Fake News, the First Amendment and Defamation – The Power of the Pen

Defamation and its Rise to Fame Panel Materials

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Jane E. Kirtley

After the fall of the Berlin Wall and the collapse of the Soviet Union, emerging democracies in Eastern and Central Europe began revising their constitutions and statutory laws to guarantee the rights of a free press. As part of that effort, in 1993, I traveled to Bucharest, Romania, to speak at a conference for nongovernmental organizations and other civil society groups. During one of the presentations, a trade union representative stood up and asked, “How do we make the press tell the truth?”

It struck me then that the question was naïve, if understandable. If you had lived in a society where all media were controlled by the Ceaușescu dictatorship and published only authorized propaganda, much of it false, it made sense to think that the opposite should prevail in the newly independent Romania. A free press should tell the truth. But as Pontius Pilate asked, “What is truth?” Who decides what is true? And who should compel the press to “tell the truth”?

“Fake News”: Trump Didn’t Invent the Term

There were no easy answers to these questions then, and 25 years later, we confront them again, not only in Europe, but in the United States and around the world. Politicians and their supporters accuse those in the mainstream media of peddling “fake news,” a term President Donald Trump claimed, in an October 2017 interview with Trinity Broadcasting Network, he invented.

In fact, he didn’t. Perhaps the most notorious use of the equivalent term, “Lügenpresse” or “lying press,” was invoked by the Nazis in the 1930s and revived by far-right anti-immigration activists in Germany in 2014 and by Trump supporters during the 2016 campaign to undermine public confidence in the mainstream media. But other groups across the political spectrum have used the term as well. As one example, the left-leaning Center for Democracy & Technology’s PR Watch has been “reporting on spin and disinformation since 1993” with its “Stop Fake News!” campaign.
So, no, Trump didn’t invent what he called “one of the greatest of all terms I’ve come up with.” But he has been one of the prolific users of it. During his candidacy and since his election, he has applied the label of fake news to virtually any media—the “failing” New York Times, NBC, ABC, CBS, CNN, among others—he disagrees with or doesn’t like. But he isn’t alone. A poll conducted by Monmouth University reported that three out of four Americans believe that the media routinely report fake news, while a Gallup/Knight Foundation study found that 42 percent of Republicans consider any news stories that cast a political group or politician in a negative light to be fake news. The phrase has become so ubiquitous that Washington Post columnist Margaret Sullivan has argued that it should be discarded because its original meaning—“fabricated stories intended to fool you”—has been distorted beyond recognition.

Yet, the fake news label persists. Trump’s inaugural “Fake News Awards,” published on the Republican National Committee’s website in January 2018, included several cases where news outlets had corrected themselves and apologized, actions that would not fit the traditional definition of fake news. In April 2018, more than 170 television stations owned by conservative-leaning Sinclair Broadcast Group were ordered to use local anchors to produce a scripted “must-run” commentary decrying fake news. Responding to criticism from others in the industry that the segment was itself fake news intended to deceive viewers, Trump tweeted that “The Fake News Networks, those that knowingly have a sick and biased AGENDA, are worried about the competition and quality of Sinclair Broadcast.”

In June 2018, at the height of the controversy over the separation of undocumented immigrant families at the southern border, Time magazine’s “Welcome to America” cover, juxtaposing a photograph of a crying Honduran toddler with one of a menacing Donald Trump on a red backdrop, was promptly labeled fake news because the child had not, in fact, been taken from her mother by federal agents. Defenders of the magazine claimed the cover was meant not as literal fact, but rather as a metaphor for the national debate. But for those looking for more evidence of fake news, Time’s cover provided it.

Weaponizing the “Fake News” Label

Despite Trump’s incendiary tweets calling “the FAKE NEWS media” “the enemy of the American People,” his actual power to take action to curtail their activities has, to date, been limited to largely unsuccessful attempts to exclude credentialed reporters from press briefings. But as Joel Simon of the Committee to Protect Journalists (CPJ) observed, in countries with less robust protections than the First Amendment, Trump’s words provide authoritarian leaders in countries such as Kenya, Venezuela, and the Philippines the ammunition to suppress opposition media, even as they spread
fake video clips and stories through paid commentators and bots. CPJ also reported that out of 262 journalists jailed around the world in 2017, 21 were arrested on “false news” charges. In April 2018, Malaysia, citing national security concerns, enacted the Anti-Fake News Act, which provides that anyone convicted of creating or circulating fake news online or in social media could face imprisonment for up to six years or fines in excess of $120,000.

The marketplace of ideas is imperfect but essential to facilitate the search for truth.

Even mature democracies struggle with the issue of fake news. On January 1, 2018, Germany announced that it would begin to enforce a law, known as NetzDG, requiring social media sites to remove hate speech and fake news within 24 hours or face fines of up to 50 million Euros. In March 2018, the European Commission’s High Level Group on fake news and online disinformation issued a report concluding that although disinformation may not necessarily be illegal, it nevertheless is harmful to democratic values. Although ostensibly eschewing “any form of censorship, either public or private,” it advocates greater self-regulation in the short term, with a long-range goal of developing a Code of Practices to encourage transparency, media literacy, diversity, the development of tools to “tackle” disinformation, and further research to monitor and assess the sources and impact of fake news. On the other hand, also in March, the Dutch Parliament voted to repudiate EUvsDisinfo.eu, a European Union website created by the East Stratcom Task Force in 2015 to report disinformation and fake news allegedly spread by Russian actors. Its Dutch opponents characterize it as a state publication that “passes judgments whether a publication in the free media contains the correct views or not. If your publication ends up in its database, you're officially labeled by the EU as a publisher or disinformation and fake news.”

These examples illustrate how problematic it can be when governmental entities become arbiters of what is true and what is fake. As the Dutch critics argued, governments should be loath to interfere in freedom of the press because “it makes it impossible for the truth to emerge in the public debate.” This thinking was at the core of the seminal 1964 U.S. Supreme Court decision, New York Times v. Sullivan.
Constitutionalizing the Right to Be Wrong

The Sullivan case arose during the civil rights movement, involving a Montgomery, Alabama, public safety commissioner named L.B. Sullivan, who sued the New York Times after it published a fundraising advertorial that described law enforcement actions designed to discourage protests by activists such as Martin Luther King Jr. and his followers. Sullivan claimed that the ad, which made several factually inaccurate allegations about the Montgomery police, had defamed him personally, even though he was not identified by name or title.

In other words, Sullivan claimed the publication was fake news. He sought and won $500,000 in damages, without being required under Alabama law to prove that his reputation was actually harmed. But in a decision by Justice William Brennan, the high court reversed, concluding that under the First and Fourteenth Amendments, public officials like Sullivan could prevail in a libel suit only if they were also able to show not only falsity, but actual malice on the part of the publisher. This term of art is defined as knowledge that the statement was false, or proof that the publisher acted with reckless disregard for the truth. A showing of hatred or ill will, known as common law malice, is not sufficient to meet that test.

According to Justice Brennan, because some factual errors are inevitable even in the most careful news reporting, this protection is essential to avoid media self-censorship, to promote vigorous reporting on government and public officials, and to preserve our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.”

In subsequent years, the First Amendment protection expanded to include lawsuits by public figures as well as government officials. Alleging falsity was not enough. No doubt this situation is what prompted Donald Trump, first as a candidate and then as president, to float the idea that the law should be changed.

“Open Up the Libel Laws”

At a rally in Fort Worth, Texas, in February 2016, Trump vowed, “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 libel laws, and we’re going to have people sue you like you’ve never got[ten] sued before.” In March 2017, he claimed in a tweet that “The failing @nytimes has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?” And in October, he complained that it is “frankly disgusting the press is able to write whatever it wants to
write.” He raised the issue again in January 2018, contending that “Our current libel laws are a sham and a disgrace and do not represent American values.”

Many would argue that existing libel laws are quintessentially American. Their sweeping protection of good faith errors, even when they harm a reputation, exceeds that of every other common law country, including Canada and the United Kingdom. This is why, in 2010, Congress passed the SPEECH Act, making foreign libel judgments unenforceable in the United States unless the legal standards in the other country offer at least as much protection to the defendant as the First Amendment. The statute was enacted to curtail libel tourism, where foreign nationals sue U.S. defendants in other nations’ courts where the standards of proof are less demanding.

Perhaps these less demanding standards might be precisely what Trump seeks to establish. In a meeting with the Washington Post’s editorial board in March 2016, Trump, after complaining about the “enormous” and “incredible hatred” demonstrated by the media, was asked what new standard he would propose, and he replied, “I want to make it more fair from the side where I am, because 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.”

As frustrating as that might be for Trump, it is exactly Justice Brennan’s point. As a commentator in The Federalist observed, freedom of the press is “too important to allow public figures . . . to use the courts to silence the publications of things they didn’t like or that made them look bad.” This brings us to the heart of the matter: Is Trump really bothered by falsehoods or by truthful reports that make him “look bad”? Libel law in the United States is, as then-10th Circuit Judge Neil Gorsuch wrote in Bustos v. A&E Television Networks, “not about compensating for damage done to a false reputation by the publication of hidden facts. It’s about protecting a good reputation honestly earned.” Libel suits are intended to provide compensation to those whose reputations have been harmed as a result of false statements made with actual malice. By design, that is a very difficult standard to meet.

Focus on Truth, Not Fault

Trump’s musings remind me of proposals to reform libel law considered in the late 1980s and early 1990s. Driven by concerns about escalating punitive damages awards, and inspired by a 1987 study by University of Iowa professors concluding that most libel plaintiffs sue to vindicate their reputations, not for the money—a sentiment Trump echoed at his 2016 Texas rally, where he claimed “I’m not taking their [the media defendants’] money”—several prominent scholars, judges,
and free press advocates argued for new approaches to libel law that would focus on truth or falsity, not fault.

In 1988, in a *Harvard Law Review* article, Judge Pierre N. Leval, then of the Southern District of New York, advocated creation of what he called the “no-money, no-fault” libel suit. Under Leval’s system, plaintiffs could sue to obtain a declaratory judgment of falsity. The fault requirements of *Sullivan* and its progeny would not apply, because, Leval claimed, “the sole purpose” of the *Sullivan* standard was to protect the press from crippling monetary awards. He also argued that these “no-money, no-fault” trials would be simpler, more efficient, less expensive, and would protect the media from inquiries into their news-gathering practices. They would provide plaintiffs with a far greater chance of vindicating their reputations, which is really what most of them want, he wrote.

Also in 1988, the Libel Reform Project at Northwestern University issued “the Annenberg Proposal.” Under the Annenberg model, a libel “victim” would have to request a retraction or opportunity to reply within 30 days of publication. If the defendant complied, any further legal action would be barred. If not, either the plaintiff or the defendant could compel any libel suit to be converted into a “no-fault, no-damages” declaratory judgment proceeding, where the only issue would be truth or falsity. A traditional suit for actual damages would remain an option, but only if the defendant agreed to it.

Neither of these proposals was adopted at the state level. However, in 1993, the Uniform Law Commission promulgated the Uniform Correction or Clarification of Defamation Act (UCCDA) making a correction/clarification request a prerequisite to a libel suit. Under the Uniform Act, if, after a correction or clarification was published, the case still went to trial, a prevailing plaintiff could recover only economic losses, not punitive damages. As of 2018, only North Dakota, Texas, and Washington had adopted the UCCDA.

Libel Reform Redux

Of course, President Trump cannot unilaterally “open up the libel laws” by executive fiat. Libel law consists of state, not federal, statutes, or judge-made constitutional or common law. But assuming Trump could persuade some state legislatures to adopt a version of the Annenberg or Leval proposals, would he be satisfied with a retraction or a declaratory judgment of falsity? Would he fit the Iowa study profile of the libel plaintiff who is seeking only vindication, not money?

I’m skeptical. Most media organizations have, of their own volition, corrected their mistakes in their coverage of Trump and his administration, such as when *Time’s* White House correspondent
erroneously reported in January 2017 that the bust of Martin Luther King Jr. had been removed from the Oval Office. Yet, despite rapid and repeated digital corrections, Trump nevertheless condemned the story as “deliberately false reporting,” including it in the “Fake News Awards” list published in 2018. He didn’t seem appeased by corrections or apologies.

Perhaps Trump would prefer some version of the “no-money, no-fault” trial. Although proof of actual malice would be off the table in a “truth trial,” the reality is that even then, “[i]t is the reporter’s accuracy, integrity, professional reputation and standing that are ultimately at stake,” as litigator Don Reuben argued in the ABA Journal in April 1989. He contended that the Annenberg proposal would “chill the hell out of the working press, the reporter and editor” by making it easier for plaintiffs to prevail in court. He feared that corporate media would be tempted to embrace the “no-fault, no damages” option, abandoning First Amendment defenses and sacrificing the reporter in the name of expediency. If that was true in 1989, it is even truer in 2018, when economic constraints encourage news organizations to reduce their financial exposure as much as possible. With its potential humiliation of the news organization and journalists as a bonus, the “no-money, no-fault” trial might be an option that Trump would relish.

All this begs the question of whether courts are the best entities to determine the official version of “the truth.” Supporters of the Leval or Annenberg proposals asserted that the government has a legitimate interest in the accuracy, or inaccuracy, of media reports. This view is shared by many government officials and institutions around the world. Numerous studies posit that fake news affected voter choices in the 2016 election, in the Brexit referendum, and other political campaigns, posing a fundamental threat to democratic institutions. Logically, governments would have a duty to protect audiences from fake news. Yet, both the executive and legislative branches might be perceived as self-interested if they tried to evaluate truth or falsity. The courts may be the best alternative.

But they would be the best of a bad lot. However independent they may be, courts are still instrumentalities of the government. As First Amendment scholar Zechariah Chafee wrote, “We must always be careful not to assume that the findings of a tribunal on a controversial issue are THE TRUTH.” The marketplace of ideas is imperfect but essential to facilitate the search for truth. Government can control and manipulate the flow of information about itself and its actors, so any determination of truth or falsity that fails to recognize the fundamental and coextensive right of the citizen to criticize without fear of sanctions or retribution—what Justice Brennan called “the central meaning of the First Amendment”—is flawed. A free and independent press, not a single
leader or a government-run “Truth Tribunal,” is the best means to ensure an informed citizenry, and to hold institutions and individuals to account. And that’s not fake news.

Jane E. Kirtley is the Silha Professor of Media Ethics and Law at the Hubbard School of Journalism and Mass Communication at the University of Minnesota, where she directs the Silha Center for the Study of Media Ethics and Law and is an affiliated faculty member at the Law School. She was a Fulbright Scholar at the University of Latvia in 2016 and the executive director of the Reporters Committee for Freedom of the Press from 1985 to 1999.
Fake News and Weaponized Defamation and the First Amendment

Erwin Chemerinsky

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KEYNOTE ADDRESS: FAKE NEWS, WEAPONIZED DEFAMATION AND THE FIRST AMENDMENT*

Erwin Chemerinsky**

The issue of false speech has been part of the United States since early American history. In 1798, Congress passed the Alien and Sedition Act that made it a federal crime to falsely criticize the government or government officials. Individuals were prosecuted and convicted for saying things much more tame than what you hear on the late night talk shows on a daily basis. Many years later, in 1964, the Supreme Court said in New York Times v. Sullivan that the Alien and Sedition Act had been held unconstitutional by the court of history. The idea of a court of history is a very romantic notion, but it does not erase the reality that Congress passed, and the President signed, a law that criminalized false speech.

Now when I say the issue of false speech is nothing new, that it has been around throughout American and throughout world history, I think it has taken on a new dimension because of the Internet. I believe that the Internet is the most powerful medium for communication to be developed since the printing press. The Internet truly democratizes the ability to reach a mass audience. In the past, in order to reach a mass audience, a person had to be rich enough to own a newspaper or get a broadcast license. Now, anyone with a smartphone or even just access to a library as a modem can immediately reach a large audience. This then means that there is the ability to spread false information—false news—much more quickly than ever before. It also makes it possible to do this with regard to defamatory speech.

* This is an edited transcript of a keynote address as virtually delivered on January 26, 2018 at Southwestern Law School, Los Angeles, CA.

** Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law. This is an edited transcript of a keynote address as virtually delivered on January 26, 2018 at Southwestern Law School, Los Angeles, CA.

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A key part of this symposium is on weaponized defamation, which is an aspect of the problems of false speech. I would suggest, as this conference begins, that there are at least three major questions that will be important to talk about throughout the day. First, what should be the constitutional protection for false speech? There are reasons to say there should be no constitutional protection for false speech. The First Amendment exists to provide for the advancement of knowledge. False speech by definition contributes nothing to that. False speech can greatly harm reputation. False speech in an election can distort the democratic process. The traditional response is that we will allow all ideas, true and false, to be expressed and then let the market place of ideas sort it out. Why believe that true speech will succeed in countering false speech? Once people have heard false information, can we really erase it? Can we really believe that the true information will triumph in their minds?

When it comes to reputation, a person who has been tarnished by false speech, may never be able to regain the lost reputation, setting the record straight usually fails to eliminate the tarnish. A headline that accuses someone falsely is not really answered by a small correction at the bottom of the page. Yet, the Supreme Court has recognized the importance of protecting false speech. I think the most important case and one that has to be at the center of this symposium is New York Times v. Sullivan, in 1964. There, as everyone knows, the Supreme Court said that in order for the First Amendment to have the breathing space necessary for speech, there has to be protection for false speech as well. The Court said that there cannot be, at least when it comes to suits by public officials, strict liability for defamation. Justice Brennan's majority opinion was one of the most important opinions ever written with regard to free speech. After the Court decided New York Times v. Sullivan, the University of Chicago Law Professor Harry Kalven Jr. said that it was an occasion for "dancing in the streets." I think that in part what made this decision so important was the Supreme Court saying that tort liability is limited by the First Amendment. I also think what makes it important is the Supreme Court saying that there is First Amendment protection, even for false speech.

Subsequent cases have also said there is protection for false speech. Several years ago, the United States Supreme Court decided United States v. Alvarez. This case involved the Stolen Valor Act, a federal law that made it a federal crime for a person to falsely claim to have received a military honor. The law was motivated by noble motives and goals. There is no doubt that Congress was trying to protect the recognition of those in the service who had received such honors. Congress did not want the recognition of those who had been honored to be diluted by false claims.
But the United States Supreme Court, in a 6 to 3 decision, declared this unconstitutional. Justice Kennedy’s plurality opinion explicitly stated that the fact that the speech is false does not mean that it is unprotected by the First Amendment. The Court stressed that there are other ways to counter the false speech, rather than criminally punishing the speaker.

I do not want to overstate the extent of the constitutional protection of false speech. There are areas where the Supreme Court has said that false speech is unprotected. For example, the Supreme Court has said that false and deceptive advertising is unprotected by the First Amendment. I think this principle is reasoned in part because commercial speech is more robust than noncommercial speech. When it comes to noncommercial speech, there is a greater danger that liability would chill expression. There is less reason to fear that in the commercial speech category.

The line between commercial and noncommercial speech becomes enormously important once we say that false commercial speech can be prohibited and other types of false speech cannot be prohibited. This is the landscape that we have to talk about. I think the question that this symposium needs to focus on is what should be the extent of First Amendment protection for false speech. If it is so called “fake-news” about political matters, should it always be protected? I think the strong presumption is that in the political arena, unlike the commercial arena, there is total protection for false speech. Should this continue to be so in the world of the Internet and the world of weaponized defamation?

The second question that I think the symposium needs to address is whether the current approach to defamation liability is desirable. The current approach was ushered in by New York Times v. Sullivan, and in the decades since, the Supreme Court has adopted a categorical approach to defamation depending on the identity of the plaintiff and also the nature of the speech. The Court stated in New York Times v. Sullivan, that if the plaintiff is a public official or the plaintiff is running for public office the plaintiff can recover for defamation only by proving with clear and convincing evidence falsity of the statement and actual malice. Actual malice requires that the speaker knew that the statement was false or the speaker acted with reckless disregard of the truth. As the Supreme Court later stated, actual malice requires that there be a subjective awareness of probable falsity.

The second category is if the plaintiff is a public figure. In cases such as Gertz v. Welch, the Supreme Court has stated that if the plaintiff is a public figure, the same rules apply as if the plaintiff were a public official. The Court has not defined with any precision who constitutes a public
figure. The Court has indicated that a public figure is one who thrusts himself or herself in the limelight. A public figure is one who likely has access to media to respond to any attack. Beyond that, the Court has not given guidance with regard to who constitutes a public figure. Also, what about someone who is a public figure for some purposes but not others? What about someone who is an involuntary public figure?

The third category is if the plaintiff is a private figure and the speech involves a matter of public concern. Private figures are obviously those that are not public officials or public figures. The Supreme Court has never defined what constitutes a matter of public concern. Matters of public concern seem to be matters in which the public has a legitimate interest. The Court has said that in this category the plaintiff can recover compensatory damages if the plaintiff proves falsity of the statement and negligence on the part of the speaker. That is, the speaker was not as careful as a reasonable speaker would have been. To recover presumed or punitive damages in this category requires proof of actual malice.

The fourth category is if the plaintiff is a private figure and the speech does not involve a matter of public concern. There has been very little case law as to this category, at least with the Supreme Court. The major case is *Dun & Bradstreet v. Greenmoss Builders*. There, the Court stated that for private figures and matters not of public concern, there does not have to be proof of actual malice to recover presumed or punitive damages. However, the Supreme Court has never clarified who has the burden of proof in this category. The Court has also never clarified the standard of liability for compensatory damages.

This is the framework for the discussion at this symposium about weaponized defamation. Part of this discussion is whether this approach makes sense. Donald Trump as a candidate and as President of the United States has urged a change in this framework to make it much easier for public officials and public figures to recover for defamation. He wants the framework to be similar to the English system. Now, of course, this is not something the President of the United States can accomplish. Defamation law is state law. There is no federal statute with regard to defamation and the limits on defamation liability come from the First Amendment. The Supreme Court has shown no inclination to want to change this.

Does the traditional approach for defamation still work in the context of the Internet in weaponized defamation? For example, is the line between matters of public concern and matters not of public concern a useful one? How is that to be decided? Is it determined based on what the public is interested in; is the fact that the people are willing to go on the internet to see it or buy a magazine with it by definition enough to make it a matter of
public concern? Does the Court have to decide whether a matter of public concern is based on a sense of what is in the public’s enlightened best interest? That too is very troubling. Should public figures really be treated the same as public officials? What about people who are involuntary public figures? What about people who are public figures for some purposes and not others? All of this underlies the discussion of defamation in the context of fake news and the context of the Internet.

I think there is a third question, perhaps a less obvious one that also needs to be addressed: should the identity of the speaker matter? A lot of our discussion with regard to fake news in connection with the 2016 Election was the extent to which Russia was circulating false information such as through Facebook. Some of this is about a concern with foreign interference with elections. Of course, there is an irony here as it has been well documented that the United States government since World War II has itself often interfered with foreign elections. Do we have a basis for objecting when another government is trying to do what we have done so frequently?

I think there is an even harder underlying issue and that is one that I posed. Should the identity of the speaker matter? If you look at *Citizens United v. Federal Election Commission*, which has now celebrated its eighth birthday, Justice Kennedy very explicitly held, writing for the majority, that the identity of the speaker does not matter. That is why he said corporations should have the same speech rights as individuals. In that case, the Court held that corporations have the same ability to spend money on political campaigns as individuals. The Court’s holding was based on an earlier Supreme Court case, *First National Bank of Boston v. Bellotti*. There, the Supreme Court first held that corporations have the right to freedom of speech under the First Amendment. The Court in *Bellotti*, and for that matter in *Citizens United*, accorded corporations speech rights not by defending the autonomy interest of corporations, but rather said the more speech that exists in the marketplace of ideas, the better off we all are for it. That is why corporations have the right to speak. Well, does it then matter whether the speaker is a foreign corporation, a foreign individual, or a foreign government? Should they not have the same ability to speak as those in the United States because their speech is also contributing to the marketplace of ideas? Federal law draws a distinction between foreign and domestic, say with regard to campaign expenditures, limiting the ability of foreign governments, foreign corporations, to spend money and contribute money with regard to election campaigns. Should that matter? Should we just say that with regard to the identity of the speaker—there should be
disclosure? That when it comes to a foreign government or foreign individual, should we know the source of the information?

But the reality is that another way that the Internet has changed expression is breaking down national boundaries. A country can no longer isolate itself from information. When the revolution was occurring in Egypt, one of the first things the government did was cut off Internet service. The people there could use their satellite phones and still gain the information. The United States can never close its borders to information.

So, the question is, should we be treating information that comes from foreign sources different than that for domestic sources?

This symposium could not come in a more timely manner. It could not be on a more important topic. Ultimately, democracy depends on information and it depends on accurate information. So how should we deal with fake news? How should we deal with weaponized defamation? Those questions are the focus of this symposium.
This is a defamation case. In September 2015, Defendant The New York Times Company (“NYT”) published an article written by Defendant Lipton (“the Article”). It appeared both online and on the Sunday edition's front page. The Article purported to document relationships cultivated by both biotechnology and organics companies with public university academics. It focused especially on the effects of these relationships in debates about the safety and regulation of genetically modified organism (“GMO”) food products. Defendants discussed and quoted Plaintiff Kevin Folta, Ph.D., professor and former chairman of the Horticultural Sciences Department at the University of Florida (“UF”), in the Article. Plaintiff now brings a claim of defamation against the Defendants for numerous statements made therein.  

Defendant moves for summary judgment by asserting a range of affirmative defenses. Among them are that the statements complained of are true or substantially true; are not susceptible to a defamatory meaning; are not “of and concerning” Plaintiff; are protected speech, either under the fair report privilege or as pure opinion; and/or are barred by the applicable statute of limitations.

This Court has considered, without hearing, Defendants' Motion for Final Summary Judgment, ECF No. 65. For the reasons set forth below, the motion is GRANTED.
such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Facts are “material” with respect to the substantive law if they form disputes that are not “irrelevant or unnecessary” and have the potential to “affect the outcome of the suit.” Id. A nonmoving party's failure to provide sufficient evidence of an element for which it bears the burden of proof at trial mandates the entry of summary judgment for the moving party, “since a complete failure of proof concerning an essential element ... necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

As it must, this Court accepts the facts in the light most favorable to Plaintiff. See Galvez v. Bruce, 552 F.3d 1238, 1241 (11th Cir. 2008). All reasonable doubts and inferences about the facts are resolved in favor of Plaintiff as the nonmoving party.

II

This Court first addresses Florida's “fair report” privilege. Defendants argue that all but one of the thirty-two statements at issue are protected by Florida's fair report privilege. ECF No. 65, at 17. The privilege's application is a question of law. See Hruszar v. Gross, 468 So. 2d 512, 515–16 (Fla. 1st DCA 1985) (“[W]hen the facts and circumstances of a communication are revealed, the issue of whether a privilege has been established is a question of law for the court to decide.”).

*2 The fair report privilege is news media's qualified privilege “to report accurately on information received from government officials.” Rasmussen v. Collier Cty. Pub'lng Co., 946 So. 2d 567, 570–71 (Fla. 2d DCA 2006). Florida courts have borrowed from the Restatement (Second) of Torts § 611 in describing the privilege. See, e.g., Woodard v. Sunbeam Television Corp., 616 So. 2d 501, 502 (Fla. 3d DCA 1993) (quoting Restatement (Second) of Torts § 611 cmt. b (Am. Law Inst. 1977) ) (“If the report of a public official proceeding is accurate or a fair abridgement, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy.”). Although its first uses were related to official proceedings—like court proceedings—the privilege has since been expanded to cover a wide range of government-derived sources.

Courts have offered three different policy rationales to support the privilege. Medico v. Time, Inc., 643 F.2d 134, 140 (3d Cir. 1981). The first, the agency rationale, casts the reporter as an agent for the public; the reporter stands in “for persons who had a right to attend, and informs them of what they might have seen for themselves.” Id. at 141. The second rationale is a theory of public supervision—meaning that publicity provides security for and promotes the “proper administration of justice.” Id. (quoting Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) ). Finally, the third rationale concerns the legitimate interest of the public in important matters. Id. at 142.
A

The threshold question presented by Defendants' argument for application of the fair report privilege is whether Plaintiff's emails—as produced by UF—trigger the privilege. Defendants argue that they do trigger the privilege, in either of two ways. ECF No. 65, at 22. First, Defendants assert that “government disclosure triggers fair report privilege protections”—if the government produced it, then it can support the fair report privilege. Id. Alternatively, Defendants argue that the emails at issue are “public records” under Florida law because Plaintiff is a public employee and the emails were created as a part of his official business. Id. at 23–24. Defendants stress that Plaintiff's job description as a land-grant scientist includes engagement with industry and the public. Id.

Plaintiff opposes Defendants' assessment of the trigger standard and focuses on the definition of “public records” in Florida's Public Records Law. ECF No. 74, at 20–21. Public records are defined as essentially all “material ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” § 119.011(12), Fla. Stat. (2018). Plaintiff further indicates that to be “public records,” documents must be both related to “official agency business” and “intended as final evidence of the knowledge to be recorded.” ECF No. 74, at 20 (quoting Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 640 (Fla. 1980)). Plaintiff argues that Defendants allege that he had a “sort of side-relationship” with industry and thus that the related emails are not official business. ECF No. 74, at 22–23 (emphasis in original).

Because most documents produced by government entities also fall within the definition of public records, the case law does not clearly address the actual hook or trigger for the fair report privilege in Florida. See, e.g., Rasmussen, 946 So. 2d at 570–71 (basing privilege on “information received from government officials,” like the “contents of official documents” and “matters of public record, including criminal informations, the Governor's executive orders appointing a special prosecutor, Mr. Rasmussen's plea agreement, and reports by government officials that Mr. Rasmussen pleaded to 'related charges' ”). Here, coming to an ultimate decision on the proper hook is unnecessary; both of Defendants' theories lead to the same answer. First, although Plaintiff opposes Defendants' government production trigger theory, all parties would concede that the source documents related to Plaintiff were produced by UF, a state agency of Florida. See, e.g., ECF No. 65, at 22 n.14.

*3 And second, this Court cannot avoid the conclusion that the Plaintiff's UF emails are public records. The Florida Constitution identifies access to public records as a fundamental constitutional right for Florida citizens. The Sunshine Amendment (Article I, Section 24(a) ) provides that “[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body,
officer, or employee of the state, or persons acting on their behalf.” Fla. Const. art. I, § 24(a).

The Florida legislature has effectuated this commitment. See § 119.01, Fla. Stat. (2018) (“It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person.”). And Florida courts have repeatedly recognized it. See, e.g., City of Riviera Beach v. Barfield, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994) (noting that “[t]he general purpose of the Florida Public Records Act is to open public records so that Florida's citizens can discover the actions of their government”). In keeping with this intention, the Public Records Act “is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.” Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 125 (Fla. 2016) (quoting Lightbourne v. McCollum, 969 So.2d 326, 332–33 (Fla. 2007) ). Exceptions are made only for “public records provided by statute to be confidential or which are expressly exempted by general or special law from disclosure.” Miami Herald Pub'lg Co. v. City of N. Miami, 452 So. 2d 572, 573 ( Fla. 3d DCA 1984), approved sub nom. City of N. Miami v. Miami Herald Pub'lg Co., 468 So. 2d 218 (Fla. 1985).

Electronic records are decisively included in the public records definition. See § 119.01, Fla. Stat. (“Automation of public records must not erode the right of access to those records.”). Emails sent to or from a public university email address—and related to the official business of that university—are public records. Rhea v. Dist. Bd. of Trustees of Santa Fe Coll., 109 So. 3d 851, 855–56 (Fla. 1st DCA 2013). Personal emails present on a government agency server are not public records, as “[t]he determining factor is the nature of the record, not its physical location.” State v. City of Clearwater, 863 So. 2d 149, 154 (Fla. 2003). Plaintiff's emails are related to official agency business. Although Plaintiff opposes Defendants' characterization of his emails, ECF No. 74, at 22–23, this argument is undercut by his own assertions of the centrality of public and industry engagement to his position at UF. See, e.g., ECF No. 64-41, at 2 (detailing duties and referring to letter from Plaintiff's “direct supervisor”); ECF No. 64-40, at 1–2 (letter from Plaintiff's supervisor indicating that his position requires interpreting and delivering scientific results to the public as well as “integrat[ing] with industry and interact[ing] with companies”).

Plaintiff’s argument that his emails are not public records because they are not “intended to perpetuate, communicate, or formalize knowledge of some type” is also unpersuasive. ECF No. 74, at 21 (quoting Shevin, 379 So. 2d at 640). The court in Shevin recognized that inter- and intra-office memoranda could constitute public records, even when only in draft form or when directed to file. Shevin, 379 So. 2d at 640. Only “rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation” were provided as examples of
items falling outside the public records label. *4 Plaintiff's attempt to force his emails to fit the “precursor” records framework is a paradigmatic example of trying to put a square peg in a round hole. Plaintiff's emails are communications and transmissions of knowledge to industry players and other academics, not the occasional Post-it note reminder to himself. Plaintiff could mount a formidable argument that draft calendar invites or draft emails are not public records—just as only the final, mailed version of a hard copy letter would be a public record, and not the earlier crumpled, handwritten drafts tossed haphazardly towards the office waste bin. Plaintiff's assertion that his emails are not public records borders on the nonsensical; taken to the extreme, Plaintiff's theory of public records would exclude the vast majority of emails between public employees and outside individuals. In today's virtual world, where almost all business is conducted electronically, this conclusion is absurd.

In summary, this Court has determined that Plaintiff's emails, as produced by UF, have both been disclosed by a government agency and constitute public records. As a result, they can form the basis of the fair report privilege.

B

This Court now turns to the application of the privilege. Having concluded that the source documents can trigger the privilege, the question becomes whether the Article statements are a “fair and accurate” report of them. Determining whether a report is fair and accurate requires a close comparison of the report and the documents and information from which it is drawn. See *5 Heekin v. CBS Broad., Inc., 789 So. 2d 355, 360 (Fla. 2d DCA 2001), disapproved of on other grounds by Anderson v. Gannett Co., 994 So. 2d 1048 (Fla. 2008) (reversing application of the fair report privilege where there was “nothing in the record to indicate that the trial court compared the broadcast at issue with the public records”).

The fair report privilege is broad. It requires only that the publication be “substantially” correct in its representation of the information received. See, e.g., Ortega v. Post-Newsweek Stations, Fla., Inc., 510 So. 2d 972, 977 (Fla. 3d DCA 1987) (privilege held to operate because the reports were “fair and substantially accurate”). “It is not necessary that [the publication] be exact in every immaterial detail or that it conform to the precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings.” Woodard, 616 So. 2d at 502–03 (quoting Restatement (Second) of Torts § 611 cmt. f (Am. Law Inst. 1977) ).

Protection of the privilege is not lost, for example, by colorful language or a failure to look beyond the government documents for verification. Editorial style is expected, and news media can phrase their coverage to “catch ... the readership's attention.” Alan v. Palm Beach Newspapers, Inc., 973
They can also select the focus of a piece and have no duty to further investigate or verify government-produced information. *See Jamason v. Palm Beach Newspapers, Inc.*, 450 So. 2d 1130, 1133 (Fla. 4th DCA 1984) (“The newspaper, had it wished, could have devoted the entire issue to the statement without any effort to neutralize the accusation by giving the accused the opportunity to deny.”); *Woodard*, 616 So. 2d at 503 (holding reporter did not need to “determine the accuracy of the information” in government records). In addition, a publication's language does not have to be “technically precise” in discussing legal proceedings. *Rasmussen*, 946 So. 2d at 570.

**C**

*5* This Court has conducted a thorough review of the thirty-one statements and the documents Defendants cite in support. For ease of analysis and explanation, this Court has categorized the statements into five groups and discusses in detail only one statement from each of the first four groups. The fifth and final group, consisting of Statements 1, 17, and 31, is not discussed with reference to the fair report privilege because the relevant statement part appears to be a quote taken from an interview, rather than from a publicly produced source document.  

The first group includes Statements 2, 3, 4, 5, 6, and 7—the statements Plaintiff has highlighted as “related to defending and promoting GMOs.” ECF No. 74, at 65–66. As explained above, the privilege is broad and requires only that the resulting report be fair and “substantially accurate.” In *Woodard*, a news report met this standard by reporting that a school bus driver had served four years in prison for homicide, though she had in fact only served two. *Woodard*, 616 So. 2d at 502–03. Similarly, a report describing inmate beatings met the standard when there were “no material differences” between the reported information and the official documents upon which it was based. *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 362 (Fla. 4th DCA 1997). Discrepancies that would not have “a different effect on the mind of the [reader]” and that do not “affect the gist of the story” do not prevent the fair report privilege from operating. *Woodard*, 616 So. 2d at 503.

This Court has determined that it would be fair and accurate to interpret the source documents Defendants cite in support of Statements 2–7 to mean that Plaintiff has written and spoken about the safety of GMO technologies. *See, e.g.*, ECF No. 64-21, at 1 (grant proposal including the statement that “[s]afe food products with no plausible means of harm become stigmatized” because of “fear and undue cynicism about transgenic crop technology”); ECF No. 64-9, at 33 (testimony before the Council of the County of Kauai describing GMO technology as “safe and used because it helps farmers compete”). Plaintiff would prefer this idea to be communicated more
neutrally—perhaps as a statement that he often explains the science of GMO technologies. But this preference is not the yardstick by which statements in a news report are measured. Defendants' statements must be only “substantially accurate,” and Defendants have a right to focus and color their report to capture and hold readers' attention. Look at Statement 3.

**Statement 3:** “Dr. Folta said that he joined the campaign to publicly defend genetically modified technologies because he believes they are safe and that it is his job to share his expertise.”

It appears undisputed that Plaintiff thinks GMO technologies are safe and that he believes it is his role as a land-grant scientist to engage with and explain complex scientific concepts to the public. Plaintiff bristles at the idea that he “joined the campaign” to defend GMOs, but this is a reasonable description of his correspondence with industry around labeling laws and his advocacy activities before government bodies. See, e.g., ECF No. 64-9, at 139–147 (email chain discussing possible public education responses to proposed state labeling laws); Id. at 137 (email from Plaintiff to an industry organization executive evaluating a meeting held by the Pennsylvania House Agriculture and Rural Affair Committee). Therefore, Statement 3 is a fair and accurate report of the cited source documents.

*6 In response to several of these statements, Plaintiff highlights the difference between GMO “products” and “technologies.” Though this Court appreciates the distinction and its relevance, in the context of the fair report privilege, this is too exacting. The court in *Woodard* specified that the standard in the news media context is not that of “technical or scientific reporting.” *Woodard*, 616 So. 2d at 502–03. The typical reader is not likely to consider Dr. Folta in a different light after hearing that he is supportive of GMO products, as opposed to GMO technologies. This is precisely the type of error that still falls within the definition of “substantially accurate.”

As a result, the fair report privilege applies to Statements 2, 3, 4, 5, 6, and 7. Summary judgment as it pertains to these statements is **GRANTED**.

2

The second group—made up of Statements 11, 24, 29, and 32—relates to Plaintiff's motivation for participation with industry and in advocacy activities. The fair report privilege allows the news media flexibility for editorial style and places no duty on it to further investigate or verify the information contained in government-produced records. See *Alan*, 973 So. 2d at 1180; see also *Woodard*, 616 So. 2d at 502–03. From this, an article's negative portrayal of an individual is not grounds for a defamation action. *Alan*, 973 So. 2d at 1180 (“While
some of the statements in the Post's articles may be viewed as painting Alan in a negative light, this alone does not rise to actionable defamation.”).

Consider Statement 24.

**Statement 24:** “Dr. Folta, the emails show, soon became part of an inner circle of industry consultants, lobbyists and executives who devised strategy on how to block state efforts to mandate G.M.O. labeling and, most recently, on how to get Congress to pass legislation that would pre-empt any state from taking such a step.”

The cited documents make clear that Plaintiff communicated with industry-associated individuals and other academics about GMO labeling legislation at both the state and federal levels. See, e.g., ECF No. 64-9, at 139–147; id. at 156–57 (email discussion about a proposed federal bill). Plaintiff takes offense at the concept of belonging to an “inner circle” and at the perceived implication that he would participate in such discussions as part of a *quid pro quo* exchange of strategic cooperation for grant money. This Court appreciates Plaintiff's frustration and believes that his true incentive for taking action was—as he stresses—about the science. Plaintiff and biotechnology companies often have, possibly to Plaintiff's detriment in some instances, aligned interests. Plaintiff seeks to educate the public about GMO technology for the sake of sharing knowledge and fighting misinformation. The biotech industry encourages such education efforts, maybe altruistically to a degree, but also because it helps their bottom line. A public with a deeper understanding of GMO food products is more likely to accept and purchase them.

The mischaracterization of motivation that Plaintiff observes in this group of statements does not provide him with a legal remedy. The news media Defendants' qualified privilege reaches these statements. Defendants have presented a fair and accurate report of the source documents, so Plaintiff cannot complain of the “negative light” in which he feels he has been cast. Accordingly, the fair report privilege applies to Statements 11, 24, 29, and 32, and summary judgment is **GRANTED** as to them.

The third group, which includes Statements 8, 9, 10, 12, 13, 14, 15, 18, 19, 20, 27, 28, and 30, covers the statements most closely tied to the Article's overarching theme, as well as those describing other academics' interactions with various industry players. This group also includes several of the statements that Plaintiff contends are “the most independently defamatory and
damaging.” ECF No. 74, at 47–53, 57–61. These statements pertain to industry's alleged practice of swapping grants for advocacy and how industry considers and seeks out academic support.

*7 At the risk of sounding like a broken record, the fair report privilege is broad and its “fair and accurate” bar is a low standard, especially considering the importance placed on news media's responsibility to report on government action. Media defendants can add color. And they are not required to regurgitate the exact, precise language of their government sources. They can also summarize and focus publications as they choose. See, e.g., Jamason, 450 So. 2d at 1133. In Rasmussen, for example, the plaintiff objected to an article stating that he had pleaded to “reduced or related charges” in a particular suit, when in reality those charges had been dropped after he had pleaded to lesser charges in a related case. Rasmussen, 946 So. 2d at 569. The court there determined that the summary language, which covered charges against numerous defendants, was not false as it related to the plaintiff and that the media's reporting was protected by the fair report privilege. Id. at 569–70.

Plaintiff's main contention with the Article is the implication that he is not the independent scientist he has spent the last thirty years becoming, but rather that he shills for industry, promoting biotech company products and technologies in a quid pro quo arrangement for grant money. While this Court acknowledges the reputational impact of such a perception, and is sympathetic to Plaintiff's situation, the Article statements to which Plaintiff objects are nonactionable. Take Statement 9, for example.

Statement 9: “So Monsanto, the world's largest seed company, and its industry partners retooled their lobbying and public relations strategy to spotlight a rarefied group of advocates: academics, brought in for the gloss of impartiality and weight of authority that come with a professor's pedigree.”

The cited sources offer evidence of industry support for academics, as well as of academics advocating for outcomes that align with company interests. See, e.g., ECF No. 64-48, at 2–16, 19–22, 28–31 (detailing Professor Chassy's communication with a Monsanto executive about a letter to the EPA and a donation to his university); ECF No. 64-49, at 2, 4–13, 21–26, 37, 41 (including Professor Shaw's communications with Dow and Monsanto executives about letters to the USDA and support for university faculty). It is clear from the communications that biotech companies, like Monsanto, had the goal and the plan of harnessing academic voices to advance their objectives. It is not obvious to this Court that a natural reading of the statement would necessarily impute any sort of strategizing or “shilling” on the
part of the targeted professors. To the extent that it does, it is likely still a fair and substantially accurate report of sources documenting industry funding for educational pursuits. The Article's reference to a “gloss of impartiality” appears to be in the eye of the industry beholder and therefore not most easily interpreted as a questioning of academic or professional integrity.

Plaintiff argues in response to at least one of these statements that the fair report privilege cannot apply with respect to him, based on its fairness and accuracy with regard to sources about other academics. ECF No. 74, at 48. Plaintiff does not provide any authority to support this assertion, and though not precisely on point, *Rasmussen*, discussed *supra*, weighs against such an application. There, the court determined that a summary statement that more precisely described the situation of others similarly situated was acceptable, even despite it being technically inaccurate as to the plaintiff. *Rasmussen*, 946 So. 2d at 569–70. Here, the UF-produced source documents do show industry collaborating with Plaintiff and expelling the virtues of his participation in their activities. See, *e.g.*, ECF No. 64-9, at 7, 36, 86, 120, 128 (mentioning, for example, the “big white hat” worn by land grant scientists in the GMO debate).

*4* After reviewing the cited source documents, this Court appreciates the ranging levels of collaborative intensity between various companies and academics. Plaintiff's involvement with industry and industry groups was different in kind from that of some other professors. This Court understands Plaintiff's frustration with being “lumped in” with others and arguably being touted as the poster child for such *quid pro quo* transactions when others had notably deeper and more involved relationships. Unfortunately, even if this perception can be gleaned from the Article, Defendants did not step outside the privilege's protection in reporting on the source documents. The fair report privilege applies to Statements 8, 9, 10, 12, 13, 14, 15, 18, 19, 20, 27, 28, and 30. Defendants' motion for summary judgment as to these statements is **GRANTED**.

*8* The fourth group—consisting of Statements 16, 21, 22, 23, 25, and 26—is concerned with the omission of favorable or explanatory information. Florida's fair report privilege requires that a report be “accurate and complete or a fair abridgment” of the underlying information. See, *e.g.*, *Huszar*, 468 So. 2d at 516 (quoting *Restatement (Second) of Torts* § 611). Fair abridgment can occur when media defendants accurately summarize separable portions of government records. See *Carson v. News-Journal Corp.*, 790 So. 2d 1120, 1122 (Fla. 5th DCA 2001), dismissed, 805 So. 2d 805 (Fla. 2002). The court in *Carson* did not find problematic that the newspaper had reported on plaintiff's dismissal without also noting that he was discharged for “reasons other than ‘misconduct connected with his work’ and that he was awarded
unemployment compensation benefits.” Id. Turn to Statement 21.

Statement 21: “’Misinformation campaign in ag biotech area is more than overwhelming.’ Yong Gao, then Monsanto’s global regulatory policy director, explained in an April 2013 email to Dr. Folta as the company started to work closely with him. ‘It is really hurting the progress in translating science and knowledge into ag productivity.’”

The quoted portions come directly from a UF-produced email. Plaintiff objects to Defendants' omission of several sentences, arguing that the abbreviated version presents the conversation in a completely different light. ECF No. 74, at 84. The omitted sentences essentially state that the author is “grateful that academics like [Plaintiff] are willing to speak out on the science in this area to the public” and thank Plaintiff for “supporting science and for educating those who are open to science.” Id. It is not apparent that the inclusion of these sentences would at all change the effect of the statement in an average reader's mind. If anything, their inclusion would likely strengthen the theme of industry executives seeing value in professorial allies. As a result, Defendants provided a fair and accurate abbreviation of the email in question, so the statement is covered by the fair report privilege.

More generally, Defendants are under no obligation to include additional information that would portray the Plaintiff in a more favorable light. The press can select the focus of their own publications, without regard to presenting both sides of every issue. See, e.g., Jamason, 450 So. 2d at 1133. For this reason, Statements 16, 21, 22, 23, 25, and 26 are protected by the fair report privilege. Summary judgment as it pertains to these statements is GRANTED.

D

As explained, Statements 2–16, 18–30, and 32 all clearly fall within the ambit of the fair report privilege. Given the current climate, it is important to recognize the critical nature of the privilege and the necessity of its expansive application. Today's environment has created a unique prism for defamation actions and the protections intended to ensure a free press. When politicians plan to “open up our libel laws,” and then after winning elections, continue to pummel the press and decry anything unflattering as “fake news,” it is clear that the Fourth Estate is under attack. When those in power describe lawful investigations as witch hunts and “[c]arefully sourced journalism” as “fake news from the enemies of the people,” it is especially important for the judiciary to consider carefully its role in providing the media ample space to exercise their First Amendment rights. Michael Miller, Enemy
of the People?, N.Y. St. B.J., September 2018, at 5.

*9 Beyond these verbal and 140-character attacks, there is also evidence to suggest that the media is losing in libel and privacy suits much more often and at a greater cost than in the past. RonNell Andersen Jones & Sonja R. West, The Fragility of the Free American Press, 112 Nw. U.L. Rev. Online 47, 58 (2017). The press has won only 39% of the privacy and libel cases at trial since 2010. Emily Bazelon, Billionaires vs. the Press in the Era of Trump, N.Y. Times (Nov. 22, 2016), https://www.nytimes.com/2016/11/22/magazine/billionaires-vs-the-press-in-the-era-of-trump.html. The average award granted against media defendants in the 1980s was $200,000; the median damage award has now grown to $1.1 million. Id. Today, it seems that super-wealthy individuals—undeterred by the negative outcomes and market forces that used to prevent many defamation suits—can treat “suing the press as an investment” and can pursue their objectives by funding cases and waiting for the right combination of issue, judge, and jury. Id.

Against this backdrop, the importance of the press's common law privileges becomes even more obvious. The fair report privilege exists largely enshrined in state and federal court jurisprudence alone. It is only as strong as the courts that enforce it. In applying the privilege, this Court is mindful of the instructive nature of the Florida Constitution and the legislature's direction in Florida's Public Records Law. Both these sources indicate a weighty significance placed on citizen oversight of their government—oversight that is assisted and largely effectuated by reliance on a free press to investigate and report on government action.

This case is not one cooked up by billionaire opponents of a free media. Plaintiff seeks only a remedy for the reputational damage he alleges he suffered because of Defendants' publication. Plaintiff would have this Court apply a narrow understanding of the fair report privilege—either through exempting his emails from the definition of public records or by applying a considerably harsher “fair and accurate” reporting standard. Despite this Court's sympathy for and understanding of Plaintiff's case, it cannot act as Plaintiff suggests. A cramped reading of the privilege would undercut its very purpose. It would open the door to far less meritorious suits by far less scrupulous plaintiffs, and it would contribute to the ongoing chipping-away of the rights and privileges necessary to the press's ability to play its intended role as government watchdog. This Court will not do so.

III

This Court now turns to the fifth and final group of statements—Statements 1, 17, and 31. Although Defendants claim four or five defenses for each statement, this Court will focus primarily on two: that the statements are not susceptible to a defamatory meaning and that they are protected as pure opinion.
Whether a statement is capable of defamatory meaning is a question of law for the court. *Turner v. Wells*, 879 F.3d 1254, 1263 (11th Cir. 2018). Only when a statement is susceptible to two reasonable meanings—one of which is defamatory—does it become a question of fact for the jury. *Id.* at 1269.

A statement is defamatory when its “gist” or “sting” is defamatory. *Greene v. Times Pub'l'g Co.*, 130 So. 3d 724, 729–30 (Fla. 3d DCA 2014). A defamatory statement is a statement that “tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated, one that exposes a plaintiff to hatred, ridicule, or contempt or injures his business or reputation or occupation.” *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1108–09 (Fla. 2008). A statement that does such “on its face” can be referred to as defamatory *per se*, and extrinsic proof is not required to establish the statement’s defamatory meaning. *See Carroll v. TheStreet.com, Inc.*, No. 11-CV-81173, 2014 WL 5474061, at *16 (S.D. Fla. July 10, 2014) (“The statements labeling Carroll a “convicted felon,” “con artist,” and “troubling character,” remain the same—they are injurious on their face and require no extrinsic evidence to establish their defamatory meaning.”). Defamation can also occur by implication under Florida law. Defamation by implication arises when “literally true statements are conveyed in such a way as to create a false impression.” *Rapp*, 997 So. 2d at 1108. This can occur in two ways: (1) through juxtaposing facts to imply a defamatory connection or (2) creating a defamatory implication by omitting facts. *Id.* at 1106.

*10* In determining the availability of a defamatory meaning for a given statement, a court considers the statement in the context of the publication as a whole and evaluates it as it would be understood by the common mind. A court must consider a publication in its totality, looking at “all the words used, not merely a particular phrase or sentence.” *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983) (quoting *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980)). “Articles are to be considered with their illustrations; pictures are to be viewed with their captions; stories are to be read with their headlines.” *Byrd*, 433 So. 2d at 595. In addition, publications should be evaluated “not by ‘extremes, but as the common mind would naturally understand it.’ ” *Id.* (quoting *McCormick v. Miami Herald Pub'l'g Co.*, 139 So. 2d 197, 200 (Fla. 2d DCA 1962)). The *Byrd* court clarified further, indicating that statements “should be considered in [their] natural sense without a forced or strained construction.” *Byrd*, 433 So. 2d at 595.

This Court first considers Statement 1.

**Statement 1:** “But he also conceded in an interview that he could unfairly be seen as a tool of industry, and his university now intends to donate the Monsanto grant money. ‘I can understand that perception
100 percent’ he said, ‘and it bothers me a lot.”

Plaintiff includes Statement 1—the “tool of industry” statement—as one of the Article's most damaging statements. ECF No. 74, at 53. Plaintiff argues that the statement as written insinuates that Plaintiff himself offered the term “tool of industry,” when the words were really those of Defendant Lipton. 7 This Court's reading of the sentence is that the phrase did come from Defendant Lipton; the use of the verb “conceded,” when discussing an interview, would suggest that the statement was the response to a question, and likely a question that included the pertinent phrase. Regardless, the identity of the party to introduce the phrase is not truly relevant to the question of the common mind's perception of the statement. This Court cannot conceive of this statement as capable of a defamatory meaning when the “tool of industry” label is so closely coupled with “could unfairly be seen.” Plaintiff's singular focus on the phrase “tool of industry” and its potential defamatory effects is misplaced. The label needs to be considered in context—beginning with the sentence in which it appeared. Reading the entire sentence, the import is not that Plaintiff is a “tool of industry” but rather that the unfair perception of him as one exists. Even considering this statement in the Article's larger context—with all the other privileged, but arguably defamatory statements—Statement 1 is not susceptible of a defamatory meaning. As a result, summary judgment is GRANTED as to this statement.

Whether a statement is one of fact or opinion is a question of law for the court. From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 57 (Fla. 1st DCA 1981). While the Supreme Court in Milkovich refused to create additional protections for all statements “categorized as ‘opinion,’ ” it also reiterated existing constitutional protections already in effect. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19–20 (1990). The Court discussed these protections in three groupings: (1) Hepps, (2) Bresler-Letter Carriers-Falwell, and (3) New York Times-Butts-Gertz. Id. at 20. Hepps means that “a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least ... where a media defendant is involved.” Id. In other words, “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” Id.

*11 Florida, like other states, has relied on the Restatement (Second) of Torts § 566, to more clearly delineate protected from nonprotected opinion. This distinction is made between pure and mixed expressions of opinion. Pure opinion must be “based upon facts that the communicator sets forth in a publication, or that are otherwise known or available to the reader or the listener as a member of the public,” while mixed opinion is “based upon facts regarding a person or his conduct that are neither stated in the
publication nor assumed to exist by a party exposed to the communication.” *Fla. Med. Ctr., Inc. v. New York Post Co.*, 568 So. 2d 454, 457 (Fla. 4th DCA 1990) (quoting *Hay v. Indep. Newspapers Inc.*, 450 So. 2d 293 (Fla. 2d DCA 1984)). Only pure opinion is protected under the First Amendment. *Hay*, 450 So. 2d at 293. It is worth noting, however, that if the stated facts upon which the speaker has based his opinion are “either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact” and therefore lose its protection. *Milkovich*, 497 U.S. at 18–19; see also *Fla. Med. Ctr.*, 568 So. 2d at 458 (“Thus, in the instant case assuming ... a subject of public concern, ... if the statements are capable of being proved false, they are not protected.”). In assessing the status of potentially defamatory statements, a court “must construe the statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in the publication.” *Fla. Med. Ctr., Inc.*, 568 So. 2d at 457 (quoting *Hay*, 450 So. 2d at 295).

1

This Court now turns to Statement 17.

**Statement 17:** “‘If you spend enough time with skunks, you start to smell like one.’ Charles M. Benbrook A proponent of labels on G.M.O. foods, backed by the organic industry”

Statement 17—the so-called “skunk smear”—appears both in the text of the Article and directly beneath a photograph of Dr. Benbrook in the print version. Viewing Dr. Benbrook's quote in the broader context of the entire Article—as this Court must do—it is apparent that the statement is Dr. Benbrook's pure opinion, based on his own experiences. Dr. Benbrook, who had been the chief scientist at an organics-funded organization, resigned for the chance at a university appointment. While at Washington State, Dr. Benbrook continued to advocate on behalf of the organics industry, just as the industry continued to fund his research and to promote coverage of his study findings. Dr. Benbrook no longer works at Washington State, as his research post was not renewed. Dr. Benbrook's recent career trajectory provides the facts upon which his protected, pure opinion is based; Dr. Benbrook's “skunk smear” appears to be his own expression of regret over the organics industry's use of his academic pedigree. Statement 17 is privileged as pure opinion and, therefore, is nonactionable. Summary judgment as to this statement is GRANTED.

2

Finally, this Court looks to Statement 31. 8
Statement 31: “Dr. Benbrook, whose research post at Washington State was not renewed this year, said the organic companies had turned to him for the same reasons Monsanto and others support the University of Florida or Dr. Folta directly. ‘They want to influence the public,’ he said. ‘They could conduct those studies on their own and put this information on their website. But nobody would believe them. There is a friggin’ war going on around this stuff. And everyone is looking to gain as much leverage as they can.’”

Statement 31 appears toward the end of the Article and immediately after a description of Dr. Benbrook's recent employment history and involvement with the organics industry. Plaintiff takes offense at the Article's assertion that Monsanto approached him for the same reasons that organics companies supported Dr. Benbrook. He does concede, though, that the statement is not actionable alone but instead argues that it supports other more defamatory statements. ECF No. 74, at 95–96. Dr. Benbrook's mention of the “same reasons” is further explained by the direct quote that follows. It is his opinion that both biotech and organics companies want to influence the public's perception of GMO products and that they perceive academic voices as particularly valuable in doing so. The direct quote that follows and the previous portion about Dr. Benbrook's employment trajectory provide the stated facts upon which his opinion is based. Plaintiff argues that this cannot be Dr. Benbrook's true opinion because he knew that Plaintiff had received no research funding from biotech companies. This information is inapposite. Dr. Benbrook's statement is most easily understood simply as opining on the strategies of Monsanto (and other companies) and does not imply that Plaintiff's research is in any way biased or disingenuous. As a result, Statement 31 is privileged as pure opinion, and as Plaintiff partially admitted, is nonactionable. Therefore, summary judgment on this statement is GRANTED.

IV

*12 In today's world of “fake news” and near-constant attacks on the traditional media, this Court is especially sensitive to upholding the legal protections that enable the press to act effectively in its essential task of policing the government. In summary, Statements 2–16, 18–30, and 32 are privileged under Florida's fair report privilege. Statement 1 is not capable of a defamatory meaning, and Statements 17 and 31 are privileged as pure opinion. Summary judgment as to all the statements—Statements 1–32—is GRANTED.

Accordingly,
IT IS ORDERED:

1. Defendant's Motion for Final Summary Judgment, ECF No. 65, is **GRANTED**.

2. The Clerk is directed to enter judgment in this matter, stating “Plaintiff's claims are dismissed with prejudice.”

3. The Clerk shall close the file.

**SO ORDERED on February 27, 2019.**

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**Footnotes**

1. Plaintiff's Amended Complaint also included an intentional infliction of emotional distress claim, ECF No. 19, at 25–26, but this Court dismissed it on a prior motion. ECF No. 34, at 6.

2. Defendants also assert that Florida has rejected the false light tort. ECF No. 65, at 3. As Plaintiff does not advance a separate false light cause of action, ECF No. 74, at 45, this Court does not address that argument.

3. The only statement excluded is Statement 1, which is based on Defendant Lipton's interview of Plaintiff, rather than the UF-produced emails. However, this Court has determined that the operative portions of two other statements (Statements 17 & 31) are also likely quotes from interviews and so not subject to the fair report privilege.

4. They would also likely concede that the documents relating to the other noted academics—Drs. Benbrook, Chassy, and Shaw—were also produced by public universities, each agencies of their resident state.

5. Plaintiff also proffers an argument that Defendants were required to review and analyze *all* the produced documents to properly invoke the fair report privilege. ECF No. 74, at 23–24. **Section 611** indicates that the report must be “accurate and complete or a fair abridgement of the occurrence reported.” Restatement (Second) of Torts § 611 (Am. Law. Inst. 1975). Despite the apparent risk of “cherry-picking,” Plaintiff's argument is not reasonable or commonsensical, and his selective reading of **§ 611** seems to elide the “fair abridgement” portion—just as he claims Defendants have done with “complete.” This group includes two statements from the thirty-one to which Defendants allege the fair report privilege applies, as well as the one remaining statement.

6. This Court has reproduced only the second half of Statement 31 above both because it summarized the first half in its discussion of Statement 17 and because Plaintiff seems most concerned with the portion that refers to him by name.

7. Plaintiff also spends time and space arguing that Defendant Lipton's question itself was defamatory. ECF No. 74, at 53–54. As Defendants note in their Supplemental Reply Memorandum—however Defendant Lipton's question was phrased—it was not published to any third party (as it does not appear in the Article) and is thus not actionable. *See, e.g.*, **Valencia v. Citibank Int'l**, 728 So.2d 330, 330–31 (Fla. 3d DCA 1999) (recognizing publication to a third party as two elements of defamation under Florida law).

8. This Court has reproduced only the second half of Statement 31 above both because it summarized the first half in its discussion of Statement 17 and because Plaintiff seems most concerned with the portion that refers to him by name.
The petition for a writ of certiorari is denied.

JUSTICE THOMAS, concurring in the denial of certiorari.

In December 2014, petitioner Kathrine McKee publicly accused actor and comedian Bill Cosby of forcibly raping her some 40 years earlier. McKee contends that Cosby’s attorney responded on his behalf by writing and leaking a defamatory letter. According to McKee, the letter deliberately distorts her personal background to “damage her reputation for truthfulness and honesty, and further to embarrass, harass, humiliate, intimidate, and shame” her. App. to Pet. for Cert. 93a. She alleges that excerpts of the letter were disseminated via the Internet and published by news outlets around the world.

McKee filed suit in federal court for defamation under state law, but her case was dismissed. Applying New York Times Co. v. Sullivan, 376 U. S. 254 (1964), and its progeny, the Court of Appeals concluded that, by disclosing her accusation to a reporter, McKee had “‘thrust’ herself to the ‘forefront’” of the public controversy over “sexual assault allegations implicating Cosby” and was therefore a “limited-purpose public figure.” 874 F. 3d 54, 61–62 (CA1 2017) (citing Gertz v. Robert Welch, Inc., 418 U. S. 323, 345 (1974)). Under this Court’s First Amendment precedents, public figures are barred from recovering damages for defamation unless they can show that the statement at issue was made with “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” New York Times, supra, at
Like many plaintiffs subject to this “almost impossible” standard, McKee was unable to make that showing. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U. S. 749, 771 (1985) (White, J., concurring in judgment).

McKee asks us to review her classification as a limited-purpose public figure. I agree with the Court’s decision not to take up that factbound question. I write to explain why, in an appropriate case, we should reconsider the precedents that require courts to ask it in the first place.

*New York Times* and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own “‘federal rule[s]’” by balancing the “competing values at stake in defamation suits.” *Gertz, supra*, at 334, 348 (quoting *New York Times, supra*, at 279).

We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, we should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.

I

From the founding of the Nation until 1964, the law of defamation was “almost exclusively the business of state courts and legislatures.” *Gertz, supra*, at 369–370 (White, J., dissenting). But beginning with *New York Times*, the Court “federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States.” *Gertz, supra*, at 370. These decisions made little effort to ground their holdings in the original meaning of the Constitution.
THOMAS, J., concurring

A

*New York Times* involved a full-page advertisement soliciting support for the civil-rights movement and the legal defense of Dr. Martin Luther King, Jr. 376 U. S., at 256–257. The advertisement asserted that the movement was facing an “unprecedented wave of terror by those who would deny and negate” the protections of the Constitution. *Id.*, at 256. As an example, the advertisement claimed that “‘truckloads of police’” in Montgomery, Alabama, “‘armed with shotguns and tear-gas,’” had surrounded a college campus following a student demonstration. *Id.*, at 257. It further claimed that “‘when the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.’” *Ibid*. The advertisement also stated that “‘the Southern violators’” had “‘answered Dr. King’s peaceful protests with intimidation and violence,’” “‘bombed his home almost killing his wife and child,’” “‘assaulted his person,’” “‘arrested him seven times,’” and “‘charged him with “perjury.”’” *Id.*, at 257–258.

The Times made no independent effort to confirm the truth of these claims, and they contained numerous inaccuracies. *Id.*, at 261. The Times eventually retracted the advertisement. *Ibid*.

L. B. Sullivan served as Montgomery’s commissioner of public affairs when the advertisement was published. *Id.*, at 256. Although none of the “Southern violators” was identified in the advertisement, Sullivan filed a libel suit

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1 For example, the police did not “at any time” surround the campus when deployed near it; the dining hall “was not padlocked on any occasion”; the student protesters had not “refus[ed] to register” but rather “boycott[ed] classes on a single day”; “Dr. King had not been arrested seven times, but only four”; and the police “were not only not implicated in the bombings, but had made every effort to apprehend those who were.” *New York Times*, 376 U. S., at 259.
alleging that the statements implicating Montgomery police officers were made “of and concerning” him because his responsibilities included supervising the police department. *Id.*, at 256, 262. A jury awarded Sullivan $500,000, and the Supreme Court of Alabama affirmed. *Id.*, at 256.

This Court reversed. *Id.*, at 264. It held that the evidence in the record was “incapable of supporting the jury’s finding” that the false statements were made about Sullivan, who was not mentioned “by name or official position” in the advertisement. *Id.*, at 288. The advertisement was an “impersonal attack on governmental operations” and could not by “legal alchemy” be transformed into “a libel of an official responsible for those operations.” *Id.*, at 292. This holding was sufficient to resolve the case.

But the Court also addressed “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.” *Id.*, at 256. The Court took it upon itself “to define the proper accommodation between” two competing interests—“the law of defamation and the freedoms of speech and press protected by the First Amendment.” *Gertz*, 418 U. S., at 325 (majority opinion). It consulted a variety of materials to assist it in its analysis: “general proposition[s]” about the value of free speech and the inevitability of false statements, *New York Times*, 376 U. S., at 269–272, and n. 13; judicial decisions involving criminal contempt and official immunity, *id.*, at 272–273, 282–283; public responses to the Sedition Act of 1798, *id.*, at 273–277; comparisons of civil libel damages to criminal fines, *id.*, at 277–278; policy arguments against “self-censorship,” *id.*, at 278–279; the “consensus of scholarly opinion,” *id.*, at 280, n. 20; and state defamation laws, *id.*, at 280–282. These materials led the Court to promulgate a “federal rule” that “prohibits a public official from recov-
THOMAS, J., concurring

erring 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.” Id., at 279–280. Although the Court held that its newly minted actual-malice rule was “required by the First and Fourteenth Amendments,” id., at 283, it made no attempt to base that rule on the original understanding of those provisions.

B

New York Times was “the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander.” Dun & Bradstreet, 472 U. S., at 766 (White, J., concurring in judgment). The Court promptly expanded the actual-malice rule to all defamed “‘public figures,’” Curtis Publishing Co. v. Butts, 388 U. S. 130, 134 (1967), which it defined to include private persons who “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,” Gertz, supra, at 345. The Court also extended the actual-malice rule to criminal libel prosecutions, Garrison v. Louisiana, 379 U. S. 64 (1964), and even restricted the situations in which private figures could recover for defamation against media defendants, Gertz, supra, at 347, 349; Philadelphia Newspapers, Inc. v. Hepps, 475 U. S. 767 (1986).

None of these decisions made a sustained effort to ground their holdings in the Constitution's original meaning. As the Court itself acknowledged, “the rule enunciated in the New York Times case” is “largely a judge-made rule of law,” the “content” of which is “given meaning through the evolutionary process of common-law adjudication.” Bose Corp. v. Consumers Union of United States, Inc., 466 U. S. 485, 501–502 (1984). Only Justice White grappled with the historical record, and he concluded that “there
are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves.” *Gertz*, *supra*, at 370 (dissenting opinion).

II

The constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.

A

The common law of libel at the time the First and Fourteenth Amendments were ratified did not require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages. Typically, a defamed individual needed only to prove “a false written publication that subjected him to hatred, contempt, or ridicule.” *Dun & Bradstreet*, *supra*, at 765 (White, J., concurring in judgment); see 4 W. Blackstone, Commentaries *150* (Blackstone); H. Folkard, Starkie on Slander and Libel *156* (H. Wood ed., 4th Eng. ed. 1877) (Starkie). Malice was presumed in the absence of an applicable privilege, right, or duty. *Id.*, at *293–*294. General injury to reputation was also presumed, special damages could be recovered, and punitive damages were available if actual malice was established. *Dun & Bradstreet*, *supra*, at 765 (White, J., concurring in judgment); see Starkie *151, *322–*323*; M. Newell, Defamation, Libel and Slander 842–843 (1890) (Newell). Truth was a defense to a civil libel claim. See Starkie *170, *528–*530*; 4 Blackstone *150–*151. But where the publication was false, even if the defendant could show that no reputational injury occurred, the prevailing rule was that at least nominal
damages were to be awarded. *Dun & Bradstreet, supra,* at 765 (White, J., concurring in judgment) (citing Restatement of Torts §569, Comment b, p. 166 (1938)); see *Starkie* *492; *Newell 839.

Libel was also a “common-law crime, and thus criminal in the colonies.” *Beauharnais v. Illinois,* 343 U. S. 250, 254 (1952); see *Beauharnais, supra,* at 254–255, and n. 4. Laws authorizing the criminal prosecution of libel were both widespread and well established at the time of the founding. See *Roth v. United States,* 354 U. S. 476, 482, and n. 11 (1957); *Newell 28–29 (describing colonial statutes dating back to 1645 and 1701). And they remained so when the Fourteenth Amendment was adopted, although many States by then allowed truth or good motives to serve as a defense to a libel prosecution. *Beauharnais, supra,* at 254–255, and n. 4.

Far from increasing a public figure’s burden in a defamation action, the common law deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary libels. See 3 Blackstone *124 (“Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man”); 4 id., at *150 (defining libels as “malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule” (emphasis added)). Libel of a public official was deemed an offense “most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties.” *Newell 533 (quoting Common-

The common law did afford defendants a privilege to comment on public questions and matters of public interest. Starkie *237–*238. This privilege extended to the “public conduct of a public man,” which was a “matter of public interest” that could “be discussed with the fullest freedom” and “made the subject of hostile criticism.” Id., at *242. Under this privilege, “criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual.” Ibid. And the privilege extended to the man’s character “so far as it may respect his fitness and qualifications for the office,” which was in the interest of the people to know. White, supra, at 290 (quoting Clap, supra, at 169).

But the purposes underlying this privilege also defined its limits. Thus, the privilege applied only when the facts stated were true. Starkie *238, n. 4; White, supra, at 290. And the privilege did not afford the publisher an opportunity to defame the officer’s private character. Starkie *238; see id., at *242 (“The question for the jury is, whether the writer has transgressed the bounds within which comments upon the character of a public man ought to be confined ... ”); ibid. (distinguishing between criticism of public conduct and the “imputation of motives by which

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2 In England, “[w]ords spoken in derogation of a peer, a judge, or other great officer of the realm” were called scandalum magnatum and were “held to be still more heinous”; such words could support a claim that “would not be actionable in the case of a common person.” 3 Blackstone *123 (emphasis added); Starkie *142–*143. This action, recognized by English statutes dating back to 1275, had fallen into disuse within which comments upon the character of a public man ought to be confined . . . ”); ibid. (distinguishing between criticism of public conduct and the “imputation of motives by which
THOMAS, J., concurring

that conduct may be supposed to be actuated”). “One may in good faith publish the truth concerning a public officer, but if he states that which is false and aspersive, he is liable therefor however good his motives may be; and the same is true whether the party defamed be an officer or a candidate for an office, elective or appointive.” Newell 533 (footnote omitted).

B

These common-law protections for the “core private right” of a person’s “uninterrupted enjoyment of . . . his reputation” formed the backdrop against which the First and Fourteenth Amendments were ratified. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 567 (2007) (quoting 1 Blackstone *129). Before our decision in \textit{New York Times}, we consistently recognized that the First Amendment did not displace the common law of libel. As Justice Story explained,

“The liberty of speech, or of the press, has nothing to do with this subject. They are not endangered by the punishment of libellous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation.” \textit{Dexter v. Spear}, 7 F. Cas. 624 (No. 3,867) (CC RI 1825).

The Court consistently listed libel among the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” \textit{Chaplinsky v. New Hampshire}, 315 U. S. 568, 571–572 (1942); see, e.g., \textit{Beauharnais, supra}, at 254–256, and nn. 4–5, 266 (libelous utterances are “not . . . within the area of constitutionally protected speech”); \textit{Near v. Minnesota ex rel. Olson}, 283 U. S. 697, 715 (1931) (“[T]he common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection
extended in our constitutions”).

New York Times marked a fundamental change in the relationship between the First Amendment and state libel law. Although the Court did not repudiate its earlier statements that libel is constitutionally unprotected, it nevertheless was unable to “accept the generality of this historic view.” Gertz, 418 U. S., at 386 (White, J., dissenting). The Court instead observed that it had never upheld the use of libel law “to impose sanctions upon expression critical of the official conduct of public officials.” New York Times, 376 U. S., at 268. In the Court’s view, it was “writing upon a clean slate,” id., at 299 (Goldberg, J., concurring in result), and thus free to work a “substantial abridgement” of the common law of libel based on its balancing of competing interests, Gertz, supra, at 343 (majority opinion).

C

There are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” See Schneider v. State (Town of Irvington), 308 U. S. 147, 160 (1939) (applying these protections against the States through the Fourteenth Amendment).3 Justice White’s dissenting opinion in Gertz provides a helpful starting point in interpreting these terms. Justice White had joined the majority opinion in New York Times. But after canvassing historical practice under similar state

3By its terms, the First Amendment addresses only “law[s]” “ma[d]e” by “Congress.” For present purposes, I set aside the question whether the speech and press rights incorporated against the States restrict common-law rights of action that are not codified by state legislatures.
constitutions, treatises, scholarly commentary, the ratification debates, and our precedent, he concluded that “[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers.” Gertz, 418 U. S., at 381; see id., at 380–388. Justice White later expressed “doubts about the soundness of the Court’s approach” in New York Times “and about some of the assumptions underlying it.” Dun & Bradstreet, 472 U. S., at 767 (concluding that the Court “struck an improvident balance in the New York Times case”).

Historical practice further suggests that protections for free speech and a free press—whether embodied in state constitutions, the First Amendment, or the Fourteenth Amendment—did not abrogate the common law of libel. See generally Chase, Criticism of Public Officers and Candidates for Office, 23 Am. L. Rev. 346 (1889) (surveying American defamation decisions). Public officers and public figures continued to be able to bring civil libel suits for unprivileged statements without showing proof of actual malice as a condition for liability. See, e.g., Root v. King, 7 Cow. 613, 628 (N. Y. 1827) (lieutenant governor); White, 3 How., at 291 (customs collector); Hamilton v. Eno, 81 N. Y. 116, 126 (1880) (assistant health inspector) (citing Lewis v. Few, 5 Johns. 1 (N. Y. 1809) (Governor)); Royce v. Maloney, 58 Vt. 437, 447–448, 5 A. 395, 400 (1886) (chief judge and chancellor); Wheaton v. Beecher, 66 Mich. 307, 309–310, 33 N. W. 503, 505–506 (1887) (candidate for city comptroller); Prosser v. Callis, 117 Ind. 105, 108–109, 19 N. E. 735, 737 (1889) (county auditor). The States continued to criminalize libel, including of public figures. E.g., People v. Croswell, 3 Johns. Cas. 337, 377–378, 393–394 (N. Y. 1804) (opinion of Kent, J.), and id., at 403–404, 410 (opinion of Lewis, J.) (President Jefferson); Clap, 4 Mass., at 169–170 (auctioneer); see also Common-
wealth v. Blanding, 20 Mass. 304, 311–314 (1825) (elaborating on legal standard); Beauharnais, 343 U. S., at 254–255 (noting that many States in the first decades after the founding began to allow truth or good motives to serve as a defense, but “nowhere was there any suggestion that the crime of libel be abolished”). As of 1952, “every American jurisdiction . . . punish[ed] libels directed at individuals.” Id., at 255, and n. 5. And “Congresses, during the period while [the Fourteenth] Amendment was being considered or was but freshly adopted, approved Constitutions of ‘Reconstructed’ States that expressly mentioned state libel laws, and also approved similar Constitutions for States erected out of the federal domain.” Id., at 293–294, and nn. 7–8 (Jackson, J., dissenting). Criticism of the public actions of public figures remained privileged, allowing latitude for public discourse and disagreement on matters of public concern.

As against this body of historical evidence, New York Times pointed only to opposition surrounding the Sedition Act of 1798, which prohibited “any false, scandalous and malicious writing” against “the government of the United States, or either house of the Congress . . ., or the President.” §2, 1 Stat. 596; see New York Times, 376 U. S., at 273–277. Most prominently, the opinion discusses a report written by James Madison in support of the Virginia Resolutions of 1798, which protested the Act. Id., at 274–275. The opinion highlights Madison’s view that the press in every State had “‘exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law.’” Id., at 275 (quoting 4 Debates on the Federal Constitution 570 (J. Elliot ed. 1876) (Elliot’s Debates)). It also emphasizes Madison’s point that “‘[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’” 376 U. S., at 271 (quoting 4 Elliot’s Debates
After discussing other opposition to the Act, the Court concluded that “the attack upon its validity has carried the day in the court of history.” 376 U. S., at 276; see id., at 273–277.

The Court gleaned from this evidence a “broad consensus” that the First Amendment protects “criticism of government and public officials.” Id., at 276. And the Court further inferred that because the Act allowed truth to be offered as a defense and applied to defamatory statements, a libel law prohibiting only false defamation could still fail First Amendment scrutiny. Id., at 273–274. But constitutional opposition to the Sedition Act—a federal law directly criminalizing criticism of the Government—does not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures. Madison did not contend that the Constitution abrogated the common law applicable to these private actions. Instead, he seemed to contemplate that “those who administer [the Federal Government]” retain “a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties.” 4 Elliot’s Debates 573. Moreover, a central assumption of Madison’s view was the historical absence of a national common law “pervading and operating through” each colony “as one society.” Id., at 561. Yet the Court elevated just such a rule to constitutional status in New York Times.

It is certainly true that defamation law did not remain static after the founding. For example, many States acted “by judicial decision, statute or constitution” during the early 19th century to allow truth or good motives to serve as a defense to a libel prosecution. Beauharnais, supra, at 254–255, and n. 4. Eventually, changing views led to the “virtual disappearance” of criminal libel prosecutions involving individuals. Garrison, 379 U. S., at 69. But these changes appear to have reflected changing policy
judgments, not a sense that existing law violated the original meaning of the First or Fourteenth Amendment.

In short, there appears to be little historical evidence suggesting that the New York Times actual-malice rule flows from the original understanding of the First or Fourteenth Amendment.

III

Like Justice White, I assume that New York Times and our other constitutional decisions displacing state defamation law have been popular in some circles, “but this is not the road to salvation for a court of law.” Gertz, 418 U. S., at 370 (dissenting opinion). We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.
What Would Justice Brennan Say to Justice Thomas?

By Lee Levine and Stephen Wermiel*

Justice Clarence Thomas’s broadside against *New York Times v. Sullivan*¹ would most likely not have fazed Justice William J. Brennan Jr., the author of that landmark decision. Indeed, because Thomas relies on arguments made and rejected decades earlier, Brennan would likely say he had heard it all before, both from the unsuccessful plaintiff in *Sullivan* itself and from his successors in the roughly 30 cases decided by the Supreme Court that collectively constitute *Sullivan*’s progeny.²

On February 19, in a concurring opinion from the denial of a petition for a writ of certiorari, Thomas, who has served on the Supreme Court since replacing Justice Thurgood Marshall in 1991, released a 14-page attack³ on *Sullivan* that reads as if he had just now discovered that the Court had limited the reach of state defamation law in the name of the First Amendment.

Brennan, the author of *Sullivan*, served on the Court from 1956 to 1990 and died in 1997.⁴ Were he still alive, there are many points Brennan could make in response to Thomas’s assertion that *Sullivan* ought to be reconsidered and overruled. These include the overwhelming academic consensus applauding the decision both at the time and thereafter; the impressive body of precedent it has spawned in the now 55 years since it was decided; the proper role of original intent in free speech analysis; the history of seditious libel in the United States and its dispositive significance in divining that intent in *Sullivan*; the case’s role in defining “the central meaning of the First Amendment” that has guided the Court’s First Amendment jurisprudence for more than half a century; and the limited nature of the past criticisms of *Sullivan* on which Thomas purports to rely, much of which he wrenches from the context in which they were actually made.

Let’s begin with the academic reaction to *Sullivan*, authored by arguably the most important First Amendment scholars of that or any era. Shortly after it was decided, the legendary Harry Kalven Jr. wrote the definitive analysis of *Sullivan* in the *Supreme Court Law Review*, an article that is still widely considered among the most important academic analyses of the First Amendment ever published.⁵ Kalven unequivocally pronounced Brennan’s opinion for the Court in *Sullivan* to be “the best and most important it has ever produced in the realm of freedom of speech.”⁶ Alexander Meiklejohn, perhaps the most important free expression scholar in our history, characterized Brennan’s opinion as nothing less than “an occasion for dancing in the streets.”⁷ And much of Brennan’s analysis was inspired by the highly respected Herbert Wechsler, the Columbia Law School professor who argued the case for *The Times* in the Supreme Court. Much of this is chronicled in Pulitzer Prize–winner Anthony Lewis’s definitive work on the case, *Make No Law*, in which he explains the genesis and aftermath of the decision and concludes that *Sullivan* succeeded in “lay[ing] down the fundamental rules of our national life. It made clearer than ever that ours is an open society, whose citizens may say what they wish about those who govern them.”⁸
Thomas’s opinion largely ignores all of this, treating *Sullivan* as some sort of jurisprudential aberration—as he puts it, a “policy-driven decision[] masquerading as constitutional law.”9 Nothing could be further from the truth. In fact, *New York Times v. Sullivan* has become one of the foundational pillars of freedom of speech in the United States. Its articulation of the “central meaning of the First Amendment,” encapsulated in Justice Brennan’s frequently repeated description of our nation’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,”10 has influenced virtually all of the Supreme Court’s subsequent First Amendment jurisprudence, including decisions that Thomas has enthusiastically joined such as *Citizens United v. FEC*.11

Beyond the decision’s importance for freedom of expression more broadly, *Sullivan* adopted the actual malice standard for defamation lawsuits by public officials, later extended to public figures. This means that a public figure cannot recover damages for defamation without proving that the harmful statements at issue in the case were “calculated falsehood[s],” that is, that they were published despite the defendant’s actual knowledge that they were false or probably false.12 This, too, has become an important part of the fabric of First Amendment law, widely accepted in subsequent rulings.13

The actual malice standard was not, as Thomas describes it, a “policy-driven approach to the Constitution.” It was, rather, a decidedly mainstream exercise in constitutional analysis, which honored both the Court’s previous recognition that “libel” is not protected by the First Amendment and its concomitant obligation to determine the definitional contours of that category of unprotected speech.14 Indeed, the Court had previously engaged in analogous exercises in so-called definitional balancing to identify the boundaries of other unprotected categories, including everything from “obscenity” to “fighting words.”15 Brennan’s decision in *Sullivan* to define unprotected “libelous” speech about public officials as encompassing only calculated falsehoods injurious to their reputations, a decision endorsed by five other members of an otherwise unanimous Court, was actually a more speech-restrictive formulation than the approach favored by the three remaining justices, who, relying on a literal reading of the constitutional text (an approach that Thomas typically favors), would have declared all defamation actions brought by public figures to be precluded by the First Amendment.16

Thomas issued his opinion while agreeing with the Court’s decision to deny a petition for certiorari in a libel case against Bill Cosby, the comedian imprisoned for sexual assault. The petition was filed by Katherine McKee, who, after accusing Cosby of rape, filed a defamation action charging that Cosby’s attorney released a letter damaging her character and distorting her background. The U.S. Court of Appeals for the First Circuit affirmed a trial judge’s decision that McKee was a limited-purpose public figure and was unable to carry her burden of proving actual malice.17

Although the issue was not placed before the Court by McKee’s petition, and although he wrote that he agreed with the Court’s decision not to hear her case, Thomas used the Court’s denial of certiorari as a vehicle to announce his view that the Supreme Court should reconsider *Sullivan*, overrule it, eliminate the actual malice standard, and return full control over libel law to the states. “The States,” Thomas wrote, “are perfectly capable of striking an acceptable balance between encouraging robust public
discourse and providing a meaningful remedy for reputational harm.”

Precisely the opposite was the case, however, when the Court decided *Sullivan* in 1964, and there is every reason to believe that, but for *Sullivan* and its progeny, an analogous effort by public officials and public figures to weaponize the law of defamation would be successful today. As Brennan’s opinion in *Sullivan* described, and as Anthony Lewis chronicles in great detail in *Make No Law*, the advertisement published by *The New York Times* that was the focus of the case never mentioned by name the plaintiff, L.B. Sullivan, the Montgomery, Alabama, commissioner of public affairs. The Alabama courts imputed the advertisement’s criticism of the conduct of the Montgomery police force to Sullivan, who had ultimate supervisory authority for its operations. At the same time, as Brennan’s opinion also noted, the newspaper faced multiple other libel suits in the Alabama courts by other public officials concerning the same advertisement.

Alabama law at the time heavily favored the libel plaintiff, imposing a relatively modest burden of proof on the person suing and a heavy burden on the defendant to, among other things, prove that the challenged statements were true. The state courts found the ad to be libel per se because it contained a number of relatively minor errors, concluded that the ad was about Sullivan because some of his witnesses testified at trial that they understood its criticisms to be a reflection on him, and therefore presumed damage to his reputation, all in accordance with the common law of Alabama. The only option for *The Times* was to prove the truth of the misstatements contained in the ad, which it could not do, both because there were errors and because the newspaper was not responsible for the content.

As Lewis documents, Sullivan’s suit, the others filed against *The Times*, and still others filed against other national media outlets then attempting to cover the civil rights movement in Alabama were not motivated by a desire to recover damages for actual reputational harm so much as to dissuade the press from reporting to the nation about a subject of palpable public concern. Simply put, the damage awards sought (and in many cases awarded) in multiple lawsuits aimed to make it too expensive for newspapers and television networks to continue reporting about civil rights. As Brennan wrote for the Court in *Sullivan*, “the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.”

It is against this backdrop that, after more than a quarter century on the Court, Thomas chose this moment in our history to call for *Sullivan* to be overruled. He writes at a time when the president of the United States has dubbed critics of his official conduct “enemies of the people” and has called for the libel laws to be “opened up” in the manner Thomas has now endorsed. He writes at a time when an unprecedented number of public officials and powerful public figures, from Sarah Palin to Joe Arpaio to an assortment of Russian oligarchs, have brought defamation actions against *The Times* and other national media. Make no mistake, but for *Sullivan* and its progeny, such lawsuits would—as Brennan wrote in *Sullivan*—deter “critics of official conduct . . . from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” What was true in 1964 remains true today: The libel law regime that Thomas apparently favors “dampens the vigor and limits the variety of public debate” and is demonstrably
“inconsistent with the First and Fourteenth Amendments.”

Which brings us to Thomas’s curious and decidedly selective discussion of original intent. Neither *Sullivan*, nor any of its progeny, Thomas asserts, “made a sustained effort to ground their holdings in the Constitution’s original meaning.” These words simply cannot be squared with Brennan’s opinion in *Sullivan* itself, four full pages of which are devoted to the Framers’ intent as gleaned from the most analogous historical experience—the controversy surrounding the Sedition Act of 1798.

As Brennan explained, seditious libel was a concept under English common law that an individual could be punished for criticism that brought ridicule or disrepute on the king and his ministers, even if (indeed, as Thomas notes, including when) the criticism was true. There is substantial evidence—all recounted in Brennan’s opinion—indicating that the proponents of the First Amendment, Madison foremost among them, intended the free speech and press guarantees to prohibit punishment for seditious libel in the United States, i.e., to prohibit libel suits against public officials for criticism of their performance of their official duties. When Congress, despite this apparently clear intent, nevertheless passed the Sedition Act in 1798, which opened the door to numerous prosecutions for statements critical of President Adams and his administration, Madison and Thomas Jefferson led protests against the law in Virginia. When Jefferson became president in 1801, he put action behind his convictions and pardoned those who had been convicted of seditious libel.

Brennan not only traced this history at length in *Sullivan*, he canvassed the most authoritative assessments of its constitutional significance, all of which, including most especially the published views of Justices Holmes, Brandeis, and Jackson, reflected “a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.” This consensus—reflecting the considered judgment of “the court of history”—was and remains especially significant because, as Brennan also noted, “the Sedition Act was never tested” in the Supreme Court.

Thomas, in contrast, rejects the significance of both this consensus and the historical record on which it is based, largely on the grounds that (1) both the criminal and common law of libel continued to exist without constitutional challenge following the controversy surrounding the Sedition Act and (2) several justices noted, in the years before *Sullivan*, that “libel” was not protected by the First Amendment.

None of this is surprising, or particularly persuasive, however, especially because *Sullivan* was the first case in which the Court undertook to assess the application of the common law in a manner analogous to the law of seditious libel and none of the judicial statements that Thomas quotes purported to speak to that issue. And, as noted, Brennan did recognize the need to tread carefully and deliberately, displacing only so much of the common law that could not be reconciled with the First Amendment’s documented antipathy to seditious libel.

Two other points are worth noting when assessing the significance of Thomas’s professed allegiance to original intent. First, notably missing from his own discussion of the relevant history is any discussion of the John Peter Zenger seditious libel trial in 1735. It is well accepted that the Zenger prosecution was a significant factor in solidifying the Colonies’ antipathy toward the Crown that ultimately led to the Revolution as well as the new nation’s insistence on a Bill of Rights that guaranteed its citizens the freedom of speech and of the press.
One would have thought that the dramatic example of the Zenger trial, which had “set the colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities,” would be worth a mention in Thomas’s assessment of the historical record, especially because the quoted language in this sentence was written by him in his concurring opinion in *McIntyre v. Ohio Elections Commission.*

Second, despite the fact that Brennan’s opinion in *Sullivan* relies on the best evidence of the Framers’ intent, it cannot be seriously questioned that Thomas’s narrow focus on such an inquiry is of limited utility in interpreting the First Amendment. Although the First Amendment was ratified in 1791, the Supreme Court did not begin to decide cases requiring judicial consideration of its meaning for more than another 125 years. Almost nothing in our First Amendment precedent, including decisions Thomas has written and joined, has turned on what the freedom of speech meant to James Madison, who drafted it, or to the first Congress, which approved it. To cite just one recent example, it is difficult to imagine that the Framers believed the First Amendment restricted the ability of local governments to enact ordinances regulating outdoor signs displaying nonpolitical messages, yet Thomas had no difficulty writing an opinion for the Court holding just that in *Reed v. Town of Gilbert.*

Finally, much of Thomas’s historical critique of *Sullivan* relies on and quotes the work of the late Justice Byron White. White, who served on the Court from 1962 to 1993 and died in 2002, joined Brennan’s *Sullivan* decision, as well as several of its progeny, but later became a vocal critic of the Court’s 1974 decision in *Gertz v. Robert Welch, Inc.*, which held that the First Amendment precludes private persons involved in matters of public concern from recovering in a defamation action without demonstrating the defendant’s fault. This aspect of the Court’s decision in *Gertz* has nothing to do either with defamation actions brought by public figures or with the actual malice standard and, as a result, White’s criticisms of that decision, many of which are taken out of their context and then quoted by Thomas, provide no support for his own critique of either *Sullivan* itself or the actual malice standard it articulated. To be sure, White later indicated he believed *Sullivan* had been wrongly decided (despite the fact that he had joined in Brennan’s opinion), but the fact remains that his historical critique in *Gertz* was directed at a very different target.

For his part, Brennan was well aware of, and concerned about, the doubts that White did ultimately express about *Sullivan*. It was for this reason that, three years later, Brennan paid particular attention to the Court’s deliberations in *Hustler Magazine, Inc. v. Falwell.* In that case, writing for a unanimous Court (although White concurred only in the judgment), Chief Justice Rehnquist unmistakably reaffirmed *Sullivan*, going so far as to hold that public figures cannot circumvent either *Sullivan* or its actual malice standard by framing their cause of action as some other tort.

Throughout his long tenure on the Supreme Court, William J. Brennan Jr. understood the importance of, as he put it, “counting to five.” We suspect that, just as he was both relieved and gratified that, in *Falwell*, the entire Court effectively repudiated White’s criticisms of *Sullivan,* he would be equally heartened that not a single justice (much less the required additional four) saw fit to join in Thomas’s opinion in *McKee.*
1 376 U.S. 254 (1964).
6 Id. at 194.
7 Id. at 221 n.125.
13 See, generally, The Progeny, supra note 2.
15 See id. (fighting words); Roth v. United States, 354 U.S. 476 (1957).
17 McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017), cert. denied, No. 17-1542 (U.S. Feb. 19, 2019).
18 McKee, No. 17-1542, slip op. at 14.
19 See Lewis, supra note 8.
20 Sullivan, 376 U.S. at 256.
21 Id. at 278, n.18.
22 Id. at 260–64, 267.
23 Id.
24 See Lewis, supra note 8, at 34–45.
25 376 U.S. at 278.
28 376 U.S. at 279.
29 Id.
31 376 U.S. at 273–77.
32 McKee, No. 17-1542, slip op. at 7.
33 Sullivan, 376 U.S. at 273–77.
34 Id.
35 Id. at 276.
36 Id.
37 McKee, No. 17-1542, slip op. at 6–10 (citing cases).
44 Stern & Wermiel, supra note 4, at 196.
45 See The Progeny, supra note 2, at 307.