IS DEFAMATION LAW OUTDATED? HOW JUSTICE POWELL PREDICTED THE CURRENT CRITICISM

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ABSTRACT

Defamation law has seen no shortage of high-dollar verdicts in recent years, but public attacks from influential public officials, including sitting U.S. Supreme Court justices, on foundational speech protections are just as concerning. That said, they aren't necessarily all that novel. Justice Lewis Powell's personal papers reveal his earlier desire to shift the balance of protection, which had steered heavily toward free speech back in favor of individual reputation. As we've found, many of today's arguments in favor of abandoning the *New York Times* actual malice rule likely draw their inspiration from Justice Powell's desire to fundamentally alter defamation law by re-elevating the state's interest in protecting individuals' reputations—which he articulated in his *Gertz v. Welch* and *Dun & Bradstreet v. Greenmoss Builders* opinions decades ago. Justice Neil Gorsuch's recent criticisms of defamation jurisprudence run parallel to Justice Powell's, and they offer free speech proponents an important opportunity to address these concerns.

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INTRODUCTION

> After observing my colleagues' efforts to stretch the actual malice rule like a rubber band, I am prompted to urge the overruling of *New York Times v. Sullivan*. Justice Thomas has already persuasively demonstrated that *New York Times* was a policy-driven decision masquerading as constitutional law. The holding has no relation to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication.[1]

Prominent jurists and government officials have begun to publicly attack powerful precedent that shields the media from frivolous defamation suits. But it is not just about public figures who seek millions of dollars in damages.[2] Undoubtedly, these high-profile lawsuits produce intensified public reactions and draw scorn from those within the industry. Often, journalists see these lawsuits as another attack leveled at the press by those who decry "fake news" rather than as a legitimate form of redress. When the plaintiff seeking the damages is a sitting member of Congress, these concerns become easy to understand.[3] Public attacks on *New York Times v. Sullivan*[4] represent a threat to the very foundation of the First Amendment. It is *Sullivan*'s actual malice standard that permits the press to cover the government and its officials "without fear or favor."[5] As a result, recent calls to overturn a half-century of precedent from some of the most

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[1] Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting) (citation omitted).

[2] *See, e.g.*, Ashley Cullins, *Johnny Depp's Defamation Suit Against Amber Heard Survives Demurrer*, HOLLYWOOD REP. (Mar. 27, 2020, 3:09 PM), https://www.hollywoodreporter.com/business/business-news/johnny-depps-defamation-suit-amber-heard-survives-demurrer-1287171/; *see also* Oliver Darcy, *CNN Settles Lawsuit with Nick Sandmann Stemming from Viral Video Controversy*, CNN BUS. (Jan. 7, 2020, 6:06 PM), https://www.cnn.com/2020/01/07/media/cnn-settles-lawsuit-viral-video/index.html.

[3] *See* Larry Neumeister, *Judge Rejects Rep. Devin Nunes Defamation Suit Against CNN*, AP NEWS (Feb. 19, 2021), https://apnews.com/article/joe-biden-new-york-new-york-city-lawsuits-manhattan-59aefbe9100fcf703335a03f9ccf5d06. Rep. Devin Nunes has filed nine defamation suits since 2019. Three have been dismissed and two voluntarily dropped. Kate Irby, *Devin Nunes Sued Twitter and an Internet Cow 2 Years Ago. Where do His 9 Lawsuits Stand Now?*, FRESNO BEE (Feb. 26, 2021, 8:47 AM), https://www.fresnobee.com/news/california/article249480315.html.

[4] 376 U.S. 254 (1964).

[5] David W. Dunlap, *1896 | 'Without Fear or Favor,'* N.Y. TIMES (Aug. 14, 2015), https://www.nytimes.com/2015/09/12/insider/1896-without-fear-or-favor.html.

influential public officials in the country have the media defense bar and other free speech advocates sounding alarm bells. What started as the grumblings of the late Supreme Court Justice Antonin Scalia[6] has now gained momentum with public support from former president Donald J. Trump,[7] Justice Clarence Thomas,[8] D.C. Circuit Senior Judge Laurence Silberman,[9] and most recently Justice Neil Gorsuch.[10] In a March 2021 dissent, Judge Silberman called *Sullivan*'s actual malice standard "profoundly erroneous," urging that it be overruled.[11] Silberman pointed to Justice Thomas' 2019 dissent in a denial of *certiorari*: "If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we."[12] The lawyers for Rep. Devin Nunes echoed these sentiments in their attempt to make the press pay, referring to the actual malice rule as "obsolete and unworkable"[13] in a court filing against the *Washington Post*:

> The actual malice rule . . . was judicially-imposed to solve problems peculiar to a bygone era, long-before the Internet and social media took hold of American society. Its justifications rest on incorrect and outdated beliefs about assumed risk and access to methods of mass communication. Not surprisingly, the rule's effects have

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[6] Justice Scalia believed "the Framers would have been appalled" at the decision in *New York Times v. Sullivan*. David G. Savage, *Scalia Criticizes Historic Supreme Court Ruling on Freedom of the Press*, L.A. TIMES (Apr. 18, 2014, 12:00 AM), https://www.latimes.com/nation/la-xpm-2014-apr-18-la-na-nn-scalia-ginsburg-supreme-court-libel-20140418-story.html.

[7] Trump has referred to the protections provided by *Sullivan* as a "sham and a disgrace [that] do not represent American values and American fairness." Brian Naylor, *Trump Again Blasts Libel Laws, Calling Them 'A Sham,'* NPR (Jan 10, 2018, 2:45 PM), https://www.npr.org/2018/01/10/577100238/trump-again-blasts-libel-laws-calling-them-as-a-sham. He has even directly called for Congress to intervene in a tweet. Donald J. Trump (@realDonaldTrump), TWITTER (Sep. 5, 2018, 7:33:18 AM), https://projects.propublica.org/politwoops/user/realDonaldTrump ("Don't know why Washington politicians don't change libel laws?").

[8] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari) ("*New York Times* and the court's decisions extending it were policy-driven decisions masquerading as constitutional law.").

[9] Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 243 (D.C. Cir. 2021) (Silberman, J., dissenting).

[10] Berisha v. Lawson, 141 S. Ct. 2424, 2428–29 (2021) (Gorsuch, J., dissenting in denial of certiorari).

[11] *Tah*, 991 F.3d at 251.

[12] *McKee*, 139 S. Ct. at 676. Four months after Judge Silberman's dissent and echoing of Justice Thomas's criticisms, Thomas would then cite Silberman's statements in another attack on the *Sullivan* doctrine. *See Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting in denial of certiorari) (citing *Tah*, 991 F. 3d at 251).

[13] Memorandum in Opposition to Defendant's Motion to Dismiss at 23, Nunes v. WP Co., 513 F. Supp. 3d 1 (D.D.C. 2020) (No. 20-cv-01403).

> transgressed far afield from its original intended purpose . . . The burden on public figures and government from the wild and unchecked proliferation of defamation on social media and the Internet justifies a thoughtful re-examination of *New York Times v. Sullivan*.[14]

The latest to publicly opine on the subject, Justice Gorsuch has become the second sitting justice to advocate for reconsideration of the doctrine. To Gorsuch, what once "tolerate[d] the occasional falsehood to ensure robust reporting . . . has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable."[15] Importantly, these scathing attacks on *Sullivan* and the appeals for a return to the common law tradition are not particularly novel or surprising. But when coupled with a period of seemingly endless technological innovation and the decline of the institutional press, the current attacks calling modern defamation law into question are especially troubling.

For more than three decades, Justice Lewis F. Powell's take on the outer limits of protection for media and non-media defendants has defined defamation jurisprudence—offering up a buffer that allowed members of the press and citizens alike to engage in critical speech about the government and matters of public concern. Perhaps because Powell spent only fifteen years on the Court, his opinions—particularly in *Gertz v. Welch*[16] and *Dun & Bradstreet v. Greenmoss Builders*[17]—rarely receive significant discussion despite their influence. Powell's legal maneuvering shifted the tide of defamation law away from *Rosenbloom v. Metromedia*'s[18] near-absolute press protections and towards a stronger state interest in protecting individual reputations. Given the current cries for reform, this legal maneuvering requires greater attention.

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[14] *Id.* at 22. The lawyers went on to say that "[p]ublic figure defamation plaintiffs should not be subjected to the unwarranted burden of the actual malice rule," *id.* at 23, and that "[t]he continued use of the actual malice rule ignores the existing imbalance between the right to an unimpaired reputation and the need to prevent government suppression of speech." *Id.* at 23–24.
[15] *Berisha*, 141 S. Ct. at 2429.
[16] 418 U.S. 323 (1974).
[17] 472 U.S. 749 (1985) (plurality opinion).
[18] 403 U.S. 29 (1971) (plurality opinion).

The recent concerns run parallel to private concerns Justice Powell shared with his colleagues. An analysis of the oft-overlooked opinions, in conjunction with Justice Powell's personal papers and correspondence, reveals a trail of legal reasoning that foreshadowed today's criticisms, possibly lending credence to jurists' efforts to overturn *Sullivan*. To be sure, those defending *Sullivan* and its progeny cannot afford to dismiss Justice Powell's concerns without serious examination. In this article, we analyze papers from the Powell Archives including correspondence, draft opinions and public decisions alongside current published criticisms of defamation jurisprudence. We conclude with a comparison of the concerns expressed by Justice Powell and Justice Gorsuch, who despite having similar views would take varying approaches to address them.

I. POWELL'S PAPERS: THE STORY BEHIND HIS DEFAMATION DECISIONS

Justice Powell's archives paint a particularly interesting picture of a largely overlooked jurist who served on the Court during an important era.[19] Housed in digital form at Washington and Lee University, they shine a light on many landmark decisions that occurred during Powell's tenure,[20] including *Roe v. Wade*,[21] *Regents of the University of California v. Bakke*,[22] *First National Bank of Boston v. Bellotti*,[23] and *Bowers v. Hardwick.*[24] Despite Justice Powell's seemingly inconspicuous role on the Court, he joined the majority in all these cases, authoring the Court's opinions in *Bakke* and *Bellotti*. Long viewed as the crucial "swing" vote, Justice Powell's papers provide real insight into myriad social issues the Court tackled during his tenure. John Jacob, the archivist for the Washington & Lee University Law Library's Powell Archives, notes:

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[19] *See* John N. Jacob, *The Lewis F. Powell, Jr. Archives and the Contemporary Researcher*, 49 WASH. & LEE L. REV. 3, 4 (1992) ("[W]hile the Powell Papers have found a home in a law school, legal scholars and historians will not be the only users and beneficiaries of this collection. They may, in fact, not even constitute a majority of the researchers.").

[20] The Powell Archives do not stop at maintaining only Justice Powell's papers for these cases, either. Their archivist notes that, in fact, "most of those writing on the Court from Powell's era must pass through this archive, either physically or virtually." John N. Jacob, *The Lewis F. Powell Jr. Archives at Washington and Lee University School of Law*, 17 TRENDS L. LIBR. MGMT. & TECH. 7, 11 (2007).

[21] 410 U.S. 113 (1973).

[22] 438 U.S. 265 (1978).

[23] 435 U.S. 765 (1978).

[24] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

> [N]o one would deny the evident value of these papers to anyone researching Justice Powell's career, the Supreme Court during his tenure generally, or specific decisions from that time. Other obvious topics of research include the recent history of the American Bar Association; massive resistance to school integration and the desegregation of the Richmond public schools; and the legal services movement of the 1960's. Other subjects that will, no doubt, draw researchers include: Military intelligence and cryptanalysis during World War II; the Richmond Charter Commission; the Virginia Commission on Constitutional Revision; the American College of Trial Lawyers and the American Bar Foundation; the President's Commission on Law Enforcement and Administration of Justice; the President's Blue Ribbon Panel to Study the Defense Department; and the American Chamber of Commerce and the 'attack on American free enterprise system' memo written by Powell in 1971. The list could go on.[25]

When looking at Justice Powell's tenure on the Court, his reach was undeniable. The Justice wrote 500 opinions, more than half of them speaking for the Court.[26] Discounting the two years he lost to illness, Justice Powell claimed to have been in the top three in number of opinions written.[27] As one of Justice Powell's former law partners pointed out, it "is difficult to predict" the long-term impact of any particular justice, but swing voters like Justice Powell and his successor Justice Anthony Kennedy have the potential to significantly influence the Court long after they leave the bench:[28]

> [T]he overriding general conclusion is that while Justice Powell has written what he believes to be relevant today, he has always seen today in the broader context of the past centuries of our Anglo-American history. This combination of realism and historical perspective should keep Justice

[25] Jacob, *supra* note 19, at 3.
[26] George Clemon Freeman, Jr., *Justice Powell's Constitutional Opinions*, 45 WASH. & LEE L. REV. 411, 411 n.2 (1988).
[27] Ray McAllister, *The Southern Gentleman*, 74 A.B.A. J. 48, 51 (1988).
[28] Freeman, *supra* note 26, at 411.

> Powell's opinions alive and relevant for future generations.[29]

Given the current debate surrounding the First Amendment, "fake news," and social media, Powell's papers provide important context for the *Gertz* and *Dun & Bradstreet* decisions—and they provide an interesting point of comparison for today's criticisms.

II. TIMES V. SULLIVAN: THE CONSTITUTIONALIZATION OF LIBEL LAW

Prior to the Supreme Court's landmark 1964 decision in *New York Times v. Sullivan*, the First Amendment provided no protection for defamatory speech. Defamation was governed merely by state law. Although the Court had espoused the importance of the First Amendment's protections for speech and press before,[30] it had provided nothing to protect the press from large libel judgments. Under most state laws, which relied on common law defamation principles, defamation plaintiffs were not required to prove falsity or fault.[31] In many instances, plaintiffs could recover damages simply by proving the publication of a statement that identified them and negatively affected their reputation.[32] The law provided defendants no extra protection when criticizing government officials. As a result, powerful plaintiffs like Montgomery County Commissioner L.B. Sullivan would use state defamation laws to their advantage, especially against a critical press.[33] Threats of costly litigation

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[29] *Id.* at 465.

[30] *See* Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."). But even in *Near*, the Court emphasized that their holding against prior restraint did not impact recovering for defamation, noting that "[t]he law of criminal libel rests upon that secure foundation [of common law]." *Id.* at 715.

[31] *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 763 (3d ed. 1964) ("It is not necessary that anyone believe [the defendant's words] to be true, since the fact that such words are in publication at all concerning the plaintiff must be to some extent injurious to his reputation . . . ."). However, in civil cases, truth was a defense in actions of libel or slander and was so "in the great majority of jurisdictions." *Id.* at 824.

[32] *See id.* at 756 ("Defamation is rather that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.").

[33] L.B. Sullivan sought $500,000 in damages, which Justice Hugo Black criticized as a "technique for harassing and punishing a free press." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring).

from prominent plaintiffs—particularly public officials—naturally imposed a chilling effect on the press, reminiscent of the notorious Sedition Act of 1798.[34] The *Sullivan* decision provided much needed "breathing space"[35] by requiring that public officials prove the publisher acted with "actual malice" to succeed in a defamation claim.[36] This breathing space was deemed necessary to ensure "uninhibited, robust, and wide-open" debate on public issues, regardless of the attacks on public officials it may invite.[37] With the Court's insistence that the First Amendment protected speech concerning public officials who had been elected or appointed to government office, it swiftly transformed the defamation landscape into one that supported the institutional press in its capacity as the Fourth Estate.[38]

The landmark decision in *Sullivan* paved the way for continued expansion of First Amendment protections for freedom of speech, eventually making it nearly impossible for plaintiffs who had to prove actual malice to succeed. Following the Court's unanimous decisions in *Sullivan,* it broadened the application of the actual malice doctrine in *Garrison v. Louisiana* (criminal defamation cases),[39] *Time, Inc. v. Hill* (false light privacy tort),[40] and *Curtis Publishing Co. v. Butts* (public figure defamation plaintiffs).[41] Extending the actual malice rule beyond the realm

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[34] *See, e.g.*, *id.* at 277 (majority opinion) ("The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act.")*; see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967) (plurality opinion) ("In *New York Times*, we were adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability.").

[35] NAACP v. Button, 371 U.S. 415, 433 (1963).

[36] *Sullivan*, 376 U.S. at 279–80.

[37] *Id.* at 270; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 766 (1985) (White, J., concurring) (citing *Sullivan*, 376 U.S. at 270).

[38] William Hazlitt first used the term 'Fourth Estate' to describe a journalist that "'lays waste' a city orator or Member of Parliament, and bears hard upon the government itself," or more simply a "fearsome and fearless journalist who tore into established powers." William Safire, *The One-Man Fourth Estate*, N.Y. TIMES (June 6, 1982), https://www.nytimes.com/1982/06/06/books/the-one-man-fourth-estate.html.

[39] 379 U.S. 64 (1964) (holding that a criminal libel statute may only criminalize the defamatory statements if they were made with actual malice).

[40] 385 U.S. 374 (1967) (holding that the actual malice standard applies to false light invasion of privacy cases dealing with matters of public concern).

[41] 388 U.S. 130 (1967) (plurality opinion).

of public officials to include public figures[42] required the Court to acknowledge the intertwined, but competing interests:

> These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake.[43]

In the years following *Sullivan,* the Court demonstrated a strong commitment to the protection of speech it believed was critical for democratic discourse, and the institutional press—who often footed the bill as defendants in the litigation—no doubt benefited as a result.

A mere seven years after *Sullivan,* the United States reached its high-water mark in the protection of speech. The natural next step seemed to be extending the protections of *Sullivan* to speakers discussing matters of public concern, and a plurality of the Court did so.[44] In the short-lived *Rosenbloom v. Metromedia* decision, four justices believed that private plaintiffs should be required to prove actual malice in defamation cases where the speech at issue relates to a matter of public concern. Justice William J. Brennan, who authored majority opinions in *Sullivan*, *Garrison*, *Hill*, and *Rosenbloom*, opined that "[d]rawing a distinction between 'public' and 'private' figures makes no sense

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[42] *See id.* at 134 ("We brought these two cases here to consider the impact of that decision on libel actions instituted by persons who are not public officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest.") (citation omitted).

[43] *Id.* at 155.

[44] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) ("If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved.").

in terms of the First Amendment guarantees,"[45] and that, when seeking recourse for defamatory statements, "the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."[46] But with Justice William Douglas not participating, Brennan could not garner a majority in *Rosenbloom,* and the high water quickly receded.

III. JUSTICE LEWIS F. POWELL JOINS THE COURT

The death of Justice Hugo Black marked a changing of the guard at the U.S. Supreme Court—at least as far as the First Amendment is concerned. A staunch advocate of free speech and free press, Black left no questions regarding his First Amendment and defamation law ideologies. In *Sullivan*, Black opined that there was "[a]n unconditional right to say what one pleases about public affairs,"[47] eventually going as far as to say that falsities broadcast with knowledge should be protected in *Rosenbloom*.[48] There was not a circumstance for which Black would change his view. In fact, Black found there to be no qualifications on the right to free speech, arguing the right was at the heart of the Bill of Rights.[49] Combined with consistent support from Justice William O. Douglas, and an often-reliable agreement from Justice Brennan, the trio significantly advanced constitutional protections for freedom of expression. But Justice Black's absolutism was replaced by Justice Lewis F. Powell's more reserved position.

Regarded by many to be the embodiment of the stereotypical "Southern gentleman,"[50] Justice Powell placed a deep significance on the values of personal reputation and community. Powell's former clerks, those who claim to have best

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[45] *Id.* at 45–46. Justice Brennan believed there need not be a distinction between private and public figures because, "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Id.* at 43.

[46] *Id.* at 47.

[47] N.Y. Times v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring).

[48] *See Rosenbloom*, 403 U.S. at 57 (Black, J., concurring) ("[I]n my view, the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false.").

[49] *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 880–81 (1960).

[50] The American Bar Association Journal published a profile on retired Justice Lewis Powell, in which the author wrote that Powell had been referred to as the "Southern gentleman" so often that it was almost as if it was a part of his name. *See* McAllister, *supra* note 27, at 48.

known the man behind the robe, have often shared similar sentiments about him. One clerk found his jurisprudence to emphasize the "communal aspects of individual life, the expression of human variety through community."[51] Court of Appeals Judge Harvie Wilkinson III, another former Powell clerk, argued that "[t]hose institutions bearing intimately on the individual's private life" were just as important to Powell as public ones.[52] These beliefs are echoed throughout Justice Powell's writings. He preferred a private life and saw his personal work to be not particularly significant or deserving of acclaim, even considering his legacy as a Supreme Court justice to, at best, find its end in the footnotes of history.[53] Powell, who was known to be "thin-skinned on matters of personal honor or dedication to duty"[54] and "so deeply sensitive to the hurt or embarrassment of another,"[55] emblazoned this reverence for modesty and reputation on his defamation opinions. To Powell, the intensifying concern that the media, including "every scandal monger,"[56] could permanently destroy the reputation of any given individual was omnipresent.

Justice Powell joined the Court almost a decade after the *Sullivan* decision instituted the 'actual malice' rule, but he would only wait a few years before leaving his imprint on defamation law. His intentions in doing so—or more accurately, halting the advancement of the constitutionalization of defamation law—were made plenty clear early on in his tenure when the Court granted *certiorari* in *Gertz v. Welch*:

> I voted to grant cert in this case because I believe the Court has gone too far already in protecting the First Amendment rights of the media as against the individual rights (whether characterized as a right of privacy or the common

[51] Christina B. Whitman, *Individual and Community: An Appreciation of Mr. Justice Powell*, 68 VA. L. REV. 303, 303 (1982).
[52] J. HARVIE WILKINSON, III, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW 106 (1974).
[53] *See* McAllister, *supra* note 27, at 51.
[54] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 278 (1994).
[55] WILKINSON, III, *supra* note 52, at 109–10.
[56] This Article makes several references to notes, letters, and memoranda from the Supreme Court Case Files contained in the Justice Lewis F. Powell Jr. Papers (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 72-617 Gertz v. Robert Welch, Inc.) [hereinafter *Gertz* File, Powell Papers]. Notes from Justice Powell on Memorandum from Clerk 1 (Feb. 14, 1973), *in Gertz* File, Powell Papers.

> law right not to be defamed) of individuals who may be permanently damaged or quite literally destroyed by the powerful news media.[57]

Justice Brennan's plurality in *Rosenbloom* had pointed the Court's jurisprudence sharply in the direction of protecting more expression by requiring all plaintiffs to prove actual malice in defamation cases involving matters of "public concern."[58] With *Rosenbloom,* the Court drifted away from its interest in protecting individual reputations. But Justice Powell quickly tamped out any momentum that *Rosenbloom* had stirred up.[59] Justice Powell's monumental collection of personal papers, which included everything from memoranda between justices, to notes to his clerks, and red-lined draft opinions, evidenced his grave concern about burgeoning First Amendment protections. Further, Justice Powell was adamant that defamed plaintiffs need to have the ability to recover damages, which his opinions make apparent.

A. Getting Down to Business in Gertz v. Welch

Less than two years after he replaced the Court's renowned guardian of the First Amendment, Justice Powell heard oral argument in *Gertz v. Welch*. The case involved a reputable lawyer, neither a public figure nor a public official as the Court had previously defined them, who had become involved in noteworthy civil litigation. The lower courts both applied the *Sullivan* actual malice standard to Elmer Gertz's defamation claim, citing the Court's holding in *Rosenbloom* and the "public interest" of the situation in which Gertz had inserted himself.[60] For the lower courts, the lawyer's status as a private individual had little relevance to the matter at hand. But Justice Powell's majority decision in the case provided a stiff course correction from *Rosenbloom,* rejecting the idea that the First Amendment required private plaintiffs to prove actual malice. The tension between the unalienable First Amendment free expression rights and the valid state interest in protecting

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[57] Summer Memorandum from Justice Powell 5 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. It was known where Justice Powell stood on the matter of *Gertz* by the time he wrote his preliminary memo. *See id.* at 5–6.

[58] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).

[59] Justice Powell even seemed eager to take on and overturn *Rosenbloom*, remarking before the Court granted certiorari, "[i]f 5 judges are willing to reconsider Rosenbloom, I'd certainly join them." Notes from Justice Powell on Memorandum from Clerk 1 (Feb. 14, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[60] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 327 (1974).

individual reputations was unavoidable[61] despite the Court's recent decisions consistently reaffirming and extending the *Sullivan* rule.[62] But, to Powell, a more equitable balancing of the interests was long overdue.[63]

In his preliminary memorandum for *Gertz*, Justice Powell showed grave concern over the direction of the Court's defamation jurisprudence, arguing that "the Court has been pursuing its own logic to what may well be the ultimate conclusion of abolishing the law of libel altogether."[64] After the *Rosenbloom* decision, Powell's fears had been greatly escalated.[65] And he was not the only justice to raise concerns about the possible overextension of the *Sullivan* rule.[66] In a reply to Justice Byron White, Powell remarked that, "[t]he one clear impression from my notes and memory is that the Conference wished to disavow the extension of *New York Times* proposed by the

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[61] *See* Summer Memorandum from Justice Powell 5 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. ("Everyone concedes that there is 'tension'—if not a head-on conflict—between the competing interests and rights, and drawing any rational line has proved so far to be extremely difficult.").

[62] *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 152 (1967) (plurality opinion) ("[S]ome antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy."); *see also* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments.").

[63] *See* Summer Memorandum from Justice Powell 6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. ("Thus, I want my law clerk (assigned to this case) to endeavor to find a more rational adjustment between the competing interests than has yet been articulated.").

[64] *Id.* at 5.

[65] After reading the briefs for *Gertz*, Justice Powell noted his agreement with Court of Appeals Judge Roger Kiley on how defamation law had extended too far. *See id.* at 6 ("Judge Kiley, concurring in the CA 7 opinion, shares my own concern. He stated his 'fear that we may have in this opinion pushed through what I consider the outer limits of the First Amendment protection against liability for libelous statements and have further eroded the interest of non-public figures in their personal privacy.'").

[66] Justice Powell's notes from a conference on November 14, 1973 discussing *Gertz* shows a shared sense of dislike for the *Rosenbloom* holding, as Justice White "disagree[d] totally with Rosenbloom—as does Potter [Stewart]," who also thought that the "Court ha[d] gone too far in extending N.Y. Times." Judge Powell's Conference Notes (Nov. 14, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Even before *Gertz,* Justice Harlan acknowledged in *Curtis* that, compared to *Sullivan* providing "constitutionally adequate protection only in a limited field," it would be "equally unfortunate" for the *Sullivan* rule to go as "far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication." *Curtis*, 388 U.S. at 135. Harlan then went on to argue in *Curtis* that considering the *Sullivan* rule "as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability." *Id.* at 148.

Rosenbloom plurality opinion."[67] Justice Brennan, author of the plurality, also joined the discussion when, according to Powell, Brennan said he hoped his past decision would be reversed to better clarify the law for the press.[68] Even with disapproval for *Rosenbloom* brewing in the chambers of the Court, Powell was still forced to temper his own criticisms and compromise to garner the slim 5–4 majority[69]—a challenge he noted to Chief Justice Burger:

> I did find it difficult to reconcile all views and to judge how far a majority of the Court would be willing to go in reversing the strong tide toward near-total abrogation of the individual's opportunity to recover for libel in favor of the stringent demands of the New York Times rule.[70]

Ultimately, Powell's published opinion in *Gertz* represented a "pull-back from the expansive plurality in *Rosenbloom v. Metromedia, Inc.*, which had virtually obliterated the common law of defamation."[71] If *Rosenbloom* were to remain law, Powell believed the doctrine "would destroy entirely the law of libel."[72] But by acknowledging in *Gertz* that private individuals are "more vulnerable to injury" than public officials or public figures,[73] Powell and the Court significantly shifted the momentum in favor of the state's interest in protecting an individual's reputation.[74]

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[67] Letter from Justice Powell to Justice White 2 (Jan. 18, 1974), *in Gertz* File, Powell Papers, *supra* note 56.

[68] *See* Justice Powell's Conference Notes (Nov. 14, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[69] In a letter to Chief Justice Burger addressing Powell's draft circulation, Powell noted compromising his own views to avoid fragmenting the Court. Letter from Justice Powell to Chief Justice Burger 3 (Jan. 4, 1974), *in Gertz* File, Powell Papers, *supra* note 56. ("I approached the writing of the opinion with a view to what seemed possible in obtaining agreement among five Justices on a coherent theory of the law of libel and the First Amendment. In taking this approach I compromised somewhat my own views in the interest of obtaining a majority opinion rather than continuing the fragmentation of the Court.").

[70] *Id.* at 1.

[71] Michael Hadley, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 499 (1998).

[72] Letter from Justice Powell to Chief Justice Burger 2 (Jan. 4, 1974), *in Gertz* File, Powell Papers, *supra* note 56.

[73] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

[74] The same day that Powell spoke for the Court in *Gertz*, he delivered a dissenting opinion in *Old Dominion Branch v. Austin*, in which he referred to the Court's holding as "needless denigration of the 'overriding state interest' in compensating individuals for injury to reputation." Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 295 (1974) (Powell, J., dissenting).

B. Dismantling Defamation Protections in Dun & Bradstreet v. Greenmoss Builders

Despite Justice Powell finding *Dun & Bradstreet* to be an undesirable case to address whether to extend *Gertz* to non-media defendants,[75] Powell's plurality opinion further tilted the balance of defamation law toward private plaintiffs and their reputations. From the moment the Court granted *certiorari*, Powell was transparent about his hope of avoiding further "intruding in state law."[76] In correspondence with Justice White addressing White's concerns with one of Powell's draft opinions, Powell did not shy away from the gravity of the situation: "The question of whether the entire law of defamation should be constitutionalized clearly is before us and needs to be decided."[77] Eleven years prior, Powell had used *Gertz* to overturn *Rosenbloom* and stop the Court in its tracks. There, he asserted that the Court would "doubt the wisdom" of leaving the "public concern" test to the conscience of judges, and that such a test "inadequately serves both of the competing values at stake."[78] In Powell's view, any test to determine whether defamatory statements are of public concern would be inherently flawed.[79] The courts would almost always be forced to defer to the institutional press based on the simple fact that the press, through its editorial discretion and agenda-setting function, determines what is newsworthy.[80]

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[75] This Article also makes several references to notes, letters, and memoranda from another case file, 83-18 Dun & Bradstreet v. Greenmoss, within the Supreme Court Case Files contained in the Justice Lewis F. Powell Jr. Papers (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 83-18 Dun & Bradstreet v. Greenmoss) [hereinafter *Dun & Bradstreet* File, Powell Papers]. Notes from Justice Powell on Preliminary Memorandum from Clerk 1 (Sept. 26, 1983), *in Dun & Bradstreet* File, Powell Papers. ("Deny—not a good case to address Q."). Powell and his clerk both believed that *Gertz* did not apply to this case and, thus, feared that the Court would further constitutionalize defamation law. *See id.* at 1, 4, 6–7.

[76] *Id.* at 8.

[77] Letter from Justice Powell to Justice White (June 18, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

[78] *Gertz*, 418 U.S. at 346.

[79] Justice Powell tasked his clerk to add a footnote to his draft opinion of *Gertz* detailing the "inherent flaw in the *Rosenbloom* test of whether a 'general or public interest' issue is involved," which he referred to as "a strong point in his view." Notes from Justice Powell to Clerk on Draft Opinion 28 (Dec. 13, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[80] Powell initially raised the question of "[w]hat determines when a matter is of 'public or general' concern" when taking notes on his clerk's brief for *Gertz*. *See* Notes from Justice Powell on Memorandum from Clerk 16 (Sept. 19, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Under the same note, Powell directed his clerk to

Nevertheless, when a credit reporting agency came before the Court seeking to recoup $300,000 in punitive damages, Powell shifted course, favoring an *ad hoc* approach for determining whether such damages were appropriate. This shift would not be immediate, however, with Powell initially pondering voting to dismiss *Dun & Bradstreet* as improvidently granted after his reluctant vote to grant in the first place.[81] It appears to be a suggestion from Justice John Paul Stevens that provided Powell with a glimpse of hope for the case, by stating that the Court "may be able to identify some subclass between the typical media defendant and the common law libel suit between private individuals."[82] Powell emphasized clear differences between Dun & Bradstreet and the typical defamation defendant, finding the former to belong to a "specialized category of disseminators of information."[83] Combining the status of the defendant with the commercial nature of the speech and his hesitancy to overstep state law, Powell saw a tangential constitutional interest and advocated for avoiding further constitutionalization:[84]

> It can be argued quite reasonably that Dun & Bradstreet owes a higher duty than the press. It is in the business—not of serving the need in a democracy for a forum in which issues and ideas may be debated—but of making money by selling sensitive credit information. It would not be irrational at all to hold it to strict liability.[85]

"[Harry] Kalven's comment," *id.*, in which Kalven argued that "the courts will not, and indeed cannot, be arbiters of what is newsworthy." Harry Kalven, *The Reasonable Man and the First Amendment:* Hill*,* Butts*, and* Walker, 1967 SUP. CT. REV. 267, 283–84 (1967). Powell even cited this article in his final opinion, *see Gertz*, 418 U.S. at 336 n.7.

[81] *See* Unsent Letter From Justice Powell to Justice John Paul Stevens & Justice O'Connor 1 (Mar. 23, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75 ("The discussion this afternoon of the above case suggests that the best solution is to DIG [dismiss as improvidently granted] a case we should not have taken.").

[82] *Id.* Powell went on to emphasize the uniqueness of this case, writing, "the more I think about this case the less willing I am to categorize it as within either of the traditional classifications of libel cases." *Id.*

[83] Letter from Justice Powell to Chief Justice Burger (Mar. 28, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

[84] Letter from Justice Powell to Justice White (June 18, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

[85] Unsent Letter from Justice Powell to Justice John Paul Stevens and Justice O'Connor 1 (Mar. 23, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

But, in another effort to obtain the necessary votes, Powell was forced to back away from his stricter criticisms and preferences. The Court had settled on re-argument after confusion at whether the issue of *Gertz* applying to non-media defendants was squarely in front of them. This time around, Powell was met with opposition from the Chief Justice—a vote Powell needed to obtain a majority—who threatened to write an opinion by himself due to the continued media/non-media distinction in Powell's circulations.[86] Powell's draft the term before had failed to adequately address "whether the constitutional rule applies with equal force regardless of the nature of speech,"[87] so Powell instead refocused on "decid[ing] this case on its facts"[88] and turning the case on "the nature of the speech rather than who the parties are."[89] The question of whether *Sullivan* and *Gertz* "should apply where the speech is of a commercial or economic nature" needed to be addressed directly by the Court,[90] and Powell had already made clear his belief that the First Amendment interest in private speech is naturally lower.[91] Powell once tasked lower courts with determining whether a plaintiff was a public or private figure in *Gertz*, and now he just needed to take one step further with public and private speech. Justice Sandra Day O'Connor laid out the strategy:

> [T]here appears to be possible agreement by you, Byron, the Chief, Bill Rehnquist, and me that the *Gertz* standards apply at most to expression related

[86] Letter from Chief Justice Burger to Justice Powell (Dec. 27, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[87] Memorandum from Justice Powell to the Conference (June 27, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[88] Memorandum from Justice Powell to Himself 3 (Mar. 4, 1985), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[89] Letter from Justice Powell to Chief Justice Burger 1 (Dec. 29, 1984), *in Dun & Bradstreet File*, Powell Papers, *supra* note 75.
[90] Memorandum from Justice Powell to the Conference (June 27, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75. Justice Powell and Justice Brennan came together to suggest this question for the reargument, as well as the question of whether the precedents apply to a non-media defendant that was already included. *See id.* Justice White, Justice O'Connor, and Chief Justice Burger all explicitly agreed to this formulation of questions in letters to Powell. *See* Note from Justice White to the Conference (June 28, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75; *see* Note from Justice O'Connor to the Conference (June 27, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75; *see* Note from Chief Justice Burger to the Conference (July 2, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[91] Memorandum from Justice Powell to Clerks 5 (June 1, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75. ("The First Amendment interest in protecting private speech is less than in a public speech.").

> to matters of public importance . . . If we were all to agree that the nature of the speech, rather than the nature of the speaker, determines whether *Gertz* applies, I believe we could then also agree this case should be affirmed, at least in part.[92]

Justice Powell's stark change in direction a decade later—from counseling against judges considering the content of speech to advocating for them to consider the type of speech—makes more sense once we take into account the regrets he expressed about *Gertz*. Privately, Powell found his opinion in *Gertz* to be "far too long and unnecessarily broad in its sweep."[93] In a memo to himself, he even admitted that much of his opinion was dicta.[94] An obvious catalyst of Powell's regret was his oft-misunderstood dictum that, "[u]nder the First Amendment there is no such thing as a false idea,"[95] which permeated subsequent court opinions favoring media defendants who faced claims of defamation.[96] Given his concerns about growing press protections, it's clear Powell never intended the statement to be used as a means of protecting defamatory statements. But he acknowledged the inconsistencies in his differing approaches for *Gertz* and *Dun & Bradstreet*,[97] reconciling them by arguing that this distinction, unlike the *Rosenbloom* test, was simple enough for a judge to determine, making it "entirely appropriate" to leave some of defamation law "to case-by-case development."[98] And

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[92] Letter from Justice O'Connor to Justice Powell 1 (Jan. 22, 1985), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

[93] Lee Levine & Stephen Wermiel, *The Landmark That Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1, 45 (2013).

[94] *See* Memorandum from Justice Powell to Himself 1–2 (Mar. 4, 1985), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75 ("As I view it now, my opinion in *Gertz* is an example of overwriting a Court opinion. I said much that was unnecessary to a decision of that case. A large part of *Gertz* is dicta.").

[95] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

[96] *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

[97] *See* POWELL CLERKS, THE POWELL CHAMBERS 52 (1987) ("The Justice was clear that the First Amendment could not be said to protect the credit reporting at issue there [in *Dun & Bradstreet*], but there was language in the Justice's earlier opinion in *Gertz* that seemed to suggest the other result."). Justice Powell even addressed the concerns of a test in *Gertz*'s oral arguments. *See* ELMER GERTZ, GERTZ V. ROBERT WELCH, INC.: THE STORY OF A LANDMARK LIBEL CASE 95 (1992) ("You made a statement that there was no public or general interest in the representation in the civil suit by Mr. Gertz. Who determines whether or not there is a public or general interest in a libelous statement?").

[98] Letter from Justice Powell to Justice White (June 18, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75. ("Nor do I think the lines between media and nonmedia, and between commercial speech and other speech, would be difficult to

Judge Wilkinson III's recollection of Powell's tenure makes clear that this inconsistency is nothing unique to *Dun & Bradstreet*: "Some of his votes are not easy to reconcile. Some of his theory is not seamlessly consistent. For those who seek a comprehensive vision of constitutional law, Justice Powell will not have provided it."[99] Regardless, Justice Powell's arrival on the Court would dramatically upend the once-consistent direction of libel law.

IV. A PRESCIENT JUSTICE POWELL

The current attacks on *Sullivan*'s actual malice standard demonstrated Justice Powell's clairvoyance. Writing in the 1970s, Powell certainly could not have anticipated the technological developments that have revolutionized modern communication. Today, anyone with access to the internet has the ability to reach millions of people; we are no longer dependent on the institutional press to reach a large-scale audience. Similarly, the shortest viral video has the potential to instantly transform an everyday citizen into an involuntary public figure—one of the key issues that would have been litigated in Covington Catholic High School student Nicholas Sandmann's case had he not agreed to settle his multimillion-dollar defamation lawsuits against CNN and the Washington Post.[100] Cognizant of today's reality, Justice Neil Gorsuch recently shared his concerns, citing lower court decisions deeming as public figures plaintiffs who would otherwise have been private figures save the hands of the internet.[101] But Justice

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draw in most cases. These are not unfamiliar concepts, and there is no reason to think judges would be unable to apply them. It is entirely appropriate that we leave some part of this area of the law to case-by-case development.").

[99] John C. Jeffries, *The Art of Judicial Selection*, *in* AM. COLL. OF TRIAL LAWS. LEWIS F. POWELL, JR. LECTURE SERIES 6, 13 (1993).

[100] *See* Darcy, *supra* note 2.

[101] Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting from the denial of certiorari) ("But today's world casts a new light on these judgments as well. Now, private citizens can become 'public figures' on social media overnight. Individuals can be deemed 'famous' because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most."). *See, e.g.*, Hibdon v. Grabowski, 195 S.W.3d 48, 59, 62 (Tenn. Ct. App. 2005) (holding that an individual was a limited-purpose public figure in part because he "entered into the jet ski business and voluntarily advertised on the news group *rec.sport.jetski*, an Internet site that is accessible worldwide."). Lower courts have even said that an individual can become a limited purpose public figure simply by *defending* himself from a defamatory statement. *See* Berisha v. Lawson, 973 F.3d 1304, 1311 (11th Cir. 2020). Other persons, such as victims of sexual assault seeking to confront their assailants, might choose to enter the public square only reluctantly and yet wind up treated as

Powell's insistence decades ago on shifting the balance back toward the protection of individual reputation offers some semblance of security for private plaintiffs in an era of mass data collection, anonymous trolling, and cheaply made deep fakes.

Although he could not have imagined the impact of the internet on the spread of misinformation and disinformation, Justice Powell anticipated the importance of protecting private figures from the power wielded by today's media institutions. To be fair, Justice Brennan, who championed free expression and wrote for the Court in *Sullivan*, acknowledged these difficulties—decades before the mass adoption of the internet and pervasive use of social media: "[I]t is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."[102] Justice Powell was focused on the press' gate-keeping function when he authored *Gertz,* but his words remain relevant in the social media era: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication, and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[103] Today, the concern is no longer about whether private plaintiffs have the ability to access the media to rehabilitate their reputations—instead, we must worry about whether a truthful response could ever catch up to the defamatory statement.

Powell's archival papers provide valuable insight into the process of formulating his *Gertz* and *Dun & Bradstreet* opinions. Powell's correspondence, memoranda, and the draft opinions he shared among the justices illuminate his concerns about the Court's earlier defamation jurisprudence, precedent he viewed as providing near-total protection for any false statements not made with actual malice. Justice Powell argued from the beginning of *Dun & Bradstreet* that *Gertz* did not apply to non-media defendants.[104] He argued the same position again during the

limited purpose public figures too. *See* McKee v. Cosby, 139 S. Ct. 675, 675 (2019) (Thomas, J., concurring in the denial of certiorari). *Cf.* Amy K. Sanders & Holly Miller, *Revitalizing Rosenbloom: The Matter of Public Concern Standard in the Age of the Internet*, 12 First Amend. L. Rev. 529 (2014).

[102] Rosenbloom v. Metromedia, 403 U.S. 29, 46 (1971).

[103] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

[104] *See* Notes from Justice Powell on Preliminary Memorandum from Clerk 1 (Sept. 26, 1983), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75 ("*Gertz* as written applied only to private defamation suits vs media defendants—a 1st Amend[ment] related decision.").

drafting of his *Gertz* opinion in a letter to Justice White, which foreshadowed his *Dun & Bradstreet* opinion more than a decade later:

> I assumed that we were addressing only First Amendment rights of the press. As I understand New York Times and its progeny, these decisions do not control the application of the law of defamation to libellous [sic] statements made by non-media speakers. The balancing of public and private interests may be different where the defendant may not fairly be deemed a part of the media, especially where the non-media defendant is not a public official or candidate for public office.[105]

When *Dun & Bradstreet* finally came before the Court though, he hoped to convince the rest of the justices that the defendant's status mattered.

V. WHAT JUSTICE POWELL REALLY THOUGHT ABOUT THE FIRST AMENDMENT

It is said you cannot judge a book by its cover, but in this instance, you cannot judge a judge merely by his opinions. Compared to his somewhat neutral Court opinions, Powell's papers reveal much more critical views of the First Amendment's protections for defamation. In a letter to Chief Justice Burger that Powell drafted before the *Dun & Bradstreet* conference, Powell vehemently opposed "choos[ing] this case as a vehicle for constitutionalizing the entire law of libel."[106] In his *Gertz* preliminary memo, Powell even appeared to ponder a return to English common law defamation, praising the English's ability to keep a "vigorous, unfettered press" while retaining "the law of libel in full vigor."[107] Powell's view of the First Amendment stood in stark contrast to his predecessor's. It was Justice Black who famously wrote that the *Sullivan* standard did not go far

[105] Letter from Justice Powell to Justice White 1–2 (Jan. 18, 1974), *in Gertz* File, Powell Papers, *supra* note 56.
[106] Letter from Justice Powell to Chief Justice Burger (Mar. 28, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[107] Summer Memorandum from Justice Powell 5–6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. ("The English—who certainly have a civilized system and a free and vigorous, unfettered press—still retain the law of libel in full vigor, even putting newspaper editors and publishers behind bars.").

enough, noting in *Curtis Publishing* that it "seriously menaces the very life of press freedom."[108] Powell's personal papers leave no doubts where he stood on First Amendment protections for free expression, placing him squarely in opposition to Justice Black's absolutist stance. In Powell's view, Black displayed "[c]onceptual clarity but [was] in total disregard of history + what [the] 1st Amend[ment] meant for more than a century."[109] Interestingly, Powell even distanced himself from Justice Brennan's "middle ground" position.[110] Taken in its context, Powell's swearing-in represented something much more than simply filling a vacant seat on the Court—at least as far as the First Amendment was concerned. Instead, the changing of the guard ushered in a nearly 180-degree pivot in the Court's defamation jurisprudence. After all, the Court had decided *Rosenbloom*—a case that Powell thought "extend[ed] *Sullivan* too far"[111]—just seven months prior to his swearing-in.

Behind closed doors[112] and in both his *Gertz* and *Dun & Bradstreet* opinions, Justice Powell embraced Justice Stewart's concurrence in *Rosenblatt v. Baer*[113] and Justice Harlan's dissent in *Rosenbloom*.[114] Both opinions clearly resonated with Powell. He and his clerks made reference to the opinions multiple times throughout the case deliberations, undoubtedly influencing his

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[108] Curtis Publ'g. Co. v. Butts, 388 U.S. 130, 171 (1967) (Black, J., dissenting and concurring).
[109] Notes from Justice Powell on Memorandum from Clerk 14 (Sept. 19, 1973), *in Gertz* File, Powell Papers, *supra* note 56.
[110] *Id.* at 15 (citing a memo dated less than a week after the *Gertz* oral argument, John C. Jeffries, Powell's clerk on the case, referred to Justice Brennan's defamation jurisprudence as "charting a middle course," but J. Powell wrote "not for me" next to the description).
[111] Notes from Justice Powell on Clerk's Initial Case Brief 1 (Dec. 10, 1972), *in Gertz* File, Powell Papers, supra note 56.
[112] Justice Powell directed his clerks to look into both Stewart's concurrence and Harlan's dissent. *See* Summer Memorandum from Justice Powell 6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Annotating a brief from his clerk on Harlan's opinion, Powell wrote notes signifying his agreement. *See* Notes from Justice Powell on Memorandum from Clerk 18–23 (Sept. 19, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Powell showed the same sense of respect for Stewart's prior opinions in defamation law. *See id.* at 7–8. Powell also instructed his clerks to research Stewart's concurrence in *Rosenblatt*. *See* Summer Memorandum from Justice Powell 6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56.
[113] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 757–58 (1985); *see also* Rosenblatt v. Baer, 383 U.S. 75, 91–93 (1966) (Stewart, J., concurring) (concurring that state defamation laws may not be converted into laws against seditious libel, but arguing that is the only situation where the *Sullivan* rule should be applied).
[114] *See Gertz*, 418 U.S. at 338–39, 343. *See* Rosenbloom v. Metromedia, 403 U.S. 29, 62 (1971) (Harlan, J., dissenting) (arguing that states should be able to determine their own libel laws for private plaintiffs).

thoughts on the matter and ultimately his majority opinion. Powell's approach is not particularly surprising given his and Justice Stewart's admiration of Justice Harlan:

> Stewart and Powell even had the same judicial hero. As a junior Justice on the Warren Court, Stewart allied himself with John Harlan. Though Powell never sat with Harlan, he took him as the model of what a judge should be—a fair-minded arbiter of disputes, carefully adapting past precedents to present realities in a process more pragmatic than ideological. This tradition was handed down from Harlan to Stewart to Powell.[115]

As a result, Powell consciously sought to mimic Harlan,[116] attempting to find the right balance in contentious cases by relying upon "a close calculus of competing interests and risks."[117] He followed the so-called "Harlan legacy," crafting a defamation law jurisprudence "devoid of simplistic rules and categorical answers," and instead drawing attention to the rich complexities of the cases.[118] Gerald Gunther, a former professor at Stanford Law, noting the likeness of Harlan and Powell in their work on the Supreme Court and specifically in defamation law, even found that "[i]n no other area has [Powell] demonstrated more persuasively that a balancing approach can provide not only the more intellectually satisfying analysis but also the one most sensitive to individual rights."[119]

Looking closely, it is possible to track the progression of legal thought from Stewart's concurrence in *Rosenblatt* to Harlan's dissent in *Rosenbloom* and on to Powell's decisions in *Gertz* and *Dun & Bradstreet.* Powell shared Stewart's concern for the "protection of private personality" and his acceptance of such

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[115] JEFFRIES, *supra* note 54, at 262–63 (noting that Stewart and Powell both held great admiration for Justice Harlan).
[116] *See id.* at 349 ("[Powell] placed himself in the tradition of John Harlan, a Justice known for craftsmanship, clarity, lawyerly reasoning, and a modest conception of the judicial role . . . . In short, Harlan sought to build on the traditions of societal consensus rather than trying to uproot them. Powell saw himself following in Harlan's footsteps as a careful, restrained, lawyerly judge.").
[117] Kalven, *supra* note 80, at 299.
[118] Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1014 (1972).
[119] Gerald Gunther et al., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 411 (1987).

protection being a "basic concept of the essential dignity,"[120] ultimately using Stewart's *Rosenblatt* concurrence to make his case in *Gertz*.[121] Notably, Stewart's insistence on the social values at the foundation of defamation law, as well as his hesitation in applying *Sullivan* to defamation of private persons,[122] found its way to Powell's writings. Powell's private notations make this emphasis on reputation clear:

> I would like to think that our society places a greater value on the sanctity of an individual's privacy and reputation, and would like to find a rational and principled basis of decision which would protect the obvious and important rights of the media, would prevent the media from feeling inhibited to print legitimate news, and yet at the same time afford some reasonable protection to individual rights.[123]

The similarities for Powell do not end with Stewart, however. Justice Harlan's dissent in *Rosenbloom* may be the most direct influence on Powell's majority opinion in *Gertz*. This was the undeniable reality to Justice Brennan as well, who remarked in *Dun & Bradstreet* that "Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz*."[124] It would be far-fetched to think that Harlan, who argued three years prior that

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[120] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J. concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."). Justice Powell took special note of this quote and Stewart's views. *See* Summer Memorandum from Justice Powell 6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56; Memorandum from Clerk to Justice Powell and Notes from Powell at 7–8 (Sept. 19, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Powell's clerk wrote early in the course of the case to Powell that "the nascent discontent revealed by Mr. Justice Stewart's concurrence" was the most interesting part of *Rosenblatt* for their purposes. *Id.* at 7.

[121] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

[122] *See Rosenblatt*, 383 U.S. at 93 (Stewart, J. concurring) ("That rule should not be applied except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars.").

[123] Summer Memorandum from Justice Powell 5 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[124] Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 779 (1985) (Brennan, J., dissenting).

states should be permitted to define their own standards for libel involving private plaintiffs, as long as they "do not impose liability without fault,"[125] was not the catalyst for the Court's holding in *Gertz*.[126]

VI. UNLIKELY ALLIES WITH A COMMON ENEMY: POWELL, GORSUCH AND THE PRESS

Powell's concerns about the private plaintiff ran deep—but they weren't the only motivations behind his First Amendment decisions. Unless the Court reconsidered the *Sullivan* standard, Powell feared the media would be left "free to defame without any referendum" of facts.[127] In Powell's view, private plaintiffs who had been defamed would rarely have sufficient evidence to prove actual malice, allowing no remedy for the reputational damage.[128] He had been adamant about there being "virtually no recourse" for defamatory statements in a 1971 speech, delivered the same year the Court decided *Rosenbloom*.[129] But his fears transcended the individual private plaintiff. Powell also believed the law could force the press to be responsible, specifically noting "that the great benefits of a free and vigilant press might sour without its simultaneous commitment to accuracy and impartiality."[130]

Nearly 50 years later, concerns about the media animate modern criticisms of the Court's defamation jurisprudence. On July 2, 2021, Justice Gorsuch issued a written dissent from the Court's denial of *certiorari* in *Berisha v. Lawson,* suggesting he and Justice Powell shared similar qualms about *Sullivan* and its progeny. It has brought a renewed focus toward one of the myriad recent pleas to reconsider *Sullivan*. Unlike his counterpart Justice Thomas, who attacks more than a half-century of precedent as "policy-driven decisions masquerading as constitutional law,"[131] Justice Gorsuch portends the adequacy of

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[125] Rosenbloom v. Metromedia, 403 U.S. 29, 64 (1971) (Harlan, J., dissenting).
[126] Powell even directly mentions Harlan's dissent. *See Gertz*, 418 U.S. at 338.
[127] Notes from Justice Powell on Memorandum from Clerk 1 (Feb. 14, 1973), *in Gertz* File, Powell Papers, *supra* note 56.
[128] *Id.*
[129] Justice Lewis F. Powell, Jr., Civil Liberties Repression: Fact or Fiction?, Article Prepared for Perpective Section of Richmond Times Dispatch, at 11 (June 28, 1971) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Powell Speeches).
[130] WILKINSON, III, *supra* note 52, at 105.
[131] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

the doctrine today. To be clear, Gorsuch agrees with Justice Thomas that *Sullivan* is a "[d]eparture[] from the Constitution's original public meaning."[132] But Justice Gorsuch also believes the Court's decision in *Sullivan* and subsequent decisions were "the product of good intentions."[133] Gorsuch accepts *Sullivan* as once needed to ensure the free flow of public debate,[134] tolerating a few lies to avoid suppressing speech—a "necessary and acceptable cost" to protect speech "vital to democratic self-government."[135] Gorsuch might also have been willing to accept a version of the actual malice standard that was limited in scope to a "small number of prominent government officials."[136] But, according to Gorsuch, times have changed, and these justifications have less weight when "everyone carries a soapbox in their hands."[137] At the time *Sullivan* was decided, he asserts the institutional press maintained safeguards such as editors and fact-checkers to "deter the dissemination of defamatory falsehoods and misinformation"[138] and made their money from truthful reporting. Now though, a cynical Gorsuch writes of a media industry that relies on an entirely new economic model—one that no longer profits off of accurate reporting but instead promotes disinformation and "falsehoods in quantities no one could have envisioned almost 60 years ago."[139] Today's media industry, he believes, has taken far too many liberties with the protections of *Sullivan* and its progeny:[140]

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[132] Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting in denial of certiorari).
[133] *Id.*
[134] *See id.* at 2427 ("In 1964, the Court may have seen the actual malice standard as necessary 'to ensure that dissenting or critical voices are not crowded out of public debate.'" (citing Brief in Opposition at 22, Berisha v. Lawson, 141 S. Ct. 2424 (2021) (No. 20-1063), 2021 WL 2020775, at *22).
[135] *Id.* at 2428 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–72 (1964)).
[136] *Id.* at 2428 ("In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs.").
[137] *Id.* at 2427.
[138] *Id.* at 2427–28 ("Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation.").
[139] *Id.* at 2428. Justice Gorsuch specifically points to the *Sullivan* rule as "no longer merely tolerat[ing] but encourag[ing]" such falsehoods. *Id.*
[140] Gorsuch cites survey data from the Media Law Resource Center to show the rarity at which a plaintiff recovers damages for defamation today, then argues that this allows the media to publish without concern for truth. *See id.* ("Statistics show that the number of [defamation] trials involving . . . publications has declined dramatically over the past few decades: In the 1980s there were on average 27 per year; in 2017 there were 3. For those rare plaintiffs able to secure a favorable jury verdict, nearly one out of five today will have their awards eliminated in post-trial

> It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy . . . Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.[141]

Gorsuch's observation that the composition of the media "has shifted in ways few could have foreseen"[142] since the landmark *Sullivan* decision is certainly accurate.[143] The rise of the internet and the associated ease with which anyone may "publish virtually anything for immediate consumption"[144] carries consequences that Gorsuch believes the Court must address. He acknowledges that First Amendment protections have never solely been provided to those publishing newspapers or periodicals,[145] and he is willing to acknowledge some of the virtues of today's media landscape, mainly its inherent accessibility.

Like Powell, though, Gorsuch's criticism of the doctrine primarily focuses on the plaintiff rather than the defendant. That said, Gorsuch certainly would not consider Powell an ally. Gorsuch questions the applicability of the actual malice rule to the 'limited purpose' or 'voluntary' public figures, as Powell envisioned them in *Gertz*. Recent lower court decisions have

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motions practice. And any verdict that manages to make it past all that is still likely to be reversed on appeal. Perhaps in part because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations *de novo*, it appears just 1 of every 3 jury awards now survives appeal.") (citations omitted).

[141] *Id.* at 2428.

[142] *Id.* at 2427. Gorsuch went on to briefly describe the early media landscape, in which "[c]omparatively large companies dominated the press, often employing legions of investigative reporters, editors, and fact-checkers." *Id.*

[143] *See id.* ("No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs.").

[144] *Id.*

[145] *See id.* ("But '[t]he liberty of the press' has never been 'confined to newspapers and periodicals'; it has always 'comprehend[ed] every sort of publication which affords a vehicle of information and opinion.'" (quoting Lovell v. City of Griffin, 303 U.S. 444, 452 (1938))).

made the issue difficult to ignore the growing influence of social media and increasing spread of false speech. Although Justice Powell's personal papers show an active concern throughout *Gertz* to limit the Court's expansion of *Sullivan*, Gorsuch argues the decision does the opposite. In fact, Gorsuch characterizes *Gertz* as "cast[ing] the net even wider" by its application of the actual malice standard to the different classifications of public figures.[146] In effect, Gorsuch says *Gertz* extends *Curtis Publishing* in ways that "leave far more people without redress than anyone could have predicted."[147] Although *Sullivan* is the foundation of the modern doctrine, it appears that Gorsuch finds *Gertz* to be the real problem:

> [T]he very categories and tests this Court invented and instructed lower courts to use in this area—"pervasively famous," "limited purpose public figure"—seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation. At least as they are applied today, it's far from obvious whether *Sullivan*'s rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life.[148]

Ultimately, Justice Gorsuch does not "profess any sure answers,"[149] nor does he know the right questions to ask, yet—like Justice Powell—he steadfastly believes the Court overextended *Sullivan* in ways that are detrimental to the private defamation plaintiff. To Gorsuch, *Sullivan*'s actual malice standard is no longer just a heightened standard for plaintiffs to meet, but instead, it has become an "effective immunity from

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[146] *Id.* at 2426. ("Later still, the Court cast the net even wider, applying its new standard to those who have achieved 'pervasive fame or notoriety' and those 'limited' public figures who 'voluntarily injec[t]' themselves or are 'drawn into a particular public controversy.'" (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974))).
[147] *Id.* at 2429.
[148] *Id.*
[149] *Id.* at 2430.

liability."[150] Whether the Court will take a case that allows Justices Gorsuch and Clarence Thomas to realize Justice Powell's vision for protecting private plaintiffs remains to be seen. What is clear is that none of today's justices are the strident proponents of free speech that Justices Black and Douglas were when *Sullivan* was decided.

VII. CONCLUSION

Despite the recent attention being paid to libel law in the United States, the *Sullivan* naysayers are not expressing a particularly novel perspective. Justice Lewis Powell's papers suggest he articulated similar arguments nearly 50 years ago, but he was unable to convince his fellow justices to fully commit to his position. Nonetheless, Powell, who was concerned with private individuals' ability to protect their reputations, deftly used the *Gertz* and *Dun & Bradstreet* opinions to fundamentally alter the course of the Court's defamation jurisprudence—steering them away from the expansive trail Justice Brennan attempted to blaze in *Rosenbloom* and toward a somewhat narrower path.

The continued criticism of American defamation jurisprudence, including Justice Gorsuch's recent statements, suggests free speech proponents need to think strategically about how to best defend the existing protections lest they be retracted by a Supreme Court less willing to empower the institutional press. For decades, the protection of free speech has taken an all-for-one and one-for-all approach, where attorneys who defend the institutional press have found themselves aligned with those who defend neo-Nazi groups seeking permission to march through predominantly Jewish communities. But as Justice Gorsuch points out, the rise of the 24-hour news cycle, the internet and social media have dramatically altered the media landscape. As a result, we've seen the proliferation of misinformation as well as the rise of powerful speakers who trade in intentional falsities. The calls to rein in protections for speech are growing louder, and free speech proponents must realize that today's U.S. Supreme Court hardly resembles the one that crafted *Sullivan* and its progeny.

[150] *Id.* at 2428.