NEW YORK TIMES V. SULLIVAN AROUND THE WORLD

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I. INTRODUCTION

New York Times Co. v. Sullivan[1] was, as one must always recite, an "occasion for dancing in the streets."[2] Or, at least, in the streets of New York, Chicago, and elsewhere in the United States. Its reception in other nations has been more tempered. High courts in other reasonably democratic nations have found Justice Brennan's opinion persuasive to an important degree, regularly emphasizing that the law of libel should indeed be responsive to concerns that the threat of liability for making provably false statements of fact that injure a person's reputation will deter news outlets from engaging in vigorous—"robust and wide open"[3]—speech.[4] And, like the Court in *New York Times v. Sullivan*, many high courts have

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1. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

2. Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (1964) (quoting Alexander Meiklejohn).

3. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

4. Noriko Kitajima reports, though, that the Japanese courts have "never accepted . . . proposals" by scholars that the courts should adopt the *New York Times v. Sullivan* rule. Noriko Kitajima, *The Protection of Reputation in Japan: A Systematic Analysis of Defamation Cases*, 37 LAW & SOC. INQUIRY 89, 92 (2012).

concluded that the traditional contours of libel liability, as they were defined at common law or by older statutes, require adjustment to take this "chilling effect" into account. Almost no one, though, believes that the precise doctrinal solution Justice Brennan devised—the requirement that plaintiffs in libel cases prove that the false statements were made maliciously, or by a publisher who knew the statements were false or published with reckless disregard of the question of the statements' truth or falsity. The Essay will describe the reception of *New York Times v. Sullivan* around the world, with specific attention to the reasons for courts' unwillingness to accept the "malice" standard imposed in *New York Times v. Sullivan*.[5]

II. THE TEMPERED REJECTION OF *NEW YORK TIMES V. SULLIVAN*

Writing for the Supreme Court of Canada in the now leading case on libel, Justice Peter Cory noted, "I can see no reason for adopting [*New York Times v. Sullivan*] in Canada" because, for him, "the law of defamation [was not] unduly restrictive or inhibiting."[6] Three judges of Australia's High Court similarly observed that "the *Sullivan* test [has been criticized because] it tilts the balance unduly in favour of free speech against protection of individual reputation[,]" a criticism the judges endorsed in their holding.[7]

Another Canadian case offers a slightly different view of *New York Times v. Sullivan*. Accurately observing that "Commonwealth courts have rejected the precise balance struck in *Sullivan* between free expression and protection of reputation," Chief Justice Beverly McLachlin continued, "[h]owever, the law has begun to shift in favour of broader defences for press defendants . . . ."[8] The shift manifests itself in adjustments in the understanding of traditional components of the cause of action. So, for example, courts emphasize the distinction between facts and opinions or, as the European Court of Human Rights put it, "between facts and value-judgments" because "[t]he existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof."[9] This theme, and

5. I do not claim to have examined defamation law in every nation, but I believe that I have examined a large portion of those cases (with reports available in English) that expressly address whether the court should adopt the *New York Times v. Sullivan* rule.

6. Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, para. 137 (Can.).

7. *Theophanous v Herald & Weekly Times Ltd*. (1994) 182 CLR 104, 134 (Austl.). I note that the constitutional issues in *Theophanous* were made more complex by a dispute within Australian constitutional theory, and among Australia's judges, over precisely how to derive—and therefore how to define—the constitutionally protected right of expression.

8. Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para. 68 (Can.).

9. Lingens v. Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 407, ¶ 46 (1986). The case involved an Austrian journalist who had published articles severely criticizing Austrian Chancellor Bruno Kreisky

others to be discussed, emerge from "following the wise course set by Brennan J in *New York Times v Sullivan*," as the New Zealand Court of Appeal put it.[10]

In *Hill v. Church of Scientology*, the Supreme Court of Canada asked whether the "common law defence of qualified privilege [should] be expanded to comply with Charter values[.]"[11] The privilege at stake was one attaching to statements made by a person with an interest in making it, to a person who has an interest in receiving it.[12] The classic example is a false and defamatory statement made in a letter of reference about a potential employee. Qualified privilege attaches because good faith in making the statement is presumed. But the privilege "can be defeated if the dominant motive for publishing the statement is actual or express malice" and "when the limits of the duty or interest have been exceeded."[13] In Justice Cory's restatement, "[T]he information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given."[14]

What matters is the expansion of the category of "occasions of privilege," that is, the circumstances under which a defendant can properly plead the privilege. Courts have expanded the category well beyond the classic reference letter. Apparently taking the view that the press has an interest—and perhaps a duty—to publish information on politics and public policy, and that the public has an interest—and perhaps a republican duty—in receiving such information, publication of material on the actions of public officials apparently is now an occasion of privilege.

The facts in *Hill* were these: Hill was a lawyer who represented the government in a series of cases involving the Church of Scientology.[15] After a long series of increasingly contentious events, Morris Manning, the Scientologists' lawyer, held a press conference on the steps of a Toronto courthouse, reading a statement that the Scientologists were beginning contempt proceedings against Hill for various actions described in the statement.[16] Many of the statements were false.[17] Hill sued Manning and the church for libel and recovered a total of $1.6 million in damages.[18] The

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for "protecting . . . former members of the SS for political reasons" and for describing Simon Wiesenthal as "belonging to a 'mafia'." *Id*. ¶¶ 12, 17. According to the European Court, "[T]he facts on which Mr. Lingens founded his value-judgment were undisputed . . . ." *Id*. ¶ 46.

10. *Lange v Atkinson* [1998] 3 NZLR 424, 460 (CA) (N.Z.).
11. *Hill*, 2 S.C.R. 1130 at para. 142 (heading; capitalization removed).
12. *See id*. at paras. 22–26.
13. *Id*. at paras. 144–46.
14. *Id*. at para. 147.
15. *Id*. at para. 3.
16. *Id*. at para. 1.
17. *Id*. at para. 2.
18. *Id*.

defendants asserted on appeal that they were entitled to qualified privilege because they were providing the public with documents filed in court. Justice Cory agreed that there was a public interest in learning about such documents.[19] But, he wrote,

> Morris Manning's conduct far exceeded the legitimate purposes of the occasion. . . . The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct . . . . While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served.[20]

Lange v. Atkinson[21] similarly invoked qualified privilege. David Lange had been Prime Minister of New Zealand. Joe Atkinson was a reporter for the magazine *North and South* who wrote an article criticizing Lange's actions during his political career, specifically referring to several events about which, Atkinson wrote, Lange had a "selective memory."[22] Atkinson raised the defense of qualified privilege as well as a broader claim of "political expression."[23] The case bounced between the New Zealand Court of Appeal and the Privy Council before reaching a final conclusion in 2000.[24] The Court of Appeal held that qualified privilege attached.[25] Its exposition of that defense had several elements. The privilege's purpose was "to facilitate responsible public discussion of the matters which it covers."[26] It followed that the privilege could be abused by irresponsible use. Then:

> If the publisher is unable or unwilling to disclose any responsible basis for asserting a genuine belief in truth, the jury may well be entitled to draw the inference that no such belief existed. . . . Furthermore, a publisher who is reckless or indifferent to the truth

19. *Id*. at para. 154.
20. *Id*. at paras. 155–156.
21. *Lange v Atkinson* [1998] 3 NZLR 424 (CA) (N.Z.).
22. *Id*. at 429.
23. *Id*.
24. *Lange v Atkinson* [2000] 3 NZLR 385 (CA) (N.Z.).
25. *Id*. at 405.
26. *Id*. at 400.

> of what is published, cannot assert a genuine belief that it was true.[27]

In addition, the privilege could be defeated by "actual malice."[28] And, it turns out, recklessness has some bearing on the actual malice requirement. Specifically, carelessness "may well support an assertion by the plaintiff of a lack of belief . . . . In this way the concept of reasonable or responsible conduct . . . becomes a legitimate consideration."[29] Even more, it might be "reckless not 'to consider or care' whether a statement be true or false," and "a perfunctory level of consideration . . . can also be reckless."[30] So, it seems, the common law of libel in New Zealand comes close to authorizing liability in just the same circumstances that *New York Times v. Sullivan* does—when (but only when) publishers avoid malice or recklessness with respect to the truth.

This conclusion misstates the situation in two respects. First, as the High Court's reference to jury inferences indicates, the burden of establishing that the publication was protected by qualified privilege appears to be on the defense,[31] whereas under *New York Times v. Sullivan* the plaintiff must show that the statement was published with malice or reckless disregard of truth or falsity.[32] More important, in New Zealand the defense is available only when the statement was published on what is known as an occasion of privilege. It seems reasonably clear that the category of such occasions is significantly narrower than the category of occasions when *New York Times v. Sullivan*'s standards come into play in the United States.[33]

These cases show how courts have adjusted the components of libel law. Taken only on its own, *Hill* may seem less than fully press-friendly, while *Lange* is clearly press-friendly. But the real significance of the cases is that both adjust the common law category of occasions of privilege in ways clearly favorable to the press overall.[34] Whatever their content, they

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27. *Id*.

28. *Id*.

29. *Id*.

30. *Id*. at 401.

31. *See id*. at 399; *Lange v Atkinson* [1998] 3 NZLR 424, 437 (CA) (N.Z.).

32. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

33. For example, the "occasion of privilege" concept would almost certainly screen out a fair number of cases involving false statements made about those who in the United States are categorized as public figures, though some such statements might be made on occasions of privilege.

34. For another example of the use of traditional components of the law of defamation in a press-friendly way, see Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr Mahathir bin Mohamad, [1999] 4 AMR 3926 (Malay.). In a politically charged case, the High Court of Malaysia invoked a traditional qualified privilege to insulate the Prime Minister from liability for stating during a press conference, "I'll tell you what the police tells me . . . (Dr Munawar) Anwar . . . Anees told them" about acts of sodomy allegedly performed by the Prime Minister's former deputy and chief political rival. *Id*. at

show that traditional libel law contains within itself resources for adjustment in response to the concerns Justice Brennan articulated in *New York Times v. Sullivan*. I turn to an inquiry into why courts outside the United States have not followed *New York Times v. Sullivan*'s precise doctrinal holding even as they respect Justice Brennan's discussion of the chilling effect that libel law can have on press behavior.

III. WHY *NEW YORK TIMES V. SULLIVAN* HAS BEEN REJECTED

This Part lists several reasons for the rejection of *New York Times v. Sullivan*'s specific rules. It distinguishes between what I call principled approaches to free speech doctrine and what I call institutional ones. Principled approaches are founded directly or indirectly on an account of the values of free expression, balanced in the present context against the impairment to reputation that utterances can cause. Institutional ones focus on the institutional, historical, and cultural setting within which rules about liability for false statements that injure reputation are implemented.[35] I argue that courts attracted to principled approaches may find the *Sullivan* doctrine unacceptable because it relies too heavily on a rule-like approach in settings where balancing or proportionality approaches are more suitable. More obviously, though, courts that reject the *Sullivan* doctrine do so because they perceive institutional and cultural differences between the United States and their nations.

A. Principled Approaches to Libel Law

We have numerous general accounts of freedom of expression as a principle. Speech is an expression of personal autonomy;[36] it contributes to

3930. The court held that the Prime Minister's statements were protected by a privilege afforded those whose character has been attacked, to "answer" attacks with defamatory statements if "published *bona fide* and . . . fairly relevant to the accusations made." *Id*. at 3936. According to the High Court, the plaintiff, who had been removed from his position by the Prime Minister, "launched attacks," described by the judge as "vituperative," asserting that his removal from office "was as a result of 'a political conspiracy of the highest level'." *Id*. at 3936–37. Both the attacks and the Prime Minister's response were widely reported. Perhaps not so incidentally, the case suggests the possibility that traditional libel law is indeed *too* defendant-friendly.

35. Note that I use the term *institutional* differently from its use in related literature. *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998). The focus in these works is on distinctions among institutions engaged in the production and dissemination of speech, whereas my focus is on the institutions used to implement regulations of expression.

36. As Chief Justice McLachlin observed in *Grant*, the interest in autonomy "is of dubious relevance" in defamation cases "because the plaintiff's interest in reputation may be just as worthy of protection as the defendant's interest in self-realization through unfettered expression." Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para. 51 (Can.). Further, the autonomy argument is problematic in free speech cases because it is difficult to distinguish between the autonomy interest in free expression from

self-government in a democracy; it is a vehicle for the search and discovery of truth. Courts often refer rather generically to political philosophy in their discussions of a free speech principle in libel cases. Writing in the Court of Appeal in the leading British case *Reynolds v. Times Newspapers Ltd.*, Lord Bingham of Cornhill observed that "[i]t would be strange if the law in this country—the land of Milton, Paine and Mill—were to deny . . . recognition" that "the common convenience and welfare of a modern plural democracy . . . are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community."[37] The New Zealand Court of Appeal added Sir James Fitzjames Stephen to the list (and subtracted Paine).[38]

These generic references do not confront the basic problem in libel cases, put well by Lord Hobhouse of Woodborough in the Reynolds case: "There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed."[39] Justice Brennan touched on this argument in a footnote in *New York Times v. Sullivan*, referring to Mill's argument that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[40] As critics have noted, Mill was referring to how confronting what one thinks to be false beliefs or opinions can bring about a clearer understanding of one's own view of the truth.[41] Whether the argument has any bite with respect to false statements of fact is questionable.[42]

Principled approaches to libel law face an additional difficulty. An adequate account of why the dissemination of false statements of fact has some probably modest value to society might generate an argument against recognizing a power in government to punish lies as such, or freestanding

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the autonomy interest in a host of ordinary commercial transactions such as the choice of a business model, and yet the latter is clearly subject to extensive regulation and in some cases prohibition.

37. Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.L.) 176–77 (appeal taken from Eng.) (U.K.).

38. *Lange v Atkinson* [1998] 3 NZLR 424, 460–61 (CA) (N.Z.).

39. *Reynolds*, 2 A.C. at 238; *see also* Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, para. 131 (Can.) ("[T]he fact that the dissemination of falsehoods is protected is said to exact a major social cost by deprecating truth in public discourse.").

40. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964).

41. *See* Jeremy J. Ofseyer, *Taking Liberties with John Stuart Mill*, 1999 ANN. SURV. AM. L. 395, 402.

42. To use an example from Frederick Schauer, how is one's (correct) belief that Barack Obama was born in Hawaii strengthened by repeated confrontations with arguments that he was in fact born in Kenya?

lies.[43] Libelous statements of course implicate another interest—the reputation of the statement's target. And, one would think, any principled account of libel law would have to give some weight to that interest.[44] Taking the interest in reputation into account, courts will find it difficult to develop anything other than a standard—"all things considered, was the defendant's action reasonable in light of the harm publication did to the plaintiff's reputation?"—to determine liability. For this reason, it seems unlikely that one could produce a cogent principled argument for the rule adopted in *Sullivan*: If courts outside the United States take a principled approach to freedom of expression in libel cases, they will not end up with *New York Times v. Sullivan*.[45]

Frederick Schauer and Lawrence Alexander have mounted quite general criticisms of principled approaches to the First Amendment.[46] Yet, even they do not deny that false statements of fact that harm reputation deserve some degree of protection beyond that afforded by the traditional common law rules. The reason is that they believe that such protection can be supported by invoking institutional (or, in an alternative terminology, strategic) arguments.

B. Institutional Approaches to Libel Law

1. The Mechanism of the Chilling Effect

If the specific rule in *New York Times v. Sullivan* has not been followed, its core perception—that libel actions create a "chilling effect" on the publication of truthful statements—has been almost universally accepted. Courts acknowledge the existence of a chilling effect but rarely identify its mechanism with any precision. Lord Nicholls's opinion in *Reynolds* provides a good example: "A degree of uncertainty in borderline cases is inevitable. This uncertainty, coupled with the expense of court

43. *Cf.* United States v. Alvarez, 132 S. Ct. 2537 (2012) (holding the Stolen Valor Act unconstitutional). In my view, the best defense of the result comes in Justice Breyer's concurring opinion's reference to the possibility of prosecutorial abuse of statutes punishing freestanding lies. That is an institutional, not a principled, argument. And I note my view that the argument does not have sufficient empirical backing in a history of prosecutorial overreaching to carry the day.

44. *But see infra* Part III.B.F. (discussing the difference between a legal system in which the interest in reputation has constitutional status and one in which it is a "mere" interest).

45. For additional discussion, see *infra* Part IV (discussing proportionality and similar approaches to construction of legal doctrine).

46. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 7–80 (1982) (criticizing a variety of free speech theories); Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319, 1321–22 (1983) (arguing that "'freedom of speech' [does] not have its own principle" but is instead "part of a more general liberty").

proceedings, may 'chill' the publication of true statements of fact as well as those which are untrue."[47] Or, Chief Justice McLachlin in *Grant*:

> Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.[48]

As Frederick Schauer summarizes the mechanism, "Because of these risks and uncertainties in the process of ascertaining and demonstrating factual truth, a rule that penalizes factual falsity has the effect of inducing some self-censorship as to materials that are in fact true."[49] In more detail: We are interested in structuring the law so that publishers are not penalized for publishing true statements. We know, however, that decision makers—judges and juries where they exist[50]—make mistakes in determining whether a statement is true or false. To ensure that publishers are not penalized for disseminating true statements mistakenly found to be false, we insulate the publication of some false statements from liability. Say, for example, that we insulate from liability all false statements published after the publisher made journalistically reasonable efforts to determine their truth or falsity. We know that decision makers will make mistakes in applying the "reasonable journalistic efforts" standard, but we hope that such mistakes will result only in the imposition of liability for statements that were actually false. Errors in applying the restrictive standard will not slop over into imposing liability in the zone of true statements. Knowing that any errors made in imposing liability will result only in imposing liability for the publication of false statements, publishers will not be deterred from publishing true ones.

The mechanism of the chilling effect can operate through several distinct though closely related paths. The most obvious is direct decision-maker error. Such errors can occur, for example, because decision makers may find it difficult to understand the constraints facing some news operations. Consider a story that a journalist has been developing for several months. Juries or judges may wonder why the journalist decided to

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47. Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.L.) 202 (appeal taken from Eng.) (U.K.).

48. Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para. 53 (Can.).

49. Frederick Schauer, *Social Foundations of the Law of Defamation – A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 11 (1980) (emphasis deleted).

50. Until 2013, the parties in British libel cases had a right to a jury trial, even though jury trials had been eliminated in all other civil actions there.

publish on the particular day she chose, rather than waiting for another day or week or two to investigate even more fully. Yet, the journalist may have been facing perceived, though perhaps exaggerated, competitive pressures,[51] or publication may have been timed to some specific event that the publisher regarded as important although the decision maker might not. Second, error may arise from the allocation of burdens of proof. Placing the burden of proving truth on the publisher allocates the risk of decision-maker error to the defendant, while placing the burden of proving falsity on the plaintiff allocates that risk to the plaintiff. Third, as Lord Nicholls wrote, defending against a libel claim is costly, and costs increase as publishers try to generate information that reduces the risk of decision-maker error.[52]

The fact that decision-maker error can occur for several reasons means that there are several margins on which courts could work to reduce the risk of error. The *New York Times v. Sullivan* rule works on what I have called the direct risk of decision-maker error, by instructing the decision maker to apply a plaintiff-unfriendly standard of liability.[53] Courts might instead change the burden of proof on various issues, most obviously by altering the traditional common law rule that allocates the burden of proof of truth to the defendant and instead requiring the plaintiff to show that the statement was false. Costs might be reduced by restricting discovery (and altering the substantive standard to make information about the publisher's decision-making process irrelevant).

With this understanding of how the chilling effect works, I turn to a number of institutional factors that go into courts' rejection of the *New York Times v. Sullivan* rule. For convenience I categorize them as country-specific, context-specific, institution-specific, legal, and cultural, although the categories overlap.

2. Country-Specific Reasons

According to Lord Nicholls in *Reynolds*, "Depending on local conditions, such as . . . the traditions and power of the press, the solution preferred in one country may not be best suited to another country."[54] After referring to the "different, newer, smaller, [and] closer . . . society" in New Zealand, the New Zealand Court of Appeal observed specifically that "New

51. *Cf. Reynolds*, 2 A.C. at 202 (referring to "a newspaper, anxious to be first with a 'scoop'").

52. *Id*.

53. Identifying the mechanism of the chilling effect does not, though, tell the precise content of the appropriate liability rule. A rule prohibiting the imposition of liability without fault (leaving open whether a rule more stringent than negligence would be desirable) might confine the effects of jury error to deterrence of the publication of false statements of fact, for example.

54. *Reynolds*, 2 A.C. at 201–02.

Zealand has not encountered the worst excesses and irresponsibilities of the English national daily tabloids."[55] For these courts, the fact that press practices in their nations were different from those in the United States was a reason for rejecting the *New York Times v. Sullivan* rule. Justice B.P. Jeevan Reddy of the Supreme Court of India also referred to national differences after discussing *New York Times v. Sullivan* in a case denying an injunction against the publication of a purported autobiography of a celebrated criminal.[56] After extensive quotations from *New York Times v. Sullivan*, Justice Jeevan Reddy observed that "constant vigilance over exercise of governmental power by the press and the media . . . is essential for a good Government."[57] But, immediately following this invocation of the core theme of *New York Times v. Sullivan*, the Justice continued, "At the same time, we must remember that our society may not share the degree of public awareness obtaining in [the] United Kingdom or United States," a fact which "may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system."[58]

We might detect something like "national exceptionalism" in the fact that courts outside the United States focus their discussion on *New York Times v. Sullivan* itself, without mentioning later developments in the United States that have created a more complex set of liability rules. The distance between *New York Times v. Sullivan* as a complex doctrine in the United States and the doctrines applied elsewhere is smaller than the discussions of U.S. libel law by non-U.S. courts suggest, although the U.S. rules remain distinctive in the core case of defamation of high-level public officials. Perhaps courts elsewhere want to emphasize that their nations are indeed different from the United States, even though emphasis would be diminished were they to acknowledge that U.S. law and their law are not dramatically different over a wide range of cases.

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55. *Lange v Atkinson* [2000] 3 NZLR 385, 397–98 (CA) (N.Z.).

56. Rajagopal v. State of Tamil Nadu, A.I.R. 1995 S.C. 264 (India).

57. *Id*. at 275.

58. *Id*. The rule stated in the case was this:

> In the case of public officials . . . the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made . . . with reckless disregard for truth. In such a case, it would be enough for the defendant . . . to prove that he acted after a reasonable verification of the facts . . . .

Id. at 277. This seems to blend the *Sullivan* standard with the British "reasonable journalism" defense.

3. Context-Specific Reasons

The Supreme Court of Canada emphasized "the social and political context of the times which undoubtedly influenced the decision in New York Times v. Sullivan" and recounted the case's civil rights context.[59] The Australian High Court was only a bit more delicate: "It would be as presumptuous as it is irrelevant to comment on the uniquely American historical background to the ruling in *New York Times Co. v. Sullivan* . . . ."[60]

The Canadian reference to context came in a case involving one of many efforts by the Church of Scientology to use the legal system as a weapon against its critics,[61] and, although the Canadian Supreme Court did not expressly allude to *that* contextual fact, invocation of *Sullivan*'s context is relevant only if context is generally relevant in explaining court decisions. To a similar effect is the Australian High Court's simultaneous mention and disclaimer of the relevance of *Sullivan*'s context.[62] One is invited to infer that in cases with a different, less highly charged context, one might expect courts to articulate different liability rules.[63]

Notably, in the United States the civil rights context of *New York Times v. Sullivan* is often offered as a justification for its press-friendly rule, perhaps on the theory that many libel cases arise from contexts that are similar in relevant respects,[64] whereas elsewhere the same context is offered as a justification for refusing to go as far as the United States Supreme Court did, perhaps on the theory that few libel cases in the United Kingdom or elsewhere arise from contexts similar to that of *New York Times v. Sullivan*. Those are ultimately empirical questions, and courts both inside and outside the United States seem willing to rest their arguments on the judges' intuitions and experience about the right answers to those questions.

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59. Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, para. 123 (Can.).

60. *Theophanous v Herald & Weekly Times Ltd*. (1994) 182 CLR 104, 161 (Austl.).

61. Turning the tables, the New Zealand Court of Appeal said that *Hill* must "be seen in its particular context," which "did not involve the media or political commentary about government policies . . . ." *Lange v Atkinson* [1998] 3 NZLR 424, 452, 450 (CA).

62. *Theophanous*, 182 CLR at 161.

63. Singapore is hardly a model of press freedom, but context may explain the course of development of the law of libel there. The leading case involved statements made at a political rally in which J.B. Jeyaretnam made thinly veiled insinuations of improper conduct by Prime Minister Lee Kuan Yew. The Court of Appeal upheld a substantial judgment against Jeyaretnam, rejecting the defense of qualified privilege. Jeyaretnam Joshua Benjamin v. Lee Kuan Yew, [1992] 2 SLR 310. The Court of Appeal expressly rejected what it took to be the "premise[]" of *New York Times v. Sullivan* and the *Lingens* case "that the limits of acceptable criticism of persons holding public office . . . in respect of their official duties or conduct are wider than those of ordinary persons."*Id.* at 332.

64. Presumably the similarities include the facts that the controversy is highly charged locally, that the plaintiff has local sentiment on its side, and that the defendant is viewed locally with hostility.

4. Institution-Specific Reasons

The "chilling effect" theory rests on implicit and sometimes explicit assumptions about how the institutions of publication—the press and broadcast media in particular—operate. Lord Nicholls drew attention to some specifics of institutional operation in *Reynolds* when he wrote that "[t]he chill factor is perhaps felt more keenly by the regional press, book publishers and broadcasters than the national press."[65]

Juries are important decision makers in libel cases in the United States, Canada, and (until recently) the United Kingdom.[66] Unsurprisingly, then, courts allude to differences in jury behavior when discussing the *New York Times v. Sullivan* rule. In *Hill*, for example, the Canadian Supreme Court said, "a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations."[67] The inference we are to draw is that juries in Canada do not make the kind of mistakes that the *New York Times v. Sullivan* rule must guard against.

As I have noted, jury errors can be reduced by increased investment in generating information for litigation. National rules of discovery regulate the generation of such information. And, courts have observed that limitations on discovery justify rejecting the inquiries into journalistic practices that *New York Times v. Sullivan* licenses.[68] Newspapers may have a privilege to refrain from disclosing confidential sources, for example, and courts have cited that privilege as a reason for rejecting liability for statements published with reckless disregard of truth or falsity.[69] The reason they offer is not entirely persuasive: A newspaper might not be able to defeat a claim of reckless disregard without exposing its confidential sources and so, courts say, would be at a litigation disadvantage under the *New York Times v. Sullivan* rule. The difficulty with this argument is

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65. Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.L.) 202 (appeal taken from Eng.) (U.K.). For confirmation, see ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT (1997) (reporting the results of survey interviews with journalists and editors in different branches of the publication industry in England and Scotland).

66. Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, para. 140 (Can.); *see* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *Reynolds*, 2 A.C. at 202.

67. *Hill*, 2 S.C.R. at para. 140.

68. Benjamin Barron, *A Proposal to Rescue* New York Times v. Sullivan *by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 86–92 (2007).

69. For example, in *Reynolds* Lord Nicholls argued that "[m]alice is notoriously difficult to prove" because a newspaper may be "understandably unwilling to disclose its sources . . . ." *Reynolds*, 2 A.C. at 201. Concurring, Lord Hobhouse praised English common law for allowing a publisher "to preserve the confidentiality of his sources," in contrast to the United States "requirement of full disclosure by way of extensive and onerous pretrial discovery." *Id.* at 240. The Australian High Court, too, noted the criticism that the *Sullivan* requirement would lead to "intrusive discovery procedures as the plaintiff attempts to prove malice," whereby "protection of sources would be undermined." *Theophanous v Herald & Weekly Times Ltd.* (1994) 182 CLR 104, 135 (Austl.).

obvious: The privilege appears to be one held by the newspaper and should be waivable if the newspaper believes that it would be disadvantaged by keeping the information confidential.

Finally, there is the broader political context, most extensively discussed by the New Zealand Court of Appeal in *Lange*. In a wide-ranging short essay embedded in his opinion, Justice Peter Blanchard described the development of New Zealand as a democracy, with expanding suffrage, the use of proportional representation, and the adoption of a freedom of information act and a bill of rights act.[70] He concluded:

> In that democratic, constitutional context the capacities of those who have or aspire to elected parliamentary and governmental positions are plainly of great importance. Not only that, members of the population of New Zealand who through . . . debate and participation attempt to influence their exercise of that power and call them to account, have a proper interest in having access to information which directly affects their capacities to carry out their public responsibilities.[71]

These conclusions might be reached with respect to any well-functioning democracy, but Justice Blanchard linked them to specific features of the New Zealand constitutional context.

5. Cultural Reasons

I found only a few references to a specific national culture in courts' discussions of the *New York Times v. Sullivan* rule. Justice Gerard Brennan of the Australian High Court used that rule to "demonstrate[] a radical difference in the legal culture of our two countries"[72] but did not elaborate on what that difference was. Nonetheless, the cases do support James Whitman's argument that U.S. rules dealing with reputation tend to level high public officials down to the status of ordinary members of the public, while courts elsewhere tend to preserve high status for public officials and either implicitly or explicitly level ordinary citizens up to that level.[73] Singapore's problematic decision imposing liability on a leading opposition politician for statements made about the nation's prime minister expressly rests on the proposition that "[p]ersons holding public office . . . are equally

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70. *Lange v Atkinson* [1998] 3 NZLR 424, 462–64 (CA) (N.Z.).

71. *Id*. at 464.

72. *Theophanous*, 182 CLR. at 160.

73. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L. J. 1279 (2000).

entitled to have their reputations protected as those of any other persons," which in context is a "leveling up" position.[74]

Justice Gerard Brennan's reference to "legal culture" suggests that the boundary between culture and law is a fuzzy one. I conclude this overview of reasons courts offer for rejecting the *New York Times v. Sullivan* rule by considering some relatively narrow legal matters and then some rather broad ones, the latter being probably best described as differences in legal cultures.

6. Legal Reasons

I begin by noting that courts in other jurisdictions can respond to the concerns underlying *New York Times v. Sullivan* by adjusting the common law or interpreting relevant statutes. That course is not readily available to the United States Supreme Court, which as a general matter must take state law as that law is given to it by state courts. So, for example, the Supreme Court was unable to build into its analysis the common and correct observation that the Alabama Supreme Court stretched the common law requirement that a statement "concern" the plaintiff almost beyond recognition.[75] In *Sullivan*, statements about actions by "the police" and the like were held to concern Sullivan, the Public Safety Commissioner with responsibility for the police department. Although the case is not on all fours with *Sullivan*, the House of Lords in the United Kingdom suggestively held that the government body itself could not recover for libel.[76] Referring to *New York Times v. Sullivan* and other cases, Lord Keith wrote, "It is of the highest public importance that a democratically elected governmental body . . . should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."[77] Lord Keith noted that false statements that "wrongly impaired" the reputation of an individual member of the public body might give rise to liability, and, invoking the classic notion that the remedy for bad speech is counterspeech, observed that the body could "defend itself by public utterances and in debate" in its chambers.[78]

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74. Jeyaretnam Joshua Benjamin v. Lee Kuan Yew, [1992] 2 SLR 310, 332 (Sing.).

75. *See, e.g.*, Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1010 (2000) (asserting that "reversal of the Alabama court could easily be justified on the ground that Alabama played fast and loose with two elements of the common law account of the wrong"). Epstein is mistaken to assert that the Supreme Court could have reversed the Alabama Supreme Court on that ground, but his criticism of the Alabama Supreme Court is substantively accurate.

76. Derbyshire Cnty. Council v. Times Newspapers Ltd., [1993] A.C. 534 (H.L.) (appeal taken from Eng.) (U.K.).

77. *Id.* at 547.

78. *Id.* at 550.

I do not want to overstate this difference in legal settings. The U.S. Supreme Court might have responded to the Alabama Supreme Court's decision by holding that the statements at issue concerning Sullivan lay outside any constitutionally permissible boundaries of the rule that libelous statements must concern the plaintiff; thus, the Court could have left it up to the Alabama court to devise its own constitutionally permissible definition. And, similarly, it might have held that the overall standards of liability applied in Alabama were constitutionally impermissible without specifying that only one liability rule—"malice" and all that—was constitutionally permissible.[79] That would have allowed state courts and legislatures to experiment with various modifications of the common law of libel by reallocating burdens of proof with respect to specific elements of the cause of action and by defining in varying ways the components of recoverable damages.[80] So, the structure of U.S. federalism did not compel the Supreme Court to adopt any specific liability rule, much less the precise one it did.

That *New York Times v. Sullivan* was a U.S. constitutional decision does make a difference, though. Constitutions vary in their content, of course. The U.S. Constitution has the First Amendment, protecting freedom of speech and the press, and a judicially developed right of privacy, best understood as a right of decisional autonomy.[81] Many other constitutions guarantee additional rights. In particular, they guarantee a right to privacy in the sense of seclusion or repose, or a right to human dignity, or a right to the free development of personality.[82] The right to reputation protected by libel law is easily understood as a specific instance of those rights.[83] As a result, in other constitutional systems, libel law involves a conflict between constitutional rights, and the courts' task is to achieve the best accommodation of rights that exist on the same conceptual plane.[84] In contrast, in the United States the right to reputation is a mere social interest,

79. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (stating that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual").

80. For an extensive treatment of how those issues arose as the Justices discussed *New York Times v. Sullivan* and subsequent cases, see Lee Levine & Stephen Wermiel, *The Landmark That Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1 (2013).

81. U.S. CONST. amend. I; Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.").

82. Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM 49, 52 (Georg Nolte ed., 2005).

83. *Id.*

84. For a discussion of the relevant German law, see RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE ANALYSIS OF THE FREEDOM OF SPEECH 102–04 (2006).

no different from any other legislatively-favored value but conceptually always subordinated to constitutional rights.[85] I think it a general characteristic of constitutional reasoning, certainly in the United States and probably everywhere, that constitutional rights necessarily prevail over mere social interests except in truly exceptional circumstances. So, in the United States, freedom of expression prevails over the interest in reputation without requiring some accommodation between the two. It should be no surprise, then, to find that libel law in the United States is more expression-friendly than elsewhere: A rights-versus-interest analysis will almost always produce a more rights-favoring outcome than a rights-versus-rights one.

The preceding argument uses the contrast between the U.S. Constitution and other constitutions to explain more press-friendly results in the United States. Elsewhere, though, libel law analysis is not constitutional analysis in the same way. Courts in the United Kingdom, Australia, and New Zealand operate in legal regimes without constitutional protection of freedom of expression.[86] Canada and South Africa, as well as many other nations, do have constitutional protections of freedom of expression, but their highest courts also have the power to develop the common law (or its equivalent in general provisions of statutory law).[87] All these courts can deal with libel law within a common law framework. This may allow them to adjust the boundaries of libel law with more flexibility and nuance than can be done pursuant to a purely constitutional analysis.

Still, as I have suggested, somewhat more flexibility than *New York Times v. Sullivan* was within reach in the United States. My final observation is that the *New York Times v. Sullivan* rule is just that—a rule—and U.S. constitutional law tends to prefer rules to standards, at least for the First Amendment.[88] The standard articulated in *Reynolds* was a ten-

85. The analysis in the text would be the same, though exposition would be needlessly verbose, if we understood libel law as protecting a right to reputation favored by common law courts subject to legislative supervision.

86. Schauer, *supra* note 82, at 59.

87. *Id.* at 59–62. A complexity arises where, as in South Africa, constitutional courts distinct from the highest courts for ordinary law exist. The general solution constitutional courts have arrived at in libel and other cases is that the constitutional court remand cases to the ordinary courts if they determine that the ordinary courts did not take sufficient account of constitutional values (of free expression and reputation) in developing the law of libel. They typically do not specify the precise rule the constitution requires, and in this regard, they resemble the U.S. decisions stating only that a rule of liability without fault is constitutionally unacceptable.

88. For a recent illustration of the U.S. Supreme Court's preference for rules over standards in First Amendment jurisprudence, see *United States v. Stevens*, 559 U.S. 460 (2010) (holding unconstitutional a federal statute making dissemination of "animal crush" videos unlawful and expressly refusing to expand the small number of categories of speech not covered by the First Amendment).

factor list, expressly said to be "not exhaustive," and "[t]he weight to be given to these and any other relevant factors will vary from case to case."[89]

The reasons for the preference in the United States for rules over standards and the attraction of standards elsewhere remain obscure. Frederick Schauer has suggested that rules precipitate out of extended experience with specific problems, and that the United States has more experience in the relevant domains than other constitutional courts.[90] I am skeptical about Schauer's argument in general,[91] and, with reference to libel law specifically, the length of experience in the United States and elsewhere seems to me roughly the same.

A preference for rules may be a feature of what Justice Gerard Brennan called the "legal culture" of the United States—more in line with the thought that we should seek institutional accounts of differences: Rules have an important "managerial" advantage over standards. Consider a supervisor who wants subordinates to reach the best outcomes in specific cases, where "best" means "the outcome that the supervisor believes best." There is always what economists call "agency slack" in such a situation. The subordinate has some range of freedom of action over which the superior has essentially no control.[92] Sometimes the subordinate will be so attuned to the superior's values that the subordinate will exercise her freedom in ways entirely compatible with the superior's views about what outcomes are best. But, the more distance there is between the subordinate's values and the superior's, the more likely it is that the subordinate will use her freedom to achieve results of which the superior would disapprove.[93] And, finally, the superior's capacity to review and revise erroneous decisions by subordinates may be limited.

Directing the subordinate to apply a standard gives the subordinate a relatively large range of freedom. Ideally, directing her to apply a rule narrows that range and thereby increases the likelihood that the subordinate will reach the best result from the superior's point of view.[94] Consider,

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89. Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.L.) 205 (appeal taken from Eng.) (U.K.); *see also* Jameel v. Wall Street Journal Eur. Sprl, [2007] 1 A.C. 359 (H.L.) 395 (appeal taken from Eng.) (U.K.) ("Any test which seeks to set a general standard . . . is bound to involve a degree of uncertainty . . . . Context is important too when the standard is applied to each piece of information that the journalist wishes to publish.") In *Jameel*, the House of Lords refused to "rule-ify" the *Reynolds* standard by requiring that journalists seek comment from the target of their stories before publishing.

90. Schauer, *supra* note 82.

91. For a brief discussion, see MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 85–88 (2014).

92. *See* Darren G. Hawkins, et al., *Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory*, *in* DELEGATION AND AGENCY IN INTERNATIONAL ORGANZIATIONS 3, 4–8 (Darren G. Hawkins et al. eds., 2006).

93. *Id*.

94. The exposition in the test simplifies the situation quite dramatically. I mention two important qualifications. (1) When the subordinate is told to implement a *system* of rules, the rule system can be

then, the conditions that make rules preferable to standards, from the superior's point of view: (1) A large distance between the superior's values and subordinates' values, which may perhaps be measured by simple numbers—the more subordinates, the larger the distance; and (2) a limited capacity to review subordinates' decisions. These conditions may obtain more in the United States than elsewhere. In this connection the New Zealand Court of Appeals's description of that nation as being "smaller [and] closer, if increasingly diverse"[95] than others takes on a somewhat different meaning: Smallness makes supervision easier, and "closeness" can be taken to refer to a larger range of shared values between that court and the lower court judges and juries called upon to apply libel law.

IV. CODA

In 2013, the British Parliament adopted the Defamation Act 2013.[96] The Act formally abolished the *Reynolds* defense[97] and replaced it with a "public interest" defense, insulating publishers from liability for all statements, including false ones, if the statement was "on a matter of public interest" and the publisher "reasonably believed that publishing the statement . . . was in the public interest."[98] Along one dimension, the new defense is weaker than the *Sullivan* rule because it places the burden of proving the defense on the publisher.[99] Along another, though, it appears to be considerably stronger. Instead of denying liability when a false statement is made with a reasonable belief in its truth (or when reasonable steps have been pursued to determine whether it is true or false), the public interest defense denies liability for statements the plaintiff has shown to be false when the false statement was on a matter of public interest—even if the publisher knew the statement to be false.[100]

The United Kingdom thus appears to have moved from a judicially developed law that rejected *New York Times v. Sullivan* because it was too

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complex enough so that it approximates a standard. (2) Rules will always produce some results the superior thinks suboptimal. They are preferable when the errors (as seen by the superior) generated by the subordinate's implementation of the rule are less frequent or important than the errors generated by the implementation of a standard.

95. *Lange v Atkinson* [2000] 3 NZLR 385, 397 (CA) (N.Z.).

96. Defamation Act 2013, c. 26 (U.K.).

97. *Id*. § 4(6).

98. *Id*. § 4(1).

99. *Id*. § 4.

100. I assume that the public interest standard is an objective one, but that will not eliminate the possibility that a publisher will be exempt from liability for publishing statements known to be false on a matter of objectively-determined public interest.

generous to publishers to a legislatively enacted statute that rejects *New York Times v. Sullivan* because it is not generous enough to publishers.[101]

101. The Defamation Act 2013 seems to be a response to the development of London as a site for "libel tourism," in which aggrieved individuals from around the world latched on to the U.K.'s plaintiff-friendly libel rules, found some basis for jurisdiction over the defendant in the United Kingdom, and filed libel actions there that had no realistic chance of success anywhere else in the world. The Act contains a section generally denying the British courts jurisdiction over libel actions brought by non-domiciliaries of the United Kingdom, the European Union, and a group of other European nations not members of the European Union. Defamation Act 2013, c. 26 § 9 (U.K.).