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RETHINKING SULLIVAN: NEW APPROACHES IN AUSTRALIA, NEW ZEALAND, AND ENGLAND

Susanna Frederick Fischer*

“This is a difficult problem. No answer is perfect.” - Lord Nicholls of Birkenhead in Reynolds v. Times Newspapers

SUMMARY

This Article employs a comparative analysis of some important recent Commonwealth libel cases to analyze what has gone wrong with U.S. defamation law since New York Times v. Sullivan and to suggest a new direction for its reform. In Lange v. Australian Broadcasting Corporation, Lange v. Atkinson, and Reynolds v. Times Newspapers, the highest courts of the Australian, New Zealand, and English legal systems were confronted with the same challenge faced by the U.S. Supreme Court in New York Times v. Sullivan. They had to decide the proper constitutional balance between protection of reputation and protection of free expression in defamation actions brought by public officials over statements of fact. This Article’s review of these Commonwealth decisions shows that none of them followed Sullivan by creating a new and freestanding constitutional defense like the “actual malice test.” Instead, the Commonwealth Courts constitutionalized the common law of defamation by expanding the existing common law defense of qualified privilege for some types of political expression. U.S. scholars have largely ignored these Commonwealth cases, but a comparative look at them provides a new perspective on the Sullivan decision. This Article contends that the U.S. Supreme Court in Sullivan took a wrong turn by ignoring the existing defense of qualified privilege and its inherent flexibility arising from the public interest rationale. As a result, the Court unnecessarily created a new constitutional defense, when it could have more simply held that the First Amendment requires the expansion of the boundaries of state law qualified privilege. This wrong turn was compounded in later cases, which built a complex maze of rules, based on overly

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rigid categories of plaintiff for liability, damages, and procedure in libel actions. Serious problems have resulted for U.S. libel litigation, including excess complexity, jury confusion, inconsistency with Sullivan's stated Madisonian rationale, and widespread dissatisfaction with the current state of the law. The three Commonwealth cases offer three different versions of a more flexible common law alternative to the rigid categorical approach of Sullivan. Critics of U.S. defamation law should bear these alternatives in mind as models for reform.

I. Introduction

This Article addresses a difficult problem involving a clash of rights: the right to protection of reputation and the right to freedom of expression. The following are hypotheticals illustrating this problem:

1. A national politician, "A," brings a libel action in the courts of another country over the broadcast of a television documentary. According to A, the documentary alleges that A has abused his public position and is unfit to hold public office.2

2. The same A, now in retirement from politics, brings another libel action over a magazine article, this time in his home country. A claims that the article bears the defamatory sting that, as a politician, he was irresponsible, dishonest, insecure, manipulative, and lazy.3

3. Another politician, "B," sues a major Sunday newspaper in a neighboring country for libel. B claims that an article published by the newspaper defames him by accusing him of lying to government ministers and democratically elected representatives.4

Assume that the allegations are all false and defamatory statements of fact.5 Can either A or B successfully sue for damages for libel? To answer this question, the law must balance competing rights: protection of reputation against freedom of expression.6 As recently noted by Lord Nicholls of Birkenhead, a judge of the

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4. These are the facts of Reynolds, 3 W.L.R. at 1010.
5. This Article is limited to the problem of defamation actions involving factual allegations. It will not address the separate, though related, problem of false and defamatory statements of opinion.
6. Some readers may already be questioning the assertion that the right to freedom of expression applies to a false statement of fact. They may contend that only opinion or commentary could implicate freedom of expression, and moreover, that no society has an interest in protecting falsehood. This Article is premised on the assumption that this argument is fallacious. In the words of Lord Hobhouse of Woodborough in Reynolds: "The free discussion of opinions and the freedom to comment are inevitably liable to overlap
English House of Lords, this is a difficult problem.\textsuperscript{7} It is a particularly vexing problem for democratic societies where political speech is concerned. A democratic society has an interest in protecting free expression for the media to ensure that sufficient public debate occurs so that electors can receive enough information to wisely exercise their voting responsibilities.\textsuperscript{8} A democratic society also has an interest in protecting an individual’s reputation against unfounded attacks, based on the importance of respecting the dignity of every individual human being.\textsuperscript{9}

In the United States, the constitutional balance between these competing rights was first established in the landmark U.S. Supreme Court case, \textit{New York Times v. Sullivan}, (\textit{Sullivan}) and later refined by thirty years of Supreme Court jurisprudence.\textsuperscript{10} \textit{Sullivan} constitutionalized state libel law by reading the First and Fourteenth Amendments of the U.S. Constitution as a significant restriction on common law libel actions.\textsuperscript{11} The \textit{Sullivan} Court established a new constitutional defense, separate from the common law, for speech about public officials. The Court held, by a 6-3 majority, that a public official was barred from recovering damages for libel unless he could prove “actual malice,” namely that the defendant published the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”\textsuperscript{12}

Upon learning that the previous hypotheticals are based on real cases, one will undoubtedly conclude from the discussion above that, if \textit{Sullivan} controls, both of the hypothetical politicians can

\textsuperscript{7} Id. at 1024D.
\textsuperscript{8} See id. at 1022H-23C; see also Campbell v. Spottiswoode, B & S 769, 777 (Q.B. 1863). In Campbell, Chief Justice Cockburn stated:

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation.

\textsuperscript{9} See Reynolds, 3 W.L.R. at 1023F; see also Rosenblatt v. Baer, 388 U.S. 75, 92 (1966) (Stewart, J., concurring).
\textsuperscript{11} See id. at 264.
\textsuperscript{12} Id. at 279-80. Justices Black, Goldberg, and Douglas separately concurred on the basis that the First Amendment required absolute protection from liability in defamation to be afforded to criticism of official conduct. See id. at 293-97 (Black, J., concurring, joined by Douglas, J.), 297-305 (Goldberg, J., concurring, joined by Douglas, J.).
only recover damages for libel if they can prove that the defendant published the offending words with "actual malice." These cases, however, were not brought in U.S. courts, nor did U.S. law govern. They are all Commonwealth cases, considered by the highest judicial bodies of Australia, New Zealand, and England over the past five years. The first case, *Lange v. Australian Broadcasting Corporation*, (Australian Broadcasting Corporation) was brought in Australia, under Australian law. The second, *Lange v. Atkinson*, (Atkinson) was brought in New Zealand, under New Zealand law. The third, *Reynolds v. Times Newspapers Ltd.*, (Reynolds) brought in the United Kingdom, under English law. In all three of these Commonwealth cases (collectively, the "Commonwealth Cases"), each jurisdiction's highest judicial authority had to resolve the question of whether there was any special constitutional protection for defamatory facts concerning government or political matters that had been published to the general public by the news media.

The resulting decisions in the Commonwealth Cases are interesting and important for a number of reasons. First, they are significant because they are effectively the *Sullivan* decisions of their respective legal systems. It is notable that, like *Sullivan*, the highest courts of three major industrialized democracies have now definitively constitutionalized the common law of libel. In all three cases, the

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13. The highest court in the Australian legal system is the High Court. For a discussion of the High Court's operation, history, jurisdiction, and judiciary, see *supra* notes 40-47 and accompanying text.


15. The highest judiciary authority in the English legal system is the House of Lords. For a discussion of the House of Lords' operation, history, jurisdiction, and judiciary, see *supra* notes 63-63 and accompanying text.


19. There is no corresponding trilogy of decisions in the Commonwealth Cases because in the New Zealand Atkinson case, both the highest court sitting in New Zealand (the New Zealand Court of Appeal) and the highest judicial authority of New Zealand (the Privy Council in London) issued decisions. Indeed, the New Zealand Court of Appeal ruled twice. See *supra* notes 298-361 and accompanying text.

20. In *Atkinson*, the New Zealand Court of Appeal held that New Zealand's common law of defamation was subject to provisions guaranteeing freedom of expression in the New Zealand Bill of Rights Act. *Atkinson* [1998] 3 N.Z.L.R. at 465-68, *aff'd*, [2000] 3 N.Z.L.R. at 400. Although these provisions are statutory, they have been treated as effec-
Commonwealth courts confronted the same issue considered by the U.S. Supreme Court in Sullivan, namely, the extent to which the common law of libel was consistent with constitutional guarantees of freedom of expression. As in Sullivan, the Commonwealth Cases involved political speech about public officials.21 Also, like Sullivan, the courts deciding the Commonwealth Cases all agreed that the common law was subject to the relevant Constitution.22

Additionally, the extent to which the Commonwealth Cases diverged from Sullivan is also notable. Unlike Sullivan, none of the courts ruling in the Commonwealth Cases found that applicable constitutional guarantees of free expression dictated a freestanding constitutional defense separate from common law (as well as statutory, as applicable) defense of qualified privilege.23 Rather, these Commonwealth courts found constitutional requirements to be satisfied by an expansion of the existing common law defense of qualified privilege.24 All these courts agreed that this expanded defense must be capable of applying to statements broadly pub-
lished to the general public by the media. They also agreed that, in keeping with the traditional common law approach, the defense could be lost if the defendant misused the occasion of privilege; however, none of them endorsed Sullivan’s constitutional “actual malice” test.

Moreover, the extent to which the Commonwealth Cases differed from each other is worthy of consideration. Although they all endorsed a common law solution to the Sullivan problem, they did not agree on the parameters of that solution. They diverged sharply on the extent to which constitutional rights required the expansion of the common law. In particular, they differed as to the scope of the expanded defense of qualified privilege, as well as the nature and extent of prerequisites for its applicability.

The Australian and New Zealand decisions endorsed a categorical approach to the common law. Both held that the expanded common law defense should protect a generic category of political expression to the general public, though the New Zealand category was narrower than its Australian counterpart. The English House of Lords took a different approach, rejecting any addition of new generic categories of protected political expression for the common law defense of qualified privilege. According to this English approach, justice could best be served only on a case-by-case basis.

Both the English and the New Zealand courts rejected any prerequisite for the expanded common law defense, but the Australian courts upheld a prerequisite of reasonable conduct by the defendant. The Australian courts also differed from their New Zealand and English counterparts by narrowing the common law test for malice that would cause the expanded privilege to be lost.

Surprisingly, despite the fact that these landmark Commonwealth decisions have generated considerable scholarly commentary in the Commonwealth, there has been virtually no scholarly

25. See infra Part V.
26. See infra Part V.
29. Id. at 1024G-H, 1046E, 1051E, 1061H.
32. For commentary on Australian Broadcasting Corp., see, e.g., George Williams, Human Rights Under the Australian Constitution 186-92 (1999); Gavin W. Anderson, Corporations, Democracy and the Implied Freedom of Political Communication: Towards a Pluralistic
attention to them in the United States. This Article attempts to plug that gap.

As background information on the legal systems of Australia, England, and New Zealand, Part II of this Article briefly introduces the courts that ruled in the Commonwealth Cases, focusing on their jurisdiction, judiciary, and the binding effect of their judgments. Part III provides background information on the law of defamation in these Commonwealth legal systems by reviewing the extent to which the defense of qualified privilege protected defamatory and false statements of fact prior to the Commonwealth Cases. Each of


these cases can be viewed as the product of recent constitutional developments over the last decade, in particular as the product of a growing solicitude for human rights. Part IV examines this constitutional activity in all three Commonwealth jurisdictions. Part V reviews the Commonwealth Cases, comparing both similarities and differences in their approach to the extended privilege. Part VI examines the Sullivan decision from the comparative perspective of the Commonwealth Cases. This examination shows that the Sullivan Court erred by constructing a new constitutional defense, the “actual malice” test, when it could have taken the approach later taken in the Commonwealth Cases. The creation of this new constitutional defense was a mistake because categorical rules tend to be overly rigid, ill-adapted to do justice in particular cases, and likely to result in doctrinal confusion. Part VII shows how the U.S. Supreme Court’s wrong turn in Sullivan was compounded by Sullivan’s progeny, which extended Sullivan far beyond its initial circumstances and constructed an overly complex set of rules governing not only liability but also damages, procedure, and evidence. The result is a deeply flawed law of libel that has been widely criticized for decades by commentators without improvement. Finally, Part VIII concludes by suggesting that the flexible extended common law approach of the Commonwealth Cases offers a promising avenue of reform for U.S. libel law. It is true that, as conceded by Lord Nicholls in Reynolds, there is no perfect answer to the Sullivan problem. However, a more flexible common law approach would better serve the public interest than the current unsatisfactory state of the law.

II. THE COMMONWEALTH DECISIONMAKERS

To assist those readers who may not be familiar with the court structure of the Australian, New Zealand, and English legal systems, this Article begins by briefly introducing the courts that ruled in the Commonwealth Cases. These courts, the Australian High Court, the New Zealand Court of Appeal, the Judicial Committee of the Privy Council (Privy Council), and the House of Lords (collectively, the “Commonwealth Courts”), share the exalted status of
the U.S. Supreme Court in their respective court hierarchies. Like the U.S. Supreme Court, the jurisdiction of each of the Commonwealth Courts is primarily appellate (in the case of the Privy Council, exclusively appellate), and generally limited to cases of great public importance. The judicial members of each Commonwealth Court are in practice, if not always in theory, professional judges, like U.S. Supreme Court justices. As with the U.S. Supreme Court, the decisions of all of the Commonwealth Courts are binding on all lower courts in that jurisdiction (although the Privy Council has recently backed away from requiring full compliance with its decisions from the New Zealand Court of Appeal).

The high status of the Commonwealth Courts means that their decisions bear the weighty importance of U.S. Supreme Court decisions in their respective Commonwealth legal systems. This introduction to the Commonwealth Courts will focus on their jurisdiction, judiciary, and the binding effect of their judgment, beginning with the High Court of Australia.

35. Henry J. Abraham has described the U.S. Supreme Court as "standing at the very pinnacle of the judiciary: [t]here is no higher court, and all others bow before it—or, at least, are expected to do so." HENRY J. ABRAHAM, THE JUDICIAL PROCESS 186 (7th ed. 1998).

36. In New Zealand, both the highest court in New Zealand, the New Zealand Court of Appeal, and the highest court of New Zealand, the Privy Council, ruled on this issue. See supra notes 298-361 and accompanying text.

37. See ABRAHAM, supra note 35, at 187 ("The U.S. Supreme Court has both original and appellate jurisdiction, but it exercises the former only in rare instances."). Most appellate cases reach the U.S. Supreme Court through a screening procedure known as a "writ of certiorari." The Rules of the Supreme Court provide that certiorari will be granted "only for compelling reasons," and all of the (admittedly non-exclusive) factors set out in the Rules indicate that an important federal question or important question of federal law is required. See Sup. Ct. R. 11. For comparative information on the Commonwealth Courts, see supra notes 40-63 and accompanying text.

38. See supra notes 40-63 and accompanying text.

39. See ABRAHAM, supra note 35, at 247 ("When officially announced as decided [by the U.S. Supreme Court], the case becomes binding on all lower and federal courts and on all state courts when and where applicable."). For comparative information on the Commonwealth Courts, see supra notes 40-63 and accompanying text.
The highest court in Australia is the High Court, established in 1901 by Section 71 of the Australian Constitution. The High Court sits primarily in Canberra, Australia's capital city, where its building is located. There are seven High Court Justices. The bulk of the work of the High Court is hearing appeals, most requiring special leave, from Australian federal and state courts. The High Court generally hears only cases of general public importance. Additionally, pursuant to the Australian Constitution, Parliament has conferred nonexclusive original jurisdiction on the High Court to determine "all matters arising under the Constitution or involving its interpretation." The judgments of the High Court bind other Australian courts.

B. The Privy Council

The highest court of New Zealand, the Privy Council, is not technically a court at all, but an advisory body to the Queen. New Zealand is one of the few independent Commonwealth countries to have retained the right of appeal to the Privy Council. In civil cases where the final judgment of the New Zealand Court of Appeal is at least $5000 (NZ), there is an appeal as of right to the Privy Council. Many other Commonwealth nations, including Australia, have passed legislation abolishing appeals to the Privy Council.

40. For regularly updated information about the High Court’s operation, history, judiciary, and judgments, see the High Court of Australia web page, http://www.hcourt.gov.au/.
42. See id. at 11, 13; see also Gerard B. Carter, Australian Legal System 104 (1995).
44. See Austl. Const. § 73 (providing for appellate jurisdiction). The High Court, however, also has original jurisdiction in some circumstances. See id. §§ 75, 76 (granting inherent jurisdiction over certain matters and empowering Parliament to confer original jurisdiction in certain circumstances).
45. See Carter, supra note 42, at 106.
46. See Austl. Const. § 76; Judiciary Act 1903 § 30(a) (Austl.).
47. See Carter, supra note 42, at 51.
48. See supra note 35 and accompanying text; see also Morag McDowell & Duncan Webb, The New Zealand Legal System § 6.4.2 (a) (2d ed. 1998); Abraham, supra note 35, at 282 (providing list of courts, tribunals, and other bodies having rights of appeal to the Privy Council).
49. See McDowell, supra note 48, § 6.4.2(b).
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Council. Despite this narrowing of its \textit{de facto} jurisdiction, the Privy Council retains great prestige. This is because the Judicial Committee's members include British Lords of Appeal in Ordinary, as well as the British Lord Chancellor. Consequently, decisions of the Privy Council bear great precedential weight in England, although they are not binding authority there. Decisions of the Privy Council do bind New Zealand courts; recently, however, the Privy Council has increasingly circumscribed its own role as an appellate tribunal in New Zealand by permitting New Zealand courts to develop New Zealand's common law when local conditions differ from England. Thus, in many cases, the final judicial authority in New Zealand is \textit{de facto} the highest court actually sitting in New Zealand, the New Zealand Court of Appeal.

C. The New Zealand Court of Appeal

The New Zealand Court of Appeal, established as a separate court in 1957, sits in Wellington, the capital of New Zealand. There are eight judges on the New Zealand Court of Appeal. Like the Australian High Court, the New Zealand Court of Appeal mainly hears appeals from lower New Zealand courts, but it has some limited original jurisdiction as well. In civil cases appeals to the New Zealand Court of Appeal may be brought as of right from the High Court, but appeals from other lower courts require

\begin{itemize}
\item[50.] See Richard Ward, Walker & Walker's English Legal System 191 (Butterworth 1998).
\item[51.] \textit{Id.} at 190.
\item[52.] Lords of Appeal in Ordinary are the judges of the House of Lords, the highest judicial body in the English legal system. \textit{Id.}
\item[53.] See \textit{id.}; see also McDowell, supra note 48, § 6.4.2(a); Abraham, supra note 35, at 282.
\item[54.] See Ward, supra note 50, at 68.
\item[55.] See Atkinson [2000] 1 N.Z.L.R. at 262; see also Invercargill City Council v. Hamlin, 1 All E.R. 756, 764 (P.C.1996).
\item[56.] For additional up-to-the minute information about the New Zealand Court of Appeal (as well as the role of the Privy Council in the New Zealand legal system), see New Zealand Government's Courts web pages, available at http://www.courts.govt.nz/courts/courts.html (last visited Nov. 26, 2001).
\item[57.] See McDowell, supra note 48, § 6.4.3.
\item[58.] The judges of the New Zealand Court of Appeal are the Chief Justice of New Zealand (the head of the New Zealand judiciary), the President of the Court of Appeal, and six other justices, who are all also justices on the High Court. 8 The Laws of New Zealand 181-82 (1993). At the time of writing (March 27, 2001), the Chief Justice of New Zealand is the Rt. Hon. Dame Sian Elias. President of the Court of Appeal is Sir Ivor Richardson. The other members of the Court of Appeal are Justices Gault, McGrath, Thomas, Sir Kenneth Keith, Blanchard, and Tipping.
\item[59.] See \textit{id.} at 187.
\end{itemize}
leave. Appeals to the New Zealand Court of Appeal are rehear-
ings, so the New Zealand Court of Appeal can hear fresh evidence although it rarely does so in practice. The decisions of the New Zealand Court of Appeal are binding on lower courts sitting in New Zealand.

D. *The House of Lords*

The House of Lords is the highest judicial authority in the English legal system. Like the Privy Council, the House of Lords is not technically a court but is part of Parliament. The House of Lords hears cases in a committee room of the House of Lords at Westminster. The judges are, in theory (and, prior to the 19th century, also in practice), the entire House of Lords. Today, appeals to the House of Lords are heard only by appointed judges, who are life peers. They are known as Lords of Appeal in Ordinary, or, more popularly, "Law Lords." There are currently twelve Law Lords, as well as the Lord Chancellor, who is the head of the judiciary and also the presiding officer of the House of Lords.

The jurisdiction of the House of Lords is predominantly appellate. The House of Lords hears both civil and criminal appeals. Appeals in civil cases are not limited to questions of law, but in practice they generally involve legal questions of significant public importance.

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60. See *Judicature Act 1908 §§ 66, 67 (N.Z.).*
62. *Id.* § 8.8.4
64. GARY SLAPPER & DAVID KELLY, SOURCEBOOK ON ENGLISH LEGAL SYSTEM 55 (1996). The House of Lords is also the pinnacle of the Scottish legal system, which is largely separate from that of England and Wales. Abraham, *supra* note 35, at 270.
68. In civil cases, appeals are generally from the Court of Appeal, but there is a statutory provision for "leap-frog" appeals from a trial court. *Administration of Justice Act 1969 §§ 12-13.*
In 1966 the House of Lords changed its approach to the binding nature of its own precedent, stating that it could now “depart from a previous decision when it appears right to do so” while “treating former decisions of this House as normally binding.”70 Decisions of the House of Lords, however, are binding on other English courts.71

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The above section attempts to provide readers with an understanding of the high status of the Commonwealth Courts deciding the Commonwealth Cases. In order to fully understand the changes the Commonwealth Courts have wrought for the law of defamation, it is also necessary to understand the preexisting law that was the subject of these changes. Accordingly, the next section reviews the preexisting libel defense of qualified privilege that the Commonwealth Cases extended as a constitutional matter.

III. THE PREEXISTING DEFENSE OF QUALIFIED PRIVILEGE

For generations the courts of Australia, New Zealand, and the United Kingdom did give some protection to defamatory and false statements through the doctrine of qualified privilege, both under common law and as extended by various statutes. As the analysis of these defenses below will show, however, this protection was relatively narrow in all three countries. Only very rarely did their courts find qualified privilege applicable to false and defamatory statements that were widely published by the media.72 Moreover, this traditional defense of qualified privilege gave no particular protection to political speech. The traditional defense was more concerned with whether the occasion of publication was in the public interest than with the status of the speaker or the nature of the speech.73 As Part VI will later discuss, at the time Sullivan was decided, the state law of Alabama was very similar.

Since the Australian Broadcasting Corporation case was chronologically the first case of the trilogy, most of this article’s comparative sections begin with Australia. However, this section begins with a discussion of the English law of qualified privilege prior to Reynolds. The reason for this is that, prior to its constitutionalization, the law

70. Practice Statement (Judicial Precedent), 1 W.L.R. 1234 (H.L. 1996).
71. WARD, supra note 50, at 74.
72. Under the common law of all three countries, the defense of qualified privilege was limited to situations where there was a reciprocal duty and interest in the making of the statement by both maker and recipient. See supra notes 74-146 and accompanying text.
73. See supra notes 74-146 and accompanying text.
of qualified privilege in both Australia and New Zealand differed very little from the English law from which both derived. It thus seems most efficient to first describe the English law and then explain the quite limited ways in which Australia and New Zealand law departed from it prior to the constitutional developments of the 1990s.

A. Traditional English law of qualified privilege

Prior to the *Reynolds* decision, the English common law of libel clearly weighed the balance between protecting freedom of expression and reputation in favor of reputation. At common law, defamatory statements of fact are presumed to be false. To establish a *prima facie* case in libel, a plaintiff need only prove that the offending words are defamatory, refer to the plaintiff, and have been published to a third party. Thus, liability is strict. The burden generally rests on the defendant to exonerate itself by proving that the statement is true or that some other defense, such as innocent dissemination, applies. The English common law has always recognized that some false speech should be protected from liability for defamation on the basis of public interest, but, as we shall see, this common law privilege was relatively narrow. Political speech, including speech about politicians or public figures, had no special protection under traditional English common law. Rather, the law focused on the occasion of the publication and whether it was in the public interest to protect it at the expense of protecting reputation.

The traditional common law recognized that the public interest mandates that some publications, in certain circumstances, have complete protection from liability. This is known as absolute privi-

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74. Words are defamatory if their effect is, in the famous words of Lord Atkin, "to lower the plaintiff in the estimation of right-thinking members of society generally." Sim v. Stretch, 2 All E.R. 1237, 1240 (H.L. 1936). Many commentators have criticized this definition as hopelessly vague. *Eric Barendt et al., Libel and the Media: The Chilling Effect* 3 (1997); *Gatley on Libel and Slander* § 1.4 (Patrick Milmo QC & W.V.H. Rogers, eds., 9th ed. 1998) ("The starting point of the law is that the plaintiff is presumed to have and to enjoy an unblemished reputation and it is up to the defendant to rebut that . . ."); see also *Reynolds*, 3 W.L.R. at 1015. For a critical assessment of the history of this presumption of malice, see Paul Mitchell, *Malice in Defamation*, 114 L.Q.R. 639 (1998).


76. *Id.* at 93-94. This burden frequently determines the outcome of a libel action because it is often impossible to prove an allegation to be true or false.

77. Toogood v. Spryng [1834] 1 C.M. & R. 181, 195 (1834) (per Parke B.); see also *Reynolds*, 3 W.L.R. at 1059 B-G.
Malice is irrelevant. The classic example of a statement with such absolute privilege is one made in the course of legal proceedings by counsel, witness, or judge. Another example is a statement made by a Member of Parliament in parliamentary proceedings. Many other types of obviously political speech, however, do not have absolute privilege. For example, if a Member of Parliament repeats to a journalist a statement that she previously made in Parliament, the repeated words would not be absolutely privileged because they were repeated outside of an occasion of absolute privilege.

The rationale underlying the common law doctrine of absolute privilege is the public policy of ensuring freedom of speech in certain circumstances. But absolute privilege is a narrow defense, covering only certain narrow and well-defined occasions of publication. The fear of the "chilling" effect arising from overprotection of reputation led to protection for speech in some additional circumstances, though this protection was always weaker than abso-

78. See generally Gatley, supra note 74, §§ 13.1-13.47 (providing a good general overview of the doctrine of absolute privilege); see also Carter-Ruck & Starte, supra note 75, at 121-34; Royal Aquarium and Summer & Winter Garden Soc'y v. Parkinson, 1 Q.B. 431, 451 (C.A. 1892).

79. See Carter-Ruck & Starte, supra note 75, at 135.

80. See, e.g., Munster v. Lamb, 11 Q.B.D. 588, 603-04 (C.A. 1883) (holding that advocates have complete immunity for what they say in court); see also Rondel v. Worsley, 1 A.C. 191, 271 (C.A. 1969) (citing with approval the opinion of Mathew, J., in Munster, which was upheld by the Court of Appeal); More v. Weaver, 2 K.B. 520, 522 (C.A. 1928) (absolute privilege applies to judges, counsel and witnesses); Bottomley v. Brougham, 1 K.B. 584, 587 (K.B. 1908) (finding report of official receiver, a judicial position, to be absolutely privileged, and reiterating that absolute privilege applies to judges, advocates and witnesses).

81. This parliamentary privilege derives from the Bill of Rights Act (1688), which provides, inter alia, "[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." See also Ex parte Wason, 4 L.R.-Q.B. 573, 576 (Q.B. 1868) (stating, per Cockburn, C.J., that "[i]t is clear that statements made by members of either House of Parliament in their places in that House, though they may be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person").

82. Stockdale v. Hansard, 9 Ad. & El. 1, 114 (1839); see also Wason v. Walter, 4 L.R.-Q.B. 73, 89, 93 (Q.B. 1868) (finding that a faithful newspaper report of a parliamentary debate was protected by qualified privilege). For more information on qualified privilege, see supra notes 72-81 and accompanying text.

83. Parkinson, 1 Q.B. at 451.
lute privilege. One example of such a weaker privilege is the doctrine of qualified privilege.

Under pre-Reynolds English common law, the applicability of qualified privilege did not depend on the type of speech (e.g., political speech) or on the status of the speaker (e.g., a public or private figure) but rather on the circumstances of the communication. As noted above, the rationale for qualified privilege is the public interest. The seminal English authority on this point, the nineteenth century case of Toogood v. Spyring expressed this as the "common convenience and welfare of society." Although Toogood appeared to contemplate that a statement could be privileged where the speaker was under a social, moral, or legal duty to publish it, later English authority added an additional requirement for qualified privilege: reciprocity. Maker and recipient had to possess either a reciprocal duty and interest in the making of the statement or a common interest in the making of the statement. In determining whether an occasion was privileged, the court had to consider all the circumstances. Classic examples of privileged occasions are a job reference, a reply to an attack on a person's reputation, and a statement made to the police concerning the commission of a crime.

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84. Reynolds, 3 W.L.R. at 1015F (stating that "[t]he common law has long recognized the 'chilling effect' of this rigorous, reputation protective principle. There must be exceptions. At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority.").

85. See id. The other major type of weaker privilege recognized under English common law is the defense known as "fair comment on a matter of public interest." This applies to statements of opinion rather than fact. Campbell v. Spottiswoode, 3 B. & S. 769, 778-79, 781 (Ex-Ch. 1863); see also London Artists Ltd. v. Littler, 2 Q.B. 375, 391B (C.A. 1969).

86. See Adam v. Ward, A.C. 309, 348 (H.L. 1917); see also CARTER-RUCK & STARTE, supra note 75, at 137, 139, 142, 146.

87. Toogood, 1 C.M. & R. at 193 (per Parke B.).

88. Adam, A.C. at 334. As Lord Atkinson stated, "[t]his reciprocity is essential." Id.

89. London Ass'n for Prot. of Trade v. Greenlands, Ltd., 2 A.C. 15, 23.

90. Fountain v. Boodle, 114 Eng. Rep. 408, 411 (Q.B. 1842) (where Lord Denham stated: "A character bona fide given to a servant of any description is a privileged communication, and in giving it bona fides is to be presumed."); see also Gardener v. Slade, 18 L.J.Q.B. 334, 336 (1849).


92. Croucher v. Inglis, 26 R. 774, 778 (Scot. Sess. 1889); see also Lightbody v. Gordon 9 R. 934, 938-39 (Scot. Sess. 1882). Although both Croucher and Lightbody are Scottish Court of Session decisions, they are well accepted as representing English law. See GATLEY, supra note 74, § 14.31.
The common law's interpretation of the public interest as requiring case-by-case analysis of the circumstances of publication created an aversion to setting limits for the application of the defense. The House of Lords has accepted that the categories of qualified privilege are never closed. In *London Association for Protection of Trade v. Greenlands, Ltd.*, Lord Buckmaster famously stated: "[T]he circumstances that constitute a privileged occasion can themselves never be catalogued."93

Nevertheless, establishing a mutual duty and interest has not always been easy. For example, credit reports made by agencies that are run for profit are not covered by the common law defense of qualified privilege because the courts have not accepted that such reports are made pursuant to a legal, moral, or social duty.94

Since the defense of qualified privilege does not attach to the statement itself but rather to the circumstances of the publication, the privilege is lost if misused. Some statements covered by common law qualified privilege in one circumstance have been held to lose this privilege if made to a broader audience.95 An example is a job reference made to a potential employer (originally privileged) that is subsequently published in a newspaper (not privileged).

Qualified privilege can also be lost if a statement is published with an improper motive. The pre-*Reynolds* defense of qualified privilege gave protection only if a statement was made honestly and without "malice."96 Malice was traditionally defined as a dominant motive of ill will, spite, or some other improper motive.97 The classic statement of the meaning of "malice" in the context of the

93. London Ass'n, 2 A.C. at 22; see also Stuart v. Bell, 2 Q.B. 341, 346 (C.A. 1891) (where Lord Justice Lindley stated: "The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not.").

94. Macintosh v. Dun, A.C. 390 (P.C. 1908) (Austl.) (finding no privilege because it was not in the public interest to protect a statement made with the motive of pecuniary gain). Though the *Macintosh* decision has been heavily criticized, it remains the current state of English law. See Gatley, supra note 74, § 14.23.

95. Pullman v. Hill & Co., 1 Q.B. 524, 528 (C.A. 1891). A well-recognized example is where the statement was made to a broader audience in the course of ordinary business practice, such as where it was dictated to a secretary as part of the ordinary course of business. Boxsus v. Goblet Frères, 1 Q.B. 842, 846 (C.A. 1894); see also Edmondson v. Birch & Co. Ltd. and Horner, 1 K.B. 371, 380 (C.A. 1907); Osborn v. Thomas Boulter & Son, 2 K.B. 226, 234 (C.A. 1930); Bryanston Finance Ltd. v. deVries, 2 All. E.R. 609, 617 (C.A. 1975).


English common law defense of qualified privilege is found in the opinion of Lord Diplock in *Horrocks v. Lowe*.\(^9\) Lord Diplock stated:

> [W]hat is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as is generally though tautologically termed, "honest belief." If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what is published is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true.\(^9\)

Lord Diplock made clear that an improper motive could be deduced from evidence that the statement was made without belief in its truth or with reckless disregard as to whether it was true or false.

Pre-*Reynolds* common law recognized no blanket privilege for statements made by the press, whether political or otherwise, unless there was a duty to report to the public.\(^\text{100}\) There are certain occasions of media publications to the general public, however, that traditional common law has long accepted as privileged. For example, fair and accurate reports of parliamentary proceedings are covered by qualified privilege under traditional English common law,\(^\text{101}\) as are fair and accurate reports of English judicial proceedings before courts and tribunals, provided such proceedings are open to the public.\(^\text{102}\) In addition, fair and accurate reports of foreign judicial proceedings have been found privileged under pre-*Reynolds* English common law if the English public has a legitimate interest in such reports.\(^\text{103}\) Other statements made by the press, however, were protected by common law qualified privilege only in circumstances where the reciprocal duty and interest test

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99. *Id.* at 150B-C.
103. See *Webb v. Times Publ'g Co Ltd.*, 2 Q.B. 535, 565 (1960) (finding privileged a report of a Swiss criminal trial of a defendant who had been previously tried and sentenced to imprisonment in England).
was met; this was a rare event. In *Blackshaw v. Lord*, Lord Justice Stephens stated:

> There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable, that publication of suspicion or speculation is justified: for example, where there is danger to the public from a suspected terrorist, or the distribution of contaminated food or drugs.

English common law's emphasis on the circumstances of publication, rather than what was said or who said it, resulted in no special protection for political speech. Nor did traditional English common law give any special privilege to speech about public figures. Statements made by the press were also not afforded any special status. Nor were statements on a matter of public interest. Privilege would not attach to any of these varieties of political speech unless the general reciprocal duty and interest test were satisfied, just like with any other type of speech.

Legislative developments did not significantly alter the common law approach. Over the years, Parliament has enacted various statutory categories of privilege. Some of the current statutory privileges do protect certain publications that could include political speech, such as fair and accurate reports of judicial proceedings both within and outside the United Kingdom, including proceedings in the European Court of Justice. None of the statutory additions to the English common law of qualified privilege, however, has given political speech, whether journalism or not, any

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104. See, e.g., *Watts v. The Sunday Times*, 2 W.L.R. 427, 441-44 (C.A. 1996) (finding that defendant newspaper had no lawful interest in publishing a defamatory statement in an apology; the scope of defendant newspaper's privilege to reply to an attack was not as broad as that of the person attacked). In limited circumstances, however, publication to a wide or unlimited audience has been regarded as coming within the ambit of qualified privilege. See *Adam*, A.C. at 319; see also *Perera v. Peiris*, A.C. 1, 21 (P.C. 1949) (report on integrity of members of Executive Council of Ceylon held privileged where widely communicated to public, due to the public interest in such wide communication); *Cox v. Feeney*, 176 Eng. Rep. 445 (1863) (newspaper report, which was critical of plaintiff's management of a college, by inspector of charities prepared under statute was held privileged even though published to the general public).

105. See *Tobin*, *supra* note 32, at 58.


107. Defamation Act 1996 §§ 14, 15, Sch. 1. This statute provides for absolute privilege for fair and accurate contemporaneous reports of public judicial proceedings in the United Kingdom and some other courts, including the European Court of Justice. See *id.* § 14. Reports of other judicial proceedings have qualified privilege. See *id.* § 15; see also *supra* note 9.
additional blanket protection.\textsuperscript{108} The next section will show that traditional Australian law, both common law and statute, generally followed the English approach.

\textbf{B. Traditional Australian law of qualified privilege}

Not surprisingly, in light of Australia’s British heritage, Australian defamation law is based on English common law. Australian State defamation statutes also largely follow the narrow approach of English statutory developments. As this subsection will show, prior to the constitutionalization of Australian defamation law, the traditional Australian common law defense of qualified privilege did not differ much from the traditional English common law defense. Like English common law, the Australian common law of qualified privilege did not recognize any generic category of protection for political discussion by the media, nor did the legislative extension of the common law create any such blanket category of protection.

Although, like the United States, Australia has a federal system of government, there is only one common law that applies throughout Australia, except where supplanted by State statute.\textsuperscript{109} The common law defense of qualified privilege applies in all Australian jurisdictions except for Queensland and Tasmania. Both Queensland and Tasmania have an analogous statutory defense known as “qualified protection,” which differs only slightly from the common law (as will be explained in the next paragraph).\textsuperscript{110} The law of New South Wales (the governing law in \textit{Australian Broad-}

\textsuperscript{108} Section 15 of the Defamation Act 1996 provides for other statutory categories of qualified privilege, which are described in Schedule 1, for example, fair and accurate reports of public legislative proceedings worldwide, fair and accurate reports of public court proceedings in foreign courts, and fair and accurate reports of public proceedings of international conferences and international organizations. See Defamation Act 1996, Sch. 1 Part I. Some other statutory categories of qualified privilege, set out in Part II of Schedule 1 of the Defamation Act 1996, are \textit{prima facie} privileged, but can be lost if the defendant neglects to publish a “reasonable letter or statement by way of explanation or contradiction.” Defamation Act 1996 § 15(2). Examples include fair and accurate copies of public notices issued on behalf of governments of European Union Member States or international organizations, fair and accurate reports of certain public meetings, such as the proceedings of United Kingdom local authorities, and fair and accurate reports of proceedings at general meetings of United Kingdom public companies. Defamation Act 1996, Sch. 1 Part II. For a complete list, see \textit{id}.

\textsuperscript{109} Australian Broad. Corp. [1997] 189 C.L.R. at 563; see also Kable v. Dir. of Prosecutions (1996) 189 C.L.R. 51, 112 (N.S.W.) (per McHugh, J., stating: “Unlike the United States of America where there is a common law of each state, Australia has a unified common law which applies in each State but is not itself the creature of any State.”).

\textsuperscript{110} Defamation Act 1889 § 16 (Qld.); Defamation Act 1957 § 16 (Tas.).
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casting Corporation) has retained the common law, despite adding a supplemental statutory defense of qualified privilege. This New South Wales supplemental defense differs more substantially from the common law than Queensland and Tasmanian "qualified privilege" but has not established any generic statutory category of protection for political discussion by the media or discussion of public figures. Before considering the New South Wales statutory extension to qualified privilege, this Article will first examine the scope of the traditional Australian common law defense of qualified privilege and its statutory replacements in Queensland and Tasmania.

The traditional Australian common law defense of qualified privilege was virtually identical to its English counterpart. Like the pre-Reynolds English law, the traditional Australian common law defense of qualified privilege did not apply unless there was a reciprocal duty and interest on the part of maker and recipient. In this respect, the Queensland and Tasmanian statutory defenses of qualified protection do differ from the traditional common law; neither requires reciprocal duty and interest. This, however, is one of only two material respects in which the Queensland and Tasmanian statutory defenses differ from the traditional Australian common law defense of qualified privilege.

The other significant difference between the Queensland and Tasmanian statutory defenses and the common law of Australia is with regard to misuse of privilege. As under the traditional English common law, the Australian common law defense of qualified privilege would fail if the plaintiff could prove that the defendant misused the privileged occasion, often described as "malice," on the part of the defendant. The English meaning of malice, namely ill-will, spite, or other improper motive, applies under Australian

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111. See Defamation Act 1974 §§ 4(2), 11, 22 (N.S.W.); see also Morosi v. Mirror Newspapers (1977) 2 N.S.W.L.R. 749, 772E; supra notes 123-127 and accompanying text.


113. Defamation Act 1957 § 16 (Tas.); Defamation Act 1889 § 16 (Qld.); see also Musgrave v. Commonwealth (1937) 57 C.L.R. 514, 548 (applying Queensland statute); Gillooly, supra note 112, at 210.

114. See supra note 110 and accompanying text.
common law.\textsuperscript{115} The Queensland and Tasmanian statutory qualified protection defenses are defeated by an absence of "good faith,"\textsuperscript{116} which requires something more than the traditional common law. Ill will or some other improper motive is necessary, but there are also two additional requirements: first, that the matter published is relevant to the occasion of privilege, and second, that the "manner and extent of the publication does not exceed what is reasonably sufficient for the publication."\textsuperscript{117}

Another important similarity between Australian common law and traditional English common law is the refusal to recognize any general privilege for media publications to the general public.\textsuperscript{118} Australian law also refused to provide such blanket protection even where the subject matter reported was a matter of public interest.\textsuperscript{119} In tandem with the approach of traditional English common law, Australian common law only exceptionally found the requisite duty and interest to exist where the defamatory material was published widely to the general public.\textsuperscript{120}

As in England, statutory developments in Australia have somewhat broadened the defense of qualified privilege, but not to the extent of creating any general statutory protection for political discussion \textit{per se}. There is no federal Australian defamation legislation; all of these statutes are State or Territory statutes.\textsuperscript{121} Most of the statutory extensions to qualified privilege follow the English statutory approach by providing that certain fair and accurate reports are privileged.\textsuperscript{122} New South Wales has enacted a statutory

\textsuperscript{115} See supra note 97 and accompanying text; see also Barbaro v. Amalgamated TV Servs. Pty. Ltd. (1985) 1 N.S.W.L.R. 30, 51 (citing English case of Horrocks v. Lowe); Morgan v. John Fairfax & Sons Ltd. (1990) 20 N.S.W.L.R. 511, 549E.

\textsuperscript{116} Defamation Act 1889 §§ 16, 17 (Qld.); Defamation Act 1957 §§ 16, 19 (Tas.).

\textsuperscript{117} Defamation Act 1889 § 16(2) (Qld.); Defamation Act 1957 § 16(2) (Tas.).

\textsuperscript{118} See Telegraph Newspaper Co. v. Bedford (1934) 50 C.L.R. 632, 653-62 (Austl.).

\textsuperscript{119} See Radio 2UE Sydney v. Parker 29 N.S.W.L.R. at 461C; see also Lang v. Wills (1934) 52 C.L.R. 637, 672; Loveday v. Sun Newspapers Ltd. (1938) 59 C.L.R. 503, 513 (Austl.).

\textsuperscript{120} Loveday (1938) 59 C.L.R. at 515-16.

\textsuperscript{121} CARTER-RUCK & STARTE, supra note 75, at 298.

\textsuperscript{122} See, e.g., Defamation (Amendment) Act, 1909 §§ 5, 6 (Austl. Cap. Terr.) (providing for qualified privilege for certain newspaper reports, including \textit{inter alia}, reports of parliamentary proceedings and other public proceedings, and court judgments); Defamation Act, 1974 §§ 24-26 Sch. 2 (N.S.W.) (providing for qualified privilege for publications of certain fair reports of specified proceedings of public concern, public documents, or public records); Defamation Act, 1989 §§ 5, 6 (N. Terr.) (providing for privilege for certain fair and accurate reports of court proceedings and public meetings); Defamation Act, 1889 § 13 (Qld.) (providing for qualified privilege for certain fair reports of parliamentary and other proceedings, also certain reports/documents issued by government and the police); Wrongs Act, 1936 §§ 6, 7 (S.A.) (providing for privilege for certain fair and accurate contemporaneous newspaper reports of court proceedings, as well as fair and accurate
defense of qualified privilege that is somewhat more powerful than
the common law or other State statutory privileges; However, this
New South Wales statutory defense does not extend to media
reports generally, whether or not they concern political matters,
politicians or public officials, or other subject matter in the public
interest.

This statutory defense is set out in Section 22 of the New South
Wales Defamation Act 1974. 123 This section provides that qualified
privilege applies to material published to a person with an interest
or “apparent interest” in receiving the statement, provided that the
conduct of the publisher is reasonable under the circumstances.124
A recipient will have an “apparent interest” if the publisher reason-
ably believes that he or she had that interest.125 This statutory
defense may be defeated by evidence that the defendant has mis-
used the privilege.126 Although this defense is potentially far
broader than the common law defense of qualified privilege, it
does not create a generic category of protection for political discus-
sion, media publications, or publications about public figures. The
New South Wales Court of Appeals stated in Morosi v. Mirror News-
papers Ltd that Section 22

\begin{quote}
gives no carte blanche to newspapers to publish defamatory mat-
ter because the public has an interest in receiving information
on the relevant subject. What the section does is to substitute
reasonableness in the circumstances for the duty or interest
which the common law principles of privilege require to be
established.127
\end{quote}

The above discussion has shown that traditional Australian law,
both common law and statutory, did not evolve very far beyond its
English model. As the next section will show, this was also the case
in New Zealand.

newspaper reports of certain public meetings and publications issued at the request of
certain public bodies); Wrongs Act, 1958 § 5A-5A (Vic.) (providing for privilege for cer-
tain fair and accurate reports of parliamentary proceedings, court proceedings, municipal
council meetings, and reports issued by the police); Criminal Code Act, 1913 § 354 (W.
Austl.) (providing for qualified privilege for, inter alia, certain fair reports of court proceed-
ings, parliamentary proceedings, and public meetings).
123. Defamation Act, 1974 § 22 (N.S.W.).
125. Id. at 22(2).
126. Morgan, (1990) 20 N.S.W.L.R. at 551F-G.
127. Morosi v. Mirror Newspapers Ltd. (1977) 2 N.S.W.L.R. 749, 797C.
C. Traditional New Zealand Law of Qualified Privilege

Prior to Atkinson, New Zealand also recognized a defense of qualified privilege at common law and under statute. Traditional New Zealand common law followed the English and Australian traditional common law approach to qualified privilege, requiring a reciprocal duty and interest on the part of the speaker and recipient before the law would find an occasion of qualified privilege to exist.\footnote{128} Thus, as in English law, an employment reference would be privileged under New Zealand common law.\footnote{129} Another example of a circumstance where the requisite duty and interest has been found to exist is an internal report made by police officers to their superiors.\footnote{130}

New Zealand common law accepted, and statute later confirmed, that newspaper reports of court cases and parliamentary debates were protected by qualified privilege.\footnote{131} New Zealand law did not, however, extend this privilege more generally to cover journalism in the form of news articles published to the general public, even if these were in the public interest. In Truth (N.Z.) v. Holloway, Justice North, delivering the judgment of the New Zealand Court of Appeal, stated that “there is no principle of law... which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest.”\footnote{132} Justice North then drove this point home, continuing, “the law does not recognize any special privilege as attaching to the profession of journalism...”\footnote{133}

Similarly, in Templeton v. Jones, a 1984 decision of the New Zealand Court of Appeal, the court held that a parliamentary candidate’s statement to the press concerning his opponent was not privileged.\footnote{134} Delivering the judgment of the New Zealand Court of Appeal, Justice Cooke stated: “As the common law of New Zealand stands, it is plain enough that the mere fact that the plaintiff

\footnotesize{\begin{itemize}
\item \footnote{129} See Wells [1952] N.Z.L.R. at 319.
\item \footnote{130} Dehn v. Attorney-General [1989] 1 N.Z.L.R. 320, 324 (C.A.).
\item \footnote{132} Truth [1960] N.Z.L.R. at 83.
\item \footnote{133} Id.
\item \footnote{134} Templeton v. Jones [1984] 1 N.Z.L.R. 448, 460 (C.A.).
\end{itemize}}
was a declared parliamentary candidate cannot be treated as
imposing on the plaintiff a social or moral duty to make a defama-
tory statement about him to the general public." The Court of
Appeal refused to extend the common law to cover this situ-
ation. Although Justice Cooke admitted in his judgment that the
New Zealand law of qualified privilege "is probably not wholly logi-
cal," he justified the refusal to extend the defense more broadly on
the basis of the public interest. Cooke claimed that the effect of
extending the defense in this way would be to discourage "sensitive
and honourable men" from entering politics.

New Zealand case law consistently confirmed that media reports
would attract the defense of qualified privilege only exceptionally,
where a media defendant could establish a reciprocal duty and
interest in publishing material to the general public. There was
some pressure to reform this aspect of the law, but efforts to
broaden the law of qualified privilege to cover political discussion
by the media did not bear fruit.

In 1977 the McKay Committee on Defamation recommended
altering New Zealand law to extend the defense of qualified privi-
lege. The Committee recommended an extension to media
reports of matters in the public interest, subject to a duty on the
part of the media defendant to establish that it had taken reasona-
bale care in preparing the report and also subject to the right of
reply. The 1992 New Zealand Defamation Act, however, did not
follow this recommendation, although it did include some nar-
rower occasions of statutory privileges. These are similar to the
English statutory privileges recognized under the English Defama-
tion Act 1996.

135. *Id.* at 459.
136. *See id.* at 458-60.
137. *Id.* at 458 (citations omitted).
church); see also R. Lucas & Son (Nelson Mail) Ltd. v. O'Brien [1978] 2 N.Z.L.R. 289, 296-
at 175.
139. *See Report of the Committee on Defamation Recommendations on the Law of
Defamation ch. 10.* The McKay Committee may well have been influenced, at least to
some extent, by Geoffrey Palmer, later Prime Minister of New Zealand and one of the
primary advocates of a bill of rights, who advocated a *Sullivan*-style privilege for New Zea-
140. *See supra* notes 107, 108. The New Zealand Defamation Act 1992 does not contain
the broad absolute privilege for contemporaneous reports of public judicial proceedings
provided by the English statute. *Compare* Defamation Act 1996 § 14 (U.K.), *with* Defama-
tion Act 1992 § 14 (N.Z.). The New Zealand statute provides that certain enumerated
Although the New Zealand legislature has failed to grant any broad statutory privilege for media news reporting, the 1992 Defamation Act did alter the law on malice, but this change appears to be merely semantic. Before 1992 the New Zealand defense of qualified privilege shared a similar doctrine of "malice" with traditional English common law. If the plaintiff established that the defendant published with malice, the defense of qualified privilege would fail.\footnote{41} New Zealand law applied the English test of "improper motive" to determine whether malice existed.\footnote{42} As in England, improper motive could be proved directly, though this was generally difficult. Also like England, under traditional New Zealand law malice could be established by proving that the defendant lacked an honest belief in the truth of the publication, namely that the defendant knew the publication to be false or published in reckless disregard as to whether it was true or false.\footnote{43} The 1992 New Zealand Defamation Act changed the law by rejecting the term "malice." The statute provided instead that the defense of qualified privilege "shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill-will towards the plaintiff or otherwise took improper advantage of the occasion of publication."\footnote{44} It does not appear, however, that this statutory requirement is substantively different than the English common law requirement of malice.\footnote{45} Instead, it was motivated by a desire to use simpler and less confusing language.\footnote{46}

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\footnote{141. Burrows \& Cheever, supra note 140, at 80-83.}
\footnote{142. See, e.g., Brooks v. Muldoon [1973] 1 N.Z.L.R. 1, 10 (Sup. Ct. Wellington) (citing English case law, including the famous case of Horrocks v. Lowe, as precedent on what constitutes "malice" under New Zealand law).}
\footnote{143. See id.}
\footnote{144. Defamation Act 1992 § 19(1) (N.Z.).}
\footnote{145. See Atkinson [1997] 2 N.Z.L.R. at 34; see also Gillooly, supra note 112, at 186.}
\footnote{146. Gillooly, supra note 112, at 186.}
The above comparative examination of the law of qualified privilege in the three Commonwealth countries shows that, despite some limited statutory extensions of the common law of qualified privilege, none of the countries departed far from the traditional English common law model. In particular, before constitutional developments in the 1990s incited the constitutionalization of defamation law in all three Commonwealth jurisdictions, none of them recognized any generic category of protection for speech about public officials like the U.S. Supreme Court's "actual malice" test in *Sullivan*.\(^{147}\) Nor did they recognize any generic category of protection for political speech, whether published by the media or otherwise.

IV. THE CHANGING CONSTITUTIONAL LANDSCAPE

The past decade has been a period of intense constitutional development in all three Commonwealth countries, although none of them actually drafted a new constitution or an entrenched Bill of Rights. Rather, they have all shown an increasing solicitude for ensuring the protection of human rights, including the right to free expression. In Australia, this has taken the form of judicial activism; the Australian High Court found various civil and political rights to be implicit in the Australian Constitution, despite the absence of a written bill of rights. These implied rights include a freedom of political communication. New Zealand's recent constitutional development has occurred through both legislative and judicial activity. New Zealand has recently enacted human rights legislation, the Bill of Rights Act 1990, which, though technically only having the force of a statute, has been treated by New Zealand's judiciary as though it has constitutional force. Even more recently, the United Kingdom has also enacted human rights legislation, the Human Rights Act 1998. As the millennium approached, these constitutional developments would eventually propel Commonwealth Courts to reexamine their English or English-derived law of qualified privilege in a constitutional context. To understand this reexamination, it is helpful to understand the constitutional changes giving rise to it. This Article will consider each of the three Commonwealth jurisdictions in turn, starting with Australia.

\(^{147}\) See infra Part VI.
A. Australia

Constitutional developments in Australia during the 1990s took place in the context of a stable and democratic system of government. Australia is a modern parliamentary democracy and constitutional monarchy based on the twin principles of "responsible government" and "representative government." These principles are designed to ensure that Australia's constitutional monarchy is sufficiently democratic. Executive power in Australia still vests formally in the English Queen, exercised through the Governor-General. In practice, however, under the system of "responsible government," the Governor-General acts in accordance with the advice of Australian government ministers, who must be members of Parliament. Under this system, the government and ministers are responsible to the Australian Parliament. If the government no longer has the confidence of the House of Representatives (usually because the government's party has lost its majority in the House of Representatives), it can no longer govern and must call an election. Because the legislature is popularly elected, the government is both representative and ultimately responsible to the Australian people.

Australia has a written constitution but no written bill of rights. Although a handful of express individual civil, political,

149. Id. § 64.
150. Id. §§ 7, 24 (providing for direct popular election of representatives to the Australian Senate and House of Representatives). It is true that the Queen, who is of course not elected, is part of the legislative branch as well, id. § 1, but the Queen's parliamentary activities are confined to giving royal assent through the Governor-General to draft legislation already passed by both houses of Parliament, id. §§ 57, 58. In modern Australia, such assent is always given. Simon Heffer, How Powerful is the Queen?, Times [Times Newspapers Limited], Jan. 4, 1994.

151. The Australian Constitution, which resulted in the federation of the six Australian colonies as of January 1, 1901, was enacted as part of a British Act of Parliament. See Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., ch. 12 § 9. Although the eligible electorate of each Australian colony had the opportunity to vote on the Constitution at several referenda held between 1898 and 1900, the Constitution was not initially considered to be a manifestation of the will of the Australian people but of the British Parliament, in the exercise of its power to legislate throughout the British Empire; however, attitudes have changed. By the 1990s the Australian High Court had largely endorsed the view that the Australian Constitution derives its power from the Australian people. See McGinty v. Western Australia (1996) 186 C.L.R. 140, 230 (Austl.) (McHugh, J.); see also Williams, supra note 32, at 28-29, 91.

152. Michael Coper has suggested that this lack may be attributable to an influenza virus caught by Andrew Inglis Clark, a strong supporter of a Bill of Rights, who consequently missed most of the 1891 Hawkesbury River cruise where the Australian Constitution was largely written. Michael Coper, The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?, 16 Sydney L. Rev. 185, 194 (1994).
and economic rights are scattered haphazardly through the Australian Constitution, freedom of expression is not among them. Although the High Court did not initially mandate a textual reading of the Constitution, starting in 1920 a highly literalist approach became ascendant. This held sway for the next thirty years. Reflecting the primacy of this approach, Sir Owen Dixon opined at his 1952 swearing-in as Chief Justice of the High Court of Australia that: “There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.” This literal method of constitutional interpretation focused strictly on the text of the Australian Constitution.

Although in fact Australian High Court judges were not always entirely consistent in applying a strictly literal approach to constitutional interpretation, in practice literalism did result in a generally narrow reading of the civil and political rights expressly included in the Australian Constitution. In contrast, express economic rights, as well as grants of Commonwealth power, were generally interpreted broadly.

One maverick Australian High Court judge, Lionel Murphy, a staunch advocate of human rights, consistently challenged this literal approach to constitutional interpretation. In a number of judgments during the 1970s and 1980s, Murphy interpreted express constitutional rights broadly and also contended that the Australian Constitution contained various implicit civil and politi-

153. These include Sections 41 (barring the enactment of laws prohibiting those eligible to vote in State elections from voting for the Commonwealth Parliament; the High Court has held, by a majority, that this provision is merely a transitional provision, see R. v. Pearson ex parte Sipka (1983) 152 C.L.R. 254, 261 (Austl.), 51(xxxi) (guaranteeing just compensation for property acquired by the Commonwealth), 80 (guaranteeing a right to jury trial in certain Commonwealth trials), 92 (guaranteeing free “trade, commerce, and intercourse among the States”), 116 (barring Commonwealth legislation “establishing any religion,” “imposing any religious observance,” “prohibiting the free exercise of any religion,” or imposing religious tests for government officials), 117 (providing that Australian citizens who are residents of one Australian state are not subject to any disability or discrimination not equally applicable to citizens resident in another state).

154. Amalgamated Soc’y of Eng’rs v. Adelaide S.S. Co. (1920) 28 C.L.R. 129, 142 (Austl.) (Engineers Case) (contending that it is “the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself”); see also George Williams, Engineers is Dead, Long Live the Engineers!, 17 SYDNEY L. REV. 62, 85 (1995).


156. ZINES, supra note 155, at 429-30.

157. WILLIAMS, supra note 32, at 79.

158. Id. at 78, 227-40.
cal rights, including freedom of speech. Murphy did not succeed in persuading his High Court colleagues of the merits of this approach, but within only a few years of Murphy's death in 1986, a more activist High Court shifted its textual approach to constitutional interpretation toward a broader, non-literal approach for questions of civil and political rights.

In 1992, in two judgments delivered on the same day in the cases of *Nationwide News Party Ltd. v. Wills* and *Australian Capital Television Party Ltd. v. Commonwealth*, six members of the High Court found that there was a freedom to discuss some political matters implicit in the Australian Constitution. This implication arose in *Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1 (Austl.) and *Australian Capital Television Pty. Ltd. v. Australia* (1992) 177 C.L.R. 106 (Austl.). All the justices endorsing the implied freedom used slightly different terminology to describe it, except for Deane and Toohey who delivered a joint judgment. Five justices endorsing the freedom (Chief Justice Mason and Justices Brennan, Deane, Toohey, and Gaudron) depicted it as essentially a broad freedom to discuss political matters. See *Australian Capital Television* (1992) 177 C.L.R. at 138, 142 (per Mason, C.J., describing it as "extending to all matters of public affairs and political discussion"), 149 (per Brennan, J., describing it as "freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution"), 169 (per Deane and Toohey, JJ.), describing it as "extend[ing] to all political matters, including matters relating to other levels of government within the national system which exists under the Constitution"), 214 (per Gaudron, J., describing it as "freedom of political discourse"); see also *Nationwide News* (1992) 177 C.L.R. at 50-51 (per Brennan, J., describing it as "freedom to discuss governments and governmental institutions and political matters"); 72-73 (per Deane and Toohey, JJ.) (describing it as "freedom of communication of information and opinions about matters relating to the government of the Commonwealth"); 94-95 (per Gaudron, J., reiterating that it was "freedom of political discourse"). In *Nationwide News*, three justices (Chief Justice Mason and Justices McHugh and Dawson) did not consider the implied freedom of political communication, because they based their judgments on an alternate contention that the challenged statutory provisions were outside the implied incidental powers contained in § 51 (xxxv) of the Australian Constitution. *Id.* at 26-34 (per Mason, C.J.), 84-91 (per Dawson, J.), 99-105 (per McHugh, J.). The sixth justice endorsing the implied freedom, Justice McHugh, took a significantly narrower approach than his five colleagues. In *Australian Capital Television*, McHugh stated that the implied freedom was limited to a "constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting in an election for the Senate or the House of Representatives." (1992) 177 C.L.R. at 232. The seventh justice in *Australian Capital Television*, Justice Dawson, rejected the implied freedom of political communication, though he would have found invalid a law that denied...
from the system of representative government set out in the Constitution and the provisions providing for election of representatives to the Australian Senate and House of Representatives.164

All of the justices endorsing this implied freedom expressed it as a negative right barring legislation, not a positive right.165 Those justices endorsing the implication also made clear that it was not an absolute right without limitation.166 Despite these limitations, the High Court in both cases invalidated federal legislation that it found to be inconsistent with this implied right.167 Neither Nationwide News nor Australian Capital Television, however, was a defamation case.168 Thus, the High Court left open the question of whether the implied freedom of political communication applied to defamatory speech, and if so, to what extent.

While in the United States, the application of the First Amendment to libel actions was not resolved for some four decades after the U.S. Supreme Court first began to take free speech seriously at
The end of World War I. The High Court of Australia confronted this issue almost immediately in 1994, when it heard two defamation cases: Theophanous v. Herald & Weekly Times Ltd., (Theophanous) and Stephens v. West Australian Newspapers Ltd. (Stephens).170

Theophanous was a defamation action brought by Dr. Andrew Theophanous, a member of the Australian House of Representatives and the chairperson of the Joint Parliamentary Standing Committee on Migration Regulations, as well as the chairperson of the Australian Labour Party's Federal Caucus Immigration Committee.171 The allegedly defamatory statements were made in a letter to the editor, headlined “Give Theophanous the Shove,” that was published in the defendant's newspaper.172 Mr. Theophanous alleged that the letter accused him of bias and of idiotic actions regarding immigration issues.173 In its defense, the newspaper argued that the implied freedom of political communication in the Australian Constitution required the introduction of a freestanding Sullivan “actual malice” constitutional defense in Australia, and, alternatively, that the publication was covered by qualified privilege.174

Although the High Court refused to introduce the Sullivan “actual malice” test into Australian law, a majority of four justices found that the implied freedom of political communication required a slightly different freestanding constitutional defense. They described the implied freedom very broadly.175 The majority

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169. Throughout the nineteenth century issues of free speech barely figured into U.S. Supreme Court jurisprudence. The First Amendment was given teeth as a result of a series of powerful dissents and concurrences, starting with the dissent of Justice Oliver Wendall Holmes in Abrams v. United States, 250 U.S. 616, 627-31 (1919). See also Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes and Brandeis, JJ., dissenting); Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., joined by Holmes, J., concurring); United States v. Schwimmer, 279 U.S. 644, 653-55 (1929) (Holmes, dissenting). It was not until 1931, however, that the First Amendment was found to be applicable to the states and thus potentially applicable to state defamation laws. See Stromberg v. California, 283 U.S. 359, 369 (1931); see also Near v. Minnesota, 283 U.S. 697, 707 (1931). Another three decades passed before the U.S. Supreme Court found that state defamation laws were in fact restricted by the First Amendment. See Sullivan, 376 U.S. at 254.


172. Id. at 117-118.

173. Id.

174. Id. at 118.

175. See id. at 122 (per Mason, C.J. and Toohey and Gaudron, JJ., stating that the “implied freedom of communication is not limited to communication between the electors and the elected. Because the system of representative government depends for its efficacy on the free flow of information and ideas and of debate, the freedom extends to all those
also found that the implied freedom required a new constitutional defense for Australia, although this defense was different to that established in Sullivan; however, at this point the majority diverged.

A three-justice plurality, comprised of Chief Justice Mason, Justice Toohey, and Justice Gaudron, contended in a joint opinion that the constitutional defense applicable in Australia placed the burden on the defendant to establish that it had acted reasonably in publishing the allegedly defamatory material. This required the defendant to “establish that it was unaware of the falsity, that it did not publish recklessly (i.e., not caring whether the matter was true or false), and that the publication was reasonable.” This was quite different from the Sullivan “actual malice” test, which presumed protection for speech about public officials unless the plaintiff could prove publication with “actual malice”; that is, with knowledge that it was false or reckless as to its truth or falsity.

Although Justice Deane agreed that the implied freedom required a freestanding constitutional defense, Deane did not agree with the scope of the joint judgment. Endorsing an absolutist approach similar to that for which U.S. Supreme Court Justice Hugo Black became renowned, Justice Deane interpreted the implied freedom in a far more radical way than his High Court colleagues. Deane interpreted the implied freedom, “to preclude completely the application of State defamation laws to impose liability in damages upon the citizen for the publication of statements about the official conduct or suitability of a member of the Parliament who participate in political discussion.”

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177. Id. at 137 (per Mason, C.J. and Toohey and Gaudron, JJ.).
178. Id.
179. See supra note 462 and accompanying text.
ment or other holder of high Commonwealth office." Due to
this split, the freestanding constitutional defense had a very shaky
foundation.

In Stephens, the companion case to Theophanous, the High Court
had to decide whether the implied freedom of political communi-
cation, as well as the Theophanous constitutional defense, applied to
discussion of state political matters. The plaintiffs in Stephens
were six members of the Legislative Council of Western Australia,
who sued for defamation over three newspaper articles published
by the defendant, which accused the plaintiffs of "sneaking off in
secret" on an overseas trip that was "a junket of mammoth propor-
tions." In Stephens, the same 4-3 majority as in Theophanous
found that the implied freedom of political communication
applied to political discussion of state government
matters. This
time, however, Justice Deane rather cryptically stated that he did
not adhere to his absolutist views expressed in Theophanous "for the
purposes of this case." As a result, Deane concurred with the
answers to the case stated in the joint judgment of Chief Justice
Mason and Justices Toohey and Gaudron, including finding that
the Theophanous constitutional defense was not bad in law.

Even if Justice Deane's cryptic statement should be interpreted
to mean that the High Court was slightly less split in Stephens than it
was in Theophanous, the High Court was still strongly divided.
Because of this division, the extent to which both of these decisions
would survive was open to question. The 1995 departures of Chief
Justice Mason and Justice Deane from the High Court raised ques-
tions as to how their successors would view Theophanous and Ste-

181. See Stephens (1994) 182 C.L.R. at 231-32. The High Court also had to determine
whether the traditional defense of qualified privilege was applicable. Id. at 231.
182. Id. at 227-29.
183. See id., 182 at 232 (per Mason, CJ. and Toohey and Gaudron, JJ) (stating that "the
freedom of communication which applies in the Commonwealth Constitution extends to
public discussion of the performance, conduct and fitness for office of members of a State
legislature), 257 (per Deane, J., concurring). Justice Brennan agreed that the freedom of
communication applied to discussion of state political matters but disagreed that it
affected the common law. Id. at 236 (per Brennan, J.). The remaining two justices, Justices
McHugh and Dawson, adhered to their view in Theophanous that there was no implied
freedom of political discussion, whether of state or Commonwealth matters, in the Aus-
184. Id. at 257.
185. Id.
To the surprise of virtually no one, it took only a few years before the High Court was invited to reconsider the two cases in the case of Australian Broadcasting Corporation. Before discussing how the High Court met that challenge (which will be done in Section V), this Article will trace constitutional developments parallel to Australia's in the two other Commonwealth jurisdictions, starting with New Zealand.

B. New Zealand

Starting with a Westminster model form of government broadly similar to Australia's, New Zealand also experienced significant constitutional development in the 1990s, largely attributable to an activist judiciary. Because New Zealand has no written constitution, the Australian technique of finding implicit rights in its Constitution could be followed in New Zealand. Instead, New Zealand's judges invoked a 1990 statute, the New Zealand Bill of Rights Act 1990, which gave the statute a kind of constitutional authority.

Although New Zealand's government differs from Australia's in that New Zealand is not a federal system, both antipodean governments share many fundamental similarities. Like Australia, New Zealand is also a modern parliamentary democracy and constitutional monarchy. Under the Westminster model followed by both New Zealand and Australia, the doctrine of parliamentary supremacy establishes that there is no higher law than that enacted by parliament (in the case of New Zealand, the unicameral New Zealand House of Representatives). Also like Australia, New Zealand's government is based on the twin principles of "responsible government" and "representative government."

As in Australia, the principle of responsible government is designed to ensure that New Zealand's system of constitutional monarchy is democratic. Although Queen Elizabeth II of England is the head of state for New Zealand, she exercises her executive

188. McDowell, supra note 48, § 3.31(c).
power through the New Zealand Governor-General, who generally acts on the advice and consent of New Zealand government ministers. As Members of Parliament, these ministers are representatives of the people. Under the principle of "representative government," it is the New Zealand people, as electors, who are sovereign. In keeping with this Diceyan notion of parliamentary sovereignty, even the New Zealand Constitution Act of 1986, which sets out New Zealand's government structure, could be invalidated by the legislature. Also like Australia, New Zealand has no written bill of rights, but unlike Australia, New Zealand also lacks a separate written constitution.

Despite the absence of a written bill of rights, in 1990 New Zealand entered into a new era of increased protection for human rights by enacting legislation entitled the New Zealand Bill of Rights Act 1990. This Act's Long Title states that its purpose is to "affirm, protect, and promote human rights and fundamental freedoms in New Zealand," as well as to, "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." Despite its grand title, the New Zealand Bill of Rights Act technically does not have constitutional status. In theory, the


190. JOSEPH, supra note 159, at 5. The Crown maintains some reserve powers to act without ministerial advice but these are rarely exercised. Id. at 590-620; see also McDOWELL, supra note 48, § 3.3.1(c).


192. JOSEPH, supra note 159, at 6-7, 12, 81; see also McDOWELL, supra note 48, § 3.3.1(c). The legislative branch of the New Zealand government is the unicameral House of Representatives (formerly the General Assembly), together with the Queen. Constitution Act 1986 §§ 14, 15 (N.Z.). The Queen's parliamentary activities are confined to giving royal assent through her representative in New Zealand, the Governor-General. Id. §§ 2(1), 16.

193. JOSEPH, supra note 159, at 12, 418, 429. The New Zealand parliament, however, does not have the power to repeal the predecessor to the Constitution Act 1986 because that is British Parliamentary legislation. Id. at 14 n.68.

194. McDOWELL, supra note 48, § 3.1.1(a). This does not mean that New Zealand is entirely without a constitution. It does have constitutional law in many forms, including statutes, common law, conventions, and the Treaty of Waitangi (an 1840 agreement between the British and the Maori people, under which the British sought to attain sovereignty over New Zealand). See id. §§ 3.2.1(a)(v), 3.7. New Zealand also has a statute setting out its governmental structure, the New Zealand Constitution Act of 1986. Constitution Act 1986 (N.Z.).

New Zealand Bill of Rights Act is just an ordinary statute, subject to being overruled by Parliament.196 This "soft," or non-entrenched, nature of the New Zealand Bill of Rights Act is the result of widespread public opposition to a 1985 proposal for an entrenched bill of rights for New Zealand.197 This caused proponents of a bill of rights, most notably Sir Geoffrey Palmer, to retreat from advocating entrenchment and to substitute a non-entrenched draft bill of rights legislation.198 This draft legislation succeeded, though its enactment was probably less the result of any particularly enthusiastic popular support, than of Geoffrey Palmer's new and influential position as Prime Minister of New Zealand.199

Despite this political compromise, critics of the enacted New Zealand Bill of Rights Act remained legion. Many deemed the legislation too weak to have much effect.200 Of particular concern were fears that New Zealand's Parliament could take away the rights in the legislation with impunity, as well as the absence of any express remedies provision. These critics were proved wrong over the next decade, the Bill of Rights Act effectively gained constitutional force.201

This constitutional status was achieved by a number of activist New Zealand judges, who were staunch proponents of protecting human rights. They invoked the New Zealand Bill of Rights Act to serve as "the ultimate guardians of liberty."202 The New Zealand Bill of Rights Act provides that New Zealand courts should prefer

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196. See id. § 4 (barring a court from declaring legislation invalid or refusing to apply legislation on the basis that it is inconsistent with the Bill of Rights Act); see also supra note 152 and accompanying text. When draft legislation is introduced, the Attorney-General must promptly point out any inconsistencies between the legislation and the Bill of Rights Act to the House of Representatives.


198. See Rishworth, supra note 197, at 20-21 (noting that despite this political compromise, Palmer has retained an abiding preference for an entrenched bill of rights).


200. Rishworth, supra note 197, at 23.


interpretations of legislation that are consistent with the New Zealand Bill of Rights Act, but the New Zealand judiciary has gone far beyond this provision in investing the New Zealand Bill of Rights Act with constitutional authority. For example, in one particularly significant case, Simpson v. Attorney-General (Paigent's Case), the New Zealand Court of Appeal created a new sui generis public law remedy for violating the New Zealand Bill of Rights Act. The New Zealand Court of Appeal has also confirmed that the rights contained in the New Zealand Bill of Rights Act must be read broadly.

The New Zealand Bill of Rights Act provides for a right of freedom of expression in section 14, which provides: “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.” There is a general limitations provision in section 5, applicable to all rights in the New Zealand Bill of Rights Act, including section 14. Section 5 provides: “[T]he rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

After the passage of the Bill of Rights Act, New Zealand’s courts were confronted with a number of cases involving the right of freedom of expression. The issues included contempt of court.

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203. Bill of Rights Act 1990 § 6 (N.Z.) (providing “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”).


206. The wording of Section 14 is very similar to the wording of Article 19(2) of the International Covenant on Civil and Political Rights, which provides: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

207. As a general limitations provision, section 5 departs from Article 19 of the International Covenant on Civil and Political Rights, which contains a specific limitation on the right of freedom of expression at Article 19(3). This provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or public order or of the public health and morals.

interim injunctions,\textsuperscript{209} assessing the quantum of damages in defamation actions,\textsuperscript{210} televising courts,\textsuperscript{211} and the libel defense of honest opinion.\textsuperscript{212} In all of these cases, the courts have made it clear that the right of free expression set out in Article 14 of the Bill of Rights Act must be expressly taken into account in cases where it is implicated. In some of these cases, the courts have concluded that existing New Zealand law takes proper account of the right of free expression in the Bill of Rights Act,\textsuperscript{213} but in other cases, the New Zealand courts have invoked Article 14 to justify changes in the law, including new guidelines for search warrants of media premises.\textsuperscript{214} Another change in the law was a finding that media publication of a correction was a tenable, though novel, remedy in an action for defamation and malicious falsehood.\textsuperscript{215} The treatment of Article 14 as imposing a constitutional requirement of free speech into New Zealand law clearly set the stage for a constitutional challenge to other aspects of defamation law, including the existing defense of qualified privilege.

Before considering the \textit{Atkinson} case raising that issue, this Article will complete this section’s review of the constitutional developments leading to the Commonwealth Courts’ constitutionalization of defamation law by examining such developments in England.

\textsuperscript{213} \textit{See}, \textit{e.g.}, Awa [1997] 3 N.Z.L.R. at 595-96 (upholding application of existing defense of fair comment as justified under the Bill of Rights Act so long as the comment at issue was factually based and expresses a genuinely held opinion, even where a judge or jury might not agree with that comment); \textit{see also} Gisbourne Herald [1995] \textit{3 N.Z.L.R.} at 571-75 (upholding existing common law of contempt of court governing pretrial publications by the media as consistent with Article 14, when balanced against the right to a fair trial); Auckland Area Health Board [1992] \textit{3 N.Z.L.R.} at 407 (finding Article 14 of the Bill of Rights Act reinforced the common law approach to interim injunctions in defamation cases, which was that their availability was restricted to cases where there were "clear and compelling reasons" for ordering such relief); Television New Zealand Ltd. v. Newspmonitor Services Ltd. [1994] \textit{2 N.Z.L.R.} 91, 92 (upholding existing New Zealand copyright law as consistent with Article 14); Quinn [1996] \textit{3 N.Z.L.R.} at 97-38, 45, 56-59 (upholding existing approach to assessing damages in defamation actions as consistent with Article 14).
C. **England**

Like Australia and New Zealand, the United Kingdom has also recently experienced constitutional development in the area of human rights. Recent constitutional developments in the United Kingdom have been closer to those of New Zealand than Australia. This is largely because, unlike Australia but like New Zealand, the United Kingdom has no written constitution or bill of rights. Thus, it has not been possible for the English judiciary to follow the Australian technique of finding implicit rights in a written constitution. Rather, the United Kingdom has followed the New Zealand approach of protecting human rights through non-entrenched legislation. This United Kingdom legislation, the Human Rights Act 1998, came into effect only recently, in October 2000.

Like both Australia and New Zealand, the United Kingdom is a constitutional monarchy and parliamentary democracy. Indeed the paradigm Westminster model of government in the United Kingdom is founded on the doctrine of parliamentary supremacy. This doctrine has been somewhat narrowed to make United Kingdom legislation subject to European Community law where applicable. Parliament has also passed legislation (which it could, of course, subsequently repeal) devolving some legislative power to the Scottish regional assembly, although this devolution has not created a federal system of government for the United Kingdom.

Like the governments of Australia and New Zealand, the British government is also based on the principles of responsibility and representative government, frequently termed “ministerial responsibility.” The Queen is the head of state in the United Kingdom, but she must exercise her powers largely on advice and consent of government ministers. The British government is ultimately chosen by the British people, through the election of members of Parliament. A government is generally formed from members of the majority party in the House of Commons. If the government’s party no longer holds the confidence of the House of Com-

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216. **ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW** 105 (1998).
219. **BARENDT, supra** note 216, at 51.
220. Id. at 120.
mons, it can no longer govern and must resign. The government is thus ultimately responsible to the people.

The structure of the British government is not set out in a written constitution, unlike most other countries of the world (New Zealand being another notable exception). Over the past few decades there has been considerable pressure from many quarters for constitutional reform in the form of a written bill of rights.

In particular, there has been pressure to incorporate the European Convention on Human Rights into national law. Although English lawyers had been very influential in drafting the European Convention on Human Rights (European Convention), by the end of the twentieth century the United Kingdom stood alone among Western European members of the Council of Europe by failing to incorporate the European Convention into national law.

By 1997 when a Labour government was elected after eighteen years of Conservative rule, this pressure to incorporate the European Convention had borne fruit. The new government made legislative incorporation of the European Convention a top priority; the result was the enactment of the Human Rights Act in 1998. Despite its history, it is important to understand that the Human Rights Act does not, in fact, incorporate the European Convention into English law, as many incorrectly believe. Rather, it makes it possible to enforce certain, though not all, European Convention rights in United Kingdom courts.

A right to bring enforcement proceedings in the European Court of Human Rights in Strasbourg has been retained, provided national remedies are exhausted.

The Human Rights Act of 1998 imposes obligations on courts and “public authorities.” Courts must interpret primary and subordinate legislation "in a way which is compatible with the..."
[European] Convention rights [included in the Act].” If a court finds itself unable to read legislation in such a way, it can make a “declaration of incompatibility.” Thus, in keeping with the doctrine of parliamentary supremacy, English courts cannot strike down primary legislation.

“Public authorities” are barred from acting “in a way which is incompatible with a [European] Convention right.” The Human Rights Act’s definition of “public authority” is somewhat unclear; besides courts and tribunals, it includes “any person certain of whose functions are functions of a public nature” but not if the act at issue is private. In keeping with the doctrine of parliamentary supremacy, Parliament is expressly excluded from the definition.

Freedom of expression is one of the European Convention rights included in the Human Rights Act of 1998. There is also a special provision relating to freedom of expression at Schedule 1, Section 12. This is applicable to courts that are “considering whether to grant any relief which, if granted, might affect the exercise of the [European] Convention right to freedom of expression.” Such courts must give particular regard to the importance of the European Convention right to freedom of expression.

Although prior to the Human Rights Act, there was no British legislation giving effect to European Convention rights, including the right to freedom of expression, there were hundreds of cases in which the English courts considered English law in the context of European Convention rights. In Derbyshire County Council v. Times Newspapers, however, the House of Lords held that Article 10 had no application to the interpretation of the English common law, contrary to the approach of the Court of Appeal below. After the Human Rights Act, the stage was clearly set for the impact
of that legislation on the English law of defamation, including qualified privilege.

V. THE COMMONWEALTH CONFRONTS THE SULLIVAN PROBLEM

The constitutional developments of the 1990s led to constitutional challenges to the law of defamation in the Commonwealth Courts. By the end of the decade, the Commonwealth Courts had all confronted the same question faced by the U.S. Supreme Court in *Sullivan*: what is the proper constitutional balance between the right to protection of reputation and the competing right to freedom of expression? In *Australian Broadcasting Corporation*, *Atkinson*, and *Reynolds*, these challenges all resulted in the constitutionalization of the common law of defamation.

This section explores the nature of this constitutionalization by first reviewing all three Commonwealth Cases and then comparing them to each other. Each case is considered in turn, in the order it was brought, which is not necessarily the same order as the date of the final relevant decision. *Australian Broadcasting Corporation* is reviewed first, then *Atkinson*, and finally *Reynolds*. The review of each case examines its facts, procedural history, and the particular constitutional solution it fashioned for the *Sullivan* problem.

Unlike *Sullivan*, none of the Commonwealth Courts endorsed a freestanding constitutional defense like the “actual malice” test. Nevertheless, all of the Commonwealth Cases resulted in broader protection for political speech than had previously been available under traditional common law or statute. They all found that the public interest of modern society necessitated expanding the existing common law defense of qualified privilege. The philosophical underpinning for this expansion was a fundamentally Madisonian rationale based on a democracy's interest in ensuring a sufficiently well-informed electorate.

This section will conclude by comparing these expanded common law defenses with each other. This comparison will focus on a number of differences between the Commonwealth Cases: the scope of the expanded common law privilege, the existence and nature of any prerequisites for the privilege, and what is required to defeat the privilege.

A. Lange v. Australian Broadcasting Corporation (Australia)

The Australian case of *Lange v. Australian Broadcasting Corporation* was the first of the Commonwealth Cases. In this case, the High
Court of Australia unanimously held that an implied freedom of political discussion in the Australian Constitution required an extension of the traditional Australian common law defense of qualified privilege. This extension took the form of a generic category of privilege applicable to certain political discussion widely published for the general public. The extended privilege was subject to a reasonableness requirement and could be overridden by proof of malice, which was defined more narrowly than it had been under the traditional common law.

The plaintiff in *Australian Broadcasting Corporation* was David Lange, the former Prime Minister of New Zealand.240 Lange brought a libel action in the Supreme Court of New South Wales over an Australian Broadcasting Corporation television documentary, which had been broadcast throughout Australia on the long-running political affairs program “Four Corners.”241 At the time of the broadcast in April 1989, Lange was still Prime Minister; he left that office a few months later.242 Lange complained that the documentary alleged that he was unfit to hold public office and that he had abused his office.243

The defendant raised, *inter alia*, a defense of common law qualified privilege and also a constitutional defense based on the *Theophanous* and *Stephens* cases.244 Lange sought to strike out both defenses as bad in law;245 he argued that the *Theophanous/Stephens* constitutional defense did not apply to non-Australian politicians and, in the alternative, that both *Theophanous* and *Stephens* were wrongly decided.246

The Australian High Court, where the case had been removed, considered both of these issues. In a unanimous decision, the High Court found that, as precedent, both *Theophanous* and *Stephens* were lacking in weight.247 Neither case clearly established a “binding statement on constitutional principle.”248 Thus, although five of the seven High Court Justices in *Australian Broadcasting Corporation* had ruled in *Theophanous* and *Stephens*, the High Court

241. Id.
242. Id.
243. Id.
244. See id. at 550-52; see supra note 170.
246. Id. at 551-52.
247. Id. at 556.
248. Id. at 554.
entirely reconsidered the legality of the pleaded defenses.\textsuperscript{249} The High Court found that \textit{Theophanous} and \textit{Stephens} were good law in Australia only in part. They had been correctly decided to the extent that they held that the common law of Australia was subject to the Australian Constitution.\textsuperscript{250} However, \textit{Theophanous} and \textit{Stevens} had been wrongly decided insofar as they established a separate constitutional defense for political discussion.\textsuperscript{251}

The \textit{Australian Broadcasting Corporation} court confirmed that the Australian Constitution contained an implied right of political communication, which was necessary to enable the Australian people to freely exercise their right to vote in Australia’s democratic political system.\textsuperscript{252} The High Court gave unanimous support to a broad interpretation of the implied freedom, like that of the joint plurality judgment in \textit{Theophanous}. This broad interpretation considered that, to be effective, the freedom had to be wider than applicable only to election periods;\textsuperscript{253} However, despite the breadth of the \textit{Australian Broadcasting Corporation} court’s implied freedom, it had some significant limitations.

One limitation was that the implied freedom was not a positive right. Consistent with \textit{Nationwide News} and \textit{Australian Capital Television}, the \textit{Australian Broadcasting Corporation} court found that the implied freedom only served to invalidate conflicting laws and did not confer rights on individuals.\textsuperscript{254} Consequently, the implied freedom could not create any private constitutional defenses like the \textit{Theophanous} constitutional defense. Another limit on the implied freedom is that it is restricted to “what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.”\textsuperscript{255} The combined effect of these limitations was that the implied freedom could only

\textsuperscript{249} The five justices were Brennan, Dawson, Toohey, Gaudron, and McHugh. The two new justices were Gummow and Kirby. \textit{Id.} at 520; \textit{Theophanous} (1994) 182 C.L.R. at 104; \textit{Stephens} (1994) 182 C.L.R. at 211.
\textsuperscript{250} \textit{See} Australian Broad. Corp. (1997) 189 C.L.R. at 556.
\textsuperscript{251} \textit{See id.} at 576.
\textsuperscript{252} \textit{See id.} at 560. This implicit freedom resulted from Section 7 of the Australian Constitution, which provides that “[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate,” and from Section 24, an analogous provision for the House of Representatives, as well as other related provisions concerning electoral rights. \textit{Id.}
\textsuperscript{253} \textit{Id.} at 561. This breadth was also required by other Constitutional provisions providing for responsible ministerial government, including Sections 6, 49, 62, 64, and 83, and also the provision providing for referendum before the Constitution could be amended, Section 128. \textit{Id.}
\textsuperscript{254} Australian Broad. Corp. (1997) 189 C.L.R. at 560.
\textsuperscript{255} \textit{Id.} at 561.
invalidate Australian federal, state or territory statutes, or common law that fails to meet two requirements. The first requirement, that the federal, state or territory statutes, or common law were in keeping with the Australian constitutional system of “representative and responsible government,” and the second was that they were proportionate or “reasonably appropriate and adapted” to some lawful purpose.256 Theophanous and Stephens had failed to expressly consider these requirements, and hence reconsideration of those decisions was necessary.257

The High Court then considered whether the existing Australian common law of qualified privilege, as well as the New South Wales statutory defense of qualified privilege, comported with the Australian Constitution.258 It noted that the common law defense was founded on the public interest or the “common convenience and welfare of society.”259 The defense of qualified privilege thus had to strike the proper balance between protection of reputation and freedom to discuss “government and political matters.”260 As society changed and developed, the public interest might necessitate a shift in this balance and require an adjustment to the parameters of qualified privilege.261

Modern Australian society experienced a number of changes that mandated a shift in the balance of protections from that of the traditional law of qualified privilege: a wider and more literate electorate, changes in federal and state political structures, and the development of a modern mass media.262 The High Court found that the law of qualified privilege, both common law and statutory, now needed expansion to include “information, opinions and arguments concerning government and political matters that affect the people of Australia.”263 The public interest of modern Australian society would be “advanced by discussion about government and political matters.”264 The expanded privilege should be broad enough to apply even to matters going beyond the choice of electors at the federal level. It would include discussions of politics at

256. Id. at 561-62.
257. Id. at 569.
258. Id. at 568.
259. Id. at 565 (citing the famous English case of Toogood, 1 CM & R at 193).
261. Id. at 565-66.
262. See id. at 565.
263. Id. at 571.
264. Id.
the state and territory level, as well as discussions of politics of other countries or of the United Nations.265

The High Court, however, mandated a “reasonableness” requirement before the expanded privilege could apply to publications that had been widely published to the general public.266 This prerequisite was necessary to counter the risk of extensive damage to reputation that could result from such a wide publication.267 Malice, the only safeguard for reputation under other traditional occasions of common law qualified privilege, was insufficient protection where the privilege was extended to include publications made to the public generally.268

To satisfy the *Australian Broadcasting Corporation* reasonableness requirement, a defendant did not need to establish the extra elements of the plurality in *Theophanous*, which required a defendant to establish that it was not aware that the material published was untrue and that it did not act recklessly.269 Rather, the *Australian Broadcasting Corporation* reasonableness test required the defendant to prove that she had acted reasonably under the circumstances. Normally a court should not find *Australian Broadcasting Corporation* reasonableness where a defendant had acted recklessly or with knowledge that the material published was false.270 Moreover, the *Australian Broadcasting Corporation* reasonableness requirement would not be met unless the defendant had a reasonable basis for believing the statement was true, did not believe it was untrue, did everything reasonably possible to verify the truth of the material, and published the plaintiff’s side of the story, where practicable.271

Unlike the approach of the *Theophanous* plurality, *Australian Broadcasting Corporation* retained, at least to a limited degree, the common law safeguard of malice. As under the traditional common law of qualified privilege, if the publication was actuated by ill-will, or some other improper motive in making the statement, the privilege would be defeated.272 The High Court stated: “We see no reason why a publisher who has used the occasion to give vent to its

265. *Id.*
267. *Id.*
268. See *Id.* The High Court did not really elaborate on its reasoning in this regard, other than to say, “a test devised for situations where usually only one person receives the publication is unlikely to be appropriate when the publication is to tens of thousands, or more, of readers, listeners, or viewers.” *Id.*
269. *Id.* at 573.
270. *Id.*
271. *Id.* at 574.
ill-will or other improper motive should escape liability for the publication of false and defamatory statements." The High Court emphasized that the mere existence of ill-will on the part of a defendant was insufficient to defeat privilege; what was needed was a causal link between ill-will and publication or proof that the publication was "actuated" by some improper motive.

The Australian Broadcasting Corporation test for misuse of privilege, however, appears to be much narrower than the common law test for malice. First, the Australian Broadcasting Corporation court interpreted "improper motive" in a limited manner. Only proof that the statement was made for some improper purpose other than for communicating government or political information or ideas could amount to improper motive. The court specifically stated that seeking to cause political damage would not amount to a sufficiently improper motive. Second, Australian Broadcasting Corporation appears to diverge from the traditional common law rule that malice can be established by proof that a defendant lacked belief in the truth of his publication. Lack of belief is irrelevant for the extended privilege; only an improper motive would suffice to counter the extended privilege.

Applying the law of qualified privilege, as expanded, to the facts, the High Court refused to strike out the pleaded defense of qualified privilege. The High Court also noted that once the common law defense of qualified privilege was extended, the statutory defense under Section 22 of the New South Wales Defamation Act did not violate the Australian Constitution. This was because it was "reasonably appropriate and adapted to achieve the protection of reputation once it provides for the extended application of the law of qualified privilege." The High Court warned, however, that the statutory law of other Australian States might need alteration.

273. Id.
274. Id.
275. See Walker, supra note 32, at 23.
277. Id.
278. See supra note 115.
280. Id. at 575.
281. Id.
282. See id.
B. Lange v. Atkinson (New Zealand)

The next case to be filed in the trilogy of Commonwealth Cases was the New Zealand case of Lange v. Atkinson. In this case, the New Zealand Court of Appeal held that the constitutional guarantee of free expression required the extension of the traditional common law defense of qualified privilege. This extension took the form of a generic category of privilege applicable to certain political discussion that was published widely to the general public. This extended defense was not subject to any reasonableness or other prerequisite, but could be overcome by proof of misuse of the occasion of qualified privilege, which was effectively the same test as common law malice.

Although this case was appealed to the Privy Council, the New Zealand Court of Appeal had the final say. The Privy Council decided that it should defer to the Court of Appeal in this type of case where value judgments dependent on local conditions had to be made.283

The plaintiff in Atkinson was the same as in the Australian Broadcasting Corporation. In the midst of fighting his Australian libel battle, Mr. Lange commenced a second libel action in New Zealand. At this time, Mr. Lange was no longer Prime Minister but was a Member of Parliament for Mangere electorate and a senior member of the parliamentary opposition in New Zealand.284 In this case, Lange was incensed about allegations regarding his performance as a politician found in an article and in an accompanying cartoon published by a national magazine.285 These allegations were a mixture of fact and opinion, for example, "[f]or whatever reason—angina pains, boredom, or some inner demon, he found it hard to sit still and often turned over the Cabinet chair to Geoffrey Palmer while he ambled off to the toilet, to his office, or even to the self-drive car which he liked to take out for a recreational spin on the Wellington motorway."286 The cartoon showed Lange seated at the breakfast table eating from a packet bearing the label "Selective memory regression for advanced practitioners."287

Lange claimed that the article and cartoon together bore the

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285. See id. The article was written by a political scientist and journalist, J.B. Atkinson, and published in a magazine, "North and South," with a wide circulation throughout New Zealand. Both Atkinson and the publisher, Australian Consolidated Press NZ Ltd., were named defendants. See id.
286. Id. at 26.
287. Id. at 27.
defamatory sting that he was “irresponsible, dishonest, insincere, manipulative, and lazy.”

Among other defenses, defendants pleaded qualified privilege, as well as a “defence [sic] of political expression” inspired by the recent Australian *Theophanous* and *Stephens* cases. Lange applied to strike out these defenses.

1. The High Court Extends the Common Law to Find a Generic Category of Privilege for Certain Political Discussion

The trial judge, Justice Elias, dismissed Mr. Lange’s application, though she ruled that the two defenses should be pleaded together as one qualified privilege defense. She found that New Zealand’s “unitary legal system” did not require a freestanding constitutional defense of political expression separate from qualified privilege. However, she found that constitutional guarantees of human rights necessitated the expansion of the New Zealand common law of qualified privilege.

Invoking the public interest of modern New Zealand society, Justice Elias found that the proper balance of the right of free speech against free expression was a new generic category of qualified privilege. This was applicable to “political discussion” published to the general public, at least in the case of claims for damages for defamation. Relying on the plurality judgment in *Theophanous*, she defined “political discussion” as “discussion which bears upon the

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288. *Id.* at 25-26. Lange claimed that he was defamed in sixteen passages in the article. For the curious, they are set out in the High Court judgment of Elias, J. *See id.* at 26-27.

289. *See id.* at 25, 29. Applicable New Zealand rules authorize striking out of pleadings where these “disclose no cause of action.” *See id.* at 29.


291. *Id.* at 48.

292. *Id.* at 31-32 (applying the New Zealand Bill of Rights Act protections to the common law).

293. *Id.* at 46, 48. Justice Elias made clear that her ruling was limited to claims for damages, stating:

Nothing I have said is intended to suggest that the privilege would be a defence to an application for a declaration. The availability of qualified privilege as a defence to a claim for declaration will need to be considered carefully in a case where it arises. If the defendant is protected against liability for damages, a balance in keeping with the pragmatic approach of the common law may be that the defence does not apply to a claim for declaration. Much will turn on the assessment of whether the costs of litigation and the exposure to solicitor and client costs in an application for declaration is unacceptably chilling of political discussion. *Id.* at 48.
function of electors in a representative democracy by developing and encouraging views upon government."

Justice Elias rejected any Australian-style reasonableness requirement for New Zealand, emphasizing that the balance between protecting freedom of speech and reputation "ultimately must be a value judgment informed by local circumstances and guided by principle." Moreover, this expanded defense should apply to the media to the same extent as to any other publisher. She admitted that the boundary between private conduct and conduct that was sufficiently public to attract the privilege was a fuzzy one, but she did not consider that to be a mortal flaw.

2. The New Zealand Court of Appeal Affirms

Mr. Lange appealed to the New Zealand Court of Appeal. The sole issue on appeal was the viability of the defense of qualified privilege. The New Zealand Court of Appeal unanimously affirmed the High Court's judgment, agreeing that New Zealand law should expand the common law of qualified privilege. This expansion created a new generic category of qualified privilege. This applied to "generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities." This defense was applicable to defamation claims seeking damages and probably to other remedies as

294. Id.
295. See id. at 43, 50 (finding such a requirement improper under New Zealand law because it would introduce concepts of malice going beyond the statutory restatement in the 1992 Defamation Act, and would also result in undesirable inconsistencies with the statutory defence of honest opinion. Justice Elias also noted that "[a]s long as the publication does not exceed the occasion, qualified privilege as developed by the common law has not been based upon fault.")
297. Id. at 46-47.
298. See Atkinson [1998] 3 N.Z.L.R. at 428. The leading judgment of Justice Blanchard was joined by three other justices, Justices Richardson, Henry, and Keith. Justice Tipping concurred, agreeing "with some hesitation" with the result and most of the reasoning of the leading judgment. Id. at 477-79. Where Justice Tipping departed from the majority was in his analysis of whether the expanded defense should include a reasonableness requirement akin to that laid down by the Australian High Court. Id.; see supra notes 323-326 and accompanying text.
well. Thus, the defendants' pleading should not be struck out.

The New Zealand Court of Appeal supported its conclusion by reviewing the law of qualified privilege in common law jurisdictions. This review showed a steadily broadening defense of qualified privilege, both common law and statutory, that was increasingly being applied to new occasions of political discussion even where widely published to the general public. In a novel and somewhat dubious interpretation of previous English and New Zealand case law, the court claimed that there was really no strict requirement of reciprocity of interest and duty for the common law defense of qualified privilege. The New Zealand Court of Appeal also contended that, by reason of its foundation in considerations of public good and public policy, the common law was inherently extremely flexible and adaptable to changing circumstances.

In his leading judgment, Justice Blanchard stated: "This is not an area of law controlled and regulated by precise rules." The New Zealand Court of Appeal, however, did note that even this ever-widening defense of qualified privilege had some limits. One limit was that it would not apply generally to any statement that was not in the general public's interest.

In determining the proper extent of the defense of qualified privilege under New Zealand law, the court again employed a comparative approach. Justice Blanchard examined the legal protection afforded to statements about politicians and other public figures under the laws of Canada, the United States, the United Kingdom, and Australia. He also considered the jurisprudence...
of the European Court of Human Rights relating to Article 10 of the European Convention, which guarantees freedom of expression.\textsuperscript{308} He found the European cases "of real assistance" due to the similarities between the wording of Article 10 and the analogous section under the New Zealand Bill of Rights Act 1990 (Section 14).\textsuperscript{309} This comparative exercise led Justice Blanchard to conclude that solutions to the problem of the proper balance between freedom of expression and the protection of reputation were not uniform across cultures, but would vary from jurisdiction to jurisdiction depending on values.\textsuperscript{310} Influenced by Justice Brennan's opinion in \textit{Sullivan}, Blanchard emphasized that the balance will depend on its "political and social context and history."\textsuperscript{311}

An examination of the political, social, and constitutional context of contemporary New Zealand led also to a conclusion that a generic privilege for political discussion was applicable. New Zealand society had moved from a society in which the monarch was sovereign to one in which the citizens of New Zealand had ultimate political power.\textsuperscript{312} This shift could be seen through the broadening of the voter base, the adoption of proportional representation, greater access by citizens to government information under the Official Information Act of 1982, and a growing transparency of government information as a result of various pieces of legislation.\textsuperscript{313} As a result, it was important that New Zealand citizens have access to information concerning the fitness for office of politicians or those aspiring to political office.\textsuperscript{314} Parliament had confirmed the importance of this goal by repealing certain criminal offenses for political statements.\textsuperscript{315} Also relevant to a changed constitutional context for New Zealand was the enactment of the Bill of Rights Act of 1990, which contained wide protections for freedom of expression.\textsuperscript{316} The New Zealand Court of Appeal was also influenced by the jurisprudence of the European Court of Human

\begin{itemize}
\item \textsuperscript{309} See supra note 308.
\item \textsuperscript{310} Atkinson [1998] 3 N.Z.L.R. at 459.
\item \textsuperscript{311} Id. at 460.
\item \textsuperscript{312} Id. at 462-65. The Court of Appeal was heavily influenced by the writings of the nineteenth century legal scholar Sir James Fitzjames Stephen. See id. at 461-61, 463.
\item \textsuperscript{313} Id. at 463-64.
\item \textsuperscript{314} Id.
\item \textsuperscript{315} Id. at 464 (namely, criminal libel and the offense of publishing untruthful matters calculated to influence votes during an election campaign or local election or poll).
\item \textsuperscript{316} Atkinson [1998] 3 N.Z.L.R. at 465.
\end{itemize}
Rights, which it read to support a lesser reputational right for politicians acting in their public capacity.317

The New Zealand Court of Appeal rejected the contention that any such extension of the law of qualified privilege should be left to Parliament.318 There were three reasons for this. First, this extension of the law of qualified privilege was only a "refinement" of the law, not a sweeping change in the law.319 Second, it was appropriate for courts to make value judgments in the context of qualified privilege, and they had been doing so for hundreds of years.320 Finally, Parliament had declined to significantly rework the defense of qualified privilege in the Defamation Act of 1992 because they had delegated the determination of the proper scope of this defense to the courts.321

The New Zealand Court of Appeal indicated that the proper scope of the extended defense of qualified privilege might be even broader than statements made about the fitness for office of politicians currently elected to or seeking election to the New Zealand Parliament. Justice Blanchard stated that "[t]he nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government."322

The New Zealand Court of Appeal, however, declined to follow Australia by requiring any "reasonableness" prerequisite for the privilege.323 It is true that Justice Tipping, in his concurring opinion, took the view that reasonableness could be a consideration in determining whether the defendant had taken improper advantage of the occasion of publication and thus lost the privilege.324 The New Zealand Court of Appeal, however, found that no reasonableness prerequisite had ever been laid down for the common law, nor had it been added to the law by statute.325 Moreover, it contended that there was logical inconsistency inherent in such a reasonableness requirement. Since the common law of qualified

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317. See id. at 458-59.
318. Id. at 462.
319. Id.
320. Id.
321. Id.
323. Id. at 469.
324. Id. at 477. Tipping was concerned about ensuring that reputation was adequately protected, especially where "it is a sad fact that the necessary responsibility is not always shown" by the media. Id. at 472-73.
privilege was premised on the proper interest in receiving information, even if that information was false, that interest should in no way be affected by how reasonably the defendant had acted to ensure that any such information was true.\textsuperscript{326}

3. The Privy Council Backs Off

Mr. Lange appealed to the Judicial Committee of the Privy Council.\textsuperscript{327} The Privy Council held that its limits as an appellate tribunal were now circumscribed in New Zealand cases where there was a “high content of judicial policy” making local conditions relevant.\textsuperscript{328} This was such a case.\textsuperscript{329} It was for the New Zealand Court of Appeal to make any value judgments because it was better placed to do so as a local court.\textsuperscript{330}

The Privy Council, however, was concerned that the New Zealand Court of Appeal had not had the benefit of the recent judgments of the English Court of Appeal and House of Lords in \textit{Reynolds}, decided after the New Zealand Court of Appeal had heard \textit{Atkinson}.\textsuperscript{331} Since both English courts had considered the \textit{Atkinson} decision, along with the Australian High Court’s decision in \textit{Australian Broadcast Corporation}, the Privy Council considered that the New Zealand Court of Appeal should likewise have had the chance to take \textit{Reynolds} into account, even though \textit{Reynolds} was not binding in New Zealand.\textsuperscript{332} The Privy Council thus formally allowed Lange’s appeal and remanded the case to the New Zealand Court of Appeal for further rehearing.\textsuperscript{333}

The Privy Council emphasized that it was in no way attempting to influence the New Zealand Court of Appeal to rule in tandem with \textit{Reynolds} or with \textit{Australian Broadcasting Corporation}.\textsuperscript{334} It noted that all of the judgments in the \textit{Commonwealth Cases} had accepted the importance of taking local politics and social conditions into account when determining the proper balance between freedom

\begin{itemize}
\item \textsuperscript{326} \textit{Id.} at 469-70. They also argued that this would make the statutory reformulation of malice (in the 1992 New Zealand Defamation Act) totally irrelevant. \textit{See id.} at 471.
\item \textsuperscript{327} The New Zealand Court of Appeal granted leave to appeal. \textit{See Atkinson [2000] 1 N.Z.L.R.} 258.
\item \textsuperscript{328} \textit{Id.} at 263.
\item \textsuperscript{329} \textit{See id.}
\item \textsuperscript{330} \textit{Id.} at 261-62.
\item \textsuperscript{331} \textit{Id.} at 263.
\item \textsuperscript{332} \textit{See supra} notes 362-362 and accompanying text for an analysis of \textit{Reynolds}.
\item \textsuperscript{333} \textit{Atkinson [2000] 1 N.Z.L.R.} at 258. No costs order was made on the appeal to the Privy Council; costs were said to be a matter for the New Zealand court. \textit{Id.}
\item \textsuperscript{334} \textit{Id.}
\end{itemize}
of expression and protecting reputation.\textsuperscript{335} The judgment of the Privy Council, however, highlighted the similarities between the governments and histories of all three parliamentary democracies, stating: "[w]hether the differences in detail of their constitutional structure and relevant statute law have any truly significant bearing on the scope of qualified privilege for political discussion is among the aspects calling for consideration."\textsuperscript{336}

4. Back to the New Zealand Court of Appeal

On reconsideration, a panel composed of the same five New Zealand Court of Appeal justices\textsuperscript{337} who had ruled earlier in the case dismissed Mr. Lange’s appeal after “carefully consider[ing]” Reynolds.\textsuperscript{338} The court largely upheld its previous judgment stating that “we would not strike the balance differently from the way it was struck in 1998.”\textsuperscript{339}

The New Zealand Court of Appeal reconfirmed its five main previous conclusions, namely that (i) qualified privilege could apply to statements that were published widely to the general public; (ii) qualified privilege could apply to generally-published statements that “directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office;” (iii) qualified privilege was capable of applying to statements made about those currently elected to New Zealand’s Parliament or aspiring to be elected to Parliament, insofar as those statements directly concern the “functioning of representative and responsible government;” (iv) qualified privilege would only apply to matters of public concern; (v) the extent of the privilege for a particular statement would depend on the extent of that public concern.\textsuperscript{340}

The New Zealand Court of Appeal, however, noted that in its previous judgment, it had not meant to indicate that the circumstances of publication should be ignored in determining whether qualified privilege was applicable to a particular statement.\textsuperscript{341} Even

\textsuperscript{335} \textit{Id.} at 261.
\textsuperscript{336} \textit{See id.} at 264.
\textsuperscript{337} The judges were Justices Richardson, Henry, Keith, Blanchard, and Tipping.
\textsuperscript{Atkinson [2000] 3 N.Z.L.R. at 385.}
\textsuperscript{338} \textit{See id.} at 389, 405. Readers unfamiliar with Reynolds may wish to read \textit{supra} notes 362-362 and the accompanying text before reading this subsection.
\textsuperscript{339} \textit{Id.} at 399.
\textsuperscript{340} \textit{Id.} at 390-91.
\textsuperscript{341} \textit{See id.} at 391.
Rethinking Sullivan

if the subject matter of a statement was capable of being privileged, the circumstances of publication might be such that the statement should not be protected because maker and recipient had no shared interest in publishing it. The New Zealand Court of Appeal essentially agreed with the House of Lords in Reynolds on this point.

The New Zealand Court of Appeal, however, criticized the House of Lords for blurring the difference between an occasion of qualified privilege and its misuse. This blurring resulted in too much uncertainty and an excessive chilling effect on the media and also arguably interfered too much with the role of the jury in libel cases. The jury's role in determining whether the privilege was misused would be eliminated if factors relating to misuse were included in the test for determining whether there was an occasion of qualified privilege, which was for a judge alone to determine.

The New Zealand Court of Appeal took up the Privy Council's invitation to consider whether there were any significant constitutional and political differences between New Zealand and the United Kingdom and easily answered this in the affirmative. There were three major differences. First, the United Kingdom did not share New Zealand's proportional representation system. Second, New Zealand legislation had resulted in far greater access to government information by New Zealand citizens than British subjects had. Third, the New Zealand Bill of Rights

342. See id. at 393. Note that the New Zealand Court of Appeal seems here to be reverting to a reciprocity requirement.
343. See supra notes 393-397 and accompanying text. The New Zealand Court of Appeal criticized Lord Hope of Craighead for suggesting in Reynolds that the difference between the English Court of Appeal's circumstantial test and the House of Lords' approach was purely a semantic difference. Atkinson [2000] 3 N.Z.L.R. at 394 (noting that "[t]hat is debatable because a shared interest cannot be divorced from the circumstances in which a communication is made").
345. Id. at 394-95.
346. See id. at 395.
347. Id.
348. Besides the three differences listed in the text, the court also was influenced by a few other matters that indicated that New Zealand law gave broader protection generally to political discussion: first, New Zealand had repealed some laws relating to political expression whereas England had not, id. at 397, second, unlike England, New Zealand's defamation act did not contain a provision reversing a common law case that upheld freedom of political discussion, Braddock v. Bevans, see id.
349. Id. at 395.
The Australian system was also different from both New Zealand and the United Kingdom in all three respects. With regard to voting and access to information, Australia was somewhat closer to the New Zealand system, but Australia stood apart from New Zealand and England in lacking human rights legislation.

Another potential difference, which the Privy Council had invited the New Zealand Court of Appeal to take into account, was the "responsibility and vulnerability of the press." The court pointed out significant differences between the British and New Zealand press. While admitting that "[g]eneralisations in this area are dangerous," they concluded that the British tabloid press was generally less responsible than the New Zealand press. They also noted structural differences. Unlike the United Kingdom national papers, New Zealand’s newspapers tended to be regional and, reflecting the smaller New Zealand population, have very small circulations. Moreover, they were not engaged in such ferocious competition as their United Kingdom counterparts.

Finally, the New Zealand Court of Appeal considered the issue of misuse of privilege. It noted that the common law "malice" rule had been altered by statute in New Zealand, namely Section 19 of the Defamation Act of 1992. Section 19 provided that qualified privilege would be lost if the defendant was "predominantly motivated by ill-will towards the plaintiff or otherwise took improper advantage of the occasion of publication." The court interpreted this provision as flexible and capable of being applied to new categories of qualified privilege that developed as society develops and changes. Under the statute, however, the common

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355. Id.
356. Id. Also unlike United Kingdom papers, New Zealand papers did not generally have close associations with particular political parties. Id.
law test for malice still applied. Privilege would still be lost if the speaker acted without a genuine belief in the truth of the statement or recklessly, not caring whether it was true or false. Here, the New Zealand Court of Appeal stated that careless journalism, though alone not determinative of misuse of privilege, could be taken into account in ascertaining whether recklessness existed. The court thus confirmed its previous holding that no prerequisite of reasonableness should be imported into the law.

C. Reynolds v. Times Newspapers (England)

The final case to be filed in the trilogy of Commonwealth Cases was the English case of Reynolds. In this case, the House of Lords held that constitutional guarantees of free expression required the extension of the traditional common law defense of qualified privilege. The House of Lords did not endorse any new generic categories of common law privilege as had been approved in Australia and New Zealand; rather, the House of Lords advocated a case-by-case balancing approach. This extended defense was not subject to any reasonableness requirement like Australia’s; it could be defeated by proof of malice, as understood under the traditional common law.

The Reynolds case arose out of a political crisis in Ireland in late 1994. Albert Reynolds, leader of the Fianna Fáil party, announced his resignation as Ireland’s Taoiseach (Prime Minister) in the Irish Dáil on November 17, 1994. The following Sunday, a major London newspaper, the Sunday Times, published an article about Reynolds’ resignation in its British mainland edition. The article bore the headline “Goodbye gombeen man.”

359. Id.
360. Id. at 401-02.
361. See id. at 404-05. The New Zealand Court of Appeal noted that it had taken the “newspaper rule” into account and it did not affect its overall conclusion. This is the rule that a newspaper does not generally have to reveal its sources in interlocutory proceedings. See id.
363. Id. at 1027D, E, F (listing factors a court could consider depending on the circumstances of the particular case).
364. Id. at 1016D, G, 1021G.
365. The Dáil is the lower house of Ireland’s Parliament. Mr. Reynolds had led a coalition government between his Fianna Fáil party and the Labour party. A good summary of the political background to this case appears in the judgment of the English Court of Appeal, reported at 3 W.L.R. 862 (1998).
367. Id. at 1014B. A “gombeen man,” an Irish stock character, is a petty moneylender, generally with exploitative tendencies, WEBSTER’S THIRD NEW INT’L DICTIONARY 977 (1981).
Reynolds brought suit against, *inter alia*, the publishers of the *Sunday Times* for libel.\(^{368}\) He claimed that the article published in the British edition contained the defamatory allegation that he had “deliberately and dishonestly misled the Dáil . . . by suppressing vital information,” that he had “deliberately and dishonestly misled his coalition cabinet colleagues . . . by withholding that information,” and that “he had lied to them about when the information had come into his possession.”\(^{369}\)

The defendants challenged the meaning ascribed to the words by the plaintiff. They raised the defenses of justification, common law qualified privilege, statutory qualified privilege (as a fair and accurate report of public proceedings in the Irish legislature), and fair comment.\(^{370}\) By the time of trial, the defenses had been whittled down to justification and common law qualified privilege.\(^{371}\)

A jury tried the action in the autumn of 1996.\(^{372}\) Delays and mishaps plagued the trial,\(^{373}\) but eventually the jury found the article to be defamatory and rejected the *Sunday Times*’ defense of justification (truth).\(^{374}\) Despite this, the jury awarded no damages.\(^{375}\) The trial judge, Mr. Justice French, substituted a nominal damages award of one penny; however, the issue of whether there was a valid defense of qualified privilege remained relevant to the issue of costs.\(^{376}\) If the judge decided that the defense of qualified privilege applied, plaintiffs would have to pay defendants’ costs.\(^{377}\) After hearing arguments on the applicability of qualified privilege, the judge ruled that this defense did not apply to the article.\(^{378}\) Mr. Reynolds appealed to the English Court of Appeal on the basis

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\(^{368}\) Reynolds, 3 W.L.R. at 869A (1998). Reynolds also sued the story’s author, Mr. Alan Ruddock (the Irish editor for the Sunday Times) and the editor of the Sunday Times, Mr. Witherow. Reynolds, 3 W.L.R. at 1014D-E (1999). He had originally also sued John Burns but discontinued proceedings against Burns when it became clear that Burns had not participated in the publication of the offending article. Reynolds, 3 W.L.R. at 874A (1998).

\(^{369}\) Reynolds, 3 W.L.R. at 874A (1998).

\(^{370}\) *Id.* at 875A-C.

\(^{371}\) *Id.*

\(^{372}\) The trial of the *Reynolds* action took place in London’s High Court of Justice between October 14, 1996, and November 19, 1996. Reynolds, 3 W.L.R. at 1014F (1999).

\(^{373}\) Reynolds, 3 W.L.R. at 875 (1998).

\(^{374}\) Reynolds, 3 W.L.R. at 1014G (1999).

\(^{375}\) *Id.* at 1014H. In his House of Lords judgment, Lord Cooke of Thornden commented that this apparent inconsistency between the verdict and award was “odd.” *Id.* at 1039C. Lord Cooke noted that the jury could have been influenced by evidence that Reynolds did not sue on similar allegations made in the Irish press. *Id.* at 1039D.

\(^{376}\) *Id.* at 1014H.

\(^{377}\) *Id.*

\(^{378}\) *Id.* at 1015A.
that the judge had misdirected the jury. Defendants cross-appealed the costs order.

1. The Appeal to the Court of Appeal: Upholding the Common Law

On appeal, a three-judge panel of the English Court of Appeal agreed with Mr. Reynolds that the jury had been misdirected, and "[w]ith very great regret, because we are mindful of the consequences," ordered a new trial. The order for a retrial made the costs appeal academic, since costs would be at the discretion of the judge hearing the retrial. The court did, however, fully consider the defendants' argument that qualified privilege applied to determine whether the defendants could invoke this defense at the retrial.

At the hearing before the English Court of Appeal, defendants' counsel, Lord Lester, contended that English law should recognize a generic category of qualified privileged for political speech. He argued that the defense should apply to "a publication to the public at large, arising out of discussion of political matters, including the manner in which a public representative or senior public officer had discharged his public functions, or relating to his public views and conduct in relation to those functions, or his fitness for political office." In making this submission, Lord Lester relied heavily on the recent antipodean case law. He cited the first New Zealand Court of Appeal judgment in Atkinson to support his argument for a generic privilege. He also relied on the Australian High Court's judgment in Australian Broadcast Corporation, contending that the generic privilege should protect "information, opinions and arguments concerning government and political matters that affect the people of the United Kingdom."

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379. Id.
380. Reynolds, 3 W.L.R. at 1015A (1999). The trial judge granted leave to appeal only as to costs from the date of payment into court, but the English Court of Appeal, by a single Lord Justice of Appeal, granted defendants leave to appeal as to costs prior to that date. Reynolds, 3 W.L.R. at 876E-F (1998).
381. The panel consisted of the Lord Chief Justice, Lord Bingham of Cornhill, as well as Lord Justice Hirst and Lord Justice Robert Walker.
383. See id. at 892D.
384. Id. at 892F-G.
385. Id. at 893F-G.
386. Id. at 894B.
387. See id. at 894A.
Even though he invoked this Australian definition, Lord Lester was really asking the English Court of Appeal to follow the New Zealand approach, steering a middle course between Sullivan’s actual malice rule and the limited freedom for political discussion of Australian Broadcast Corporation.\(^{388}\) In support of his argument, he cited a recent English decision, Derbshire County Council v. Times Newspapers Ltd. In Derbshire, the House of Lords had found that the public interest barred organs of central or local government from recovering damages in defamation at common law.\(^{389}\) Lord Lester also invoked European Court of Human Rights jurisprudence concerning Article 10 of the European Convention on Human Rights (the provision guaranteeing freedom of expression).\(^{390}\)

The English Court of Appeal did not find Lord Lester’s arguments persuasive. In a unanimous judgment, the court rejected the Atkinson approach on the basis that it was contrary to the need to balance concerns for reputation against freedom of the press emphasized in the jurisprudence of the European Court of Human Rights.\(^{391}\) The English Court of Appeal found the Atkinson approach both too broad and too narrow. It was overbroad in that it failed to adequately protect reputation, and it was simultaneously too narrow because its generic category would fail to protect other kinds of socially valuable speech.

Lord Bingham, in the leading judgment, stated:

> While those who engage in public life must expect and accept that their public conduct will be the subject of close scrutiny and robust criticism, they should not in our view be taken to expect or accept that their conduct should be the subject of false and defamatory statements of fact unless the circumstances of publication are such as to make it proper, in the public interest, to afford the publisher immunity from liability in the absence of malice.\(^{392}\)

This showed that the English Court of Appeal strongly prefers the traditional English approach, which focused on the circumstances of publication.

Although refusing to establish any generic category of privilege for political discussion, the English Court of Appeal did define the

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389. Id. at 894B-C; see also Derbshire County Council v. Times Newspapers Ltd., A.C. 534, 549 (H.L. 1993).
391. Id. at 907G-H.
392. Id.
The scope of qualified privilege was rethought very broadly for contemporary conditions. The Court of Appeal stated that the public interest, namely the "common convenience and welfare of a modern plural democracy," dictated an "ample flow of information" about the public interest to the general public. This included not only political discussion but also discussion of other matters, such as corporate governance. The court stated that both the duty and interest tests would be "rather more readily held to be satisfied" in modern conditions than had been found to be the case in previous case law. This can be regarded as a significant extension of the English common law of qualified privilege.

The opinion of the English Court of Appeal can be regarded as radical for another reason going beyond the breadth of their holding on the scope of common law qualified privilege. The court laid down a new and additional prong to the duty/interest test for qualified privilege, which they termed the "circumstantial test." This test asked whether "the nature, status, and source of the material, and the circumstances of publication, [were] such that the publication should in the public interest be protected in the absence of express malice." Although previous English common law authority had indicated that circumstances were certainly relevant to the application of qualified privilege, this articulation of a separate circumstantial test by the English Court of Appeal was a novel interpretation of English law. Previously, the test for qualified privilege had been formulated only as one of reciprocal interest and duty.

The introduction of the circumstantial test, however, did not mean that it was easy to satisfy. On the facts of Reynolds, the Court of Appeal found the duty and interest tests to be met, but not the circumstantial test. Their consideration of the nature, status, and circumstances of the Sunday Times publication led to the conclusion that it was not in the public interest for the law to protect it. There were significant factors weighing against publication:

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393. Id. at 909C.
394. See id. at 909D.
395. Id. at 909F.
397. Id.
398. The Court of Appeal impliedly recognized this by stating that the circumstantial test was not very different from the reasonableness test of Australian Broadcasting Corp. See id.
399. See id. at 911E.
400. See id. at 911E-12A.
the Article's reliance on an unreliable source, the failure to include Mr. Reynolds' account of the incidents in question, the failure to inform Reynolds of the damaging conclusions made about him prior to their publication, and the inconsistency of the allegations made by the English and Irish editions. 401

The defendants were not satisfied with this judgment. They obtained leave to appeal the ruling of the English Court of Appeal to the House of Lords. 402

2. The House of Lords: A Fear of Rigidity

The House of Lords dismissed the appeal by a 3-2 majority. 403 All five members of the House of Lords agreed with the Court of Appeal that the common law approach was "essentially sound" and comported with the European Convention. 404 Although two Lords of Appeal in Ordinary, Lord Steyn and Lord Hope of Craighead, dissented as to the applicability of qualified privilege on the facts, they agreed with the majority interpretation of the law of qualified privilege.

Like the Court of Appeal, the House of Lords rejected Lord Lester's argument that qualified privilege should be extended to cover a generic category of political discussion. 405 All five members agreed with the reasoning on this issue of Lord Nicholls of Birkenhead, who delivered the leading judgment. Lord Nicholls repeated the familiar common law mantra that there was a reciprocity requirement for qualified privilege, namely that speaker and recipient must have a corresponding interest or duty in a statement's publication for it to be protected by the defense. 406 The court had to "assess whether, in the public interest, the publication should be protected in the absence of malice." 407 Since the reciprocity requirement was based on the public interest, the court had to take all the circumstances into account. 408

Analyzing this public interest rationale, Lord Nicholls endorsed the Court of Appeal's broad approach to the scope of qualified privilege. Lord Nicholls clearly agreed with the Court of Appeal

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401. See id. at 911E-H.
402. Reynolds, 3 W.L.R. at 1015C (1999). The House of Lords granted leave to appeal because it viewed the issue as one of general public importance.
403. See id. at 1028A, 1038H, 1049D, 1059A, 1061E.
404. Id. at 1026C-27A; see also id. at 1032G-H, 1039A, 1056A, 1059B.
405. See id. at 1027A, 1032G-H, 1042D, 1056C, 1060G.
406. See id. at 1017D.
407. Id. at 1017G.
that qualified privilege was flexible and should adapt to changing
times. In modern social conditions, a media publication to the
general public often would be in the public interest.⁴⁰⁹ Nicholls
used strong, even ringing language to describe the importance of
the press in a modern democratic society:

It is through the mass media that most people today obtain their
information on political matters. Without freedom of expres-
sion by the media, freedom of expression would be a hollow
concept. The interest of a democratic society in ensuring a free
press weighs heavily in the balance in deciding whether any cur-
tailment of this freedom bears a reasonable relationship to the
purpose of the curtailment.⁴¹⁰

In endorsing the English common law approach over the antipo-
dean common law approaches, the House of Lords also stressed
the importance of local conditions. They contended that the irre-
sponsibility and commercial interest of the English press necessi-
tated stronger safeguards for reputation than might be necessary
elsewhere.⁴¹¹ In these conditions, malice was insufficient because
it was too difficult for the plaintiff to establish.⁴¹² Thus, the House
of Lords agreed with the Court of Appeal that English law should
not recognize a new generic category of qualified privilege.

Yet the House of Lords did not entirely agree with the reasoning
of the English Court of Appeal; all five law Lords rejected the addi-
tional circumstantial test.⁴¹³ The need to take circumstances into
account was not a separate test from the duty/interest test.⁴¹⁴
Underlying this view was a fear that departing from the flexible
approach of the common law would result in overly rigid law.⁴¹⁵
Their Lordships believed that maintaining flexibility and elasticity
was key to ensuring that the law could adapt to changing circum-

⁴⁰⁹. Id. at 1023.
⁴¹⁰. Id. at 1023C-D.
⁴¹¹. See id. at 1024E (Lord Nicholls stating that "the sad reality is that the. . . national
press, with its own commercial interests to serve, does not always command general confi-
dence"); see also id. at 1040H ("[a]lthough investigative reporting can be of public benefit,
the commercial motivation of the press and other sections of the media can create a tem-
pation, not always resisted, to exaggerate, distort, or otherwise unfairly represent alleged
facts in order to excite the interest of readers, viewers, or listeners"), 1061A-B.
⁴¹². Id. at 1024D; see also id. at 1041H-42A.
⁴¹³. See id. at 1020B (Lord Nicholls stating "there is no separate and additional ques-
tion"), 1035B (Lord Steyn), 1046E (Lord Cooke of Thornden stating: "I agree that the two-
fold classical test is enough once it is accepted that all the circumstances of the publication
are to be taken into account"), 1058H (Lord Hope of Craighead stating: "the circumstan-
tial test is confusing and it should not be adopted"), 1059A (Lord Hobhouse of
Woodborough).
⁴¹⁴. See Reynolds, 3 W.L.R. at 1020B (1999); see also id. at 1020C.
⁴¹⁵. See id. at 1033A-B, 1038G.
stances as society changed.\textsuperscript{416} It was also important for the law to be able to do individual justice in particular cases.\textsuperscript{417} Their Lordships also stressed that, in their view, this balancing approach was more consistent with the European Court of Human Right's Article 10 jurisprudence than a generic category.\textsuperscript{418}

The House of Lords recognized that the price of flexibility in the law was some degree of uncertainty, yet their Lordships felt that this defect could, at least in part, be overcome by the provision of some guidelines for future courts to follow.\textsuperscript{419} Lord Nicholls listed some nonexclusive factors to take into consideration, including the seriousness of the allegation, the extent to which it was a matter of public concern, the source of the information, what steps had been taken to verify the information, the status of the information, the urgency of the matter, whether the defendant sought a response from the plaintiff, whether the article included the plaintiff's version of events, the tone of the article, and the circumstances of publication, including timing.\textsuperscript{420}

In keeping with their fear of rigidity, the House of Lords rejected other arguments made on behalf of both defendants and plaintiffs. They rejected Lord Lester's alternate contention that a qualified privilege should apply to political discussion unless the plaintiff could prove the newspaper had not exercised reasonable care.\textsuperscript{421} In their Lordships' view, this would upset the proper balance of the law of qualified privilege;\textsuperscript{422} the burden should remain on the newspaper, which was in a better position to know the circumstances of publication.\textsuperscript{423} Their Lordships also rejected the plaintiff's contention that if a newspaper failed to report the other side's version of events, it would automatically lose privilege, and that the newspaper should bear the burden to show why it should not have to prove truth.\textsuperscript{424} They felt that this was also a dangerously rigid interpretation of the law.\textsuperscript{425}

A bare majority of the House of Lords agreed that, in the circumstances of this case, qualified privilege did not apply. In con-

\textsuperscript{416} Id. at 1027B.
\textsuperscript{417} See id. at 1024G-H, 1033B, 1046E, 1051E, 1061H.
\textsuperscript{418} Id. at 1026A, 1035A, 1045D, 1056H, 1059B.
\textsuperscript{419} Id. at 1027D.
\textsuperscript{420} See Reynolds, 3 W.L.R. at 1027C-E (1999).
\textsuperscript{421} Id. at 1025E-F.
\textsuperscript{422} Id. at 1025G.
\textsuperscript{423} Id. at 1025H.
\textsuperscript{424} Id. at 1025H-26A.
\textsuperscript{425} Id.
cluding that it was not in the public interest to report the Sunday Times article to the general public, the majority was particularly influenced by the article’s failure to report Mr. Reynolds’s explanation to the Dáil. This was contrary to “elementary fairness.” Lord Steyn and Lord Hope of Craighead disagreed, both believed that, on the facts, qualified privilege should be considered at a new trial.

D. Comparing the Commonwealth Cases

The above review of the Commonwealth Cases has shown how they all followed Sullivan by constitutionalizing the common law of libel. Unlike Sullivan, however, they all rejected a freestanding constitutional defense, and rather endorsed a different approach, expanding the existing common law of qualified privilege. They all agreed that the extended common law qualified privilege could apply to statements that were generally published by the media. They also all invoked an essentially Madisonian rationale for the privilege. The Commonwealth Cases, however, differed among themselves on a number of issues, in particular as to the scope of the expanded defense, the nature of any prerequisites for the defense, and what was necessary to overcome the defense.

Both the Australian High Court and the New Zealand Court of Appeal endorsed a new generic common law category of qualified privilege, which the English House of Lords rejected in favor of a case-by-case balancing approach. The Australian generic category was broader in scope, applicable to “information, opinions, and arguments concerning government and political matters that affect the people of Australia.” The New Zealand category of generic privilege was somewhat narrower, applicable to

generally published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect or affect their capacity (including their personal ability and willingness) to meet their public responsibilities.

426. Reynolds, 3 W.L.R. at 1028C-F, 1059B (1999). Lord Cooke endorsed the Court of Appeal’s approach, which was influenced by this fact but also took other facts into consideration. See id. at 1048B-49B.
427. Id. at 1028F.
428. Id. at 1038D-E (Lord Steyn); 1058H-1059A (Lord Hope).
The New Zealand Court of Appeal did leave open the possibility that this generic category might not be the full extent of the privilege and that it might be applicable to other "generally-published statements which directly concern the functioning of representative and responsible government."\textsuperscript{431}

Taking a slightly different approach to the antipodean courts, the English House of Lords rejected any generic category of qualified privilege for political discussion.\textsuperscript{432} Rather, in the interests of justice, the applicability of qualified privilege is considered on a case-by-case basis.\textsuperscript{433} Despite this absence of recognition for a new generic category of privilege under English law, the English extended privilege could be regarded as broader than the antipodean generic categories. This was because the expanded English privilege was not limited to overtly political speech, but could potentially apply to other types of speech in the public interest.

Of the three Commonwealth Courts, only the Australian High Court laid down a prerequisite for the expanded privilege. Under Australian law, for the expanded privilege to apply, a defendant had to establish reasonableness. To establish this, she had to prove that she had reasonable grounds to believe the statement was true, did not believe it to be untrue, took appropriate steps to verify the accuracy of what was being published, and sought or published a response, where practicable.\textsuperscript{434} Both the English and New Zealand courts rejected any prerequisite, whether reasonableness or otherwise, for the expanded defense.\textsuperscript{435}

All of the Commonwealth Courts found that, in keeping with the traditional common law of qualified privilege, the expanded defense could be defeated by a misuse of the privilege, but they differed as to the test for such misuse. All agreed that proof that a defendant was actuated by an improper motive, such as ill-will or spite, could defeat the privilege,\textsuperscript{436} but under the traditional common law, a lack of belief in the truth of the publication could also constitute malice. The Australian High Court held that this was no longer the case for the expanded qualified privilege,\textsuperscript{437} but it

\textsuperscript{433} See id. at 1024 G-H, 1033B, 1046E, 1051E, 1061H.
\textsuperscript{434} See Australian Broad. Corp. (1997) 189 C.L.R. at 573.
\textsuperscript{436} See Atkinson [2000] 3 N.Z.L.R. at 400-01; Reynolds, 3 W.L.R. at 1023H (1999); Australian Broad. Corp. (1997) 189 C.L.R. at 574.
remained the case for the English and New Zealand versions of the expanded qualified privilege.\textsuperscript{438}

VI. THE SULLIVAN DECISION: TAKING THE WRONG ROAD

The above section has shown how the Commonwealth Courts declined to follow Sullivan by creating a new freestanding constitutional defense for libel actions involving false statements of fact concerning politicians or public officials; rather, all the Commonwealth Courts agreed that the existing law of qualified privilege must be extended to cover some political discussion by the media to the general public. This section contends that the Commonwealth approach was equally available to the Sullivan Court. The U.S. Supreme Court erred by ignoring it in favor of the creation of a new, rigidly categorical, constitutional defense. This wrong turn away from the common law may have been more the result of concerns for outcomes than for coherent legal doctrine. Sullivan was part of one of the greatest political and social struggles of 20th century United States.\textsuperscript{439}

A. Sullivan’s Unique Place in History

The Sullivan dispute arose in the historically turbulent context of the civil rights movement of the early 1960s. In 1960 the New York Times ran an advertisement promoting the civil rights movement (paid for by the Committee to Defend Martin Luther King\textsuperscript{440}) that criticized various actions taken against civil rights demonstrators by the police in Montgomery, Alabama.\textsuperscript{441} There were a number of trivial inaccuracies in the advertisement.\textsuperscript{442} A Montgomery city

\textsuperscript{438} See Reynolds, 3 W.L.R. at 1016H (1999); Atkinson [2000] 3 N.Z.L.R. at 400.


\textsuperscript{441} The fact that the advertisement was paid for did not affect the outcome of the case; the Court believed that the speech in the advertisement was still entitled to the protection of the First Amendment. See Sullivan, 376 U.S. at 265-66.

\textsuperscript{442} The ad wrongly claimed that students demonstrating on the steps of the Alabama State Capitol sang “My Country ’Tis of Thee;” they actually sang the National Anthem. Id. at 258-59. The ad also falsely stated that students were expelled from college for leading the demonstration; in fact, they were expelled for another reason. Id. at 259. Another
official, L.B. Sullivan, whose duties included supervising the police, sued for libel in Alabama state court, although the advertisement did not refer to him by name.\textsuperscript{443} Nevertheless, the trial court awarded Sullivan half a million dollars in damages, the largest amount ever awarded in an Alabama libel case.\textsuperscript{444} The Alabama Supreme Court upheld the award.\textsuperscript{445} When other state officials brought separate lawsuits, cumulatively seeking more than $2 million in damages, the \textit{New York Times} was threatened with bankruptcy.\textsuperscript{446} The historical importance of the \textit{Sullivan} action went far inaccuracy in the ad was the statement that "the entire student body protested to state authorities by refusing to re-register;" in fact, only a majority of the student body had joined in the protests and moreover, the protests were not refusals to register but rather boycotts of classes. \textit{Id.} at 257, 259. The ad also wrongly stated that padlocks were used to keep students from a dining hall and "starve them into submission;" in fact, no padlocks were ever used and only a few students had been kept out for lack of proper registration. \textit{Id.} Also inaccurate was the statement in the ad that the police had been ringing the campus. \textit{Id.} at 259. Moreover, the ad made a number of false statements concerning civil rights leader Dr. Martin Luther King; it wrongly numbered King's arrests as seven rather than four. \textit{Id.} It also inaccurately claimed that King had been assaulted in connection with an arrest; this assault was denied by the arresting officer. \textit{Id.} at 257-59. Finally, the ad incorrectly charged that the police had been involved in bombing King's home, when in fact they had tried to apprehend the perpetrators. \textit{Id.} at 259.

\textsuperscript{443} As well as suing the newspaper, Sullivan sued four black Alabama ministers whose names appeared in the advertisement, probably to defeat diversity and to keep the action out of federal court. \textit{See} Lewis, \textit{supra} note 440, at 13.

\textsuperscript{444} \textit{See} \textit{id.} at 35. The trial judge, Judge Walter P. Jones, an advocate of segregation in his courtroom and elsewhere, was clearly biased in favor of Sullivan. One blatant example was the judge's finding that there was jurisdiction over the \textit{New York Times}. The newspaper argued that it did not do enough business in Alabama to be subject to the court's jurisdiction. \textit{Id.} at 25. Moving to challenge personal jurisdiction, the newspaper's counsel Eric Embry (later a justice on the Alabama Supreme Court) attempted to avoid a finding of personal jurisdiction over the newspaper by making only a special appearance in the case. To ensure that he did so, Embry carefully followed the procedure set out in a standard textbook on Alabama pleading that had been authored by Judge Jones. \textit{Id.} In response, Judge Jones took the extreme step of overruling his own book and found jurisdiction over the newspaper on the basis of a general appearance. \textit{Id.} at 26. Many years later, Embry's anger about the judge's conduct of the trial remained strong; he accused the judge of meeting with others to "concoct all these lawsuits." \textit{Id.} Judge Jones instructed the jury that, because the words were "libellous per se," Sullivan did not need to prove that they were defamatory, and moreover, the law presumed them to be false. \textit{Id.} at 32. According to Jones, injury was also presumed under the law. \textit{Id.} Since the \textit{New York Times} had admitted that the words of which Sullivan complained were not entirely error-free, the only issues left for the jury to decide were publication and reference, that is, whether the words had been published by the defendants, and whether the words were "of and concerning" Sullivan. \textit{Id.} at 32-33.

\textsuperscript{445} \textit{New York Times} v. Sullivan, 144 So. 2d 25, 51-52 (Ala. 1962) (upholding Jones', Montgomery County Circuit Court Judge, decision in all respects, including finding that the award of damages was not excessive).

\textsuperscript{446} \textit{See} Sullivan, 376 U.S. at 278 n.18. By the time the U.S. Supreme Court ruled in \textit{Sullivan}, only one of these additional actions against the \textit{New York Times} had gone to trial, resulting in a verdict awarding the plaintiffs $500,000. \textit{Id.}
beyond the question of one newspaper's viability; at issue was a more deeply political conflict: the extent to which the press could cover the civil rights conflict then raging in the United States South.447

B. Not Entirely Strict Liability: The Existing Alabama Qualified Privilege Defense

As Justice Brennan emphasized in his majority opinion in *Sullivan*, Alabama libel law was a formidable barrier for press coverage of the civil rights conflict.448 As Brennan noted, under Alabama law defamatory statements of fact "tend[ing] to injure a person in his reputation" or "bring [him] into public contempt" were "libel-lous per se."449 Alabama law presumed "libels per se" to be defamatory, false, and injurious.450 Justice Brennan stated: "[O]nce 'libel per se' has been established, the defendant has no defense to stated facts unless he can persuade the jury that they were true in all their particulars."451 Justice Brennan's opinion, however, overstated the extent to which Alabama libel law favored plaintiffs.

Justice Brennan mischaracterized Alabama libel law as being a tort of strict liability for defamatory facts;452 in fact, although Brennan failed to point this out in his opinion in *Sullivan*, Alabama law did in fact recognize a defense of qualified privilege that protected certain statements of fact from liability for defamation.453 As at English common law, this defense arose when there was a reciprocal duty and interest in publishing the statement, whether this duty was legal or moral.454 Also like English common law, the Alabama

448. See *Sullivan*, 376 U.S. at 267.
449. *Id.*; see also *Johnson Publ'g Co. v. Davis*, 124 So. 2d 441, 450 ( Ala. 1960).
451. *Id.*; see also *Starks v. Comer*, 67 So. 440, 444 (Ala. 1914).
453. See, e.g., *Kenney v. Gurley*, 95 So. 2d 34, 38 ( Ala. 1923) (finding privileged an allegedly defamatory letter from school personnel sent to a parent of a dismissed student and stating the cause of the student's dismissal); see also *Bhd. of Ry. Trainmen v. Jennings*, 168 So. 173, 179 ( Ala. 1936); *Interstate Elec. Co. v. Daniel*, 151 So. 463, 467 ( Ala. 1933), *Berry v. City of New York*, 98 So. 290, 293 ( Ala. 1923), *Ferdon v. Dickens*, 49 So. 888, 895 ( Ala. 1909). In his opinion in *Sullivan*, Justice Brennan entirely failed to mention the existence of a defense of qualified privilege in Alabama law. *See* *Sullivan*, 276 U.S. at 268. Brennan's contention that the defendant had no defense as to misstatements of facts that were libels per se apart from truth was thus not entirely accurate. *Id.*
454. See, e.g., *Lawson v. Hicks*, 38 Ala. 279, 285 (1862) (stating that qualified privilege is applicable "where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his
defense of qualified privilege was defeated by proof of malice on the part of the defendant.\textsuperscript{455} Alabama courts had found the defense of qualified privilege applicable to certain fair and accurate press reports of judicial or quasi-judicial proceedings that had been published to the general public;\textsuperscript{456} however, they had declined to find the defense more broadly applicable to any statement of fact made about public officials or candidates for public office.\textsuperscript{457} Thus, even though Alabama law did give some protection to defamatory statements of fact at the time of \textit{Sullivan}, the defense of qualified privilege had not been broadly extended to protect statements like those made in the \textit{New York Times} advertisement. Clearly concerned about the effect of Alabama libel law on press reporting of the civil rights conflict, in conjunction with the problem of racist state judges, the U.S. Supreme Court granted certiorari in \textit{Sullivan} on the basis of important constitutional issues, namely violations of the First and Fourteenth Amendments.\textsuperscript{458} The Court unanimously held that the award in damages against the \textit{New York Times} should be reversed.\textsuperscript{459}

\begin{footnotesize}
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\item \textsuperscript{455} See, e.g., Kenney, 95 So. at 39 (finding insufficient evidence of malice in the circumstances of the particular case).
\item \textsuperscript{456} See, e.g., Age-Herald Publ'g Co. v. Waterman, 81 So. 621, 626 (Ala. 1919) (finding that qualified privilege extended to a fair and accurate report of a meeting of a bankrupt's creditors).
\item \textsuperscript{457} See Starks v. Comer, 67 So. 440, 444 (Ala. 1914) (statement about candidate for public office); Parsons v. Age-Herald Publ'g Co., 61 So. 345, 351 (Ala. 1913) (public official). At the time of the \textit{Sullivan} case, state courts in some other states had recognized a qualified privilege for defamatory and false statements concerning the public conduct of public officials. See, e.g., Coleman v. MacLennan, 98 P. 281, 293 (Kan. 1908) (holding that qualified privilege did not apply to a false statement about the fitness for office of a candidate for a state office); see also Sniveley v. Record Publ'g Co., 185 Cal. 565, 570-76 (1921); Lawrence v. Fox, 97 N.W.2d 719, 725-26 (Mich. 1959); Ponder v. Cobb, 126 S.E.2d 67, 82 (N.C. 1962); McLean v. Merriman, 175 N.W. 878, 881 (S.D. 1920); Salinger v. Cowles, 191 N.W. 167, 174 (Iowa 1920); Bailey v. The Charleston Mail Ass'n, 27 S.E.2d 837, 844 (W. Va. 1943). All of these cases were cited by Brennan in \textit{Sullivan} to illustrate what he portrayed as the minority rule. Sullivan, 376 U.S. at 280. According to Brennan, three other states (New Hampshire, Arizona, and Minnesota), also afforded qualified privilege to defamatory statements of fact about candidates for public office. \textit{Id.} W. Wat Hopkins has argued that Brennan was incorrect in characterizing these cases as representing the minority position at the time of \textit{Sullivan} because by that time at least 21 states, as well as the District of Columbia, recognized a qualified privilege for certain false political statements. See W. Wat Hopkins, \textsc{Actual Malice: Twenty-Five Years After Sullivan} 76 (1989). Hopkins' research, however, confirms that in 1964, Alabama law did not recognize such a privilege. See \textit{id.} at 76; see also Starks, 67 So. at 440.
\item \textsuperscript{458} Sullivan, 276 U.S. at 264 n.4.
\item \textsuperscript{459} \textit{Id.} at 264, 293 (Black, J., concurring), 305 (Goldberg, J., concurring).
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A 6-3 majority of the U.S. Supreme Court established a new free-standing constitutional defense for libel actions brought by public officials. Writing for the majority of the Court, Justice Brennan constitutionalized the liability rules for defamation action on the basis of the defendant's fault. According to Brennan, the First and Fourteenth Amendments of the Constitution demanded a rule barring public officials from recovering damages for false and defamatory statements regarding official conduct unless they could prove "actual malice." As defined by Justice Brennan, "actual malice" did not carry the meaning of "spite" or "ill will" toward the plaintiff but rather knowledge that the statement at issue was false or made with reckless disregard as to its truth or falsity.

In decisions subsequent to Sullivan, the U.S. Supreme Court made clear that "actual malice" is a subjective test dependent on the state of mind of the actual defendant. In his 1968 opinion in St. Amant v. Thompson, Justice White, delivering an opinion for eight members of the Court, stated:

Reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

In Sullivan, not only did Justice Brennan establish a constitutional rule for the standard of liability in libel actions brought by public officials but also a corresponding rule for the standard of proof; Brennan held that proof of actual malice must be clear and con-
This is an unusually high standard of proof in civil actions, where normally proof on the balance of probabilities suffices.

Brennan's constitutionalization of the common law of libel in *Sullivan* was based squarely on his belief in the importance of freedom of speech on public issues. The philosophical rationale underlying this belief was a Madisonian conception of democracy that, in the U.S. system of government, the people were sovereign. As a result, "free public discussion of the stewardship of public officials was... a fundamental principle of the American form of government." Brennan stated:

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 vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

According to Brennan, the government could not use the civil law of libel to prevent such attacks even if they were false and defamatory. There were two reasons for this: first, the analogy between the Alabama civil law of libel and seditious libel, and second, the risk of "chilling" otherwise protected speech. Brennan made the historical argument that the Alabama civil law of libel was analogous to the ill-fated Sedition Act of 1798, which criminalized speech that was critical of the government and was gener-

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465. *Sullivan*, 376 U.S. at 285-86 (finding that the evidence of actual malice "lacks the convincing clarity which the constitutional standard demands").
466. See *Lewis*, *supra* note 440, at 148.
470. *Id.* at 270.
471. *See id.* at 276-77 (referring to "the lesson to be drawn from the great controversy over the Sedition Act," describing this controversy in great detail, and arguing passionately that the Sedition Act was unconstitutional).
472. *See Sedition Act of 1798*, 1 Stat. 596-97 (criminalizing, *inter alia*, speaking or writing about the government, President, or Congress with "intent to defame" or so as to "bring them... into contempt or disrepute"). Fourteen people were prosecuted under the Sedition Act, some received jail terms. *Lewis*, *supra* note 440, at 63-64. David Brown, an itinerant "apostle of sedition," received a four-year jail sentence for the seemingly rather
ally decried as unconstitutional. Brennan also contended that fear of being sued under Alabama libel law would lead to too much self-censorship on the part of critics of public officials and would improperly deter true speech that was clearly deserving of First Amendment protection. Therefore, the law should ensure "breathing space" for false and defamatory attacks on public officials. To achieve this goal, Brennan did not need to resort to the drastic course of creating a new constitutional defense; as the Commonwealth Courts later recognized, there was another possibility.

D. A Missed Opportunity: Extending the Existing Alabama Defense of Qualified Privilege

The alternative possibility was to employ the approach later taken by the Commonwealth Courts, of simply expanding the existing common law defense of qualified privilege. The contention that ignoring this approach was an error builds on the work of Professor Richard Epstein. In a very well known essay published in the University of Chicago Law Review in 1986, Epstein criticized the development of a new constitutional "actual malice" defense in Sullivan and recommended a return to the common law of libel. Epstein, however, portrayed the common law of libel as a law of strict liability. He did not consider an extension of the existing

trivial act of instigating the erection of a liberty pole in Massachusetts. Samuel Eliot Morison, The Oxford History of The American People 354 (1965). Anthony Lewis disagrees with Morison as to the length of Brown's sentence, stating that it was 18-months, but that Brown remained in prison for an additional few months because he could not pay the fine to which he had also been sentenced. Lewis, supra note 440, at 64. Whoever is correct, Brown received a sentence that seems disproportionate to his offense.

473. Protest that the Sedition Act was unconstitutional occurred almost immediately after its passage, most notably in James Madison's Virginia Resolutions and Thomas Jefferson's Kentucky resolves. Morison, supra note 472, at 354. When Jefferson became president in the "Revolution of 1800," he allowed the Sedition Act to expire and pardoned those who had been convicted under it. Lewis, supra note 440, at 65. Subsequently, there has been general agreement that the Sedition Act violated the First Amendment. See Sullivan, 376 U.S. at 276 (citing, inter alia, the very influential dissent of Oliver Wendall Holmes in Abrams v. United States, 250 U.S. 616, 650 (1919)).

474. See Sullivan, 376 U.S. at 279 (where Brennan contended that a libel rule requiring a critic of official conduct to prove the truth of all factual assertions "dampens the vigor and limits the variety of public debate").

475. See id. at 272.

476. See Epstein, supra note 439, at 792, 795, 814-815 (endorsing a return to the common law of strict liability and suggesting various common law alternative solutions for the Sullivan problem, including construing the "of and concerning" requirement, shifting the burden of proving truth to the plaintiff, and/or limiting damages).

477. Id. at 795, 814.

common law defense of qualified privilege; indeed, Epstein did not discuss this defense at all.

This argument for a return to the common law is thus different than Professor Epstein's. This Article does not advocate a return to strict liability because the common law was never entirely a law of strict liability. The common law has long contained the defense of qualified privilege, which insulated some publications from strict liability on the basis of the public interest. The Commonwealth Cases illustrate how Sullivan could have been resolved differently, by expanding the existing defense of qualified privilege rather than adopting the more drastic and rigid alternative of creating a new constitutional defense.

Although, as discussed above, Alabama law at the time of Sullivan apparently did not find the common law defense of qualified privilege broadly applicable to statements made by the press about official conduct, the public interest rationale underlying this defense meant that it was inherently capable of expansion. The Alabama defense of qualified privilege derived from the English common law defense and shared the same basis in the public interest. A frequently cited Alabama Supreme Court authority on the defense of qualified privilege, the 1862 case of Lawson v. Hicks, made clear the public interest rationale by citing to the seminal English authority on qualified privilege, Toogood v. Spyering. Toogood had held that the defense of qualified privilege was founded on the public interest, namely the "common convenience and welfare of society." In keeping with that public interest rationale, Lawson described the defense as applying "where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or even that of another, called upon him to perform."

This public interest rationale for qualified privilege was generally endorsed in Alabama defamation cases before Sullivan. A defense of qualified privilege founded on the public interest has

478. See supra note 458.
479. See Lawson v. Hicks, 38 Ala. 279, 285 (1862).
480. See Toogood, 1 C. M. & R. at 193 (per Parke, B.).
481. Lawson, 38 Ala. at 285
482. See, e.g., Kenney v. Gurley, 95 So. 34, 37 (Ala. 1923) (citing the "standard definition . . . of matter qualifiedly, conditionally privileged, given in Lawson v. Hicks"); Smith Bros. & Co. v. Agee & Co., 59 So. 647, 649 (Ala. 1912); Ferdon v. Dickens, 49 So. 888, 894 (Ala. 1909) (noting the breadth of the defense of qualified privilege, describing it as "quite large").
no absolute limits, as the English case law has made clear. Thus, it was open to the Sullivan Court to expand it to cover the New York Times advertisement on the basis of the Madisonian rationale. This would have represented an expansion of the common law, but, as W. Wat Hopkins has pointed out, prior to Sullivan some other states had expanded their common law doctrine of qualified privilege to apply to political discussion by the mass media.

Thus, the Sullivan Court could have taken the same approach that was later taken by the Commonwealth Cases and expanded the existing common law defense of qualified privilege. Why should it have preferred this course of action? There are two reasons, one theoretical and one practical.

The theoretical reason is this: Where the common law is capable of adequately giving effect to constitutional rights, it should always be preferred over the creation of new constitutional defenses like Sullivan's "actual malice" test. Categorical rules, such as "actual malice," are too black and white to do adequate justice in the individual case. This is especially so in the area of libel, which requires a delicate balancing of two important rights: the right of free expression against the right of protection to reputation. The "actual malice" rule does not allow the circumstances of an individual publication to be adequately taken into account. Moreover, categorical rules create problems in hard cases; courts are often forced to create exceptions or extensions of categorical rules for such cases, and these tend to distort the original categorical rule. The result is an overly complex and confusing doctrine.

The practical problems with Sullivan's categorical "actual malice" rule are discussed in the next section, which traces the extension and development of the categorical rule laid down in Sullivan to show how the practical result for U.S. libel law has mirrored the theoretical problems inherent in such categorical rules.

VII. CONTINUING DOWN THE WRONG ROAD: SULLIVAN'S PROGENY

U.S. libel jurisprudence over the more than three decades since Sullivan makes clear that Sullivan's establishment of a separate constitutional "actual malice" defense was an unfortunate legal development. Sullivan's progeny compounded the difficulties inherent

483. See supra note 94.
484. See Hopkins, supra note 457, at 79 (noting that Michigan, New Jersey, and New York expanded their common law defenses in this way and that Kentucky expanded it to discussions about political candidates, though the Kentucky case expanding the law was not a case involving a media publication).
in a categorical constitutional rule by extending the “actual malice” rule far beyond its original circumstances and by distorting its underlying rationale to fit new fact situations. The Sullivan rule was initially limited to one situation: false and defamatory criticism of the conduct of public officials. Over the next thirty-five years, a series of often badly divided U.S. Supreme Court decisions extended the Sullivan rule in four major ways. First, they extended the “actual malice” rule beyond “public official” plaintiffs to “public figure” plaintiffs. Second, they constructed a complex, if not byzantine, set of rules relating to the recoverability of damages in defamation actions, hinging on the liability rules. Third, they built even more rules governing procedure and evidence in defamation actions. Finally, they extended the “actual malice” rule to causes of action beyond libel. The results have been disastrous: overly rigid and confusing doctrine, jury bewilderment, a high rate of appellate reversals resulting in escalating libel litigation costs, and widespread dissatisfaction with the state of the law.

A. Extension to “Public Figures”

The first extension of the Sullivan “actual malice” rule was to “public figures” other than public officials, in the case of Curtis Publishing Co. v. Butts. This extension is now well established, despite the fact that the Curtis Court was very divided as to the proper standard of liability for public figures. Only three members of the Court in Curtis unreservedly endorsed the Sullivan standard. Two other members, Justices Black and Douglas, held absolutist views on the First Amendment and advocated adoption of “the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.”

Led by Justice Harlan, four other justices in Curtis advocated a rea-
sonableness standard, namely “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers.”

In *Rosenbloom v. Metromedia*, a 1971 decision so fractured that it lacked any opinion joined by more than three justices, a plurality opinion authored by Justice Brennan advocated extending the *Sullivan* constitutional privilege even further. Brennan’s view in *Rosenbloom* was that the *Sullivan* test applied to all matters of public interest or concern, regardless of the status of the plaintiff as a public or private figure. The philosophical basis for Brennan’s *Rosenbloom* opinion was an extended view of the requirements of Madisonian democracy going beyond the seditious libel rationale of his earlier opinion in *Sullivan*. In *Rosenbloom*, Justice Brennan stated that an effective democracy required free and open public debate on public issues as well as the actions of public officials. This approach shifted the focus from the nature of the plaintiff to the nature of the defamatory falsehood.

Justice Brennan’s plurality opinion in *Rosenbloom* can be viewed as the high water mark of the Madisonian application of the *Sullivan* rule. Three years later in its decision in *Gertz v. Robert Welch*, another badly divided Court stopped this expansion in its tracks, retreating to a focus on the status of the plaintiff. In *Gertz*, a shaky 5-4 majority held that where the plaintiff was not a public official or public figure, he did not have to establish *Sullivan* “actual malice” wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation.” (internal citations omitted)).

490. *Id.* at 155 (plurality opinion of Harlan, J., joined by Clark, Stewart, and Fortas, J.).


492. *See id.* at 43-44 (plurality opinion of Brennan, J.) (stating: “We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”).

493. *See id.*

494. *Id.* at 41 (plurality opinion of Brennan, J.) (stating that “[s]elf-governance in the United States presupposes far more than knowledge and debate about the strictly official actions of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense.”).

to recover damages for libel. States could determine their own standards of liability for such cases, provided that they did not impose standards of strict liability. Thus, negligence was the minimum standard of liability for non-public officials or figures. The *Gertz* majority, however, expanded the category of public figure to include what has come to be known as a “limited purpose public figure.” This was defined as a person who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”

In *Gertz*, the majority had clearly moved away from the seditious libel rationale of Brennan’s majority opinion in *Sullivan*. Rather, the majority’s rationale was a balancing of the competing interests of the press in being protected from the “chilling” effect of libel actions and of the states in protecting the reputations of private individuals. Fearful of too much uncertainty in the law, the *Gertz* majority rejected balancing on a case-by-case basis but justified different treatment of public and private figures on the basis that public figures generally assume the risk of being libeled and generally have a far greater ability to resort to self-help.

Although *Gertz* limited the application of the *Sullivan* “actual malice” standard to public figures or public officials, it represented an expansion of the *Sullivan* principle of fault-based liability. After *Gertz* it appeared that all libel actions were governed by categorical liability rules. Thus the categorical reach of the *Sullivan* rule was expanded; however, U.S. Supreme Court jurisprudence after *Gertz* has left some issues relating to liability unresolved, resulting in some doctrinal confusion on the issue of liability in libel actions.

One open issue is whether the First Amendment protects nonmedia defendants to the same extent as media defendants. By discussing only media defendants, *Gertz* hinted at a possible differ-

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496. See id. at 343 (majority opinion of Powell, J.). Justice Blackmun concurred to “have a clearly defined majority position that eliminates the unsureness engendered by the *Rosenbloom* diversity.” Id. Chief Justice Burger and Justices Brennan, Douglas, and White dissented. Id. at 354-55 (Burger, C.J., dissenting), 355-60 (Douglas, J., dissenting), 361-69 (Brennan, J., dissenting), 369-404 (White, J., dissenting).

497. See id. at 347-48.

498. Id. at 351.

499. For a discussion of the seditious libel rationale in *Sullivan*, see supra, notes 471-475 and accompanying text. The approach of the *Gertz* majority was foreshadowed by the dissenting opinions of Justice Harlan and Justice Marshall in *Rosenbloom*. See *Rosenbloom*, 403 U.S. at 63 (Harlan, J., dissenting), 78-79 (Marshall, J., dissenting).

500. See *Gertz*, 418 U.S. at 340-41.

501. See id. at 343.

502. See id. at 345.
ence in treatment for nonmedia defendants, but at least five justices later directly rejected this approach in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, and the other four justices in that case appear to have implicitly rejected it. In two cases decided after *Dun & Bradstreet*, however, the Court expressly stated that this issue remains unresolved.

Another open issue is whether *Gertz* applies to libel actions brought by public figures regarding speech that is not of public concern. In *Dun & Bradstreet* the plurality had suggested that *Sullivan* “actual malice” may be inapplicable to speech concerning purely private matters. Limiting *Gertz* in this way would be a step closer to the Madisonian rationale for protecting some false and defamatory speech in the interest of free debate on public issues. U.S. Supreme Court jurisprudence following *Gertz* has also placed some limitations on the recoverability of presumed and punitive damages in libel actions. This will be considered in the following subsection.

### B. Expansion to Damages Rules

As well as refining the *Sullivan* liability rules, *Gertz* also moved *Sullivan* beyond liability rules alone, beginning the development of a complex set of rules governing recoverability of damages in libel actions. These new rules added to the reach and complexity of

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503. See id.
505. See id. at 764 (Burger, C.J., concurring), 759 (plurality opinion of Powell, J., joined by O'Connor and Rehnquist, J.J.).
507. See 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 3:7 (2d ed. 1999).
508. See *Dun & Bradstreet*, 472 U.S. at 759 (per Powell, J., stating: “Speech on matters of purely private concern is of less First Amendment concern”), 773-74 (per White, J., stating: “Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this [i.e. involving a matter of private concern]”). *Dun & Bradstreet* did not directly address the issue of liability; it ruled only on the question of the availability of presumed and punitive damages where the plaintiff was a private figure and the speech was not of public concern. *Id.* at 757.
constitutional, categorical rules. The Gertz majority held that a private plaintiff could not recover punitive or presumed damages for libel unless he or she could prove "actual malice" as defined in Sullivan, that is, "knowledge of falsity or reckless disregard for the truth." The rationale underlying this restriction on damages rules was the unnecessary and excessive chilling effect of such damages.

An additional complication was introduced in 1985 by a highly divided Court in the case of Dun & Bradstreet. In his plurality opinion in this case, Justice Powell breathed new life into the Rosenbloom rationale by finding that the Gertz rule, which outlawed punitive and presumed libel damages unless Sullivan "actual malice" could be shown, was inapplicable to speech that was not of public concern.

C. Expansion/Extension of Procedural and Evidential Rules

After Sullivan, the Court added yet another level of doctrinal complexity by constructing still more constitutional rules governing procedure and evidence in libel actions. The effect of these rules is to shift the burden of proving truth to plaintiffs, limit applications for summary judgment, and permit de novo appellate review in libel actions.

1. Shifting the Burden of Proving Truth to Plaintiff

At common law the defendant had the burden of proving that the defamatory words were true. After Sullivan, the U.S. Supreme Court has shifted the burden of proving truth to plain-

509. Gertz, 418 U.S. at 349.
510. See id. at 349-50. The majority justification for this restriction on the recoverability of presumed damages was that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." Id. at 349. The justification for limiting the recoverability of punitive damages was that "[l]ike the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship. . . ." Id. at 350. In dissent, White J. termed this "judicial overkill." Id. at 397.
511. See Dun & Bradstreet, 472 U.S. at 749 (Powell, J. authored a plurality opinion, joined by Rehnquist, J., and O'Connor, J. There were separate concurrences by Burger, C.J. and White, J. Brennan, J.'s dissenting opinion was joined by Marshall, Blackmun, and Stevens, J.J.).
512. Id. at 762-63 (per Powell, J., joined by Rehnquist and O'Connor, J.J.) (advocating permitting recovery of presumed and punitive damages for defamation without a showing of actual malice where the speech "concern[ed] no public issue").
513. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) ("the common law's rule on falsity [is] that the defendant must bear the burden of proving truth").
tiffs, at least where they are public figures or public officials.\textsuperscript{514} The allocation of the burden of proof where the plaintiff was a private figure remained unresolved until the Court’s 1986 decision in \textit{Philadelphia Newspapers, Inc. v. Hepps}.\textsuperscript{515} Although the Court was badly divided on this issue, five justices agreed that such a plaintiff must prove falsity.\textsuperscript{516}

2. Limiting Applications for Summary Judgment

As mentioned above, Brennan’s opinion in \textit{Sullivan} itself established a higher evidentiary standard (“clear and convincing evidence”) for establishing “actual malice” than the normal civil preponderance of the evidence standard.\textsuperscript{517} In 1986 a divided U.S. Supreme Court applied this higher standard to summary judgment motions in libel actions in \textit{Anderson v. Liberty Lobby}.\textsuperscript{518} In \textit{Liberty Lobby}, Justice White, writing for a six-justice majority, argued that, to successfully respond to a motion for summary judgment, a libel plaintiff must do more than simply “present evidence from which a jury might return a verdict in his favor.”\textsuperscript{519} Rather, a plaintiff must establish that a jury, applying the higher evidentiary standard required by \textit{Sullivan}, could reasonably find for the plaintiff.\textsuperscript{520} It remains unclear after \textit{Liberty Lobby} whether this higher evidentiary standard applies to other elements of a libel claim beyond “actual malice.”\textsuperscript{521}

3. Standard of Appellate Review

In \textit{Sullivan}, Justice Brennan independently reviewed the record to determine whether the evidence of “actual malice” met the constitutional requirements. Brennan claimed that such \textit{de novo} review was necessary due to “considerations of effective judicial adminis-
Despite this language, however, it seems that Brennan's true concern was with outcomes. Brennan feared that, in the tense civil rights climate of the time, the Alabama state courts were so biased that they would uphold the ruling against the *New York Times* by simply finding evidence of "actual malice." To prevent this, Brennan had to independently determine that there was no evidence of "actual malice." Although such an independent examination of the record is a highly unusual procedure for the U.S. Supreme Court, in 1984 the Court reiterated the constitutionality of this de novo review for the question of "actual malice."

4. Extension to Other Causes of Action

The U.S. Supreme Court has extended the *Sullivan* "actual malice" rule to other causes of action beyond defamation. In *Garrison v. Louisiana*, the Court held that the "actual malice" rule also applies to criminal libel. The rule has also been held applicable to actions for false light invasion of privacy, in *Time, Inc. v. Hill*. Additionally, in *Hustler Magazine, Inc. v. Falwell*, the Court extended the rule to a cause of action for intentional infliction of emotional distress.

E. Sullivan’s Legacy: An Unsatisfactory State of Affairs

As set out in the preceding section, *Sullivan*’s progeny has resulted in a highly complex web of libel rules in the United States. Both liability and the recoverability of various types of damages depend on the status of the plaintiff (i.e., public figure or private figure). Recoverability of damages depends, for private figures at least, on the nature of the statement (i.e., public concern or private concern). The extent to which the nature of the statement may be relevant to cases involving public figures is uncertain. Professor Sheldon Halpern has aptly described the law as "rococo... in many ways similar to the ancient world of Ptolemaic epicycles: it

522. Sullivan, 376 U.S. at 284.
524. *Id.*
525. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1985) (*"Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."*) (majority opinion of Stevens, J.).
has so many complexities and legal curlicues that it too is intelligible, if at all, only to a learned few who, with more candor than their priestly predecessors, confess largely to inability to predict the future."\textsuperscript{529} Although Halpern penned this comment over a decade ago, U.S. libel law has not seen any substantial simplification since that time.

Criticism of the current state of libel law is rife. Some commentators contend that the balance of U.S. libel law is tipped too far in favor of free expression and against the protection of reputation.\textsuperscript{530} Others believe that \textit{Sullivan} has an excessively "chilling" effect on speech; they charge the \textit{Sullivan} line of cases with causing too much libel litigation, skyrocketing libel damages, soaring and excessive costs in libel actions, and jury confusion as to the "actual malice" fault standard.\textsuperscript{531} Still other commentators complain that \textit{Sullivan} and its progeny have made U.S. libel law too complex and confusing.\textsuperscript{532}

\begin{footnotes}
\item[531] See, e.g, \textit{Lewis}, supra note 440, at 603 (advocating absolute protection for criticism of the "public actions of public men" and commenting that "[i]t is a time of growing libel litigation, of enormous judgments, and enormous costs. The press and its lawyers are deeply worried; the protection that they thought was won for free expression in \textit{New York Times v. Sullivan} seems to them to be crumbling. . . . [T]his time even someone as skeptical of press claims as I must admit that there is something to the concern."). \textit{Lewis} also charges that juries are confused by the "actual malice" standard. \textit{Id.} at 612-14. The literature echoing or elaborating on \textit{Lewis}’ criticisms is enormous; this footnote does not purport to provide a full list. See, e.g, David Boies, \textit{The Chilling Effect of Libel Defamation Cases: The Problem and Possible Solution}, 39 St. Louis U. L.J. 1207, 1208 (1995) (arguing that defamation actions are overly expensive, wrongly deter some cases that should be brought, and have an excessive "chilling" effect on the media); Edward Costantini & Mary Paul Nash, \textit{SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response}, 7 J.L. & Pol. 417 (1990); Susan M. Gilles, \textit{Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation}, 58 Ohio St. L.J. 1753, 1755 (1998) (focusing on procedural flaws in post-\textit{Sullivan} libel litigation leading, \textit{inter alia}, to excessive costs and delays); Irving R. Kaufman, \textit{Press, Privacy and Malice: Reflections on New York Times v. Sullivan}, 56 N.Y. St. B.J. 10 (1984) (criticizing the "actual malice" standard as confused and confusing, and advocating the creation of alternative remedies in libel actions); Pierre N. Leval, \textit{The No-Money, No Fault Libel Suit: Keeping Sullivan in Its Proper Place}, 101 Harv. L. Rev. 1287 (1988) (criticizing \textit{Sullivan} as leading to excessive costs and other burdens on defendants and proposing a non-damages libel suit, not subject to \textit{Sullivan’s} actual malice requirement).
\item[532] See, e.g., Halpern, supra note 529, at 310-15, 325-24 (advocating simplification of the law and adoption of a negligence fault standard for defamation actions).
\end{footnotes}
This Article does not take on the difficult question of whether all of these criticisms are justified. The current state of the empirical evidence is insufficient to draw solid conclusions on some of these issues, especially as to whether Sullivan has caused libel actions to proliferate,\textsuperscript{533} libel damages awards to skyrocket,\textsuperscript{534} or made it virtually impossible for plaintiffs to win libel actions against media defendants.\textsuperscript{535} It is clear nonetheless that the current U.S. law of libel is deeply flawed and that these flaws are largely attributable to

\textsuperscript{533} A Libel Defense Resource Center (LDRC) study found 225 reported media libel decisions for the period 1954-1964, 55 of which went to trial. Libel Defense Resource Center, Historical Trends in Media Libel Damage Awards 1 (1986) [hereafter "Historical Trends"]. These average 5.5 trials per year. For the period 1980-1999, the Libel Defense Resource Center reported 438 media libel and related trials, averaging 21.9 trials per year. See Libel Defense Resource Center, 2000 Report on Trials and Damages 14 (2000) [hereafter "2000 Report"]. A recent trend appears to be that the number of trials may be falling; the number of trials reported for the 1990s, 177 total, is much lower than the 261 for the 1980s, or nearly ten fewer trials per year during the 1990s. Id. But even this lower average of 17.7 trials per year for the 1990s is significantly higher than the average number of trials per year for the period just prior to Sullivan of 1954-1964. It is not clear whether the Libel Defense Resource Center reports cover the same universe of cases, since the first report only covers "reported" trials and the second seems to cover trials "reported" by the LDRC. Even assuming, however, that the universe is the same, it is also not clear whether this rise in the number of trials is attributable to Sullivan rather than some general increase in tort litigation over this period.

\textsuperscript{534} Studies by the LDRC show that libel damage awards have risen considerably since Sullivan. Compare Historical Trends, supra note 533, at 2 (showing that the average pre-Sullivan award in media libel trials for the period 1954-1964 was $127,434 and if two disproportionately high awards were excluded, $49,513) with 2000 Report, supra note 533, at 31 (showing that the average damages award at trial for libel and related cases brought against media defendants between 1980 and 1999 was $2,962,525, and even if one disproportionately high award was excluded, $2,154,594). Even adjusting for inflation, this is an enormous increase; however, the rise itself does not establish that it was attributable to Sullivan and not just part of some general rise in tort damages over this period.

\textsuperscript{535} The LDRC study for the pre-Sullivan period 1954-1964 shows that plaintiffs won damages in 40 of 55 reported libel trials against media defendants, or 73% of the time, so the defendant win rate was 27%. See Historical Trends, supra note 533, at 1. For the period 1980-2000, the LDRC studies indicate that defendants' win rates averaged 36.9%, rising slightly for the 1990s only to 39.1%. See 2000 Report, supra note 533, at 15. This does not include summary judgment motions; if those are taken into account, success rates are much higher. See LDRC Bulletin, Summary Judgment Update Part II, Summary Judgment Motions in Libel and Related Cases Brought Against Media Defendants 1996-1999 13 (1995) (showing that between 1980 and 1994, defendants won summary judgment in 82.2% of media libel and related cases and obtained partial awards of summary judgment in another 3.5% of such cases). As Susan Gilles has pointed out, this success rate may be inflated because the LDRC studies reported cases, and many summary judgment motions never get reported. Gilles, supra note 531, at 1774, 1775 n. 74. Also, as Gilles also notes, the absence of comparative data on summary judgment in other tort cases means that it is not clear whether this is just part of some general trend or whether it is really attributable to Sullivan.
what Randall Bezanson has called a “confusing maze of categorical
rules.”536

First, as Professor Halpern has charged, the actual malice test, as
extended, is overly complex; it confuses juries and leads to a signifi-
cant error rate at trial. The high rate of appellate reversals in libel
actions has an unduly escalating effect on the costs of libel litiga-
tion. Second, the actual malice rule, as extended, has become
inconsistent with its original Madisonian rationale; it is overly rigid
and ill equipped to do justice in particular cases. Thirdly, the
actual malice rule has resulted in doctrinal confusion. Reform is
clearly needed.

1. Complexity and Jury Confusion

Many lawyers find the “maze of categorial rules” confusing, but it
appears to be even more baffling to juries. In Stephen Brill’s
famous study of the jury in the Tavoulareas libel action, Brill found
that the jury was seriously confused about the actual malice stan-
dard.537 Moreover, as Susan Gilles has pointed out, Libel Defense
Resource Center (LDRC) studies of libel and related actions
against media defendants between 1984 and 1994 show a very high
appellate reversal rate. In trials where actual malice was at issue,
the reversal rate of judgments for plaintiff was almost 70%.538 This
indicates that something is going wrong at libel trials where actual
malice is at issue. What seems most likely in light of Brill’s study is
that the juries are confused by the complexities of Sullivan’s cate-
gorical, constitutional rules. This premise is supported by the
LDRC’s finding that appellate reversal rates for libel and related
actions not involving “actual malice” are far lower, around 40%.539

2. Lack of Consistency With the Madisonian Rationale and Ill
Equipped to Do Justice in Particular Cases

Sullivan’s progeny has departed from the Madisonian rationale
on which Justice Brennan’s majority judgment was explicitly based.
If the purpose of constitutionalizing the law of libel is to ensure a
well-informed electorate by ensuring adequate “breathing space”
for “debate on public issues,”540 the expansion of Sullivan’s reach

536. RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 200
537. See Stephen Brill, Inside the Jury Room at the Washington Post Libel Trial, AM. LAW.,
Nov. 1982, at 1, 94.
538. Gilles, supra note 531, at 1781-82.
539. Id.
does not seem consistent with this goal. Moreover, the overly categorical "actual malice" rule is ill-equipped to do justice in particular cases.

For example, comedienne Carol Burnett, indisputably a public figure, had to prove "actual malice" in a libel action brought against the tabloid the National Enquirer over an article accusing Burnett of drunken behavior in a restaurant. As Anthony Lewis has noted, it is hard to see how a categorical legal rule giving tabloid commentary on purely private conduct the protection of "actual malice" is justified under the rationale that it promotes the free ability to criticize official conduct.

Some may object because Burnett in fact won her case; however, that does not expunge the law's failing. It does not seem consistent with the Madisonian rationale for the law to equate a tabloid publication like the one about Burnett, which could not be viewed as contributing to a debate on public issues that would help electors rationally exercise their voting responsibilities, with a publication like the New York Times advertisement.

Others may argue that Dun & Bradstreet indicates that the First Amendment protects speech of private concern less than speech of public concern. Even if there are suggestions in Dun & Bradstreet that the type of speech at issue in Burnett's case should be afforded less First Amendment protection than political speech, there is no definitive U.S. Supreme Court authority that says this is so. Thus, not only is the current state of U.S. libel law apparently inconsistent with the Madisonian rationale, but there is also a serious lack of doctrinal clarity as to the limits of the "actual malice" rule.

3. Doctrinal Confusion

To ensure sufficient protection for reputation where speech is of purely private concern, the law must carve out exceptions to the actual malice rule. Dun & Bradstreet appears to represent a step in that direction, although that case speaks definitively only on the issue of the recoverability of damages in cases concerning speech of purely private concern and not to liability. It is clear from Dun & Bradstreet that it is difficult to carve out exceptions to an absolute rule; where Dun & Bradstreet attempted to do so concerning the issue of damages, it ended up only creating a serious lack of doctrinal clarity with regard to the issue of liability. This shows how the

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541. See Lewis, supra note 440, at 197.
542. Id.; see also Sullivan, 376 U.S. at 255.
theory discussed at the end of the previous section has come to life in practice. Categorical rules, such as "actual malice," ironically tend to result in a lack of doctrinal clarity while attempting to impose absolute and clear constitutional rules.

VIII. Conclusion: Learning from the Comparison

It appears that all of the problems examined above (jury confusion, philosophical inconsistency, inflexibility, and doctrinal confusion) are the unfortunate result of Sullivan's creation of a separate constitutional defense, the "actual malice" rule. Even assuming that the Sullivan Court could not predict the outcome of creating a rigid rule based on forcing plaintiffs into constitutional categories, it was clearly misguided to ignore the possibilities inherent in years of common law, which contained a flexible qualified defense based on the public interest. Indeed, creating rigid constitutional categories that did not permit the court to fully analyze the circumstances of the publication plainly seems contrary to the established rationale for granting privilege to certain defamatory facts: the common convenience and welfare of society. The Sullivan Court could have established a better balance between the competing rights of free expression and protection of reputation by extending the existing common law defense of qualified privilege instead of creating a new freestanding constitutional defense.

Although some may criticize this approach for introducing uncertainty into the law and for giving judges too much power, the gain in flexibility seems to offset that price. Ultimately, the question of what defamatory publications should be permitted despite their harm to reputation is a delicate balancing test, based on the public interest of a society. The Commonwealth Cases show us three different possible models of reform within a more flexible common law framework, which have all been developed to serve the public interest of a particular modern society. The public interest in the United States may merit a slightly different extension to the common law, but the general Commonwealth approach of extending common law better permits proper balancing of important right than the rigid constitutional model developed by Sullivan and its progeny. The Commonwealth approach is thus instructive as a model for reform of the law of libel in the United States.