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ERIC M FREEDMAN

## American Libel Law 1825-1896: A Qualified Privilege For Public Affairs?

On March 9, 1964, in *The New York Times Company v Sullivan*, the United States Supreme Court gave its sanction to a

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.<sup>1</sup>

This doctrine has governed virtually all subsequent decisions in libel cases.<sup>2</sup> The *Sullivan* ruling has been seen as introducing new principles into the field;<sup>3</sup> it has been denounced as providing "virtually a license to lie";<sup>4</sup> and it called forth a promise of corrective legislation from President Nixon.<sup>5</sup> Nonetheless, the issue in *Sullivan*, the standards by which it was resolved, and the resolution itself all have considerable precedent in cases from nineteenth-century America.<sup>6</sup>

This paper will seek to explore some of those precedents. It will try to focus as narrowly as possible on the question: what was the law in America between 1825 and 1896 with respect to civil actions brought by public figures to recover for the written publication of defamatory falsehoods?<sup>7</sup> As background, however, we shall begin by defining a few key terms and glancing at some major developments in this area between 1787 and 1825.

A widely-cited textbook writer offered this definition of libel in 1887:

Any written words . . . which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice or dishonorable conduct, or has been accused or suspected of any such misconduct; or which suggest that the plaintiff is suffering from any infectious disorder; or which have a tendency to injure him in his office, profession or calling. And so, too, are all words which hold the plaintiff up to contempt, hatred, scorn or ridicule, and which, be they engendering as evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse or society.<sup>8</sup>

Each jurisdiction had its own particular rules, but in general if the words did not fall within this description no action could be maintained.

Even if they did, however, there were several defenses available. One was that the words were true.<sup>9</sup> Another, and the one with which we shall be principally concerned, was that the words fell under a privilege, that-is,

an exemption from liability for the . . . publishing of defamatory words concerning another, based on the fact that the statement was made in the performance of a duty, political, judicial, social, or personal.<sup>10</sup>

Such an exception could come about in several ways.<sup>11</sup>

One important line of early decisions established the doctrine that there was no liability for false assertions in petitions to forums competent to redress the grievances complained of, or in statements made in the normal course of judicial proceedings. For example, in 1802 the Supreme Court of Vermont set aside a \$1 verdict recovered by Ebenezer Harris for a petition to the state legislature which protested against his appointment as justice of the peace on the grounds that he was "heinously a peace-breaker," and did "not possess . . . uprightness . . . and integrity."<sup>12</sup>

The court ruled that

[a]n absolute and unqualified indemnity from all responsibility in the petitioners is indispensable, [and concluded:] [t]he court, therefore, consider that no action can be maintained for a libel upon a petition for redress of grievances, whether the subject matter of the petition be true or false, simply upon its being preferred to . . . the General Assembly or disclosed to any of its members.<sup>13</sup>

And in 1815, a South Carolina court held that the electorate was the proper tribunal to judge the qualifications of a candidate for its suffrage.<sup>14</sup>

The earliest cases were also liberal in regard to words published in judicial proceedings. For example, in 1807 a witness brought a libel suit against a defendant who had said in court upon hearing his testimony, "That is a lie and I can prove it." The New Jersey Supreme Court took only one paragraph to dispose of the complaint, saying: "[t]he words . . . were spoken in a court of law . . . in a

course of justice . . . they are not actionable."<sup>15</sup> But, although mainly in *dicta*, it was generally agreed that malice would defeat the privilege in both kinds of action.<sup>16</sup>

Since participants in the legal system after 1825 did not know that to a future writer they would be in a different class from ones before that date, perhaps it is not too surprising that these same concepts continued to play an influential role in the development of the law during the final three-quarters of the century.

A threshold question that arises in discussing the libel of public figures is — who is a public figure? A most obvious example — and one which virtually all courts recognized, whatever degree of privilege they granted — is a person regularly employed by the government.<sup>17</sup> Candidates for elective offices were also widely held to be public figures.<sup>18</sup>

The class of public figures, however, was by no means limited to public officers or candidates. A local chairman of a political party was held to fall within the class,<sup>19</sup> as were architects under government contract.<sup>20</sup> The Supreme Court of Errors of Connecticut found privileged an attack on "[t]he remarkable letter of Albert H Walker, giving his so-called reasons for falsely asserting that Mr Lounsbury's nomination was secured by corrupt means."<sup>21</sup> The court agreed with defense counsel that his client "did not refer to the plaintiff otherwise than as a political supporter of a political claim."<sup>22</sup>

But, although they frequently were, public figures did not need to be political ones. There was much to support the statement of a leading textbook writer of the time: "[w]hen a man comes forth in any way, and acquires for a time a quasi-public position, he cannot escape the necessary consequence — the free expression of public opinion."<sup>23</sup> Attorneys in general were held to be within the class,<sup>24</sup> as was an allegedly corrupt customs house broker,<sup>25</sup> a financier said to be plotting the takeover of a railway,<sup>26</sup> a lecturer and author,<sup>27</sup> and a man who claimed that a newspaper's harsh comments had cost him the \$30,000 sale of a statue he was exhibiting.<sup>28</sup>

The range of publications held actionable was similarly broad. The most generally accepted rule seems to have been that an action could be maintained "if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred contempt or ridicule, or deprive him of the benefits of public confidence and social intercourse."<sup>29</sup>

This doctrine was particularly useful to legislators charged with corruption which fell short of legal bribery.<sup>30</sup> A frequently-cited example was that of a state senator in Missouri named McGinnis. A St Louis newspaper published the following: "[t]he distribution of the \$50,000 slush fund sent here by the liquor interests may enable Senator McGinnis to make good his boast that . . . he would defeat [a licensing bill] in the senate."<sup>31</sup> The defendants successfully demurred below on the ground that the publication did not impute bribery; but the state supreme court overruled the demurrer with the words:

The court will not make strained inferences in favor of those who . . . touch with flippant lightness upon so sacred a thing as private character. . . . And the penalties which the law provides for such acts cannot be defeated by evasions, however skillful, or thwarted by artifices, however subtle.<sup>32</sup>

Charges which tended to injure public-figure plaintiffs in their callings were also frequently held to provide a basis for bringing libel actions.<sup>33</sup> Some jurisdictions, however, followed the narrower rule announced by the Supreme Court of Alabama in an 1835 slander case: "Actionable words . . . in reference to . . . all public functionaries . . . must point to previous official misconduct, implying criminality or moral turpitude."<sup>34</sup>

In actions brought by officeholders, it was sometimes asserted that the test was whether the charge, if true, would be a cause for removal.<sup>35</sup> Similarly, one case held that the standard to be applied to an action brought by a candidate was whether the electorate's belief in the charge would cost him votes.<sup>36</sup>

Most courts adopted "the opinion that the official act of a public functionary may be freely criticized,"<sup>37</sup> but drew a line between such comments and those which "aspersed the personal character of a public man."<sup>38</sup>

This distinction was clearly made in the 1893 case of *Buckstaff v Viall*. The Supreme Court of Wisconsin held that it might be privileged to write of a state senator named Buckstaff: "His majesty Bucksniiff, under the pretense of consulting some of his friends, who are a number of well-known little political gods of Oshkosh, intends to defeat these amendments by procrastination and delay."<sup>39</sup> But the court labelled, "gibes, taunts and contemptuous and insulting phrases . . . not privileged, by any principle of law," such as "[e]loquent, and beautiful senatorial god . . . lock with they mighty right eye alone . . . and . . . reconsider they determination to

defeat the laws,"<sup>40</sup> where it was averred that the words referred to a paralysis of one side of the plaintiff's body.

The application of this same distinction to candidates for public office, however, presented some difficulties. Courts frequently made such statements as:

Let the . . . public record of a candidate, so far as it may affect his fitness or qualification for office be the subject of free and vigorous comment . . . but when his private life is assailed by imputing to him a crime, let his accusers . . . prove the truth of the charges.<sup>41</sup>

This led to both a logical and a practical problem. In logic, it is hard to maintain the moral character which is revealed by a criminal conviction "is something aside from, and not entering into or influencing, . . . public conduct."<sup>42</sup> Practically, therefore, a critic could make a charge against a candidate, such as drunkenness, which would be defamatory of an officer unless specifically tied to his performance of official duties. Indeed, a defendant was convicted of criminal libel in Massachusetts for making comments about an incumbent sheriff, who refused to declare whether or not he would run again, which could permissibly have been made of the same man as candidate.<sup>43</sup>

Although defendants routinely tried to advance the argument that the public was the proper tribunal to judge public men, and hence a privilege attached to utterances to it, the cases decided during our period did not go nearly so far. They generally held not more than that a non-malicious complaint about a public officer to his governmental superior,<sup>44</sup> about a member to a professional organization,<sup>45</sup> or the solicitation of signatures for such complaints,<sup>46</sup> enjoyed a privilege. The courts, however, rejected the claim of such a privilege for public complaints made against an appointed officer,<sup>47</sup> a candidate for appointment,<sup>48</sup> or during governmental hearings not adequately judicial in character.<sup>49</sup>

There was wide agreement that the privilege could be defeated by malice; but there was wide disagreement on the precise definition of such malice. Most courts accepted, at least in theory, the distinction between actual and legal malice stated by a judge in Philadelphia:

Malice, in fact, as it is called — or actual malice, is what is understood by that word in its ordinary use, ill will, desire to to injury . . . Implied malice, as it is sometimes, called or inferential malice, has a much broader scope. It means doing a thing without lawful justification or excuse.<sup>50</sup>

Some courts held, without defining their terms

more explicitly, that actual malice would defeat the conditional privilege of complaining to a proper tribunal.<sup>51</sup> Others inferred malice from the absence of probable cause for making the complaint.<sup>52</sup> One court held that the existence of either of these two conditions would defeat the privilege;<sup>53</sup> another, that the plaintiff needed show the defendant's knowledge that the charges were false;<sup>54</sup> and yet another, that the defendant's desire for gain was central.<sup>55</sup> Perhaps all these cases can be shoe-horned into upholding a loose version of the actual malice criterion, but it would be more accurate to say that fixed standards had not evolved.

In dealing with comments about public figures, many courts insisted on the central distinction between fact and opinion — and normally went on to hold the latter privileged, however harsh, as long as the former was correct.<sup>56</sup> For example, in one federal case which was upheld on appeal, it was said:

The jury were instructed that . . . the distinction between comment or criticism and allegations of fact could not be too clearly borne in mind; that the facts which gave rise to the comments must be proved substantially as alleged, and that . . . in so far as the publication sued upon fell within the limits of criticism and comment, it was privileged.<sup>57</sup>

To fall within the rule, courts said that the criticism had to be directed at the public activity of the public man.<sup>58</sup>

Despite all of these problems, many courts had to wrestle directly with the question of whether or not there existed a *Sullivan*-type privilege for defamatory statements of fact. Cases were decided each way, and it is difficult to judge which view was more widely held.<sup>59</sup> There was, of course, little difficulty in finding for plaintiffs in cases where actual malice was shown,<sup>60</sup> as even those who were inclined to grant the privilege extended it no further than to misstatements made in good faith; after all, the only question was whether a new class of occasions would come within the well-known rules of qualified privilege.

Many courts said no. Their reasoning generally paralleled that of the Supreme Court of Michigan:

To hold that false charges of a defamatory character, made against a candidate, are privileged as matters of law, if made in good faith . . . seems to me . . . a most pernicious doctrine. It would deter all . . . honorable men from accepting the candidacy . . . Besides . . . the voters are deceived by falsehood . . . and so two wrongs are perpetrated: one upon the candidate, the other in misleading the voter.<sup>61</sup>

The majority of courts which denied the privilege did so more or less unqualifiedly,<sup>62</sup> although there is an occasional suggestion that — "If statements,

though false, are published in good faith . . . damages may be reduced to a minimum."<sup>63</sup>

There were, however, some jurisdictions which placed limits on their denials. There are some cases which seem to have turned on the fact that a crime was charged.<sup>64</sup> A smaller number of opinions seem to suggest that the privilege was refused in the case at hand because the publication concerned the public man's private character.<sup>65</sup>

There seems to have been less variation among the courts which granted the privilege. They virtually all agreed that protection should be extended only to those publications made with probable cause for believing their truth.<sup>66</sup> The judges on this side of the privilege issue showed less inclination to flights of rhetoric than their oppositely-minded colleagues, but their general public policy argument seems to have been that the granting of the privilege was essential to enable people to judge officers and candidates, and expose "all the rogues and thieves, who may by their own cunning or the negligence of the people, get into public office."<sup>67</sup> The Supreme Court of Texas, for example, said:

In the exercise of this high and important power of selecting their agents to administer for them the affairs of government, are the people to be denied the right of discussion . . . ?

Usually it is by such discussion . . . that the people obtain the requisite information to enable them intelligently to exercise the elective franchise. Any abridgement of this right . . . would be extremely unwise.<sup>68</sup>

The Supreme Court of Michigan added the argument that the rule was necessary to prevent the contempt for law that would follow from having "the reckless libeler . . . ranked by the law in the same company with respectable and public-spirited journalists."<sup>69</sup>

While it is difficult to come to a conclusion as to the precise status of the *Sullivan* privilege during the latter part of the nineteenth century, it is plain that the "license to lie" was not invented in 1964; and the existence of a long line of cases in this area should perhaps be of interest to historians as well as lawyers. Libel cases of this nature are peculiarly political,<sup>70</sup> and might well be studied not only on an individual basis — with a view to the interaction between political and judicial opinions<sup>71</sup> — but in groups, as a rough reflection of political cohesion within a given geographical jurisdiction. For example, there seems to have been a sharp drop in the number of libel cases in the ten years on either side of the Civil War; and of those which did take place, a substantial portion dealt with sectional issues.<sup>72</sup> ■

## NOTES

- 1 *New York Times Company v Sullivan* 376 US 255, 280-1 (1964).
- 2 A good summary of post-*Sullivan* decisions is at *Recent Decisions*, 20 JPUL 601 (1971). See also *Case Note* 40 *FordLRev* 651 (1972).
- 3 *Carey v Hume Civ No 71-1736* (DC Cir January 28 1974) at 6, concurring opinion of Judge MacKinnon at 17.
- 4 *Anthony Lewis Nixon And A Right Of Reply* NY Times March 24 1974 sec 4, at 2, col 4.
- 5 *Id.*
- 6 See *Atwater v Morning News Company* 34 A 865, 866 (1896).
- 7 But there are some pitfalls in this narrow undertaking. During some of this period, especially its early segment, the law did not categorize actions precisely as we do. Hence, some consideration of criminal libel and of slander cases is necessary to a proper treatment of our subject, and they are identified in the text. The problem becomes clear when we consider how slowly the distinction between written and unwritten defamation emerged in the United States. As early as 1637, we find the statement in Europe, *Perezus, Praelec*, in *Cod* (1637 ed) lib 9 tit 1 (my translation from the Latin):

The written type of injury is a more serious kind, because it remains longer in the sight of men. For voices are easily forgotten, but written letters remain

and wander far and wide through many hands, and the shame lasts as long as memory endures.

- In 1812, Lord Mansfield — albeit with great reluctance — upheld the distinction: *Thorley v Lord Kerry* 4 Taun 354, 366 (1812). In the United States it was not uncommon to find such phrases as "slander, written or unwritten": *Turrill v Dolloway* 26 Wend 383, 396 (NY 1841) (concurring opinion of Senator Lee). Cf *Tillotson v Cheatham* 2 Johns 63, 74 (NY 1806). The question was still being discussed as late as 1878: *Tillson v Robbins*, 68 Me 295, 298. See also *Pollard v Lyon*, 91 US (1 Otto) 225 (1875). An excellent discussion of what constitutes slander is to be found at 226. See also *Johnson v Stebbings* 5 Ind 364, 366. (The headnote to this case inaccurately, if humorously, summarizes it as holding: "To sustain an action for libel, it is not necessary that the words should be libelous": *id* at 364. "Slanderous" is meant). See generally *W Blake Odgers I The Law Of Libel And Slander* (from the second English edition; Philadelphia, 1887) 267 and *RC Donnelly History Of Defamation* 1949 *WisLRev* 99 (1949).

- 8 *Odgers Law, supra* note 7 at 19-20.
- 9 The fact that the allegedly defamatory words were true was almost universally regarded as a complete defense to a libel action in the US at least as early as 1787. But see *Romayne v Duane* 20 FedCas 1140 (PennCC 1814). Duane was editor of the "Aurora," a highly partisan Republican newspaper. His activities in this connection twice made him the subject of sedition actions, and it is

possible that political considerations were behind the court's ruling in this case. See Dumas Malone ed 5 Dictionary of American Biography (New York 1930) at 467. (This set is hereinafter cited as DAB). See also 16 DAB 127, and 2 DAB 390. On truth, see also Johnson v St. Louis Dispatch Company 2 MoAppRep 565, 570.

Despite the recognition of the truth defense, however, the road to establishing such a justification was often strewn with technical obstacles. Defendants were often held strictly to proof of the precise words published. See *Frederitze v Odenwalder* 7 Penn (2 Yeates) 243 (1797); *Kerr v Force* 3 DC (3 Craunch CC) 8, 14 FedCas386. UQ Adams had endorsed the allegedly forged note in this case. Cf *Robert H Phelps and E Douglas Hamilton Libel* 110 (New York 1966). This is an excellent practical manual on where the law stands today. See also *Andrews v Vanduzer* 11 Johns 38 (NY 1814). The standard of proof required was sometimes that the establishment of the charge be, as the Kerr court put it, "certain to a certain intent." Good examples are *Beniss v Brooks* 8 Johns 356 (NY 1811) and *Maybe v Avery* 18 Johns 352 (NY 1820), although both cases were ultimately decided for the defendants.

Moreover, the attempt at justification could be legally dangerous. For one thing, it could be regarded as proof of publication. See *Samuel v Bond* 16 Ky 158 (1812) and *Jackson v Stetson*, 15 Mass 49 (1818). Massachusetts changed this rule by statute in 1827. See Clyde Augustus Duniway *The Development Of The Freedom Of The Press In Massachusetts* 159 (New York 1969), and *Hix v Drury* 22 Mass (5 Pick) 296, 303. More seriously, an unsuccessful justification attempt was often considered a serious aggravation of the original offense. Examples are: *Clark v Binney* 19 Mass (2 Pick) 113, 121 (1824); *Wilkinson v Palmer Tapp* 66, 69 (Ohio 1816); *Alderman v French* 18 Mass (1 Pick) 1, 9 (1822). The same rule is stated at *Joseph Chitty 1 A Treatise On Pleading* 487 (New York 1809). This is an excellent volume for the guidance of the modern reader. See also *Downing v Brown* 3 Col 571, 596 (1877).

Some jurisdictions, however, adopted the rule that an attempt to justify would not be aggravation if made in good faith, eg *Upton v Hume* 24 Ore 420, 437 (1893). See also *King v Root* 4 Wend 113, 150-1 (NY 1829) (only aggravation if known false); *Sweeney v Baker* 13 WV 158, 206 (1878) (only aggravation if unsustainable by evidence). See also *Dolloway v Turrill* 26 Wend 383, 390 (NY 1841) (separate opinion of Senator Lee).

In any event, it was well established that the truth must be pleaded specially in order to avoid surprising the plaintiff with such evidence at trial. See *Barns v Webb Company* 34 A 865, 869 (Conn 1896). Even if the only purpose of introducing evidence of truth was to mitigate damages, it was still not allowed in under the general issue. See *Else v Ferris Anthon's* NP 36 (NY 1808); *Samuel v Bond* 16 Ky 158, 159 (1812); *Shepard v Merrill* 13 Johns 475 (NY 1816). Cf *Cooke v O'Brien* 2 Cranch CC 17, 6 FedCas 438 (DCCC 1810).

But courts generally did allow a defendant to introduce in mitigation evidence which showed his reasons for believing his charge at the time he made it, provided that such evidence was not so strong as to amount to a justification: eg *Treat v Browning* 4 Conn 408, 418 (1822). The rule was changed in New York by statute in 1849 to permit the introduction of mitigating evidence regardless of its

weight. *Bush v Prosser* 11 NY (1 Kernan) 347, 354-5 (1854). See also *Hamilton v Eno* 81 NY 116, 128 (1880).

- 10 Henry Campbell Black, *Black's Law Dictionary* 1360 (revised fourth edition St Paul 1968).

Most of the following material on early libel law was originally collected for a course in American Constitutional History taught by Professor Louis H Pollak. See generally Donnelly, *History*, 100-119. The discussion in the text of the development of civil libel law before our period is by no means intended to obscure the fact that by far the greatest number of developments in the field at that time took place on the criminal side. The most important occurrence was the passage of the Sedition Act of 1798. 1 Stat 596. It would be hard to deny that the Act led to widespread contemporary abuses. See James Morton Smith *The Sedition Law, Free Speech, And The American Political Process* 9 Wm&MQ 504 (1952). See also the charge to the jury in *US v Cooper* 25 FedCas 631, 640-1 (PennCC 1800), and the account of the case of Representative Lyons in Francis Wharton *State Trials of the United States During the Administrations of Washington and Adams* 333-44 (Philadelphia, 1849), also *In Re Lyons* 15 FedCas 1183. Cf *US v Callender* 25 FedCas 239 (VaCC 1800), *Wharton* 688; *US v Haswell* 26 FedCas 218 (VtCC 1800), *Wharton* 684.

Nevertheless, modern scholars seem generally to agree that: "Despite these prosecutions, the repressive impact of the Sedition Act has been exaggerated." Leonard W Levy *Judgments* 164 (Chicago 1972). The point is made more strongly at Stanley Nider Katz ed *A Brief Narrative Of The Case And Trial Of John Peter Zenger* (Cambridge Mass 1963).

Sullivan specifically declared the Sedition Act unconstitutional at 276, saying: "The attack on its validity has carried the day in the court of history." For a comment on the implications of this, see Harry Kalven Jr *The New York Times Case: A Note On "The Central Meaning Of The First Amendment"* 1964 SCtRev 191, 204-5, 209.

For the view that the federal constitution bars the national government from proceeding against seditious libel at all, see: [George Hay], *Two Essays On Liberty Of The Press* (New York 1970); reprints of essays from 1799 and 1803); *The Kentucky Resolutions of 1798 and 1799* in Johnathan Elliot comp, *The Debates . . . on The Adoption of the Federal Constitution . . .* (Washington 1836) 540-1; *Abrams v US* 250 US 616, 630 (dissenting opinion of Mr Justice Holmes); Charles Warren, *The Early Law Of Criminal Libel In Massachusetts*, XXVII MassLQ 10 (1942); O John Rogge *The First And The Fifth* 35 (New York 1971). For the opposite point of view, see Leonard W Levy *Freedom Of Speech And Press In Early American History: Legacy Of Suppression*, preface to the Torchbook Edition at 1 (New York 1963).

Some of the most important English precedents, including the trials of John Wilkes and the seven bishops, *The Law Of Libels* (London 1765). The volume also contains an exhaustive discussion of libel law as it related to number 38 of "The North Britain." The main controversy in England was over the relative roles of the court and the jury. See: Joseph Towers *Observations On The Rights And Duty Of Juries In Trials For Libel* (London 1784); Francis Maseres *An Inquiry Into The Extent Of The Power Of Juries On Trials . . . for . . . Libels* (London, 1785) and *Another Letter*

- To Mr Almon, In Matter Of Libel (London, 1770); 32 Geo III c60 (Fox's Act). In the US, the question usually caused little trouble. See: *Genet v Mitchell* 7 Johns 120 (NY 1810); *Vigours v Palmer* 1 Browne 40 (Penn 1807); *Dexter v Spear* 7 FedCas 624 (RICC 1825); *Levy Legacy* at 28. But consider the colloquy between Judge Chase and counselor Wirt in *US v Callender* 25 FedCas 239, 253 (VaCC 1800).
- 12 *Harris v Huntington* 2 Tyler 129, 130-1 (Vt 1802).
  - 13 *Id* at 139, 146. For the further development of this doctrine, see: *Reid v Delorme* 2 Brev 76 (SC 1806) (material defamatory of third party); *Thorn v Blanchard* 5 Johns 508 (NY 1808); *Gray v Pentland* 2 Serg&R 23 (Penn 1815) (appointed officers); *Law v Scott* 5 Har&J 438 (Md 1822) (candidate for appointive office).  
Although we have no occasion to consider it, courts with little variation, seem to have adopted the rule that fair accounts of judicial proceedings were not actionable, but commentary in such reports was. Typical examples are: *Thomas v Croswell* 7 Johns 264, 272-3 (NY 1810); *The State v Lehre* 4 Hall's AmLJ 48, 55 (SC 1811). Cf: *Paul P Ashley Say It Safely* 50-51 (Seattle 1969); *Phelps Libel* 126.
  - 14 *Mayrant v Richardson* 1 Nott & McC 347, 352-3 (SC 1815). But see *Lewis v Few Anthon's* NP 102, 5 Johns 1 (NY 1808). Cf *Van Vechten v Hopkins* 5 Johns 211 (NY 1809). The outcome in *Lewis* may have been related to the fact that the plaintiff was governor of the state. A similar situation arose in *Bishop v The Cincinnati Gazette Company* 4 WklyLB 1082 (Ohio 1880). Other early New York cases with political overtones include: *Genet v Mitchell* 7 Johns 120 (NY 1810), *Spencer v Southwick* 9 Johns 314, 10 Johns 259 (NY 1812), *Coleman v Southwick* 9 Johns 45 (NY 1812), *Southwick v Stevens* 10 Johns 443 (NY 1813). The first involved a widely-known French minister to the United States, and the last three a prominent Republican journalist.
  - 15 *Badgley v Hedges* 2 NUL (1 Penning) 217, 217, 220 (1807).
  - 16 *Dictum in Bunton v Worley* 7 Ky (4 Bibb) 38, 38-9 (1815); see also *Hardin v Cumstock* 9 Ky (2 Marsh) 480 (1820). Holdings in: *Bodwell v Osgood* 20 Mass 379 (1825) (letter to school committee; malice defined as knowing falsity); *Milam v Burnside* 1 Brev 295 (SC 1803) (charges to a court martial; malice defined as no probable cause).
  - 17 The Sullivan court said (Sullivan, 283 at note 23):  
We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend.  
No cases in this period could be found in which an otherwise meritorious claim of privilege was overturned on the ground that the plaintiff was too low-ranking an official. On the other hand, the number of government employees has swelled considerably since 1896.
  - 18 See *Knapp & Company v Campbell* 14 TexCivAppRep 199 (1896) and *Mott v Dawson* 46 Iowa 533 (1877) (slander). See also *Van Vechten Verder Freedom Of Public Discussion* 23 HarvLRev 413, 417-9 (1910).
  - 19 *Barr v Moore* 87 PaStRep 385, 388 (1878). The plaintiff won his case, however.
  - 20 *Struthers v Peacock* 11 PhilRep 287, 293 (1876). *Bearce v Bass* 88 Me (8 Hamlin) 521, 543 (1896).
  - 21 *Walker v Hawley* 16 A 674 (1888).
  - 22 *Id* at 676.
  - 23 *Odgers Law, supra* note 7 at 51.
  - 24 *Miller v Krabb* 5 PaCoRep 636 (1887).
  - 25 *Burt v Advertiser Newspaper Company* 154 Mass 238, 242 (1891).
  - 26 *Crane v Waters* 10 F 619 (CCMass 1882) at 620. But see *Wilson v Fitch* 41 Calif 363, 382 (1871).
  - 27 *Smith v Tribune Company* 4 Biss 477, 480 (CC NorthDIII) (1867). The plaintiff won his case, however.
  - 28 *Gott v Pulsifer* 122 Mass 235, 239 (1877).
  - 29 *Blakeslee & Sons v Carroll* 64 Conn 223, 301 (1894).
  - 30 See, for example, *Randall v The Evening News Association* 79 Mich 266, 275 (1890), and *Hand v Winton* 39 NJLRep (9 Vroom) 123 (1875). Cf *Young v Clegg* 93 Ind 371 (1883).
  - 31 *McGinnis v George Knapp & Company* 18 SW 1134 (1892).
  - 32 *Id* at 1138.
  - 33 *Curtis v Mussey* 6 Gray 261, 273 (Mass 1856) (impropriety of a judge); *Sanderson v Caldwell* 45 NY 398 (1871) (extortionate lawyer fees); *Hetherington v Sterry* 28 Kan 426 (1882) (improper resignation of city attorney); *Bourresseau v The Detroit Evening Journal Company* 63 Mich (5 Fuller) 425 (1886) (oppressive conduct of a sheriff).
  - 34 "This restriction must be observed," the court continued, "or a boundless field of litigation would open before us; and thus far only, consistent with the genius of our government, can the licentious use of words be checked and punished." *Hoggs v Dorrah* 2 Port 212 226-7 (Ala 1835). This rule was found in Illinois, Connecticut, and West Virginia: *Ayers v Grider* 15 Ill (5 Peck) 37 (1853), *Hoag v Hatch* 23 Conn 385 (1855), *Sweeney v Baker* 13 WV 158, 185, 191 (1878).
  - 35 *Cotulla v Kerr* 11 SW 1058, 1059 (Tex 1889). *Robbins v Treadway* 2 JJMarsh 540, 544 (Ky 1829).
  - 36 *Belknap v Ball* 47 NW 674, 675 (Mich 1890).
  - 37 *Hamilton v Eno* 81 NY 116, 127 (1880).
  - 38 *Negley v Farrow* 60 Md 158, 177. Note also 171 and 184 (dissent). The public-private distinction is also drawn in *Cotulla v Kerr* 11 SW 1058, 1059 (1889) and *Sweeney v Baker* 13 WV 158, 183 (1878). See also *Rowand v De Camp* 96 Pa (15 Norris) 493, 496.
  - 39 *Buckstaff v Viall* 54 NW111, 112. (1893).
  - 40 *Id* at 113, 112.
  - 41 *Upton v Hume* 24 Ore 420, 432 (1893). See also *Jones Varnum & Company v Townsend's Administratrix* 21 Fla 431, 451 (1885).
  - 42 *Verder, Freedom* at 430. See also *Dix W Noel Defamation Of Public Officers And Candidates* 49 ColumLRev 887-8 (1949).
  - 43 *Commonwealth v Wardwell* 136 Mass 164 (1883).
  - 44 *Larkin v Noonan* 19 Wis 93 (1865), *Young v Richardson* 4 IllApptCitRep 364 (1879), *Wieman v Naber* 45 Mich 484 (1881), *Ramsey v Cheek* 109 NC 96 (1891).

- 45 *Shutleff v Stevens* 51 Vt 500 (1879).
- 46 *Vanderzee v M'Gregor* 12 Wend 545, 547 (NY 1834).
- 47 *Usher v Severance* 20 Me 9 (1841), *Foster v Scripps* 39 Mich 376, 382 (1878).
- 48 *Kanpp & Co v Campbell* 14 TexCivAppRep 199 (1896), *Hart v Bennett* 19 NY 173 (1859).
- 49 *Blakeslee & Sons v Carroll* 64 Conn 223, 234-5 (1894). *But see Young v Richardson* 4 IllAppCtRep 364 (1879).
- 50 *Struther v Peacock* 11 PhilRep 287, 292 (1876). Another example is at *King v Root* 4 Wend 113, 136 (NY 1829). But in 1857 New York's highest court had this to say:  
 Malice has been sometimes divided into legal malice . . . and actual malice . . . The true distinction, however, is not in the malice itself, but simply in the evidence by which it is established. In all ordinary cases, if the charge . . . is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law, in such cases, does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious when no other motive appears. Where, however, the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff the proof of its existence. It is actual malice in either case; the proof only is different.  
*Lewis and Herrick v Chapman* 16 NY 369, 372-3 (1857). See also *John Townshend A Treatise On The Wrongs Called Slander And Libel* 131 *et seq.* (3d ed New York 1877). There is considerable logical force behind this view. However, for us to give it too much weight would be anachronistic in view of the fact that courts generally made the distinction drawn in the text.
- 51 *Eg Dennehy v O'Connell* 33 A 920, 922 (1895).
- 52 *White v Nicholls* 44 US (3 How) 266, 291 (1845), *Kent v Borgarts* 15 RR 72, 75 (1885).
- 53 *Cotulla v Kerr* 11 SW 1058, 1060 (1889).
- 54 *Atwater v Morning News Company* 34 A 856, 869.
- 55 *Ramsey v Cheek* 109 NC (18 David) 270, 277.
- 56 *But see Edsall v Brooks* 25 NYSupCtRep (2 Rob) 29, 35, also reported at 26 How 413 (NY 1864), where the express ground of the holding in favor of the plaintiff is that the defendants, though perhaps non-maliciously, made "unfair, and untrue deductions from the facts," which were concededly reported accurately. See generally: *Odgers Law supra* note 7 at 26, *Bearce v Bass* 88 Me (8 Hamlin) 521, 541 (1896). *Cf Noel, Defamation* at 878. For modern doctrine see *Phelps, Libel* 184 *et seq.*, and *Kalven, New York Times, supra* note 11 at 195. *Cf Development, supra* note 9 at 927.
- 57 *Hallam v Post Publishing Company* 55 F 456, 462 (CCSDO, WD 1893); *aff'd* 59 F 530 (CC of App for 6th C 1893); the opinion above was written by William Howard Taft; the plaintiff had been an aspirant for a Democratic Congressional nomination.
- 58 *Jones, Varnum & Company v Townsend's Administratrix* 21 Fla 431, 451 (1885); *Sweeney v Baker* 13 WV 158, 183 (1878); *Negley v Farrow* 60 Md 158, 177 (1882).
- 59 Perhaps for this reason, there is disagreement on the point in the literature. *Clifton O Lawhorne Defamation And Public Officials (Carbondale 111 1971)* says, at 90, that the privilege "was recognized to some extent or another by a great majority of states before the twentieth century." His chapter on our period, however, (87-110) is scrupulously fair in giving equal weight to both sides. *Noel, Defamation*, 891 reaches the opposite conclusion. Words to the same effect are to be found at *Wahle v Cincinnati Gazette Company* 4 WklyLB 61, 66 (Ohio nd, but 1878 or 1879), and *The Post Publishing Company v Moloney* 50 OStRep (NS) 71, 89 (1893).
- 60 *But note the dictum* suggesting that "actual malice would not necessarily . . . be the controlling question," in *Henry v Moberly* 6 IndApp 490, 501 (1892).
- 61 *Bronson v Bruce* 59 Mich (1 Fuller) 467, 474-5 (1886).
- 62 *Aldrich v Press Printing Company* 9 Minn 133, 139 (1892); *King v Root* 4 Wend 113, 138 (NY 1829), confirming the position taken by the lower court at 7 Cow 613, 628; *Wheaton v Buchr* 66 Mich (8 Fuller) 307, 310 (1887); *Boureseau v The Detroit Evening Journal Company* 63 Mich (5 Fuller) 425, 432 (1886).
- 63 *Belknap v Ball* 47 NW 674, 676 (Mich 1890); *Bailey v Kalamazoo Publishing Co* 40 Mich 251, 257 (1879).
- 64 *Bronson v Bruce* 59 Mich (1 Fuller) 467, 472 (1886); *Smith v Tribune Company* 4 Biss 477, 481 (CC NorthDIII) (1867); *Long v Tribune Printing Company* 107 Mich 207, 211 (1895); *Jones Varnum & Company v Townsend's Administratrix* 21 Fla 431, 459 (1885); *Mattice v Wilcox* 147 NY 624, 637 (1895).
- 65 *The Post Publishing Company v Moloney* 50 OStRep (NS) 71, 89 (1893); *Rearick v Wilson* 81 Ill 77, 81 (1876); *Hamilton v Eno* 81 NY 116, 124 (1880); *Neglev v Farrow* 60 Md 158, 177 (1882).
- 66 *Miller v Knabb* 5 PaCoRep 636, 640 (1887); *Knapp & Co v Campbell* 14 TexCivAppRep 199, 207 (1896); *Jackson v Pittsburgh Times* 152 Pa 406, 416 (1893); *Byrd v Hudson* 113 NC 203, 211 (1893); *Briggs v Garrett* 111 PaStRep 404, 414, 422 (dissent; in substantial agreement on this point) (1886); *Crane v Waters* 10 F 619, 621 (CCMass1882); *Bearce v Bass* 88 Me 521, 543 (1896); *Palmer v City of Concord* 48 NH (4 Hd) 211, (widely-cited criminal case) (1868); *Mott v Dawson* 46 Iowa 533, 537 (slander) (1877).  
 However, there were a few cases applying different standards. Under *Gott v Pulsifer* 122 Mass 235, protection was denied to publications made "in . . . reckless disregard of . . . the consequences": *id* at 239 (1877). *Ex parte Steinman and Hessel* 95 PaStRep 220, 238, (1880), *The State v Balch* 31 Kan 465, 472 (criminal) (1884), and *Bays v Hunt* 10 Iowa 251, 255 (slander) (1882) all imposed the test of whether the defendant believed his words at the time of publishing them. *Struthers v Peacock* 11 PhilRep 287, 293 (1876) required merely an honest intention.
- 67 *Briggs v Garrett* 111 PaStRep 404, 419 (1886).
- 68 *Express Printing Company v Copeland* 64 Tex 354, 358 (1885).
- 69 *Miner v The Detroit Post and Tribune Company* 49 Mich 358, 365 (*dicta*) (1882).



- 70 See *King v Root* 4 Wend 113, 124 (1829) (jury charge):  
It will not escape your remark that [with the exception of one], the adverse witnesses stood opposed to each other in political sentiments, and every one called by the plaintiff warmly espoused his sentiments and opposed the political course of the defendants . . . and all those called by the defendants decidedly objected to and opposed the political course of the plaintiff.
- 71 Some interesting instances to consider might be: *Layton v Harriss* 3 HarrRep406 (Del 1842), *Swearingen v US* 161 US 446 (1896), *Tillotson v Cheetham* 2 Johns 63 NY (1806), *Weed v Foster* 11 Barbv 203 (NY 1851), and *Turrill v Dolloway* 17 Wend 426 (NY 1837).
- 72 *Eg Curtis v Mussey* 6 Gray 261 (Mass 1856) (enforcement of Fugitive Slave Act); *Sanderson v Caldwell* 45 NY 398 (1871) (overcharging soldiers); *Palmer v City of Concord* 48 NH (4 Had) 211 (1868) (libel on Union army); *Smith v Tribune Company* 4 Biss 477 (CC NorthDIII) (1867) (participation in John Brown's raid); *Hosmer v Loveland* 19 Barb 111 (NY 1854) (construction of US Const IV 2.2).

