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An Originalist Libel Defense

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A federal judge in Kentucky dismissed high-school student Nicholas Sandmann's libel suit against the Washington Post last week. That's no vindication of the newspaper's skewed reporting on the teen's run-in with American Indian activist Nathan Phillips on the National Mall in January. But it's a vindication of the First Amendment's limitations on state libel law, which have come under scrutiny of late, including from President Trump and Justice Clarence Thomas.

Mr. Sandmann and his peers were targeted by a Twitter mob, and the Post joined in portraying him as the villain in a "white privilege" morality play. Mr. Sandmann claimed the Post had defamed him by repeating Mr. Phillips's claim that Mr. Sandmann had physically "blocked" him. That judge held that was an opinion, not a factual claim, and therefore shielded by the First Amendment.

That conclusion may be debatable, but the First Amendment's protection of opinion shouldn't be. It is the legal expression of America's "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," as Justice William Brennan put it in *New York Times* Co. *v. Sullivan* (1964), which established that the Constitution imposes limits on state libel law.

Mr. Trump said in 2016 that he wanted to "open up" libel laws, and in February Justice Thomas wrote a solo opinion arguing that *Sullivan* departs from the Constitution's original meaning. He has a point: Brennan's reasoning is all policy. For decades, originalists like Justice Antonin Scalia have criticized it as an exercise of raw judicial power. Yet there's a good originalist case for limits on libel law.

Sullivan established that government officials suing for defamation must demonstrate that the defendant either knew that the defamatory statements were false or acted with "reckless disregard" for their accuracy—a standard confusingly known as "actual malice." Later decisions extended the requirement to all "public figures," whether or not they hold office.

Sullivan made it far more difficult for plaintiffs to win libel suits, even for statements that are false and seriously damaging. That price is worth paying, the justices reasoned, to provide breathing room for "uninhibited, robust, and wide-open" debate of public issues, given that inadvertent falsehoods are inevitable. Critics blame *Sullivan* for declining journalistic standards—including the Post's mobbing of Mr. Sandmann and his classmates.

But that's all policy. What about the law?

Sullivan was right to recognize the Constitution's relevance in libel cases. It doesn't matter that libel suits are brought by private parties, rather than the state, because it is the state's law that imposes the liability. If the First Amendment precludes a statute imposing fines for speech criticizing government officials, why would the constitutional analysis be different for a law that awards money to a plaintiff?

And while it may be that "the freedom of speech" recognized by the First Amendment does not protect defamatory speech—which was Scalia's view and apparently is Justice Thomas's—no one seriously argues that a state can punish any speech it wants, free from constitutional scrutiny, merely by labeling it "defamation." That means the court has to define the term somehow.

For all Justice Thomas's criticism of *Sullivan,* he doesn't take issue with its conclusion that the Constitution limits the reach of libel law. His beef is with the actual-malice standard. And that's where things get complicated.

To begin with, he doesn't say what he thinks the proper constitutional standard should be. He observes that judge-made common law provides the "backdrop" for understanding the First Amendment's guarantees of freedom of speech and the press, and he cites cases showing that the adoption of the First and 14th amendments "did not abrogate the common law of libel." That suggests he would have courts scrutinize libel claims for whether they comport with the historical understanding of defamation—if so, the speech would be unprotected. As he notes, it was black-letter law at the time of the framing that a libel plaintiff didn't have to assert actual malice at the outset of the case.

But plaintiffs often *did* have to prove actual malice to prevail. The law recognized circumstances in which a libel defendant could assert a "qualified" or "defeasible" immunity from damages and thereby put the plaintiff to the burden of proving "express" or "actual" malice under more or less the same standard *Sullivan* prescribed. One musty treatise, published in 1877, reports such immunity applies whenever the speaker has a "legal, social, or moral" duty to comment on another's character, fitness or conduct, including in matters of business, crime, morality or religion. Moreover, libel claims concerning government officials' conduct were often subject to the actual-malice standard, as were claims for punitive damages. *Sullivan*'s reasoning was loose, but it didn't fashion actual malice out of whole cloth.

And it may be that Justice Thomas's understanding of the First Amendment is wrong. What if "the freedom of speech" *does* protect defamation? There was no reason for it to be excluded. James Madison's view was that freedom of speech should be understood as a broad natural right, not a specialized legal concept. The only other appearance of "speech" in the Constitution is the Speech or Debate Clause, which completely immunizes members of Congress from liability for legislative speech. The federal government had no general authority to punish or regulate libel. No one expected in 1789 that the First Amendment would apply to state law, and it didn't until it was incorporated under the 14th Amendment.

Yet this poses a conundrum: Imposing so strict a rule on the states would abolish libel laws altogether. Among the ways a court might reconcile the First and 14th amendments, actual malice has the benefits of historical pedigree, practical experience, and balancing vigorous public debate with at least some compensation and deterrence.

Modern originalism is young, and answers to these questions of original meaning often involve some doubt. Yet the *Sullivan* court might have stumbled onto a standard that comports with the Constitution.

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