How Best to Explain "Actual Malice" to Juries? For Starters, Don't Use Those Words

By Steve Zansberg

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In the past few years, two major trends appeared on the landscape of American libel law: First, two Supreme Court justices, and a number of lower court judges, questioned the continued viability of the *New York Times Co. v. Sullivan* standard of requiring public figures and public official plaintiffs to prove actual malice.[1] Additionally, a 2023 Florida Senate bill directly seeks to upend the actual malice standard in some cases.[2] Second, for the first time in about a decade, a handful of high-profile public figure/public official libel cases went to jury verdict,[3] and in one of those cases, the parties vigorously disputed how the jury should be instructed about actual malice.

With respect to the first development above (and at the risk of being proven wrong), I do not believe that four justices are eager to jettison the 59-year-old *Sullivan* precedent and adopt a lower standard of fault for public figure/public official libel cases.[4] This article, then, focuses only on the latter development, and it offers recommendations for practitioners and judges on how to properly instruct juries in future public figure/public official libel trials where the actual malice requirement applies.

Palin Case Brings the Propriety of Jury Instructions to the Fore

As all readers of this magazine are well aware, in 2017, former Alaska Gov. Sarah Palin sued the *New York Times* over an editorial that suggested her campaign communications had incited Jared Lee Loughner to go on his 2011 shooting rampage in Phoenix, Arizona, in which he killed six and severely wounded then U.S. Congresswoman Gabby Giffords. The Second Circuit reversed Judge Edward Rakoff's granting of the Times' motion to dismiss because of an unorthodox procedural process.[5] Subsequently, the *Times*' motion for summary judgment was denied; in early February 2022, a seven-day jury trial was conducted in the Southern District of New York.

On the afternoon of February 14, 2022, while the jury was deliberating, Judge Rakoff orally granted the *Times*' Rule 50 motion for judgment as a matter of law, finding that Palin had not presented clear and convincing evidence that the *Times*' Editorial Page Editor James Bennet harbored serious doubts as to the truth of the editorial (but Rakoff did not notify the jury, directly, of his ruling).[6] The very next day, the jury returned its verdict that echoed Judge Rakoff's ruling, concluding that the *Times* was "not liable" for having defamed Palin.[7] Palin's appeal to the Second Circuit is still pending.

In the course of the trial, Palin and the Times sparred over different ways to define constitutional malice, and that battle illuminates a central question for all public figure libel cases: how to instruct the jury.

The Times proposed the following:

> Fourth, plaintiff must prove what is called actual malice. That is another term of art. Actual mal- ice is comprised of the following two things: (1) that the defendants were aware of and intended to convey to readers the defamatory meaning that Governor Palin claims the challenged statements conveyed; and (2) that the defendants published the challenged statements knowing that meaning was false or with a high degree of awareness that that meaning probably was false.[8]

(to be published in Communications Lawyer: Volume 38, Number 3, ©2023 by the American Bar Association).

Palin proposed the following:

> The fifth element of Plaintiff's claim for you to decide is whether at the time Defendants published the statement, they knew the statement was false or acted in reckless disregard of its truth or falsity. "Reckless disregard" means that when defendants made the statement, they had serious doubts as to the truth of the statement or made the statement with a high degree of awareness that it was probably false.
>
> Plaintiff must prove this element by clear and convincing evidence.
>
> Plaintiff can prove actual malice through circumstantial evidence and any reasonable inferences to be drawn from that evidence. You should consider the evidence in its totality, as well as any reasonable inferences you may draw from it.
>
> In deciding whether Defendants published the statement with knowledge of falsity or in reckless disregard of its truth or falsity, you may consider evidence of several things:
>
> 1. Negligence
> 2. Motive and intent
> 3. The Defendants' own actions or statements
> 4. The inherent probability of the story
> 5. Bias or ill will
> 6. A failure to properly investigate
> 7. Any refusal to meaningfully retract the statement and apologize
> 8. Any failure to adhere to journalistic policies
> 9. Previous dealings between the parties
>
> If you find that Plaintiff has proved that when Defendants made the statement, they knew it was false or acted in reckless disregard of its truth or falsity, then you must proceed to consider the other elements of Plaintiff's case. If you find that Plaintiff has not proved that when Defendants made the statement, they knew it was false or acted in reckless disregard of its truth or falsity, then you need proceed no further and you should report to the Court.[9]

Note that Palin's lawyers asked the judge to instruct jurors that, in deciding whether Times' opinion writer James Bennet was guilty of reckless falsity, they may consider his "motive and intent" in writing the opinion column critical of Palin, as well as his purported "bias or ill will" toward her because James's brother is Sen. Michael Bennet (D-Colorado). Those facts in combination with the words "actual malice" themselves could, theoretically, persuade a jury to rule in Palin's favor. Obviously, the *Times* did not want Judge Rakoff telling the jurors that such alleged motivation and/or bias and ill will could, in combination with other factors, satisfy Palin's burden of demonstrating "actual malice."

Ultimately, Judge Rakoff delivered the following instruction (No. 13) to the jury:

> The fourth element that the plaintiff must prove is called "actual malice," a legal term that concerns the defendants' state of mind and specifically Mr. Bennet's state of mind, at the time the editorial was published. There are two aspects of actual malice, both of which the plaintiff must prove by clear and convincing evidence, that is they must be proved to be highly probable.
>
> The first aspect of "actual malice" you must decide is whether, at the time the editorial was published, Mr. Bennet, and therefore The New York Times Company, (i) knew that either or both

> of the allegedly defamatory statements he had drafted were in fact false; or that, at a minimum, (ii) he consciously chose to recklessly disregard the high probability that they were false.
>
> In considering Mr. Bennet's state of mind, you should consider all the evidence, including relevant inferences to be drawn therefrom. But also keep in mind that the plaintiff must prove what was in Mr. Bennet's mind by clear and convincing evidence. For example, with regard to "reckless disregard," it is not enough just to show that Mr. Bennet did not know, one way or the other whether the challenged statement you are considering was true or false. Nor is it enough to prove that he was merely negligent regarding that statement's truth or falsity.
>
> For instance, a failure to sufficiently investigate or to research a particular point does not establish actual malice, unless the plaintiff has demonstrated that such inaction was a conscious, deliberate attempt to avoid confirming the statements' probable falsity. Even irresponsible reporting or a demonstrated failure to follow professional, journalistic standards does not, on its own, establish actual malice unless the plaintiff has proved that there was a high probability that Mr. Bennet actually doubted the truth of the challenged statement you are considering and, nevertheless, consciously chose to disregard the high probability that the statement was false.
>
> The second aspect of "actual malice" that you must decide is whether the plaintiff has proved by clear and convincing evidence that, if Bennet believed the challenged statement you are considering was false, he also either (i) intended that the statement to defame Palin, or (ii) acted in reckless disregard of whether the statement would defame Palin. As previously noted, "reckless disregard" is only satisfied if the plaintiff has proved that there was a high probability that Bennet had a high degree of awareness that ordinary readers would understand the challenged statements to convey that Palin bore clear or direct responsibility for causing Loughner to commit the Arizona shooting and proceeded to publish anyway.
>
> If you find that the plaintiff has proved, by clear and convincing evidence, both of the two requirements of actual malice to the challenged statement you are considering, then you must proceed to the issue of damages. But if you find that the plaintiff has failed to prove either or both of the requirements of actual malice as to the challenged statement you are considering, you must find the defendants not liable.[10]

Notably, the instruction Judge Rakoff delivered did not incorporate Palin's laundry list of factors the jury could consider, in combination, to find actual malice. And Judge Rakoff *sua sponte* added some illustrations of what is not actual malice, undoubtedly helpful to the *Times*' position. Lastly, it is noteworthy that the delivered instruction mentions the term "actual malice" eight times.

How Best to Instruct Juries Regarding Actual Malice

Palin v. New York Times highlights the need for clear and understandable instructions in future actual malice cases. Without question, the primary challenge is to clarify how "constitutional malice" differs from ordinary, common law malice, which is generally understood to mean an act motivated by "spite, ill will, or hatred." The difficulty is further complicated by the fact that the defendant's dislike for, and desire to do harm to, the plaintiff, while itself insufficient to establish actual malice,[11] is among the facts a jury may consider (unless excluded as unfairly prejudicial under Evidence Rule 403) to determine whether constitutional actual malice has been proven.[12] The key, then, is for the judge to emphasize the central teaching of *Garrison v. Louisiana* and its progeny: The First Amendment forbids public figures

from recovering damages for defamation premised on "a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood."[13]

Therefore, a reporter's declaration that she intends to "take [the subject of a news report] down" or will expose the subject as a fraud or crook—while substantiating such allegations and/or fully believing in their truth (although mistaken)—is not evidence of actual malice.[14] For example, in one case, the fact that the reporter had allegedly said to the plaintiff "I'll get you" and "I'll destroy you" was held insufficient to establish actual malice.[15]

Accordingly, the instructions on fault must clearly and unmistakably focus the jury's attention on the defendant's actual subjective belief regarding the truth of what was published at the time of publication. While the jury may, in some cases, be permitted to consider the defendant's intent to harm the plaintiff,[16] it is only the defendant's actual subjective belief as to the truth of the published statements that can establish "knowing or reckless falsity." So how best to explain this all to those not trained in the law?

One helpful approach to avoiding the confusion regarding constitutional "actual malice" and ordinary common law "malice" is for judges steadfastly to avoid mentioning the word "malice" in front of the jury. And, as demonstrated below, several states' pattern civil jury instructions committees have adopted this approach. But prior to examining those instructions, it is worth exploring how and why those instructions came into being.

Justices Warn Against the Risk of Juror Confusion in Actual Malice Cases

Between 1983 and 1989, there were a series of high-stakes, high-profile, public figure/public official libel cases tried to juries in federal courts in New York and the District of Columbia. *Sharon v. Time, Inc.*,[17] *Westmoreland v. CBS*,[18] and *Tavoulareas v. Piro*[19] were among the landmark cases that generated momentous and oft-cited judicial opinions regarding the contours of actual malice and the intricacies of trial management.

Of course, a fourth case of that period, *Harte-Hanks Communications v. Connaughton*, was the only one to be reviewed by the Supreme Court. *Connaughton* remains the most detailed and enduring explication of the elements of the mental state of "reckless disregard of the truth" (including through "deliberate avoidance of the truth"/"willful ignorance" once suspicions of error have arisen) to establish constitutional actual malice.

Connaughton makes clear that while a defendant's ill will, spite, or desire to harm the plaintiff is not alone sufficient to establish constitutional malice,[20] evidence of such animus can be relevant (and therefore admissible) in the mosaic of circumstantial evidence by which a plaintiff can establish constitutional malice.[21] Aye, so there's the rub: Common law "malice" can be relevant to the issue of "constitutional actual malice," even if the former is not independently sufficient to establish the latter. If this is confusing to you—a law school graduate steeped in First Amendment law—imagine the challenge it poses to an ordinary citizen, deliberating in a jury room with eleven equally untrained peers.

In several of the landmark libel cases, the justices acknowledged that the phrase "actual malice," and one of its two alternative components, "reckless disregard of the truth," pose significant challenges for trial judges tasked with instructing juries. In his concurrence in *Sullivan*, Justice Arthur J. Goldberg foresaw the danger that "[i]f the constitutional standard is to be shaped by a concept of malice, the

speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice."[22] A decade later, Justice William J. Brennan Jr. recommended that jury instructions should refer only to "knowing or reckless falsity" rather than describe this state of mind as "actual malice."[23]

And, in *Connaughton*, the Supreme Court recognized that "[t]he phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will."[24] Accordingly, like Justice Brennan had in 1974, the *Connaughton* Court urged trial judges to instruct juries "in plain English":

> By instructing the jury "in plain English" at appropriate times during the course of the trial concerning the not-so-plain meaning of this phrase, the trial judge can help ensure that the *New York Times* standard is properly applied.[25]

While *Connaughton* remains the gold standard for elucidating the substantive elements of constitutional malice, *Tavoulareas* provides the most detailed guidance on the process by which jurors are to be instructed as to those elements. Notably, among the circuit court judges who participated in the *Tavoulareas* rehearing were future Justices Antonin Scalia and Ruth Bader Ginsburg.[26] Judge Ginsburg's separate concurrence explains why and how trial judges must strive, fastidiously, to guide jurors in cases involving public figure plaintiffs:

> Keeping the jury on track poses a formidable challenge for the judge in a libel case governed by the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 [] (1964). As Justices Black and Goldberg anticipated, *the risk is considerable that jurors will not comprehend the difference between reckless disregard and mere neglect or carelessness*, or will confuse or blend the separate issues of falsity and actual malice.[27]

Borrowing a nice turn of phrase from Eldon R. Sunderland in the 1920 edition of the *Yale Law Journal*, Judge Ginsburg stated, "[i]n the libel area particularly, it is not a large exaggeration to suggest that jurors can easily misunderstand more law in a minute than the judge can explain in an hour."[28] To guard against the unusually high likelihood of juror confusion, Judge Ginsburg instructed that

> the judge should act to reduce the risk that "the protective benefits of the *Sullivan* rule [will become] mythical." . . . The trial judge can explain, instruct, or clarify continuously, from the commencement of the trial through to the jury's deliberations. The means at hand include: *instructing the jury, in plain English*, at the opening of the case and at appropriate times during trial as well as at the close of the case; allowing the jury to retain during deliberations a copy of the charge or key portions of it; and requesting the jury to return a special verdict or a general verdict accompanied by answers to interrogatories. . . .
>
> To arm the jury with the information needed for the intelligent performance of its task, *the judge [should] endeavor to speak the language of the jurors*, and *avoid the jargon of the legal profession*.[29]

In its most recent (1991!) decision to address the merits of a libel claim (not as cabined by a specific federal statute[30]), the Supreme Court again prescribed that trial judges should avoid confusing jurors by using the legal jargon of *Sullivan*:

> We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But *the term can confuse as well as*

> *enlighten*. In this respect, the phrase may be an unfortunate one. *See Harte-Hanks Communications*, Inc. *v. Connaughton*, 491 U.S. 657, 491 U.S. 666, n.7 (1989). *In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity*.[31]

Pattern Jury Instruction Drafters Respond Accordingly

> "[A]ctual malice" is entirely different from common-law "malice." Because of the possibility of con- fusion of meanings the trial judge eliminated "actual malice" from the instructions. . . . [W]e entirely agree with the trial judge and think that it would not be good practice to use the term "actual malice" in instructions in future cases.[32]

Accordingly, Colorado's pattern civil jury instruction for cases in which actual malice is required states that the plaintiff must prove, by clear and convincing evidence, that the defendant either "knew the statement(s) was/were false or published with reckless disregard for the truth." A second instruction that must be delivered in all such cases defines "reckless disregard of the truth" as "when, at the time of publication, the person publishing [the statement(s)] believes that the [statement(s)] is/are probably false or has serious doubts as to (its) (their) truth."

It could be argued that mentioning recklessness in these two related instructions is also problematic. After all, lay jurors probably believe they have a solid grasp on what it means to act recklessly. Nevertheless, both the first elements instruction and the second one defining "reckless disregard of the truth" serve to focus the jury's attention on the crucial aspect of the defendant's attitude towards the truth or falsity of the published statement(s). Most importantly, no mention is made of malice.

Michigan's pattern civil jury instructions on defamation similarly avoid any mention of the words "actual malice" or "malice."[33] The jury instructions committee's comment explains that this was a conscious, deliberate decision: "Although this instruction does not use the words 'actual malice,' it does incorporate the definition of that term. Use of th[at] term in jury instructions has been criticized."[34]

Other states whose pattern jury instructions refrain from mentioning "actual malice" in favor of "knowing or reckless falsity" include Arizona,[35] California,[36] Virginia,[37] and even the state of New York, where the *Palin* case was tried.[38]

Conclusion

While there may be no perfect jury instruction to properly guide jurors in determining whether a libel plaintiff has presented clear and convincing evidence of constitutional actual malice, the ones set forth above from Colorado, Michigan, and Virginia are recommended. By avoiding any reference to "malice," these states' pattern instructions strive to avoid juror confusion, as the late Justice Ginsburg warned in *Tavoulareas:*

> *New York Times v. Sullivan* presents a standard that may slip from the grasp of lay triers unfamiliar with legal concepts and perhaps unsympathetic to publishers who print statements shown to be false. Careful efforts by judges to make the legal rules genuinely accessible to jurors may reduce some of the turbulence in this unsettling area of the law.[39]

Among those "careful efforts," the instruction Judge Rakoff gave in *Palin*—in which he explained the types of conduct in news reporting that do not satisfy the standard of knowing or reckless falsehood—is certainly worth urging trial judges to deliver. But, as the Supreme Court has indicated, trial judges

should avoid confusing the jury by making any reference to "actual malice."

Endnotes

1. *E.g.*, McKee v. Cosby, 139 S. Ct. 675 (2019); Berisha v. Lawson, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting from denial of certiorari) and (Gorsuch, J., dissenting from denial of certiorari); Tah v. Global Witness Publ'g, Inc., 991 F.3d 231 (D.C. Cir. 2021) (Silberman, J., dissenting in part).

2. Emily Hockett, *Florida Proposes to Really "Open Up" Defamation Law*, RCFP (Mar. 6, 2023), https://www. rcfp.org/florida-defamation-law-bills/ (this effort has faced opposition from across the political divide); Ken Besinger, *Right-Wing Media Splits from DeSantis on Press Protections*, N.Y. Times (Apr. 3, 2023), https://www.nytimes. com/2023/04/03/us/politics/desantis-defamation-libel-laws-florida.html.

3. Though not discussed herein, those cases included two libel suits against Alex Jones (resulting in jury verdicts exceeding $1 billion, after he'd defaulted on liability) and the widely watched courtroom drama of cross-claims for defamation between Hollywood celebrities Johnny Depp and his former wife, actress Amber Heard, which recently settled on appeal.

4. *But see* Matthew Schafer & Jeff Kosseff, *Protecting Free Speech in a Post*-Sullivan *World*, Fed. Comm'ns L.J. (Sept. 28, 2022), https://ssrn.com/abstract=4232480.

5. Palin v. N.Y. Times Co., 940 F.3d 804, 812 (2019) (reversible error to rely on testimony from a *sua sponte* evidentiary hearing without converting the motion to dismiss into a summary judgment motion).

6. Palin v. N.Y. Times Co., 588 F. Supp. 3d 375 (S.D.N.Y 2022).

7. Jeremy W. Peters, *Sarah Palin's Libel Claim Against* The Times *Is Rejected by a Jury*, N.Y. Times (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/business/media/new-york-times.html ("[T]he jury concluded that the newspa- per and its former opinion editor, James Bennet, had not acted with the level of recklessness and ill intent required to meet the high constitutional burden for public figures who claim defamation."). The jury's verdict on the general ver- dict form is available at @KlasfeldReports, Twitter (Feb. 16, 2022, 2:28 PM), https://twitter.com/KlasfeldReports/ status/1494045948816859137/photo/1.

8. Defendants' Proposed Jury Instructions, Palin v. N.Y. Times Co., No. 17-cv-04853-JSR, Docket No. 146 at 36–37 (S.D.N.Y. Jan. 17, 2022).

9. Plaintiff's Proposed Jury Instructions, *Palin*, No. 17-cv-04853-JSR, Docket No. 151 at 18–19 (S.D.N.Y. Jan. 17, 2022).

10. Court's Instructions of Law to the Jury, *Palin*, No. 17-cv-04853-JSR, Docket No. 170 at 19-20 (S.D.N.Y. Feb. 14, 2022).

11. *See, e.g.*, Harte-Hanks Commc'ns Corp. v. Connaughton, 491 U.S. 657, 666 (1989) ("the actual malice stan- dard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term"); Cantrell v. Forest City Publ'g, 419 U.S. 245, 252 (1974) (actual malice "is quite different from the common-law standard of 'mal- ice' generally required under state tort law to support an award of punitive damages."); Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991) ("Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.").

12. *Connaughton*, 491 U.S. at 668.

13. Garrison v. Louisiana, 379 U.S. 64, 73 (1964).

14. *See, e.g.*, Henry v. Collins, 380 U.S. 356, 357 (1965) (per curiam) (reversing libel verdict for plaintiff where "The jury might well have understood the[] instructions to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood."); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 10 (1970) (judge's instructions "that defined 'malice' to include 'spite, hostility or deliberate intention to harm'" unconstitu- tionally permitted recovery without requiring knowledge of falsity or reckless disregard of the truth"); Campbell v. Citizens for an Honest Gov't, Inc., 255 F.3d 560, 569 (8th Cir. 2001) ("Evidence of a defendant's ill will, desire to injure, or political or profit motive does not suffice" to establish actual malice); New Times, Inc. v. Isaaks, 146 S.W.3d 144, 165 (Tex. 2004) ("actual malice concerns the defendant's attitude toward the

truth, not toward the plaintiff"); Saenz v. Playboy Enters., Inc., 653 F. Supp. 552 (N.D. Ill. 1987) (same), *aff'd*, 841 F.2d 1309 (7th Cir. 1988).

15. Herbert v. Lando, 781 F.2d 298, 309 n.6 (2d Cir. 1986).

16. A section of the Media Law Resource Center's Model Trial Brief (2007) is dedicated to seeking the exclusion of evidence of defendant's bad motive or intent, in actual malice cases, as unfairly prejudicial.

17. No. 83 Civ. 4660 (ADS) (S.D.N.Y.). Following a two-month trial, the jury ruled (after 11 days of delibera- tion) that the publication was both materially false and defamatory, but there was not clear and convincing evidence of actual malice, thereby rejecting Israeli General Ariel Sharon's libel claim seeking $50 million in compensatory damages. Defending the case cost Time, Inc. $3 million in attorney fees alone. *See Sharon v. Time*, Christian Sci. Monitor (Jan. 28, 1985), https://www.csmonitor.com/1985/0128/etrial.html.

18. No. 82 Civ. 7913 (PNL) (S.D.N.Y). After five weeks of trial on Westmoreland's claim seeking $120 million in damages, Judge Pierre Leval made clear he would submit a series of separate special verdict forms to the jury (on fal- sity, actual malice, and injury), which could deprive the plaintiff of a finding on the issue of falsity. Shortly thereafter, the case settled. *See* https://en.wikipedia.org/wiki/Westmoreland_v._CBS. *See also* Renata Adler, Reckless Dis- regard: Westmoreland *v. CBS* et al., Sharon *v.* Time (Alfred A. Knopf, 1986); Rodney A. Smolla, Suing the Press (Oxford Univ. Press, 1986) (discussing multimillion-dollar libel suits by Ariel Sharon, William Westmoreland, Carol Burnett, Senator Paul Laxalt, and the former Miss Wyoming).

19. Following a three-week trial, a six-member jury awarded the president of Mobil Oil Corp. $250,000 in compensatory and $1.8 million in punitive damages against the *Washington Post*. U.S. District Judge Oliver Gasch vacated that verdict upon granting the *Post*'s post-trial motion for J.N.O.V. *See* Stuart Taylor Jr., *Court Overturns Libel Ver- dict Against the* Washington Post, N.Y. Times (May 3, 1983), at A-1. The D.C. Circuit affirmed Judge Gasch's ruling. Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987).

20. *Connaughton*, 491 U.S. at 666.

21. *Id.* at 668 ("it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry").

22. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 302 n.4 (1964) (Goldberg, J., concurring).

23. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1974) (plurality) (*Rosenbloom*), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See also* Jesse L. Jenike-Godshalk, *"Actual Malice" Is Not Actually Malice: Clarifying and Solving One of the Supreme Court's Enduring Paradoxes*, Lexology (Feb. 3, 2012), https://www. lexology.com/library/detail.aspx?g=e5a471ce-2c61-4deb-964f-592d96a05544 (advocating that the Supreme Court partially overturn *Sullivan*, only to the extent that it refers to "actual malice," and that it replace that term with "knowing or reckless falsity").

24. *Connaughton*, 491 U.S. at 666 n.7.

25. *Id.* (citations omitted). Using "plain English" and eschewing the use of legal jargon a/k/a "terms of art" in jury instructions were the focus of national reform efforts in the 1980s, and continue to the present. *See, e.g.*, William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Calif. L. Rev. 731 (1981); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979); *see also* Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37, 41–44 (1993) (surveying some of the empirical data showing jurors often do not comprehend pattern jury instruc- tions); *id.* at 49 ("While terms of art serve as a convenient shorthand for lawyers, they obviously befuddle those uninitiated into the legal fraternity."); Ian Lewenstein, *We Need Plain Language in Our Justice System, Especially Jury Instructions*, Minn. Reformer (Apr. 21, 2021), https://minnesotareformer.com/2021/04/21/we-need-plain-language- in-our-justice-system-especially-jury-instructions-opinion/ ("It is not hyperbole to say that some defendants have died because of incoherent jury instructions.").

Colorado's Pattern Civil Jury Instruction Committee, on which this author serves, includes a "Lay Advisor," a retired middle school English teacher, for the express purpose of helping ensure that all pattern instructions are com- prehensible to lay people, by incorporating as much "plain English" as possible.

26. After he had participated in oral argument, Judge Scalia was appointed to the U.S. Supreme Court, so he

did not participate in the panel's final ruling.

27. Tavoulareas v. Piro, 817 F.2d 762, 806 (D.C. Cir. 1987) (italics added). Judge Pierre Leval expressed similar concerns: "Since what is meant [by 'actual malice'] is something distinctly different from malice in its everyday sense of spite, ill will or hatred, the addition of the adjective 'actual' seems to me to do little to avert confusion. I do not suggest that 'constitutional malice' . . . is much of an improvement. . . . [I]n the context of a jury trial . . . the use of the term malice, or
worse—actual malice, carries a significant potential for prejudice." Westmoreland v. CBS, 596 F. Supp. 1120, 1172 (2d Cir. 1984).

28. *Tavoulareas*, 817 F.2d at 808 (Ginsburg, J., concurring) (internal quotation marks omitted) (quoting E. Sunder- land, *Verdicts, General and Special*, 29 Yale L.J. 253, 259 (1920)).

29. *Id*. at 807–808 (italics added).

30. Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014) (holding that "immunity may not be denied under [the Aviation and Transportation Security Act, 49 U.S.C. §44901, *et seq*.] to materially true statements"). One other libel case, *Tory v. Cochran*, 544 U.S. 734 (2005), was limited only to the remedies available upon a finding of actionable defamation.

31. Masson v. New Yorker Mag., Inc., 401 U.S. 496, 511 (1991) (italics added).

32. Walker v. Colo. Springs Sun, 538 P.2d 450, 459 (Colo. 1975) (internal citation omitted) (italics added).

33. Mich. Civ. J. Instr. 118.06 (2003) (citing Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666 n.7 (1989); *Masson*, 501 U.S. 496).

34. *Id.*

35. Rev. Ariz. Jury Instr., Defamation 1A & 1B (2021).

36. CACI 1700 & 1701 (2023).

37. Va. Civ. Jury Instr. 37.090 & 37.095 (2022).

38. N.Y. Pattern Jury Instr. 3.28 & 3.34 (2022).

39. Tavoulareas v. Piro, 817 F.2d 762, 808 (D.C. Cir. 1987) (Ginsburg, J., concurring).