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London Conference Papers



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Persistent And Emerging Threats To The Autocrat's Bugbear: Satire And Political Cartoons

Threats Prompt New Resource for Legal Guidance

By Terry Anderson^{1*} and Roslyn A. Mazer^{2*}

As a profession, cartoonists seem to be perennial troublemakers. There's something uniquely provocative about cartooning, caricature, and visual satire. The word caricature comes from the Italian *caricare* i.e., to charge, as in fill a wineglass, load cargo onto a ship... or put ammo in a gun. Because they come charged with visual hyperbole and taunting ridicule, political cartoons have a particular way of enraging the powerful. By necessity, a caricature is "reductive" or, perhaps more accurately, a distillation; the mere act of rendering a powerful person as a cartoon character may be perceived as an affront to their dignity, their public image, and a challenge to their power.

In general cartoonists make a contrarian or at least a negative point – skepticism about a particular policy or public figure, despair over perennial social problems, sadness in the wake of a tragedy, anger over gross hypocrisy, and so on. It is a mistake to assume that the primary purpose of a cartoon is to be funny; when political, editorial, or satirical cartoonists connect with their readers, the result is more often a rueful snort than gales of joyful laughter. This is their superpower: accessibility, immediacy, and piercing insight that may be consumed readily by a broad swath of the population.

Religious fundamentalists who cannot tolerate anything they see as blasphemy, an authoritarian movement that characterizes all dissent as an agenda propagated by "enemies of the people," or a tyrant who fosters a cult of personality will each have difficulty shrugging off satire, especially from a cartoonist who can command a large following, whether through the press or social media.

In the last 25 years, coincident with the rise of the satirical news format on cable television and the proliferation of meme culture online, a growing body of academic literature is deconstructing the unique power of satire – what exactly makes it work. For example, in their comprehensive study, *Is Satire Saving Our Nation?*, authors Sophia A. McClennen and Remy M. Maisel chronicle the role of satire since the founding of the American republic and its unique place in promoting critical thinking about public affairs. They believe satire "is correcting the misinformation of the news,

¹ Terry Anderson is the Executive Director of the [Cartoonists Rights Network International](#), an organization that defends political cartoonists around the world. This paper is based in part upon his post for the [Graphic Justice](#) blog.

² Roslyn A. Mazer is a retired attorney in Washington, DC. A longtime advocate for cartoonists and their craft, she represented the [Association of American Editorial Cartoonists](#) as *amici curiae* in [Hustler Magazine, Inc. v. Falwell](#), the 1988 US Supreme Court case which extended First Amendment protection to cartoonists and satirists against claims of emotional distress injury.

holding politicians accountable, and helping reframe citizenship in ways that productively combine entertainment and engagement.”³

In his authoritative treatment of satire, Gilbert Highet emphasized that the power of satire lies in its topicality, as it deals with “actual cases, mentions real people by name or describes them unmistakably (and often unflatteringly), talks of this moment and this city, and this special, very recent, very rich deposit of corruption whose stench is still in the satirist’s curling nostrils.”⁴

Thus, a cartoonist may be accused of sedition (as was the case with [Zunar](#) in Malaysia) or “insulting” the police, military, or ministers (as with [Aroeira](#) and others in Brazil, or [Nime](#) in Algeria), or the nebulous but increasingly common charge of “cybercrime” (as most recently demonstrated in Tanzania and the case of [Optatus Fwema](#)). Of course, a truly corrupt regime may pin any crime at all on any person they wish to persecute; memorably, [Ramón Nsé Esono Ebalé](#) went to prison in Equatorial Guinea on a counterfeiting charge which was eventually shown to be comprehensively false.

This trend intensified with the onset of 2020’s pandemic. In such emergencies criticism of government may very easily be conflated with disinformation and therefore a danger to public health. Cartoonists Rights Network International (CRNI) was among the organizations [warning](#) that such a pretext would be seized upon by those governments already curtailing free expression. As detailed below, such was the case in Bangladesh, where [Ahmed Kabir Kishore](#) was jailed and allegedly tortured for cartoons about “Life in the Time of Corona.”

An editorial cartoon is an opinion piece, not reportage, and orders of magnitude shorter than the average column, too. Hence those who disagree with the point made might double-down due to the apparent impudence of the format. This perceived glibness explains why cartoonists often get in trouble over matters of religious sensibility, racial prejudice and so on. A book that very intelligently analyzes (among others) the notorious *Jyllands-Posten/Charlie Hebdo* cartoons was [banned](#) from publication in Singapore as the ministry responsible feels that their (sparing and contextualized) inclusion presented too great a risk to public order. This despite the [careful rationale](#) of the authors. And a Parisian school teacher was [murdered](#) following a mischaracterization of his attempt to address the topic in his classroom.

Without question then, cartoons have power. There can be no other reason why so many cartoonists require defense.

³ McClennen and Maisel, *Is Satire Saving Our Nation?*, Palgrave MacMillan (2010), at 8. See also Tsakona & Popa, *Editorial: Confronting Power With Laughter*, [European Journal of Humour Research](#) 1(2); Burton, “More Than Entertainment”: *The Role of Satirical News in Dissent, Deliberation, and Democracy*, Masters Thesis in Media Studies (Pennsylvania State University, College of Communications (2010); and *Sunday Reading: The Power of Political Satire*, *The New Yorker* (May 19, 2019).

⁴ Highet, *The Anatomy of Satire* (Princeton Univ. Press 1962), at 16.

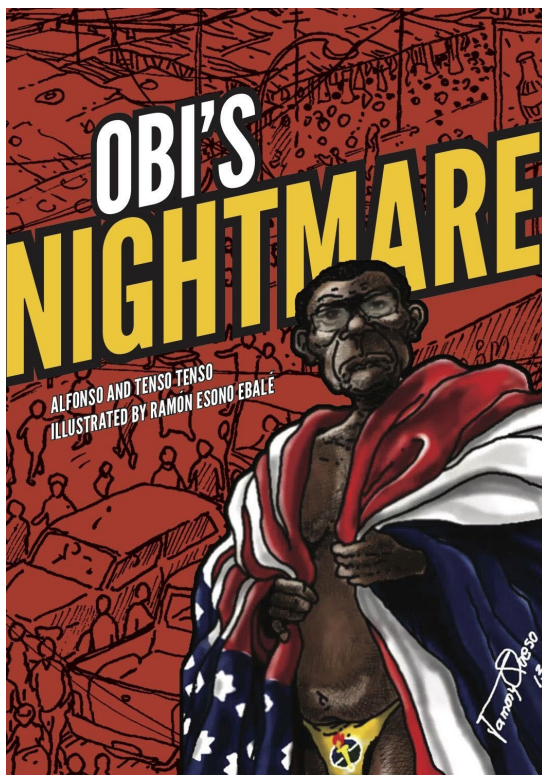
CHALLENGING TIMES

While far from exhaustive, the following cases offer some clear illustrations of the nature of cartoonists' criminalization and the varied, sometimes oblique means by which their freedom of expression is attacked.

EQUATORIAL GUINEA

Ramón Nsé Esono Ebalé, pen name Jamón y Queso is an artist and cartoonist who left Equatorial Guinea in 2011. While visiting his childhood home in September 2017 to renew his passport, Ebalé was stopped and detained by police without charge, contrary to EG law and held for [two months](#) at the notorious Black Beach Prison where he was questioned about his cartoons. Eventually a criminal case of counterfeiting and money laundering was brought, but a police officer admitted to fabricating the case on the instruction of a superior.

[All charges were dropped](#) on the first day of trial following urgent appeals from international human rights groups including EG Justice, Cartoonists Rights Network International, and Amnesty International. Ebalé's international legal team was led by Caoifhionn Gallagher, QC of Doughty Street Chambers. Impossible to prove, but it is safe to assume the incident arose from Ebalé's [vociferous criticism](#) of President Teodoro Obiang Nguema Mbasogo.



Ebalé's 2014 graphic novel "Obi's Nightmare" – co-written with two others who remain anonymized for their own safety – depicts President Obiang Nguema in an extended dream sequence where he "spends a single day as an ordinary citizen of his own country, which is to say, without access to education, electricity, healthcare, sanitation, free speech, or the estimated \$700M+ in oil payments that he holds in American banks."

TURKEY

Musa Kart is a former editorial cartoonist based in Turkey. Recep Tayyip Erdoğan took Kart to court three times during his career, first as prime minister and then president, the last occasion in 2017 when Kart and multiple staffers from the *Cumhuriyet* newspaper were charged with offering aid to terrorists and “fifth columnists.” This case formed part of the wider purge of oppositional voices from academia, the press and the public sector in Turkey, following on from the attempted coup of 2016, and which saw prosecutions on an [industrial scale](#) that drew criticism from human rights groups around the world.

Kart was illegally detained for nine months pre-trial and after a further nine-month court process he along with twelve other employees of the newspaper were sentenced to prison terms ranging between two and nine years. In 2019, Turkey’s highest court [overturned his conviction](#) and ordered Kart and four of his newspaper colleagues released from prison. Kart had served one hundred and forty-two days of a one year and sixteen-day prison sentence.

Kart’s [powerful opening statement](#) at the trial noted the irony of being charged with terrorism when most of his artistic career focused on exposing terrorist organizations in Turkey, including the FETO:



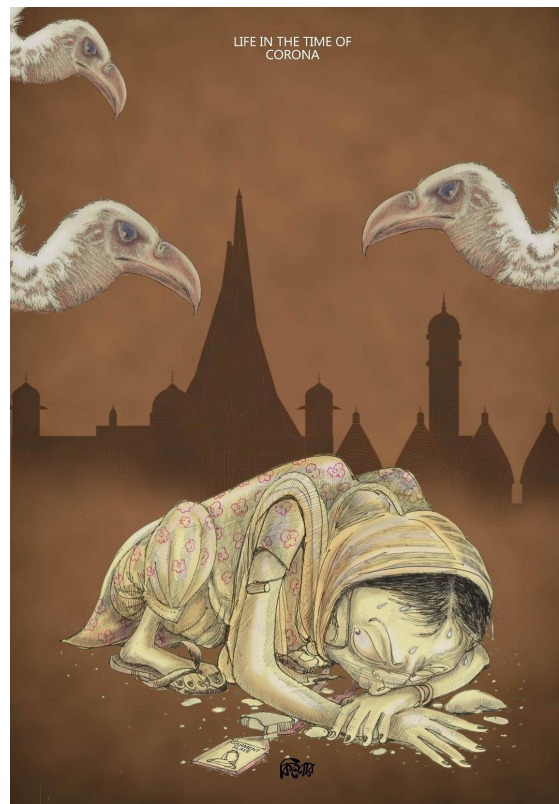
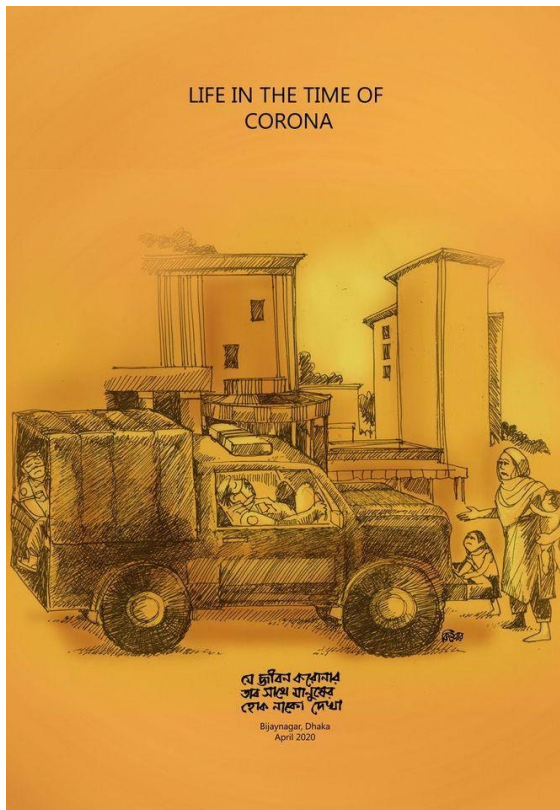
“It is against the very nature of things for cartoonists and their creators to align themselves with a culture of submissiveness and with entities that are unbending and based upon crude hierarchical relations that promote violence. Courageous and independent viewpoints that have broken free of cliché and standardized forms are what make for a true and effective cartoon.”

*Notably, Kart’s cartoons had satirized Erdoğan’s role in a 2013 money laundering scandal. While he is in jail, his regular [front page spot](#) in the *Cumhuriyet* newspaper was occupied by the work of a host of [international cartoonists](#) expressing their solidarity.*

BANGLADESH

Ahmed Kabir Kishore is a cartoonist and rights activist who campaigned on behalf of fellow Bangladeshi cartoonist Arifur Rahman (jailed in 2007, now exiled in Norway) and Prageeth Ekmaligoda, the Sri Lankan cartoonist and journalist who disappeared in 2010 and is presumed to have been killed by state actors.

After posting a series of cartoons to Facebook in the spring of 2020 concerning Bangladesh's response to the coronavirus pandemic, Kishore was named as a "co-conspirator" and [arrested](#) by the [notoriously heavy-handed](#) Rapid Action Battalion under the [widely criticized](#) Digital Security Act 2018 (DSA). He was allegedly tortured in police custody and denied adequate medical treatment in jail, bailed ten months later and only [after a former cellmate died](#). He has been permanently maimed, with the loss of hearing in one ear and mobility issues. Human Rights Watch, PEN American, the UN High Commissioner for Human Rights, and thirteen OECD countries condemned his arrest and torture. Today he is exiled in Europe.



Kishore's cartoons focused on issues such as political corruption, the inadequate roll-out of aid, PPE and vaccines, and the suffering of low-paid garment workers in Bangladesh during the pandemic.

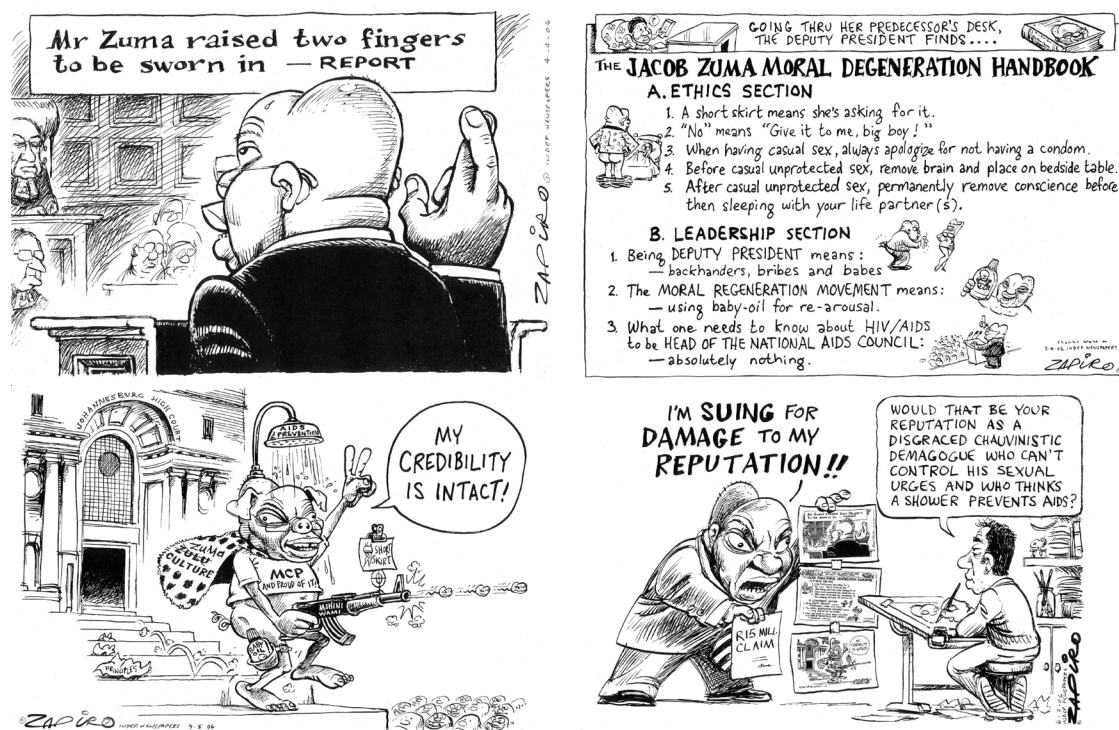
SOUTH AFRICA

Content Warning – this section contains references to rape.

Jonathan Shapiro, pen name Zapiro is a South African cartoonist, sued twice by Jacob Zuma, these filed before he was SA president but pursued after winning the 2009 election.

The first suit was in mid-2006, immediately after Zuma had been acquitted of rape, suing for R15 million (then \$2 million) in damages over three cartoons for *Independent media*, as below. In the third cartoon at issue, Zapiro made an attempt to portray the many misogynistic statements Zuma had made under cross-examination, including his startling revelation that he had unprotected sex with the rape claimant whom he knew to be HIV positive and said he then had a shower to lessen his chance of infection. (The “shower head” would feature in many subsequent cartoons of Zuma.)

Zapiro’s first response, against the advice of editors, was to draw a cartoon about the lawsuit in which he included a miniature version of the three cartoons that were the subject of the case.



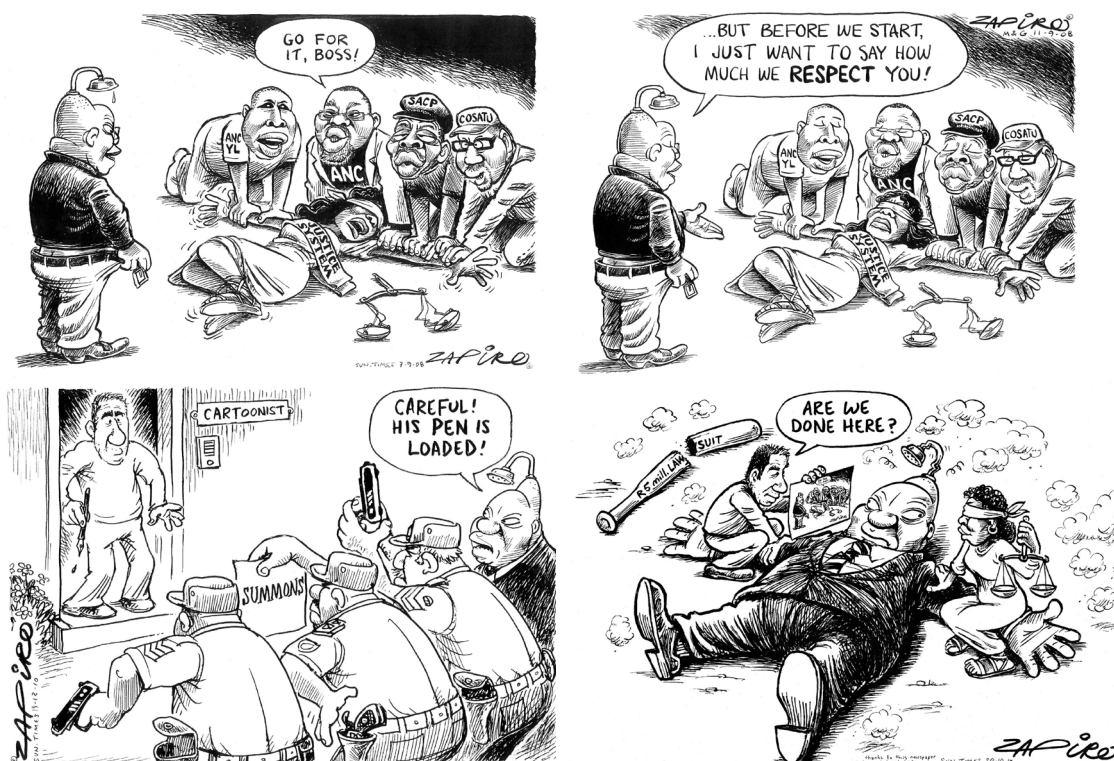
A second defamation lawsuit was mounted in 2008 seeking damages totaling R7 million (then \$1 million). Although the monetary demand was less than in the earlier lawsuit, the cartoon in question was far more significant, “certainly the most important cartoon I have ever done,” says Zapiro.

In the middle of that year and ahead of a court hearing on whether a National Prosecuting Authority’s corruption case against Zuma could proceed, he and his allies

threatened reprisals if he was prosecuted. It was then that Zapiro drew the *Sunday Times* “Rape of Justice” cartoon which provoked enormous public reaction, both positive and negative. Zapiro is adamant that “the cartoon reads metaphorically, not literally, because Lady Justice is a symbolic figure” but many were enraged that Zuma was portrayed as a rapist so soon after his acquittal for that crime. A few days later a second cartoon featuring both Zuma and Gwede Mantashe, (the ANC secretary general) appeared in the *Mail & Guardian* prompted by conciliatory statements they had made in the meantime but duplicating the scenario.

An initial ruling (later overturned – Zuma is [in prison](#) today) meant the corruption charges as then constituted had to be dropped and on this basis Zuma sued, pursuing the case well into his eventual presidency. Zapiro was served with legal papers and prepared for a 2012 a court date along with the *Sunday Times* and the same legal team who had been briefed for the earlier lawsuit.

However, it became apparent Zuma’s advisors were shaken by potential for negative publicity at a crucial time, with a second term in the balance. Zapiro was approached for an apology which would lead to the suit being dropped, but refused, and did so again upon an offer to drop it if legal costs were covered. Shortly before the opening of proceedings the claimant capitulated, [dropped all charges](#) and paid legal costs. Again, Zapiro was no more reticent in victory than he had been years before.



INDIA

Rachita Taneja, pen name **Sanitary Panels**, is an Indian artist and cartoonist who draws in a *faux naïve* style for a social media audience, leveling criticism at patriarchy, nationalism, and Hindu hegemony in Modi-era India. In 2022, a complaint by [a law student](#) led to a prosecution for [contempt](#) of India's Supreme Court for publishing cartoons on her Twitter account, [Sanitary Panels](#). Pandemic-related delays in the courts have delayed court hearings in the case.

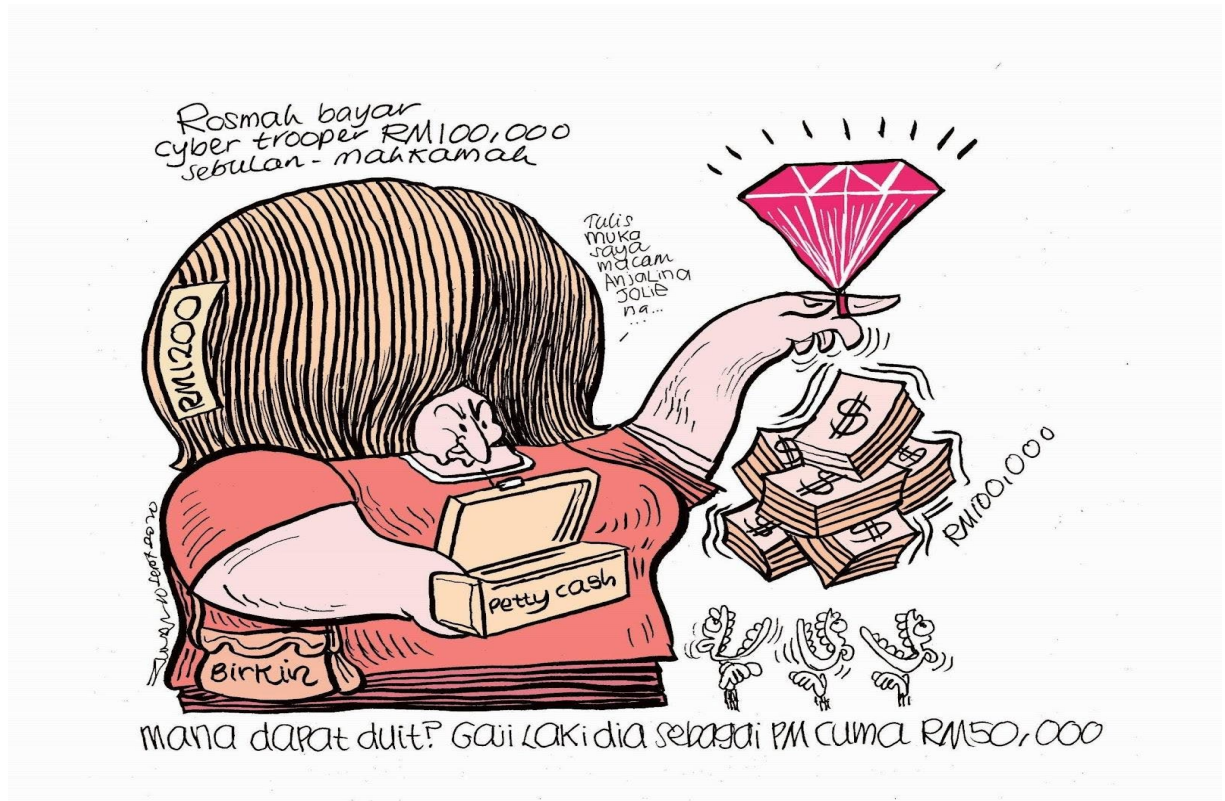


The complaint against Rachita Taneja cites three of her illustrations, [one of which](#) depicted Prime Minister Narendra Modi in a transaction with former chief justice Rajan Gogoi, and the [other two](#) (below) forming comment on legal proceedings against journalist Arnab Goswami.



MALAYSIA

Zulkiflee Anwar Haque, pen name **Zunar** is a Malaysian cartoonist who has defended numerous charges by the government in the last two decades, including under the [Sedition Act](#) and the Penal Code. For “insults” against the judiciary, he was detained and jailed twice, faced [forty-three years](#) imprisonment, endured a freeze of his freedom to travel, had his cartoon books banned from sale on the grounds that they were “detrimental to public order,” and saw his printers, publishers, distributors, and bookstores harassed.



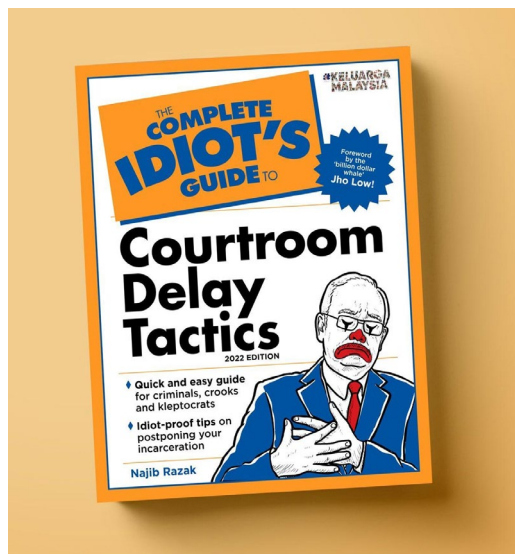
All charges were dropped in 2018 after the fall of Najib Razak's government. Zunar's 2019 book, *Fighting Through Cartoons: My Story of Harassment, Intimidation & Jail*, chronicles his artistic development alongside the country's deepening political crisis between 2009 – 2019. In May 2021, Zunar reported that hackers had attempted to disrupt an online exhibition by Craftora of editorial cartoons criticizing autocratic leaders in ASEAN countries.



Zunar's cartoons were without pity in their lampooning of Najib Razak and his wife Rosmah Mansor, usually depicting the latter enjoying the spoils of her status. Zunar was also quick to assimilate and respond to criticism; after a police chief commented that as a cartoonist he should draw something pleasant like Disney characters, his versions of the politicians came to resemble Mickey Mouse and Donald Duck.

Fahmi Reza is a Malaysian satirist, cartoonist and graphic designer perhaps best known for depicting the former Malaysian Prime Minister Najib Razak as a clown. He has been subject to numerous forms of political harassment: in 2021 he was placed in police custody over his [Spotify playlist](#) that was interpreted as mocking the Malay Queen, prompting him to publish a powerful [note from a police cell](#) on the importance of parody and satire.

He was also investigated under the Penal Code (Sedition Act) and Communications and Multimedia Act of 1998 for [satirical graphic posters](#). In February 2022 he was charged under the Communications and Multimedia Act with caricaturing a [former health minister](#) for his alleged negligence in handling the Covid pandemic. He was released on bail the next day. At the time of writing, Malaysian police are pursuing multiple separate lines of enquiry against him.



Fahmi Reza's works often have a punk aesthetic and in the past his images of Najib Razak have been a familiar sight in [popular protests](#) in Malaysia. Of late he has moved more into the world of social media with memes that riff on pop culture.

HUNGARY

It would be a mistake to consider the prosecution and persecution of cartoonists to be a phenomenon of the “global south” or something that occurs only under theocratic or dictatorial regimes. Populist, nationalist and increasingly authoritarian leaders are transforming nominally democratic societies at every point on the map. The European Union [has been convulsed](#) by the [evermore intolerant](#) and illiberal tenor of Hungarian Prime Minister Viktor Orbán – now widely considered to be a dictator in all but name – elected four times in a row and making frequent use of “emergency powers.”

Oppositional views – atheism, feminism, secularism, LGBTQ+ alliance – are increasingly marginalized in Orbán's Hungary. Of late, the *Népszava* newspaper and its cartoonist Gabor Pápai were decried by various politicians and [eventually taken to court](#) by Member of Parliament and chairman of the parliamentary Justice Committee, Imre Vejkey, for infringement of the right to human dignity over a cartoon featuring

Christ on the cross; the case now advances on appeal to the [European Court of Human Rights](#). Other cartoons by Pápai have prompted threats of legal action, as has a recent piece by cartoonist [Béla Weisz](#).

That Orbán was [so prominently heralded](#) by a leading conservative group in the United States this year, and that his particular brand of Christian Nationalism and “strong man” toxicity is regarded by some as a model of good governance, should give our American colleagues pause for thought.



Cartoonist Gábor Pápai (left) was one of two to receive the Kofi Annan Courage in Cartooning Award from Freedom Cartoonists Foundation, Geneva in 2022 – the other, Vladimir Kazanevsky (second from right) had fled Ukraine earlier in the same year.

UNITED STATES AND UNITED KINGDOM - STORM CLOUDS BREWING

While the power of satire to loosen the iron grip of autocrats invites brutal reactions of the type catalogued above (arrest, imprisonment, censorship, exile, harassment), satire’s power also is moving some of democracies’ emerging authoritarians – and their kindred spirits in judicial robes – to mount other forms of resistance.

Hence, while threats to cartooning and satire described above in Africa, across Asia and within continental Europe remain vivid and acutely disturbing, we are simultaneously approaching a crossroads in our free speech journey in the United States and the United Kingdom.



American exemplars of cartoon art are fulsome and indelible: Benjamin Franklin’s “Live Free or Die”; Thomas Nast’s assaults on the corrupt Tammany Hall regime in New York City; Herblock’s scathing caricatures of President Richard Nixon at the

height of the Watergate scandal; Jeff MacNelly's devastating chronicle of the bankruptcy of the Soviet Union; Patrick Oliphant's rebukes of a promiscuous President Bill Clinton; Ann Telnaes' hilarious tableaux of President Donald Trump's extended circle.

Satire has enjoyed a special place at the heart of American discourse. Indeed, then Associate Justice William Rehnquist, who later led the Court from 1986-2005, tried to persuade Chief Justice Warren Burger to "[see] what each annual crop of law clerks, together with such help from the Justices that they might wish, could do in the way of a gridiron show or other parody or satire on the Court."⁵

But that was a different Court. Nearly 60 years after the Supreme Court of the United States constitutionalized free speech protections against reputational injury suits, two sitting Justices of the Supreme Court have voiced their readiness to revisit or even overrule the Court's seminal First Amendment decision, *New York Times v. Sullivan*. That decision and its progeny require that before public officials and public figures may recover damages, they must show that any allegedly defamatory statements were published either with knowledge the statements were false or with reckless disregard of their truth or falsity.



⁵ Greenhouse, *How Not to be Chief Justice: The Apprenticeship of William H. Rehnquist*, 154 U. Penn. L. Rev. 1365, 1371 (2006). Later, as Chief Justice, Rehnquist sponsored an annual reunion for Court clerks at which the current clerks would present satirical skits aimed at the Chief and the current Term. See Thompson, *Chief Justice William H. Rehnquist: Prizing People, Place, and History*, 58 Stan. L. Rev. 1695, 1696 (2006).

The Court extended this principle to emotional distress claims in the 1988 case, [*Hustler Magazine, Inc. v. Falwell*](#), where a unanimous Court overturned a verdict for the Moral Majority’s Reverend Jerry Falwell. Fatal to Reverend Falwell’s claim was the jury’s determination that the hurtful statements *were not reasonably understood to be false statements of fact*. As the cartoonists argued in their [friend-of-the-Court brief](#), unless the First Amendment bars emotional distress injury claims, lower evidentiary standards for tort liability among the 50 states would have put cartoonists and satirists constantly at risk of damage judgments, or put them out of business – and deprive the public of a powerful and entertaining form of free speech.

Associate Justices Clarence Thomas and Neil Gorsuch mount a series of arguments about the constitutional underpinnings of *Sullivan* and the changed media landscape in their open invitation to reconsider or overrule the [landmark](#) decision. They did not hide their eagerness to take on the challenge:

- In a 2019 opinion concurring in the Court’s decision to decline to review dismissal of a defamation suit, Justice Thomas purported to assault the historical and constitutional underpinnings of the *Sullivan* case and lamented what he believes is the wholly unjustified displacement of state law standards for reputational injury claims. He declaimed that “*New York Times* and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law.”⁶
- In a 2021 opinion dissenting from the Court’s decision denying review of the grant of summary judgment to the defendant in another defamation suit, Justice Gorsuch manifested his own disdain for the *Sullivan* decision, stating, “What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reportage by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable.”⁷

The Supreme Court has not yet agreed to hear a case that squarely presents the opportunity to overturn the *Sullivan* decision. But Court watchers and practitioners are wary and ready. Academicians are lining up on both sides of the battle,⁸ and the Media Law Resource Center published a [“white paper”](#) documenting the historical, contextual, and doctrinal shortcomings in the arguments for revisiting the ruling.

And then there is the former and would-be future President of the United States who called the press the [“enemies of the people”](#) and promised in February 2016 to “open up libel laws so when they write purposely negative and horrible and false articles, [we can sue them](#) and win lots of money.” It must have stung when one of his judicial appointees threw out at an early stage his campaign’s [latest libel suit](#) against CNN on

⁶ [McKee v. Cosby](#), 139 S. Ct. 675 (2019)(Thomas, J., concurring in denial of certiorari).

⁷ [Berisha v. Lawson](#), 141 S. Ct. 2424, 2427 (2021)(Gorsuch, J., dissenting from denial of certiorari).

⁸ See, e.g., Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 Ohio St. L.J. 759 (2020); Schafer, *In Defense: New York Times v. Sullivan*, 82 La. L. Rev. 81 (2021).

grounds that the complaint's conclusory allegations were insufficient to meet the demanding *Sullivan* standard.⁹



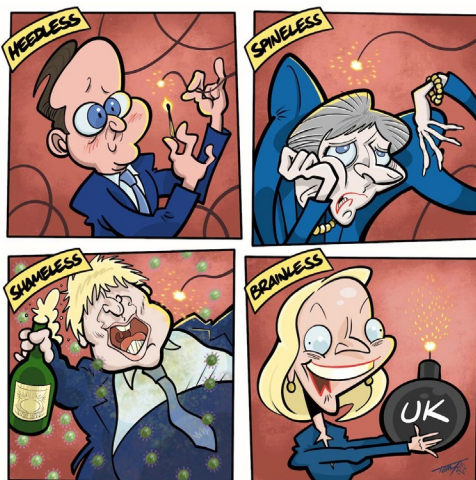
In Great Britain, James Gilray's skewering of King George III and Napoleon Bonaparte, William Hogarth's bawdy ridicules of the British upper classes, and Thomas Rowlandson's caricatures of London Street life forever secured the UK's enduring contribution to cartoon art. In the late 20th century and early 21st century, cartoonists in the British press have grown accustomed to portraying their elected leaders and representatives in some of the most splenetic and grotesque work ever published. From the scatology of Martin Rowson and viscera of Dave Brown to the contorted caricatures of Morten Morland and anthropomorphic animals of Peter Brookes, to feature as the subject of a British political cartoon means, almost by definition, to be denigrated.

Have these cartoonists cause to be fearful?

It is worth noting that London has become something of a global hub for SLAPPs – Strategic Lawsuits Against Public Participation – as evidenced by the [Foreign Policy Centre's research](#). Thus far it seems that SLAPPs are generally deployed against investigative journalism more than satirical commentary. Notably, the last time a prominent cartoonist was sued for damages in the UK it [did not end well](#) for the plaintiff.

The tone of the recent leadership campaign for Prime Minister has raised some red flags, including curbs to the [right to protest](#) and promises made to yolk “[vilification of the UK](#)” in with extremism and terrorism (a move indistinguishable from policy in President Recep Tayyip Erdoğan's Turkey). It remains to be seen what new Prime Minister Liz Truss will mean for human rights reform, but it is worth noting that the new Home Secretary is both a former barrister, UK attorney general and [self-declared](#) “anti-woke” warrior. Those who belong to her reviled “[fringe campaign groups](#)” - satirists, “lefty lawyers” and all human rights defenders - shall watch with interest.

⁹ Trump v. CNN Broadcasting, Inc., Case No. 1:20-cv-01045 (N.D. Ga. 2020).



Picture credit: [Cartoon Movement](#)

British cartooning is still largely and stubbornly a boy's club, as is America's; so far accusations of sexism in the depiction of women by these male cartoonists have been scarce. There has been less plain sailing on the matter of [race](#).

NEW INITIATIVE TO PROVIDE LEGAL GUIDANCE TO CARTOONISTS



In 2019 CRNI was present at the international conference organized by Canada and the UK, establishing UNESCO's [Global Media Defence Fund](#) and made a submission to the GMDF's first call for partnerships in 2020. With their support, CRNI established a new [Cartoonists' Legal Advisory Network](#) in 2021. This panel of experts includes practicing lawyers and academics specializing in human rights and most particularly freedom of expression as well as journalism and media, digital rights, and security.

The Cartoonists' Legal Advisory Network exists to address persistent and emerging threats to cartoonists and satire and is a discrete mechanism within CRNI by which cartoonists may receive legal guidance in an emergency. A survey of CRNI's regional representatives in 2020 showed that criminalization had supplanted terrorism, fundamentalism or extremism as their [chief concern](#) and this sentiment was echoed at 2021's Press & Cartooning Global Forum (held virtually), where all delegates regardless of their point of origin expressed concerns about erosion of democracy and civil liberties in their respective countries.

Of course, many free speech and journalism NGOs are doing excellent advocacy, and multiple cartoonists have enjoyed first-class legal support in the past (indeed, some of CRNI's recruited experts have been responsible for their defense); CRNI will continue to work in partnership with others. But cartoonists who have never had cause to use a lawyer before, who suddenly find themselves taken to a police station or in receipt of a court summons need a clear idea who they might rely on. We hope that they come to think of this network as their first contact when it is needed.

IN CONCLUSION

As journalism changes to keep pace with emergent digital media and deals with the challenges of a shrinking readership willing to pay for access, the traditional venues for political and editorial cartoons are [fast disappearing](#). The new generation of satirical cartoonists will share as much in common with artists as journalists and increasingly more with political agitators. They will require knowledgeable and specialized defense when targeted by authoritarian regimes. CRNI aims to build and bolster that [front line](#). We invite you to join us.

<i>All images are copyright and reproduced with the permission of the respective artists.</i>

Dear Friends,

Thank you very much for the invitation to take part in the MLRC London Conference. It is great honor for me and to my country.

At all times, political cartoons have been a sharp tool in the fight against corruption, violence, terror, and many other manifestations of the Forces of Evil. And these Forces have always opposed the free creativity of political cartoonists.

Political cartoonists often experience oppression of free speech. They have faced and are facing persecution from both terrorists and disgruntled politicians and oligarchs. Cartoonists can be protected from persecution by terrorists by power structures of the government. Laws can protect cartoonists against persecution of artists by disgruntled politicians and oligarchs.

I was drawing a cartoon when I heard the first explosions from Boryspil International Airport in Kyiv. It was almost four in the morning. I immediately remembered a song from the Second World War. The song began like this: "June 22 at exactly four o'clock Kyiv was bombed, we were declaring that the war had begun." "Putin attacked Kyiv at the same time as Hitler," I thought. I crossed out the harmless cartoon and began to draw a smiling old woman with a scythe, who hugged two terrible dictators of the 20th and 21st centuries Hitler and Putin.

For us, Ukrainians, Vladimir Putin became the main symbol of the manifestations of the Forces of Evil, who unleashed a bloody war in the center of Europe. Hundreds of cartoons have been drawn and published by Ukrainian cartoonists in recent months that depict the bloody essence of this dictator. Only the Armed Forces of Ukraine with the active support of the democratic forces of the whole world can protect us from the persecution of Putin, as the main terrorist of the planet. At the same time, Putin is a disgruntled politician and an oligarch. In this case, only laws can protect us from it. One of these laws could be the recognition of Russia as a state sponsor of terrorism.

Best wishes,

Vladimir Kazanevsky

A Landmark Precedent: Past, Present, Future

By Matthew L. Schafer¹

Introduction

New York Times Co. v. Sullivan is a landmark precedent.² It constitutionalized much of the law of libel—foremost a product of state tort law—by reading the First Amendment as imposing certain minimum standards that must be met before a libel plaintiff may recover damages. *Sullivan* is not just about constitutional baselines though.

Rather, *Sullivan* lies at the heart of our democratic system: the free exchange of ideas. As the Court observed in that case, “the First Amendment ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.’”³ By protecting even some false speech, *Sullivan* protects democratic self-governance by ensuring that truthful speech is not chilled. At least, that’s the idea.

When the Court decided *Sullivan*, it put down a marker. Throughout the nineteenth-century, state courts had begun to mold the common law of libel as inherited from England to suit a young country, often finding it inconsistent with republican government. But it was not until *Sullivan* that freedom of the press in the First Amendment became truly American. It could not have come sooner.

In the early 1960s, L.B. Sullivan, the public-official plaintiff in *Sullivan*, and other officials had decided that the best way to prevent “outside agitators” like the Northern press from supporting the civil rights movement in the South was to force them to reconsider “their habit of permitting anything detrimental to the South and its people to appear in their columns.”⁴ How? On pain of multi-million-dollar libel verdicts handed out by sympathetic all-white juries in favor of segregationist officials.

Sullivan was, with apologies for using the tired phrase, “an occasion for dancing in the streets” in the United States.⁵ And while the republican principles that animated it are widely shared—in the words of the House of Lords, that it “is of the highest public importance that a democratically elected governmental body . . . should be open to uninhibited public criticism”—the rest of the world has questioned whether *Sullivan* found the right tune.⁶

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² *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³ *Id.* at 270 (quoting *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945)).

⁴ ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 34 (1991).

⁵ 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 (internal quotation marks omitted) (quoting Alexander Meiklejohn).

⁶ *Derbyshire County Council v Times Newspapers Ltd and Others* [1993] AC 534.

Just this year, Chief Judge John MacMenamin of the Supreme Court of Ireland criticized the First Amendment's protections "when there is hate speech and character assassination . . . accessible on every desktop and mobile phone."⁷ In that context, he said simply of *Sullivan*, "The law in this State provides otherwise." Other countries have also roundly "rejected the precise balance struck in *Sullivan* between free expression and protection of reputation," including Australia, Canada, India, and the United Kingdom to name just a few.⁸

Many American lawyers will be unbothered by these criticisms. They are likely to remember that *Sullivan* was unanimous. And, indeed, it was. They also might remember that it has stood resolute since it was decided in 1964. And, indeed, it has. They are likely to remember the fundamental change it wrought. And, indeed, it did. As Justice Elena Kagan remarked when she was still an academic: "*Sullivan* has served as an utterly reliable source not of libel doctrine but of broad First Amendment principle."⁹

Sullivan's foundation, laid during the halcyon era of the Warren Court, is not as unshakable as all these lawyers might remember it today though. While that Court was committed first, in the words of its Chief Justice Earl Warren, to making sure that constitutional rights "become not theoretical rights, but actual rights that can be translated by our people into practice opportunities," the practical implications of *Sullivan* stumped it and its successors.¹⁰

In what follows, I attempt to make sense of *Sullivan* as multiple sitting Justices on the Court call for it to be revisited or overruled. First, I review *Sullivan*, and then I summarize the historical criticisms that it weathered at the Court soon after it was handed down. Next, I summarize contemporary attacks on *Sullivan* at the Court and other Justices' extrajudicial views on the case. Finally, I offer some closing remarks on the future of *Sullivan*.

New York Times Co. v. Sullivan

Sullivan was "a major instance of the important consequences of the civil rights issue and the apparatus of protest that accompanies it."¹¹ The Court decided the case in 1964 in the heat of the civil rights movement where Blacks in the South were engaging in nonviolent protest against Jim Crow. Newspapers like the *New York Times* were viewed as "outside agitators."¹² Southern plaintiffs, southern courts, and southern juries packed with white men who still called the Civil War the war of northern aggression used libel law as a cudgel to maintain the status quo.

Sullivan was not the traditional libel case; the suit was not even about journalism. Rather, it was about an ad. The Committee to Defend Martin Luther King and the Struggle for Freedom in the

⁷ Higgins v. Irish Aviation Auth., [2022] IESC 13 (Ir.).

⁸ Grant v. Torstar Corp., [2009] 3 S.C.R. 640 (Can.); see also Reynolds v. Times Newspapers Ltd., [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.) (collecting cases).

⁹ Elena Kagan, *A Libel Story: Sullivan Then and Now* (reviewing Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991)), 18 LAW AND SOCIAL INQUIRY 197, 215 (1993).

¹⁰ Harry E. Groves, *The Legal Philosophy of Chief Justice Earl Warren of the United States Supreme Court*, 2 UNI. MALAYA L. REV. 178, 183 (1960).

¹¹ Kalven, *supra* note 5, at 192.

¹² *Sullivan*, 376 U.S. at 294 (Black, J., concurring).

South commissioned the full-page ad to marshal support for its cause.¹³ As the ad explained, “thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.”¹⁴

But those students were met by police “intimidation and violence.”¹⁵ The ad alleged, among other things, that students had been “expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus.”¹⁶ The students’ “dining hall was padlocked in an attempt to starve them into submission.”¹⁷ It was signed by some sixty-four civil rights activists and urged readers to “support of the student movement, ‘the struggle for the right-to-vote,’ and the legal defense of Dr. Martin Luther King, Jr.”¹⁸

Sullivan, one of the commissioners of Montgomery, Alabama, sued the *Times* for libel over the ad. He alleged that its generic references to “police” reflected on him because of his position as commissioner overseeing the police.¹⁹ Despite the limited circulation of the *Times* in Alabama and an absence of any evidence of damage, the trial court found that the *Times* was subject to its jurisdiction and the all-white jury ultimately found in Sullivan’s favor.²⁰

For the *Times*, *Sullivan* was bet-the-company litigation. (A companion case brought against some of the signatories had even more catastrophic implications for those men.) What’s more, it risked setting a precedent for other cases—both those related to the ad and other cases that were sure to follow should Sullivan be successful. Worse, a jury had already awarded another plaintiff who sued over the ad \$500,000, and similar damages sought by three others totaled \$2,000,000.²¹

But then the Supreme Court stopped the southern political machinery in its tracks, reversing the \$500,000 verdict in favor of Sullivan on First Amendment grounds and imposing constitutional limits on future libel cases. Warren assigned Justice William Brennan to write the opinion. That opinion mirrored in many ways the arguments advanced by Herbert Wechsler, counsel for the *Times*. According to Brennan, echoing Wechsler, “libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”²²

What were those standards? Where are we to look for them? Brennan said we had to begin with first principles from the Court’s nascent First Amendment jurisprudence (while the First Amendment was nearly two hundred years old, it had only recently been construed as a limit on state power). The Court had already explained that the First Amendment “‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes

¹³ *Sullivan*, 376 U.S. at 257.

¹⁴ *Id.* at 256.

¹⁵ *Id.* at 257.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 258.

²⁰ *Id.* at 257.

²¹ *Id.* at 278 n.18.

²² Kalven, *supra* note 5, at 201.

desired by the people.”²³ It had similarly said that it was a “fundamental principle of our constitutional system” to maintain “the opportunity for free political discussion to the end that government may be responsive to the will of the people.”²⁴

History animated these observations. Beginning with the Sedition Act of 1798—a statute adopted by John Adams’ Federalists to keep Adams in power and his critics in jail for their criticisms of the Administration, Brennan said that opposition to that Act “first crystallized a national awareness of the central meaning of the First Amendment.”²⁵ The Act, James Madison wrote at the time, was incompatible with republican government in the United States as compared to that in England where “the Crown was sovereign and the people were subjects.”²⁶

From this, he famously observed: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.”²⁷ Practice, he said, supported him: “in the Union, the press has 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.”²⁸

No court, however, had ever declared the Act unconstitutional. Still, Brennan wrote, more than 150 years after the Act expired on its own terms and the fines assessed under it were repaid, “the attack upon its validity has carried the day in the court of history.”²⁹ The law was unconstitutional.

Nor did Brennan concern himself with the distinction between a sedition law adopted by the federal government (“*Congress* shall make no law . . .”) and libel laws adopted by a state government. The Fourteenth Amendment, adopted after the Civil War to restrict state rights, “eliminated” any such distinction.³⁰

From the history of the Sedition Act, Brennan concluded that “neither factual error nor defamatory content suffice[d] to remove the constitutional shield from criticism of official conduct.”³¹ As to truth, the Court had historically “refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials.”³² In politics, after all, “the tenets of one man may seem the rankest error to his neighbor.”³³ Recognizing that “erroneous statement is inevitable,” the Court had already found that “it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”³⁴

²³ *Sullivan*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

²⁴ *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

²⁵ *Id.* at 273.

²⁶ *Id.*

²⁷ *Id.* at 275.

²⁸ *Id.*

²⁹ *Id.* at 276.

³⁰ *Id.* at 277.

³¹ *Id.* at 273.

³² *Id.* at 271.

³³ *Id.*

³⁴ *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

As to the defamatory nature of speech, Brennan argued that damage to public official reputation afforded “no more warrant for repressing speech that would otherwise be free than does factual error.”³⁵ Rather, officials must “be treated as ‘men of fortitude, able to thrive in a hardy climate’” of criticism.³⁶ In fact, that the statement was harmful was often the point: “Criticism of . . . official conduct does not lose its constitutional protection merely because it is effective.”³⁷

From all of this, and more that we skip over for the sake of brevity, Brennan declared: “Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehemence, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³⁸

To give practical meaning to this discussion, he concluded that the First Amendment demanded “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁹ Something like this rule, Brennan observed, had long ago developed in the States as a “privilege for criticism of official conduct,” and the Court now believed that “such a privilege is required by the First and Fourteenth Amendments.”⁴⁰

Over the next thirty years, the Court applied *Sullivan*’s principles to limit criminal libel laws,⁴¹ to require public officials to carry the burden of proving falsity,⁴² to libel cases brought by public figures,⁴³ to impose certain limitations in cases brought by private figures that related to matters of public concern,⁴⁴ to require private figures to prove falsity,⁴⁵ to distinguish between factual statements (that were actionable as defamation) and statements of opinion (that were not),⁴⁶ and to undertake philosophical discussions about what it means for something to be false.⁴⁷

Historical Attacks on *Sullivan* at the Court

Despite its proliferation, *Sullivan* was never free from criticism. It was the beginning of a constitutional journey, a journey where no one seemed able to agree on the destination, or if there was one, or how best to get there. Its most strident supporters on the Court thought it did not go far enough or thought that it went too far in the wrong direction, that it had been thrown

³⁵ *Id.* at 272.

³⁶ *Id.* at 273 (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

³⁷ *Id.*

³⁸ *Id.* at 270.

³⁹ *Id.* at 279-80.

⁴⁰ *Id.* at 282-83.

⁴¹ *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

⁴² *Id.*

⁴³ *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162-65 (1967) (Warren, C.J., concurring in result); *id.* at 170 (opinion of Black, J.); *id.* at 172 (opinion of Brennan, J.).

⁴⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

⁴⁵ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 780 (1986).

⁴⁶ *Milkovich v. Lorain J. Co.*, 497 U.S. 1 (1990).

⁴⁷ *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496 (1991).

off course; its detractors came to believe that, whatever of its good intentions, the Court should have never embarked on a flag-planting expedition across the state territory of tort law.

One of the earliest critics was Justice Abe Fortas, who joined the Court a year after it decided *Sullivan*. In *St. Amant v. Thompson*, Fortas did not call on *Sullivan* to be overruled but rather characterized it as having only erected a “minimal standard” that defamation plaintiffs must meet.⁴⁸ For Fortas, “The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities.”⁴⁹

Then in 1968, the question presented itself of whether *Sullivan*’s rules for public officials applied to public-figure defamation cases as opposed to public-official cases. In *Curtis Publishing Co. v. Butts* and a companion case, four Justices argued against the extension of *Sullivan*’s actual malice rule. In an opinion authored by Justice John Marshall Harlan II (it was joined by Justices Tom Clark, Potter Stewart, and Abe Fortas), Harlan confessed fealty to *Sullivan*.⁵⁰ But, he argued, while “libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard,” “the rigorous federal requirements of [*Sullivan*] are not the only appropriate accommodation of the conflicting interests at stake.”⁵¹

In 1974, in *Gertz v. Robert Welch, Inc.*, the Court allowed the States to decide for themselves what level of fault is required in a case brought by a private figure that relates to a matter of public concern and imposed some limitations on damages in such cases. Justice Byron White, however, thought that extending *Sullivan* to private figures was a mistake.

White recognized that *Sullivan* and its progeny “worked major changes in defamation law.”⁵² And he stood by those cases: “The central meaning of [*Sullivan*], and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the State.”⁵³ But *Sullivan* did not “suggest that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation.”⁵⁴

His dissent in *Gertz* was not wholly surprising. Four years prior, in *Ocala Star-Banner Co. v. Damron*, White questioned *Sullivan*’s protections of mistaken falsehoods to avoid self-censorship: “The First Amendment is not so construed, however, to award merit badges for intrepid but mistaken or careless reporting. Misinformation has no merit in itself; standing alone it is as antithetical to the purposes of the First Amendment as the calculated lie.”⁵⁵

⁴⁸ *St. Amant v. Thompson*, 390 U.S. 727, 734 (1968) (Fortas, J., dissenting)

⁴⁹ *Id.*

⁵⁰ *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967) (opinion of Harlan, J.).

⁵¹ *Id.*

⁵² *Gertz*, 418 U.S. at 377 (White, J., dissenting)

⁵³ *Id.* at 387.

⁵⁴ *Id.*

⁵⁵ *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301 (1971) (White, J., concurring).

Then, in 1985, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a private figure libel case over a private matter, White said he was “convinced that *Gertz* was erroneously decided” and that he had “become convinced that the Court struck an improvident balance” in *Sullivan* itself.⁵⁶ The false statements that *Sullivan* protected, he wrote, were a “disservice” to democratic debate and impermissibly “impugn[ed] the honesty of those men and women and hence lessen[ed] the confidence in government.”⁵⁷ (Even *Gertz*’s author, Justice Lewis Powell questioned *Gertz*, “As I view it now, my opinion in *Gertz* is an example of overwriting a Court opinion.”⁵⁸)

In *Dun & Bradstreet, Inc.*, Chief Justice Warren Burger, for the first time, joined in White’s criticisms of *Sullivan*, saying he “agree[d] generally” with them.⁵⁹ And, later, in *Philadelphia Newspapers, Inc. v. Hepps*, a case about whether even private figures must carry the burden of proving falsity, Justice John Paul Stevens would write a dissent joined by Burger, White, and the to-be Chief Justice William Rehnquist, cautioning against what they saw as an further, unwarranted expansion of the *Sullivan* principle outside of the public official context.⁶⁰

Nor are the attacks on *Sullivan* premised only on it going too far. Justices Hugo Black, William Douglas, and Arthur Goldberg thought that *Sullivan* did not go far enough. “The press will be ‘free’ in the First Amendment sense,” Douglas said, “when the judge-made qualifications of that freedom are withdrawn and the substance of the First Amendment restored.”⁶¹ Thus, time and again, beginning with *Sullivan*, they argued that the Amendment’s “make-no-law” language meant what it said: “a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs.”⁶²

In a similar vein, Justice Thurgood Marshall argued that *Sullivan*’s actual malice standard had not “accomplish[ed] the ends for which it was conceived.”⁶³ Instead, liberal discovery rules allowing searching inquiries into a reporter’s state of mind had “proved [to be] tools for harassment and delay.”⁶⁴ He also questioned whether *Sullivan* erroneously focused on fault as opposed to limiting damages in public official/public figure cases, which Marshall thought were the chief problem: “The size of the potential judgment that may be rendered against the press must be the most significant factor in producing self-censorship.”⁶⁵

⁵⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1971) (White, J., concurring).

⁵⁷ *Id.*

⁵⁸ Amy Kristin Sanders & Kirk Von Kreisler, *Is Defamation Law Outdated? How Justice Powell Predicted the Current Criticism*, 20 FIRST AMEND. L. REV. 1, 18 n.94 (2022).

⁵⁹ *Id.* at 764 (Burger, C.J., concurring).

⁶⁰ *Hepps*, 475 U.S. at 789 (Stevens, J., dissenting).

⁶¹ *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 255 (1974) (Douglas, J., dissenting).

⁶² *Sullivan*, 376 U.S. at 295 (Black, J., dissenting); *see also, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 501 n.* (1975) (Douglas, J., dissenting) (listing cases); *Henry v. Collins*, 380 U.S. 356, 358 (1965) (arguing that “it would violate the First and Fourteenth Amendments to subject petitioner to any libel judgment solely because of his publication of criticisms against respondents’ performance of their public duties”); *Rosenblatt v. Baer*, 383 U.S. 75, 90 (1966) (Douglas, J., concurring); *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., dissenting).

⁶³ *Herbert v. Lando*, 441 U.S. 153, 204 (1979) (Marshall, J., dissenting).

⁶⁴ *Id.*

⁶⁵ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting).

Contemporary Attacks on *Sullivan*

Attacks on *Sullivan* waned as the Court abruptly stopped hearing libel cases in the 1990s. Instead, attacks became extrajudicial. Justice Antonin Scalia, for example, long criticized *Sullivan* in the press. In 2005, he said of *Sullivan*, “I don’t think that’s what the founding fathers intended.”⁶⁶ And, in 2011, he’d say that in *Sullivan* the Court “thought in modern society, it’d be a good idea if the press could say a lot of stuff about public figures without having to worry.”⁶⁷ A year later, he said he “abhorred” *Sullivan*.⁶⁸ While it’s hard to say what effect these public statements had on members of the Court, it’s clear that at least one Justice was listening.

McKee v. Cosby. In *McKee v. Cosby*, Kathrine McKee alleged that she was one of comedian Bill Cosby’s numerous victims of sexual violence.⁶⁹ In response to one of McKee’s interviews with the press, Cosby’s lawyer sent a letter to a news organization attacking McKee “with numerous false allegations, calling her an admitted liar, not credible, unchaste, and a criminal.”⁷⁰ As a result, McKee filed a libel lawsuit.⁷¹ The lower courts, however, dismissed the case, finding that she was a public figure who failed to plead actual malice.⁷² She then petitioned the Supreme Court for review.⁷³

After a long delay that made members of the media bar nervous, the Court finally declined to review the case. But, when the Court did so, Thomas issued an opinion attacking *Sullivan*: “The constitutional libel rules adopted by this Court in [*Sullivan*] 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.”⁷⁴

Although Thomas agreed that the McKee’s case was not the vehicle to revisit *Sullivan*, he wrote to explain “why, in an appropriate case,” the Court should do so.⁷⁵ *Sullivan* and its progeny, he said, “were policy-driven decisions masquerading as constitutional law.”⁷⁶ The Court had not begun “meddling in this area until 1964, nearly 175 years after the First Amendment was ratified,” and it should leave it to the States to strike an “acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.”⁷⁷

⁶⁶ John Dean, *Justice Scalia’s Thoughts, And A Few Of My Own, on New York Times v. Sullivan*, FINDLAW (Dec. 2, 2005), <https://tinyurl.com/mr2t2zaa>.

⁶⁷ Bob Cohn, *Scalia: Our Political System Is ‘Designed for’ Gridlock*, THE ATLANTIC (Oct. 6, 2011), <https://tinyurl.com/2p8dncjd>.

⁶⁸ Abby Rogers, *Justice Scalia ‘Abhors’ The Supreme Court’s 1964 Ruling On Libel*, INSIDER (Dec. 4, 2012), <https://tinyurl.com/sbe66xzt>.

⁶⁹ Petition for Writ of Certiorari, *McKee v. Cosby*, 139 S. Ct. 675. (No. 17-1542).

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 6.

⁷² *Id.*

⁷³ *Id.* at i.

⁷⁴ *See generally McKee*, No. 17-1542, 139 S. Ct. 675 (2019).

⁷⁵ *Id.*

⁷⁶ *Id.* at 675.

⁷⁷ *Id.* at 682.

First, Thomas argued that neither in 1791, when the States ratified the First Amendment, nor in 1868, when they ratified the Fourteenth, did libel law “require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages.”⁷⁸ A plaintiff in a civil defamation case “needed only to prove ‘a false written publication that subjected him to hatred, contempt, or ridicule.’”⁷⁹ Malice and injury were presumed, and truth was a defense.⁸⁰ “Far from increasing a public figure’s burden in a defamation action,” he said, “the common law deemed libels against public figures to be, if anything, more serious and injurious than ordinary libels.”⁸¹

Second, Thomas argued that the right to “uninterrupted enjoyment” of one’s reputation was never viewed by the Court as in conflict with these Amendments.⁸² Before *Sullivan*, the Court “consistently recognized that the First Amendment did not displace the common law of libel.”⁸³ Instead, libel was one of the “well-defined and narrowly limited classes of speech: that had “never been thought to raise any Constitutional problem.”⁸⁴ Yet, *Sullivan* refused to “repudiate” these earlier cases, choosing instead to reject the “generality of this historic view.”⁸⁵

Third, Thomas wrote that there were “sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompass[ed] an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law.”⁸⁶ Indeed, there was “[s]cant, if any, evidence” that the First Amendment “abolish[ed] the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers.”⁸⁷

In support, Thomas offered a few nineteenth-century cases and asserted that “[p]ublic officers and public figures continued to be able to bring civil libel suits for unprivileged statements without showing proof of actual malice.”⁸⁸ He further pointed to those States that continued to criminalize libel against public officials, even after the adoption of the Fourteenth Amendment.⁸⁹

Finally, Thomas faulted *Sullivan* for its brief a historical survey. *Sullivan*, “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.’”⁹⁰ This history was not persuasive because “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.”⁹¹

⁷⁸ *McKee*, 139 S. Ct. at 678.

⁷⁹ *Id.* (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 765 (White, J., concurring in judgment)).

⁸⁰ *Id.* (citations omitted).

⁸¹ *Id.* at 679.

⁸² *Id.* at 679-80 (quotation marks omitted).

⁸³ *McKee*, 139 S. Ct. at 680.

⁸⁴ *Id.* at 680 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

⁸⁵ *Id.* (citing *Gertz*, 418 U.S. at 386 (White, J., dissenting)); *Sullivan*, 376 U.S. at 268).

⁸⁶ *Id.*

⁸⁷ *Id.* (citing *Gertz*, 418 U.S. at 381; *id.* at 380-88 (White, J., dissenting)).

⁸⁸ *Id.* (citations omitted).

⁸⁹ *McKee*, 139 S. Ct. at 681 (citations omitted)).

⁹⁰ *Id.* (citations omitted).

⁹¹ *Id.* at 682.

Thomas conceded, though, “that defamation law did not remain static after the founding.”⁹² He acknowledged that the “common law did afford defendants a privilege to comment on public questions and matters of public interest.”⁹³ The privilege allowed discussion about the “‘public conduct of public men,’” which was seen as “a ‘matter of public interest’ that could ‘be discussed with the fullest freedom.’”⁹⁴ Yet, these changes were not the product of constitutional law but “changing policy judgments.”⁹⁵

Berisha v. Lawson. In *Berisha v. Lawson*,⁹⁶ Shkëlzen Berisha, the son of former Albania Prime Minister Sali Berisha, sued the publisher Simon & Schuster and its author, Guy Lawson, for defamation arising out of the book *Arms and the Dudes*.⁹⁷ He argued that the book defamed him as it alleged that Berisha was part of the Albanian mafia and involved in a “tragic explosion of an Albanian munitions stockpile” that killed twenty-five people.⁹⁸ As in *McKee*, the lower courts found that Berisha was a public figure who could not show actual malice.⁹⁹

In early 2021, Berisha filed a petition for a writ of certiorari, asking the Court to overrule *Sullivan*: “The question presented is whether this Court should overrule the ‘actual malice’ requirement it imposed on public figure defamation plaintiffs.”¹⁰⁰ As in *McKee*, the case was relisted multiple times for consideration by the Court. Then, on the last day of the October 2020 term, the Court denied the petition.¹⁰¹

Thomas again dissented, largely repeating his arguments from *McKee*. What made *Berisha* notable, however, was that Justice Neil Gorsuch, a Justice recently appointed by Donald Trump, also dissented becoming the second active Justice to suggest revisiting *Sullivan*.

Gorsuch claimed that the dearth of historical support for *Sullivan* merited granting the petition. According to him, to “govern themselves wisely, the framers knew, people must be able to speak and write, question old assumptions, and offer new insights.”¹⁰² But with this right, came a duty: “those exercising the freedom of the press had a responsibility to try to get the facts right – or, like anyone else, answer in tort for the injuries they caused.”¹⁰³ “This principle,” he said, “extended far back in the common law and far forward into our Nation’s history.”¹⁰⁴

In addition, Gorsuch observed that, in the nineteenth century, Justice Joseph Story maintained that “the liberty of the press do[es] not authorize malicious and injurious defamation.”¹⁰⁵ It was

⁹² *Id.*

⁹³ *Id.* at 679 (citation omitted).

⁹⁴ *Id.* (citation omitted).

⁹⁵ *Id.*

⁹⁶ 141 S. Ct. 2424 (2021).

⁹⁷ *Berisha v. Lawson*, 973 F. 3d 1304 (11th Cir. 2020).

⁹⁸ *Id.* at 1308.

⁹⁹ *Berisha*, 973 F.3d 1304.

¹⁰⁰ Petition for Writ of Certiorari, *Berisha v. Lawson*, 141 S. Ct. 2424 (No. 20-1063).

¹⁰¹ 141 S. Ct. 2424 (2021).

¹⁰² *Id.* at 2425-26 (Gorsuch, J., dissenting from denial of certiorari).

¹⁰³ *Id.* at 2426.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citation omitted).

this view, Gorsuch said, that was accepted in “this Nation for more than two centuries.”¹⁰⁶ Thus, from the Founding to 1964 when the Court decided *Sullivan*, defamation law “was ‘almost exclusively the business of state courts and legislatures.’”¹⁰⁷

He spent the balance of his opinion cataloguing how different the world in 2021 was than that of 1964. In 1964, “building printing presses and amassing newspaper distribution networks demanded significant investment and expertise,” and broadcast television “required licenses for limited airwaves and access to highly specialized equipment.”¹⁰⁸ As a result, a few “large companies dominated the press, often employing legions of investigative reporters, editors, and fact-checkers.”¹⁰⁹ But “today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world.”¹¹⁰ It was “hard not to wonder what these changes mean for the law,” Gorsuch said.¹¹¹

Moreover, in *Sullivan*, Gorsuch recounted, the Court accepted that the actual malice rule would shield “some false information,” but in practice it had turned into something of a grant of “immunity from liability.”¹¹² In 2018, there were only three libel trials, while there had been nearly thirty in the 1980s.¹¹³ Worse still, of those plaintiffs who do secure a jury verdict, “nearly one out of five today will have their awards eliminated in post-trial motions practice.”¹¹⁴

And, while the *Sullivan* Court “may have thought the actual malice standard would apply only to a small number of prominent governmental officials,” today it applied to all kinds of people.¹¹⁵ “Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public’s business,” he said, “increasingly seem to leave even ordinary Americans without recourse for grievous defamation.”¹¹⁶

This led to the “bottom line”: “publishing without investigation, fact-checking, or editing has become the optimal legal strategy.”¹¹⁷ When the actual malice rule is combined “with the business incentives fostered by our new media world,” “the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.”¹¹⁸

Gorsuch then added his voice to the “[m]any Members of this Court [who have] raised questions about various aspects of *Sullivan*”—although, unlike Thomas, he did “not profess any sure

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *Gertz*, 418 U. S. at 369-70 (White, J., dissenting)).

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 7.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 5-6.

answers” and was “not even certain of all the questions we should be asking.”¹¹⁹ While he did not doubt the Court in *Sullivan* had good intentions—“[d]epartures from the Constitution’s original public meaning are usually the product of good intentions”—and he urged the Court to return its attention “to a field so vital to the ‘safe deposit’ of our liberties.”¹²⁰

Coral Ridge Ministries Media v. SPLC. The Court would again deny review on a petition asking it to overrule *Sullivan* in the summer of 2022. In that case, *Coral Ridge Ministries Media, Inc. v. SPLC*, the plaintiff had brought a lawsuit against the Southern Poverty Law Center after the group classed it as a “hate group.”¹²¹ The lower courts found that Coral Ridge was a public figure corporation that could not prove actual malice. While Gorsuch did not dissent this time, Thomas again dissented as he had in *McKee* and *Coral Ridge*.

In a short dissent, Thomas explained that *Sullivan* and its progeny had “no relation to the text, history, or structure of the Constitution,” and the Court had “never demonstrated otherwise.”¹²² And, Thomas wrote, the case provided a good excuse to revisit *Sullivan*: “SPLC’s ‘hate group’ designation lumped Coral Ridge’s Christian ministry with groups like the Ku Klux Klan and Neo-Nazis. It placed Coral Ridge on an interactive, online ‘Hate Map’ and caused Coral Ridge concrete financial injury.”¹²³ To refuse intervention, he concluded, was to continue to “insulate those who perpetrate lies from traditional remedies like libel suits.”¹²⁴

Other Justices’ Positions on *Sullivan*

Thomas and Gorsuch are the only active Justices who have made their position on *Sullivan* public. And, it’s hard to say how the other Justices on the Court will come out. (Remember, Gorsuch as a lower court judge and at his confirmation hearings gave no indication at all that he was interested in revisiting *Sullivan*. As a result, his opinion in *Berisha* surprised many.) To hear a case involving *Sullivan* requires four votes; to overrule *Sullivan* would require five.

While some might jump to suggest that other conservative Justices would provide the extra votes, that’s not guaranteed. Justice Samuel Alito previously endorsed the Court’s libel jurisprudence, explaining that the “constitutional guarantee of freedom of expression serves many purposes, but its most important role is protection of robust and uninhibited debate on important political and social issues.”¹²⁵ “If citizens cannot speak freely and without fear about the most important issues of the day,” Alito wrote, “real self-government is not possible.”¹²⁶

¹¹⁹ 141 S. Ct. at 2430.

¹²⁰ *Id.*

¹²¹ No. 21-802 (Jun. 27, 2022).

¹²² *Id.* (marks and citation omitted).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *National Review, Inc. v. Mann*, 140 S.Ct. 344, 346 (2019) (Alito, J., dissenting from denial of certiorari).

¹²⁶ *Id.*

On the other hand, Justice Amy Coney Barrett refused to answer Senator Amy Klobuchar's question as to whether Barrett agreed with *Sullivan*.¹²⁷ While there were some "super-precedents" that could not be overruled, she said, *Sullivan* apparently was not one of them: "I can't really express a view on either *New York Times v. Sullivan* or Justice Thomas's critique."

Justice Brett Kavanaugh, like Gorsuch before him, previously endorsed *Sullivan*. But we don't know where he stands today. Considering his outlandish pique of sanctimony at his confirmation hearings, which he called a "national disgrace," his affection for the case and the press's role in American society may well have waned. He did, after all, condemn the media "circus."¹²⁸

In 1985, to-be Chief Justice John Roberts, then working at the White House, penned a short memo about *Sullivan* after then-Congressman Chuck Schumer from New York introduced a national libel law.¹²⁹ In that memo, he advised the White House to stay out of "the raging debate about whether the current state of libel law threatens the media (because of the cost of defense and the rare large verdict) or public figures (because of the near-impossibility of prevailing under the *New York Times v. Sullivan* standard)."¹³⁰

Roberts added that his "personal view" was that "a legislative trade-off relaxing the requirements for public figures to prevail (a return to the pre-*Sullivan* standards) in exchange for eliminating punitive damages would strike the balance about right, and would satisfy the First Amendment concerns of *Sullivan*."¹³¹ At his confirmation hearings, Roberts would again question *Sullivan*, saying that it presented "issues for the Court," including, for example, the scope of the public figure doctrine that Thomas and Gorsuch would later criticize.¹³²

If Thomas and Gorsuch are to find support, Kagan appears to be their best bet. Decades ago, as a professor, she wrote that "the revolution worked by *Sullivan* in the treatment of public official libel suits appears justified, correct, even obvious."¹³³ But, she said, *Sullivan* imposed "serious costs," the "adverse consequences" of which "do not prove *Sullivan* itself wrong," but did "force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far."¹³⁴ During her confirmation hearing, she also asserted that the Framers "did not understand the First Amendment as extending to libelous speech."¹³⁵

Justice Sonia Sotomayor came to the Court with little experience with libel. Still, in 2014, she was the author of the Court's opinion in *Air Wisconsin Airlines Corp. v. Hooper*.¹³⁶ While not a

¹²⁷ James Hohmann, *The Daily 202: First Amendment plays an unexpected starring role in Amy Coney Barrett confirmation hearing*, N.Y. TIMES (Oct. 15, 2020), <https://tinyurl.com/wwwavyku>.

¹²⁸ Jen Kirby, *Read: Brett Kavanaugh's angry, emotional opening statement*, VOX (Sept. 27, 2018) <https://tinyurl.com/4y22e2vy>.

¹²⁹ John G. Roberts to Fred F. Fielding (Aug. 28, 1985), <https://tinyurl.com/2abfr894>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States 636 (2005).

¹³³ Kagan, *supra* note 9, at 205.

¹³⁴ *Id.* at 205-06.

¹³⁵ Elena Kagan, Senator John Cornyn, Questions for the Record at 11.

¹³⁶ 571 U.S. 237 (2014).

libel case, the statute at issue borrowed *Sullivan*'s "actual malice" verbiage. In summarizing the Court's libel jurisprudence, Sotomayor faithfully summarized and, indeed, clarified the case law. She explained that the actual malice requirement "entails falsity" and the falsity must be "material." (As a result, she threw some dirt on the inverse phrasing of "substantial truth.")

Finally, Justice Ketanji Brown Jackson has not directly criticized *Sullivan*. But, in two cases from her time as a district court judge, she took a narrow view of *Sullivan*.¹³⁷ While the concern presently is the overruling of *Sullivan*, Jackson's narrow application of its existing rules perhaps suggests that she would be amenable to a half-measure "solution" by maintaining the present rules but redefining how sweepingly they might otherwise apply.

What's Next

While *Sullivan* might be safe for now, it seems increasingly likely that the Court will revisit the case. Lower court judges are already trying to tee up an attractive case. After Thomas made his views known, Judge Laurence Silberman, who sits on the influential U.S. Court of Appeals for the D.C. Circuit, issued a scathing and overtly partisan assessment of *Sullivan*.¹³⁸ Other judges have also felt free to criticize *Sullivan* after Thomas' broadsides, including judges on the Florida Court of Appeals and Michigan Court of Appeals.¹³⁹ In light of this, I offer a few observations about *Sullivan*.

First, the last meaningful *Sullivan*-related case the Court issued an opinion in dates to the 1991 case, *Masson v. New Yorker Magazine, Inc.* Not a single Justice that was on the Court remains on it today. We very much do not know what a *Sullivan* case would look like if it did reach today's Supreme Court.

Moreover, while *Sullivan* stands for the general principle that the First Amendment has a central meaning, *Sullivan* has noticeably not been cited in an opinion for the Court in almost a decade despite the Court hearing many First Amendment cases. On a court where Justices feel free not to overrule precedent but merely abandon it *sub silentio*, this silence is especially worrisome.

Second, while Thomas and Gorsuch have recently criticized *Sullivan*, no Justice has felt compelled to defend *Sullivan* with, perhaps, the exception of Alito and his opinion in *National Review Inc. v. Mann*. While this may be strategic so as to avoid the appearance of a live dispute over *Sullivan*'s continued viability, the lack of stalwart defenders of *Sullivan* speaking out on the Court begs the question of whether such stalwart defenders are, in fact, on the Court today.

Third, to switch gears a bit to address some criticisms of Thomas and Gorsuch, that libel is treated differently than other torts under the First Amendment seems perfectly reasonable. Libel

¹³⁷ See *Kahl v. Bureau of Nat'l Affs., Inc.*, No. CV 09-0635, 2015 WL 13546450 (D.D.C. Aug. 21, 2015), *rev'd*, 856 F.3d 106 (D.C. Cir. 2017); *Zimmerman v. Al Jazeera Am., LLC*, 246 F. Supp. 3d 257 (D.D.C. 2017).

¹³⁸ *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting).

¹³⁹ *Mastandrea v. Snow*, 333 So.3d 326, 328 (Thomas, J., concurring with opinion); *Reighard v. ESPN, Inc.*, No. 355053, 2022 WL 1513112, at *19 (Mich. Ct. App. May 12, 2022) (Boonstra, P.J., concurring).

is unlike most torts. It is an “oddity” of tort law.¹⁴⁰ Its target is not conduct but speech. And because of the liberality with which the common law protects reputation, defamation claims are likely to permeate the rough and tumble world of politics, intruding on First Amendment rights.

Relatedly, we, here in the United States, should take little comfort in Thomas’ observation that the States are perfectly capable of striking the appropriate balance between freedom of speech and the feigned purpose of protecting reputation. Take, for example, *Dobbs v. Jackson Women’s Health Organization* where the Court held that “the authority to regulate abortion must be returned to the people and their elected representatives.”¹⁴¹ Rather than considered choice after the ruling, several States quickly moved to ban abortion outright.¹⁴²

Or, take the aftermath of *Shelby County v. Holder*, which held unconstitutional certain portions of the Voting Rights Act. The majority there assured that the political branches could address the fallout of its opinion and, at any rate, that the United States “changed” from the days of racist voting laws.¹⁴³ But, of course, that turned out to be untrue as numerous States—usually conservative ones—moved immediately to begin rolling back voting rights.¹⁴⁴

Were *Sullivan* overruled, no doubt we could expect more of the same with several States moving to open up their libel laws. No doubt these laws will, in turn, be weaponized against “outside agitators” just as they were in pre-*Sullivan* Alabama. The risk to speakers will in such a world are hard to overstate. *Sullivan* was, after all, bet-the-company litigation; and the signatories to the ad were driven to the brink of financial ruin.

We can imagine even more nightmarish scenarios. While we know the prevalence of civil libel lawsuits in this country, it’s worth pausing to recognize that some two-dozen states still have criminal libel laws. While the Court circumscribed criminal libel laws based on *Sullivan* too, it’s still rare to go more than a few weeks without some hellish story of law enforcement—usually in small, poor, and rural communities—tossing a critic in jail for daring to criticize police. Were *Sullivan* to fall, these abuses of criminal libel would surely increase.

Finally, we must not forget that the attack on *Sullivan* is merely one battle in a larger culture war. Much like attacks on voting rights, discrimination against the LGBTQ+ community, and the recent rise in book banning, attacks on *Sullivan* are part of the illiberal attack on individual rights and democracy. Let’s be clear: the goal is not to protect reputation. Unrestrained libel law is about power. Power to control thought. Power to prevent criticism. Power as a means and end.

That this is where we find ourselves so many years later is impressively depressing. As Brennan discussed at length in *Sullivan*, in 1798, the U.S. Congress passed the Sedition Act. That too was about power. We rounded up untold numbers of citizen critics and newspapermen and threw

¹⁴⁰ *Gertz*, 418 U.S. at 349.

¹⁴¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022).

¹⁴² *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Aug. 17, 2022), <https://tinyurl.com/yxj8bvch>.

¹⁴³ *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).

¹⁴⁴ P.R. Lockhart, *How Shelby County v. Holder upended voting rights in America*, VOX (Jun. 25, 2019), <https://tinyurl.com/yc25vw3j>.

them in jail. Fortunately, we let that Act expire. And we agreed that the Act was, in the words of St. George Tucker, the editor of the first American edition of Blackstone's *Commentaries on the Laws of England*, "the most flagrant violation of the constitution of the United States."¹⁴⁵

Yet, here we are again, considering whether to have another go, and it is far from improbable that the Court will greenlight that endeavor. So, there is real reason to be concerned with attacks on *Sullivan* beyond the mere violence it would inflict on the Court's First Amendment jurisprudence. If *Sullivan* falls, we'll have more to worry about than First Amendment doctrine.

Free press defenders must, then, start looking for solutions outside of the Court. State anti-SLAPP statutes, which are becoming increasingly popular, are one solution. A federal anti-SLAPP would be even better. While some have suggested a national libel law—an idea that is at least 120 years old, there are more modest approaches that would insulate much of the press and public from overruling *Sullivan*. For example, a colleague and I have proposed a federal preemption statute that would preempt onerous libel laws making libel lawsuits unattractive to those who seek to abuse them.¹⁴⁶

It's these kinds of creative solutions—not appeals to the Court—that will best protect freedom of press and speech when the Court comes for *Sullivan*. More importantly, they will protect individual citizens from those who wish to use the law and the courts to bend others to their political will. We'd do good to start now.

¹⁴⁵ ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF ENGLAND 123 n.9 (1803).

¹⁴⁶ Matthew L. Schafer & Jeff Kosseff, *Protecting Free Speech in a Post-Sullivan World*, 75 FED. COMM'C'N L.J. --- (forthcoming).

English Libel Law and the SPEECH Act: A Comparative Perspective

By Dave Heller and Katharine Larsen*

American and English libel law were historically written with the same pen, but separated dramatically after the United States Supreme Court decided *New York Times v. Sullivan*.¹ At its heart, the *Sullivan* decision reflects not only the oft-quoted American commitment to “robust” and “uninhibited” debate on public issues, but also a keen awareness that the common law of defamation can be manipulated to punish the press, deprive the public of vital information, and launder the reputation of rogues. As Harry Kalven Jr. wrote at the time it was decided, the facts of *Sullivan* left the inescapable impression that “Alabama pounced on the opportunity to punish the *Times* for its role in supporting the civil rights movement in the South.”²

The Supreme Court’s warnings about the dangers of common law defamation have been proven true over the past half-century in England.³ There was never a single cultural or political moment to mark its start but, in the decades following *Sullivan*, London became the “libel capital of the world” in which the aggressive and costly pursuit of libel claims by powerful people created a vast environment of self-censorship.⁴ Scholars surmised that the common law created a

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¹ 376 US 254 (1964); see Johnson, *Comparative Defamation Law: England and the United States*, 24 U. Miami Int’l & Comp. L. Rev. 1, 4 (2017) (“As late as 1964, American libel law was essentially ‘identical’ to English libel law.”).

² Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 Supreme Court Review 191, 200.

³ The United Kingdom consists of three separate legal jurisdictions: England and Wales, Scotland, and Northern Ireland. This Chapter focuses on the law of England and Wales – England in shorthand – where the bulk of caselaw has developed.

⁴ Robertson QC & Nicol QC, *Media Law* 38 (3d ed. 1992) (As explained by Geoffrey Robertson QC and now-Judge Andrew Nicol, in their authoritative treatise, “[n]o other legal system offers such advantages to the wealthy maligned celebrity. . . . The result is that Britain reads less than other countries, as nervous publishers cut passages critical of the wealthy and powerful from books published locally.”)

“structural chilling effect,” i.e., an environment where certain categories of news reporting – such as accounts of police misconduct – became “no go areas” for fear of suit.⁵ Perversely, what flourished instead was celebrity gossip and scandal which, even if deliberately false, could be paid for out of increased sales. In other words, tabloids could budget for payments of libel damages.⁶ On the other hand, more serious newspapers and book publishers stung by damage awards and legal costs would “often want to sidestep the financial risks altogether by deleting material or ‘spiking’ it. Investigative and polemic writing or broadcasting being the primary victims.”⁷

These “opportunities” to weaponize defamation law were exploited by the legal profession based in London. It was said of notorious plaintiff’s lawyer Peter Carter-Ruck that: “Until Carter-Ruck got his teeth into the libel law, actions were infrequent and inexpensive. But from the 1950s, Carter-Ruck became the leading libel lawyer and clients sought him out. He honed his menacing letters to encourage socialites to sue for imagined slights and fashion a weapon for politicians to suppress hostile stories. . . . He established the idea that libel law was complicated and merited very high fees. In the process he became very rich. ‘I like to bill the clients as the tears are flowing.’”⁸ This created a vicious circle of bad law incentivizing litigation, forum shopping, high damage awards and forced settlements.

Whatever the starting point, the phenomenon was made worse by the advent of online publishing, which subjected a vast number of foreign publications to potential liability if they were read by anyone in England. This provided rocket fuel to the problem of so-called “libel tourism” and sharpened dramatically the clash of constitutional versus common law libel – most notably with respect to enforcement of foreign libel judgments.

During this period, *New York Times v. Sullivan* was not wholly ignored in England. Rather, it was cited and debated, though not adopted.⁹ It served as something of a “directional principle” for those English lawyers, scholars,

⁵ Barendt, Lustgarten, Norrie & Stephenson, *Libel and the Media: The Chilling Effect* 192-93 (1997).

⁶ It has also been argued that England’s strict libel laws played a role in encouraging illegal phone hacking by British tabloids as a means of gathering proof of the truth of gossip and rumor and make publication defensible. See *Why Britain’s Strict Libel Laws Actually Encourage Tabloid Antics*, Time, July 13, 2011.

⁷ See Nicol QC, Millar QC & Sharland, *Media Law and Human Rights* 64 (2001).

⁸ Hooper, *The Carter-Ruck chill. He did for freedom of speech what the Boston Strangler did for door-to-door salesmen*, The Guardian, Dec. 23, 2002. Notably, the cited article was published on the occasion of Carter-Ruck’s death, when he could no longer bring a libel suit.

⁹ *Derbyshire County Council v. Times Newspapers Ltd*, [1993] AC 534 (government authority cannot sue in libel for words that reflect on its governmental and administrative functions; citing *Sullivan*, the House of Lords observed that “the public interest considerations which underlaid [*Sullivan*] are no less valid in this country”).

politicians and campaigners who recognized that the ancient common law cannon was incompatible with modern democracy – and that reform was necessary.

This Chapter offers a brief survey of these issues – from English libel law at and after the Supreme Court decided *Sullivan*, to the thorny issues of libel tourism, law reform and enforcement of judgments that have brought these issues into sharp focus. Each of these topics could be addressed at much greater length. The modest purpose of this overview is to shed light on an overseas branch of our “legal family tree”—and perhaps glimpse at what our branch could suffer were we to abandon *Sullivan*. It concludes with a discussion of what can only be described as the emphatic rejection of the English approach to defamation law, in the name of *Sullivan* and our own First Amendment, by a unanimous Congress in 2010.

I. LIBEL LAW IN ENGLAND FROM *SULLIVAN* ONWARD

To understand what English defamation law was like in 1964 when *Sullivan* was decided, one could profitably start by reading Justice Brennan’s summary of the instructions given to the Alabama jurors in that case. “Once ‘libel per se’ has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. . . . Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury.”¹⁰ This strict liability instruction was “customary under Anglo-American libel law.”¹¹ Indeed, those jury instructions reflected the then-existing common law of libel in England (and in much of the rest of the United States).¹² As the House of Lords explained in this florid paragraph:

Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those

¹⁰ *Sullivan*, 376 US at 267.

¹¹ *Kalven*, *supra*, at 195.

¹² See *id.* at 196 (citing, e.g., *Peck v. Tribune Co.*, 214 US 185, 189 (1909) (“As was said of such matters by Lord Mansfield, ‘Whatever a man publishes he publishes at his peril.’”). See also Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, *Comm’n’s L. & Policy*, 13:4, 415, 418 (2018) (“American libel law is peculiarly media-oriented, but prior to *Sullivan* in 1964 it was identical to the still restrictive English common law of libel. This is no surprise, given that U.S. libel law originated with British law. The Anglo-American law of defamation was based on the rule of ‘strict liability.’”).

circumstances he has no defence to the action, however excellent his intention.¹³

A defamatory statement is one that tends to lower someone in the eyes of right-thinking members of society generally or to expose them to hate, ridicule or contempt—a familiar formula, but with broader scope under English law. In 1959, Liberace, the famously flamboyant American entertainer, successfully sued a *Daily Mirror* columnist for calling him a “a deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered heap of mother love.”¹⁴ The judge determined that this critique could bear the defamatory meaning that Liberace was a homosexual which, of course, was true but not something the newspaper could prove. Some years later, a British actor and director sued a *Sunday Times* movie critic for calling him “hideous”—a divided Court of Appeal held his case should go to a jury since it could expose him to ridicule.¹⁵ More recently a British tennis player obtained more than thirty apologies and damages from dozens of publishers for being called the “world’s worst tennis pro.”¹⁶ His string of legal victories was only broken when the *Daily Telegraph* successfully mounted a defense of truth.¹⁷

The main defenses to defamatory statements were truth (justification), fair comment and privilege. In each instance, the defendant had the burden of establishing the defense. The practical impact of allocating the burden of proof of truth in a defamation action in this manner cannot be overstated. This is because there will always be cases where the issue of truth is inconclusive – or ambiguous in light of publication deadlines. Among many notorious cases, in 2004, the *Sunday Times* paid £300,000 in damages to cyclist Lance Armstrong for reporting accurately, but unproveably to the standards of English law, that Armstrong used performance enhancing drugs.¹⁸ In England, the difficulties of proving truth could

¹³ *Hulton (E) & Co v Jones*, [1909] [UK Law Rp AC 57 \(1910\) AC 20](#) (6 December 1909).

¹⁴ Greenslade, *The meaning of ‘fruit’: How the Daily Mirror libeled Liberace*, *The Guardian*, May 26, 2009. The newspaper did not even attempt to prove truth, but sought unsuccessfully to defend the column as fair comment.

¹⁵ *Berkoff v. Burchill* (1997) EMLR 139 (“film directors, from Hitchcock to Berkoff are notoriously hideous-looking people”).

¹⁶ Deans, *Tennis pro labelled world's worst loses libel action against Daily Telegraph*, *The Guardian*, April 28, 2010.

¹⁷ *Id.*

¹⁸ In a pretrial decision addressing the issue of “meaning,” the judge noted that “[s]ome of the particulars pleaded in the defence go back for decades and others even to ancient Greece and Rome.” *Armstrong v. Times Newspapers*, [2004] EWHC 2928 (QB); see *id.* (“The overall effect of the quotations and the events described in the article is to leave readers with the impression that Mr. Armstrong’s denials of drug-taking beggar belief and are to be taken with a pinch of salt. It is not for me to rule on meaning, at least at this stage, but only on whether the words are capable of bearing the pleaded meanings. I am quite satisfied that the words are not capable of conveying merely that ‘a third party has alleged enough to warrant an investigation of the claimant’s activities.’”). After Armstrong’s deceit was revealed, the *Sunday Times* [successfully sued him](#) to recover the 1,000,000 pounds it paid him in damages and costs..

lead to complicated, time-consuming and often head-spinning litigation to determine the “meaning” of the alleged defamation that needed to be proven true.¹⁹

The “fair comment” defense was akin to the defense commonly known in the United States as “opinion based on disclosed facts”²⁰—but significantly narrower. In England, the published “comment” had to be about a matter of public interest and made without malicious motive. Moreover, the “fairness” of the comment had to be determined only with reference to the publication in which it appeared, not in its broader context.²¹ Thus, in *Telnikoff v. Matusevitch*, the House of Lords reinstated a libel claim over a letter to the editor, holding that it was an error of law for the trial court and court of appeal to have considered, in determining whether the letter constituted “fair comment,” the initial article that prompted it in response.²²

The “privilege” defense protected accurate republication of statements made in court and other official documents—not unlike the U.S. fair report privilege.²³ However, the privilege would be lost if publication was malicious or if it was deemed contrary to the public interest.²⁴

As it turned out, years later, the concept of “privilege” provided an important doctrinal vehicle to expand the protection of responsible journalism in the public interest. In *Reynolds v Times Newspapers Limited*,²⁵ the House of Lords

¹⁹ Given the strict liability standard in English defamation law, and as defamation cases flourished in the post-*Sullivan* years, the question of “meaning” became a crucial one for defendants as it would determine precisely what they had to prove true, fair or privileged. For example, when reporting an allegation of misconduct, is the alleged defamatory meaning that plaintiff is guilty (difficult to prove); suspected of misconduct (easier to prove) or that grounds exist to inquire into plaintiff’s conduct (the best-case scenario for the press)? For a discussion of the different levels of meaning see, e.g., *Jameel v. Times Newspapers* [2004] EWCA 983 (“The elevation of this taxonomy of meanings into legal categories is recent.”). See also Kenyon, *Defamation Comparative Law & Practice* 23-66 (2006) (discussing the importance of determining meaning).

²⁰ *Restatement of Torts (Second)* §566 (1974).

²¹ See *Telnikoff v. Matusevitch*, [1991] 4 ER 817.

²² *Id.* See *Libel in context – a key amendment to the Defamation Bill is put forward as it passes through the House of Lords*, Law Gazette, April 23, 1996.

²³ See, e.g., *Tsikata v Newspaper Publishing Plc*, [1996] EWCA Civ 618.

²⁴ *Id.* (reports of official proceedings that have been “conclusively and publicly discredited thereafter” may no longer be in the public interest as required for the privilege to attach). Compare *Solaia Tech. v. Specialty Publ’g Co.*, 852 NE 2d 825, 843 (Ill. 2006) (“We hold that the fair report privilege overcomes allegations of either common law or actual malice.”). See also Defamation Act 1996 § 15 (“The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to be made with malice.”).

²⁵ [1999] 4 All ER 609; 2 AC 127. The House of Lords noted that effective Oct. 2000 the European Convention on Human Rights was to be incorporated into all U.K. legal jurisdictions. This included the right to freedom of expression (Article 10) and right to respect for private and family life (Article 8). The main impact has been an ongoing development of a European-influenced law of privacy in the U.K. pursuant to Article 8. See, e.g., *Bloomberg LLP v. ZXC* [2022] UKSC 5 (affirming judgment and injunction against American financial news company and holding that “a person under

undertook an extensive examination of English, American and European Court of Human Rights law and recognized that the common law concept of a “duty” to communicate defamatory statements could and should be expanded to protect responsible journalism. The House of Lords, however, rejected a broad privilege for “political speech.”²⁶ Instead, Lord Nicholls set out a list of ten factors surrounding the gathering, preparing and publishing of information to determine whether the journalism was “responsible.” The factors were: 1) The seriousness of the allegation; 2) The nature of the information and the extent to which it constitutes a matter of public concern; 3) The source of the information; 4) The steps taken to verify the information; 5) The status of the information; 6) The urgency of the matter; 7) Whether comment was sought from the plaintiff prior to publication; 8) Whether the article contained the gist of the plaintiff’s side of the story; 9) The tone of the article; and 10) The circumstances of the publication including the timing.²⁷

When it was decided in 2001, *Reynolds* was hailed as a sort of “*New York Times v. Sullivan* lite”—but it never lived up to its promise. Trial level decisions “gave the appearance of wishing to define it out of existence.”²⁸ Trial court judges schooled in the common law not only took a restrained approach to *Reynolds*, they typically treated the ten factors as a mandatory check list, all items of which needed to be satisfied for the privilege to apply, rather than as a set of potentially applicable considerations, any combination of which might, in a given case, give rise to the privilege.²⁹

In 2006, the House of Lords delivered a rebuke to the lower courts in *Jameel v. Wall Street Journal Europe*, a case concerning a *Journal* article about international investigations into Saudi-linked terrorism financing.³⁰ The trial court

criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation”)

²⁶ *Id.* (“Given the procedural restrictions in England I regard the recognition of a generic qualified privilege of political speech as likely to make it unacceptably difficult for a victim of defamatory and false allegations of fact to prove reckless disregard of the truth.”)

²⁷ *Id.*

²⁸ Stephens, Hooper, Mathieson, et al., *MLRC 50-State Survey Media Libel Law* 983 (2005) (“Six years into the defense there has yet to be a successful first instance decision for a defendant on a *Reynolds* defense.”). See, e.g. *Gilbert v. MGN*, [2000] EMLR 680 (privilege did not apply because of inadequate investigation and unreliable source); *Al Fagih v. HH Saudi Res. & Marketing* [2001] EWCA Civ 1634 (trial court ruled that privilege did not apply because of failure to publish plaintiff’s side of the story); *Grobbelaar v. News Group Newspapers* (2001), EWCA civ 33 (privilege did not apply because of overall tone of article).

²⁹ England employs “specialist” libel judges, typically drawn from the ranks of defamation barristers, to preside over virtually all defamation cases brought in the High Court of London. The rationale is that defamation law is so complicated it requires a specialist judge. As can be gleaned from this Chapter, that is certainly an accurate assessment. The upside of this regime is the efficiency of having expert judges. The downside is a natural resistance to innovation and creative thinking otherwise typical of the common law and its evolution.

³⁰ [2006] UKHL 44 (“In this case, Eady J said that the concept of ‘responsible journalism’ was too vague. It was, he said, ‘subjective’. I am not certain what this means, except that it is obviously a

judge (a former media law barrister) found that the newspaper's defense – if any – should be to prove truth; there was no obvious “social or moral duty” for the newspaper to have published the article when it did (five months after Sept. 11) or in the form it did.³¹ Revisiting the issue of privilege for responsible journalism, the House of Lords reversed, concluding that, “[i]f ever there was a story which met the test, it must be this one.”³² But the Baroness Hale added a caution: “the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it.”³³ This legal distinction between “what the public is interested in” and “what is a matter of public interest” gives English judges an ongoing and significant role in determining what journalism is protected and, relatedly, what journalism is created.³⁴

On top of these issues, English publishers could take little comfort in the statutes of limitations which, in the United States, tend to be both relatively short (typically one or two years) and subject to a “single publication rule” that starts the “clock” running on initial publication and subsumes all subsequent dissemination of the same material by the original publisher.³⁵ Under the infamous 1849 decision in *Duke of Brunswick v. Harmer*³⁶ (good law until 2014!), a separate cause of action existed for each and every distribution of an alleged libel, no matter the date of first mass publication. In 1849, this meant that a 17-year old newspaper available in the British Library Reading Room was still actionable.³⁷ In the 2000s, it meant potential chaos for publications available online.³⁸ In *Loutchansky v. The Times Newspapers Ltd.*, the Court of Appeal, in an unfortunately shortsighted decision, applied the *Duke of Brunswick* rule to a newspaper's online archives.³⁹ The Court of Appeal asserted that the “maintenance of archives is a comparatively

term of disapproval. (In the jargon of the old Soviet Union, ‘objective’ meant correct and in accordance with the Party line, while ‘subjective’ meant deviationist and wrong.”).

³¹ [2004] EWHC 37 (QB) (reversed on appeal).

³² [2006] UKHL 44 (“In the immediate aftermath of 9/11, it was in the interests of the whole world that the sources of funds for such atrocities be identified and if possible stopped.”).

³³ *Id.*

³⁴ Foster, *Interesting or in public interest?*, Press Gazette, Aug. 28, 2007 (“between a judge and the general public there is little common ground over what public interest actually means”).

³⁵ Sack, *Sack on Defamation: Libel, Slander, and Related Problems*, § 2.6.4 (5d ed. 2017). See also *Lokhova v. Halper*, 995 F. 3d 134, 142 (4th Cir. 2021) (“Jurisdictions that have adopted the single publication rule are nearly unanimous in applying it to internet publications.”)

³⁶ [1849] 14 Q.B. 185.

³⁷ *Id.*

³⁸ *Berezovsky v. Forbes*, [2000] 1 W.L.R. 1004, 1012 (per Lord Steyn) (under *Duke of Brunswick* multiple publication rule, it is a distinctive feature of English law that each communication is a separate libel).

³⁹ [2001] EWCA 1805.

insignificant aspect of freedom of expression.”⁴⁰ It described the newspaper archive as “stale news,” which could not rank in importance with the dissemination of contemporary material.⁴¹

This is but a thumbnail of English defamation law in place in 1964 and the decades that followed. Alongside the referenced defenses, there stood a complex maze of pleading and procedural rules that, taken together, confounded even the most esteemed judges. As Lord Diplock observed in 1968, “I venture to recommend once more the law of defamation as a fit topic for the attention of the Law Commission. It has passed beyond redemption by the courts.”⁴² A 1996 law treatise pointedly described English defamation law as “absurd, complex and unfair.”⁴³

II. THE RISE OF LIBEL TOURISM—SYMPTOM OF A LARGER PROBLEM

In 1992, Geoffrey Robertson QC and Andrew Nicol (QC, now Judge) noted London’s magnetic pull on aggrieved international politicians, oligarchs and celebrities. Their list included Sylvester Stallone, Armand Hammer, Erica Jong, Bianca Jagger and Greek Prime Minister Andreas Papandreou. Each sued or threatened to sue an American publisher in London.⁴⁴ Over the next decade, more joined the parade, including Roman Polanski, Kate Hudson, and Cameron Diaz, as well as an assortment of Russian oligarchs and Saudi financiers.⁴⁵ The tactic became known as “libel tourism.”⁴⁶

⁴⁰ *Id.* at para. 74 (“We accept that the maintenance of archives, whether in hard copy or on the internet, has a social utility, but consider that the maintenance of archives is a comparatively insignificant aspect of freedom of expression.”).

⁴¹ *Id.* at para. 74.

⁴² *Slim & Others v. Daily Telegraph & Others*, [1968] 2 Q.B. 157, 179.

⁴³ Weir, *A Casebook on Tort* 525, 530 (8th ed. 1996) (The plaintiff “can get damages (swingeing damages!) for a statement made to others without showing that the statement was untrue, without showing that the statement did him the slightest harm, and without showing that the defendant was in any way wrong to make it (much less that the defendant owed him any duty of any kind).”).

⁴⁴ Robertson QC & Nicol QC, *supra*, at 38.

⁴⁵ Brook, *Kate Hudson wins damages from UK Enquirer*, *The Guardian*, July 20, 2006; Wheatcroft, *The worst case scenario: British libel law means our press is vulnerable and the wealthy are shielded from criticism*, *The Guardian*, Feb. 28, 2008 (“The late Telly Savalas was one of the first, winning an action here that he couldn’t even have begun in the US. Roman Polanski was allowed to give evidence from France to London by video link when he sued *Vanity Fair*, a New York magazine.”); Lyall, *Are Saudis Using British Libel Laws to Deter Critics?*, *N.Y. Times*, May 22, 2004; See also Hooper, *Reputations Under Fire: Winners and Losers in the Libel Business* 428 (2000) (“London has become known to many foreign ‘forum-shoppers’ as a Town named Sue—a place where you can launder your reputation on the basis of a few sales in the UK of some overseas publication.”).

⁴⁶ The term “libel tourism” gained currency among English defamation lawyers in the 1990s and early 2000s. See, e.g., Carvajal, *Britain, a destination for “libel tourism,”* *N.Y. Times*, Jan. 20, 2008 (“You’re an investment bank in Iceland with a complaint about a tabloid newspaper in Denmark that published critical articles in Danish. Whom do you call? A pricey London libel lawyer. That is called libel tourism by lawyers in the media trade.”)

The reason was two-fold. First, of course, was the body of law itself—one which combined the presumptions of the common law with a modern costs recovery and damages system that was the highest in Europe.⁴⁷ This legal cocktail worked to the decided advantage of plaintiffs (whether libel tourist or English resident) in extracting damages, apologies and even pulping of published books and magazines.⁴⁸ Not surprisingly given this system, English libel lawyers actively sought out clients in America, touting their chances of success in a London court.⁴⁹

Secondly, as noted above, English law did not limit the exercise of jurisdiction in defamation cases based on considerations of fundamental fairness. In defamation cases, an English court had presumptive jurisdiction over a foreign defendant if there was *any* publication in England and the defendant was properly served. The English law of jurisdiction in libel cases was so solicitous that the House of Lords found it wholly appropriate for a London court to hear a case brought by film director Roman Polanski against the American magazine *Vanity Fair*— even though Polanski was a fugitive from U.S. justice for raping a 13-year old and subject to arrest if he entered Britain.⁵⁰ Polanski was allowed to appear by video-conference. The trial judge noted that, while “the reason underlying the application was unattractive . . . this did not justify depriving Mr. Polanski of his chance to have his case heard at trial.”⁵¹

The Rachel Ehrenfeld case, discussed further below, brought the issue to a head in the United States. For U.S. media lawyers and their clients, it was unfathomable that a serious book, intended for U.S. readers and entirely legal in this country, addressing the most serious issue of the day—international terrorism financing—could be censored and its author hounded by a declaration of falsity issued in absentia by an English court.⁵²

The problem was not limited to American defendants. Campaigners for reform highlighted equally egregious cases brought in London—such as the libel suit by an Icelandic bank, Kaupthing, against the Danish newspaper *Ekstra Bladet*

⁴⁷ A 2008 Oxford University study examining legal fees, cost recovery and damage awards found English defamation cases to be by far the costliest in Europe. See Centre for Socio-Legal Studies, *A Comparative Study of Costs in Defamation Proceedings Across Europe* 180 (2008). With respect to legal fees, the study noted that defamation cases in England had the most lawyers per case, the lengthiest proceedings, and the most expensive legal fees. As for cost recovery, under England’s “loser pays” system, a winning plaintiff is entitled to recovery their attorney fees as costs. *Id.*

⁴⁸ See, e.g., Johnson, *Music critic's book is pulped as Penguin loses defamation case*, The Independent, Aug. 28, 2007; Donadio, *Libel without borders*, N.Y. Times, Oct. 7, 2007 (“Rather than challenging the accusations, [Cambridge University Press] agreed in August to destroy the remaining 2,300 warehoused copies of the book [*Alms for Jihad*].”).

⁴⁹ In the early 2000s, for example, lawyers at MLRC received a letter from Schilling & Lom in London touting its expertise in bringing defamation suits on behalf of American celebrities.

⁵⁰ *Polanski v. Conde Nast*, [2005] UKHL 10 (“There can be no doubt that, as between Mr. Polanski and Condé Nast, the judge's order was rightly made.”).

⁵¹ [2003] EWCA Civ 1573.

⁵² See Section IV, *infra*, at 181-82 n.79.

over reports critical of the bank's tax advice to wealthy clients.⁵³ In hindsight, the case may have provided some clues to the coming financial crisis that bankrupted Iceland, but it settled before it went to trial, with the newspaper agreeing to pay the bank substantial damages, as well as its legal costs, and carry an apology on its news site for a month.⁵⁴ Other examples include libel suits brought in London by a Ukrainian billionaire against two Ukrainian news organizations⁵⁵ and by a Tunisian sheikh against an Arabic language satellite television network based in Dubai.⁵⁶

The academic and scientific communities were similarly fertile ground for litigation. Thus, for example, a U.S. company, GE Healthcare, sued Danish radiologist Dr. Henrik Thomsen over a 15-minute presentation he delivered at a scientific meeting in Oxford about injuries suffered by kidney patients in Denmark.⁵⁷ Another U.S. company, NMT Medical, sued British cardiologist Dr. Peter Wilmschurt in London for raising questions at a conference in the United States about the effectiveness of a heart implant device.⁵⁸ And in what became the trigger for the Defamation Act 2013, the British Chiropractic Association sued science writer Simon Singh for questioning the benefits of chiropractic treatments and describing some as "bogus."⁵⁹

⁵³ English Pen and Index on Censorship, *The Impact of English Libel Law on Freedom of Expression* 17-18 (2012) ("The Danish tabloid Ekstra Bladet was sued in London by Kaupthing, an investment bank in Iceland, over articles it had published that criticised advice the company had given to wealthy clients about tax shelters.").

⁵⁴ Greenslade, *Banking on libel victories in Britain* (2008) (The Danish newspaper editor sued by the Icelandic bank later stated: "I want to encourage my colleagues in the media industry to be very careful with translating articles to English. A small newspaper might end up folding if it was to pay the legal expenses for such a trial.")

⁵⁵ Peel & Murphy, *English courts in the dock on 'libel tourism,'* Financial Times, April 1, 2008 ("Rinat Akhmetov, a Ukrainian energy tycoon ranked by Forbes magazine as the world's 214th richest billionaire, is no stranger to England's libel courts. He has launched successful actions in London over the past year against Kyiv Post and Obozrevatel, two Ukrainian internet journals.").

⁵⁶ English Pen and Index on Censorship, *supra*, at 19 (The Dubai "programme was broadcast in Arabic, but was available via satellite receivers in this jurisdiction.").

⁵⁷ Gerth, *GE and Muzzled Radiologist End UK Libel Case*, ProPublica, Feb. 18, 2010.

⁵⁸ Ghosh, *NMT libel case intensifies for cardiologist*, BBC News, Nov. 2, 2010 ("A US medical devices company has threatened to step up its libel action against a consultant cardiologist who criticised its clinical trials."). The lawsuit ended when the U.S. plaintiff went out of business. See Boseley, *US company suing British doctor for libel goes out of business*, The Guardian, April 21, 2011.

⁵⁹ The trial court ruled that "bogus" was a factual assertion, not fair comment. *British Chiropractic Ass'n v. Singh*, [2009] EWHC 1101 (QB), but was reversed on appeal, see [2010] EWCA Civ 350 ("It was in our judgment a statement of opinion, and one backed by reasons. We would respectfully adopt what Judge Easterbrook, now Chief Judge of the US Seventh Circuit Court of Appeals, said in a libel action over a scientific controversy, *Underwager v Salter* 22 Fed. 3d 730 (1994): "[Plaintiffs] cannot, by simply filing suit and crying 'character assassination!', silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation. . .

These cases brought the twin issues of libel tourism and defamation reform to a head. The *Singh* case presented a nightmare scenario, even though both parties were English and presumably anticipated being subject to English law, because it illustrated how a writer, scientist or academic can be subject to strained legal interpretations about the “meaning” of published words, which can present an author with the impossible task of proving the truth of a meaning that was neither stated nor intended.⁶⁰

The dangers posed by English libel law were particularly pronounced in the context of online publication. What the U.S. Supreme Court described as the most participatory form of mass speech yet developed⁶¹ was nevertheless subject to the 1849 *Duke of Brunswick* rule in England, which (until 2014) treated every distribution of a publication as separately actionable.⁶² For online publications, this meant there was no effective statute of limitations for the wealth of material they made available to the public. Publishers, academics and scientists all faced the risk of being called to defend the truth of their online statements years after witnesses and memories had faded. As a result, English libel law raised the very real risk that much information would simply be removed and rendered unavailable to the public.

III. THE DEFAMATION ACT OF 2013

The criticisms of English defamation law did not go unheard. A powerful campaign for libel reform began under the leadership of scientists, academics, actors and even comedians. The campaign won the support of both Labor and Tory Prime Ministers. The press took a decided backseat in public, but lobbied behind the scenes for significant but realistic reform.

After many years of lobbying and debate (if not international shaming through the SPEECH Act),⁶³ Parliament approved a host of reforms in 2013. The Defamation Act of 2013 came into force in January 2014.⁶⁴ It is, however, more evolutionary than revolutionary. Shifting the burden of proving truth to claimants was never seriously considered, but the new law introduces a number of both significant and incremental changes that, at least in theory, increase protection for the press and other speakers about matters of public concern. The key changes include: 1) a threshold test that the statements sued on cause “serious harm.”⁶⁵

. More papers, more discussion, better data, and more satisfactory models – not larger awards of damages—mark the path towards superior understanding of the world around us.”).

⁶⁰ *Id.*

⁶¹ *Reno v. ACLU*, 521 U.S. 844, 863 (1997).

⁶² The rule was rejected in the U.S. more than 60 years ago as unworkable in the era of mass communications—circa 1938! See, e.g., *Wolfson v. Syracuse Newspapers, Inc.*, 4 N.Y.S.2d 640 (1938); *Gregoire v. G.P. Putnam’s Sons*, 81 N.E.2d 45 (N.Y. 1948) (adopting the single publication rule).

⁶³ See Section IV, *infra*, at 181-90.

⁶⁴ [Defamation Act 2013](#).

⁶⁵ See *id.* § 1 (addressing “serious harm”):

During Parliamentary debate, it was asserted that this provision merely codified prior law disfavoring trivial libel claims, but by its terms there is now room for judges to expand the scope of protection; 2) Companies are required to prove serious financial loss to pursue a defamation claim, although executives can sue in their individual capacity without such limitations;⁶⁶ 3) The law includes a “public interest” defense that replaces and expands the *Reynolds* defense of qualified privilege.⁶⁷ Instead of a checklist of factors as set out in *Reynolds*, the new statutory defense applies to a statement about a matter of public interest where the defendant reasonably believed the statement to be in the public interest;⁶⁸ 4) The law includes a single publication rule that eliminates the *Duke of Brunswick* rule.⁶⁹ The new rule was intended to speak specifically to the advent of the Internet, but it still gives judges discretion to extend the limitations period in the interests of justice;⁷⁰ 5) The Act includes a new defense for websites sued for defamation. Somewhat analogous to Section 230 of the Communications Decency Act in the United States, under this provision websites are not liable for third-party content provided they abide by a new scheme of notice and takedown regulations promulgated in connection with the Act;⁷¹ 6) Finally, the law addresses libel tourism by requiring certain claimants to show that England is the most appropriate jurisdiction for the case to be heard.⁷² This provision applies only to claimants outside of the European Union and other European states who can sue in any member state under applicable European treaties.⁷³

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.

⁶⁶ *Id.*

⁶⁷ *Id.* § 4.

⁶⁸ In *Serafin v. Malkiewicz*, [2020] UKSC 23, the U.K. Supreme Court considered the “reasonable belief” requirement and concluded “the defendant must (a) prove as a fact that he believed that publishing the statement complained of was in the public interest, and (b) persuade the court that this was a reasonable belief. The reasonable belief must be held at the time of publication.”

⁶⁹ Defamation Act 2013, § 8 (“This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.”).

⁷⁰ *Id.* § 6a (noting that the new single publication rule does not affect a court’s discretion to toll a statute of limitations on equitable grounds) (citing Limitations Act 1980 § 32A).

⁷¹ *Id.* § 5 (“It is a defence for the operator to show that it was not the operator who posted the statement on the website. The defence is defeated if the claimant shows that—(a) it was not possible for the claimant to identify the person who posted the statement, (b) the claimant gave the operator a notice of complaint in relation to the statement, and (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.”). Compare 47 U.S. Code § 230 (c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

⁷² Defamation Act 2013, § 9.

⁷³ *Id.* § 17. The Act changed the law of England but none of its provisions applied to Northern Ireland. That means that foreign plaintiffs can still sue there under its defamation law. Indeed, plaintiffs’ lawyers in Northern Ireland and Ireland (with its own strict liability regime) have, like

Thus, while the state of the law in England has plainly improved, it remains a jurisdiction where the “global elite” can and do exert a chilling effect on publishers.⁷⁴ As Floyd Abrams has observed, the differences in legal protections for the press in the United States and England “remain oceanic.”⁷⁵ The Defamation Act 2013 was a significant reform, but in terms of its success in protecting free expression, it deserves a slow dance rather than Alexander Meiklejohn’s exuberance.⁷⁶

IV. PROTECTING *SULLIVAN* FROM GLOBAL ATTACK

In 2010, with bipartisan support, a unanimous Congress enacted the SPEECH Act.⁷⁷ Its acronymic title reflects the legislators’ commitment to “Securing the Protection of our Enduring and Established Constitutional Heritage” by forbidding recognition in U.S. courts of foreign defamation judgments awarded under legal frameworks repugnant to American free speech and press traditions as reflected in *Sullivan*.⁷⁸ Much has been written about how the SPEECH Act was catalyzed by the threat of “libel tourism” in England⁷⁹ Yet, well before 2010, U.S.

their English colleagues, actively sought American clients to sue abroad. See Brennan, *Heavyweight Irish lawyer picks fight with pending U.S. libel legislation*, Hollywood Reporter, April 9, 2009 (“Although every bit the Belfast native, Paul Tweed is no stranger to Hollywood and New York, where his clients have included Harrison Ford, Liam Neeson, Britney Spears, Michael Jackson and Jennifer Lopez. He has become the attorney of choice for actors who want to take on the tabloids in a manner Tweed has made his trademark — and he has not lost a case.”). One tactic these lawyers have employed is to sue simultaneously in London, Belfast and Dublin, on the basis that their clients have a reputation in each of these countries and can choose to litigate separately for injury to reputation in each of them. See Beoiley, *BuzzFeed legal case shows Dublin’s draw for foreign libel claimants*, Financial Times, Dec. 4, 2019 (“One London-based defamation lawyer said Mr. Tweed was ‘the best at arbitrating jurisdictions’, jumping between London, Dublin and Belfast, often suing simultaneously in all three.”). The House of Lords has debated extending the Defamation Act 2013 to Northern Ireland, rightly questioning “[w]hy should the citizens and journalists of Northern Ireland not be afforded the same protection as those in the rest of the United Kingdom, whether they are expressing opinions online or holding government to account?” Hansard Debate, (Lord Lexton), Jan. 11, 2021. And there is now pending a draft libel reform bill in the Northern Ireland Assembly. See Defamation Bill as introduced in the Northern Ireland Assembly on 7 June 2021 (Bill 25/17-22).

⁷⁴ See Section IV.A., *infra*, at 182-85 (addressing modern “lawfare” in the U.K.).

⁷⁵ Abrams, *The Soul of the First Amendment* 9 (2017) (discussing differences in defamation, privacy and hate speech laws in the U.S., U.K. and Europe.)

⁷⁶ Kalven, *supra*, at 221 n. 125 (describing Meiklejohn’s pronouncement that *Sullivan* marked “an occasion for dancing in the streets”). See Johnson, *supra*, at 97 (“Despite the United Kingdom’s passage of Defamation Act 2013, it is still the case that American defamation law is far more protective of free speech and free press than English law.”)

⁷⁷ P.L. 111-223, codified at 28 U.S.C. §§ 4101-4105.

⁷⁸ 28 U.S.C. § 4102(a)(1)(A) (referencing the “protection for freedom of speech and press . . . provided by the first amendment to the Constitution of the United States and by the constitution and law of the [relevant] State”).

⁷⁹ Barbour, *The SPEECH Act: “The Federal Response to ‘Libel Tourism,’”* Cong. Res. Serv., Sept. 16, 2010, at n.1 (defining “libel tourism” and noting that “[b]ecause several high profile-cases have been brought by alleged supporters of terrorist groups for the supposed purpose of dissuading reporters from exposing their terrorist connections, the phrase ‘libel terrorism’ has been used in

courts were already effectively rejecting enforcement of “libel tourist” judgments on public policy grounds, and the SPEECH Act’s text and legislative history reflect a broader Congressional intent. The legislative branch’s expansive concerns and approach reveal the deeper aim of the SPEECH Act extended beyond deterrence of international forum shopping to the more fundamental purpose of defending and empowering American voices as their words travel around the globe. Beyond its prohibition on recognition and enforcement of foreign judgments in libel cases, the SPEECH Act was designed to grant American journalists and other speakers⁸⁰ additional legal tools: recovery of attorney’s fees, the ability to pursue a declaratory action, potential removal to federal court, and confirmation that an entry of appearance in the unsuccessful foreign action is no bar to challenging the judgment anew in U.S. courts.⁸¹ These protections are especially valuable in today’s tumultuous times, when truth and truth tellers are under siege from wealthy and powerful plaintiffs leveraging jurisdictional differences to bury unflattering realities. They offer concrete, and nationally uniform, backing to speakers, including the press, who might otherwise fall to self-censorship from the pressure, fear and financial risks of vigorously exercising their First Amendment rights. At its core, the SPEECH Act functions to combat the chilling effect on American voices and preserve from global attack America’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁸²

A. The Global Context: Truth Tellers Face an Increasingly Perilous World

To place the significance of the SPEECH Act in appropriate context, it is necessary to apprehend the extent to which the world’s essential truth tellers – journalists in particular – face growing risks from all directions. The honest pursuit of facts is challenging in the best of times. Today, this pursuit is further complicated by increasing safety threats, a multi-year pandemic, relentlessly accelerating news cycles, decreasing operating budgets, and expansion of “lawfare” against freedom of speech and of the press – strategic legal threats from the wealthy and powerful

reference to the same phenomenon”). In the United States, the best-known libel tourism action is the default judgment awarded by an English court to Saudi billionaire banker Khalid bin Mahfouz against terrorism financing expert and author Dr. Rachel Ehrenfeld, whose book was intentionally withheld from the U.K. market. Nevertheless, because 23 copies were ordered by English residents via Amazon, the English judge asserted jurisdiction over Ehrenfeld, accepted an *ex parte* presentation of evidence, declared that the statements at issue were false, awarded damages and attorney’s fees, and ordered her to apologize and destroy physical copies of the book. See, e.g., *id.* at 4-5 & nn.26-29; see also *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501 (2007) (describing the English action and holding that New York courts lacked personal jurisdiction over Bin Mahfouz in context of declaratory action pursued by Ehrenfeld); Preface, *supra*.

⁸⁰ This Chapter uses the term “speaker” in its broadest sense, i.e., persons and entities exercising their free speech and free press rights. It is intended to include all types of content creators, from TikTokers and tweeters to journalists, publishing houses and broadcasters.

⁸¹ 28 U.S.C. §§ 4102-05.

⁸² See H.R. Rep. 111-154 (111th Cong., 1st Sess. 2009), 2009 WL 1664629 (June 15, 2009) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

designed to intimidate and silence. At the same time, the global public's need for accurate and reliable information is greater than ever.

The Committee to Protect Journalists has confirmed that, in 2021 alone, 27 journalists around the world were murdered in direct retaliation for their work, an additional 18 were killed for undetermined reasons, and 293 were imprisoned.⁸³ The 2021 World Press Freedom Index, compiled by Reporters Without Borders (RSF), assessed that only twelve countries—just seven per cent of the 180 evaluated—offered a “good” press freedom environment.⁸⁴ Falling from that group this year was Germany, after RSF documented dozens of journalists physically assaulted while working to document demonstrations against pandemic restrictions.⁸⁵

Over the past decade, and also accelerating during the pandemic, international legal attacks on free speech and a free press have been increasingly pursued from inside and outside government. One approach is the enactment of so-called “fake news” laws, which purport to address disinformation but often – and sometimes intentionally – hinge on loose definitions of falsity that allow for suppression of true but critical information.⁸⁶

Another approach is popularly known as “lawfare” or, in U.S. legal parlance, SLAPP suits—that is, strategic litigation against public participation. Internationally, those with financial resources have increasingly demonstrated their ability strategically to exploit differences in countries’ substantive laws and procedural rules, selectively issuing demands from jurisdictions that allow for greatest intimidation of would-be critics, including lesser protections for speech about matters of public concern, fee-shifting and high defense costs, and the ability to seek *ex parte* injunctions against information gathering and speech.⁸⁷

⁸³ Committee to Protect Journalists, [annotated data](#).

⁸⁴ [Reporters Without Borders](#).

⁸⁵ *Id.*

⁸⁶ See, e.g., Sanders, Jones & Liu, *Stemming the Tide of Fake News: A Global Case Study of Decisions to Regulate*, 8 J. Int’l Media & Ent. L. 203, 213-18 (2019-20) (documenting proposals to define “fake news” as, e.g., content that “causes panic” and noting “harsh criticism . . . because of the chilling effect [such laws] are likely to have on freedom of expression”); Funke & Flamini, [Poynter](#), last updated Aug. 13, 2019 (cataloguing anti-misinformation legislative action around the world while raising concerns about “infringing free speech guarantees” and “muddying the definition of fake news”); Fischer, [“Fake news” laws on the rise globally during the coronavirus pandemic](#), Axios, May 26, 2020 (reviewing recent enactments and noting arguments that broad-based definitions “will inevitably be used to suppress true information”); see also Erlanger, *“Fake News,” Trump’s Obsession, Is Now a Cudgel for Strongmen*, N.Y. Times, Dec. 12, 2017 (documenting spread around the globe of “fake news” allegations by political leaders to attack critics).

⁸⁷ See, e.g., Tobitt, [SLAPP down: David Davis says Putin’s People libel case cost ex-FT journalist £1.5m](#), Press Gazette, Jan. 24, 2022; Sullivan, [Libel Tourism: Silencing the Press through Transnational Legal Threats](#), Report for the Center for International Media Assistance, Jan. 6, 2010, at 24, (“The mere threat of a suit can cause the same damage as an actual suit. It can cost news media money for lawyers to deal with the threat; it can waste staff time Lawyers and media organizations say one of the reasons for these lawsuits is to intimidate media organizations.

Former British cabinet minister and Conservative Party leader David Davis recently sounded alarms about the impact of “lawfare against the freedom of the press,” pointing to litigation by Chelsea FC owner Roman Abramovich and others against Harper Collins and highly regarded journalist and author Catherine Belton over her book *Putin’s People*. After Abramovich’s case was settled with apologies, revisions to the book, and a costs award of £1.5 million against Belton, Davis observed that “[s]ome [English] newspapers hesitate to cover certain topics, such as the influence of Russian oligarchs, for fear of costly litigation.”⁸⁸ Dr. Rachel Ehrenfeld has described how Saudi billionaire banker Khalid bin Mahfouz’s default defamation judgment against her in England “hung over [her] head like a sword of Damocles and kept [her] up at night,” noting that “[i]n nearly forty cases, Mahfouz obtained settlements against his victim, all with forced apologies, by the mere threat of libel litigation.”⁸⁹

At the global news agency Reuters alone, where one of the authors is employed, its journalists have in recent years confronted a broad array of legal threats to their reporting, including:

- Reuters text reporters Wa Lone and Kyaw Soe Oo were framed, convicted on espionage charges and sentenced to seven years in prison in Myanmar after accurately reporting the massacre of ten Rohingya Muslim men by military and police forces. They were still behind bars in 2019 when they won a Pulitzer Prize for their courageous coverage and were ultimately pardoned and released after 511 days in prison.⁹⁰
- Hedge fund manager Brevan Howard Asset Management (BHAM) – one of the largest in Europe, with offices in New York, managing over \$15 billion for 330 institutional investors internationally – successfully obtained an injunction from an English court, which prohibited Reuters from publishing, anywhere in the world, concededly accurate information that BHAM provided to potential investors; BHAM was also awarded attorney’s fees.⁹¹

Threatening media with expensive suits can force them to hold off on stories or remove materials from stories.”).

⁸⁸ *Id.* Ms. Belton was formerly a reporter for the *Financial Times* and is now employed by Reuters.

⁸⁹ See Sullivan, *supra*, at 15.

⁹⁰ Lewis & Naing, [Two Reuters reporters freed in Myanmar after more than 500 days in jail](#), Reuters, May 6, 2019.

⁹¹ [Brevan Howard Asset Mgm’t LLP v Reuters Ltd](#), [2017] EWCA 644 (QB) (Hon. Mr. Justice Popplewell) (abbreviated judgment omitting, rather than redacting, selected text), *aff’d*, [Brevan Howard Asset Mgm’t LLP v Reuters Ltd](#), [2017] EWCA Civ 950. The English trial court stated that it recognized “the public interest in [pensioners and individual investors] having available to them relevant information so as to be in a position to influence and hold to account the institutions whose investment decisions affect their financial welfare” but concluded that it was outweighed by the public interest in “the adequate protection of [financial institutions’] confidentiality.” *Id.*

- At a time of increasing civil conflict in Ethiopia, Reuters video journalist Kumerra Gemechu was arrested in Addis Ababa. Though never charged, he was held in solitary confinement for twelve days. Federal police stated they were investigating allegations he disseminated fake news, communicated with paramilitary groups and breached anti-terrorism laws. Under the public spotlight and in the absence of evidence, police dropped their investigation and Gemechu was ultimately freed.⁹²

While Reuters has a legal team to defend and support its journalists in such circumstances, many American journalists and other speakers have no such luxury, leaving them alone to face the potential emotional, reputational, physical and financial impact of global attacks on their work.⁹³

B. The Background: Non-Enforcement of Foreign Defamation Judgments Prior to 2010

Largely because of *Sullivan* and its progeny, the United States offers legal protection to free speech and press at the highest levels in the world,⁹⁴ and American courts have long been alive to the threat foreign defamation judgments pose to these well-established American values.⁹⁵ Before 2010, in the absence of relevant state or federal legislation,⁹⁶ several American courts declined to enforce such judgements on public policy grounds.⁹⁷ For example, in *Telnikoff v. Matusevitch*, the Maryland Court of Appeals rejected the validity of a £ 240,000 English libel judgment because a “comparison of English and present Maryland

⁹² [Ethiopian police release detained Reuters cameraman without charge](#), Reuters, Jan. 5, 2021.

⁹³ Cf. Tobitt, *supra* (quoting David Davis) (“Even if someone defends their case successfully, in this day and age they face material costs so huge that [it] will further deter others from following a story.”).

⁹⁴ See, e.g., Youm, *The “Actual Malice” of New York Times Co. v. Sullivan: A Free Speech Touchstone in a Global Century*, 19 Comm. L. & Pol’y 185 (2014) (documenting “Americans’ extraordinary commitment to free speech” and cataloguing countries that have adopted, in whole or part, the actual malice standard); Rolph, [Splendid Isolation? Australia as a Destination for “Libel Tourism.”](#) Sydney Law School, Legal Studies Research Paper No. 13/51 (July 2013) (comparing Australian, American, and (pre-Defamation Act 2013) English legal standards).

⁹⁵ See, e.g., *Ehrenfeld v. Bin Mahfouz*, 881 NE 2d 830, 834 (N.Y. 2007) (discussing “the use of libel judgments procured in jurisdictions with claimant-friendly libel laws — and little or no connection to the author or purported libelous material — to chill free speech in the United States”) (emphasis added).

⁹⁶ Prior to the enactment of the SPEECH Act, three states – New York, Illinois and Florida – already had statutes blocking the recognition or enforcement of foreign defamation judgments repugnant to state and federal constitutional law. See 2008 N.Y. Laws 66, *codified at* N.Y. C.P.L.R. §§ 302(d), 5304(b)(8) (New York Libel Terrorism Protection Act); 735 ILCS 5/12-6264 (c)(3) (previously found at 5/12-621(b)(7)); Fla. Stat. § 55.605(2)(h) (2009 Florida statute). California procedural rules offered similar protections. See Cal. Civ. Pro. Code § 1716(f) (previously found at § 1716(c)(9), the California code was subsequently updated to reference the SPEECH Act’s standards).

⁹⁷ Barbour, *supra*, at 8 (“state courts have generally declined to enforce foreign libel judgments”).

defamation law does not simply disclose a difference in one or two legal principles [but instead a difference] in virtually every significant respect.”⁹⁸ And in *Bachchan v. India Abroad Pubs., Inc.*, a New York trial court rejected efforts to enforce an English libel judgment because the “protection to free speech and the press embodied in [the First Amendment] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the US Constitution.”⁹⁹ A New York district court followed this same path in *Abdullah v. Sheridan Square Press, Inc.*, noting that recognition of the judgment in that case “would be antithetical to the First Amendment protections accorded the defendants.”¹⁰⁰

Well before the passage of the SPEECH Act, therefore, common law and statutory frameworks on enforcement of foreign judgments authorized their rejection in circumstances in which such enforcement would be “repugnant” to the public policy of the state.¹⁰¹ And courts did not hesitate: multiple scholars have confirmed their inability to identify any published decision in which a challenged foreign defamation judgment satisfied the scrutiny of a U.S. court.¹⁰²

⁹⁸ 702 A.2d 230, 248 (Md. 1997) (on certified question from the D.C. Circuit).

⁹⁹ 154 Misc. 2d 228, 585 N.Y.S.2d 661, 665 (Sup. Ct. N.Y. Cty. 1992) (“English law does not distinguish between private persons and those who are public figures or are involved in matters of public concern. None are required to prove falsity of the libel or fault on the part of the defendant. No plaintiff is required to prove that a media defendant intentionally or negligently disregarded proper journalistic standards in order to prevail.”).

¹⁰⁰ No. 93 Civ. 2515, 154 F.R.D. 591, 1994 WL 419847 (S.D.N.Y. 1994).

¹⁰¹ See, e.g., Anderson, *Transnational Libel*, 53 Va. J. Int’l L. 71, 76-77 (2012) (“The Second Restatement of Conflicts, the Uniform Foreign Money-Judgments Recognition Act, the common law of most states, and various international conventions authorize refusal to enforce foreign judgments . . . if enforcement would be repugnant to the public policy of the state in which enforcement is sought.”) (citations omitted); *Restatement (Second) of Conflict of Laws* § 117, comment c (1971) (“A State of the United States is therefore free to refuse enforcement to [a foreign] judgment on the ground that the original claim on which the judgment is based is contrary to its public policy.”).

¹⁰² Anderson, *supra*, at 77 (“Indeed, so far as I know, no ‘libel tourist’s’ foreign judgment has ever been enforced in the United States; at least I am unable to find any reported case.”); Coyle, *The Speech Act and the Enforcement of Foreign Libel Judgments*, 18 Y.B. Priv. Int’l L. 245, 257 (2016/2017) (“In the years prior to 2010, a number of U.S. court had declined to enforce foreign defamation judgments on public policy grounds. While the SPEECH Act formalized this rule, it did not constitute a departure from existing policy.”); Barbour, *supra*, at 8 (“state courts have generally declined to enforce foreign libel judgments,” including under the SPEECH Act and predecessor state statutes).

C. The Law: The Plain Language of the SPEECH Act

The SPEECH Act provides that a U.S. court, whether state or federal, “shall not recognize or enforce a foreign judgment for defamation”¹⁰³ against a “United States person”¹⁰⁴ unless the court determines that:

- (1) the defamation law of the foreign court “provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the [relevant state] constitution and law,”¹⁰⁵ or
- (2) the American defendant nonetheless “would have been found liable for defamation” in an action before the U.S. court in which enforcement is sought.¹⁰⁶

In either instance, the party seeking to enforce the judgment bears the burden of making the requisite showing.¹⁰⁷

The Act provides four additional tools that American speakers, including most notably defendants in defamation actions arising from speech about matters of public concern, can employ to defend their exercise of First Amendment rights:

- A U.S. person successful in employing the SPEECH Act to defeat the attempted enforcement of a foreign defamation judgment “shall” be awarded “a reasonable attorney’s fee,” “absent exceptional circumstances.”¹⁰⁸
- A U.S. person may proactively bring an action in federal court for “a declaration that the foreign [defamation] judgment is repugnant to the Constitution or laws of the United States,” i.e., would not be enforceable under the SPEECH Act—and does not need to wait for the foreign plaintiff to seek to enforce the judgment in U.S. courts.¹⁰⁹

¹⁰³ 28 U.S.C. § 4102(a)(1). Although not discussed here, the law also requires demonstrated satisfaction of U.S. due process requirements in the context of the exercise of personal jurisdiction over the defamation defendant, as well as, where relevant, consistency with Section 230 of the Communications Act of 1934, 47 U.S.C. § 230. See 28 U.S.C. §§ 4102(b), 4102(c).

¹⁰⁴ A “United States person” is defined as a U.S. citizen or lawful resident, or an entity incorporated or primarily located in the United States. 28 U.S.C. § 4101(6).

¹⁰⁵ *Id.* § 4102(a)(1)(A).

¹⁰⁶ *Id.* § 4102(a)(1)(B).

¹⁰⁷ *Id.* § 4102(a)(2).

¹⁰⁸ *Id.* § 4105. Fee awards are not, however, available in declaratory judgment actions pursued under Section 4104.

¹⁰⁹ *Id.* § 4104(a)(1). The burden of proof in such cases is borne by the party bringing the declaratory judgment action. *Id.* § 4104(a)(2). The law expressly provides that service may be effectuated anywhere in the United States. *Id.* § 4104(b).

- Any action for enforcement of a foreign defamation judgment may be removed to federal court where there is diversity jurisdiction, or where the parties are citizens of different countries.¹¹⁰
- There is no waiver of rights if the American speaker chooses to fight both the action abroad and its enforcement in the United States, that is, the speaker's appearance in the foreign court is no bar to opposing recognition or enforcement under the SPEECH Act.¹¹¹

On its face, the Act applies broadly to any foreign defamation judgment repugnant to the American free speech tradition articulated in *Sullivan* and its progeny that is obtained against a "United States person."¹¹² Its prohibition on enforcement makes no assessment of the sufficiency of the parties' contacts with the foreign jurisdiction, the appropriateness of the plaintiff filing there, or where the American speaker was located at the time of publication.¹¹³ Thus the Act's plain language makes clear that its impact extends well beyond a prohibition of "libel tourism," to reach almost all foreign defamation judgments against Americans journalists and other speakers.¹¹⁴

D. The Intent: The Legislative History of the SPEECH Act

The bill that would become the SPEECH Act was passed by unanimous voice vote in the U.S. Senate and without objection by voice vote in the House, on July 19 and 27, 2010, respectively.¹¹⁵ In its findings, the unified members of Congress recognized that greater global protection for First Amendment values was necessitated by the growing tide of defamation suits against the American press and other U.S. voices, seeking to silence them to the detriment of the greater citizenry. The Act takes express note that:

- Freedom of speech and of the press as enshrined in the First Amendment is "is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy."

¹¹⁰ *Id.* § 4103.

¹¹¹ *Id.* § 4102(d); see also *id.* § 4101 note (stating the sense of Congress that such a declaratory action "shall constitute a case of actual controversy under" 28 U.S.C. § 2201(a)).

¹¹² See Coyle, *supra*, at 249 ("[The SPEECH Act] can and does apply to judgments obtained by individuals who are not libel tourists. . . . All foreign defamation judgments are treated the same, regardless of whether the plaintiff sued at home or sought out a more favourable forum abroad.").

¹¹³ The SPEECH Act does not, and could not, attempt to preclude enforcement of the foreign judgment in the jurisdiction of issuance, and were the defendant to have assets there, those assets could be attached.

¹¹⁴ See Anderson, *supra*, at 77 ("The SPEECH Act does not aim only at judgment that are repugnant to U.S. public policy; for that purpose, it is superfluous. Its real aim is to discourage all libel suits against American [speakers] abroad.").

¹¹⁵ [*H.R. 2765 — 111th Congress: Securing the Protection of our Enduring and Established Constitutional Heritage Act*](#), GOV TRACK. The bill was introduced on June 9, 2009, by Tennessee Rep. Steve Cohen, together with 11 cosponsors. *Id.*

- The act of suing U.S. journalists and other speakers in foreign jurisdictions obstructs free expression and “chills the first amendment . . . interest of the citizenry in receiving information on matters of importance.”
- Fear of such suits pushes speakers, including the press, to self-censor, thereby discouraging critical media reporting on matters of serious public interest.¹¹⁶

Some legal scholars and government researchers critiqued the bill’s efforts “to give American [speakers] the benefit of U.S. constitutional defamation immunities worldwide through indirect extraterritorial application of American interpretations of the First Amendment,”¹¹⁷ and thereby prevent the potential “chilling effect” on speech.¹¹⁸ Congress heard, and rejected, these views,¹¹⁹ adopting a law that pursued this very approach, as confirmed by the statute’s title, to protect America’s “Enduring and Established Constitutional Heritage” for the benefit of American journalists and other speakers around the globe.

In fact, from the outset, members of Congress recognized that the threat to First Amendment values extended beyond circumstances of “libel tourism” to a more fundamental level. As one lawmaker explained:¹²⁰

¹¹⁶ 28 U.S.C. § 4101 note; see also 156 Cong. Rec. H6126-06, 2010 WL 2923638 (July 27, 2010); H.R. Rep. 111-154, 111th Cong. (1st Sess. 2009), 2009 WL 1664629 (June 15, 2009) (stating that those who receive such threats face a dilemma—risk an expensive lawsuit or forego their First Amendment rights— and “[a]ll too often choose the latter option. This self-censorship not only threatens First Amendment rights; it also deprives Americans of important information and insights on matters of national concern.”).

¹¹⁷ Anderson, *supra*, at 75. While Professor Anderson criticizes the SPEECH Act as “unilateral fiat,” his ultimate recommendation is that foreign jurisdictions increasingly adopt U.S. legal rules and standards, and learn from “useful [American] lessons for resolving the problems of transnational libel.” *Id.* at 72 & 90-95.

¹¹⁸ Barbour, *supra*, at 14.

¹¹⁹ See, e.g., Rendleman, [Collecting a Libel Tourist's Defamation Judgment?](#), 67 Wash. & Lee L. Rev. 467, n.* (2010) (stating that his critique had been submitted to the Senate Judiciary Committee).

¹²⁰ 155 Cong. Rec. H6771-01, 2009 WL 16582221 (June 15, 2009) (Rep. King); see also H.R. Rep. 111-154, 111th Cong. (1st Sess. 2009), 2009 WL 1664629 (June 15, 2009) (“H.R. 2765 is intended to dissuade potential defamation plaintiffs from circumventing First Amendment protections by filing suit in foreign jurisdictions that lack similar protections.”). Early proposals had sought to provide American speakers exceptionally strong legal vehicles to advance and defend the exercise of their free speech rights. See H. Rep. 111-154, at 6 (“Some lawmakers and commentators, while supportive of H.R. 2765, have urged Congress to take a more aggressive approach . . .”); see also S. 449, § 3(a), (b); H.R. 1304, § 3(a), (b) (bills in the 111th Congress collectively known as the “Free Speech Protection Act”). One provision contemplated a federal cause of action to claw back damages and costs, with the potential for trebled damage awards if it were established the foreign defamation proceeding was brought to suppress the exercise of First Amendment rights, but the provisions were pulled back upon recognition of constitutional due process concerns. See Free Speech Protection Act, S. 449, §§ 2(c)(1), 2(d), 3(a) 111th Cong. (1st Session 2009), 155 Cong. Rec. D150 (Feb. 12, 2009); *id.* H.R. 1304 §§ 3(a), 3(c)(1), 3(c)(2), 3(d); see also Rendleman, *supra*, at 467, n.* & 482-87 (detailing earlier bills and urging respect and recognition of foreign substantive

[T]he main threat posed by libel tourism is not just the clever exploitation of foreign courts' libel laws to win financial judgments against American authors. It's not even the risk that Americans are losing their First Amendment guarantee of freedom of speech (although that is quite troubling). The danger is that foreign individuals are operating a scheme to intimidate authors and publishers from even exercising that right. And it's actually scarier because, in many of these cases, the journalists are trying to write on topics of national and homeland security. Therefore it is imperative that Congress address the issue and pass legislation to stop this nefarious activity at once.

The bill's sponsor in the House took note of how its protections had been expanded throughout the course of its consideration.¹²¹ Atop the foundational prohibition on recognition and enforcement, he explained that attorney's fees "would now be required . . . to put more teeth in the bill" and a declaratory judgment remedy was included to lend "an added measure of protection for the free speech rights of American authors and publishers."¹²²

When the bill unanimously passed the Senate—itsself recognized as a "rare achievement"¹²³—its key features were lauded on both sides of the aisle. Senator Patrick Leahy, a Democrat from Vermont, commended the legislation for "provid[ing] a single, uniform standard for addressing . . . foreign libel judgments," describing it as a bill that "combats the chilling effect that [such] judgments are having on American free speech in two significant respects," first through the prohibition on enforcement in U.S. courts and second through the declaratory action mechanism, which empowered speakers "to clear their names even when a foreign party does not attempt to enforce its judgment."¹²⁴ Senator Jon Kyl, Republican of Arizona, emphasized the bill was "necessary to ensure that all Americans are protected by the rights they are afforded under U.S. law," and identified its "important steps toward achieving this goal," including the mandatory award of attorney's fees.¹²⁵

law, stating "[t]he idea, moreover, that a foreign nation's substantive law is 'repugnant' unless it is identical to ours is itself of repugnant one"); Rolph, *supra*, at 90 (same).

¹²¹ H.R. 2765, 111th Cong. (2d Sess. 2010), 156 Cong. Rec. H6126-06 (July 27, 2010).

¹²² *Id.*

¹²³ 156 Cong. Rec. H6126-06, 2010 WL 2923638 (July 27, 2010) (statement of Rep. Cohen).

¹²⁴ S. Rep. 111-224, 111th Cong. (2d Sess. 2010), 2010 WL 2837008 (July 19, 2010); see also 155 Cong. Rec. S2342-43 (Feb. 13, 2009) (statement of Sen. Specter) ("[I]t is the chilling effect and the mere threat of litigation that suffices to silence authors; there is no need to try the cases.").

¹²⁵ S. Rep. 111-224, 111th Cong. (2d Sess. 2010), 2010 WL 2837008 (July 19, 2010). Senator Kyl expressed his disappointment that the bill did not go further: "Congress needs to pass broader measures that permit U.S. citizens accused of libel in foreign courts to force their accusers to pay for legal fees incurred abroad and, in certain cases, additional damages. . . . [T]here is more that can, and should, be done." *Id.*

V. CONCLUSION

Faced with growing global attacks on American free speech values, especially in England, Congress contemplated whether American press and other U.S. speakers around the world should benefit from the constitutional protections articulated in *Sullivan*—from the requirement of convincing proof of “actual malice” in actions filed by public persons to the obligation of plaintiffs to prove material falsity—and unanimously answered with a resounding “yes”. Its legislative response extends beyond the threat of libel tourism. The text, legislative history, background and even the title of the SPEECH Act demonstrate that members of Congress focused on a greater goal: preserving and defending from international threat the free speech and free press constitutional tradition that is embodied in *Sullivan* and is foundational to what America is today. It recognized that increasingly regular demands from London-based solicitors, injunctions, forced apologies for accurate publications, fee-shifting, and even unenforced foreign judgments had caused Americans who would otherwise speak and write about public matters to self-censor and withhold critically important information from the public. The legislation, in Congress’ own words, “represents the strongest policy response”¹²⁶ to defend the “cornerstones of American society”—i.e., the “complementary freedoms of speech and the press enshrined by our founding fathers in the First Amendment” and reflected most prominently in the protections against defamation liability emanating from *New York Times v. Sullivan*.¹²⁷

¹²⁶ 156 Cong. Rec. H6126-06, 2010 WL 2923638 (July 27, 2010) (statement of Rep. Rooney).

¹²⁷ S. Rep. 111-224, 111th Cong. (2d Sess. 2010), 2010 WL 2837008 (July 19, 2010) (statement of Sen. Kyl).



Countering legal intimidation and SLAPPs in the UK

A POLICY PAPER

By the UK Anti-SLAPP Coalition

A growing body of evidence has identified abusive legal threats and strategic lawsuits against public participation (SLAPPs) as a key emerging issue of concern for freedom of expression and the right to information in the UK. The impact goes beyond those directly subject to these legal tactics, posing a wider challenge to society and the principle of public participation.

Summary

SLAPPs are abusive lawsuits pursued with the purpose of shutting down acts of public participation. These legal actions are directed against individuals and organisations - including journalists, media outlets, whistleblowers, activists, academics and NGOs - that speak out on matters of public interest. SLAPPs have been gaining wider recognition as an issue in several jurisdictions. However, there is also a significant concern regarding the 'hidden problem' of UK law firms sending threatening legal communication prior to any official filings, which can have a similar effect to SLAPPs. These legal threats are particularly effective when emanating from the UK, which is seen as a more plaintiff-friendly jurisdiction and where mounting a defence is a particularly costly and lengthy process.

The aim of this policy paper is threefold:

1. To provide an overview of the problem in the UK context;
2. To identify the key principles for mitigating the threat of legal intimidation and SLAPPs; and
3. To form a starting point for legislative and regulatory initiatives to address this issue in the UK.

As an immediate step, a formal Parliamentary inquiry into legal intimidation and SLAPPs is needed to **a)** examine this issue in the UK, including the impact it is having on those subject to these tactics as well as more broadly on public debate and discussion; and **b)** explore the legislative and regulatory proposals needed to counter it, including a potential UK Anti-SLAPP Law.

About the UK Anti-SLAPP Coalition

The UK Anti-SLAPP Coalition is an informal working group established in January 2021, co-chaired by the Foreign Policy Centre, Index on Censorship and English PEN. It comprises a number of freedom of expression, whistleblowing, anti-corruption and transparency organisations, as well as media lawyers, researchers and academics who are researching, monitoring and highlighting cases of legal intimidation and SLAPPs, as well as seeking to develop remedies for mitigation and redress.

Background to the issue of legal intimidation and SLAPPs in the UK

Common hallmarks

From the many cases members of the UK anti-SLAPP coalition have studied and worked on, we can identify a number of common hallmarks or qualities:

- The lawsuit or legal threats are generally based on defamation law, though an increasing number of lawsuits invoke other laws concerning privacy, data protection, and harassment.
- There is an imbalance of power and wealth between the plaintiff and defendant.
- The plaintiff engages in procedural manoeuvres or exploits resource-intensive procedures such as disclosure to drive up costs.
- The lawsuit often targets individuals instead of/as well as the organisation they work for.
- The plaintiffs often have a history of legal intimidation and use many of the same law firms to facilitate their SLAPPs.
- The plaintiff may claim to pursue a disproportionately large amount of compensation from the defendant if they refuse to comply with the plaintiff's demands.
- Legal threats are increasingly being issued in response to 'right to reply' requests and result in journalists being drawn into a protracted quasi-legal communication process prior to publication.

Broader context

Legal intimidation and SLAPPs do not happen in isolation, but come in tandem with other forms of harassment and must be seen also in the context in which they are financed and pursued:

- Subjects of legal intimidation and SLAPPs have also raised concerns regarding online trolling, smear campaigns as well as on-and-offline surveillance.¹
- Cases of legal intimidation and SLAPPs in the UK are frequently linked with investigations into financial crime and corruption. Law enforcement bodies, such as the Serious Fraud Office, have also been subject to lawfare tactics that share similar characteristics.² How legal intimidation and SLAPPs are financed must also be examined as part of a wider cause for concern. Investigations into transnational financial crime and corruption are rarely published without the mention of funds being used to pay for property, education or indeed legal and reputation services in the UK.³
- Reputation management appears to be a common driving force behind legal intimidation and SLAPPs taken against media, with reputations seen as assets to be defended against criticism or enquiry, with media pressured to remove 'uncomfortable' information from the public domain.⁴
- Even well-funded media organisations or NGOs are not immune from the "chilling effect" of legal intimidation - watering down reports or stories, avoiding pursuing litigious individuals/organisations, and generally holding back on contentious speech in order to avoid draining their funds. This is particularly true in light of the growing journalism-funding crisis, with declining revenues.⁵
- This is taking place against a backdrop of other worrying trends for media freedom in the UK, regarding attempts to restrict freedom of information and challenges to public scrutiny. The UK is ranked 33rd out of 180 countries in Reporters Without Borders' 2021 World Press Freedom Index.⁶

¹ The Editorial Board of the Financial Times, *London, libel and reputation management: The English courts attract those with deep pockets and much to lose*, May 2021, <https://www.ft.com/content/e37f3349-479f-42c6-85fe-11b5a29bdee0>; The Foreign Policy Centre (FPC), *Unsafe for Scrutiny: How the misuse of the UK's financial and legal systems to facilitate corruption undermines the freedom and safety of investigative journalists around the world*, December 2020, <https://fpc.org.uk/publications/unsafe-for-scrutiny-12-2020-publication/>. The FPC's contribution to the working group is based on the findings of the Unsafe for Scrutiny research programme and any views expressed are those of Project Director Susan Coughtrie.

² Index on Censorship, *Index and 21 other organisations condemn lawsuits brought by ENRC against public watchdogs*, June 2021, <https://www.indexoncensorship.org/2021/06/lawsuits-brought-by-enrc-against-uk-serious-fraud-office-and-dechert-llp/>; RAID, ENRC's egregious attempts to curtail freedom of expression jeopardise anti-corruption efforts, June 2021, <https://www.raid-uk.org/blog/enrcs-egregious-attempts-to-protect-freedom-expression-jeopardise-anti-corruption-efforts>

³ Ben Cowdock and Rachel Tekla Davis, *How UK anti-corruption groups work with journalists to push for change*, FPC, December 2020, <https://fpc.org.uk/how-uk-anti-corruption-groups-work-with-journalists-to-push-for-change/>

⁴ The Editorial Board of the Financial Times, *London, libel and reputation management: The English courts attract those with deep pockets and much to lose*, May 2021, <https://www.ft.com/content/e37f3349-479f-42c6-85fe-11b5a29bdee0>; Susan Coughtrie, *The UK as a key nexus for protecting media freedom and preventing corruption globally*, FPC, December 2020, <https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/>

⁵ Rob Sharp, *Solutions to the journalism funding crisis: what are they?*, LSE, April 2020, <https://blogs.lse.ac.uk/polis/2020/04/21/solutions-to-the-journalism-funding-crisis-what-are-they/>

⁶ Reporters without Borders, United Kingdom - <https://rsf.org/en/united-kingdom>; 2021 World Press Freedom Index - <https://rsf.org/en/ranking>

Supporting evidence

Usually cases of legal intimidation and SLAPP do not get publically reported until after the legal threat has dissipated, if at all. Recently, however, there has been an increasing effort to research and document cases:

- A report from the Foreign Policy Centre (FPC) published in November 2020, which surveyed 63 investigative journalists in 41 countries working to uncover financial crime and corruption, found:⁷
 - **73% of all respondents stated they had received legal threats** as a result of information they had published, with **more than half saying it had made them more cautious as a result**.
 - Of the 71% of respondents who reported experiencing threats, **legal threats were identified as having the most impact on their ability to continue working (48%)**, more so than psychosocial (22%), or physical and digital threats (each 12%).
 - Crucially, **the UK was found to be by far the most frequent international country of origin for legal threats after the journalists' home countries**. It was almost as frequent a source of these legal threats (31%), as all EU countries (24%) and the United States (11%) combined.
- Eight years after the passage of the Defamation Act 2013, UK courts continue to attract authoritarian governments and other international plaintiffs: recent examples include the lawsuits filed by Russian billionaires against Catherine Belton;⁸ the lawsuit filed by Swedish businessman Svante Kumlin against the Swedish publication Realtid, their journalists, and editor;⁹ the lawsuits filed by allies of the Malaysian Prime Minister against Clare Rewcastle Brown;¹⁰ and the lawsuit filed against OCCRP and its co-founder Paul Radu by an Azerbaijani politician.¹¹
- Cases do not even have to reach court to create a detrimental impact. In May 2020, journalists at openDemocracy described the effects of legal action pursued against them by Jeffery Donaldson, the now Democratic Unionist Party leader, stating *"Those two years cost us a lot. We spent months dealing with legal letters, burning through thousands of pounds and precious time that would otherwise have been spent on our journalism. The psychological toll was even higher."* The case eventually became time expired.¹²
- So concerning are the threats of potential legal action that it has led to instances of self-censorship – such as the delayed publication of *Billion Dollar Whale* or the blocked UK publication of Karen Dawisha's *Putin's Kleptocracy*, believed to be the tip of the iceberg.¹³
- The abusive potential of UK existing laws beyond its borders is also of concern. Indeed, the Balkans Investigative Reporting Network (BIRN), which covers countries in Southern and Eastern Europe, created a guide specifically on English libel law that is mandatory reading for all its journalists. One of the last sections is particularly telling: *"For now, our advice regarding third-country libel suits (i.e. not in your country and not in England) is straightforward: I. Know the law in your own country; II. Know the law in England; III. Assume that any third country would be just as strict on libel as England."*¹⁴
- On a European level, a number of groups have documented a rise in SLAPPs across the continent, with the Coalition Against SLAPPs (CASE) in Europe working to collect research on the issue.¹⁵

⁷ Susan Coughtrie and Poppy Ogier, *Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial pressure and corruption around the world*, November 2020, <https://fpc.org.uk/wp-content/uploads/2020/11/Unsafe-for-Scrutiny-November-2020.pdf>.

⁸ Nick Cohen, Are our courts a playground for bullies? Just ask Catherine Belton, *The Guardian*, May 2021, <https://www.theguardian.com/commentisfree/2021/may/08/are-our-courts-a-playground-for-bullies-just-ask-catherine-belton>

⁹ Index on Censorship, SLAPP Lawsuit against Swedish Magazine Realtid Filed in London, December 2020, <https://www.indexoncensorship.org/2020/12/slapp-lawsuit-against-swedish-magazine-realtid-filed-in-london/>

¹⁰ Clare Rewcastle Brown, A scandal of corruption and censorship: Uncovering the 1MBD case in Malaysia, FPC, December 2020, <https://fpc.org.uk/a-scandal-of-corruption-and-censorship-uncovering-the-1mdb-case-in-malaysia/>

¹¹ Paul Radu, How to Successfully Defend Yourself in Her Majesty's Libel Courts, GIJN, February 2020, <https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/>

¹² Peter Geoghegan and Mary Fitzgerald, Jeffrey Donaldson sued us. Here's why we're going public, openDemocracy, May 2021, <https://www.opendemocracy.net/en/opendemocracyuk/jeffrey-donaldson-sued-us-heres-why-were-going-public/>

¹³ *The Economist*, *The Story Behind Billion Dollar Whale*, September 2019, <https://www.economist.com/books-and-arts/2019/09/19/the-story-behind-billion-dollar-whale>; Jim Waterson, Bookshops threatened with legal action over book about Malaysian 'playboy banker', *The Guardian*, September 2018, <https://www.theguardian.com/world/2018/sep/14/bookshops-threatened-with-legal-action-jho-low-billion-dollar-whale>; Ellen Barry, *Karen Dawisha, 68, Dies; Traced Roots of Russian Corruption*, *The New York Times*, April 2018, <https://www.nytimes.com/2018/04/17/obituaries/karen-dawisha-68-dies-traced-roots-of-russian-corruption.html>

¹⁴ English libel law for journalist: A brief Guide, Balkan Fellowship of Journalist Excellence, <http://fellowship.birn.eu.com/en/file/show/English%20libel%20law%20for%20journalists.pdf>

¹⁵ For more about the work of the Coalition against SLAPPs in Europe (CASE) - <https://www.the-case.eu/>

Principles for mitigating the threat of legal intimidation

Given the aforementioned problems, any effort to address legal intimidation and SLAPPs should seek to apply the following principles:

1. **SLAPPs are disposed of and dealt with expeditiously in court:** SLAPPs take advantage of the litigation process to harass and intimidate their targets. The shorter the process, the less potential there is for abuse. The importance of disposing of a SLAPP quickly is particularly acute prior to the costly disclosure process, which provides the greatest opportunity for legal harassment.
2. **Costs for SLAPP Targets are kept to an absolute minimum:** an award of costs post-SLAPP is an important measure, but not sufficient in this regard. Costs need to be minimised throughout the litigation process to avoid the financial threat of prolonged litigation.
3. **Costs for SLAPP Litigants are sufficient to deter SLAPPs:** these must be made automatically available so as not to represent a further burden for those already exhausted by the litigation process. Can take the form of punitive or exemplary damages or other sanctions.
4. **Laws implicating speech are narrowly drafted and circumscribed:** that is to say, they must be tightly worded enough to prevent their application being stretched to cover legitimate acts of public participation.
5. **The use of SLAPPs or legal intimidation is delegitimised as a means of responding to criticism:** this principle requires a process of delegitimation, involving an expansion of industry standards, engagement with stakeholders on the incoming standards and finally clear enforcement if the use of SLAPPs or legal intimidation is used in contradiction to these standards.

Approaches to countering legal intimidation and SLAPPs in the UK

There are four different approaches that, taken together, would address the principles outlined above and should be encompassed in any efforts to counter legal intimidation and SLAPPs in the UK:

1. **The introduction of an Anti-SLAPP law to strengthen procedural protection.**
2. **Legal review and reform of relevant laws to reduce opportunities for abuse.**
3. **Tighten regulatory and ethical standards covering industries facilitating SLAPPs or issuing baseless legal threats.**
4. **Expanding admissibility of legal aid or otherwise providing funding for defendants acting in the public interest.**

These are explored briefly in turn in the accompanying explanatory note, set out as a starting point for addressing this issue, with the intention for further examination and development, including hopefully as part of an official inquiry.¹⁶ To note, initiatives to examine and address the issue of SLAPPs are already underway elsewhere. The 2021 Annual Report of the Council of Europe Platform explicitly identifies the UK as the “foremost country of origin” of SLAPPs, and warns that the practice “threatens to bring the UK and its legal profession into disrepute in the eyes of the world.”¹⁷ Council of Europe Commissioner for Human Rights Dunja Mijatović has called on Council of Europe member states, which includes the UK, to take action saying that it is “high time” to tackle SLAPPs.¹⁸ The European Commission has already committed to taking action against SLAPPs: in 2021 it set up an expert group on SLAPP and it is due to present an anti-SLAPP initiative later this year.¹⁹ Commissioner Věra Jourová has repeatedly voiced her support for EU anti-SLAPP legislation.²⁰

¹⁶ Explanatory Note: Approaches to Countering Legal Intimidation and SLAPPs in the UK -

<https://fpc.org.uk/wp-content/uploads/2021/07/Explanatory-Note-Approaches-to-Countering-Legal-Intimidation-and-SLAPPs-in-the-UK.pdf>

¹⁷ Partner Organisations to the Council of Europe Platform, ‘Wanted! Real Action for Media Freedom in Europe’, May 2021, <https://rm.coe.int/final-version-annual-report-2021-en-wanted-real-action-for-media-freed/1680a2440e>

¹⁸ Dunja Mijatovic, ‘Time to take action against SLAPPs’, Council of Europe, October 2020,

https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/time-to-take-action-against-slapps?_lang=en

¹⁹ European Commission, ‘Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan’, December 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>

²⁰ Jessica Ni Mhainin, ‘Fighting Back against the Menace of SLAPPs’, Index on Censorship Magazine, April 2021, <https://journals.sagepub.com/doi/full/10.1177/03064220211012279>

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UK ANTI-SLAPP WG: PROPOSALS FOR PROCEDURAL REFORM
Judicial Guidance, Civil Procedural Reform, and a UK Anti-SLAPP Law

PRACTICE DIRECTIONS/JUDICIAL GUIDANCE

Judicial guidance should be used to help assist judges in the interpretation of existing measures, whether procedural protections under civil procedural rules or statutory mechanisms that exist to address SLAPPs. “Practice directions” give practical advice to judges on how to interpret the civil procedure rules (CPR) - while this is unique to England and Wales, the principles below apply to all UK jurisdictions:

- **Security for Costs/Caution for Expenses:** CPR 25.12 provides for limited circumstances in which security for costs can be issued. In a few instances, however, security for costs has been imposed on claimants as a sanction for misconduct, even where the test under 25.12 was not met.¹ In other cases, such as the lawsuit filed by Charles Taylor against the author of *The Mask of Anarchy*, security for costs has apparently been used as a means of testing the seriousness of a claim (in that case successfully, since the SLAPP was dismissed after Taylor was ordered to pay security for costs).² There has not as yet been any practice direction issued dealing with security for costs, and given the ad hoc way courts have responded to issues such as proportionality guidance should be issued on when security for costs could be used as an interim sanction, or as a means to test the seriousness of a claim.
- **Motion to Strike:** CPR 3.4 allows courts to strike out a claim not only if it discloses no reasonable grounds for bringing a claim, but also where the statement represents an “abuse of the court’s process”. A Practice Direction for such motions already exists, which explains that an abuse of process includes claims that are “vexatious, scurrilous or obviously ill-founded”. There is no established legal definition for vexatious (or indeed scurrilous), but in *Attorney General v Barker* Lord Bingham set out characteristics of ‘vexatious conduct’, including that ‘whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process by the court, meaning by that *a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*’ [emphasis added]. One simple but potentially effective way to strengthen the use of 3.4 in relation to SLAPPs would be to incorporate Bingham’s criteria into the existing Practice Direction, thereby making clear that “vexatious” here includes SLAPPs.

RECOMMENDATIONS

1. The Practice Directions should be updated to include guidance on how security for costs and motions to strike should be applied in the context of SLAPPs.
2. Training should be offered by the Judicial College to judges across the UK on how to understand and respond to abuse of process in the context of SLAPPs.

OUTSTANDING QUESTIONS

1. To what extent do similar rules exist in Northern Ireland and Scotland that are not being applied consistently in the context of SLAPPs? What forms of guidance would be appropriate?
2. What other ways can judges be made more sensitive to the use of SLAPPs/SLAPP tactics and of the ways they can be tackled using existing judicial mechanisms?

¹ See *Alba Exotic Fruit Sh Pk v MSC Mediterranean Shipping Company S.A.* [2019]

² Stephen Ellis, *Face to face with England’s libel laws*, available at <https://journals.openedition.org/socio/568?lang=en>

CPR REFORM

Arguably, in the context of the procedural abuse engaged in by SLAPP litigants, much can be accomplished within the CPRC's mandate of ensuring "the civil justice system is accessible, fair and efficient" (s1 Civil Procedure Act 1997). The extent to which needed reform can be accommodated within the CPR, or within the framework of NI and Scottish procedural reform, needs to be further explored. While the following applies only to the rules stipulated within the CPR of England and Wales, however, the principles underpinning these recommendations should be understood as applying across the UK:

- **Summary judgement:** grounds for dismissal need to be significantly widened so as to allow abusive claims to be disposed of at the earliest stage in proceedings. One way this could be done would be to amend CPR 24.4 to require claims targeting public participation to meet a higher threshold, and to ensure such cases can be heard prior to any disclosure obligations: e.g.
 - (1) *The court may give summary judgement against a claimant or defendant on the whole of a claim or on a particular issue if -*
 - (a) *It considers that -*
 - (i) *The claimant has no real prospect of succeeding on the claim or issue; or*
 - (ii) *The claim targets acts of public participation and discloses no likely prospect of succeeding.*

A definition of "public participation" could then be included (see below).

- **The Courts Discretion as to Costs (CPR 44.2):** a claim may be meritorious under law but still be pursued using abusive SLAPP tactics: e.g. where proceedings are deliberately stretched out to harass and drain the resources of the defendant. A potentially straightforward way to provide for sanctions against SLAPPs that succeed on their merits would be to amend 44(4) to include a new basis for departing from the general rule. For example:
 - (1) *In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including -*
 - (a) *whether the claim targets acts of public participation, and is intended to have or will have the impact of chilling further acts of public participation*
- **Pre-Action Protocol for Claims Targeting Public Participation:** pre-action protocols set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims. This can be important in informing the court's approach to costs. A pre-action protocol governing claims against public participation should consist of:
 - A clear definition of "public participation", including "public interest" (see below)
 - A statement on the importance of protecting public participation rights, and a clear set of aims for protecting these rights and preventing abusive proceedings.
 - A note that this protocol is meant to complement rather than replace the Pre-Action Protocol for Media and Communications Claims, extending the expectation that parties pursue ADR to all claims concerning acts of public participation.
 - Requirements to reply to good-faith pre-publication letters enquiring on matters of public interest and, if a reasonable period is given, to engage in any fact-finding process before commencing civil proceedings.
 - A requirement to pursue a case in the small claims court for claims that are reasonably understood to be under £10,000
 - Potentially circumstances in which the use of SLAPPs could lead to the issuance of a civil restraint order, in line with CPR 3.11

RECOMMENDATIONS

1. The Civil Procedure Rules Committee should assess how the CPR can be updated to address the growing problem of SLAPPs, pursuant to sections 1 and 2 of the Civil Procedure Act 1997. This should entail a full consultation on potential anti-SLAPP reform to the CPR.
2. A Pre-Action Protocol should be issued to set out the steps the court would expect parties to take before commencing proceedings targeting acts of public participation, including an expectation that parties engage in good-faith with the right-to-reply process and pursue alternative dispute resolution (ADR) before commencing litigation.

OUTSTANDING QUESTIONS

1. How much of the SLAPP problem can be addressed within the framework of the civil procedure rules? In particular, to what extent can the grounds for dismissal be extended?
2. How else might procedural protections be extended to SLAPP victims through CPR reform?

ANTI-SLAPP LAW

The CPR Committee cannot create new law, and so anything that goes beyond the powers delegated under Sections 1 and 2 of the Civil Procedure Act 1997 must form the basis of a new law. The following are provisions that cannot be achieved through the above and should be included in a UK anti-SLAPP law.

- **Right to Public Participation:** the law should start by affirmatively recognising the right to public participation. This will reinforce the application of Articles 10 and 11 of the ECHR in the context of civil lawsuits and assist in the interpretation of defamation and civil procedural provisions. By clearly defining the scope of the right, this can also avoid overreach or abuse of the law. An example of how this could look like can be found below:

1 Purpose of this Act

The purpose of this law is to protect and promote public participation and to prevent the use of the courts to undermine the rights of individuals to participate in public debate on matters of public interest. Provisions in this act should be interpreted so as to advance this purpose and accord special protection to the right to public participation, in line with Articles 10 and 11 of the European Convention on Human Rights.

2 Meaning of Public Participation

- (1) *In this act “public participation” means any communication or conduct aimed at influencing public opinion or otherwise engaging on a matter of public interest.*
- (2) *For the purposes of subsection (1) “matter of public interest” means any issue of political or societal significance.*

- **Filter Mechanism:** a new means for summary disposal of claims should be instituted similar to Section 8 of the Defamation Act 1996, requiring a higher threshold to be met for claims targeting public participation. An example of what this could look like can be found below:

3 Summary disposal of claims targeting public participation

- (1) *The court may dispose summarily of the plaintiff’s claim where:*
 - (a) *The claim targets an act of public participation; and*
 - (b) *It appears to the court that the claim has no likely prospect of success and there is no reason why it should be tried; or*
 - (c) *The court otherwise considers it to be in the interests of justice for the claim not to proceed to trial*
- (2) *In considering whether the claim should not proceed under (c) the court shall have regard to -*

- (a) *Any unreasonable failures to comply with the Pre-Action Protocol for Claims Targeting Public Participation*
- (b) *The disproportionate, excessive or unreasonable nature of the claim, or part of it, including but not limited to the quantum of damages claimed by the claimant;*
- (c) *The scope of the claim, including whether the objective of the claim is a measure of prior restraint;*
- (d) *The nature and seriousness of the harm likely to be or have been suffered by the claimant;*
- (e) *The litigation tactics deployed by the claimant, including but not limited to the choice of jurisdiction and the use of dilatory strategies;*
- (f) *The foreseeable costs of proceedings;*
- (g) *The existence of multiple claims asserted by the claimant against the same defendant in relation to similar matters;*
- (h) *The imbalance of power between the claimant and the defendant;*
- (i) *The financing of litigation by third parties;*
- (j) *Whether the defendant suffered from any forms of intimidation, harassment or threats on the part of the claimant before or during proceedings;*
- (k) *The actual or potential chilling effect on public participation on the concerned matter of public interest*

(3) *Court proceedings shall otherwise be suspended pending resolution of a motion for summary dismissal under subsection (1)*

- **Security for Costs:** where a claim targets an act of public participation, the court may make an order for security for costs in line with CPR 25.13(b)(ii) as an alternative to summary dismissal. Regard should be had to the factors listed out in 3(2) above, including compliance with the Pre-Action Protocol on Claims Targeting Public Participation.
- **Sanctions:** all costs should automatically be borne by the plaintiff where the case is found to be a SLAPP, and exemplary damages should be made available for cases where the claimant has exhibited particularly egregious conduct. This could be modeled on the examples that exist of where Parliament explicitly authorised the award of exemplary damages, such as the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951. For example:

4. Exemplary Damages

- (1) *Where a case targeting public participation is dismissed by the court, the court may take account of the conduct of the claimant with a view, if the court thinks fit, to awarding exemplary damages in respect of the wrong sustained by the defendant and the threat posed to public participation.*
- (2) *In considering whether exemplary damages should be imposed, the court shall have regard to the factors listed under s3(2).*

- **Civil Restraint Orders:** courts should be empowered to issue a civil restraint order (CRO) against SLAPP litigants. This could potentially be achieved by amending Section 42 of the Senior Courts Act to enable such orders to be imposed, without the need for application from the Attorney General, against those who have pursued multiple (i.e. 2 or more) SLAPP cases. This would enable repeat offenders to be included in the MOJ's registry of vexatious litigants - providing an important deterrent against those routinely relying on the use of SLAPPs.³

³ HM Courts & Tribunals Service, Guidance – Vexatious litigants, Gov.uk, last updated 9 July 2021, <https://www.gov.uk/guidance/vexatious-litigants>

RECOMMENDATIONS

1. The Ministry of Justice should launch a consultation with a view to introducing an anti-SLAPP law in the next Parliamentary session.
2. Any anti-SLAPP law should include an early dismissal mechanism to filter out SLAPPs at the earliest possible point in proceedings along with robust sanctions to deter the use of SLAPPs.
3. Courts should be empowered to issue security for costs and, where necessary, civil restraint orders against those pursuing SLAPPs.

OUTSTANDING QUESTIONS

1. To what extent could a universally applicable public interest defence (similar to section 4 of the Defamation Act 2013) be introduced alongside the above measures?
2. How can protective measures be instituted to ensure SLAPP victims are not at a substantial financial disadvantage in defending themselves in court? Can such measures be introduced in an anti-SLAPP law or does an anti-SLAPP fund (or legal aid) need to be introduced?
3. Are there other means beyond the MOJ register to “name and shame” SLAPP litigants that can be built into an anti-SLAPP law? Should this be extended to those who routinely use spurious legal threats as a means of shutting down criticism?

Strategic Litigation Against Public Participation (Freedom of Expression) Bill [HL]

[AS INTRODUCED]

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[AS INTRODUCED]

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Make provision about individual expression on matters of public interest; for participation in debates on matters of public interest; and for discouraging the use of litigation as a means of limiting expression on matters of public interest.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Dismissal of proceedings that limit debate

- (1) On a motion by a defendant to a proceeding brought in the High Court or the County Court a judge must, subject to section 2, dismiss the proceeding against the defendant if the defendant satisfies the judge on a balance of probabilities that the proceeding arises from an expression made by the defendant that relates to a matter of public interest. 5
- (2) A judge may of his or her own motion dismiss the proceeding at any stage if the judge concludes that the proceeding is abusive and brought with a view unduly to limit an expression on matters of public interest.

2 No dismissal

10

A judge must not dismiss a proceeding under section 1 if the claimant satisfies the judge that—

- (a) there are grounds to believe that the proceeding has substantial merit, and
- (b) the harm suffered or likely to be suffered by the claimant as a result of the defendant's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 15

3 The public interest

In weighing the public interest the judge must take into account factors including but not limited to— 20

- (a) the right of an individual or organisation to vindicate their reputation through litigation;

- (b) the right and value of freedom of expression;
- (c) the right and value of public participation in democratic discourse;
- (d) the actual or potential chilling effect of the proceeding on future expression generally on matters of public interest;
- (e) the history of litigation between the parties, including the choice of jurisdiction, any refusal by the claimant to engage in good faith in negotiations for settlement, or the use of dilatory strategies or intimidatory conduct; 5
- (f) any disproportion between the resources deployed by the claimant or financed by third parties, and the harm caused or the amount of damages likely to be awarded for that harm, if proved; 10
- (g) the possibility that the expression might provoke hostility against an identifiably vulnerable group.

4 Definition of “expression”

In this Act, “expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 15

5 Stay of proceeding

Upon the filing of a motion, no further step may be taken in the proceeding by any party until the motion, including any appeal against the motion, has been finally disposed of. 20

6 No amendment to pleadings

Unless a judge orders otherwise, the claimant is not permitted to amend his or her pleadings in the proceeding—

- (a) in order to prevent or avoid an order under this Act dismissing the proceeding; or 25
- (b) if the proceeding is dismissed under the Act, in order to continue the proceeding.

7 Costs on dismissal

If a judge dismisses a proceeding under this Act, the defendant is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 30

8 Costs if motion to dismiss denied

If the judge does not dismiss a proceeding under this Act, the claimant is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 35

9 Damages

If, in dismissing a proceeding under this Act, the judge finds that the claimant brought the proceeding in bad faith or for an improper purpose, the judge may award the defendant such damages as the judge considers appropriate.

10 Legal aid

5

- (1) Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is amended as follows.

- (2) After Paragraph 20 insert—

“Applications to dismiss gagging proceedings

- 20A Civil legal services provided in relation to an application to dismiss proceedings, including mediation, advocacy and appeal, under the Strategic Litigation Against Public Participation (Freedom of Expression) Act 2022.

10

Exclusions

- 20B Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule.”

15

11 Rules

Rules may be made by the Civil Procedure Rules Committee under the Civil Procedure Act 1997 for the purposes of this Act.

12 Commencement, extent and short title

20

- (1) This Act comes into force on the day on which it is passed.
- (2) This Act extends to England and Wales.
- (3) This Act may be cited as the Strategic Litigation Against Public Participation (Freedom of Expression) Act 2022.

Strategic Litigation Against Public Participation (Freedom of Expression) Bill [HL]

[AS INTRODUCED]

A

B I L L

TO

Make provision about individual expression on matters of public interest; for participation in debates on matters of public interest; and for discouraging the use of litigation as a means of limiting expression on matters of public interest.

Lord Thomas of Gresford

Ordered to be Printed, 7th September 2022.

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May 19, 2022

VIA EMAIL TO: slapps.evidence@justice.gov.uk

SLAPPs Evidence
Ministry of Justice
102 Petty France
London SW1H 9AJ

Re: UK Ministry of Justice Call for Evidence on SLAPPs: MLRC Comments

On behalf of the Media Law Resource Center (MLRC), we welcome the opportunity to submit comments in response to the Ministry of Justice's call for evidence on Strategic Lawsuits Against Public Participation ("SLAPP").

By way of background, MLRC is a non-profit organization founded in 1980 by leading American publishers and broadcasters to defend free speech and press rights under the First Amendment. Today MLRC is supported by over 100 leading publishers, broadcasters, digital platforms, media trade associations, media insurance professionals; and over 200 law firms in the United States and around the world that specialize in defending freedom of expression.

Our submission answers **Questions 7-12 and 14** of the Call for Evidence. These questions deal with Legislative Reform and the task of writing new law to counter and deter SLAPPs. These are issues which MLRC and its members have a great deal of experience with under the American legal system. We believe our experience and lessons learned can be useful to the Ministry of Justice in crafting legislation to protect free expression from abusive defamation, privacy and related lawsuits. We begin with a short introduction setting out the background in which SLAPP laws developed in the United States, the current SLAPP landscape, and our common issues of concern. Our answers to Questions 7-12 and 14 contain more detailed information on the content and scope of effective SLAPP laws and suggested reforms with referenced source material.

Introduction

The phenomena of SLAPPs in the United States was identified over 30 years ago. Notwithstanding our robust First Amendment protections for free expression, scholars recognized that aggressive plaintiffs could abuse the legal system to harass and intimidate journalists, whistleblowers, academics, authors, government critics, and concerned citizens alike for merely exercising their lawful right of free expression. Lawmakers concluded that traditional judicial remedies were inadequate to address the problem and that statutory remedies were required to combat illegitimate claims brought under the guise of defamation, tortious interference and related claims. Thus, starting in the 1990s and continuing to the present, state lawmakers throughout the country have undertaken efforts to protect the public from SLAPP lawsuits through new legislation. These legislative efforts are based on the principle that individuals deserve to be protected when exercising their human rights of freedom of expression and information. Although in the U.S. we often refer to our “First Amendment rights,” as provided in Article 19 of the Universal Declaration of Human Rights, free expression is a global human right that is at stake both for the speaker and the public when abusive lawsuits, seeking to prevent exposure of wrongdoing or impede community engagement, can be pursued in advantageous jurisdictions (like the UK) and stymie vital discussions that impact our society at large.

In the United States, SLAPP statutes are matters of individual state law, and states have taken a variety of approaches that differ significantly in scope and effectiveness. Some of the older statutes defined SLAPPs extremely narrowly as lawsuits over speech made at legislative and administrative hearings. These laws failed to adequately address the problem and have proven to be of little utility. Other states, like California, Tennessee, Oregon, and Texas, have adopted broad protection. These laws define SLAPPs to include meritless lawsuits against speech or conduct (right of assembly) on matters of public interest and establish accelerated proceedings to dismiss such suits. Common features of strong SLAPP protection are:

- Expedited dismissal of the case upon showing that it lacks merit (fast-track motion and hearing);
- To determine if it lacks merit, use of a burden shifting framework in which the Movant establishes the SLAPP law applies; the Claimant demonstrates the case has merit, and, if necessary, the Movant can respond by establishing a defense as a matter of law;
- Stay of discovery while the motion is being considered;
- Ability to immediately appeal denial of motion (and the underlying case remains stayed); and
- Recoupment of fees (to make SLAPP victim whole).

These broad laws have proven effective in deterring SLAPP lawsuits and compensating SLAPP victims for the legal costs of defending themselves.

The trend in the U.S. over the last 10-15 years has been to adopt broad anti-SLAPP statutes or amend previously enacted narrow statutes and expand their scope of protection, like has been done recently in New York, Florida, Georgia and Nevada. Today 33 states have anti-SLAPP laws, including more than a dozen that have been adopted or enlarged since 2010. These recent

laws have received wide support from affected groups and the legal profession.¹ The effort to enact SLAPP protection throughout the United States continues to strengthen. However, given the uneven landscape of SLAPP protection in the United States, plaintiffs continue to abuse the legal system. In fact, like the situation in Britain, the United States has experienced a spate of SLAPP lawsuits brought not only by Russian oligarchs but also disgruntled political figures.

In 2020, the [Uniform Law Commission](#) promulgated a [Uniform Public Expression Protection Act](#). This model anti-SLAPP law is recommended for adoption throughout the United States and has already been enacted in Washington state, Kentucky, and is awaiting the Governor's signature in Hawaii. Its key features and operations are described more fully in our answer to Question 11.

What has become evident in the U.S. is that a patchwork of protection that varies by state (with no overarching federal protection) promotes libel tourism. Recalcitrant litigants, like former Congressman Devin Nunes, file defamation lawsuits in jurisdictions with no or little anti-SLAPP protection. *See Judges tell Devin Nunes he cannot continue suing CNN. Here's where all of his lawsuits stand*, The Fresno Bee, <https://amp.fresnobee.com/news/politics-government/article260584207.html>; *see also Why Johnny Depp Is Suing Amber Heard in Virginia*, Reason.com, <https://reason.com/2022/04/11/why-johnny-depp-is-suing-amber-heard-in-virginia/> (“It is not immediately clear how Virginia factors into the equation at all, until you consider the state's weak Anti-SLAPP law.”); “The Need for a Federal Anti-SLAPP Law,” NYU Journal Legislation & Public Policy, <https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slap-law/>, (“In fully 21 states, including populous states like Ohio, North Carolina, and Michigan, defendants who are subjected to SLAPP suits enjoy no Anti-SLAPP protection whatsoever—a defect that enables forum shopping and so-called ‘libel tourism.’”). The phenomenon of SLAPP suits and libel tourism were famously discussed by John Oliver on “Last Week Tonight with John Oliver.” *See* <https://youtu.be/UN8bJb8biZU> The U.S. experience demonstrates the danger of having some jurisdictions without protection from this form of judicial harassment. If the UK does nothing, it will likely become one of the chosen forums for SLAPP filers world-wide.

What is also clear from the U.S. experience in deterring this unique form of judicial harassment is that robust SLAPP laws are vitally needed to prevent the judicial system from being weaponized against citizens, journalists and other watchdogs to intimidate and silence them. Litigation not aimed at vindicating legitimate rights, but rather as a part of a strategy to distract and deter public criticism is an improper use of the legal system, interferes with due administration of justice and undermines the integrity of our judicial process. In our answers below, we highlight the fundamental components of such laws with suggestions on how they can be incorporated into UK law.

1. In 2012, the American Bar Association passed a Resolution imploring the passage of anti-SLAPP laws: “RESOLVED, That the American Bar Association encourages federal, state and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).” <https://medialaw.org/wp-content/uploads/2022/05/Resolution-115.doc>

SLAPP Call for Evidence: Legislative Reform Questions 7-12

7. Do you agree that there needs to be a statutory definition of SLAPPs?

Yes. There should be a statutory definition of SLAPPs. A statutory definition would give effect to government policy by communicating the law clearly to the people affected by it and to the judges charged with interpreting and applying it.

In addition to a deterrent effect, a statutory definition is necessary to give judges clear guidance on applying the law, particularly where the SLAPP law modifies common law or other preexisting statutory rules. With respect to defamation claims in England, we respectfully point out that English judges have been notoriously reluctant to depart from the heavily “rules-based” common law of defamation. For example, English trial courts were reluctant to apply the House of Lord’s defense first articulated by the House of Lords in 2001 in *Reynolds v. Times* as the “responsible journalism” defense. It required a subsequent decision by the House of Lords in 2006 in *Jameel v. Wall Street Journal Europe* and the statutory Defamation Act 2013 for this public interest speech defense to finally begin to take hold. Even since the Defamation Act 2013 s.4 version of the defense came into force its value to defendants has continued to be undermined by the injection of “common law” type rules, such as the artificial “single defamatory meaning” rule, into the defense by the judges. There is still judicial reluctance to apply it on a broad, “principles” rather than “rules” basis. This past reluctance further demonstrates the need for a statutory definition and perhaps some training of the judiciary about what SLAPP is.

Further, we agree with the Ministry of Justice that the Defamation Act 2013 was not specifically designed to meet the challenges which SLAPPs represent. This is because the Defamation Act 2013 retains the anomalous common law presumption of falsity and requires defendants to prove their speech was lawful. In no other civil tort claim is the defendant presumptively guilty. This is a historical legacy of the ancient construct of the common law and one that should be modified in the limited context of SLAPP cases (*see* section 10 below). As the UK Supreme Court observed, English defamation law “has accumulated, over the centuries, a number of formal rules with no analogue in other branches of the law of tort.” [Lachaux v. Independent](#) (2019). These rules are fundamentally incompatible with the defense of freedom of expression from SLAPPs. So are the rules that have crept into the application of the s.4 defense. When the merits of a public interest speech defense to the defamation claim is being considered on an early disposal application under the statutory anti-SLAPP regime these rules should be disappplied in favor of a broader principles based approach.

8. What approach do you think should be taken to defining SLAPPs? For example, should it be to establish a new right of public participation? What form should that take?

A new statutory right of public participation should be created. That right would supersede any of the torts used to bring a SLAPP provided the activities at issue fall within the statutory definition. Once the new right of public participation is engaged, the Claimant must bear the burden of showing that the right does not apply. The way to do that is for the Claimant to present admissible evidence showing his or her claim is meritorious (*i.e.*, they establish *prima facie*

viability of a claim both legally and factually) and this claim is not an abusive court proceeding. If the Claimant fails to establish either the merits of his claim or that he is not engaged in an abusive court proceeding, the claim should be dismissed.

For example, the Uniform Public Expression Protection Act applies to the rights of free speech, press, association/assembly, and petition guaranteed by the United States Constitution or the State constitution. This includes communications in a legislative, executive, judicial, administrative, or other governmental proceeding; communications on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or the exercise of the foregoing constitutional rights on a matter of public concern.

Because the UK does not have the same enumerated constitutional protections, it would be even more important to establish a new right of public participation. A potential working definition follows:

“Public participation” means any statement or activity by a natural or legal person expressed or carried out in the exercise of the right to freedom of expression or information on a matter of public interest, such as the creation, exhibition, advertisement or other promotion of journalistic, political, scientific, academic, artistic, commentary or satirical communications, publications or works, and any preparatory activities directly linked thereto. It includes activities related to the exercise of the right to freedom of association and peaceful assembly, such as the organization of or participation in lobbying activities, demonstrations and protests and activities resulting from the exercise of the right to petition, such as the filing of complaints, petitions, administrative and judicial claims and participation in public hearings. It also includes preparatory, supporting or assisting activities that have a direct and inherent link to the statement or activity in question and that are targeted to stifle public participation. It can also cover other activities meant to inform or influence public opinion or to further action by the public in relation to issues of public interest.”

9. If a new right of public participation were introduced, should it form an amendment to the Defamation Act 2013, or should it be a free-standing measure, recognising that SLAPP cases are sometimes brought outside of defamation law?

We recommend adoption of a free-standing law because SLAPP cases are not confined to defamation law. Other torts such as invasion of privacy, data protection, tortious interference have been used to bring SLAPPs. Moreover, a free-standing right of public participation would affirm that protection from SLAPPs supersedes the inadequate common law/statutory regime currently in place. And SLAPP suits could be heard under new streamlined and accelerated procedures specifically designed for this purpose. *See* answer to Question 10 below.

10. Do you think the approach should be a definition based on various criteria associated with SLAPPs and the methods employed?

Yes. When court proceedings are brought against one for engaging in public participation, those persons can apply for early dismissal of unmeritorious claims or abusive court proceedings and for remedies including fees, costs, penalties, and security.

The application for early dismissal should be treated on an accelerated basis and the main proceedings should be stayed until a final decision on that application is taken (and any appeal).

When a Movant applies for early dismissal, his application shall include a description of the elements of the right of public participation at issue and, if one chooses, a description of the supporting evidence. The Court shall be able to take judicial notice based on the content of the publication whether a matter of public interest is at issue.

A matter of public interest means a statement or activity in which the public takes a legitimate interest concerning, for instance:

- (a) public health, safety, the environment, climate, economic concerns, community well-being or enjoyment of fundamental rights;
- (b) activities of a person or entity in the public eye who has drawn substantial public attention due to the person's official acts, fame, or notoriety, or celebrity;
- (c) matters of political, social, or other interest to the community;
- (d) matters under public consideration or review by a legislative, executive, or judicial body, or any other official proceedings;
- (e) allegations of corruption, fraud or criminality; or
- (f) activities aimed to fight disinformation."

Once it is established that the Movant is being sued over his exercise of the right of public participation, the Claimant bears the burden of must establish both that his claim is meritorious (*i.e.*, establish *prima facie* viability of a claim both legally and factually) and is not an abusive court proceeding. If the Claimant fails to establish either the merits of his claim or that he is not engaged in an abusive court proceeding, the claim should be dismissed, and remedies awarded.

A proposed definition for what constitutes an "abusive court proceeding" follows:

"Abusive court proceeding against public participation" means court proceedings brought in relation to public participation that are fully or partially unfounded and have at least three of the following six criteria:

- (1) Disproportionate, excessive or unreasonable nature of remedies sought;
- (2) Engagement in procedural maneuvers designed to drive up costs by Claimant or his or her representatives;
- (3) Existence of multiple proceedings initiated by Claimant or associated parties in relation to similar matters;
- (4) Exploitation of economic advantage to put pressure on Movant by Claimant or his or her representatives;
- (5) Lawsuit targets individuals rather than just the organization that employs them;
- (6) History of SLAPPs, pre-suit litigation threats, legal intimidation, harassment or threats by Claimant or his or her representatives.

Potential remedies should include reasonable fees and expenses, penalties for abusive conduct, damages for physical and emotional harm caused to the Movant, and the ability to require security at the beginning of the proceedings for all of these measures.

11. Are there any international models of SLAPP legislation which you consider we should draw on, or any you consider have failed to deal effectively with SLAPPs? Please give details.

Yes. There are models of effective laws on which the UK should draw.

United States Models

The Uniform Public Expression Protection Act (“UPEPA”) is a comprehensive Model Act devised by the Uniform Law Commission after a two-year study by legal practitioners, judges, and other interested parties throughout the United States who considered existing anti-SLAPP statutes, case law, and ongoing needs for legal reform. Since its passage, the Model Act has been passed in Washington State, Kentucky, and is awaiting the Governor’s signature in Hawaii. Here is an annotated version of the Act providing additional comments and explanations for the provisions. [Uniform Public Expression Protection Act](#)

Key provisions in UPEPA are:

- **Broad applicability** – UPEPA applies to lawsuits brought against one for the exercise of the right of free speech, association, or petition. This is defined to include: (1) Communication in a legislative, executive, judicial, administrative, or other governmental proceeding; (2) Communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or (3) Exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or the State constitution, on a matter of public concern.
- **Limited Exemptions** –
 - Claims against a governmental entity or official acting in official capacity
 - Claims by a governmental entity or employee acting in an official capacity to enforce a law or regulation to protect against an imminent threat to public health or safety
 - Claims involving commercial speech
- **Procedural aspects**
 - The motion challenging the lawsuit as a SLAPP must be filed within 60 days of service or a later time on a showing of good cause.
 - Upon filing of the motion, there is an immediate stay of the proceedings while waiting on a ruling on the motion and conclusion of any appeal.
 - The court expedites consideration of the motion within 60 days of its filings unless good cause.
 - The court expedites ruling on the motion – within 60 days of its consideration.
- **Burden shifting framework for consideration of the motion**

- First step – Movant establishes the law applies.
 - Second step – Respondent establishes *prima facie* viability of his or her claim. In short, the responding party must provide evidence of each element of his or her claim sufficient as a matter of law if not rebutted or contradicted.
 - Third step - Moving party establishes there is no legal viability for the claim. In this phase when the burden shifts back to the moving party, he can either show that: (1) the responding party failed to state a cause of action upon which relief can be granted; or (2) there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law on the claims or part of the claims.
- **Express right to immediate appeal** - if the motion is denied.
 - **Reasonable attorney’s fees and litigation expenses** must be awarded to the movant if the motion succeeds in whole or in part; conversely on an express finding that the motion was frivolous or filed solely with intent to delay, reasonable attorney’s fees and expenses shall be awarded against the movant.
 - **Dismissal does not impact right to receive fees** – if a Claimant dismisses all or part of his or her claims while a motion is pending, it does not impact the right to reimbursement of fees and expenses.

See file:///C:/Users/Pratherl/Downloads/UPEPA_Summary_ADA.pdf (Summary of UPEPA)

For a comprehensive evaluation of current state anti-SLAPP laws throughout the United States, the Institute for Free Speech has prepared a scorecard evaluating their strength based on several objective criteria which have proven effective in combatting SLAPP suits. See <https://www.ifs.org/anti-slapp-report/>

European Models

On April 27, 2022, the EU Commission proposed an anti-SLAPP Directive (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0177&from=EN>) (“EU Directive”) and Member State Recommendations (https://ec.europa.eu/info/sites/default/files/1_1_188781_recc_slapp_en_1.pdf) (“EU Recommendations”) outlining a comprehensive approach to handling SLAPPs in the EU.

The key provisions in the proposed EU Directive include:

- Broad applicability to a newly defined right of public participation and protection against abusive court proceedings. (Articles 2 and 3)
- Mechanism for early dismissal of manifestly unfounded cases and remedies against abusive court proceedings. (Articles 5, 9, 12, 14-16)
- Stay of the proceedings while a determination is made whether the law applies. (Article 10)
- A special rule on the burden of proof Movant seeks early dismissal such that the Claimant must prove the claim is not manifestly unfounded. (Article 12)
- Any decision is subject to appeal. (Article 13)
- Movant can seek fees, damages and penalties. (Articles 14-16)

The biggest concern with the proposed EU Directive is that it is unclear whether the remedies are only provided for abusive court proceedings and may not apply to manifestly unfounded cases. All of the remedies outlined in the proposal should apply to cases whether they are manifestly unfounded or abusive court proceedings.

12. Would you draw any distinction in the treatment of individuals and corporations as Claimants in drawing up definitions for SLAPP type litigation?

No. SLAPPs are not defined by the type of claimant, and as indicated in the Foreword to this Call for Evidence, oftentimes these claims are brought by extremely wealthy individuals.

One of the most notorious SLAPP suits filed in the UK was brought by cyclist Lance Armstrong against *The Sunday Times*. Armstrong's suit, in many ways a precursor to today's Russian oligarch suits, poignantly demonstrates the dangers of SLAPPs.

"Armstrong rose to bicycling fame as a seven-time winner of the Tour de France. Throughout his career, however, rumors of performance-enhancing drug use plagued him. His denials were vehement. Over the course of his career, in an attempt to silence those who spoke out against him, he filed lawsuit after lawsuit.²

- In 2003, Emma O'Reilly, Armstrong's former soigneur, publicly described Armstrong's performance-enhancing drug use when she agreed to cooperate with authors of the book *L.A. Confidential: Les secrets de Lance Armstrong*. Armstrong sued her. The case settled.³
- In 2004, Armstrong sued *The Sunday Times* of London for libel, after the paper reprinted allegations contained in the book *L.A. Confidential: Les secrets de Lance Armstrong*. *The Sunday Times* spent more than \$1 million in legal fees defending against the lawsuit and paid Armstrong \$500,000 to settle the suit.⁴
- In 2004, Armstrong sued SCA Promotions for failure to pay a bonus for winning the Tour de France. SCA had declined to pay it because of reports of Armstrong's performance-enhancing drug use.⁵ SCA Promotions paid Armstrong \$7.5 million to settle the suit.⁶

2. See Juliet Macur, *End of the Ride for Lance Armstrong*, N.Y. TIMES, Mar. 1, 2014, <http://www.nytimes.com/2014/03/02/sports/cycling/end-of-the-ride-for-lance-armstrong.html>.

3. Mary Pilon, *Armstrong Aide Talks of Doping and Price Paid*, N.Y. TIMES, Oct. 12, 2012, <http://www.nytimes.com/2012/10/13/sports/cycling/lance-armstrong-aide-talks-of-doping-and-price-paid.html?pagewanted=all&r=0>.

4. Charles Miranda, *British Journalist David Walsh Says the Sunday Times Wants Money Back After Being Sued by Lance Armstrong*, HERALD SUN, Jan. 19, 2013, <http://www.heraldsun.com.au/sport/british-journalist-david-walsh-says-the-sunday-times-will-wants-money-back-after-settling-with-lance-armstrong/story-fngr0c3f-1226557282585?nk=9ac0381c4e051fec75f20feb33c63b9d>.

5. Robert Wilonsky, *Dallas-Based Sports Insurer that Paid Lance Armstrong \$7.5 Million for '04 Tour de France Win Wants Money Back*, DALL. MORNING NEWS SCOOP BLOG (Oct. 22, 2012, 4:51 PM), <http://thescoopblog.dallasnews.com/2012/10/dallas-based-sports-insurer-that-paid-lance-armstrong-7-5-million-for-04-tour-de-france-win-wants-money-back.html/>.

6. *Id.*

- In 2005, Armstrong sued his former personal assistant, Mike Anderson, after Anderson disclosed his discovery of a box of androstenone while cleaning Armstrong's apartment.⁷ The case settled.⁸
- In 2006, lawyers for *The Sunday Times* issued the following statement: "*The Sunday Times* has confirmed to Mr. Armstrong that it never intended to accuse him of being guilty of taking any performance-enhancing drugs and sincerely apologizes for any such impression."⁹

After six years and millions of dollars in legal fees and settlements, the truth finally vindicated these voices that Armstrong had subdued through lawsuits. In 2012, the United States Doping Agency issued its "Reasoned Decision," citing to mountains of proof of Armstrong's performance-enhancing drug use.¹⁰ In an about face, Armstrong did a "tell-all" interview with Oprah Winfrey, admitting to doping to improve his race results. He also conceded that he was nothing more than a bully, who had sued the journalists, friends, and colleagues who had accused him of doping:

Armstrong: "Yeah, I was a bully."

Winfrey: "'You're suing people and you know they're telling the truth? What is that?'"

Armstrong: "It's a major flaw."¹¹

Armstrong had lied about his years of rampant performance-enhancing drug use. **His vehement denials survived in part because, each time a truth-teller challenged him, Armstrong slapped that person with a lawsuit in retaliation.**¹² Excerpt from *Bullies beware: Safeguarding Constitutional Rights through Anti-SLAPP in Texas*,⁷ Texas Tech Law Review 725, 727-728, by Laura Lee Prather and Justice Jane Bland

7. Ben Broad, *A Brief Look at Some of Those Who Haven't Believed Lance Armstrong*, HERALD SUN, June 14, 2012, <http://www.heraldsun.com.au/news/a-brief-look-at-some-of-those-who-havent-believed-lance-armstrong/story-e6frf7jo-1226395139794>.

8. Mike Anderson, *My Life with Lance Armstrong*, OUTSIDE (Aug. 31, 2012), <http://www.outsideonline.com/outdoor-adventure/biking/road-biking/My-Life-With-Lance-Armstrong.html>.

9. *The Sunday Times Sues Lance Armstrong Over Libel-Suit Settlement*, VELONEWS (Dec. 23, 2012), http://velonews.competitor.com/2012/12/news/the-sunday-times-sues-lance-armstrong-over-libel-suit-settlement_269715 (quoting the formal apology, as part of a joint statement, issued by *The Sunday Times*).

10. See generally U.S. ANTI-DOPING AGENCY, REPORT ON PROCEEDINGS UNDER THE WORLD ANTI-DOPING CODE AND THE USADA PROTOCOL: REASONED DECISION OF THE UNITED STATES ANTI-DOPING AGENCY ON DISQUALIFICATION AND INELIGIBILITY (2012), available at <http://d3epuodzu3wuis.cloudfront.net/ReasonedDecision.pdf> (explaining the U.S. Anti-Doping Agency's reasoned decision on disqualification and ineligibility regarding *U.S. Anti-Doping Agency v. Armstrong*).

11. Debra Cassens Weiss, *Was Lance Armstrong a Lawsuit Bully? Cyclist Admits 'Major Flaw'*, ABA J. (Jan. 18, 2013, 12:38 PM), http://www.abajournal.com/news/article/lance_armstrong_admits_to_lawsuit_bullying/; *Highlights of Lance's Interview, Part I*, ESPN (Jan. 18, 2013), http://espn.go.com/sports/endurance/story/_/id/8854829/situation-was-one-big-lie.

12. See, e.g., *Armstrong v. SCA Promotions, Inc.*, No. 05-14-00300-CV, 2014 WL 1678988, at *1 (Tex. App.—Dallas Apr. 24, 2014, no pet. h.) (mem. op.); Philip Jankowski, *Firms Sue Lance Armstrong for \$500,000 Over Doping Admission*, STATESMAN (Oct. 7, 2014, 7:15 PM), <http://www.statesman.com/news/news/local/firms-sue-lance-armstrong-for-500000-over-doping-a/nhdhT/>; *Lance Armstrong Settles with Sunday Times*, THE GUARDIAN (Aug. 25, 2013, 4:17 AM), <http://www.theguardian.com/sport/2013/aug/25/lance-armstrong-settles-sunday-times>; Juliet Macur, *End of the Ride for Lance Armstrong*, N.Y. TIMES, Mar. 1, 2014, http://www.nytimes.com/2014/03/02/sports/cycling/end-of-the-ride-for-lance-armstrong.html?_r=0; Brent Schrottenboer, *Lance Armstrong Loses Bid to Have Lawsuit Dismissed*, USA TODAY, June 19, 2014, <http://www.usatoday.com/story/sports/cycling/2014/06/19/lance-armstrong-lawsuit-us-government-doping/10999179/>.

(emphasis added). <http://texastechlawreview.org/wp-content/uploads/Prather-Bland.PUBLISHED.pdf>

Ultimately, and only because of his confession, Armstrong returned some of the settlement money he received from *The Sunday Times*. See *Drug cheat Lance Armstrong settles with The Sunday Times*, *The Sunday Times*, <https://www.thetimes.co.uk/article/drug-cheat-lance-armstrong-settles-with-the-sunday-times-9cztmzt796d>; *Lance Armstrong settles with Sunday Times*, *The Guardian*, <https://www.theguardian.com/sport/2013/aug/25/lance-armstrong-settles-sunday-times>.

What is clear from this example is that whether the claimant is an individual or a corporation is of no measure, SLAPP suits are brought by those trying to silence those exposing wrongdoing. Armstrong's case also demonstrates – perhaps more clearly than any other – the problem presented by the UK's typical allocation of the burden of proof. When enacting an anti-SLAPP statute, the UK should follow the lead of the EU Directive (Article 12), establishing a special rule on the burden of proof in SLAPP cases once a movant has applied for early dismissal showing that the statement or activity constitutes an act of public participation.

14. Are there additional reforms you would pursue through legislation?

Yes, there are three unique provisions in the EU Directive (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0177&from=EN>), that should be considered, in particular:

EU Directive -

(1) NGO Intervention (Article 7) - Oftentimes those who are victims of SLAPP suits are freelance reporters or individual watchdogs who have no structured organizational support to assist with the defense of this form of harassment. Anticipating the difficulties these individuals would confront, the EU Commission included a right of intervention by non-governmental organizations (“NGO’s”) in support of SLAPP victims in its proposal. Such a measure ensures that NGO’s safeguarding or promoting the rights of persons engaging in public participation may take part in those proceedings, either in support of the defendant or to provide information.

(2) Subsequent amendment does not deprive court of power to consider remedies (Article 6) - In addition, we often see Claimants attempt to drag out the court proceedings and increase the cost of litigation in a harassing fashion by repeatedly amending their claims or pleadings such that the respondent must continually file new responses and the proceedings are delayed. Article 6 of the EU Directive states that subsequent amendments to claims or pleadings, including the discontinuation of the proceedings, do not affect the ability of the court to consider the motion and impose remedies.

(3) Security requirement (Article 8) - Article 8 provides the court with power to require the Claimant to provide security for procedural costs and damages, if it considers such security appropriate in view of evidence the matter is an abusive court proceeding.

EU Recommendations –

In addition, to issuing its proposed Directive, the European Commission simultaneously issued a Recommendation for Member States

(https://ec.europa.eu/info/sites/default/files/1_1_188781_recc_slapp_en_1.pdf) which includes, among other things, a recommendation to aggregate data at a national level to better track SLAPP lawsuits. The California anti-SLAPP statute has a similar requirement (California Code of Civil Procedure § 425.16(j)) which has proven useful in determining the number of SLAPP suits filed and accurately tracking the impact on the court system. *See, e.g.*, “California’s Anti-SLAPP Statute Not Systematically Abused,” Law 360, <https://medialaw.org/wp-content/uploads/2022/05/California-Anti-SLAPP.pdf>. In the UK, such a requirement could also assist in determining which lawyers are representing SLAPP Claimants, like the Russian oligarchs, on a repeated basis. *Do Russian Oligarchs Have a Secret Weapon in London Libel Lawyers?* The New York Times, <https://www.nytimes.com/2022/03/29/business/oligarchs-london-putin-russia.html>

Other key recommendations made by the European Commission include training of legal professionals and the judiciary to recognize SLAPP suits, awareness raising campaigns, and providing access for SLAPP victims to obtain individual and independent support. These are all worthy measures for consideration and could help stem the tide on the current outbreak of “lawfare” in the UK (and beyond).

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MKSR Memorandum

To: **The UK Ministry of Justice**
Call for Evidence on SLAPPS
SLAPPS Evidence, Ministry of Justice
102 Petty France, London SW1H 9AJ
Slapps.evidence@justice.gov.uk

From: **David S. Korzenik, Esq.**
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<https://mksr.law>

Dated: **May 18, 2022**

Re: **Five Proposed Parameters for the Definition of a SLAPP & A Chart of SLAPP Problems and Proposed Anti-SLAPP Solutions**

Interest in Making this Submission to the Ministry of Justice

My professional commitments are devoted to the defense of news organizations and freedom of expression. I have defended and managed claims against U.S. news organizations in the U.S. and in the U.K. And I have defended and managed claims against U.K. news organizations in the U.S. I have advocated a strengthened anti-SLAPP law in New York State and have litigated anti-SLAPP motions and counterclaims under the new NY law.

Academic Commitments: I have taught Media Law as an Adjunct Professor for over 20 years at the Benjamin N. Cardozo School of Law in NY. The central theme of the course matches the theme of my practice: The impact of First Amendment rights on libel, privacy and intellectual property rights. Our students were half LLM candidates who were lawyers from other countries and half 3rd year law students. The course has always had a comparative law focus – treating UK and ECHR rulings as well as U.S. I have written papers comparing U.S., U.K and ECHR law on freedom of the press.¹

¹ *Why Are the British Not More British?: Underlying Philosophical Differences between U.S., U.K. and ECHR Law on Freedom of Expression* – published in “Developments in International Media Law,” Media Law Resource Center, London Conference 2019.

I am a partner with *Miller Korzenik Sommers Rayman LLP*. Our firm is devoted almost exclusively to the defense of the press. We represent news organizations, publishers, and other creators of content, protecting their work against the kinds of claims and threats that are typically directed against them – libel, privacy, copyright, newsgathering torts, etc. We do not represent plaintiffs or claimants in such matters. We do not take positions inconsistent with free speech/ 1st Amendment values.

I have defended news organizations such as *The Guardian*, *New York Magazine*, *BBC*, *NPR*, science journals, *Consumer Reports*, *Forbes*, other financial news outlets such as *SeekingAlpha.com* and human rights groups such as *Global Witness* against libel, privacy and related claims.

Of special interest to my practice is the international dimension of libel, privacy and press law. We have acted on behalf of U.S. media confronted with foreign libel and privacy litigation. The firm website describes some of those matters.

I have watched and read transcripts of some of the Parliamentary Committee testimony regarding SLAPP suits and possible legislative solutions with keen interest. It convinced me that it might be worthwhile to offer some comments in support of the Ministry's important efforts. My first encounter with UK defamation law was when I was counsel for *Spy Magazine*. We published an investigative article on Robert Maxwell entitled, *Daily News Workers Check Your Pension Funds Now!*" We did **not** distribute that issue in the UK out of concern over unfavorable UK libel law and Maxwell's propensity for libel actions. As acting editorial counsel for *Forbes*, I was briefly involved with the *Berezovsky v. Forbes* case in London, working with our defense counsel David Hooper.

Five Suggested Parameters for the Definition of a SLAPP

The Statute's Definition of a "SLAPP" suit will set the trigger – the on/off switch - for the Anti-SLAPP law's procedural and substantive protections. The definition of a UK "SLAPP" will not be easily crafted, but there are five general parameters that the definition of "SLAPP" should meet:

1. A SLAPP should *not* be limited to the Defamation Cause of Action

Reason: Many suits designed to suppress speech and public discourse do not just sound in defamation. They can take the form of privacy type claims (e.g., *Global Witness* case cited below), or claims alleging false or

• *Press Freedom in the Balance: A Comparative Explanation and Critique of ECHR's Developing Case Law on Privacy and Libel* published in "Publishing in the Global Environment – Developments in European and American Media Law", Media Law Resource Center, London Conference, 2007.

misleading “commercial”² speech, or putative trademark claims aimed at criticism of a company, or other claims targeting speech.

2. **A SLAPP should be Defined in a Way that Does not create the prospect of costly threshold hearings or fact-finding. It should be clearly defined as a *matter of law* in the course of a threshold “special motion” in advance of any other pleading or proceeding in the case.**

Reason: A clear definition of a SLAPP – to be made as a matter of law - is necessary to avoid self-defeating costs of hearings or fact-finding that cripple the speed of proceedings, increase costs, or create an incentive for SLAPP plaintiffs to test the law’s definition and thus burden speakers.

3. **A SLAPP suit must be Defined Broadly and Generously if it is to Deter costly abuses of a speaker’s rights to public discourse. The statute should expressly state that its definition is to be interpreted “broadly and generously.” That will deter narrow rulings from Judges who may resist the new law. (In the U.S. there has been some judicial resistance to Anti-SLAPP laws which have required legislatures to amend the statutes and redeclare their purpose. Anti-SLAPP laws may sometimes run up against judicial inertia, habit and custom which legislators must anticipate.)**

Reason: There is little hope that an Anti-SLAPP law will serve as an effective deterrent to abusive attacks on speakers if its definition is susceptible to narrow or ambiguous judicial readings or to open-field fact-finding.

Example: The earlier NY Anti-SLAPP law was read to be limited to plaintiffs who were applying for public permits. It could have been read more broadly, but courts chose the narrow reading. The law was therefore largely abandoned as a source of protection for speakers. California’s Anti-SLAPP was more broadly read by courts, and it became a potent model for the protection of speakers in other states like Nevada, Texas and Florida. NY followed more recently with a new law expressly intended to remedy the earlier legislative and judicial deficiencies. The

² What might be or might not be deemed “commercial” speech can be quite malleable. And plaintiffs who seek to evade or diminish Article 10 protections may and do try to style their claims as aimed at “commercial” speech. (It is a common move in the U.S.) The time and effort imposed on a defendant who must clean up such muddy pleading will multiply the costs of defending legitimate speech. The “it’s commercial” canard is an alternative rhetorical device used by plaintiffs to push the speech out of zone of public interest. It should not be readily entertained. Much speech and expressive works in the UK and the US are undertaken for profit.

original NY Anti-SLAPP was signed by Gov. Mario Cuomo. The Remedial amendment was signed by Gov. Andrew Cuomo in 2020.

4. **A UK Definition of SLAPP should turn on concepts such as “public interest” since that term already engages other standards that are entrenched in UK and US law and should not cause confusion in the application of SLAPP triggers. Terms such as “matter of public interest” or “matter of societal import” are well known to Judges and Courts. A list of possible *public interest* SLAPP Elements follows. Their presence would support a determination that the action is one involving public interest:**
 - 1) Matters of Public Health & Safety
 - 2) Matters of environmental, economic or community well-being;
 - 3) Political Discourse on a matter of current controversy;
 - 4) Isolated individual Defendant(s);
 - 5) Apparent asymmetry of resources between Plaintiff and Defendant;
 - 6) Comment on off-shore wealth and assets;
 - 7) Suits against efforts to examine, discuss or criticize ties to foreign governments or foreign adversaries;
 - 8) Matters regarding National Security where Plaintiff has an alleged interest in a national security issue;
 - 9) Matters involving alleged corrupt business activities;
 - 10) An unclear Jurisdictional posture that cannot be readily resolved without discovery or hearing;
 - 11) Plaintiff or Defendant is seeking government action in connection with the challenged statements;
 - 12) Plaintiff has capacity for access to public fora to rebut the challenged statements and/or has already deployed that capability;
 - 13) A review or comment about a good product or service in the marketplace;
 - 14) Involves comment on the government or a public official or a person trying to influence government or a public official;
 - 15) Matters involving alleged funding of domestic activities by foreign governments or entities;
 - 16) The statement at issue was made in a public forum open to the public.
5. **The UK SLAPP Definition and trigger should not turn on a *private versus public* dividing line. That line is too fraught; and it overlaps with HRA and ECHR case law and uncertain balancing which would confuse and impede the application of SLAPP protections. (The above SLAPP elements are all Article 10 relevant and justifiable.)**

Reason: It is understood that the line between public and private matters might be complicated by Article 10 versus Article 8 balancing issues.

Multifactor balancing tests can impede the legitimate objectives of Anti-SLAPP legislation. If balancing is engaged by the statute's Anti-SLAPP definition/trigger, then substantial threshold fact-finding costs will inevitably follow and defeat the statute's purpose. But the ECHR/HRA should not be read to frustrate efforts to intercept abusive SLAPP suits. It is not likely at all that Strasbourg will fail to recognize the urgencies that motivate the UK Parliament's present legislative undertaking. It is best to have a set of set check-off factors that will trigger Anti-SLAPP protections.

Attached is a Chart that Offers Proposed Anti-SLAPP Protections, Procedural and Substantive, That Should Come into Play once the SLAPP Definition is Triggered.

The first column identifies particular **SLAPP Problems**; the second column identifies proposed **Anti-SLAPP Solutions** that the new UK Law might provide.

The SLAPP Problem

Anti-SLAPP Solution

<p>The Threshold Burdens Imposed on a UK SLAPP Defendant: The Cost and burdens of assembling <i>detailed UK style “Defenses”</i> and the threshold <i>defamatory meanings</i> rulings that are the common fare of UK libel proceedings are sufficiently daunting and freighted with steep costs that would chill and intimidate most publishers and journalists who are vulnerable to UK libel actions.</p> <p>The <i>burdens of proof</i> too that surround such proceedings with the added uncertainty that multifactor balancing tests carry with them (<i>Flood/Reynolds</i> factors), make the threat and imposition of SLAPP suits all the more attractive to potential Plaintiffs. It makes the resolution of a case all the more far off and their outcomes harder to predict. It is the reason that oligarchs have for the past several decades planted themselves in London to have their suits tailored at Saville Row and their reputations laundered at the High Court of Justice.</p> <p>Similarly, the UK legal indulgence of <i>secretive offshore tax havens and trusts</i> – with all the obscurity that further cloaks oligarchs and criminals from press scrutiny – makes being a defendant in a SLAPP action all the more daunting and chilling. They allow the Maxwells and oligarchs of the world to safely continue their wrongdoing until it is too late to undo the staggering harm they cause.</p>	<p>An Effective UK Anti-SLAPP law must authorize a Threshold Anti-SLAPP Motion, a “special motion” or “screening motion” – prior to any Defenses and prior to any other proceeding in the case.</p> <p>That “special motion” would require two things:</p> <ol style="list-style-type: none"> 1. <i>Procedural Burden:</i> Plaintiff must face a Procedural Burden of Coming Forward with a showing of a Likelihood of Success on the merits and/or meritorious basis for the claim. Conclusory allegations of libel or other speech offenses should not suffice. If that burden of coming forward with probative evidence is not met, then the Defendant’s Anti-SLAPP motion to dismiss “must” be granted by the Judge. And the statute should be drafted to say that the motion “must be granted unless plaintiff meets its burden of coming forward.” 2. <i>Stay of Discovery:</i> During the pendency of the motion all discovery must be “stayed.” It should not be seen as a matter of unfairness that the Plaintiff cannot make its threshold showing without discovery. If there is no substantial basis or likelihood of success on the merits, then the action must be terminated. If a Plaintiff cannot plead facts that support each element of the action including facts showing that the <i>Reynolds/Flood</i> defense would be defective, then the action must be dismissed. The Court should not in this setting indulge the pleading of a plaintiff for discovery to “see if they have a case.”
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The SLAPP Problem	Anti-SLAPP Solution
<p>Similarly, the privacy rights wielded by wrongdoers, such as Jimmy Saville, provide the darkness that they need to continue their crimes, until, again, it is far too late.</p> <p><i>The Greater Harm of Speech Suppression:</i> There should be no doubt that freedom of expression <i>can</i> allow harm. But suppression of that freedom, as J.S. Mill recognized, causes far greater harm. U.S. case law at least as early as 1919 <i>Abrams v. U.S.</i> 250 U.S. 616 (1919) (O.W. Holmes, J. whose Dissent in <i>Abrams</i> became a cornerstone of U.S. 1st Amendment law) relies expressly on Mill, not just in genuflection, but in holding. UK case law strangely has little to say of Mill until very recently. The harm of suppression goes well beyond the punitive impact of a SLAPP. It is found in the harm that follows when truth is not published that should have been. Such harm to the public is unseen and on rare occasions discovered only after the fact and only after wrongdoing has been reveal by other accidents. (e.g., Maxwell, Saville, oligarch threats that succeed well before they reach any tribunal, etc.)</p>	<p>It might be an appropriate indulgence in some types of cases, but not in SLAPP actions.</p> <p>The Authorized Anti-SLAPP “special motion” will a) call for the Judge to determine whether the action is one that falls within the definition of a SLAPP and b) it will then test the allegations – prior to defenses or any other proceeding within the action – to determine if the SLAPP Plaintiff has met its burden of coming forward with a showing of likelihood of success on the merits or substantial/meritorious basis. Conclusory pleading that might be indulged in other causes of action should not be allowed to pass muster in SLAPP actions.</p> <p>The Substantive Burden of Proof Should Shift: There is also in present UK law the burden of proof that falls on the defendant to prove both truth (justification) and responsible journalism. But an effective Anti-SLAPP law should also, as discussed below, shift that burden of proof as well - quite apart from the Burden of coming forward in opposition to a “special motion.” That may be a heavier lift in the UK framework, but it deserves serious consideration.</p>

The SLAPP Problem

Anti-SLAPP Solution

<p><i>The Global Witness Problem – Cumbersome and needless Public Interest Hearing and Fact-Finding:</i></p> <p><i>Sassou Nguesso v Global Witness</i> [2007] EWHC 1816 (QB). Sassou was the President of the State oil company of the Republic of Congo. Global Witness had obtained documents relating to Sassou’s financial affairs via a legal proceeding in Hong Kong. GW posted them on its website to support the claim that he may have been guilty of misconduct as President and to show the public where their oil money was going and how he spent it. Sassou claimed that GW’s publication of his financial records violated his privacy rights. He sought an injunction against GW, which Justice Burton denied. Andrew Nicol, instructed by Mark Stephens acted for Global Witness. Though the ruling went the right way, the battle to prove legitimate “public interest” was needlessly involved and costly for speakers in the UK than it ever would have been in a U.S. court. The subject of the GW publication on its face alone should have supported that conclusion.</p> <p>The suit was a brazen SLAPP driving a shameless privacy claim on behalf of one who was plundering his nations assets to his own benefit. The people of his nation were entitled to know that. The plaintiff’s privacy claims should not have been indulged even as far as they went. If an Anti-SLAPP law was in place to intercept it, it would have ended with less cost and risk to GW.</p> <p>(I do not believe that Plaintiff ever had to cover any legal costs.) SLAPPS of this kinds should not in all events be allowed to proceed without the posting of a bond.</p>	<p><i>The Solution: In a SLAPP setting, public interest should be assessed based in a reading of the challenged publication alone.</i> There should not be and need not be any hearing or costly fact-finding to figure that out. Extrinsic materials can be offered by a defendant, to be sure, but should not be required. The public interest dimension of a writing is typically manifest from a reading of the article itself. A privacy case of this kind faced by GW was a perfect example of a SLAPP. There was no need for a hearing in which the defendant GW should sustain any burden to prove that what they published was a matter of legitimate “public interest.” That may be the past custom and practice, but it needs to be lifted in the context of a SLAPP.</p> <p>When it comes to SLAPP actions, the inclination of UK judges to decide what the public should be properly interested in should be curtailed where SLAPP actions are in play. As one UK Supreme Court Justice once opined: “The publisher must show that the publication was in the public interest; and he does not do this merely by showing that the subject matter was of public interest.” There could be settings in which this thought deserved currency. But in the setting of SLAPP suits, this distinction sets up an undue burden on a speaker. An effective Anti-SLAPP law must curtail such speculation and must procedurally truncate such types of inquiry by mandating deference to the publisher’s <i>good faith</i> assertion of public interest. The burden to defeat that presumption should fall upon a plaintiff.</p> <p><i>Matter of Law:</i> The assessment of public interest or definition of SLAPP Suit should be one made as a matter of law based on a reading of the publication at issue.</p>
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The SLAPP Problem

Anti-SLAPP Solution

<p>Layered Off Shore Money Laundering: Tom Burgis, the author of <i>Kleptopia</i> in his testimony to the Parliamentary Committee explained how difficult if not impossible it is to untangle decades of layered offshore money laundering that obscure the criminal origins of oligarch wealth. That makes it easier for plaintiff oligarchs to hide behind the manufactured “deniability” of the taint to their financial power. When the burden of proof is on the speaker to demonstrate the impropriety behind an oligarch’s wealth and status, the defense of inquiries into his wealth is more uncertain and costly – especially as <i>libel by implication</i> is the weapon of choice for a plaintiff. Calling for an investigation or writing an expose emphasizing suspicious facts and circumstances should never face perilous uncertainty. Such information needs to be available to the public and to other journalists so that the inquiry can be advanced by others, building on the research, however incomplete, of others.</p> <p>Example: <i>Brennermann v The Guardian</i>: Both <i>The Guardian</i> and <i>The Times of London</i> published articles about the use of offshore tax havens and complex shell companies, and how they were used to pay for expensive London real estate. The articles faulted the law on making such transactions obscure and legal. They cited Plaintiff Brennermann as an example of one who had so benefited. Brennermann retained expensive counsel to advance his libel claims both in the U.S. and in the U.K. He was defeated in both actions, but the costs imposed on both publications was needless and undeserved. Brennermann was later separately convicted in Federal Court of an international fraud scheme.</p>	<p>Adverse Inference against a SLAPP Plaintiff when provenance or transfers of offshore wealth are not fully disclosed: When the origins of wealth or of a transaction is at issue in a SLAPP, then as part of a SLAPP plaintiff’s burden of coming forward with evidence of his/her likelihood of success on the merits, plaintiff must provide full and convincing disclosure of their chain of title and source /origins of the funds or assets at issue. If they do not - bank or offshore secrecy laws notwithstanding - the SLAPP should be dismissed with prejudice. This specialized protection of the press in such reporting is critical to the ability of democratic nations to protect themselves from corruption.</p> <p>There should also be a <i>presumption</i> surrounding what is often referred to as “<i>oligarch capital</i>.” Plaintiffs will tag such reports with <i>libel by implication</i> claims. But if capital was acquired or businesses acquired in Russia during the post-Soviet collapse - while Putin or were in power, then a presumption must arise that the capital invested in UK or elsewhere outside of Russia is tainted unless the Plaintiff can trace its legitimate provenance. This is a recurring issue in “oligarch” or Russian money claims. <i>Lack of financial transparency should work against the SLAPP plaintiff, not in their favor.</i></p> <p>Propriety of Requiring an Ample Bond: The requirement of a bond might have spared the Bennermann Defendants from some of these costs.</p>
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The SLAPP Problem	Anti-SLAPP Solution
<p>Burden of Proof: It is the standard feature of UK libel law to impose the burden of proof (justification) on the defendant. That classic feature of the law produces its greatest injustice in SLAPP suits. It changes entirely the cost calculus for a plaintiff and insures a punitive imposition of costs on a defendant speaker no matter the circumstances of the case.</p>	<p>Burden Shifting: An effective Anti-SLAPP law must shift that burden onto the Plaintiff in two critical ways:</p> <ol style="list-style-type: none"> 1. Burden of Proof of Falsehood and Harm must be upon the Plaintiff, not the Speaker: The Plaintiff may make their case, but the burden must be upon them and not upon the Defendant speaker. Without that shift, summary dispositions are far less probable or achievable. 2. Clear and Convincing Evidence: The burden of proving Falsehood and Harm must be carried with clear and convincing evidence. That will also have an impact on the Plaintiff's burden of coming forward in opposing the defendant's special motion – the burden to show likelihood of success on the merits or substantial factual basis for the claim. <p>This substantive burden shifting is separate from the procedural Burden of Coming Forward with evidence of a likelihood of success on the merits or substantial basis in fact for the claim that a “special motion” would require.</p>

The SLAPP Problem

Anti-SLAPP Solution

<p>Potential Defamatory Meanings Rulings: It is UK practice to allow a plaintiff to re-write a defendant's article in the form of a series of alternative potential defamatory meanings that the Court will then select so as to set the defendant's justification proof burden in the proceeding.</p> <p>This has several deleterious consequences for a defendant:</p> <ol style="list-style-type: none"> 1) It allows a plaintiff to impose threshold hearing costs on a defendant before the substantive game begins; 2) it favors loose and vague <i>libel by implication</i> claims and allows them to be directed against a journalist; and 3) it prevents the defendant from asserting the <i>intended</i> meaning based on the <i>actual</i> words used. The judicial rewrite is highly prejudicial to a defendant. In the U.S. the words at issue are the specific words that the defendant used. The parties can argue what they will around them, but the proceeding is anchored to specifics. 	<p><i>In Haec Verba Requirement:</i> The UK alternative attributable meanings practice should not be countenanced in a SLAPP suit. The <i>specific</i> words used should be the <i>only</i> words examined by the Court. In most U.S. courts the specific words at issue must be set forth in the complaint or it will be dismissed. In the US, a court might rule that the words at issue are not defamatory or that they are non-actionable opinion etc. But it will not fix the meaning of libel claims that are allowed to continue.</p> <p><i>"The Big Short" Case</i> is an instructive example of how words should be treated by a court.: One of the packagers and sellers of mortgage credit default swaps (CDS) that triggered the 2008 economic collapse sued Michael Lewis, the author of "The Big Short." <i>Chau v. Lewis</i>, 771 F.3rd 118 (2014)</p> <p>Lewis had written disparagingly of the CDS packager. At argument, as plaintiff's counsel was about to begin argument, Federal Judge G. Daniels cautioned: "Don't tell me what you think the defendant said about your client. Tell me specifically what he wrote about your client; how it is false and defamatory and how that harmed your client." The Plaintiff's case fell apart as he argued. Had he been allowed to expound on his own interpretation of the book, the proceeding would have been chaotic, costly and, most of all, <i>unfair</i>. The case was dismissed as non-actionable opinion. It was not subject to an anti-SLAPP statute.</p> <p>UK courts in SLAPP suits should impose an <i>in haec verba</i> limitation to the proceedings and not indulge an alternative meanings hearing or ruling. The defendant should not be tied to</p>
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The SLAPP Problem	Anti-SLAPP Solution
	<p><i>words he/she did not write. That is surely how it should be in the case of a SLAPP suit.</i></p> <p>In part, the issue of “meaning” ties in with the burden of proving truth. If the Plaintiff must carry the burden of proving falsehood, then there will be no need to fix or rewrite the potential meaning of the publication at issue.</p>
<p>The Libel by Implication Problem: If an investigative journalist assembles the evidence then available against a subject and provides that evidence to the public in a way that points to objectionable behavior or status of a plaintiff, this information – even if only a <i>partial</i> picture is of value to the public. Others may and will add to it and that is the only way the people in a democracy can put the facts together for themselves – by means of successive reports on the same subject. If such libel by implication claims are allowed to advance without special restrictions or limitations, much critical investigative journalism can be easily impugned and silenced.</p>	<p>Special Requisites for Libel by Implication Claims: Easy pleading of Libel by Implication claims needs to be controlled lest the proceeding become unruly and thus all the more unpredictable for the defendant speaker.</p> <p>One way to do that, especially in SLAPP actions, is to require that the alleged implications be <i>expressly endorsed</i> by the publisher. Such claims may not be made out by defamatory implications built on third party statements or neutrally presented facts. They must be separately endorsed by the writer/publisher – by more than presenting an open question that deserves further scrutiny. Where there are <i>potential neutral readings</i> of the publication at issue, then implication claims should not survive the special motion. There must be a presumption against them.</p>

The SLAPP Problem

Anti-SLAPP Solution

<p>UK Law on Attorneys' Fees: When a SLAPP defendant prevails, they will in the UK, in all events, receive some portion of their legal fees. Cost hearings will typically chop down the fee award. But more significantly, wealthy plaintiffs bring SLAPP actions with the full recognition that an award of fees may follow a loss of the case. But that is little comfort to a defendant speaker. And it is even less of a deterrent to many SLAPP plaintiffs for whom the payment of legal fees to both sides is of little weight, worry or consequence. They can cover such costs without feeling it. So the prospect that the defendant will ultimately yield to the cost and pressure provides the appealing incentive for the SLAPP.</p>	<p>Scaled Sanctions and Required Posting of Bond to Maintain Action: If fee awards are only partial and in all events already anticipated, some <i>punitive damages</i> must be awarded and <i>bonded</i> as well.</p> <p>The extent of punitive damages might depend on a number of factors:</p> <ol style="list-style-type: none"> 1. The costs in time, effort and impact for the defendant. 2. The use of merely blanket denials and failure to provide substantive evidence when given an RoR. 3. Whether the SLAPP was set up to isolate the writer from his/her news organization or editors by bringing suit against the writer alone. 4. Whether the SLAPP is a political show trial aimed at a large swath of media organizations in order to intimidate them and chasten their reporting. Such show trials are now more common in the U.S. – See <i>Blankenship v Fox</i> et al and some of the cases brought by Congressman Nunes. 5. Whether they are serial and multiple related suits. 6. The degree to which the plaintiff fails to meet his/her procedural burden of coming forward.
<p>SLAPPS Typically Exploit Ancillary Error to Impugn Otherwise Accurate and Well-Founded Reporting: A common feature of SLAPP actions is that they focus on separate ancillary and lesser errors to impugn the core accusations of an article that is otherwise well reported. SLAPPs of this type are essentially public relations stunts that require some remedy for a conscientious and good faith report.</p>	<p>Incremental Harm Analysis – To combat a SLAPP attack on ancillary errors that have less impact than the rest of the <i>unassailed reporting</i>, Courts in SLAPP actions should be able to dismiss the action based on that assessment of the article in question even if the ancillary error is unrelated to the core reporting.</p>

The SLAPP Problem

Anti-SLAPP Solution

<p>Retroactivity of the New Legislation: When the new New York Anti-SLAPP law became effective it was immediately deployed by defendants in pending cases. The new statute was intended to be applied to pending actions. But plaintiffs tried to argue, with some confused results still to be resolved, that the new law could not be retroactively applied. Most courts so far have given the new law retroactive effect, the first one in <i>Sarah Palin v New York Times</i>, 510 F.Supp. 3d 21 (SDNY 2020). Judge Rakoff’s careful ruling has been largely followed by all. But a recent ruling has unsettled that consensus and new rulings are awaited.</p>	<p>Anticipate & Draft for Retroactive Application: Any new UK Anti-SLAPP should anticipate and support its retroactive application. The legislation’s articulated purpose should be clear that it is intended to be applied retroactively to remedy existing law that has not be appropriately applied to protect speakers. The statute should explicitly be directed against both “the initiation <i>and continuation</i>” of a SLAPP. And the law should, among other things, state that it is to be “<i>effective immediately.</i>” There may be other features of UK retroactivity law that might need to be addressed in the legislation.</p>
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- END -



EUROPEAN
COMMISSION

Brussels, 27.4.2022
C(2022) 2428 final

COMMISSION RECOMMENDATION

of 27.4.2022

on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")

{SWD(2022) 117 final}

COMMISSION RECOMMENDATION

of 27.4.2022

on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) Article 2 of the Treaty on European Union states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
- (2) Article 10(3) of the Treaty on European Union states that every Union citizen has the right to participate in the democratic life of the Union. The Charter of Fundamental Rights of the European Union (the 'Charter') provides, *inter alia*, for the rights to respect for private and family life (Article 7), the protection of personal data (Article 8), freedom of expression and information, which includes respect for the freedom and pluralism of the media (Article 11), and to an effective remedy and to a fair trial (Article 47).
- (3) The right to freedom of expression and information as set forth in Article 11 of the Charter includes the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. While it is not an absolute right, any limitations thereto must be provided for by law, respect the essence of the right and be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52(1) of the Charter).
- (4) In line with Article 52(3) of the Charter and with the Explanations relating to the Charter, Article 11 of the Charter should be given the meaning and scope of Article 10 on freedom of expression and information of the European Convention on Human Rights as interpreted by the European Court of Human Rights. Article 10 of the European Convention on Human Rights protects freedom of expression and information. Within the scope of application of the European Convention on Human Rights, any restriction must be prescribed by law, must be necessary in a democratic society, and be made in pursuit of the legitimate aims set out in Article 10(2) of the European Convention on Human Rights.
- (5) The European Convention of Human Rights also imposes a positive obligation on contracting states to safeguard the freedom and pluralism of the media and to create a favourable environment for participation in the public debate¹. The case law of the

¹ See for instance European Court of Human Rights' judgement of 14 September 2010, *Dink v. Turkey* (applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), paragraph 137. See also on the

European Court on Human Rights further specifies that the freedom of expression constitutes one of the essential foundations of a democratic society and is applicable not only to information or to ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any group in the population². It has further clarified that ‘in a democratic society even small and informal campaign groups (...) must be able to carry on their activities effectively’ and that ‘there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest’³.

- (6) Journalists play an important role in facilitating public debate and in the imparting and the reception of information, opinions and ideas⁴. It is essential that they are afforded the necessary space to contribute to an open, free and fair debate and to counter disinformation and other manipulative interference, including from actors from third countries. Journalists should be able to conduct their activities effectively to ensure that citizens have access to a plurality of views in European democracies.
- (7) Human rights defenders also play an important role in European democracies, especially in upholding fundamental rights, democratic values, social inclusion, environmental protection and the rule of law. They should be able to participate actively in public life and make their voices heard on policy matters and in decision-making processes without fear of intimidation. Human rights defenders refer to individuals or organisations engaged in defending fundamental rights and a variety of other rights, including environmental and climate rights, women’s rights, LGBTIQ rights, the rights of the people with a minority racial or ethnic background, labour rights or religious freedoms.
- (8) A healthy and thriving democracy requires that people are able to participate actively in public debate. In order to secure meaningful participation, people should be able to access reliable information, which enables them to form their own opinions and exercise their own judgement in a public space in which different views can be expressed freely.
- (9) To foster this environment, it is important to protect journalists and human rights defenders from manifestly unfounded and abusive court proceedings against public

positive obligations under Article 10 of the European Convention on Human rights, the Report of the Research Division of the European Court of Human Rights’, https://www.echr.coe.int/documents/research_report_article_10_eng.pdf

² See European Court of Human Rights’ judgement of 7 December 1976, *Handyside v. The United Kingdom* (application no. 5493/72), paragraph 49.

³ See European Court of Human Rights’ judgement on 15 February 2005, *Steel and Morris v. The United Kingdom* (application no. 68416/01), paragraph 89.

⁴ Recommendation CM/Rec(2022)4 of the Committee of Ministers of the Council of Europe on promoting a favourable environment for quality journalism in the digital age provides that “...*quality journalism, which rests on the standards of professional ethics while taking different forms according to geographical, legal and societal contexts, pursues the dual goal of acting as a public watchdog in democratic societies and contributing to public awareness and enlightenment*” https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ddd0. Resolution 2213 (2018) on the status of journalists in Europe adopted by the Parliamentary Assembly of the Council of Europe refers as regards professional journalists to “*a mission to provide the public with information on general or specialist topics of interest as responsibly and as objectively as possible.*” https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ddd0.

participation (commonly known as ‘SLAPPs’). These court proceedings are either manifestly unfounded or fully or partially unfounded proceedings which contain elements of abuse justifying the assumption that the main purpose of the court proceedings is to prevent, restrict or penalise public participation. Indications of such abuse are the disproportionate, excessive or unreasonable nature of the claim or part thereof, the existence of multiple claims asserted by the claimant in relation to similar matters, or intimidation, harassment or threats on the part of the claimant or their representatives prior to the initiation of manifestly unfounded or abusive court proceeding. These proceedings constitute an abuse of court proceedings and put unnecessary burdens on courts as their aim is not to access justice but to harass and silence defendants. Long proceedings create burdens on national court systems.

- (10) Manifestly unfounded and abusive court proceedings against public participation can take the form of a wide array of legal abuses, mainly in civil or criminal matters, but also in administrative law matters and may be based on various grounds.
- (11) Such court proceedings are often initiated by powerful individuals or entities (for example lobby groups, corporations and state organs) in an attempt to silence public debate. They often involve imbalance of power between the parties with the claimant having a more powerful position than the defendant for example financially or politically. Although not being an indispensable component of manifestly unfounded or abusive court proceedings, where present an imbalance of power significantly increases the harmful effects as well as the chilling effects of court proceedings against public participation.
- (12) Manifestly unfounded or abusive court proceedings against public participation may have an adverse impact on the credibility and reputation of journalists and human rights defenders in particular and exhaust their financial and other resources. They may have adverse psychological consequences for their targets and their family members. Manifestly unfounded or abusive court proceedings against public participation endanger journalists and human rights defenders’ ability to conduct their activities. As a result of such proceedings, the publication of information on a matter of public interest may be delayed or altogether prevented. The existence of such proceedings may have more broadly a deterrent effect on the work of journalists and human rights defenders in particular, by contributing to self-censorship in anticipation of possible future court proceedings, leading to the impoverishment of the public debate to the detriment of society as a whole. The length of procedures, the financial pressure and the threat of criminal sanctions constitute powerful tools to intimidate and silence critical voices.
- (13) Those targeted by manifestly unfounded or abusive court proceedings against public participation often face multiple court proceedings simultaneously and in several jurisdictions. Court proceedings initiated in the jurisdiction of one Member State against a person resident in another Member State are usually more complex and costly for the defendant. Claimants in manifestly unfounded or abusive court proceedings against public participation may also use procedural tools to drive up the length and cost of the litigation, and bring cases in a jurisdiction they perceive to be favourable for their case, rather than to the court best placed to hear the claim.

- (14) The use of manifestly unfounded or abusive court proceedings against public participation is on the rise in the European Union. According to recent studies⁵, such proceedings are increasingly used across Member States.
- (15) The European Parliament, in its Resolution of 25 November 2020⁶, condemned the use of SLAPPs to silence or intimidate investigative journalists and media outlets and create a climate of fear around their reporting of certain topics, calling on the Commission to present a proposal to prevent them. In its Resolution⁷ of 11 November 2021 on Strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, Non-Governmental Organisations (NGOs) and civil society, the European Parliament highlighted again the prevalence of the phenomenon and the need for effective safeguards for its victims across the Union.
- (16) The Council of Europe's Platform to Promote the Protection of Journalism and Safety of Journalists⁸ also reports an increasing number of alerts of serious threats to the safety of journalists and media freedom in Europe, including multiple cases of judicial intimidation. The 2021 annual Report of the partner associations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists underlines the notable increase of SLAPP-related alerts reported in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe member states concerned⁹. In its Recommendation on the protection of journalism and safety of journalists and other media actors¹⁰ of 13 April 2016, the Council of Europe recommended its member states to take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors.

⁵ Academic network on European citizenship rights, Ad hoc request – SLAPP in the EU context, 29 May 2020: https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf, p.4 and Academic network on European citizenship rights, Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study, 30 June 2021 https://ec.europa.eu/info/files/strategic-lawsuits-against-public-participation-slapp-european-union-comparative-study_en.

⁶ P9_TA(2020)0320. In this Resolution, the Parliament also reiterated the terms of its Resolution of 28 March 2019 (P8_TA(2019)0328).

⁷ P9_TA(2021)0451.

⁸ Since 2015, the Platform of the Council of Europe has facilitated the compilation and dissemination of information on serious concerns about media freedom and safety of journalists in Council of Europe member states. Contributing Partner organisations – invited international NGOs and associations of journalists – issue alerts on media freedom violations and publish annual reports on the situation of media freedom and safety of journalists in Europe. The Council of Europe member states are expected to act and address the issues and inform the Platform on the actions taken in response to the alerts. The low response rate of Council of Europe member states, which are also EU Member States, shows a need for further action. <https://www.coe.int/en/web/media-freedom>.

⁹ In 2021, 282 alerts were published on the [Platform to promote the protection of journalism and safety of journalists \(coe.int\)](https://www.coe.int/en/web/media-freedom), amongst these, several concerned cases of judicial intimidation, i.e. opportunistic, arbitrary or vexatious use of legislation, including defamation, anti-terrorism, national security, hooliganism or anti-extremism laws. The 2021 Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists noted an increase in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe member states concerned - [1680a2440e \(coe.int\)](https://www.coe.int/en/web/media-freedom).

¹⁰ Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1.

- (17) The Commission's 2020¹¹ and 2021¹² Rule of Law Reports underline that in a number of Member States, journalists and others involved in protecting the public interest increasingly face threats and attacks in relation to their publications and their work, in various forms including the deployment of SLAPPs.
- (18) A stark example of the use of court proceedings against public participation in the Union is that of the journalist Daphne Caruana Galizia who, at the time of her assassination, was facing over 40 civil and criminal libel and defamation court proceedings related to her investigative work.
- (19) The European Democracy Action Plan¹³ presented by the Commission on 3 December 2020 underlines the fundamental role of free and pluralistic media in democracies as well as the importance of civil society. It highlights among others the important role that independent and pluralistic media play in enabling citizens to make informed decisions, as well as in the fight against information manipulation and interference in the information space, including disinformation. In that context, the Commission already adopted Recommendation (EU) 2021/1534 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union¹⁴. That Recommendation aims to ensure safer working conditions for all media professionals, free from fear and intimidation, whether online or offline. In view of the increasing threat posed by manifestly unfounded or abusive court proceedings against public participation to media freedom and public participation, the Union should develop a coherent and effective approach to counter such proceedings. This Recommendation complements Recommendation (EU) 2021/1534 by providing specific recommendations on manifestly unfounded or abusive court proceedings against public participation. It goes beyond the protection of journalists and other media professionals and includes human rights defenders in its scope. This Recommendation should address the specific threat posed by manifestly unfounded or abusive court proceedings against public participation and by doing so, support the proper functioning of the checks and balances in a healthy democracy. It should provide guidance for Member States to take effective, appropriate and proportionate measures to address such proceedings and to ensure in this context in particular the protection of journalists and human rights defenders. The recommended measures should include raising awareness and developing expertise, in particular among legal professionals and the targets of manifestly unfounded or abusive court proceedings against public participation, to ensure that support is available for those targeted by such proceedings and to support enhanced monitoring.
- (20) In order to provide for efficient protection against manifestly unfounded or abusive court proceedings against public participation and prevent the phenomenon from taking root in the Union, Member States should ensure that their respective legal

¹¹ COM/2020/580 final - Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and Committee of Regions 2020 Rule of law report – The rule of law situation in the European Union. - <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580>.

¹² COM/2021/700/final Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and Committee of Regions 2021 Rule of law report – The rule of law situation in the European Union. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1634551652872&uri=CELEX%3A52021DC0700>.

¹³ COM(2020) 790 final.

¹⁴ Commission Recommendation (EU) 2021/1534 of 16 September 2021 (OJ L 331, 20.9.2021, p. 8)C(2021) 6650 final.

frameworks governing civil, criminal, commercial and administrative proceedings, provide for the necessary safeguards to address such court proceedings, in full respect of democratic values and fundamental rights, including the right to a fair trial and the right to freedom of expression. To provide consistent and efficient protection against manifestly unfounded court proceedings against public participation, Member States should aim to ensure that an early dismissal is available. They should also aim to provide other remedies against abusive court proceedings, namely the award of costs so that a claimant who has brought abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, the compensation of damages for any natural or legal person who has suffered harm as a result of abusive court proceedings against public participation, and the possibility to impose effective, proportionate and dissuasive penalties on the party who brought abusive court proceedings against public participation. The main objective of giving courts the possibility to impose penalties is to deter potential claimants from initiating abusive court proceedings against public participation. Such penalties should be proportionate to the elements of abuse identified. When establishing amounts for penalties, courts could take into account the potential for a harmful or chilling effect of the proceedings on public participation, including as related to the nature of the claim, whether the claimant has initiated multiple or concerted proceedings in similar matters and the existence of attempts to intimidate, harass or threat the defendant.

- (21) Member States should aim to include in their national laws similar safeguards for domestic cases as those included in Union instruments that seek to address manifestly unfounded and abusive court proceedings against public participation for civil matters with cross-border implications. This would provide a consistent and efficient protection against such court proceedings and would contribute to prevent the phenomenon from growing roots in the Union.
- (22) Member States should specifically review their legal frameworks applicable to defamation to ensure that existing concepts and definitions cannot be used by plaintiffs against journalists or human rights defenders in the context of manifestly unfounded or abusive court proceedings against public participation.
- (23) In order to prevent a chilling effect on the public debate, Member States should ensure that penalties against defamation are not excessive and disproportionate. They should pay particular attention to the Council of Europe's guidelines and recommendations¹⁵ addressing the legal framework for defamation, in particular criminal law. In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. The Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007)¹⁶ has called on its member states, which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them

¹⁵ See, *inter alia* PACE's Resolution 1577 Towards decriminalisation of defamation (2007) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>, PACE's Recommendation Towards decriminalisation of defamation 1814 (2007) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en>, the Secretariat General of the Council of Europe's study on Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights (2012) <https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5>, and most recently the Council of Europe's study of the case law of the European Court of Human Rights (2016) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>.

¹⁶ <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>.

- without delay. Member States are also encouraged to favour the use of administrative or civil law to deal with defamation cases, provided that such provisions have a less punitive effect than those of criminal law¹⁷.
- (24) Dealing with defamation cases from a criminal law angle should only be used as a last resort and responses through administrative or civil law should be favoured instead, in line with guidance from international organisations. The United Nations' Human Rights Committee¹⁸ and the Organization for Security and Co-operation in Europe¹⁹ have recommended the removal of defamation from criminal law statutes. Similarly, the Council of Europe has expressed reservations in this context²⁰.
 - (25) The right to the protection of personal data is further concretised in Regulation (EU) 2016/679 of the European Parliament and of the Council²¹. The right to the protection of personal data is not an absolute right. Article 85 of the GDPR provides that Member States shall by law reconcile the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.
 - (26) Member States should encourage self-regulatory bodies and associations of legal professionals to align, where necessary, their deontological standards, including codes of conduct, with this Recommendation. Member States should also ensure, as relevant, that the deontological standards which seek to discourage or prohibit legal professionals from engaging in conduct which might constitute an abuse of process or an abuse of their other professional responsibilities towards the integrity of the legal process, and their corresponding disciplinary sanctions, cover manifestly unfounded or abusive court proceedings against public participation. This should be accompanied by appropriate awareness raising and training activities in order to increase knowledge and efficacy of existing deontological standards that are relevant to manifestly unfounded or abusive court proceedings against public participation.
 - (27) Legal professionals are key actors in manifestly unfounded or abusive court proceedings against public participation, either by representing litigants, prosecuting individuals or adjudicating disputes. Therefore, it is crucial that they have the necessary knowledge and skills to do so. Member States should support and offer training opportunities to these legal professionals. Training could substantively contribute to building their knowledge and capacity in how to detect manifestly unfounded or abusive court proceedings against public participation, including those

¹⁷ See also United Nations' Human Rights Committee's General comment No. 34 Article 19: Freedoms of opinion and expression of 12 September 2011, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> and the Organization for Security and Co-operation in Europe's Office of the Representative on Freedom of the Media's Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/documents/c/f/505075_0.pdf

¹⁸ United Nations' Human Rights Committee, General comment No. 34 Article 19: Freedoms of opinion and expression of 12 September 2011, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

¹⁹ Organization for Security and Co-operation in Europe's Office of the Representative on Freedom of the Media, Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/documents/c/f/505075_0.pdf.

²⁰ Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, see paragraph 6.

²¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

with a third-country element, and react appropriately. Such training should address the judiciary and the judicial staff at all court levels including judges, prosecutors, court and prosecutors' office staff, as well as any other justice professionals associated with the judiciary or otherwise participating in the administration of justice, irrespective of the definition in national law, legal status or internal organisation, at the regional and local levels, where manifestly unfounded or abusive court proceedings against public participation may appear in the first instance. Such training should also address other legal professionals such as qualified lawyers. Developing local training capacity can contribute to the long-term sustainability of the training.

- (28) Extending such training to journalists, press council members, media professionals and human rights defenders would help them to recognise when they are confronted with such court proceedings and provide them with critical legal skills to reduce their risks of being exposed to manifestly unfounded or abusive court proceedings against public participation or equip them with better knowledge to better address it. It could also enable them to engage in robust reporting on SLAPPs. Training for journalists should also refer to the ethical standards and guidelines set out by national press or media councils. To contribute to overall capacity building and strengthen the institutional response to manifestly unfounded or abusive court proceedings against public participation, such training could also involve data protection authorities, National Human Rights Institutions, ombudsman institutions and media state regulatory bodies.
- (29) Providers of legal training and associations of legal professionals are very well positioned to impart training on manifestly unfounded or abusive court proceedings against public participation, as well as to determine the objectives of such training and to assess the most suitable training methodology. Training delivered by legal professionals to other legal professionals allows all to learn as a group, to better share experiences and to foster mutual trust. Exchanges of relevant practices at the European level should be encouraged, including with the support of the Commission, with the involvement of the European Judicial Training Network (EJTN). Involvement of legal practitioner's and their professional associations, from preparing needs analyses to the evaluation of results, is of paramount importance to ensuring the effectiveness and sustainability of training activities.
- (30) Training should address freedom of expression and information and other fundamental rights, under the EU Charter of Fundamental rights of the European Union and the European Convention on Human rights and national law and include practical guidance on how to apply relevant case-law, restrictions to and articulation between fundamental rights, including freedom of expression, procedural safeguards as well as other relevant provisions under national law. Due account should be taken of Council of Europe's handbook for legal practitioners on protecting the right to freedom of expression under the ECHR²².
- (31) Training should, among other things, address the protection of personal data which may be used to initiate manifestly unfounded or abusive court proceedings against public participation. It should also address information manipulation and interference, including disinformation.
- (32) Training should consider the national legal framework and context. Combining these with the guidance developed by the Council of Europe, testimonials from targets of

²² Council of Europe's handbook for legal practitioners on protecting the right to freedom of expression under the ECHR (2017), <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.

- manifestly unfounded or abusive court proceedings against public participation and best practices from other Member States in a structured and coherent manner could contribute to the successful learning objectives associated with training on manifestly unfounded or abusive court proceedings. Training may also be used to foster exchange of best practices between Member States.
- (33) To reach a wider audience and to foster support, training on manifestly unfounded or abusive court proceedings against public participation should also make best use of new technologies, including online training. Access to e-resources, up-to-date material, and stand-alone learning tools on relevant legislation and guidance would complement the benefits of such training activities.
 - (34) In order to foster synergies with similar initiatives on the training of legal professionals, training modules on manifestly unfounded or abusive court proceedings on public participation could be included in training on related topics, such as freedom of expression and legal ethics. The use of existing materials and training practices such as those promoted on the European e-Justice Portal, the UNESCO Global Toolkit for Judicial Actors²³ and the Council of Europe's HELP (Human Rights Education for Legal Professionals)²⁴ online courses should be encouraged.
 - (35) Including manifestly unfounded or abusive court proceedings against public participation in the law and journalism curricula would help equip legal professionals and journalists with better knowledge to recognise such proceedings and equip them with specific knowledge to respond accordingly, and support the development of expertise and professional competencies among lecturers. Such knowledge could be provided by higher education institutions in complementary courses or seminars during the final years of a degree programme, for instance to law students of law and journalism.
 - (36) Member States should support awareness raising campaigns on manifestly unfounded or abusive court proceedings against public participation organised among others by national entities, including National Human Rights Institutions and civil society organisations.
 - (37) Communication activities on manifestly unfounded or abusive court proceedings against public participation could take the form of publications, messages, public meetings, conferences, workshops and webinars.
 - (38) The targets of manifestly unfounded or abusive court proceedings against public participation often have difficulties finding information on available support resources. To facilitate the identification of entities or bodies able to provide assistance on manifestly unfounded or abusive court proceedings and to ensure the effectiveness of support against such proceedings, information should be collected and made available at a single point, be free of charge and easily accessible. To that end, each Member State should establish one national focal point that gathers and shares information on available resources.
 - (39) An underlying goal of awareness raising activities on manifestly unfounded or abusive court proceedings against public participation should be to promote awareness of the

²³ Global toolkit for judicial actors: international legal standards on freedom of expression, access to information and safety of journalists (2021) <https://unesdoc.unesco.org/ark:/48223/pf0000378755>.

²⁴ <https://www.coe.int/en/web/help/home>.

importance of a public space that enables democratic participation and allows citizens to have access to a plurality of views and reliable information, free from bias.

- (40) Awareness raising campaigns should be coordinated with national focal points and other competent authorities to ensure their effectiveness. They should also seek synergies with awareness raising campaigns on compatible topics such as those focusing on fostering of open, free and fair debate and the protection of the right to freedom of expression and should be integrated with awareness raising activities that promote active civic participation, pluralism of views and access to reliable information. They should also seek synergies, as relevant, with resilience building on media, information literacy, journalistic standards and fact-checking in the context of measures addressing disinformation, information manipulation, and interference including from abroad. The target audience could include *inter alia* specific groups, such as media professionals, legal professionals and members of civil society organisations, communication professionals, academics, think tanks, politicians, civil servants, public authorities and private corporations.
- (41) Member States should aim to ensure, by any means they consider appropriate, the availability of information on the procedural safeguards and other safeguards under their national legal frameworks, including information on the entities or bodies which can be contacted to provide assistance against manifestly unfounded or abusive court proceedings against public participation.
- (42) Such support resources may include law firms that defend *pro bono* the targets of manifestly unfounded or abusive court proceedings against public participation, the legal clinics of universities which provide such support, organisations that register and report on SLAPPs, and organisations that provide financial and other assistance to the targets of manifestly unfounded or abusive court proceedings.
- (43) The targets of manifestly unfounded or abusive court proceedings against public participation need to be adequately equipped to face such proceedings. It is therefore necessary to develop capacities in Member States in order to provide support to those targeted by such proceedings. Member States should offer funding and promote funding available at Union level to organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings.
- (44) A more systematic monitoring of manifestly unfounded or abusive court proceedings against public participation is necessary to better tackle the phenomenon. Data collected should include sufficient information for authorities and other relevant stakeholders to quantify and better understand it including in view of providing the necessary support to targets. Member States should entrust, taking into account their institutional arrangements on judicial statistics²⁵, one or more authorities with collecting and aggregating data on manifestly unfounded or abusive court proceedings against public participation initiated in national courts. These authorities may collect the data from several stakeholders. To ease the collection of data, the authorities entrusted to collect data may establish contact points so that judicial authorities, professional organisations, non-governmental organisations, human rights defenders, journalists and other stakeholders can share data on manifestly unfounded or abusive court proceedings. Member States should entrust one of these authorities with

²⁵ See the Guidelines on judicial statistics of the European Commission for the efficiency of justice (CEPEJ) at its 12th plenary meeting (Strasbourg, 10 – 11 December 2008) - [CEPEJ-GT-EVAL](#) (coe.int).

- coordinating the information and reporting the aggregated data collected at national level to the Commission on a yearly basis starting by the end of 2023. Member States should ensure the accountability of the data collected. For this purpose, they should ensure that the data collection process follows professional standards and that the authorities entrusted with data collection and statistics enjoy sufficient autonomy. Data protection requirements should be complied with.
- (45) When entrusting authorities with data collection and reporting, Member States could consider establishing synergies with relevant instruments in the area of the rule of law and the protection of fundamental rights. National Human Rights Institutions, where established, may play an important role as well as other entities such as ombudspersons' offices, equality bodies, or competent authorities such as those designated under the Directive (EU) 2019/1937 of the European Parliament and of the Council²⁶ may also be relevant. National focal points providing an overview of support resources and the entities or authorities entrusted to collect and report data could be situated in the same organisation, taking into account the requirements and criteria described in this Recommendation.
 - (46) The authorities entrusted to collect data should publish information on manifestly unfounded or abusive court proceedings against public participation, in accessible formats on their websites, and, as relevant via other appropriate tools. When doing so, they should ensure that fundamental rights including the right to privacy and to the protection of personal data of those individuals involved in manifestly unfounded or abusive court proceedings against public participation are fully respected.
 - (47) To delineate the duration of proceedings concerning manifestly unfounded or abusive court proceedings, precise information on the events, acts or actions that started and closed such proceedings and the dates on which they occurred should be collected whenever possible. The collected data should also include, as relevant, information about the background of a case, for example, where there have been repetitive preceding court proceedings against the same defendant or by the same plaintiff.
 - (48) As necessary, the EU expert group against SLAPP established by the Commission²⁷ could support the development across Member States of comparable criteria that can be easily applied by the authorities entrusted to collect and report data on manifestly unfounded or abusive court proceedings against public participation.
 - (49) The EU expert group against SLAPP supports the exchange and dissemination of practice and knowledge among practitioners on SLAPP related issues. It could provide among others technical assistance to authorities in setting up focal points, developing training material and organising legal assistance.
 - (50) The Citizens, Equality, Rights and Values (CERV) Programme, established by Regulation (EU) 2021/692 of the European Parliament and of the Council²⁸, aims to protect and promote the rights and values enshrined in the Treaties and the Charter. In order to sustain and further develop democratic societies based on the rule of law, the

²⁶ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17).

²⁷ [Register of Commission expert groups and other similar entities \(europa.eu\)](https://ec.europa.eu/euipo/registers/index.cfm)

²⁸ Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014 (OJ L 156, 5.5.2021, p. 1).

CERV programme provides *inter alia* for the possibility to fund activities linked to capacity building and awareness on the Charter including on freedom of expression. The Justice Programme, established by Regulation (EU) 2021/692²⁹ provides *inter alia* for the possibility to fund activities linked to judicial training, with a view to fostering a common legal and judicial culture based on the rule of law, and to support and promote the consistent and effective implementation of Union legal instruments that are relevant in the context of the Programme.

HAS ADOPTED THIS RECOMMENDATION:

SUBJECT MATTER

1. This Recommendation sets out guidance for Member States to take effective, appropriate and proportionate measures to address manifestly unfounded or abusive court proceedings against public participation and protect in particular journalists and human rights defenders against such proceedings, in full respect of democratic values and fundamental rights.

APPLICABLE FRAMEWORKS

2. As a general rule, Member States should ensure that their applicable legal frameworks provide for the necessary safeguards to address manifestly unfounded or abusive court proceedings against public participation in full respect of democratic values and fundamental rights, including the right to a fair trial and the right to freedom of expression.
3. Member States should aim to ensure that procedural safeguards to grant an early dismissal of manifestly unfounded court proceedings against public participation are available. They should also aim to provide other remedies against abusive court proceedings against public participation, namely the award of costs meaning that a claimant who has initiated abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, the compensation of damages for any natural or legal person who has suffered harm as a result of abusive court proceedings against public participation, and the possibility to impose effective, proportionate and dissuasive penalties on the party who initiated abusive court proceedings against public participation.
4. Member States should aim to include in their national laws similar safeguards for domestic cases as those included in Union instruments that seek to address manifestly unfounded and abusive cases against public participation for civil matters with cross-border implications.
5. Member States should ensure that their rules applicable to defamation do not have an unjustified impact on the freedom of expression, on the existence of an open, free and plural media environment, and on public participation.
6. Member States should ensure that their rules applicable to defamation are sufficiently clear, including their concepts, to reduce the risk that they are misused or abused.

²⁹ Regulation (EU) 2021/692 of the European Parliament and of the Council, aims to contribute to develop a European area of justice and to strengthen democracy, the rule of law and the protection of fundamental rights.

7. Member States should also ensure that penalties against defamation are not excessive and disproportionate. Member States should take utmost account of the Council of Europe's guidelines and recommendations³⁰ addressing the legal framework for defamation, and in particular criminal law. In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. Member States are encouraged to favour the use of administrative or civil law to deal with defamation cases³¹, provided that such provisions have a less punitive effect than those of criminal law.
8. Member States should strive for an adequate articulation in their legislation between the right to the protection of personal data and the right to freedom of expression and information to reconcile those two rights, as required by Article 85(2) of the Regulation (EU) 2016/679.
9. Member States should take appropriate measures to ensure that the deontological rules that govern the conduct of legal professionals and the disciplinary sanctions for violation of those rules consider and include appropriate measures to discourage manifestly unfounded or abusive court proceedings against public participation. Member States should encourage self-regulatory bodies and associations of legal professionals to align their deontological standards, including their codes of conduct, with this recommendation. Appropriate awareness raising and training is also recommended.

TRAINING

10. Member States should support training opportunities on manifestly unfounded or abusive court proceedings against public participation for legal professionals such as judiciary and judicial staff at all court levels, qualified lawyers as well as for potential targets of such court proceedings. The focus of trainings should lie on building expertise to detect such proceedings and react appropriately.
11. Member States should encourage associations of legal professionals and legal training providers to offer training on how to deal with manifestly unfounded or abusive court proceedings against public participation. The Commission will encourage European level training providers like the European Judicial Training Network to provide such training. Legal practitioners and their professional

³⁰ See, *inter alia* PACE's Resolution 1577 Towards decriminalisation of defamation (2007) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>, PACE's Recommendation Towards decriminalisation of defamation 1814 (2007) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en>, the Secretariat General of the Council of Europe's study on Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights (2012) <https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5>, and most recently the Council of Europe's study of the case law of the European Court of Human Rights (2016) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>.

³¹ Beyond the Council of Europe (see previous footnote), there is a growing international demand to decriminalise defamation. See United Nations' Human Rights Committee's General comment No. 34 Article 19: Freedoms of opinion and expression of 12 September 2011, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> and the Organization for Security and Co-operation in Europe's Office of the Representative on Freedom of the Media's Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/documents/c/f/505075_0.pdf

associations should be involved in the development, organisation, conduct and evaluation of the training.

12. Training should cover the relevant aspects of the EU Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. It should include practical guidance on how to apply Union law, national case law, the case law of the Court of Justice of the European Union and the case law of the European Court of Human Right, on ascertaining that restrictions to the exercise of the freedom of expression meet the requirements provided for, respectively, by Article 52 of the Charter and by Article 10(2) of the European Convention on Human Rights as well as on the articulation of freedom of expression and information, and with other fundamental rights.
13. Training should also cover the procedural safeguards against manifestly unfounded or abusive court proceedings against public participation, where available, as well as jurisdiction and relevant applicable law in fundamental rights, criminal, administrative, civil and commercial matters.
14. Training activities should also address the obligation for Member States, under Regulation (EU) 2016/679, to reconcile, by law, the protection of personal data with the right to freedom of expression and information. They should cover rules adopted by Member States to this end and the specific exemptions or derogations to Regulation (EU) 2016/679 applicable to data processing carried out for journalistic purposes or the purpose of academic, artistic or literary expression³². Due account should be taken of the elements mentioned in the Annex to this Recommendation.
15. Member States should consider embedding such training in training on freedom of expression and legal ethics.
16. Training for journalists, other media professionals and human rights defenders should strengthen their capacity to deal with manifestly unfounded or abusive court proceedings against public participation. It should focus on recognising manifestly unfounded or abusive court proceedings against public participation, how to manage being targeted by such court proceedings and inform them of their rights and obligations in order for them to be able to take the necessary steps to protect themselves against such proceedings. Training for journalists should also include the ethical standards and guidelines set out by national press or media councils.
17. Member States could encourage higher education institutions to include knowledge on how to identify manifestly unfounded or abusive court proceedings against public participation in their curricula, especially for law and journalism degrees.
18. Training could include testimonials from the targets of manifestly unfounded or abusive court proceedings against public participation. Training could also, making best use of the knowledge developed within the framework of the EU expert group against SLAPP, foster the exchange of experience among Member States.

AWARENESS RAISING

19. Member States are encouraged to support initiatives, including those of National Human Rights Institutions and civil society organisations, aimed at raising awareness and organising information campaigns on manifestly unfounded or abusive court

³² For more information on the transposition of Article 85 GDPR into national law, see the SWD, p. 26.

proceedings against public participation. Particular emphasis should be placed on addressing potential targets of such proceedings.

20. Awareness raising activities should aim to explain the issue of manifestly unfounded or abusive court proceedings against public participation in a simple and accessible way so that such proceedings are easily recognised.
21. Awareness raising activities should provide information on existing support structures, including reference to national focal points that gather and share information on available resources. Awareness raising efforts should also provide a clear overview of legal lines of defence available under national frameworks in case of manifestly unfounded or abusive court proceeding against public participation and how they could be used effectively.
22. Awareness raising campaigns combating negative attitudes, stereotypes and prejudices could also address manifestly unfounded or abusive court proceedings against public participation.
23. Promoting better understanding of the nature and extent of the impact of manifestly unfounded or abusive court proceedings against public participation should be included in awareness raising activities on the right to freedom of expression addressed to specific groups, such as media professionals, legal professionals, members of civil society organisations, academics, think tanks, communication professionals, civil servants, politicians, public authorities and private corporations.

SUPPORT MECHANISMS

24. Member States should ensure that targets of manifestly unfounded or abusive court proceedings against public participation have access to individual and independent support. To that end, Member States should identify and buttress organisations that provide guidance and support for such targets. Such organisations may include associations of legal professionals, media and press councils, umbrella associations for human rights defenders, associations at Union and national level, law firms defending targets of manifestly unfounded or abusive court proceedings against public participation *pro bono*, legal clinics of universities and other non-governmental organisations.
25. Each Member State should establish a focal point that gathers and shares information on all organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation.
26. Member States are encouraged to make use of national and Union funding to provide financial support and promote funding available at Union level towards organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation in particular to make sure that they have sufficient resources to react quickly against such proceedings.
27. Member States should ensure that legal assistance is available to defendants of manifestly unfounded or abusive court proceedings against public participation in an affordable and easily accessible manner.
28. Member States should facilitate the exchange of information and best practices between organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation.

DATA COLLECTION, REPORTING AND MONITORING

29. Member States should, taking into account their institutional arrangements on judicial statistics, entrust one or more authorities to be responsible to collect and aggregate, in full respect of data protection requirements, data on manifestly unfounded or abusive court proceedings against public participation initiated in their jurisdiction. Member States should ensure that one authority is responsible to coordinate the information and report the aggregated data collected at national level to the Commission on a yearly basis starting by the end of 2023, in full respect of data protection requirements. The Commission will publish a yearly summary of the received contributions.
30. Where necessary, the EU expert group against SLAPP could support the development and best use of standards and templates on data collection.
31. Data referred to in point 29 should include:
 - (a) the number of manifestly unfounded or abusive court proceedings against public participation cases, initiated in the relevant year;
 - (b) the number of manifestly unfounded or abusive court proceedings against public participation cases dismissed early in the relevant year starting from 2022, both dismissed on merits and for procedural reasons;
 - (c) the number of court proceedings, classified by type of defendant (e.g. journalist, human rights defender, press outlet);
 - (d) the number of court proceedings, classified by type of plaintiff (e.g. politician, private person, company, whether the plaintiff is a foreign entity);
 - (e) figures about acts of public participation on the account of which court proceedings were launched;
 - (f) figures on the estimated amount of initial damages requested by plaintiffs;
 - (g) description of the different legal bases employed by plaintiffs and related figures;
 - (h) figures on the length of the proceedings, including all instances;
 - (i) figures on cross-border elements; and
 - (j) as available, other data including on judicial costs of proceedings and, as relevant and appropriate, relevant figures on historical backgrounds of cases.
32. The authority ensuring coordination, referred to in point 29, should publish the data, in accessible formats on its website, and as relevant via other appropriate tools, while taking the necessary arrangements to ensure the protection of the rights of those involved in manifestly unfounded or abusive court proceedings against public participation.

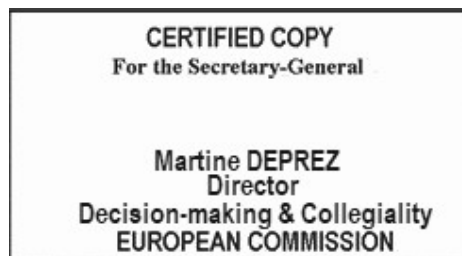
FINAL PROVISIONS

33. Member States should make full use of the funding support available at Union level to implement the specific provisions of this Recommendation, and promote the funding opportunities available for public and private entities, including civil society organisations, in particular under the CERV Programme and the Justice Programme.

34. Member States should transmit by the end of 2023 and subsequently on request, in compliance with data protection rules, a report to the Commission on the implementation of this Recommendation containing aggregated data consolidated at Member States' level. The Commission will hold, as necessary, discussions with Member States and stakeholders, in relevant forums, on the measures and actions taken to apply the Recommendation.
35. No later than 5 years after the date of adoption, the Commission will assess the impact of this Recommendation on the evolution of manifestly unfounded or abusive court proceedings against public participation in the European Union. On this basis, the Commission will determine whether additional steps are required to ensure the adequate protection of targets of such proceedings, taking into account the findings of the Commission's Rule of Law Reports and other relevant information, including external data.

Done at Brussels, 27.4.2022

For the Commission
Didier REYNDEERS
Member of the Commission





EUROPEAN
COMMISSION

Brussels, 27.4.2022
C(2022) 2428 final

ANNEX

ANNEX

to the

Commission Recommendation

**on protecting journalists and human right defenders who engage in public participation
from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against
public participation")**

ANNEX

Elements that could be included in the training on data protection claims in the context of manifestly unfounded or abusive court proceedings against public participation (commonly known as ‘SLAPP’):

- The legislation adopted by Member States to reconcile the right to the protection of personal data with the right to freedom of expression and information, which shall provide for exemptions or derogations from the provisions listed in Article 85(2) GDPR for processing carried out for journalistic purposes or the purpose of academic, artistic or literary expression, if they are necessary to reconcile these two rights.
- For the exercise of the data subject’s rights under the GDPR, Article 12(5) GDPR lays down that requests which are manifestly unfounded or excessive, may be refused (or charged by a reasonable fee).
- The right to rectification in Article 16 GDPR concerns only situations where personal data is inaccurate. In addition, the right to have incomplete personal data completed is not automatic and depends on the purpose of the processing.
- For the exercise of the right to be forgotten, the GDPR provides that this right shall not apply to the extent that processing is necessary for the right of freedom of expression and information (Article 17(3)(a) GDPR).
- As a barrier to forum shopping, Article 79(2) GDPR provides that proceedings against a data controller or processor – e.g. the journalist, right defender, civil society actor, media company, etc. – may be brought before the courts of the Member State where the controller or processor has an establishment or, unless the controller or processor is a public authority of a Member State exercising its public powers, where the data subject has his or her habitual residence. That provision leaves no scope for actions claiming a violation of data protection rules before other courts without any relation to the processing of the personal data, the establishment of the journalist or media or the habitual residence of the plaintiff, including for damages.

Too Close for Comfort – Liability of Search Engines and Online Intermediaries in Australia

Harry Melkonian¹

Is an internet search engine a publisher liable for defamatory content in documents found in response to a search query? Is the search engine a publisher liable for defamatory content when the search results themselves do not contain any defamatory content but have a hyperlink to a document that does contain defamatory material? In a 5-2 decision on 17 August 2022, the High Court of Australia, reversing a decision of the highest court in the State of Victoria, held that Google was not a publisher in these circumstances. *Google LLC v Defteros* [2022] HCA 27. While this decision might not seem earth-shattering to many non-Australian media lawyers, it was a definite change in direction in Australian defamation law.

Setting the Stage

In Australian defamation law, which is notoriously plaintiff-friendly, the act of publication can be central to choice of law and jurisdiction. Publication is also the linchpin to liability as the act of publication is the actionable wrong. This was made clear in *Dow Jones & Co v Gutnick*, (2002) 210 CLR 575, where the High Court found that Victoria's laws of defamation applied where an online publication had been downloaded in Victoria regardless of where the content was created and uploaded, the location of the servers, or where the content was primarily directed. In the *Gutnick* case, there was no question that Dow Jones was the publisher. The issue was where was the offending article published? The Court found that publication occurred wherever the article was downloaded, including Australia. The logical result of this decision is that a publisher can be liable under the local laws wherever the matter is downloaded. In other words, an online publisher can be subject to the defamation laws of every country that has the internet.²

In *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27, the High Court held that an internet online intermediary could be sued for the defamatory content of works authored by third parties that were posted on a public Facebook page

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² The situation for US publishers is not as dire as it might appear as enforcement of foreign defamation judgments in the US is severely curtailed by the SPEECH Act 2010 (28 USC 4101-4105) and general principles of private international law. See e.g., *Desai v Hersh*, 954 F.2d 1408 (7th Cir 1992).

maintained by the intermediary. *Voller* involved a Facebook page maintained by the defendants, major Australian newspaper publishers and broadcasters. The Fairfax-owned Facebook page contained hyperlinks to news stories contained on Fairfax websites. In addition, the public Facebook page invited reader comments from the public. The plaintiff, Dylan Voller, contended that defendant Fairfax was the publisher of reader comments on the Facebook page. The High Court agreed.

The defendants argued that they did not make the defamatory comments that were written by members of the public and were not instrumental in the publication but merely administered a public Facebook page. But the High Court majority found that the defendants created the Facebook page with the intention that third parties will comment on posted stories – the defendant ‘encouraged and facilitated publication of comments from third parties’ and ‘were thereby publishers of third-party comments.’ [2021] HCA 27 at ¶105.

The *Voller* decision created publisher liability for online intermediaries but it left unanswered how far up the chain publisher liability would extend. It bears mention that even if the defendant is deemed legally to be a publisher, there may be possible defences such as innocent dissemination (the newsagent defence).

Google v Defteros

The *Defteros* case brought the issue of who is a publisher up to the question of search engine liability. Mr Defteros is a Melbourne solicitor specialising in criminal law. In 2004, Mr Defteros had been charged with conspiracy to commit murder. He denied all charges, surrendered his practising certificate, and a year later all charges against him were withdrawn. He regained his license to practise in 2007. [2021] VSCA 167 at ¶ 13-17. In 2004, an article written by John Silvester appeared in the Underworld section of *The Age* (a major Melbourne newspaper) that allegedly defamed Mr Defteros. Defamation proceedings were brought against the authors and a book publisher but not against *The Age*. The matter was settled during mediation.

However, the original 2004 article was still available on the internet. In 2016, Defteros submitted a removal request to Google which Google rejected. Even if Google had removed the article from the search engine, the article remained available on the webpage of *The Age* – something over which Google did not have any control. Defteros also made demands on *The Age* and in late 2016, the article itself was removed. In the action against Google, Mr Defteros alleged that Google became a ‘publisher’ and was not entitled to the innocent dissemination defence when it failed within a reasonable time to remove the hyperlink to the offending article after it had been put on notice. Both the Supreme Court of Victoria and the Victoria Court of Appeal agreed with the plaintiff.

After review by the High Court, the issue of whether the innocent dissemination defence applied to a search engine remained undecided because the majority held that Google was not a publisher in the first place. The High Court focused on the fact that the search engine results did not themselves contain defamatory matter but only contained hyperlinks that would lead to the alleged defamation, namely, the article appearing in *The Age*.

Inasmuch as *Voller* had been decided less than one year before, the High Court distinguished the situations:

The defendants in *Voller* were media companies which each maintained a public Facebook page on which they posted hyperlinks to news stories, with an associated headline, comment and image. Clicking on the hyperlink took the reader to the news story on the defendant's website. But it was not these acts which were said to involve the defendants in publication of the alleged defamatory material; rather it was what the defendants did in seeking commentary upon the articles which brought them within the principles stated in *Webb v Bloch*.³ The defendants were found to have invited and encouraged comment about the articles from Facebook users. It was the response by some third-party users to that encouragement which contained the alleged defamatory material. **It was the defendants' acts in facilitating, encouraging and assisting the posting of comments by the third-party users which rendered them liable as publishers of those comments.** [2022] HCA 27 at ¶ 33 (Kiefel, CJ, Gleeson) (emphasis added)

The Court found that Google was in a legally different situation than the defendant Fairfax in *Voller*:

It cannot be said that the appellant was involved in the communication of the defamatory material by reference to the circumstances in *Webb v Bloch* and *Voller*. It did not approve the writing of defamatory matter for the purpose of publication. It did not contribute to any extent to the publication of the Underworld article on *The Age*'s webpage. It did not provide a forum or place where it could be communicated, nor did it encourage the writing of comment in response to the article which was likely to contain defamatory matter. Contrary to the finding of the trial judge, the appellant was not instrumental

³ (1928) 41 CLR 331. *Webb v Bloch* was a seminal Australian High Court decision on the significance of publication of a libel – the communication to a third party of the defamatory writing. 41 CLR at 363

in communicating the Underworld article. It assisted persons searching the Web to find certain information and to access it. [2022] HCA 27 at ¶ 49

The question of whether the appellant could be said to participate comes down to the assistance provided by the hyperlink to move to another webpage. This is not a strong basis for liability and it finds no support in existing authority in Australia or recent cases elsewhere. As observed in *Crookes v Newton*,⁴ a hyperlink is content-neutral. **A search result is fundamentally a reference to something, somewhere else. Facilitating a person's access to the contents of another's webpage is not participating in the bilateral process of communicating its contents to that person.** To hold that the provision of a hyperlink made the appellant a participant in the communication of the Underworld article would expand the principles relating to publication. [2022] HCA 27 at ¶ 53 (emphasis added)

That Google failed to remove hyperlinks after demand could be relevant in applying the innocent dissemination defence but not here because Google was never a publisher. The Court concluded that defences were not relevant where there had not been any publication by the defendant. [2022] HCA 27 at ¶ 55.

With *Google v Defteros* and *Fairfax v Voller* being decided less than one year apart, the internet space in Australia continues to pose serious challenges for the media. To alleviate some of the consequences of the *Voller* decision, there has been an ongoing consultation among Australian Attorney Generals to formulate statutory reforms to allow internet companies to avoid defamation liability through compliance measures. Those reform proposals are now well-advanced.

The Legislative Way Forward

In 2020 the New South Wales Court of Appeal affirmed the trial court's imposition of defamation liability on the owner of a Facebook page.⁵ Upon the Court of Appeal decision and well before the High Court decision in 2021 that

⁴ [2011] 3 SCR 269. *Crookes v Newton* is a decision of the Supreme Court of Canada that reached the same conclusion as the Court in *Defteros*. However, the Australian Court was careful to note that *Crookes* was clearly influenced by the Canadian *Charter of Rights and Freedoms* – something which finds no application in Australia.

⁵ *Fairfax Media Publications Pty Ltd v Voller* (2020) 380 ALR 700, affirming [2019] NSWSC 766.

affirmed the New South Wales decision, the New South Wales Attorney General's Office convened a consultation to consider legislation that would provide an exemption from liability for intermediaries if certain procedures were implemented.

The NSW AG solicited submissions from interested parties. In response, media defence lawyers, defamation lawyers, the media industry, academics and public interest groups participated in a comprehensive consultation that consisted of written submissions as well as extensive Zoom sessions. At the time, I was teaching Media Law at the Macquarie University Law School and our students made a written submission and I followed up by participating in the Zoom sessions. We had what may be the final Zoom session on 1 September 2022 with final written submissions on 9 September.

The result of the consultation will be the Model Defamation Amendment Provisions 2022.⁶ While there can be a long and tortuous road of lobbying between a recommendation of the Attorneys General and enactment by the State Governments, these legislative proposals are promising.

Key provisions include:

- Conditional exemption from defamation liability for conduits, caching and storage devices. This is intended to include internet intermediary functions such as ISPs, cloud services and emails. *Recommendation 1*⁷
- Conditional exemption from defamation liability for standard search engine functions. [not a change in law as this reflects the 2022 High Court decision in *Google v Deferos*]. *Recommendation 2*
- Introduction of a new defence for internet intermediaries [legislatively reversing *Fairfax v Voller*] *Recommendation 3*
- A series of technical amendments. *Recommendations 4-7*.

The new defence for internet intermediaries is the most controversial aspect of this proposal. At this point in time, there are two alternative recommendations. *Recommendation 3A* provides a safe harbour defence for an intermediary (1) if it has in place a complaints process whereby the complainant would be provided with the identity of the poster (author) of the offending material (with the poster's consent) or (2) takes reasonable access prevention steps. *Recommendation 3B* provides an innocent dissemination defence if the intermediary has a complaints process and within 14 days of notice from the complainant, takes reasonable access

⁶ Australia has relatively uniform defamation legislation as each State has enacted Model Defamation Provisions

⁷ The Policy Recommendations are attached.

prevention steps. Both proposals effectively overrule the High Court *Voller* decision. My submission supports the safe harbour route as opposed to the innocent dissemination defence.

While the *Model Defamation Amendment Provisions 2022* are promising, right now the law, as stated in *Voller*, imposes liability on online intermediaries as publishers of third-party content regardless of whether the intermediary has actual knowledge of the contents. On the other hand, under *Defteros*, search engines avoid defamation liability on the basis that they are not publishers. Unfortunately, there is a great deal of uncharted territory between the two decisions.

UK's Crackdown on Anti-Royal Protests Makes U.S. Free Speech Look Good

By Jacob Mchangama

This article was first published by [The Daily Beast](#) on September 13, 2022.

“Who elected him?”

Shouting these three words led to [the arrest of Symon Hill](#), a British republican activist in Oxford at a [coronation ceremony](#) parade of (now) [King Charles III](#). Hill was [arrested](#) (although later de-arrested, which is a thing in the U.K.) under the recently enacted Police, Crime, Sentencing and Courts Act 2022 (PCSC Act) and is also being [investigated](#) under the Public Order Act, 1986.

This was [not an isolated incident](#) of overzealous policing. [U.K. police](#) have detained at least three other protestors voicing their criticism of the institution of monarchy over the last few days.

In Edinburgh, a 22-year-old woman was [arrested](#) for breaching peace after she held up a sign reading “Abolish monarchy” and “F*** imperialism.” A [viral video](#) from Buckingham Palace in London showed officers of the Metropolitan Police escorting a barrister holding a “#NotMyKing” sign. The police later [clarified](#) that the person was not officially arrested and that “the public absolutely have a right to protest,” something that has subsequently been [made clear](#) to all officers. Despite this welcome course correction, it seems clear that U.K. police have adopted a more or less systematic campaign against people denouncing the monarchy during the period of mourning of the Queen’s passing.

For those who believe that free speech and peaceful protests are fundamental rights in a democracy, the legal basis for suppressing such political protests is deeply concerning.

The PCSC was enacted earlier this year against the backdrop of widespread [climate](#) and [Black Lives Matter](#) protests in recent years. The Act empowers the police to place conditions on public assemblies—and even [one-person protests](#)—if the police believe that protests may cause serious disruption to people in the vicinity. Unsurprisingly, the Act was widely [criticized](#) for eroding the protection to the right to free expression and assembly by providing the police vague and arbitrary powers capable of being abused.

In addition to the PCSC, the police have also cited the Public Order Act, 1986, which [prohibits](#) the use of threatening or abusive words or disorderly behavior likely to cause harassment, alarm, or distress to other persons. But these subjective concepts also provide the police with too wide a berth of discretion and, as a result, the Act has been used to crack down on a [variety of peaceful protests](#)—ranging from [animal cruelty](#) demonstrators to [atheists displaying posters](#) questioning the existence of God.

The British crackdown on republican protests highlights a fundamental difference between British and American conceptions of free speech.

The U.K. tends towards an elitist and top-down approach to this freedom, which sees order and liberty in tension, and tends to err on the side of order when these values are perceived to clash. Moreover, in the U.K., “order” has frequently been interpreted to mean the established order and the institutions and people who embody it. Not least the monarch.

Perhaps, no case demonstrates this tradition more clearly than the [1792 trial against Tom Paine](#) for his famous book, [Rights of Man, Part II](#). In it, Paine praised universal suffrage and equality—which was denied to the lower classes and religious dissenters—and argued that “All hereditary government is in its nature tyranny. An heritable crown, or an heritable throne, or by what other fanciful name such things may be called, have no other significant explanation than that mankind are heritable property.”

According to the attorney general, Paine’s work was “sneering and contemptuous” and “an utter defiance to all law, morality, and religion,” especially since it had been distributed to the lower classes of society who were easily misled. Moreover, “The indecency with which Monarchy was treated was quite shocking.”

In short, Paine was guilty of seditious libel for being a “wicked, seditious, and ill-disposed person, and wickedly, seditiously, and maliciously intending to scandalize, traduce, and vilify the character of the said late Sovereign Lord King William” and intending to “destroy all subordination and submission to the law.” It took the jury about 30 seconds to agree, though Paine had already fled to France.

Contrast this with [James Madison’s draft](#) of what would become the First Amendment. It was based on the premise that in America, the people—not Congress—were ultimately sovereign; and members of Congress were the servants, not the masters, of those who elected them. From this, it followed that the people had a right to scrutinize and criticize those who exercised power on their behalf. Madisonian free speech philosophy thus fused the idea that egalitarian free speech is necessary for a sovereign people to rule itself with the assertion that free speech also constitutes the “[bulwark of liberty](#)” protecting all other rights of the citizens. As such, free speech would be safe from both illiberal democratic majorities and designs to thwart dissent by the newly empowered federal government.

Despite the stark philosophical differences between free speech protections in the U.S. and the U.K., Americans’ constitutionally protected rights to peaceful protest and vehement criticism of public officials have far from always been respected in practice. In 1798, President John Adams signed into law the [Sedition Act](#), protecting himself, his government and Congress from criticism. That very year, [Luther Baldwin](#) was jailed for making a drunken joke about John Adams’ “arse,” when the president passed through Newark in a carriage.

But the debate over the Sedition Act brought back to life a debate about first principles and differences between British and American free speech conceptions. In a pamphlet attacking the Sedition Act, the Virginian lawyer George Hay [wrote](#) that a law against sedition was natural in

Britain “where privilege and monopoly form the basis of the government” but, “in the United States it is disgraceful.”

The Sedition Act expired in 1801, but as persecuted groups sought to protest their subjugation and disenfranchisement, the letter and spirit of the First Amendment was frequently encroached in the following centuries.

In 1919, at least forty members of the National Woman’s Party [were arrested after burning](#) an effigy of President Woodrow Wilson and making “violent speeches” denouncing Wilson as “the leader of an autocratic party” holding “millions of women in political slavery” at a suffragist protest outside the White House.

In the South, authorities [tried to strangle the civil rights movement’s](#) challenge to white supremacy by arresting and imprisoning activists on seemingly content-neutral charges such as “distributing literature without a permit”—after handing out leaflets to mobilize African-Americans to vote in Alabama and Mississippi. In 1963, John Lewis [was arrested](#) for carrying a sign with the slogan “One man, one vote.” Martin Luther King, Jr. [was arrested](#) more than twenty times for various speech offenses, including praying outside the city hall and parading without a permit. He penned his famous *Letter from a Birmingham Jail* in 1963 while incarcerated for [violating an injunction](#) against “parading, demonstrating, boycotting, trespassing and picketing.”

Yet, in the 1960s civil rights-era, Supreme Court cases like [New York Times v. Sullivan](#) and [Edwards v. South Carolina](#) finally transformed the First Amendment from an empty promise into an actual enforceable right, ensuring that racial, political, and religious minorities would be protected (rather than prosecuted) when speaking out against authorities and majorities.

But even today, the right to peaceful protest is challenged [as state](#) legislatures have proposed or adopted a flurry of laws limiting protest [couched in wording that is](#) frequently vague and undefined, and thus posing a risk to hard won First Amendment freedoms.

Accordingly, the crackdown on public displays of republicanism in the U.K. is a timely reminder that the right to peaceful protest cannot be taken for granted and should be vigorously protected even when used to propagate ideas that are “offensive” or “insensitive” to the public.

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