political endorsements. This is most clear when a newspaper took a position *against* a candidate for public office. In majority jurisdiction endorsements, opinions and non-defamatory charges were routine; but in minority jurisdictions, a newspaper could lay out the factual basis underlying its opinion with less fear of an aggrieved candidate filing, much less winning, a libel suit.

For example, on May 31, 1912, *The Sioux Falls Daily Press* ran "South Dakota Exchanges," republishing articles from other media outlets covering the primary race for the Republican nomination for Governor and including its own editorial "Compare the Two Men."[365] The *Daily Press*'s editorial used information from the republished articles to help assess the qualifications, reputations, and fitness of the candidates, Lieutenant Governor Frank Byrne and attorney George Egan.[366] The paper endorsed Byrne while criticizing Egan.[367] The editorial written in the waning days of the primary campaign contained republished charges pertaining to Egan including allegations of rape and lying about his wealth, closing with:

> Never in the history of South Dakota, as state or territory, has there ever been a man who has gone about the state vilifying citizens as George W. Egan has done and is doing. He has abused people until he has more enemies among men, women and children of South Dakota

363. *See, e.g.*, *Charles Parker Co.*, 116 A.2d at 444-45 ("Any political campaign is a process of debate and appeal publicly conducted in a way to bring knowledge to the voters to assist them in making a choice on election day. It is a time-honored American institution indispensable to our way of life. Courts must be careful not to permit the law of libel and slander to encroach unwarrantably upon the field of free public debate.").

364. *Coleman*, 98 P. at 292.

365. Egan v. Dotson, 155 N.W. 783, 785-86 (S.D. 1915); *see Governor Frank M. Byrne*, NAT'L GOV. ASS'N, https://classic.nga.org/cms/home/governors/past-governors-bios/page_south_dakota/col2-content/main-content-list/title_byrne_frank.default.html (last visited Nov. 10, 2018) (noting that Frank Byrne took office as governor of South Dakota in 1913 as a Republican).

366. *Egan*, 155 N.W. at 785-87.

367. *Id.* at 785-86.

than any other man, a hundred times over.[368]

Egan, representing himself, sued the publisher and editor of the *Daily Press* for libel, praying for damages of $50,000.[369]

At trial, Egan: gave unsworn testimony in his opening statement; disparaged two members of the Supreme Court of South Dakota; suggested to the jury that he should club one of the defendants; and had his associate counsel in closing remarks tell the jury that "[Egan] had taken the depositions of two Catholic priests to be offered in evidence on behalf of [Egan]; . . . [but defendants] then procured an order suppressing the depositions."[370] The jury awarded Egan $1000; defendants appealed.[371]

The sprawling record of *Egan v. Dotson* required 795 printed pages to contain the 478 assignments of error.[372] The Supreme Court of South Dakota reversed the judgment and remanded the case for a new trial (the proximate cause being newly discovered evidence that, if true, would help the defendant's truth defense and indicate that Egan perjured himself).[373] Putting aside the errors that emanated from the trial's circus-like atmosphere, reversible errors were committed by the trial judge on evidentiary rulings and in jury instructions.

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368. *Id.* at 786 (quoting *Compare the Two Men*, SIOUX FALLS DAILY PRESS, May 31, 1912). It also stated:

> George W. Egan has been a resident of the state for five years. He came from Logan, Iowa. The record is that two separate cases were brought against him charging him with having committed rape. Disbarment proceedings were started against him shortly before he left that place. He was disbarred by the Supreme Court of South Dakota. He went before the court and asked to be reinstated. It was refused. He went again before the court and asked to be reinstated, all this after he had gone about the state denouncing the members of the court and writing matter in his paper denouncing them, and on this last occasion apologized for what he had said and printed and begged to be forgiven, and there acknowledged that he had been treated justly by the court and their charges against him were true. He says he came to South Dakota with more than thirty thousand dollars. The record shows that he paid $20.46 in taxes in Iowa the year before he moved to South Dakota. He says that he spent a fortune defending his character in Sioux Falls.

Id. (see quotation in text for remainder of published passage).

369. *Id.* at 785-86 (quoting articles republished by the defendant newspaper). Charges from other articles republished in the editorial included: *Faulkton Advocate,* "George may be a good show, but for Governor the people want a man of ability, sanity, and integrity, and not a vaudeville performer"; *Huronite,* "He is willing to promise all things that he would be utterly unable to deliver"; *Bradley Globe,* "A man must have a grudge against himself and every one else that would for a moment consider this man's candidacy for the executive head of the state of South Dakota." *Id.* at 785.

370. *Id.* at 790-91 (discussing "the misconduct of plaintiff as his own counsel in his argument to the jury").

371. *Id.* at 785-86.

372. *Id.* at 786.

373. *Id.* at 792.

South Dakota's Supreme Court noted that the State adopted the minority view of fair comment in 1900, and so long as a charge against a candidate for public office was made with "probable ground" and the person making it "believes in [its] truth," the charge is privileged, "regardless of the fact that the charge is a false statement of fact."[374] The trial judge had excluded the republished articles from evidence, a reversible error as reliance on other papers' coverage of Egan and his reputation was relevant to the claim of privilege as proof of reason to believe the truth of the charges in the article and to rebut malice.[375] The court noted, "if a publication is not malicious, it is privileged under [the minority] rule, whether true or false."[376] The court added that the defendant's desire to defeat the plaintiff's candidacy because he was "unfit for the office" did not alone establish malice to overcome the qualified privilege.[377]

In minority view jurisdictions, the ability of editorial writers to rely on factual statements made about the candidate reported by other media outlets or relayed by credible sources appears invaluable. In this respect, the minority view's liberal interpretation appeared to create a common interest (apart from having a vote in an election or property interest impacted by the quality of a municipal government) in commenting on newsworthy matters.[378] The charge of Egan's unfitness was important, but the weight of proof came from the factual predicate on which that opinion was based. It cannot be proven whether the paper would have published verbatim the same editorial passages about Egan if South Dakota had been a majority view jurisdiction, but the potential for liability and a larger damage award in a suit for libel would have been greater.

d. How to Get Away with Murder (of a Political Candidacy)

Newspaper editorial endorsements were publications ripe for libel suits. Some newspapers made an affirmative case for their endorsed candidate, but rarely would publishing positive statements about one candidate result in a libel suit filed by the non-endorsed candidate. Many times, the endorsement of one candidate was a byproduct of pointing out

374. *Id.* at 787.
375. *Id.* at 787-88.
376. *Id.* at 787.
377. *Id.* at 788.
378. Just as *The Topeka State Journal* had no vote in the election involving Coleman (although the defendant's owner, publisher, and writers probably did), Weinstein had no vote in the election where he called then-candidate Rhorer a drunk, whore-hopping grafter. *See supra* Part III.B.1 (discussing common interest privilege in good government).

the faults of the other candidate. These anti-endorsements were the ripest publications for libel suits as they usually contained negative and possibly defamatory statements and were published in opposition to candidates, some of whom were unfit for office and public life.[379] Some anti-endorsements escaped civil prosecution because they were deemed not defamatory per se or per quod or because they stated pure opinion.[380] Opining that a candidate was *unqualified* or *unfit* for office was not usually defamatory.[381] This type of anti-endorsement would be safe in majority and minority fair comment jurisdictions.[382]

If an anti-endorsement conveyed its predicate for why someone was unqualified or unfit for office, it mattered which view of fair comment applied in the jurisdiction. In a majority jurisdiction, a writer had to be confident that any factual predicate was entirely accurate or not defamatory. In a minority jurisdiction, the factual predicate needed to have sufficient evidence that would allow a writer to prove that he had an honest good faith belief that the charge was true.[383]

The opinion in *Coleman* cautioned newspapers that the majority view courts were telling litigants and commentators: "You have full liberty of free discussion, provided, however, that you say nothing that counts."[384] This statement applied to political endorsements. By chilling the provision of a factual predicate for an opinion that a candidate was unqualified or unfit for office, the weight of the opinion was less, as was the public debate.[385] However, the ability to comment on and/or express an opinion about political candidates under either view of fair comment was a significant filament in the common law web constraining political defamation suits.

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379. *See supra* notes 368-69 and accompanying text (anti-endorsement of George Egan for governor). For a scathing "endorsement" of a candidate, see P.J. O'Rourke, *P.J. O'Rourke: I'm Endorsing Hillary Clinton, the Devil We Know,* DAILY BEAST (May 11, 2016, 1:00 AM), https://www.thedailybeast.com/pj-orourke-im-endorsing-hillary-clinton-the-devil-we-know ("[Did I mention that s]he is the *second*-worst thing that could happen to America." (emphasis added)).

380. *See, e.g.*, Walsh v. Pulitzer Publ'g Co., 157 S.W. 326, 327, 330 (Mo. 1913) (affirming dismissal of suit by holding parts of endorsement non-defamatory and deeming parts as opinion).

381. *See supra* Part III.A.2.b (discussing unfit and unqualified).

382. *See, e.g.*, Knapp v. Post Printing & Publ'g Co., 144 P.2d 981, 983, 985 (Colo. 1943) (holding not defamatory per se and privileged as fair comment the assessment that George J. Knapp was "not qualified" for governor).

383. *See, e.g.*, Egan v. Dotson, 155 N.W. 783, 787-88 (S.D. 1915).

384. Coleman v. MacLennan, 98 P. 281, 291 (Kan. 1908).

385. *Compare Egan*, 155 N.W. at 785-86 (quoting *Compare the Two Men*, SIOUX FALLS DAILY PRESS, May 31, 1912), *with Walsh*, 157 S.W. at 327-28 (quoting *Connett for Circuit Attorney*, ST. LOUIS POST-DISPATCH, July 22, 1908); *see also* Noel, *supra* note 40, at 896-97 n. 102-03 (identifying Missouri as majority view and South Dakota as minority view).

3. Conclusion

The privilege of common interest and defense of fair comment were critical strands of the common law web confining political defamation suits, allowing defendants to fight off successfully pled complaints. While jurisdictions were less uniform in the strength of their privileges and defenses than in the trend of limiting what was defamatory and narrowing what was a special damage; the qualified privileges did prevent many political plaintiffs from cashing in on potentially defamatory statements that may have been false. However, even if a plaintiff stated a claim for defamation and defeated the defendant's successful invocation of a qualified privilege by showing malice in fact or a lack of an honest good faith belief in the truth of the charge (actual malice), trial and appellate courts could still monitor and modify any judgment awarded.

C. Modification of Damages: "Don't Get Comfortable" Courts "Make Money Moves"[386]

Trial and appellate judges had broad powers to review and modify damage awards from 1870-1964. Remittitur was available in most cases where damages were awarded.[387] Strong reasons existed to remit

386. CARDI B, *Bodak Yellow*, *on* INVASION of PRIVACY (Atlantic Records 2018).

387. Consistent with the Seventh Amendment, federal courts had (and have) the power of remittitur, although, unlike State courts, see *infra* note 388, they did not have the power of additur as held by the Court in Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935).

Dimick was a personal injury suit for damages sustained in a car accident, filed in federal court under diversity jurisdiction. *See* 293 U.S. at 475. The jury awarded the plaintiff $500 in damages. *Id.* The district judge denied the plaintiff's motion for a new trial after being informed that the defendant would pay the plaintiff $1500. *Id.* at 475-76. The plaintiff did not consent to the increase in damages and appealed. *Id.* at 476. The U.S. Court of Appeals for the First Circuit reversed, holding that additur violated the Seventh Amendment. *Id.* The U.S. Supreme Court, in a 5-4 decision, affirmed the First Circuit. *Id.* at 488. In dicta, the Court unanimously agreed that remittitur was constitutional. *Id.* at 484. The majority relied on stare decisis giving particular weight to Justice Story's 1822 opinion on circuit in *Blunt v. Little*. *Id.* at 482-85 (discussing *Blunt v. Little*, 3 F. Cas. 760, 761-62 (C.C.D. Mass. 1822), remitting damages in malicious prosecution suit)). The *Dimick* holding, barring additur but allowing remittitur, applies in federal diversity suits because it is a procedural rule under the *Erie* doctrine. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537-39 (1958).

The *Dimick* line between additur and remittitur is not universally accepted. *See, e.g.*, *Dimick*, 293 U.S. at 491, 496-97 (Stone, J., dissenting) (arguing remittitur and additur are consistent with the Seventh Amendment); Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 739-46 (2003) (arguing that the choice to remit damages or face a new trial operates, in effect, as a denial of a jury trial on the issue of damages in violation of the Seventh Amendment). *See generally* Joseph B. Kadane, *Mr. Justice Story Invents American Remittiturs: "The Very Limits of the Law,"* 3 BRIT. J. AM. LEGAL STUD. 313 (2014) (arguing that Justice Story's 1822 decision in *Blunt* was wrong as to remittitur's use in pre-1791 British courts and misled subsequent American courts).

damages in political defamation cases: damage awards were speculative; and the parties to the suit, the substance of the alleged defamation, and/or the context in which the allegedly defamatory statements were made tended to invoke the passions and prejudices of factfinders. In political defamation suits, trial or appellate courts would usually have some legal ground to modify part or all of the damage award.[388] The cases reviewed for, cited, and discussed in this Part provide good evidence that remittitur became an important strand in the common law web constraining political defamation in the twentieth century.

Remittitur was employed by judges, in part, as a tool of judicial efficiency. Trial judges considered remittitur at the end of a trial when presented with a verdict and damages awarded for the winning party, coupled with a motion for a new trial by the losing party if not motions by both parties. To avoid a new trial on all issues or the sole issue of damages, a judge could deny the motion for a new trial conditioned upon the consent of the winning party to a reduction in damages. If the winning party declined to remit, the judge could grant a new trial; and the winner would incur further legal fees and face the prospect of losing the new trial. As remitting damages was a loss for the winning party, many jurisdictions only required the consent of the party receiving the abated damage award.[389]

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388. The Seventh Amendment was not (and has never been) incorporated against the states. *See, e.g.*, Minneapolis & St. Louis. R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916) (holding that "the 7th Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same"). Thus, a State court could employ additur as well as remittitur; however, my research gleans that additur had little usage in correcting inadequate damage awards for defamation. Judges and other scholars have noted that employing additur in cases where damages were not easily calculable was (and is) not the correct remedy. Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318, 323-25 (1934). Rather, judges would grant a motion for a new trial on the issue of damages. *See, e.g.*, *id.* at 322 ("Where the verdict is inadequate rather than excessive, the scope of judicial interference has been more limited. *The usual remedy is the setting aside of the verdict and the ordering of a new trial.*") (emphasis added)); *see also* Coats v. News Corp., 197 S.W.2d 958, 962 (Mo. 1946) ("In libel cases, as in other tort actions, 'a verdict will be set aside as inadequate for the same reasons that will justify the setting aside of a verdict for excessive damages.' However, the verdict of the jury will not be set aside merely because of being greater or less than the court might deem proper, since 'there is no fixed measure of damages applicable to actions for defamation.'") (internal citations omitted)); Blackwell v. Landreth, 19 S.E. 791, 792 (Va. 1894) (reversing five dollar judgment for plaintiff in slander suit, brought by woman alleged by the defendant to have been the mother of a bastard child fathered by the defendant's political rival, on grounds that the award was "so obviously inadequate and unjust as to call for the interference of an appellate court"). *But see* Kennedy v. Item Co., 34 So. 2d 886, 888, 896 (La. 1948) (awarding plaintiff $7500 on plaintiff's appeal from the trial court's grant of defendant's motion to dismiss).

389. *See, e.g.*, Henderson v. Dreyfus, 191 P. 442, 444 (N.M. 1919) (noting remittitur was filed by the plaintiff).

An unhappy party could appeal the denial of the motion for a new trial. However, appellate review of denials of motions for a new trial was limited; similarly, review of the application of remittitur was limited. Narrow review in both instances was premised on the belief that the trial judge was in the best position to judge the merits of the trial he oversaw.[390]

Professor Brad Snyder placed the timing of the extension of remittitur to defamation suits at the turn of the twentieth century; arguing that remitting damages was part of a larger response to the growth of personal injury suits of all kinds.[391] My research confirms that the extension of remittitur occurred around 1900, as judges branched remittitur out from contract cases to tort suits and finally to the intentional tort of defamation.[392] My research also suggests that remittitur in defamation suits was not simply part of a broader commitment to protect corporations from damage awards;[393] rather, remittitur was used in political defamation cases due to their innate tendency to arouse passions and prejudices of juries and judges and background concerns about freedoms of speech and press.[394]

Use of remittitur in political defamation cases was discussed at length in a 1919 case of first impression for the Supreme Court of New Mexico.[395] On October 7, 1916, *The Santa Fe New Mexican* published an article alleging that in 1906, Henry Dreyfus "tore down the American flag and stamped and spat upon it and got off with it."[396] Dreyfus sued, claiming that the article was libelous, seeking damages of $50,000.[397] The defendants pled truth and claimed that the story was common knowledge among the community, as the *Albuquerque Morning Journal* published a similar article in 1911 during the plaintiff's failed run for sheriff.[398]

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390. Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 449 (Ala. 1960) ("[T]he favorable presumption which attends the correctness of the verdict of the jury is strengthened when the presiding judge refuses to grant a new trial.").

391. Brad Snyder, *Protecting the Media from Excessive Damages: The Nineteenth-Century Origins of Remittitur and its Modern Application in* Food Lion, 24 VT. L. REV. 299, 302-23 (2000).

392. *See id.* at 307-11 (discussing the extension of judicial application of remittitur).

393. *See, e.g.*, *id.* at 313-19 (discussing the vision of some legal historians of remittitur as a corporate tool with which to chip away at verdicts won by plaintiffs in personal injury suits).

394. *Id.* at 311-13.

395. Henderson v. Dreyfus, 191 P. 442, 445-49 (N.M. 1919). This was a case of first impression for the newly formed State Supreme Court, though the territorial Supreme Court had ruled on a similar issue prior to statehood.

396. *Id*. at 444.

397. *Id.*

398. *Id.* at 444, 449. At trial, Dreyfus, over objection, claimed sending a denial of these facts to the publisher of the 1911 article. *Id.* at 453.

After the jury returned a verdict for Dreyfus, awarding $35,000, the defendants moved for a new trial.[399] Considering the trial, the verdict, the award, and the motion for a new trial, the trial judge ordered a new trial *unless* Dreyfus consented to remit damages to $10,000.[400] After Dreyfus filed a consent to remit the award by $25,000, the defendants appealed.[401]

The main question before New Mexico's Supreme Court was whether the trial court deprived the defendant of due process and trial by jury by offering the plaintiff the option to remit damages in lieu of granting the motion for a new trial.[402] The court, adopting the majority rule, held that "remittitur will not cure a verdict tainted by prejudice and passion[;]" therefore, if the court found the "verdict was excessive by reason of passion and prejudice[,]" it was their duty to grant the motion for a new trial so as to grant a trial by a jury free of such passion and prejudice.[403]

Though the plaintiff was no longer a public official nor candidate for public office when the 1916 article was published, the case was immersed in political passion. The story was first reported during the plaintiff's 1911 campaign for political office;[404] testimony was provided by political figures,[405] and witnesses were asked on the stand about their political views.[406] The Supreme Court noted: "The case was tried by the jury just a few days before the declaration of war by the United States against Germany, and at a time when the patriotic impulses of the people had been aroused, *and increased love and devotion for the flag was everywhere in evidence*."[407]

The court viewed the trial judge as being in a better position to assess whether the jury's verdict was a product of passion and prejudice.[408] The most persuasive evidence to the court that the verdict was not the product of passion and prejudice was that the trial judge offered to remit damages in lieu of granting the defendant's motion for a new trial.[409] According to the logic of the court, had there been passion

399. *Id*. at 444.
400. *Id*.
401. *Id*.
402. *Id.* at 444-45.
403. *Id.* at 445-46; *cf.* Snyder, *supra* note 391, at 307-08 (discussing nineteenth century use of remittitur generally). A minority of jurisdictions allowed remittitur when the verdict was "the result of passion and prejudice." *Henderson*, 191 P. at 445.
404. *Henderson*, 191 P. at 449, 451-52.
405. *Id.* at 454 (noting the testimony of a former Governor of New Mexico).
406. *Id.* at 452-53.
407. *Id.* at 449 (emphasis added).
408. *Id.*
409. *Id.*

or prejudice the trial judge would have ordered a new trial and not offered the compromise on damages.[410] This logic enabled the court to view the trial judge's actions as curing an excessive jury verdict, while simultaneously arguing that not all excessive damage awards indicate passion or prejudice.[411] Dreyfus's agreement to remit damages to $10,000 also put the award in line with other libel judgments affirmed on appeal, allowing the Supreme Court to more easily affirm the judgment.[412]

In 1962, the Supreme Court of Minnesota decided *Hammersten v. Reiling*, an appeal from a libel case in which the defendant had published "approximately 1,600 to 2,000" pamphlets opposing the plaintiff's candidacy for reelection as clerk of Roseville, Minnesota.[413] Defendant's pamphlet accused the plaintiff of supporting "racketeers" and accepting bribes to impact zoning ordinances while serving on the village council (a felony under Minnesota law).[414] The jury found for the plaintiff, awarding $12,500 in general damages and $7500 in punitive damages.[415]

On appeal, the defendant argued *inter alia* that the general and punitive damage awards were excessive, indicating passion and prejudice.[416] While the court did not rule that the awards were produced by passion and prejudice, the court held the general damage award excessive.[417] The court ordered a new trial on the issue of general

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410. *Id.* This logic evinces why appellate review of how trial courts decide motions for new trials was and is limited. *Cf.* Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 450 (Ala. 1960) ("The trial court in this case refused to grant a motion for a new trial based, among other grounds, on the ground that the verdict was excessive. When the trial court refuses to grant a new trial because it does not think the verdict to be excessive, the favorable presumption attending the verdict of the jury is thereby strengthened.").

411. *Henderson*, 191 P. at 445.

412. *See id.* at 451 (discussing verdicts larger than $10,000 affirmed by appellate courts as not excessive).

413. Hammersten v. Reiling, 115 N.W.2d 259, 261 (Minn. 1962).

414. *Id.* at 261-62, 264 & n.1 (noting that the statute criminalizing the conduct described in defendant's pamphlet called for fines, jail time, and disqualification from holding public office in the State). The court held that the pamphlet was libelous per se, but privileged as a communication about a candidate for public office. *Id.* at 264. The burden thus shifted to the plaintiff to prove malice, which was proved by the defendant's history of publishing negative pamphlets about the plaintiff and allegedly calling the plaintiff a "son of a bitch." *Id.* at 264-65. The court also found that the defendant made no effort to try to ascertain the truth of his charges. *Id.* at 265.

415. *Id.* at 261. The trial court instructed the jury that the plaintiff could not recover for the emoluments of office that he would have received had he been elected to office. *Id.* at 264.

416. *Id.* at 261. In closing remarks plaintiff's counsel remarked that defense counsel asked questions that he hoped the jury would punish the defense for "not in any of the damages, but hold it against him for it." *Id.* at 263.

417. *Id.* at 265-66 (reasoning that the $7500 punitive damage award was reasonable in light of the defendant's conduct and his admitted net worth of $100,000).

damages *unless* the plaintiff agreed to remit general damages from $12,500 to $5000.[418]

Not all judicial modification of damage awards furthered the interests of public debate or advanced a coherent formula for assessing damages in political defamation cases. In 1948, in *Kennedy v. Item Co.*, the Supreme Court of Louisiana, in a 2-1 decision, reversed a dismissal ordered by the trial court, gratuitously critiqued the trial judge,[419] and remanded the case to the trial court with instructions to award the plaintiff $7500.[420]

The *New Orleans Item* published an editorial critical of attorney Kemble Kennedy (then viewed as harboring political ambitions) who was challenging the State Civil Service Act.[421] The editorial charged that Kennedy's suit was the product of either a "professional incompetent," a "pettifogger," or one hoping to "'get a verdict' motivated by political bias on the part of the judiciary."[422] Kennedy sued the newspaper for libeling his professional skills as an attorney, seeking $30,000 in damages for lost business, diminished personal and professional reputation, and for "humiliation and mental suffering."[423] The trial court dismissed the suit on the grounds that the publication was privileged as fair comment upon the acts of a "quasi-public person[;]"[424] Kennedy appealed.

A majority of the Louisiana Supreme Court held the publication was not privileged as fair comment because it stated as fact that Kennedy was either "professionally incompetent, a pettifogger, one who expected to get a verdict because of personal influence with the court rather than by expounding sound legal considerations, or one who brought such suits as devices of political bushwhackery[;]" the majority found any of those options to be a false statement of fact about a private individual devoid of any proof.[425] Rather than remand the case for trial,

418. *Id.* at 266.

419. Kennedy v. Item Co., 34 So. 2d 886, 892, 896 (La. 1948). The majority opinion cited an article written by the trial judge in 1916 critical of courts failing to distinguish between the defense of fair comment and a privileged communication. *Id.* at 892. This appeared to criticize the trial judge for applying what he thought was the applicable case law of Louisiana rather than what the trial judge wrote approvingly of in an academic pursuit three decades prior.

420. *Id.* at 896.

421. *Id.* at 888-89.

422. *Id.* at 888.

423. *Id.* at 889 (noting that the plaintiff prayed for $10,000 in injury to personal and professional reputation, $5000 for humiliation and mental suffering, and $15,000 for loss of potential legal clients and loss of public confidence).

424. *Id.* at 892; *id.* at 896 (Hamiter, J., dissenting).

425. *Id*. at 892-94.

the majority reversed the trial court, assessed damages, and entered judgment for the plaintiff.[426]

After taking the remarkable step of reversing a dismissal to award a judgment for the plaintiff, neither of the two justices in the majority agreed as to the amount of the plaintiff's damage award.[427] Justice Fournet, writing for the majority, thought $7500 seemed correct "in light of the awards that have heretofore been given" in the State.[428] Justice Bond, concurring, would have awarded $25,000.[429] Neither the majority nor the concurring opinion stated on what proof the damage award lie nor whether the award was for general and/or punitive damages.[430]

The decisions in *Henderson* and *Hammersten*, showed that trial and appellate courts possessed the power to remit damages in defamation cases.[431] This was an important judicial failsafe and an integral part of the common law web. However, *Kennedy* showed the potential peril of judicial power to modify damages, with the majority of the Supreme Court of Louisiana not remanding a case for trial on the issue of damages, but settling on a number from the ether and ordering the trial court to enforce that award.[432] These decisions show that vast judicial powers to alter damage awards in political defamation cases were exercised prior to 1964.

D. Conclusion: The Common Law Web

The common law web delineated in this Part provided a great deal

426. *Id*. at 896.

427. *See id*.; *id.* (Bond, J., concurring).

428. *Id.* at 896.

429. *Id.* at 896 ("Bond, J., concurs, but believes the award should be in the amount of $25,000."). Justice Hamiter would have affirmed the trial court's dismissal awarding the plaintiff nothing. *Id.* (Hamiter, J., dissenting).

430. *See id.*

431. For other instances of remitting damage awards in defamation cases, see, for example, Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 461 (Ala. 1960) (reversing libel judgment unless plaintiff agreed to remit damage from $67,500 to $45,000 within thirty days); Taylor v. Hungerford, 217 N.W. 83, 85 (Iowa 1927) (affirming trial court's remittance of a libel award from $3000 to $1000); Smith v. Lyons, 77 So. 896, 904 (La. 1918) (reducing damage award on rehearing in political libel case from $2500 to $500); Cook v. Globe Printing Co., 127 S.W. 332, 341, 356 (Mo. 1910) (reversing libel judgment unless plaintiff remitted damages from $150,000 to $50,000 within twenty days); *see also* Johnson v. Gerasimos, 225 N.W. 636, 636, 638 (Mich. 1929) (remitting damages in cause of action for slander at trial court level by $1000 as excessive; Michigan Supreme Court conditionally affirming verdict for malicious prosecution contingent on the discontinuance of the slander claims); Steinbuchel v. Wright, 23 P. 560, 560 (Kan. 1890) (reversing and remanding for new trial a slander judgment for $4000 where the trial judge had already remitted damages by $3500 due to passion and prejudice).

432. *See Kennedy*, 34 So. 2d at 896.

of protection for political speech through 1964, evincing an anti-political plaintiff trend in defamation suits. Courts nationwide limited what was defamatory and narrowed what would be accepted as proof of special damages. If a plaintiff sufficiently pled a cause of action for defamation, the defendant could plead the qualified privilege of common interest or fair comment; thus, suspending the legal presumption of malice, and shifting the burden to the plaintiff to prove ill-will or actual malice. Ultimately, trial and appellate courts could remit any damages awarded where the amount of the verdict was excessive and/or indicated passion or prejudice. Some form of these three strands of the common law web existed in jurisdictions nationwide. Webs existed in the common law of the state courts of the Deep South that would decide weaponized libel suits in the 1960s. As Part IV details, the state courts of Alabama disregarded the common law web and its own precedents, facilitating political plaintiffs to civilly prosecute weaponized libel suits against reporters and press outlets covering and activists in the Civil Rights Movement.[433]

IV. *EXPELLIARMUS!*[434]: DISARMING POLITICAL PLAINTIFFS IN WEAPONIZED LIBEL SUITS

In the early 1960s, *The New York Times* and other press outlets found their corporate persons and employees hauled before all-white juries in courts across the South.[435] Members of the national press faced numerous massive libel suits filed by public officials[436] and public

433. *See infra* Part IV.

434. *Expelliarmus*, POTTERMORE, https://www.pottermore.com/explore-the-story/disarming-charm (last visited Nov. 10, 2018) ("[Defined as:] A handy (even life-saving) spell for removing an object from an enemy's grasp.").

435. *See, e.g.*, N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 51 (Ala. 1962) (discussing *N.Y. Times Co. v. Conner* and finding the Fifth Circuit's construction of Alabama law on jurisdiction and venue "erroneous" and the "opinion faulty" (citing 291 F.2d 492 (5th Cir. 1961)), *rev'd*, 376 U.S. 254 (1964). The federal litigation involving Harrison Salisbury's 1960 article for *The New York Times* would linger until 1966. *See* N.Y. Times Co. v. Connor, 365 F.2d 567, 568 (5th Cir. 1966) ("This case now makes its third appearance before this Court. It originated as a libel action against The New York Times and Mr. Harrison Salisbury, a staff member of The Times, arising out of the publication of Salisbury's article on Alabama racial conditions in the April 12, 1960, issue of The Times."). As of 1964, at least $288 million in libel suits had been filed by southern public officials from three states. ROBERTS & KLIBANOFF, *supra* note 29, at 357.

436. *Connor*, 365 F.2d at 568 (filing by Birmingham City Commissioner); *Sullivan*, 144 So. 2d at 28-29 (filing by Montgomery City Commissioner).

men,[437] for allegedly defamatory articles,[438] television reports,[439] and a paid advertisement.[440]

The primary purpose of these suits was not to compensate plaintiffs for damage to their political, professional, or personal reputation—former U.S. Senator from Alabama and then-Justice Hugo Black would later note, such plaintiffs' reputations were likely enhanced by fights with the national press.[441] Rather, these suits were used as weapons by which to attempt to shutter national press outlets and chill, if not eliminate, coverage of the race beat in the Deep South. To those ends, weaponized libel suits were effective; for example, *The New York Times*, fearful of its financial ability to withstand scores of six-figure libel suits, curtailed its own coverage of Alabama in the early 1960s.[442]

Weaponized libel suits posed a mortal threat to a national press

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437. *See, e.g.*, Associated Press v. Walker, 393 S.W.2d 671, 672, 674-75 (Tex. Civ. App. 1965) (affirming $500,000 compensatory damage award in a libel suit brought by former General Edwin Walker for his role in stoking deadly riots at Ole Miss (the University of Mississippi) over integration), *rev'd*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 140-42, 155 (1967) (holding that the actual malice standard applies to public men and public figures). The trial judge in Ft. Worth, Texas stated that in awarding Walker $800,000: "The jury has reflected the attitude of the entire country with respect to false and one-sided reporting of the news." ROBERTS & KLIBANOFF, *supra* note 29, at 357-58; *cf.* sources cited *supra* note 187 (discussing modern developments regarding the phrase "fake news"); Gold, *supra* note 6 (discussing candidate Donald Trump's promise/threat at a campaign rally to loosen up libel laws to be able to sue the press and win a lot of money).

438. *Connor*, 365 F.2d at 568 (*New York Times* article); *Walker*, 393 S.W.2d at 672 (*Associated Press* article).

439. *See Sullivan*, 376 U.S. at 295 (Black, J., concurring) (noting $1,700,000 sought from CBS in five libel suits); *see also* ROBERTS & KLIBANOFF, *supra* note 29, at 251 (noting $1,500,000 sought in libel suits against CBS and Howard K. Smith for the television broadcast *Who Speaks for Birmingham?*).

440. *See Sullivan*, 376 U.S. at 256 (alleging libel in *Heed Their Rising Voices* advertisement).

441. *Id.* at 294 (Black, J., concurring) ("Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication."). As an ancillary benefit, weaponized libel plaintiffs would be content to accept any financial gains that came from monetary judgements for non-existent harms or possible boosts to their reputations, while the weaponized plaintiff's bar would enjoy the attorney's fees.

442. *The Times* would choose not to cover many newsworthy events in Alabama—such as legs of Freedom Rides that passed through the State and the election of George Wallace as governor in 1963—out of fear that its reporter Claude Sitton would be personally served in Alabama. ROBERTS & KLIBANOFF, *supra* note 29, at 234-35, 242-43, 301-02; *see* N.Y. Times Co. v. Conner, 291 F.2d 492, 493-94 (5th Cir. 1961) (assuming personal jurisdiction over reporters served in Alabama would exist in Alabama state court); *cf.* N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 29 (Ala. 1962) (discussing the work of Claude Sitton to support a finding that *The Times* had a presence in Alabama).

corps[443] and posed many legal questions for federal courts. As we have seen, federal courts played only a modest role in forming American common laws of defamation.[444] Once the U.S. Supreme Court granted certiorari in *New York Times v. Sullivan*, the question became not simply whether the Court would disarm southern courts and plaintiffs of weaponized libel suits, but how and on what constitutional basis?[445]

A narrow procedural ruling on jurisdiction was unlikely to help current or potential political libel defendants facing weaponized libel suits. For example, holding that Alabama lacked personal jurisdiction over The New York Times Co.,[446] would not have helped *Times* reporters, like Claude Sitton, personally served within Alabama's borders.[447] With personal jurisdiction over a corporation of limited use to potential defendants, including out-of-state corporations,[448] a substantive

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443. *See* ROBERTS & KLIBANOFF, *supra* note 29, at 235 ("But [Claude Sitton's] job was to cover the South, and now it was the South minus Alabama.").

444. *See supra* Part II.

445. *See Sullivan*, 376 U.S. at 264-65. By 1964, the Court had heard no shortage of cases on desegregation, civil rights, and Alabama's efforts to hinder the organization and mobilization of political and social justice groups involved in the civil rights movement. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 536-37, 540, 583-84, 587 (1964) (argued November 13, 1963) (Alabama legislative reapportionment cases) (holding that the Equal Protection Clause demanded a "one person, one vote" principle when drawing state legislative districts); N.A.A.C.P. v. Alabama, 357 U.S. 449, 451-54, 466-67 (1958) (holding that Alabama could not compel the Alabama NAACP to hand over its membership list to the State under the free association clause incorporated through the Fourteenth Amendment); Browder v. Gayle, 142 F. Supp. 707, 711, 717 (M.D. Ala. 1956) (holding Alabama state statutes and Montgomery city ordinances segregating buses unconstitutional), *aff'd*, 352 U.S. 903 (1956); *see also* Cooper v. Aaron, 358 U.S. 1, 4, 19-20 (1958) (reordering racial desegregation of Central High School in Little Rock, Arkansas); Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

446. This argument, which *The New York Times* placed great stock in, was dispensed with in a footnote. *Sullivan*, 376 U.S. at 264 n.4 (finding against *The Times* on the jurisdictional question in dicta based on the failure to enter a special rather than a general appearance to contest personal jurisdiction in state court); *see also Sullivan*, 144 So. 2d at 36 ("The Times, by questioning the jurisdiction of the lower court over the subject matter of this suit, made a general appearance, and thereby submitted itself to the jurisdiction of the lower court.").

447. It would have been possible for Bull Connor to schedule a cause for a race riot in Birmingham to draw the press out and then miraculously have persons at the scene ready to serve reporters personally. *Cf.* ROBERTS & KLIBANOFF, *supra* note 29, at 246-49 (detailing how Connor gave the Klan a fifteen-minute head start, to do what they had to do when a Freedom Ride bus reached a specific Birmingham bus terminal, before the police would respond).

448. Such a ruling might have helped press defendants without minimal contacts in Alabama, such as out-of-state newspapers printing syndicated columns or wire reports and opinion journalists opining on Alabama who were not to be found in the state. *See* N.Y. Times Co. v. Conner, 291 F.2d 492, 493-95 (5th Cir. 1961); *see also supra* Part III.A.2.c (discussing Syndicate cases). It is unclear if a holding in *Sullivan* altering the constitutional framework of personal jurisdiction over a corporation would have deterred southern state courts from disregarding or evading such a ruling. Judge Jones asserted jurisdiction over *The New York Times* by disregarding the instructions on pleading that Jones wrote in his own book on Alabama civil procedure. LEWIS, *supra* note 5, at 24-

ruling was defensible.

The broad substantive rulings of *Sullivan* are further supported by two factors. First, explored in Subpart A, Alabama courts disregarded their own common law precedents.[449] Second, explored in Subpart B, the Warren Court followed its own precedent of looking to state constitutional, common, and statutory laws to inform the Due Process Clause of the Fourteenth Amendment.[450] Subpart C concludes that *Sullivan* was justifiable.[451]

*A. Not-So-*Sweet Home Alabama[452]

The problem in *New York Times Co. v. Sullivan* was not that the common law of defamation in Alabama was an outlier among states. While restrictive, Alabama was in the mainstream on libel laws in the 1960s.[453] The problem was not that Alabama adhered to the majority view of fair comment. A plurality (if not a majority) of states did.[454] The problem with Alabama's courts, particularly in *Sullivan*, was that they strayed from Alabama precedent.

Alabama in 1963, had plaintiff-friendly laws on libel. In 1914, the Alabama Supreme Court adopted the majority view of fair comment, which did not protect misstatements of fact when making comment.[455] In 1957, the Alabama Supreme Court affirmed that though a state statute required a libel to be both false and defamatory, if a trial judge ruled a publication libelous per se, falsity and malice would be presumed.[456] If not ruled libelous per se, plaintiffs could proceed on a libel per quod

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449. *See infra* Part IV.A.

450. *See infra* Part IV.B.

451. *See infra* Part IV.C.

452. LYNYRD SKYNYRD, *Sweet Home Alabama*, *on* SECOND HELPING (MCA Records 1974).

453. In Respondent's brief in *New York Times Co. v. Sullivan*, counsel placed outsized reliance on a large libel verdict awarded in a case from the Supreme Court of New York that was reversed for being grossly excessive by the Appellate Division two months after Respondent's brief was submitted and one month prior to oral argument of *Sullivan* in the U.S. Supreme Court. Brief for Respondent at 41, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39) (citing Faulk v. Aware, Inc., 231 N.Y.S.2d 270, 281 (N.Y Sup. Ct. 1962)), *rev'd*, 244 N.Y.S.2d 259, 266-67 (App. Div. 1st Dep't. 1963) (reversing judgment unless plaintiff consented to remitting damages from $2,250,000 to $450,000). This was in line with the in-State precedents that Alabama had been ignoring.

454. *See* Noel, *supra* note 40, at 896-97 & nn.102-06 (identifying majority and minority view jurisdictions as of 1949).

455. Starks v. Comer, 67 So. 440, 441-42 (Ala. 1914).

456. McGraw v. Thomason, 93 So. 2d 741, 742 (Ala. 1957). Whether "malice" justifying punitive damages in libel suits was malice in-fact, or legally presumed, it was a widely discussed problem. *See, e.g.*, Cooper v. Romney, 141 P. 289, 291 (Mont. 1914) (criticizing presumptions of malice and falsity).

action without presumed falsity and malice.[457]

The courts of Alabama also had a precedent of patrolling damage awards in libel cases. In *Tidmore v. Mills*, Alabama's Court of Appeals affirmed a $900 verdict in a libel case where the defendant placed a placard for public view comparing the plaintiff to Adolf Hitler.[458] The court justified the award by comparing $900 to other libel awards affirmed by appellate courts.[459]

In 1960, the Supreme Court of Alabama decided *Johnson Publishing Co. v. Davis*.[460] This appeal stemmed from an article published in *Jet* that included charges that Edward Davis was reported to have assaulted Reverend Ralph Abernathy with a hatchet and a pistol, and that Davis, a teacher, resigned from a prior teaching position due to charges that he had sexual relations with students.[461] Davis sued for libel.[462] Judge Walter Jones ruled the publication libelous per se.[463] The jury found for the plaintiff and awarded $67,500.[464]

On appeal, the Alabama Supreme Court held: "Because damages are presumed from the circulation of a publication which is libelous per se, it is not necessary that there be any correlation between the actual and punitive damages[,]" and that the scope of circulation of a libelous per se publication is "proper" for the jury to consider when ascertaining malice and assessing damages.[465] The court noted: "The matter of damages must be left to the discretion of the jury, whose judgment ordinarily should not be interfered with unless the amount is so

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457. *See* White v. Birmingham Post Co., 172 So. 649, 652 (Ala. 1937) ("The published words may be actionable in themselves, or per se; or they may be actionable only on allegation and proof of special damage or per quod. . . . Words libelous per se import damage, while words actionable only per quod are those whose injurious effect must be established by allegation and proof.").

458. Tidmore v. Mills, 32 So. 2d 769, 772, 778-82 (Ala. Ct. App. 1947).

459. *Id.* at 781-82 (citing larger awards affirmed by appellate courts in Alabama, Illinois, New York, West Virginia, and Wisconsin).

460. 124 So. 2d 441 (Ala. 1960). This case may have been one of weaponized libel, though the plaintiff was black. *Id.* at 445. The defendant was the holding corporation of a Negro Press outlet. *Id.* at 446-47. This case can be viewed as the onset of a trend culminating with *Sullivan* in that jurisdiction was extended over a foreign corporation, removal was not allowed, and damages were large; yet the Alabama Supreme Court applied its own precedent in this case when remitting damages. *See id.* at 454, 456, 461.

461. *Id.* at 444. Davis was charged with and acquitted of assaulting Abernathy with a pistol and a hatchet. *Id.* at 446. Davis was perceived by many in the black community as being used by the white community to try to discredit leaders of the civil rights movement. *Id.* Abernathy was a lieutenant of Dr. Martin Luther King Jr. and would go on to be the *New York Times*'s named co-defendant in *Sullivan*. Abernathy v. Sullivan, 376 U.S. 254 (1964).

462. *Davis*, 124 So. 2d at 445.

463. *Id.* at 441.

464. *Id.* at 445.

465. *Id.* at 450.

excessive as to show passion or prejudice, or other improper motive."[466]

The court justified a large award because *Jet* was a national magazine, with 1500 copies of the edition at issue sold in the Montgomery area.[467] However, the court viewed the $67,500 award as excessive because "facts 'tending but failing to prove the truth' of the libel's charge" existed as to the alleged assault.[468] The court affirmed the judgment for the plaintiff contingent upon Davis's agreement to remit the award by one-third from $67,500 to $45,000.[469]

At issue in *Sullivan v. New York Times Co.* was a $4800 paid advertisement in *The New York Times* placed by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" entitled *Heed Their Rising Voices*.[470] The ad never mentioned a "Mr. Sullivan" nor the City Commissioners of Montgomery; the ad did name the "police," "southern violators of the Constitution," and made sloppy use of the word "they."[471]

Ray Jenkins of the *Montgomery Advertiser* wrote an article detailing the ad; he noted that the solicitation for donations to Dr. King's legal defense fund was signed by prominent liberals and contained factual errors.[472] After Jenkins' story ran, Sullivan demanded a retraction from *The Times*.[473] In response, *The Times* wrote to Sullivan asking what in the ad Sullivan thought referred to him.[474] Sullivan replied not by answering *The Times*'s letter, but by suing for $500,000; alleging that by publishing the ad, *The Times* falsely and maliciously damaged his reputation as a city commissioner and held him up to ridicule and

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466. *Id.*

467. *Id*. at 449 (noting that 10,500 copies were sold statewide).

468. *Id.* at 453 (quoting Crane v. N.Y. World Telegram Corp., 126 N.E.2d 753, 757 (N.Y. 1955)).

469. *Compare id*. at 461 ("We conclude that the ground of the motion for new trial charging excessiveness of the verdict was well taken. Accordingly a judgment will be entered here that unless the appellee files with the clerk of this court a remittitur within thirty days reducing the judgment to $45,000, the judgment of the trial court will stand reversed. If such remittitur is duly filed the judgment for $45,000 with interest from the date of the judgment in the circuit court will stand affirmed."), *with* Hammersten v. Reiling, 115 N.W.2d 259, 266 (Minn. 1962) ("Accordingly, a new trial on the issue of general damages must be ordered, unless within 10 days after the filing of this opinion plaintiff shall file in supreme court a written consent to a reduction of the total verdict to the sum of $12,500. In the event of compliance with this condition, the order appealed from shall be and is affirmed.").

470. N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 37, 46, 48 (Ala. 1962).

471. *See Advertisement, "Heed Their Rising Voices*," N.Y. TIMES, Mar. 29, 1960, at 25.

472. ROBERTS & KLIBANOFF, *supra* note 29, at 229-32 (detailing how Ray Jenkins came to write his article). Grover Hall, editor of the *Montgomery Advertiser*, testified for Sullivan. *See Sullivan*, 144 So. 2d at 47.

473. ROBERTS & KLIBANOFF, *supra* note 29, at 230.

474. *Sullivan*, 144 So. 2d at 46.

contempt in Montgomery, Alabama.[475]

Judge Jones could have read the ad not to be libelous per se, thus requiring Sullivan to plead special damages, innuendo, and/or falsity.[476] However, Jones, who opened the trial by praising "white man's justice[,]" ruled the ad libelous per se.[477] Jones' oral jury charge instructed that because the article was libelous per se, if the ad was "aimed at the plaintiff," punitive damages may be awarded.[478] These rulings set in motion the legal presumptions that carried the jury to its $500,000 damage award.[479]

The Supreme Court of Alabama, did not try to wrestle with the size of the $500,000 award,[480] other than to suggest that the U.S. Dollar was not worth what it used to be.[481] Instead, the court justified the theories behind presumed and punitive damages in libel cases, rather than the application of those theories to *Sullivan*.[482] The court stressed *The Times*'s malice in failing to retract the ad and failing to fact check the ad, and strongly implied that having a wide circulation proved excessive publication.[483]

These points did not address whether the $500,000 award was excessive. The court had two routes of Alabamian precedent to follow to scrutinize the damage award. First, compare amounts of libel awards affirmed on appeal with the award in *Sullivan*.[484] Second, apply the rule that evidence tending to prove truth of the charge mitigates

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475. *Id.* at 28, 37 (discussing plaintiff's complaint).

476. One example of a libelous per se publication under the decisions of the Alabama Supreme Court is to be found in White v. Birmingham Post Co., 172 So. 649, 650-52 (Ala. 1937). That case involved an article "Arabian Sheik asks Friend Here to Buy him an American Girl" alleging that Sheik Fareed Iman asked his friend, Lytle White, to find and purchase a "chief-wife" for his harem in Jerusalem. *Id.* at 650. The court, reversed a demurral for the defendant granted in the trial court, found the article libelous per se and reversed and remanded for trial. *Id.* at 652-53 ("The very idea of a harem is repulsive to our American conception of morality and virtue. The purchase of a girl from her parents here in America, to be carried to some distant country, to complete an Arab's harem of four wives is abhorrent to our American institutions and our conceptions of morality.").

477. LEWIS, *supra* note 5, at 26.

478. *Sullivan*, 144 So. 2d at 43.

479. *Id.* at 43-44. The part of the jury charge regarding colloquium using the phrase "aimed at the plaintiff" was excepted to, but the Alabama Supreme Court found it inconsequential in full context of the instructions on appeal. *Id.*

480. *See id.* at 50.

481. *Id.* at 51 ("It is common knowledge that as of today the dollar is worth only 50 cents or less of its former value.").

482. *Id.* at 49-50.

483. *Id.* at 50-51. Malice was found in the lack of a retraction for Sullivan, in part because Alabama's Governor asked for and received a retraction and because *The Times* ad department did not fact check the ad against information housed in *The Times*'s archive. *Id.*

484. *Id.* at 49-51.

punitive damages.[485]

In *Tidmore*, the Alabama Court of Appeals compared prior libel awards affirmed by appellate courts to the award in the case on appeal.[486] Had the Alabama Supreme Court engaged in a similar inquiry in *Sullivan*, the court would have conceded that the largest libel award in Alabama history was out of line with prior libel awards affirmed by that court. Most relevant would have been *Davis* decided two years prior to *Sullivan*. In *Davis*, the court conditionally affirmed a remitted damage award of $45,000 where the circulation of that publication within Alabama was much greater than the edition of *The Times* at issue in *Sullivan* which led to a $500,000 award.[487] Comparing the size of the awards in *Sullivan* and *Davis* should have led the court to view the *Sullivan* award with more skepticism.

In *Davis*, the Supreme Court of Alabama remitted damages because evidence tended to prove the truth of the charge that Davis, at least in the colloquial sense, assaulted Reverend Abernathy.[488] While the *Sullivan* court stated that no such truth existed in the ad that would allow for a similar application of remittitur, this was an assertion separated from the analysis of the misstatements in the ad.[489] Some facts in the ad tended to prove truth,[490] other misstatements of fact were clearly wrong but not defamatory,[491] and to the extent that misstatements of fact accompanied violent and possibly defamatory charges, such as the bombing of Dr. King's home, it was unclear how those charges could have been "of and concerning" Sullivan.[492]

The problem in *Sullivan* was that Alabama courts disregarded or misapplied Alabama common law precedents to allow plaintiffs to swing

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485. *See* Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 453 (Ala. 1960).

486. Tidmore v. Mills, 32 So. 2d 769, 780-82 (Ala. Ct. App. 1947).

487. *Compare Davis*, 124 So. 2d at 449, 461 (noting that 10,500 copies of the issue of *Jet* with the libelous article were sold statewide), *with* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 260 n.3 (1964) (noting that 394 copies of *The New York Times* containing *Heed Their Rising Voices* were circulated in Alabama).

488. *Davis*, 124 So. 2d at 453.

489. *Sullivan*, 144 So. 2d. at 51 (inferring bad faith from testimony from a *Times* employee that the ad was substantially true stating, "In the face of this cavalier ignoring of the falsity of the advertisement, the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom").

490. The police did not "ring" the campus but were "near the campus in large numbers[,]" and Dr. King was arrested only twice by the Montgomery police. *Id.* at 47 (quoting report for *The New York Times* prepared by Claude Sitton).

491. The error that protesters sang "My Country Tis of Thee" instead of the National Anthem was harmless. *See id.* at 37, 47.

492. *Id.* at 37, 43, 47-48. It is on the charge of bombing Dr. King's home that the ad made messy use of "they."

a nightstick at the national press.[493] Though the Alabama Supreme Court could have justified some largish verdict in *Sullivan* based on the wide circulation of *The Times*, the court did not engage in whether the award was in line with other libel awards affirmed on appeal, nor whether evidence of truth should mitigate damages.[494]

Alabama's law of libel was plaintiff-friendly, perhaps primed to be weaponized, yet Alabama's courts could have disarmed weaponized libel plaintiffs. The failure to at least neutralize plaintiffs, like Sullivan, justified the U.S. Supreme Court disarming those plaintiffs.[495]

B. The Failing (Up) New York Times v. Sullivan

When the U.S. Supreme Court considered whether and how under the U.S. Constitution to disarm plaintiffs filing weaponized libel suits,[496] the Court was on firm ground looking to state constitutional and common law precedents to inform the Due Process Clause of the Fourteenth Amendment.[497] The Court routinely weighed the precedents

493. *See id.* at 49-52.

494. *See id.* at 49-51.

495. The U.S. Supreme Court crafting a common law opinion on a state tort claim with a constitutional dimension was as unusual as the Louisiana Supreme Court reversing a judgment for the defendant and ordering a $7500 award for the plaintiff in a suit for libel. *Compare* Kennedy v. Item Co., 34 So. 2d 886, 896 (La. 1948), *with* sources cited *supra* note 431 (citing cases employing remittitur).

496. Counsel for *The Times* excepted to the suit and verdict upon the First and Fourteenth Amendments to the U.S. Constitution. *See Sullivan*, 144 So. 2d at 40 (dismissing constitutional objections as "without merit").

497. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 & n.30 (1964) ("Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact . . . ."). The Court had a long practice of citing to state law to inform its reading of the U.S. Constitution. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 337-38, 344-45 (1963) (holding that the Fourteenth Amendment demands provision of counsel for indigents in state criminal cases), *overruling* Betts v. Brady, 316 U.S. 455, 464-65 (1942) (holding that a study of state laws and practices did not require states to provide assistance of counsel to indigent criminal defendants); Mapp v. Ohio, 367 U.S. 643, 651-53 (1961) (noting a trend toward states adopting versions of the exclusionary rule from 1949 through 1961 when incorporating said rule), *overruling* Wolf v. Colorado, 338 U.S. 25, 31-33 (1949) (holding that the existence of state alternatives did not require the incorporation of the exclusionary rule into the Fourteenth Amendment). The Court has continued to cite state laws and choose between majority and minority views on constitutional questions since 1964. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564-65, 568 (2005) (discussing the existence of a "national consensus" when holding that "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment"); Lawrence v. Texas, 539 U.S. 558, 570-71, 578 (2003) (noting that only a minority of states adopted or enforced laws banning consensual same-sex sodomy while holding those laws unconstitutional under the Fourteenth Amendment), *overruling* Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986) (upholding constitutionality of "the sodomy laws of some 25 States"); Loving v. Virginia, 388 U.S. 1, 6, 12 (1967) (invalidating anti-miscegenation laws in sixteen states).

and practices of one group of states against those of another.[498] Usually, the Court adopted a majority rule as a national standard, but not always. The Warren Court decided at least two cases in the three years preceding *Sullivan* relying, in part, on state constitutional and legal practices to inform the Due Process Clause of the Fourteenth Amendment.[499]

In 1961, in *Mapp v. Ohio*, the Court incorporated the Exclusionary Rule as "an essential part of both the Fourth and Fourteenth Amendments[,]"[500] though only a plurality of states adhered to it.[501] In 1949, in *Wolf v. Colorado*, the Court declined to incorporate the Exclusionary Rule due, in part, to the wide variety of rules that the states developed that dealt with illegally obtained evidence in criminal prosecutions.[502] *Mapp* noted a national trend of states adopting the Exclusionary Rule, and the Court hastened that trend by incorporating the rule, thus binding all states to one way of dealing with illegally obtained evidence—exclude it.[503]

The ruling in *Sullivan* is akin to the ruling in *Mapp* in that states had many options for dealing with political defamation suits other than adopting the minority view of fair comment.[504] That each jurisdiction designed its own civil defamation framework balancing protection for political speech against an individual's reputation is well-documented.[505] That the Court in *Sullivan* chose to incorporate into the Fourteenth Amendment a particular framework was defensible under *Mapp* and generally as a matter of common law constitutional practice.[506]

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498. One factor in granting certiorari is whether a conflict exists among federal "courts of appeals" and/or "state court[s] of last resort" on "an important federal question . . . ." SUP. CT. R. 10.

499. *See Gideon*, 372 U.S. at 345 ("Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-Two States, as friends of the Court, argue that Betts was 'an anachronism when handed down' and that it should now be overruled."); *Mapp*, 367 U.S. at 651 ("While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule." (citing Elkins v. United States, 364 U.S. 206, app. at 224-32 tbls.1 & 2 (1960) (charting the admissibility of illegally seized evidence in state courts and the representative cases in each state))).

500. *Mapp*, 367 U.S. at 657.

501. *See Elkins*, 364 U.S. app. at 225 tbl.1 (reporting that as of 1960, twenty-six states excluded illegally seized evidence).

502. *Wolf*, 338 U.S. at 27-32 (discussing the "contrariety of views of the States").

503. *Mapp*, 367 U.S. at 653, 658-60.

504. *See supra* Part III (describing state courts limiting what was defamatory and what could be claimed as special damage, applying the common interest privilege, and patrolling damage awards in defamation cases).

505. *See supra* Parts II–III; *see, e.g.*, Noel, *supra* note 40, at 896-97 & nn.102-06 (discussing fair comment variations among states).

506. *See Mapp*, 367 U.S. at 657-60.

C. Actual Malice in Wonderland[507]

In *Sullivan*, the Court adopted the minority view of fair comment and imposed the actual malice standard as a constitutional predicate for *plaintiffs* to prove prior to the imposition of damages in defamation suits filed by public officers regarding their official acts.[508] The Court then applied that standard to the facts of *Sullivan*,[509] holding that the evidence presented did not establish that *The Times*'s ad department published *Heed Their Rising Voices* with knowledge of or with reckless disregard as to its falsity and that the ad was not "of and concerning" Sullivan.[510] By incorporating a variant of existing state constitutionally backed common law protections into the Fourteenth Amendment,[511] the Court disarmed weaponized political libel plaintiffs, chilled political libel suits filed by public officials, and gave for posterity (or the life of *Sullivan*) federal limitations on political defamation suits.[512]

Soon after the Court's decision in *Sullivan*, it became clear that U.S. laws of defamation were substantially changed and changing. All state and federal courts were bound to follow the constitutional rules laid down by *Sullivan* and its progeny. This new form of the actual malice standard would change how courts decided political defamation cases and come to influence what the national and local press would print. The (ongoing) transition into the *Sullivan* era has taken decades and scores of U.S. Supreme Court cases; while not universally acclaimed,[513] the actual malice standard has taken root as a fundamental tenet of constitutional law and American discourse.[514]

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507. *Cf.* TAYLOR SWIFT, *Wonderland*, *on* 1989 D.L.X. (Big Machine Records 2015) ("We found wonderland; You and I got lost in it; . . . And in the end in wonderland we both went mad.").

508. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits 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."); *see also id.* at 292 n.30 ("Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact . . . .").

509. *Id.* at 284-92 (applying the facts of *Sullivan* to the adopted framework in the opinion in "considerations of effective judicial administration").

510. *Id.* at 287-88.

511. *See, e.g.*, Charles Parker Co. v. Silver City Crystal Co., 116 A.2d 440, 445 n.2 (Conn. 1955) (quoting CONN. CONST. art. I, § 5); Coleman v. MacLennan, 98 P. 281, 283 (Kan. 1908) (quoting KAN. CONST. Bill of Rights § 11).

512. *See infra* notes 521-22 and accompanying text. If *Sullivan* were overruled, federal courts could continue reviewing punitive damage awards in weaponized libel cases. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562, 585-86 (1996) (holding that the Fourteenth Amendment's Due Process Clause bars states from imposing excessive punitive damages, though declining to adopt a bright-line rule).

513. *See supra* note 5.

514. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 270-72 (1971) (holding actual malice

V. CONCLUSION: DELICATE[515]

Reputations are delicate. A person who has a special concern with maintaining a good reputation, might want to (but should not) refrain from volunteering as tribute in the political Hunger Games. The rough and tumble of politics and public life can diminish the glow of the brightest of halos. This is less about the failings of U.S. defamation laws than it is the difficulty for most people (myself included) to be charitable with words, open with minds and hearts, and kind in acts no matter the context or circumstances.[516]

Lawyers involved in political defamation suits would do well to revive the overshadowed arguments and precedents forming the common law web rather than placing continued reliance on *Sullivan*. If *Sullivan* is curtailed or overruled in the near future,[517] a current revival of old state precedents that formed the filaments of the common law web would strengthen those precedents.[518] Prior to *Sullivan*, states had a rich

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applies to charges about candidates for public office as public figures); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (extending applicability of the actual malice standard to suits filed by public officials and figures for Intentional Infliction of Emotional Distress).

515. TAYLOR SWIFT, *Delicate*, *on* REPUTATION (Big Machine Records 2017) ("This ain't for the best; My reputation's never been worse . . . ."). *But see* Eliana Dockterman, *'I Was Angry.' Taylor Swift on What Powered Her Sexual Assault Testimony*, TIME (Dec. 6, 2017), http://time.com/5049659/taylor-swift-interview-person-of-the-year-2017 (interviewing Taylor Swift for *Time*'s Person of the Year for 2017 as a "Silence Breaker" for her one dollar jury award for assault in a counter-suit to a Disc Jockey suing Swift for defamation).

516. TAYLOR SWIFT, THIS IS WHY WE CAN'T HAVE NICE THINGS (Big Machine Records 2017) ("Did you think I wouldn't hear all the things you said about me? This is why we can't have nice things."); *cf.* KATY TUR, UNBELIEVABLE: MY FRONT-ROW SEAT TO THE CRAZIEST CAMPAIGN IN AMERICAN HISTORY 240 (2017) ("Trump is crude, and in his halo of crudeness other people get to be crude as well."); *see also* Anna North, *Man Accused of Groping Woman on Plane Argues that Trump Says it's Okay*, VOX (Oct. 23, 2018), https://www.vox.com/policy-and-politics/2018/10/23/18013854/trump-airplane-access-hollywood-tape.

517. In the political realm, President Donald Trump has campaigned at rallies and in the press against current defamation laws. *See supra* notes 6-10 and accompanying text (calling libel laws a "sham" and a "disgrace"). In the legal realm, *Sullivan* might be under threat from two defamation cases that could be granted certiorari by the U.S. Supreme Court; if granted *for any reason*, the Court could take the opportunity to ask the parties to brief the issue of whether *Sullivan* should be overruled. McKee v. Cosby, 874 F.3d 54, 61-62 (1st Cir. 2017) (holding female accuser of Bill Cosby a limited purpose public figure), *petition for cert. filed*, No. 17-1542 (U.S. Apr. 19, 2018); Zervos v. Trump, 74 N.Y.S.3d 442, 444-46, 449 (N.Y Sup. Ct. 2018) (denying current President Donald Trump's motion to dismiss defamation suit stemming from his campaign promise to sue all the women that accused him of sexual misconduct).

518. Legal scholars have long called for utilizing state constitutions to safeguard federal rights at times when the possibility of a federal retreat looms over the nation. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) (arguing for states to safeguard federal rights under state constitutions as a means to force federal courts to respect those rights); Michael C. Dorf, *Can State Supreme Courts Protect Liberal Constitutionalism in the Coming Era of Reactionary SCOTUS Jurisprudence?*, VERDICT (July 11, 2018), https://verdict.justia.com/2018/07/11/can-state-supreme-courts-protect-liberal-constitution

history of (imperfectly) protecting political speech in civil defamation suits.[519] Balancing the values of reputation against the need for political speech is a delicate task that states have performed for centuries, and can perform to a greater extent again.[520]

The common law web developed mostly as products of common tort law, with occasional use of state common law constitutionalism through the invocation of state protections for the freedoms and liberties of speech and press.[521] Lawyers and judges shifting reliance from the majestic music of the federal protections under *Sullivan* and its progeny to the subtle lyrics of state constitutional and common law protections under the common law web could result in more workmanlike judicial opinions in political defamation cases and would guard against the impoverishment of a national press corps and public discourse that could occur if *Sullivan* were curtailed or overruled.[522]

Herbert Wechsler, counsel for The New York Times Co. in *Sullivan*, warned that "the sort of difficulty now dramatically presented in the South is one that is likely to arise anywhere in the country."[523] In truth, weaponized tort suits may arise anywhere and at any time.[524] It is

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alism-in-the-coming-era-of-reactionary-scotus-jurisprudence (discussing state constitutions as a vehicle by which to safeguard federal rights under threat including abortion and affirmative action).

519. *See supra* Part III.

520. *See* sources cited *supra* note 505. Throughout the history of the American Republic, personal reputation has been one of the key factors (along with party affiliation and membership) as to whether a politician is elected to office, reelected, or elevated or appointed to a higher office. *See* FREEMAN, AFFAIRS OF HONOR, *supra* note 29, at 24, 59, 198, 284 ("[P]ersonal reputation was the currency of national politics.").

521. *See supra* Parts II.A, II.B.3, III.B.2.b.

522. *See, e.g.*, Schatz v. Republican State Leadership Comm'n, 669 F.3d 50, 55-56 (1st Cir. 2012) ("After argument, the judge wrote a thoughtful opinion granting the RSLC's motion. Even assuming that the RSLC's statements were false and smacked of '"gotcha" politics' of a 'juvenile' sort, the *judge still had 'serious doubts' about whether they were defamatory under Maine law—doubts that he did not resolve because he concluded that Schatz's complaint did not plausibly allege that the RSLC had acted with actual malic*e. . . . *Like the district judge, we skip over whether Schatz's complaint plausibly alleges defamation and focus on whether it plausibly alleges actual malice*—given that this is the simplest way to pinpoint Schatz's problem." (emphasis added)). Prior to *Sullivan*, most courts would have to decide whether a statement was defamatory, and courts should do so again. *See supra* Parts II–III.

523. LEWIS, *supra* note 5, at 219-20 (quoting Herbert Wechsler).

524. *See, e.g.*, Callum Borchers, *Peter Thiel, Gawker and Why All of This Could Matter During a Trump Presidency*, WASH. POST (May 25, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/25/peter-thiel-gawker-and-why-all-of-this-could-matter-during-a-trump-presidency/?utm_term=.5692c9c3ddda (discussing rich people financing tort litigation at a time when dissatisfaction with the media is rising); Candace Owens (@RealCandaceO), TWITTER (May 9, 2018, 3:33 PM), https://twitter.com/RealCandaceO/status/994299770192760832 ("One email, one phone call, and I am putting together a legal fund to go after publications that think that they can smear and libel black conservatives who dare to think for themselves. *Do you guys remember Gawker? Yeah, me neither. Stay tuned.*") (emphasis added).

important that some institution, federal or state, have the power to disarm those litigants.[525] Americans returning to existing and/or spinning new filaments of the common law web may be one important way of protecting one of the world's oldest constitutional republics and messiest democratic societies from pernicious weaponized political defamation suits today and in years to come.[526]

525. Institutions other than the U.S. Supreme Court could protect a *Sullivan*-like standard. Many state courts of last resort have based protections similar to or building on *Sullivan* based on their own state constitutions or common law. *See, e.g.*, Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 570-71 (1975) (adopting as New York common law a version of the U.S. Supreme Court's abandoned *Rosenbloom* test (applying *Sullivan* to persons suing for libel on a matter of public concern)). Legislatures can pass statutes (if they have not already) that redefine what libel and slander are and put the burden of proving "actual malice" or outright falsity on plaintiffs. Even if *Sullivan* were overruled by the Court, any decisions based exclusively on state constitutional grounds that went further than *Sullivan* in protecting speech would likely be untouchable by the U.S. Supreme Court based on independent and adequate state grounds. Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); *see also* Don King Prods., Inc. v. Douglas, 742 F. Supp. 778, 782 n.3 (S.D.N.Y. 1990) (discussing independent and adequate state grounds as applied to protections of statements of opinion under New York State constitutional law).

526. *See* Sarah Haner, *Paul Ryan Claims the US is the 'Oldest Democracy' in the World. Is he Right?*, POLITIFACT (July 11, 2016), https://www.politifact.com/wisconsin/statements/2016/jul/11/paul-ryan/paul-ryan-claims-us-oldest-democracy-world-he-righ (rating the claim "true").