Ten Years Later: Pleading Standards and Actual Malice

BY MATTHEW SCHAFER

There is no “short and plain” way to tell the story of pleading standards: “Cause and effects here, as with other historical questions, are virtually impossible to disentangle.” Even before the Federal Rules of Civil Procedure existed, the niceties of these sometimes strict, sometimes lax procedural requirements spanned hundreds of pages of treatises.

Bell Atlantic Corporation v. Twombly and Ashcroft v. Iqbal marked a new chapter. Twombly first discarded Conley v. Gibson’s “no set of facts” formulation of Rule 8, substituting a requirement that a plaintiff plead enough facts to state a claim that is plausible on its face. Iqbal then applied Twombly’s holding to allegations of “[m]alice, intent, knowledge, and other conditions of a person’s mind” pleaded generally under Rule 9.

This legal couplet had a “seismic” effect on the law. Much of defamation law sat on the fault line. All-important actual malice—whether a defendant in a public figure defamation suit published with knowledge of falsity or with a high degree of awareness of probable falsity—is precisely the kind of allegation made under Rule 9 and subject to Rule 8.

After Twombly and Iqbal, critics lamented that requiring enough facts from which a court could conclude that a complaint was plausible risked transforming motions to dismiss into summary judgment motions. Professor Stephen Subrin—a preeminent authority on procedure—was less charitable: “Ashcroft v. Iqbal is an embarrassment to the American Judicial System.”

For press advocates though, plausibility was a vehicle for the early dismissal of costly defamation suits. Previously, that a public figure defamation plaintiff pleaded actual malice “generally, without alleging corroborating evidence, [would] not defeat her complaint.” After, it would: A plaintiff now had to plead facts going to actual malice in her complaint, and a judge had to pan the complaint for enough nuggets of facts to determine whether they “plausibly” made out actual malice. In 2012, the First Circuit became the first appellate court to affirm a dismissal for failure to plead actual malice. Four more joined the “chorus” and even state courts harmonized.

Times were good.

Then Sarah Palin sued the New York Times. An editorial allegedly implied that her super PAC incited an attack on Congresswoman Gabrielle Giffords. In a stinging reversal of a lower court opinion, the Second Circuit found that Palin plausibly pleaded actual malice. In doing so, it stressed the much-ado-about-nothing nature of the case: “This case is ultimately about the much-ado-about-nothing nature of the case: ‘This case is ultimately about the First Amendment, but the subject matter implicated in this appeal is far less dramatic: rules of procedure and pleading standards.’” This observation is just one of many things wrong with the opinion: Procedure and pleading play a dramatic role in the administration of justice, developing

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FROM THE CHAIR

Legal Profession Must Evolve in Step with the World Around Us

BY DAVE GILES

In August 2019, the American Bar Association (ABA) released a study providing a snapshot of the legal profession. The 98-page report is a veritable feast for statistics geeks like us, laying out demographics, pay, and other minutia about lawyers, judges, and law students.

Some of the information is predictable: The number of lawyers in the United States is growing; Washington, D.C., has the most lawyers per capita; and lawyers in big cities get paid higher wages than those in small towns and rural areas. (For those who want to take a deep dive, access the 2019 ABA Profile of the Legal Profession at https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf).

Other data raised some alarming concerns about increased substance use that are worth noting and discussing. The number of lawyers with a drinking problem (21 percent) is more than three times the national average (6 percent)—and for lawyers under 30, the rate is even higher; illegal drug use among law students is almost double that of students in other graduate programs; and there is a clear tie between mental health issues, substance abuse, and attorney discipline.

Yet one piece of data jumped off the page: The legal profession track record on creating a diverse workforce is well below national averages and is not evolving at the pace of demographic changes in the United States.

The percentage of female lawyers has increased slowly since 2009. Source: ABA National Lawyer Population Survey

States.

By 2044, in about the time it will take to raise a child born in the next few years, the demographics of the United States will continue to shift, with the majority being people of color. This shift is guaranteed and requires our attention. We have a responsibility to the success of our profession to ensure we are evolving in step with the world around us. And today, according to the ABA report, only 15 percent of lawyers are racially or ethnically diverse. As the ABA Profile reports, 5 percent of all lawyers are African American—no progress since 2009—yet more than 13 percent of the U.S. population is African American. Likewise, 5 percent of U.S. lawyers are Hispanic, while more than 18 percent of the U.S. population is Hispanic. The difference is not limited to race and ethnicity. The U.S. Census Bureau reports that women already outnumber men, yet women make up only 36 percent of all lawyers in the United States. Unfortunately, our corner of the profession is not outpacing the profession at large. The Forum on Communications Law membership is reasonably close to the ABA Profile’s findings: about 40 percent of Forum members are women and 13 percent are people of color.

The diversity gap in law is not a new issue. Back in 2004, more than 100 corporations believed that a diverse legal profession was so important that they banded together in a call to action by pledging to, among other things, retain outside law firms “based in significant part on the diversity performance of the firms.” Fifteen years later, as Steven Rodgers, general counsel for Intel characterized it, the impact of that call to action is “frustratingly slow.”

Having an equitable and inclusive work environment provides clear economic and cultural benefits. So why has change been so slow?

The Center for American Progress has reported that the top 10 economic benefits of workplace diversity include the ability to drive economic growth, capture a greater share of the consumer market, hire a more qualified workforce, and be more entrepreneurial and innovative.

Further, organizations with an inclusive culture are twice as likely...
to meet or exceed financial targets; three times as likely to be high-performing; six times as likely to be innovative and agile; and eight times as likely to achieve better business outcomes.\(^3\)

If the economic benefits of operating an organization with a diverse workforce are not compelling enough, we ought to be motivated by the need simply to be relatable to our clients and theirs. The industries that many of us represent are becoming more diverse every day. Traditional news organizations such as broadcast television, newspapers, and radio have diversity rates that are higher than the legal profession and are growing at a faster rate. Evolving companies with a focus on delivering news, information, and entertainment through social media, websites, podcasts, and other platforms outpace their traditional brick-and-mortar competitors. In fact, as of 2019, the Bureau of Labor Statistics reports that companies focused on Internet publishing and broadcasting and web portals have a workforce that is more than 33 percent racially and ethnically diverse.

Shareholders and investors are demanding a more diverse workforce as well. And as investors and consumers have ratcheted up their emphasis on corporate social responsibility, public companies are following suit. Supplier diversity initiatives have become an emphasis for government contractors, nonprofits, and private businesses. Committing to spend an enhanced percentage on minority- and women-owned businesses is becoming the norm. Their motivation is clear, and their practices are reflecting it. As a recent survey indicated, companies emphasizing diversity in the selection of vendors are more profitable than those that don’t.\(^4\)

For many of these organizations, diversity is essential to survival, and they expect their vendors—including their law firms—to reflect their emphasis on diversity. The same is true of the news and entertainment business. As news organizations big and small, traditional and cutting edge, compete for business—whether it’s for advertising dollars, viewership, usership, or readership—diversity is a key component of success.

Companies are approaching the needed changes in a variety of ways. At my company, E.W. Scripps, we are taking steps to improve. We’ve formed an Equity, Diversity and Inclusion (EDI) department led by my friend and colleague Danyelle Wright as chief diversity officer. She is leading a variety of EDI initiatives for Scripps.

Likewise, at the individual local broadcast television stations Scripps owns, thoughtful and hard work has been done in recent years regarding diversity. The reasons for this are business, ethical, and cultural. First, it’s the right thing to do. Second, it is responsive to our audiences.

In order to connect authentically with our company’s advertisers, audiences, and communities, we believe our workforce must reflect the diversity in our markets so that our employees are well-equipped to understand, appreciate, and interact with persons from across cultures and belief systems. To that end, we are in the middle of an extensive research and training effort keyed on learning about the uniqueness and diversity in our local markets and building cultural competency in our journalists so they can make news judgments that take into consideration implicit biases, commonalities, and differences in the markets they cover.

The Forum is also no stranger to taking steps to increase its diversity. With respect to gender, the efforts have been driven through the Women in Communications Law (WICL) Committee, which provides a variety of events and opportunities for conversation on important issues. The WICL events each November in New York are well-attended, and the speakers at the annual conference each February always draw a packed room.

The Forum’s diversity initiatives have also focused on demonstrating our commitment to people of color with law schools and law students. Each year the Forum provides a scholarship to one law student to attend the annual conference, giving that student of color an opportunity to meet lawyers and learn more about legal issues facing news, information, and entertainment companies.

What’s more, the First Amendment Diversity Moot Court Competition is in its 12th year. It provides law students an opportunity to work with mentors in the Forum and gain valuable experience writing and practicing their oratorical skills in front of Forum members and—for the finalists—a live panel of judges. Several success stories have come from the First Amendment Diversity Moot Court Competition. You may know some of the rising stars in our membership who got early exposure...
to media law and the Forum through the competition. Adrianna Rodriguez is in-house legal counsel at Univision and a co-chair of the Young Lawyers Committee. Sara Bell is in-house legal counsel at PBS and the other co-chair of the Young Lawyers Committee. April Jones is an attorney-advisor with the Federal Communications Commission. Cristina Salvato is an intellectual property lawyer with Sheppard Mullin in Los Angeles. Likewise, the Forum’s governing structure has been modeling the way for years. Women comprise many of the top leadership roles, including our past and incoming chairs, our executive director, and the chairs or co-chairs of numerous committees.

When daunting societal problems present themselves, we can have a tendency to throw up our hands and let others take the lead or convince ourselves that one person can’t effect change. For decades, smart, thoughtful, and motivated people have worked to capture the benefits of equity, diversity, and inclusion. Despite some progress, we have a long way to go.

The Forum on Communications Law will continue taking steps to make the legal profession a more inclusive place, and, in fact, some of your organizations may already be doing so. A natural place to start: For law firm lawyers, make hiring, retaining, and promoting diverse candidates a priority. For in-house counsel, practice what some of your corporate legal colleagues pledged 15 years ago. Insist on diversity in your internal hires and in the firms you retain to do your legal work.

The work doesn’t stop once you have a more diverse workforce. In fact, it’s just beginning. For instance, we must also address the high turnover rates in the legal profession. One way to do this is by mentoring.

Take a page from the Diversity Moot Court Competition. Each team is provided with a Forum member to serve as a mentor, and the students find the input and feedback invaluable. So regardless of whether you work at a law firm or in the legal department of a company or non-profit, volunteer to mentor students or young associates. You, the person you’re mentoring, and the profession will reap the rewards of your efforts for years to come. ■

Endnotes
IN MEMORIAM
John Borger: More Than a Brilliant Lawyer, He Was a Great Man

BY LEITA WALKER

By now, the media law bar has heard of the passing of John Borger, as have readers of Twin Cities newspapers and, yes, even the New York Times, where an obituary served as testament to the national importance of the life he lived.

John, one of the country’s pre-eminent First Amendment lawyers, died December 16, 2019, in Minneapolis at the age of 68. He spent his 40-year career practicing law at Faegre Baker Daniels (Faegre & Benson, when he joined it). During that time, he led the development of the law relied upon by those who speak truth to power, defending journalists in libel litigation, protecting them from subpoenas, and ensuring they could access government information and judicial records.

But what eludes capture in the long list of cases he handled are the sentiments conveyed to me since he died by people from across the country—some who saw him just once or twice a year at legal conferences. Even these casual acquaintances intuitively know: John was more than a great lawyer; he was a great man.

Many a brilliant lawyer is just that: Brilliant at the law, but singularly focused on that pursuit, forsaking the diversity of experiences and the pausing to be human that make life worth living. Not John.

In the decade-plus I worked under his tutelage, I had many opportunities to learn from the example he set, but two incidents in particular stand out.

The first was when I was a fairly young associate, trying to figure out how to balance the demands of motherhood with a career in “big law.” One day I came in late, having spent the morning reading to my son’s daycare class. I will never forget what John said when I saw him.

While many partners of his gender and generation might have been noticeably annoyed or simply said nothing, John went out of his way to tell me how important it is to take time to do what I had done—how finding work-life balance is hard but can be done and is so worth it. It meant the world to me, even more so because I knew he spoke from experience: John’s wife, Judy, had an important career of her own as a Twin Cities journalist, and together they juggled the raising of three great kids, now three great adults.

The second incident was a year or two later, when I was discussing some firm policy with John. I must have rolled my eyes, conveying disbelief that the firm was doing anything more than paying lip service to the issue. John stopped me with a gentle reprimand. I wish I could remember his exact words. But he essentially said not to go looking for shadows lurking in dark corners. Assume the best of people, he was saying. Take them at their word, at least until they give you reason not to.

Like any good journalist, John was often skeptical. But I never saw him cynical. He questioned people’s judgment but rarely their motives. He understood that there is enough adversity in the world—certainly in the practice of law—without going looking for it among your friends, colleagues, and allies. It’s a lesson I will never forget.

Not all of us will get to take a case to the U.S. Supreme Court, as John did, or be named, as John was, a Champion of the First Amendment, the highest honor from the ABA Forum on Communications Law. (John was only the third to receive this prestigious award.)

But the things that made John one of the giants of my life—his generosity of spirit, his patience, his commitment to a worthy cause—are things all of us can model. What a wonderful life he led and what a wonderful, many-layered legacy he left.

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Minnesota and Tennessee Tackle the Fair Report Privilege

BY PAUL R. MCADOO AND LEITA WALKER

The fair report privilege is “considered to be ‘one of the most powerful and frequently invoked common-law defenses,’ and is widely recognized in judicial decisions and by statute.”1 This still-young century has seen a significant number of state high courts address the contours of this critical common law privilege.2 The year 2019 saw two more decisions on the privilege, both in Tennessee—Funk v. Scripps Media3 and Burke v. Sparta Newspapers4—with another having been briefed and argued in the Minnesota Supreme Court, Larson v. Gannett.5 For Tennessee, the Funk decision was the first by its supreme court regarding the fair report privilege since 1956.6 The Minnesota Supreme Court’s last analysis of the fair report privilege was in its 2000 decision in Moreno v. Crookston Times Printing, Inc.7 These cases will reshape the law on the fair report privilege in these two states and could have broader impact when other courts address the fair report privilege in the future.

The focus of the Funk case was whether a showing of malice, either express (common law) malice or constitutional actual malice, defeats an assertion of the privilege. Both Larson and Burke focus on a different issue: What is an official action or proceeding upon which the speech must be based in order to qualify for the privilege in the first place? In addition, Larson addresses what constitutes a fair and accurate summary of the proceeding, for purposes of deciding whether the privilege has been abused, and Burke touches on the type of attribution, if any, that is required for the speech to be covered by the privilege.

Should Malice Be Able to Defeat the Fair Report Privilege?
The Funk case “presents a case within a case within a case.”8 The original case was a prosecution of a Nashville developer by Funk, the district attorney general. That case was ultimately dismissed, but only after the developer agreed to dismiss his federal lawsuit against the Nashville police.9 The developer then sued his accuser and others in a civil suit, which included a malicious prosecution claim.10 During discovery in the second case, there was discussion of “a $2,000,000 payment that [a] public relations consultant . . . requested of [the developer’s] father on behalf of an undisclosed source” in a sealed motion to compel Funk to testify.11 The Nashville Scripps Media station ran a story about the second suit, including the deal to dismiss the criminal suit and “the request from an undisclosed source for a $2,000,000 payment.”12 Funk then sued the Scripps station alleging that its story “claimed the plaintiff solicited a $2,000,000 bribe and blackmailed [the developer] into dismissing his federal court lawsuit.”13 Scripps quickly moved for summary judgment based on the fair report privilege and moved for a stay of discovery, but the summary judgment motion did not trigger the appeal.14 Instead, the appeal arose when Funk moved to compel the deposition of Scripps’ reporter after the stay was denied.15 Scripps argued that its reporter was protected from testifying by Tennessee’s Shield Law.16 The trial court granted the motion to compel, holding that “because a showing of malice can defeat the fair report privilege, the plaintiff should be allowed to discover information relating to malice” and that an exception to the Shield Law applied.17 Scripps sought interlocutory appeal, which was granted.18

Despite the convoluted facts, the fair report privilege issue in Funk was a relatively clean, legal one: whether the privilege may be defeated by either express or actual malice. In the nineteenth century, the Tennessee Supreme Court held that a showing by a defamation plaintiff that a speaker acted with express malice defeats an assertion of the fair report privilege.20 This precedent had not been overturned by Tennessee’s highest court. Federal courts in Tennessee, however, have largely ignored express malice and instead held that actual malice defeats an assertion of the privilege.21 And, in recent years, Tennessee’s intermediate appellate courts have varied in their approach with some noting the Tennessee Supreme Court’s nineteenth century precedent, some following the federal courts, and some not including a malice component in the analysis of the privilege.22

The lower court’s decision in Funk focused just on whether actual malice was a means of defeating the privilege. The lower court held that “under the current state of the law the privilege cannot be defeated by a showing of actual malice by the plaintiff. . . .”23 The court also omitted express malice from its summary of the privilege, instead explaining that the privilege
applied so long as the defendant could show that its publications “were ‘a fair and accurate summation of the proceeding[s]’ and that they ‘display[ed] balance and neutrality.’”

In his application for review, the plaintiff did not argue that actual malice defeated the privilege, but instead claimed that the Supreme Court’s decisions from the late nineteenth and early twentieth centuries mandated that express malice could defeat the fair report privilege and that the court of appeals decision was “directly contrary to over 100 years of this Court’s mandatory precedent.”

In their brief, the defendants explained the differences between the two types of malice and argued that neither type of malice defeated the privilege. The focus of the argument was on express malice. The defendants relied upon both a court of appeals decision and decisions by other state high courts in arguing that the “modern rule” was that express malice did not defeat the fair report privilege.

A group of media amici made complementary arguments that the Constitution and public policy both supported excision of express malice from the fair report privilege. First, relying primarily upon Garrison v. Louisiana and Rosenblatt v. Baer, the media amici argued that the inclusion of express malice as a means for defeating a defamation defense was unconstitutional. In Garrison, for example, the Court explained that “[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.” The media amici argued that this rule should bar express malice from the fair report privilege calculus.

Second, inspired by Susan E. Seager’s article in Communications Lawyer on a First Amendment–based fair report privilege, the media amici argued that the line of U.S. Supreme Court cases beginning with Cox Broadcasting v. Cohn generally barred punishment of truthful speech based on lawfully acquired information on matters of public concern and that this constitutional principle could not be overcome by express malice. Amici discussed Cox, Landmark Communications v. Virginia, Smith v. Daily Mail Publishing Co., Florida Star v. B.I.F., and Bartnicki v. Vopper, and explained that these cases “essentially create a constitutional fair report privilege. For this protection to apply, the published information must be truthful, the information must be about a matter of public concern, and the information must have been lawfully acquired.” The media amici further explained that the Supreme Court has carefully avoided making a categorical rule, leaving open the possibility that this privilege might be overcome by a state interest of the highest order. But the Supreme Court has explained that “absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.” Thus, the media amici argued, these cases demonstrate the constitutional problem with permitting a plaintiff to overcome an assertion of the fair report privilege with a showing of express malice.

Finally, the media amici argued that the Tennessee Supreme Court’s nineteenth century and early twentieth century precedents should be overturned because permitting express malice to overcome the fair report privilege is illogical and against the public policy favoring free speech. To illustrate the logic problem with the rule, the media amici highlighted the threat of disparate treatment of journalists covering the same official action or proceeding with similar reports being treated differently under the privilege if one of them was “acted upon by ill will or personal spite.”

On the public policy point, the amici analogized to the absolute privilege the Tennessee Supreme Court recognized in Jones v. State in 2013 for state cabinet-level executive officials for statements “made while performing their official duties.” In Jones, the Tennessee Supreme Court extolled the virtues of free speech and its importance to self-governance, relying heavily upon the U.S. Supreme Court’s decision in Barr v. Matteo: “‘The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.’” And Jones explained “that the public has a vital interest in receiving information from public officials about the effective, or ineffective, functioning and performance of the government.” The media amici noted, however, that the public is not limited to receiving their information from the government, but that the press plays “an important role in the discussion of public affairs. . . .” The same free speech principles that supported an absolute privilege in Jones should support elimination of the express malice component of the fair report privilege.

The Tennessee Supreme Court issued its decision in Funk on March 13, 2019. The court traced the origins of the fair report privilege to an English decision in 1769 in which “the judge observed that a newspaper should not be held liable for republishing allegedly defamatory statements made during a judicial proceeding because such a proceeding ‘is open to all the world.’” The court further explained that the scope and justification of the privilege had since been expanded by courts to include more than just judicial proceedings and that the privilege also “facilitates the worthwhile goal of public supervision of official actions or proceedings.” But traditionally, courts required that a statement was “not made solely for the purpose of causing harm to the person defamed” in order for the privilege to apply. On actual malice, the court explained that, predicated on the U.S. Supreme Court’s decisions like Sullivan and Garrison, a number of states have revisited their fair report privilege to examine whether a showing of actual malice defeats the fair report privilege, and “the vast majority of states have concluded that it does not defeat the privilege.” The court rejected the application of actual malice to defeat the fair report privilege because it would be inconsistent with the purpose of the privilege to include it as a component of the privilege: “It would lessen the public’s opportunities to be apprised of what takes
place in the proceedings without hav-
ing been present’ and to ‘assess the
value of our government action.’”56

On express malice, the court rec-
ognized its long history in Tennessee
as a means for defeating the fair
report privilege” but acknowledged that “[c]ourts have also reconsidered
the role that motives to harm another—express malice—plays in
the fair report privilege.”58 Specifically,
the court noted that in light of cases like Landmark Communications,
which “emphasized the importance
of public access to information about
governmental proceedings,” “a num-
ber of states have eschewed the
traditional approach to the fair report
privilege for a modern approach that
looks only at whether a report of an
official action or proceeding is fair
and accurate, eliminating express mal-
lice from consideration.”59 Several of
the courts that have stuck with the
traditional approach “do so because
they are bound by statute.”60

The court addressed two of the
plaintiff’s arguments supporting
application of express malice to the
fair report privilege. First, the court
rejected his argument that omit-
ting the express malice component
might lead to “reporters with ven-
dettas” soliciting or goading “others
into making defamatory statements in
official proceedings” so the reporter
could repeat them with impunity.61
While acknowledging that such a
scenario would be troubling, the priv-
eilege would be unlikely to apply: A
speaker cannot “confer the privilege
upon a third person, even a mem-
er of the communications media, by
making the original statement under
a collusive arrangement with that per-
son for the purpose of conferring the
privilege upon him.”62

The court also rejected the plaint-
iff’s argument “that the express
malice limitation is necessary to deter
reporters from injuring others with
fair and accurate reports of official
actions or proceedings ‘in this age of
‘fake news’ and increasing politically
motivated news stories.”63 The
court explained that express malice
would largely be ineffective in address-
ing these concerns and utilized a hypo-
thetical similar to the one the media
amici offered regarding disparate
treatment of reporters for the same
coverage of the same official pro-
cceeding, explaining that such a result
would neither advance the purposes
of the fair report privilege nor protect
the individuals about whom defama-
tory statements were made.”64

In the end, the court overruled
its prior decisions and adopted the
modern rule and the approach taken
by the Restatement (Second) of
Torts § 611 that express malice does
not defeat the fair report privilege
because “the modern approach bet-
ter serves the purposes of the fair
report privilege.”65 Therefore, in Ten-
sessee, “[t]he privilege can only be
defeated by showing that a report
about an official action or proceed-
ing was unfair or inaccurate.”66

Larson: Is a Press Conference an
Official Action or Proceeding? And
How Closely Must the Published
Account Hwe to the Official
Statements to Qualify as “Fair”? The
Larson case arose after the
November 29, 2012, ambush killing
of a police officer in a small Min-
nesota town and the arrest—within
an hour—of the plaintiff, Ryan Lar-
on. Police booked Larson and put
his name in the public jail log on
charges of “murder.” The next day,
law enforcement officials held a joint
press conference about the shoot-
ing, at which officials stressed that
the investigation was in its early stages
and refused to answer some ques-
tions, but also stated that they did
not have “any information to believe”
that other individuals were involved.
The Minnesota Department of Pub-
lc Safety also issued a press release
that next day that said that “[w]ithin
an hour” of the shooting, a SWAT
team had arrested Larson, who “was
booked into the Stearns County Jail
on murder charges.”67

The killing of Police Officer Tom
Decker was big, breaking news in
Minnesota and was widely covered
by the media. At least two enti-
ties—KARE 11-TV and the St.
Cloud Times—published Larson’s
name in their early news reports,
even though he had not been for-
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not false should stand.\textsuperscript{73}

Revisiting and expanding upon \textit{Moreno}, the court of appeals provided a number of reasons why the fair report privilege attached in the first place: First, it said, “a law-enforcement press conference is a ‘meeting open to the public that deal[s] with matters of public concern.’”\textsuperscript{74} “Likewise, a law-enforcement news release is a ‘report of an official action or proceeding.’”\textsuperscript{75} The court further explained that a fair and accurate report of the press conference would “‘simply relay information to the reader that she would have seen or heard herself were she present at the meeting’” and that “public interest in police statements about the slaying of a police officer is perhaps more obvious than public interest in a private citizen’s statements during public comment at a city council meeting.”\textsuperscript{76} Second, the court said, the Restatement “support[s] the view that the fair-report privilege applies to official written statements by law enforcement.”\textsuperscript{77} And third, the criminal defamation statute that \textit{Moreno} analyzed also suggests that the fair report privilege extends to this context.\textsuperscript{78} That statute “extends a privilege to ‘other public or official proceedings,’” and the press conference at issue was “in the nature of an official proceeding because law enforcement from the state, county, and municipality jointly convened the conference to inform the public about an ongoing investigation.”\textsuperscript{79}

With regard to the issue of whether the privilege had been abused, the court of appeals stated:

\textit{We conclude that there was a genuine issue of fact whether appellants’ reports . . . were substantially accurate summaries or fair abridgements of law-enforcement statements at the press conference and in the news release. Appellants’ reports used terminology and recited some facts not mentioned at the press conference or in the news release. Most of these differences appear to be minor details, such as stating that Decker was shot twice. But some differences may be more significant. At the press conference, law enforcement did not “say” that Larson ambushed Decker, but law enforcement did “say” that Decker was shot and ambushed and that they had arrested Larson in connection with the shooting. Further, the news release and jail log indicated that Larson was being held and a murder charge was anticipated. Thus, if law-enforcement statements from the jail log, press conference, and news release are considered together, a reasonable jury may conclude that statements 1–8 were substantially accurate reports of official statements.\textsuperscript{80} Thus, the court held, the district court “correctly denied summary judgment to appellants before trial” but “erred in granting partial judgment to Larson after trial by determining that statements 1–8 were false as a matter of law.”\textsuperscript{81}

Following the court of appeals decision, Larson petitioned for review by the Minnesota Supreme Court, the high court granted his petition, and oral argument took place on January 7, 2019. At the time of this writing, a decision remains pending. However, at oral argument the justices expressed a clear desire to “book end” the fair report privilege and the chief justice went so far as to suggest the fair report privilege should perhaps only apply to those official documents made public by Minnesota’s freedom of information law (the Minnesota Government Data Practices Act). Any experienced media attorney can see the problems with such an approach as important, breaking news often is not accompanied by the release of official documents, even if it is based on official statements or action. At the same time, the justices (thankfully) seemed skeptical of Larson’s radical argument that the fair report should not apply to any “extra-judicial” statement by public officials, which would mean—as his counsel acknowledged at oral argument—that even if the media defendants had recorded the entirety of the press conference and posted the recording, unaltered, on their websites, no privilege would apply and the media could be held liable (on a republication theory) for any false statement made by police. Although it is difficult to predict how the Minnesota Supreme Court will rule, media defendants should hope and pray to whatever First Amendment–loving god they worship that the supreme court took the case up primarily to clarify the confusing rule set down in \textit{Moreno} and that it will whole-heartedly conclude that the privilege applies to official press releases and press conferences. The cherry on top would be if the high court were to also hold that the defendants’ news reports were fair and accurate as a matter of law—and that the court of appeals was wrong in concluding (at least on these facts) that the issue of abuse of the privilege was one for the jury.

\textit{Burke: Is a Private One-on-One, Official, on-the-Record Interview with a Public Official an Official Action or Proceeding?}

In \textit{Burke}, a small-town Tennessee newspaper interviewed the local public information officer for the sheriff in a private, on-the-record, official telephone call about a case for which the officer was also the lead investigator.\textsuperscript{82} The case involved the alleged theft of fund-raising money from a local youth football league.\textsuperscript{83} The officer provided facts about the alleged theft, including the alleged sum stolen, that the league had allegedly not received the cookie dough the money was raised for, and that the plaintiff had allegedly not turned the money over to the fund-raising company.\textsuperscript{84} The article also recounted another indictment of the plaintiff in a nearby county and included a statement from the officer that “[w]e are trying to get justice for these kids. It’s a shame that kids have to learn a lesson like this so early.”\textsuperscript{85}

The plaintiff argued that his reputation was damaged because the newspaper incorrectly stated “(1) the amount of money involved; (2) the fact that the cookie dough was never delivered; and (3) the fact that [the plaintiff] never delivered the collected funds to the fundraising company.”\textsuperscript{86} The plaintiff claimed that his performance was merely “delayed” and that the cookie dough was “ultimately delivered more than two months before the case against him was
presented to the grand jury.” In the trial court, the newspaper successfully moved for summary judgment on the fair report privilege.

The Tennessee Court of Appeals reversed, rejecting application of the fair report privilege to the private, on-the-record, official telephone interview with the public information officer and lead law enforcement officer on the case, who was the sole source for the story, because it was not an official action or proceeding covered by the privilege. In reaching this conclusion, the court of appeals focused on the one rationale that prior Tennessee cases had recognized as supporting the privilege: “[t]he requirement that official actions or proceedings be open to the public serves the underlying rationale behind the privilege, allowing the press to be ‘the eyes and ears of the members of the public who would have been able to witness the proceeding or obtain the information.’” This is commonly referred to as the agency rationale for the privilege. Prior Tennessee decisions had applied the privilege to pleadings filed in court, “public meetings of local government bodies,” an arrest warrant, a deposition, and “a press release by a chief of police.” But the privilege has not been extended so far as to provide protection from liability for fair and accurate reports of statements made by any governmental employee in any circumstance, but has only been applied “to circumstances involving . . . proceedings or official actions of government that have been made public.” As a result, the court of appeals held that the official, on-the-record private telephone interview with the public information officer and lead detective on the case was not covered by the fair report privilege.

The appellate court also drew a distinction between official actions or proceedings and “sources within the government,” with the former being covered by the privilege and the latter not. Under this logic, the privilege might apply if the source is providing information on an official action or proceeding, but “the privilege extends only to the source’s account of the official action, official proceeding, or official meeting.” In this case, that would have meant that information found in the grand jury indictment and the fact that the plaintiff had been arrested would have been covered by privilege, but any other statements made by the public information officer would not have been covered. The parties completed briefing in the case in April and one substantive amicus brief has been filed on each side.

The defendant focused its argument on Tennessee decisions, including federal decisions in Tennessee, that found the privilege applied to one-on-one interviews and to verbal statements by police officers. The defendant also explained that because a press release by a chief of police is covered by the privilege, “[n]o legal consequence should arise from the fact that the White County Sheriff’s Department’s official spokesman on the criminal case against Plaintiff chose to make his statement orally and directly to one reporter, as opposed to in a writing apparently distributed to numerous people.” The defendant also argued that the proper distinction for analyzing the case is not between reports of official actions or proceedings and sources within the government, but instead should have been whether the reporting was based on “anonymous, off-the-record sources versus on-the-record, authorized official statements.” The proper analysis would instead be “whether the statement was authorized, whether it was from an official with authority to speak for the agency, and whether it was on the record versus an off-the-record statement from an anonymous source.”

The media amici focused on the other primary justification for the privilege and the impracticality of the rule that only proceedings that are open to the public are covered. The court of appeals restricted its discussion of the policy supporting the privilege to the agency rationale. The media amici argued that “[w]hile at one time the agency rationale may have been most prevalent, the predominant rationale now is public supervision.” The public supervision rationale “recognizes that news organizations play an important role in providing the public with information it needs to monitor the operations of government.” This rationale has been used to justify application of the fair report privilege to a variety of statements made by public officials, and to sources of information that are not public. Even states that have taken a narrower view of the official action or proceeding prong of the privilege would have applied the privilege on the facts of the Burke case because the statements were made by the public information officer, who plays a critical role in relaying official information to the public.

The media amici also argued that private, on-one-on-one, official, on-the-record interviews serve the same purpose as press releases and press conferences that the court of appeals suggested were covered by the privilege. In fact, the one-on-one interview might have more benefit for the public because of the ability to ask follow-up questions. And the court of appeals ruling might lead to some pretty odd results. For example, a press conference or briefing that was only open to the credentialed press might not be covered by the privilege. Similarly, there might be a question about whether a one-on-one interview with a public official, like the president or a governor, would be covered because the public would not be able to attend the interview.

The plaintiff focused his argument on court of appeals decisions from Tennessee that relied exclusively on the agency rationale for the fair report privilege and Restatement (Second) of Torts § 611 comment h. Burke argued that “the privilege’s purpose in Tennessee ‘is to serve the public’s interest in being informed of official actions or proceedings that are themselves public.’” Burke explained that the report privilege applies to official proceedings or actions “that have been made public.”

Burke’s other main argument relied on the Restatement (Second) of Torts § 611 comment h, which says, “[s]tatements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged.” Burke explained that comment h had been “approvingly
Burke’s supporting amici were the authors of two treatises on defamation law, Dean Rodney Smolla and Professor David Elder, the latter of which in particular was extensively relied upon by Burke. Smolla and Elder take a narrower view of the fair report privilege than their fellow defamation treatise author Judge Robert D. Sack, who they largely ignore in their amicus brief. Consistent with their treatises, Smolla and Elder argued that “[t]he nearly unanimous view of the common law decisions . . . holds that the fair report privilege does not apply unless the proceeding is public, such as in open court, or the matter is one of public record or a report subject to inspection by the public.”

Like Burke, Smolla and Elder also focused exclusively on the agency rationale, which they refer to as the “eyes and ear” rationale,” for the fair report privilege and argued that affirming the court of appeals would be consistent with that rationale. Finally, Smolla and Elder argued that the potential for abuse of the privilege is too great for the broader rule to be justified, that “expanding the privilege [would] destabilize the law,” and that the Internet’s ubiquitousness also makes the expansion of the privilege too risky.

In its reply brief, Sparta Newspapers attacked the bright-line rule advocated by Burke and his supporting amici that the proceeding or action must be public for the fair report privilege to apply by advocating for a totality of the circumstances test that looked at “whether the action or statements were made by an authorized official, in an official capacity, for the purpose of being made public (and therefore, by definition, not private).” Sparta Newspapers argued that this was the way Tennessee courts have historically examined the issue and the court of appeals decision was a departure from this approach.

Sparta Newspapers also argued that in this case the reporting was substantially true and that if the reporting is on an official action or proceeding, the privilege protects “news reporting even if the report includes inaccuracies or word changes, so long as it conveys a just impression of official statements.”

Sparta Newspapers relied heavily on Judge Sack’s treatise to counter Burke and his supporting amici’s arguments that the agency “eyes-and-ears” rationale is the only one that supports the fair report privilege and thus only public actions or proceedings are covered. Finally, Sparta Newspapers noted that the decision in Funk expressly acknowledged that the policy justification for the fair report privilege is more than just the agency theory: “The second justification is that the privilege facilitates the worthwhile goal of public supervision of official actions or proceedings.”

The Tennessee Supreme Court issued its opinion in Burke on December 5, 2019, and affirmed the court of appeals. The court began its analysis by noting the historical origins of the privilege in judicial proceedings and Tennessee’s reliance on the agency theory as the rationale for the privilege. The court also acknowledged its brief discussion in Funk of the alternative, public supervision rationale. Looking to section 611 of the Restatement (Second) of Torts for guidance, the court explained that the case turned on whether the “nonpublic, one-on-one conversation” between the public information officer and the reporter was considered an official action or proceeding. But section 611 does not answer the question, as comment d explains: “It is not clear whether the privilege extends to a report of an official proceeding that is not public or available to the public under the law.” Noting a split of authority nationally, the court pivoted to Tennessee’s jurisprudence on the issue and explained that “the Court of Appeals has consistently held that the fair report privilege in Tennessee is ‘limited to circumstances involving public proceedings or official actions of government that have been made public.’”

In holding that “the fair report privilege encompasses only public proceedings or official actions of government that have been made public,” the court relied on two lines of logic. First, the ruling “still enables newspapers and other outlets ‘to be the eyes and ears of the members of the public who would have been able to witness the proceeding or obtain the information had they been present to see or hear for themselves,’” while “at the same time, this limitation ensures that the fair report privilege remains closely connected to the rationale from which it originated—the public’s interest in being informed of official actions or proceedings that are themselves public.”

Second, the court was concerned with the ability of possible litigants and courts to verify what was said during an official action or proceeding. The court posited that records are generated for official actions and proceedings that are open to the public that could be readily compared to a news account of the official action or proceeding. In contrast, the court argued, there would be “no objective means of determining the fairness and accuracy of a report derived from a nonpublic, one-on-one conversation,” which could only be verified by the participants to the conversation and would require credibility determinations in litigation. “In sum, we conclude that expanding the fair report privilege to nonpublic, one-on-one conversations would constitute a departure both from the rationale on which the privilege is based and from existing Tennessee law defining its scope and that such an expansion would unnecessarily complicate the task of determining whether a report should be protected by the privilege.”

The court’s decision also leaves open two other, related questions. First, similar to the question before the Minnesota Supreme Court in Larson, “our holding here does not resolve the question of whether a press conference or a press release constitutes a public proceeding or an official action of government that has been made public.” And second, the court also explained that its opinion did not address whether comment h of section 611, which limits the information covered by the privilege in the criminal context, further limits the scope of the privilege in Tennessee.
Court of Appeals, takes a narrow approach to the fair report privilege that is inconsistent with what Judge Sack describes as the “now predominating rationale”: public supervision.142 The ruling, including the two questions it specifically leaves open for a future case, makes the scope of the fair report privilege in Tennessee both more narrow and uncertain.

Burke: What Type of Attribution, If Any, Is Required for the Fair Report Privilege to Apply?
Independent of the official action or proceedings analysis, the court of appeals in Burke held that the defendant lost the privilege because of the way it attributed the complained-of statements.143 This was the first time a Tennessee court had included an attribution requirement for the fair report privilege. The court explained that the standard was “the article should be written in such a manner that an average reader can understand the article (or pertinent section thereof) to be a report on or summary of an official document or proceeding.”144

The source for the article was identified by name, Detective Isom, and referred to as the “case’s lead investigator.”145 But the article did not identify him as the public information officer for the local sheriff.146 This was a fatal flaw, according to the court, because “even if all communications of a public information officer are official actions within the scope of the fair report privilege, the average reader would not have understood [the] article, either from its context or specific attribution, to have been based upon an official act of government.”147

The media amici argued that, even if attribution was a requirement for the privilege, it was misapplied here. “The purpose of an attribution requirement is so ‘the reader can judge the veracity of statements. . . .’”148 For example, the Massachusetts Supreme Court had found attribution to be sufficient in an article that made broad references to “officials.”149 The defendant in Burke did much more than that by identifying the official by name and his specific relationship to the case being discussed.150 The media amici also argued that a strict attribution requirement would unconstitutionally tread on editorial discretion because the court was mandating that the source be identified as the public information officer for the privilege to apply.151 Burke argued that the court of appeals properly applied the attribution requirement.152 Burke highlighted the newspaper’s failure to identify the source as the public information officer, choosing instead to refer to him as the lead investigator.153 Without specific attribution to the public information officer, Burke argued, “the reader would not have known whether Detective Isom’s ‘remarks were made off-handedly or in his official capacity. . . .’”154

Because the Tennessee Supreme Court found that the private, one-on-one, official, on-the-record interview was not an official action or proceeding such that the fair report privilege did not apply, the court declined to rule on the attribution issue, but by affirming the court of appeals decision, the intermediate court’s opinion now stands as the law on the issue.155

Conclusion
“The common law of America is evolutionary; it is not static and immutable. It is in constant growth, going through mutations in adapting itself to changing conditions and in improving and refining doctrine. By its very nature, it seeks perfection in the achievement of justice.”156 These three cases from Tennessee and Minnesota are part of this ongoing process. In Tennessee, while the Funk decision removed an outdated limitation, the Burke decision narrowed the scope and left open crucial questions that may further limit the privilege in the future. In Minnesota, Larson will hopefully bring additional clarity to the scope and protections offered by the privilege for media and nonmedia speakers alike in the North Star State.

Endnotes
5. No. A17-1068. Larson was argued before the Minnesota Supreme Court on January 7, 2019.
7. 610 N.W.2d 321 (Minn. 2000).
9. Id. at *2–3.
10. Id. at *3.
11. Id. at *3–4.
12. Id. at *4.
13. Id.
14. Id. at *5.
15. Id. at *6.
16. Id.
17. Id. at *9.
18. Id. at *9–10.
19. The Funk case also includes a statutory reporter’s privilege issue.
24. Id. at *16 (citation omitted).


27. Id. at 27–31 (citations omitted).


31. 383 U.S. at 73.


33. Susan E. Seager, Forget Conditional State Fair Report Privilege; the Supreme Court Created an Absolute Fair Report Privilege in Cox Broadcasting Corp. v. Cohn Based on the First Amendment over 40 Years Ago, 32 COMM. LAW. 1, 1 (Summer 2016).

34. 420 U.S. 469 (1975).


41. Id.


44. Id. at 16.

45. 426 S.W.3d 50 (Tenn. 2013).

46. Brief for The Associated Press, supra note 30, at 16 (quoting Jones, 426 S.W.3d at 51).

47. 360 U.S. 564 (1959).


50. Id. at 17 (quoting Mills v. Alabama, 384 U.S. 214, 219 (1966)).


53. Id. at *14 (quoting David Elder, DEFAMATION: A LAWYER’S GUIDE § 3.1 (July 2018 update); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975)).

54. Id. at *14–15 (quoting RESTATEMENT (FIRST) OF TORTS § 611 (AM. LAW INST. 1938)).

55. Id. at *16–18 (citations omitted).

56. Id. at *24 (citations omitted).

57. Id. at *20–21.

58. Id. at *18–19.

59. Id. (citations omitted).

60. Id. at *20 (citations omitted).

61. Id. at *25–26.

62. Id. at *26 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. c (AM. LAW INST.)).

63. Id. at *26–27.

64. Id. at *27.

65. Id. at *27–28.

66. Id. at *28.


68. Id. at 488–89.

69. Id. at 489.

70. Id. at 490.

71. Id.

72. Id. at 491.

73. Id.

74. Id. at 493 (quoting RESTATEMENT (SECOND) OF TORTS § 611 (AM. LAW INST.)).

75. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 611).

76. Id. (quoting Moreno v. Crookston Times Printing, Inc., 610 N.W.2d 321, 331 (Minn. 2000)).

77. Id.

78. Id. at 494.

79. Id. (quoting MINN. STAT. § 609.765, subd. 3(4)).

80. Id. at 497.

81. Id.


83. Id. at *2–3.

84. Id. at *3.

85. Id. at *3–4.

86. Id. at *5.

87. Id.

88. Id. at *5–6.

89. Id. at *14–15.


93. Id. at *10–11 (quoting Lewis, 238 S.W.3d at 285) (emphasis added by the Burke court).

94. Id. at *14–15. In further support of this holding, the court cited to David A. Elder, TRUTH, ACCURACY & NEUTRAL REPORTAGE: BEHEADING THE MEDIA JABBERWOCK’S ATTEMPTS TO CIRCUMVENT NEW YORK TIMES v. SULLIVAN, 9 VAND. J. ENT. & TECH. L. 551, 763–64 (2007), for the proposition of that “nearly unanimous requirement under the common law for the proceeding or report to be public or available to the public.” But this statement is contradicted by Judge Sack in his treatise in which he explained that “[t]here is substantial but not unanimous support for the proposition that even where proceedings reported are official but not public, and the press is not therefore acting as a ‘public eye,’ the privilege may nevertheless attach.”


96. Id. at *15–16.

97. Id. at *16.

98. Id. at *17–18.

99. In addition, the Tennessee Association of Broadcasters filed an amicus brief supporting the application for review in the Tennessee Supreme Court filed by Sparta Newspapers.


101. Id. at 26–27.


103. Id. at 36.

104. Burke v. Sparta Newspapers, Inc., No. M2016-01065-SCA-R3-CV, 2018 Tenn. App. LEXIS 420, at *15 (Tenn. Ct. App. July 23, 2018); see also Rosenburg v. Helsinki, 616 A.2d 866, 873 (Md. 1992) (explaining that one of the rationales for the fair report privilege is “the agency rationale, by which the reporter acts as an agent for an otherwise preoccupied public which could, if it possessed the time, energy or inclination, attend the
proceeding”).

105. Brief for The Associated Press et al. as Amici Curiae Supporting Appellants at 5, Burke, No. M2016-01065-SC-R11-CV (citing SACK ON DEFAMATION, supra note 94, § 7:3.5[B][2]).

106. Id. at 6 (quoting Reuber v. Food Chem. News, Inc., 925 F.2d 703, 713 (4th Cir. 1991)).

107. Id. at 7–9, 12–13.

108. Id. at 9–10.

109. Id. at 14–16.

110. Id. at 14.

111. Id. at 15.

112. Id.


115. Id. at 18 (quoting Lewis, 238 S.W.3d at 285).

116. Id. at 29–30 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. h (AM. LAW INST. 1977)).

117. Id. at 30 (citing Lewis, 238 S.W.3d at 286–87).


119. Id. at 20 (quoting DAVID A. ELDERS, DEFAMATION: A LAWYER’S GUIDE § 3.12 (2003)); but see SACK ON DEFAMATION, supra note 95, § 7:3.5[B][4] (“There is substantial but not unanimous support for the proposition that even where proceedings reported are official but not public, and the press is not therefore acting as a ‘public eye,’ the privilege may nevertheless attach.”)

120. Id. at 17.

121. Id. at 39 (capitalization and bolding removed).

122. Id. at 44–45.

123. Sparta Newspapers’ Reply Brief at 8–9, Burke, No. M2016-01065-SC-R11-CV.

124. Id. at 5–9.

125. Id. at 9–11.

126. Id. at 13–14, 18–19.


129. Id. at *11–13.

130. Id. at *13–14.

131. Id. at *15.

132. Id.

133. Id. at *16 (citations omitted).

134. Id. at *17.

135. Id. (citations omitted).

136. Id. at *17–18.

137. Id. at *18.

138. Id.

139. Id. at *18–19.

140. Id. at *19.

141. Id. at *19–20.

142. SACK ON DEFAMATION, supra note 94, § 7:3.5[B][2].


144. Id. at *18 (quoting Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 739 (D.C. Cir. 1985)).

145. Id. at *19.

146. Id.

147. Id.


149. Id. (quoting Howell v. Enter. Publ’g Co., 920 N.E.2d 1, 20 (Mass. 2010)).

150. Id. at 17–18.

151. Id. at 19–20.


153. Id. at 60.


156. Dodson v. Shrader, 824 S.W.2d 545, 549 (Tenn. 1992) (citations omitted).
Unpacking FOIA’s “Foreseeable Harm” Standard

BY AL-AMYN SUMAR

Even in a hyperpartisan and bitterly divided Congress, at least one thing continues to unite policymakers on both sides of the aisle: the need for reform to the Freedom of Information Act (FOIA). In July 2019, for instance, a bipartisan group of senators—including Republican Senators Chuck Grassley of Iowa and John Cornyn of Texas—introduced the Open and Responsive Government Act of 2019. The bill aims “to reverse recent developments that undermine the public’s right to access information and hold government accountable,” including the Supreme Court’s reshaping of FOIA Exemption 4 in Food Marketing Institute v. Argus Leader (more on that later).2

The FOIA Improvement Act of 2016—the most recent amendment to FOIA and the focus of this article—received similarly broad partisan support. Passing the House by voice vote and receiving unanimous consent in the Senate, the bill was signed into law on June 30, 2016.3 Among the Act’s major changes was the codification of a Department of Justice (DOJ) policy known as the “foreseeable harm” standard.4 As amended, FOIA permits an agency to withhold information from a requestor only if it “reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption.”5 The requirement does not apply where “disclosure is prohibited by law,” i.e., the agency must withhold the information and has no discretion to release it.6 Though this provision did not generate much jurisprudence in the first two years of its adoption, district courts in New York and the District of Columbia are now giving shape to it, and the D.C. Circuit will soon have the opportunity to consider it.

This article focuses on the two fronts where the foreseeable harm standard may have the greatest impact. The first is the deliberative process privilege of FOIA Exemption 5,7 which applies to “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”8 The second is the part of FOIA Exemption 4 that covers “commercial or financial information obtained from a person and privileged or confidential.”9 There are now a number of lower court decisions that have addressed the impact of the foreseeable harm standard on each exemption. After a brief word about the foreseeable harm provision’s origins and impetus, this article considers recent developments in these two areas and suggests how courts might resolve disputes that may come before them.

The Origins of Foreseeable Harm

The origins of the foreseeable harm standard and Congress’s impetus for codifying it are key to a full understanding of the provision.10 As noted above, the now-statutory foreseeable harm requirement began as a DOJ policy. On October 4, 1993, Attorney General Janet Reno announced that the DOJ would defend an agency’s assertion of a FOIA exemption “only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by an exemption.”11 Three months later, DOJ’s Office of Information Policy (OIP) issued guidance to agencies for implementing that policy. The guidance was particularly concerned about the breadth of Exemption 5’s deliberative process privilege, which in OIP’s view had become irreconcilable with the spirit of FOIA. OIP thus directed FOIA officers to consider whether disclosure “would foreseeably harm the basic institutional interests that underlie the [privilege] in the first place.”12 It enumerated eight “primary factors” to be weighed in that analysis, including the nature of the decision involved, the status of the decision, and the status of the personnel involved.13 The DOJ policy was reversed by John Ashcroft in October of 200114 but reinstated by Eric Holder in March 2009.15 The new OIP guidance did not mention the eight-factor analysis but mandated agencies to consider whether the harm to an interest protected by Exemption 5 was reasonably foreseeable given the “age, content and character” of the information.16

Whether the DOJ policy had a meaningful impact on agency decision making is unclear. What is clear is that the impact wasn’t to Congress’s satisfaction. As the legislative record reflects, Congress codified the foreseeable harm provision in 2016 for the same reasons that the attorney general introduced the policy over 20 years earlier: to counter agencies’ reflexive and broad use of FOIA exemptions, particularly the deliberative process privilege. The Senate report on the FOIA Improvement Act bemoaned the “growing and troubling trend” of agencies’ reliance on “discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure.”17 In 2012 alone, the report observed, the Exemption 5 privileges were invoked 79,000 times to withhold information—a 41 percent increase over the previous year.18 Echoing OIP’s 2009 guidance, the report noted that the foreseeable harm standard requires agencies to consider the “age, content, and

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character” of a document in assessing potential harm from disclosure.19

Foreseeable Harm in the Courts
Although the FOIA Improvement Act of 2016 went into effect in mid-2016, no court had meaningfully unpacked the foreseeable harm standard until late 2018. That’s partly because the Act did not apply retroactively; only FOIA requests filed after the date of enactment are within the statute’s ambit.20 In late 2017, in Ecological Rights Foundation v. FEMA,21 a district court in California cited the foreseeable harm standard in rejecting an agency’s reliance on the deliberative process privilege.22 But the absence of foreseeable harm was one of several grounds for the court’s ruling, and it said little of substance about the nature of the agency’s burden under the standard.

The first case to meaningfully tackle the standard was Rosenberg v. DOD.23 The records at issue in the case are emails between senior agency officials and John Kelly, then Commander of the U.S. Southern Command, regarding a military task force based at Guantanamo Bay, Cuba. As relevant here, the plaintiffs argued that explanations from the Department of Defense (DOD) for its Exemption 5 withholdings did not satisfy the foreseeable harm standard.

The court agreed. Relying on the text of the statute and its application in Ecological Rights Foundation, D.C. District Judge Amit Mehta held that an agency is required to “explain how a particular Exemption 5 withholding would harm the agency’s deliberative process.”24 It could do so with a “categorical approach,” by grouping like records together, but it would nonetheless be required to “explain the foreseeable harm of disclosure for each category.”25 DOD’s perfunctory assertion that disclosure of any of the withheld material “would jeopardize the free exchange of information” did not meet that standard.26 Rather than compel the DOD to disclose, however, Judge Mehta gave the agency another bite at the apple and permitted it to file supplemental declarations on the issue of foreseeable harm.27

The courts that have since opined on foreseeable harm have generally followed Rosenberg’s lead. In another D.C. district court case, Judicial Watch, Inc. v. DOC,28 Judge Emmet Sullivan took an identical approach, adopting Rosenberg’s interpretation of the statute and rejecting the agency’s “speculation” and “boiler plate” assertions of harm but permitted it to supplement the record before ordering disclosure.29 Likewise, in NRDC v. EPA (NRDC I),30 Judge Jesse Furman in the Southern District of New York ordered more detailed explanations from the agency after it put forth “generic, across-the-board articulations of harm . . . as to a broad range of document types.”31 (As noted below, Judge Furman later found that the agency had met the standard.)

A case now before the D.C. Circuit, Machado Amadis v. DOJ,32 will give that court the chance to have its say on the issue, too. The requester in the case seeks, among other things, the notes and recommendations of OIP attorneys who processed the administrative appeals for FOIA requests he previously filed.33 The district judge found that this information fell within the deliberative process privilege and—without any statutory analysis or reference to Rosenberg or Judicial Watch—accepted the agency’s broad claim that disclosure would have “a chilling effect on OIP Administrative Appeals Staff attorneys.”34 The Reporters Committee for the Freedom of the Press has filed an amicus brief on behalf of three dozen media organizations about the proper interpretation and application of the foreseeable harm provision.35 The case will be argued in January 2020.

What Constitutes Reasonably Foreseeable Harm to the Deliberative Process?
The district court decisions that have meaningfully taken on the foreseeable harm standard—including Rosenberg, Judicial Watch, and NRDC I—convincingly establish that the standard imposes an additional, meaningful burden on agencies that invoke discretionary exemptions. It’s clear that broad and generalized assertions of harm from disclosure simply don’t cut it. What’s less obvious, though, is the practical issue of what it takes for an agency to actually satisfy the foreseeable harm standard in a given case.

Before turning to that question, it’s worth considering why the holdings of Rosenberg and the decisions following it are correct. As Machado Amadis suggests, some judges have read the foreseeable harm standard as setting a low bar for agency withholdings.36 And agencies continue to press that view. In the ongoing Rosenberg litigation, for instance, the DOD has maintained that “a showing of particularized harms with respect to the interests protected by [the deliberative process privilege] is both redundant and inconsistent” with congressional intent.37

That’s not a tenable argument, whatever one’s approach to statutory interpretation. As noted, the legislative history reflects that Congress sought to make a material change to the law. Under the foreseeable harm standard, as the Senate report says, "the content of a particular record should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by the applicable exemption."38

The fact that Congress codified an existing DOJ policy certainly doesn’t mean that it approved of the agency’s implementation of it. On the contrary, the 2015 Senate report— penned nearly six years after the Obama administration readopted the policy—cited the “growing and troubling trend” of broad Exemption 5 withholdings, with reference to statistics from the year 2012.39 By enacting the provision into law, Congress gave the judiciary the authority and duty to independently assess an agency’s claims of foreseeable harm.

A textualist approach favors this reading, too. On their own, the words of the provision—“[a]n agency shall . . . withhold information under this section only if . . . [i]t reasonably foresees that disclosure would harm an interest protected by an exemption”—are perhaps less decisive than the legislative history.
But the position that the amendment had essentially no effect, which appears to be the DOD’s view in \textit{Rosenberg}, runs up against the canon against surplusage.\textsuperscript{40} Put simply, the language of the foreseeable harm provision can’t be read to be redundant. It must mean something.

That leaves the question of what, as a practical matter, the provision actually requires of agencies. \textit{Rosenberg} and the cases that followed make clear what is considered insufficient to show foreseeable harm. But how far must an agency go?

One case that sheds some light on this is the follow-up decision in \textit{NRDC v. EPA (\textit{NRDC II}).} As of the date of this writing, the decision appears to be the only instance of a court ruling on an agency’s claims of foreseeable harm after previously rejecting them.\textsuperscript{41} After losing the initial summary judgment motion, the Environmental Protection Agency (EPA) sought to satisfy the foreseeable harm standard with a supplemental declaration, which broke down the requested records by category and laid out the harms of disclosure for each.\textsuperscript{42}

The declaration was a mixed bag. On some matters, the agency’s assertions of harm were specific and credible—for instance, where the requested records related to proposed agency rules that had yet to be finalized.\textsuperscript{43} The claim that disclosure will impair the deliberative process tends to be more plausible when decision making is ongoing because the agency has pinpointed a specific decision where a chilling effect can hurt the quality of internal deliberations and the ultimate result. On other matters, however, the EPA’s claims of harm were less plausible. The agency often made the same generalized assertions of harm as it had before (e.g., disclosure would “cause public confusion” and “inhibit . . . candid, internal discussions”), just now tying them to specific categories of documents.\textsuperscript{44}

Judge Furman recognized that some of the agency’s discussion “verge[d] on boilerplate” but nonetheless granted summary judgment on the issue in the agency’s favor.\textsuperscript{45}

Another data point is the DOD’s supplemental briefing in the ongoing \textit{Rosenberg} litigation.\textsuperscript{46} The agency’s briefs don’t simply verge on boilerplate—they are the definition of it. The briefing breaks down the requested records by category (e.g., records pertaining to “detention operations,” “detainee health,” and “facilities management”) but simply parrots the same rationales offered by the agency before (e.g., disclosure would “lead to confusion about the reasons and rationales supporting the agency’s position” and “harm the agency’s ability to engage in frank discussions”).\textsuperscript{47} Judge Mehta has yet to rule on the sufficiency of these representations.

The EPA’s declaration in \textit{NRDC II} was more detailed than the DOD’s in \textit{Rosenberg}, but the outcome of that case should nonetheless be somewhat troubling. It suggests that an agency’s path to victory on foreseeable harm is to simply organize documents by category (which the case law on the deliberative process privilege arguably already requires agencies to do\textsuperscript{48}) and then recite the typical rationales for the privilege for each category of documents. That puts the plaintiff in the position of having to rebut generic assertions of a “chilling effect,” which as an evidentiary matter can be difficult if not impossible to do. This is probably not what Congress had in mind.

Why, then, might courts go in this direction? It’s likely not because (all) judges are predisposed to rule reflexively in favor of agencies over FOIA requesters. Indeed, Judge Furman’s ruling in \textit{NRDC I} made it clear that he wasn’t going to give the agency a pass (as the district court in \textit{Machado Amadis} arguably did).

More likely, it is because judges generally tread cautiously when agencies invoke the deliberative process privilege. Given their personal experience, judges are sensitive to the need for candor in decision making, and they may be uneasy with the idea of ordering release of documents over an agency’s objections that disclosure will impair its deliberative process—even when those objections are stated in boilerplate and generalized terms. After all, judges may reason, how can one really gauge the degree of the “chilling effect” that disclosure of any given record will have on agency decision makers? And yet, as understandable as that position may seem, it has helped create the very problem Congress sought to address in the 2016 amendments: the government’s increasing invocation of the deliberative privilege to withhold “large swaths” of information from the public, even when the information is seemingly innocuous or merely embarrassing.\textsuperscript{49}

There is no silver bullet for this problem, but one approach courts might consider is to treat foreseeable harm as a multifactor inquiry, much like the 1994 OIP guidance envisioned. As noted, the guidance listed eight “primary factors” for FOIA officers to consider when assessing the foreseeable harm from disclosure of a document otherwise covered by the deliberative privilege:

(i) The nature of the decision involved (is the decision particularly sensitive or confidential?);
(ii) The nature of the decision-making process (is the process one that requires confidentiality?);
(iii) The status of the decision (has the decision already been made?);
(iv) The status of the personnel involved (is disclosure likely to affect the same agency employees?);
(v) The potential for process impairment (will disclosure actually diminish deliberative quality?);
(vi) The significance of process impairment (how great will the “chilling effect” be?);
(vii) The age of the information (does the passage of time lessen the potential harm?); and
(viii) The sensitivity of individual record portions (are particular pieces of information in a record sensitive?).\textsuperscript{50}

These factors are largely objective proxies for the benchmark set by Congress: the presence of reasonably foreseeable harm. The factors could better equip the courts to cut through an agency’s broad assertions of harm and distinguish between innocuous and genuinely sensitive
information. While the factors don’t appear in the Obama-era guidance or the legislative history of the 2016 amendments, that’s not fatal or even all that important. In many areas of the law, judges resort to multifactor tests to interpret and give effect to a statutory mandate, even where those factors are nowhere to be found in the text of the law.51

This kind of analysis is susceptible to both general and specific critiques. As a general matter, multifactor tests are seen as yielding less predictability and more indeterminacy, making it likelier that judges will tilt the analysis in favor of a desired result. That is true to some extent here: The lack of a clear rule could make it hard for FOIA officers to correctly and consistently make assessments of foreseeable harm. But as in other areas of the law, the development of the case law will, over time, help give FOIA officers better direction. More to the point, bright-line and highly predictable rules aren’t a feasible alternative in this circumstance. The statute requires not just that an agency foresee harm from disclosure, but also that such foresight be “reasonable[e].” However courts make that assessment, it will necessarily be contextual.

One might also push back against an eight-factor analysis on the ground that it is a heavy burden to impose on agencies. But that concern shouldn’t be overstated. Per Rosenberg, an agency can still avail itself of a categorical approach to justify its withholdings. And just identifying the relevant factors benefits agencies by clarifying what is required from them. It’s certainly true that the burden on agencies will be heavier than it is under the current regime, but that appears to be precisely what Congress sought to do in enacting the 2016 amendments.

As to criticisms of the specific factors above (particularly the fifth and sixth), one might argue that they are somewhat subjective and will solicit the same kinds of overstated and conclusory assertions of harm from agencies. That isn’t entirely unfair. But in cases where an agency relies primarily or heavily on these more subjective factors, a court might more seriously scrutinize the agency’s representations or require more substantial evidence of harm (e.g., declarations from the agency employees whose communications are at issue).

On a final note, it merits emphasis that the other Exemption 5 privileges—including the attorney-client and attorney work-product privileges—are also subject to the foreseeable harm standard. Indeed, the Senate report on the 2016 amendments specifically refers to these privileges.52 and the 1994 OIP guidance actually explains how FOIA officers apply the standard to records covered by the attorney-client and attorney work-product privileges.53 In particular, the OIP pointed to the “strong connections” between the attorney-client and deliberative process privileges and reasoned that “the very same strong policy considerations” applied to disclosure of information covered by each privilege.54 The courts will surely soon have to wrestle with these questions, too.55

What Foreseeable Harm Means for Exemption 4

Another issue that the courts are only beginning to tackle is whether and how the foreseeable harm provision applies to confidential commercial information covered by FOIA Exemption 4. Given the Supreme Court’s ruling in Food Marketing Institute v. Argus Leader (FMI),56 the stakes of these cases are enormous. The two key issues for courts are these: Is FOIA Exemption 4 a mandatory or discretionary exemption? And even if it is discretionary, what is the nature of the interest the exemption protects?

Before delving into those, it’s worth briefly recounting the Supreme Court’s 2019 decision in the FMI case, which reshaped the jurisprudential landscape on Exemption 4. The FOIA request at issue in the case was filed with the Department of Agriculture and sought data about the retail stores that participate in the national food-stamp program, known as SNAP.57 The agency withheld the data under FOIA Exemption 4, arguing that it constituted “commercial or financial information obtained from a person and privileged or confidential.”58 The agency lost in the district court and declined to appeal. But the Food Marketing Institute (FMI), a trade association representing grocery retailers, intervened and appealed.

FMI lost in the Eighth Circuit but fared better in the Supreme Court. The central question was the meaning of the term confidential in Exemption 4. Led by the D.C. Circuit’s 1974 decision in National Parks & Conservation Association v. Morton,59 many of the courts of appeals had long interpreted that word as limiting Exemption 4 to cases where disclosure would cause “substantial competitive harm” to the submitter, at least where the information was provided to the government under compulsion.60

Writing for a majority of the Court, Justice Neil Gorsuch dispensed with that interpretation of the statute. Brushing aside legislative history and zeroing in on the text of Exemption 4, he concluded that information is “confidential” if it is “customarily and actually treated as private by its owner.”61 Justice Gorsuch suggested that the information must also be “provided to the government under an assurance of privacy” but did not resolve whether that is also a necessary condition for confidentiality.62

The FMI decision also left open a second question: What impact, if any, does the foreseeable harm standard have on FOIA Exemption 4? As the Reporters Committee and three dozen media organizations pointed out in an amicus brief, the Court’s decision could not speak to that point because the request at issue was filed before June 30, 2016, when the 2016 amendments went into effect.63 Given that fact, the amici urged the Court, unsuccessfully, to dismiss the writ of certiorari as improvidently granted or, alternatively, to adopt the D.C. Circuit’s reading of Exemption 4 in National Parks.64 The “substantial competitive harm” test, the amici argued, is entirely consistent with what the foreseeable harm provision requires. The Court’s opinion did not mention foreseeable harm, much less add these arguments—leaving it to lower courts to sort things out. To date, it...
appears that only three courts, one in D.C. and two in the Northern District of California, have squarely considered the impact of the 2016 amendments on Exemption 4. Two found that the foreseeable harm standard imposes an additional burden on agencies invoking the exemption, while the third forcefully rejected that view.

Going forward, lower courts will have to resolve two main questions. The first is whether Exemption 4 is “discretionary” (an exemption that only permits nondisclosure) or “mandatory” (an exemption that makes nondisclosure obligatory). That makes all the difference because, as noted, the foreseeable harm standard does not apply where “disclosure is prohibited by law.”

The issue is likely to be hotly disputed. No one argues that the text of Exemption 4 itself erects a “mandatory bar[ ] to disclosure.” However, the DOJ has historically taken the view that the scope of Exemption 4 is coterminous with that of a criminal statute, the Trade Secrets Act, which prohibits government employees from disclosure of certain information. The statute applies to information that concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.

As Professor Bernard Bell has pointed out, a 1979 Supreme Court decision may have been the first to suggest that Exemption 4 and the Trade Secrets Act are coextensive. In that decision, Chrysler Corp. v. Brown, Justice William Rehnquist noted in dictum the “similarity of language between Exemption 4 and the substantive provisions of § 1905.” Since then, the D.C. Circuit and other courts of appeals have held that “the scope of the Act is at least co-extensive with that of Exemption 4 of FOIA.”

Professor Bell has explained why the reasoning of these decisions is dubious, whether one is a textualist or purposivist: (i) The enumerated list of matters in the Act is arguably narrower than Exemption 4’s sweeping protection for all “confidential” and “commercial” information, (ii) the rule of lenity calls for a narrower construction of the Act since it is a criminal statute, and (iii) the Trade Secrets Act was adopted eighteen years before FOIA and “[t]here is little indication that the enacting Congresses actually considered the scope of the [Act] and FOIA Exemption 4 coterminous.”

In the wake of FMI, though, one could even go further than that. Specifically, one might argue that the effect of the Supreme Court’s broadening of the term confidential is to make Exemption 4 more expansive than the Trade Secrets Act. That, in turn, means that some information falling within Exemption 4 is now outside the scope of mandatory disclosure—and thus within the purview of the foreseeable harm standard.

The existing case law on Exemption 4 lends some support to this view. In 1992, the D.C. Circuit narrowed the scope of the National Parks test by limiting the “substantial competitive harm” requirement to information that private parties are compelled to provide to the government. Information voluntarily furnished to the government could be withheld without such a showing—the rationale being that publicly disclosing such information would disincentivize parties from providing it to the government in the first place.

Because the effect of the decision was to expand the scope of information covered under Exemption 4, the D.C. Circuit subsequently questioned whether the Trade Secrets Act and Exemption 4 remained coextensive. As the court put it, “it is possible that this [view] is no longer accurate in light of our recently more expansive interpretation of Exemption 4.” The court declined to reach the issue because it had not been raised, and subsequent courts did not act upon these dicta. In addition, in the pre-FMI days some courts found that the failure to show “substantial competitive harm” brought information outside the scope of both Exemption 4 and the Trade Secrets Act. It would seem to follow that showing such harm remains a requirement for information covered by the Act, at least absent any further direction from the Supreme Court.

In response, one might argue that, like Exemption 4, the Trade Secrets Act makes no mention of competitive harm, and given the Court’s holding in FMI, such a requirement shouldn’t be read in. That argument isn’t without force. But as Professor Bell argues, a genuinely textualist reading of the Act doesn’t seem consistent with the proposition that the Act and Exemption 4 are coextensive. In other words: Even if a textualist reassessment of the Act’s scope doesn’t yield a competitive harm requirement, the result should still be an Act with a narrower scope than Exemption 4.

If the courts do find that FOIA Exemption 4 is, at least in part, a discretionary exemption subject to the foreseeable harm standard, they’ll then have to answer a second question: What is the nature of the “interest protected by” the exemption? As noted, it is harm to that specific interest that the agency must reasonably foresee before it can withhold documents.

National Parks identified two main purposes for Exemption 4 based on the statute’s legislative history: “encouraging cooperation with the Government by persons having information useful to officials” and “protect[ing] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.” It follows that under a foreseeable harm analysis, the test for Exemption 4 looks very much like it did in National Parks, at least for information that submitters are required to provide to the government. (The withholding of information provided voluntarily could arguably serve the first interest.) Is it really more complicated than that?

To no one’s surprise, the government and information submitters...
will argue that it is. They may contend that the “interest protected” by Exemption 4 is simply a private entity’s interest in the confidentiality of information it submits to the government. And they will likely point to language in the FMI case that took issue not just with the fact that National Parks relied on legislative history, but also with how the D.C. Circuit went about reading that history. The result, they may say, is that even if Exemption 4 has purposes other than protecting a submitter’s confidentiality, nothing useful can be gleaned from the legislative history about those purposes.

That’s not entirely convincing, for two reasons. The first, as noted above, is that this reasoning would effectively make the foreseeable harm standard meaningless. Put simply, the foreseeable harm provision must be read as adding something to an agency’s burden to justify withholding under a discretionary exemption. The only exceptions to that rule, as the Senate report explains, are for discretionary exemptions that are already built in a required showing of harm—namely, Exemption 6, which shields information whose disclosure would cause an “unwarranted invasion of personal privacy,” and Exemption 7, which permits nondisclosure for law enforcement records whose release would occasion certain kinds of harm.

Exemption 4, as read by the Supreme Court, contains no such harm requirement. Nor can it be plausibly said that the mere loss of confidentiality is harmful to a submitter. Judge William Alsup took a different view in American Small Business League v. DOD, writing that “[d]isclosure would necessarily destroy the private nature of the information, no matter the circumstance.” But that takes a shallow view of harm. The universe of “confidential” information—that is, all information that is “customarily and actually treated as private”—is vast. Surely disclosure of some kinds of confidential information could cause harm to a submitter in some form, whether competitive or otherwise. But it’s hard to imagine that disclosure of “confidential” information being invariably harmful in a meaningful sense.

The government is wrong for a second reason, too: Legislative history isn’t essential for discerning the interest protected by an exemption. That is how Charles Seife, a New York University professor and plaintiff in a pending FOIA case against the Food and Drug Administration (FDA), sees it. His request seeks studies containing clinical trial data for a controversial drug manufactured by Sarepta Therapeutics, which the FDA and Sarepta claim is exempt from disclosure under Exemption 4. Seife contends, among other things, that the defendants have failed to show reasonably foreseeable harm from disclosure.

He argues that both the structure and the plain meaning of Exemption 4 reflect that it protects “an interest in intangible property” and that harm to the interest should be measured “as the diminution in value of that information that would result from its disclosure.” He goes on to argue that, given FOIA’s core purpose of shedding light on government activity, an agency can withhold information consistent with the 2016 amendments only if the foreseeable harm to the submitter from disclosure “is significant enough to overcome the public interest in knowing what an agency is up to.”

The court has yet to resolve these questions. But whatever the outcome, Seife’s briefing offers an instructive example of how courts and FOIA plaintiffs might use textualist tools to discern the interests served by Exemption 4.

Conclusion

Despite FMI, optimism is warranted about both the foreseeable harm standard and FOIA. To date, the district courts have largely taken the standard seriously. It is possible that the appellate courts won’t do the same, but unlike in most areas of policy, the possibility of swift, bipartisan legislative correction of judicial errors is a realistic one. The FOIA Improvement Act of 2016 was not the major overhaul that the system needs, but it shows that Congress has its eye on the real-world operation on FOIA and continues to have a pro-disclosure bent. If the foreseeable harm standard doesn’t live up to its promise, we might actually be able to count on Congress.

Endnotes


2. 139 S. Ct. 2356 (2019).


4. Congress Passes Amendments to the FOIA, Dep’t of Justice, https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016. The Act made other important changes to FOIA, including a sunset provision precluding agencies from asserting the deliberative process privilege to records more than 25 years old. See 5 U.S.C. § 552(b)(5).


6. Id. § 552(a)(8)(A)(i)(II).

7. Exemption 5 applies to “interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” Id. § 552(b)(5).


9. Exemption 4 also covers “trade secrets.” 5 U.S.C. § 552(b)(4). That category has been defined much more narrowly than confidential commercial information. See, e.g., Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (defining trade secret as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort”).

10. I draw here from briefs filed by the Reporters Committee for the Freedom of the Press and Yale Law School’s Media Freedom and Information Access
an interest protected by the deliberative

As required by the FOIA Improvement

agency would be harmed by disclosure


FOIA Improvement Act of 2016, Pub. L.

governmentacted to 'discretionary' federal involvement

See NRDC II, 905 F.3d 694, 707 (3d Cir. 2018)


See, e.g., id. ¶¶ 7, 8.

See Memorandum of Points & Authorities in Support of Defen-

date with the attorney-client privilege, the attorney work product doctrine, and the deliberative process privilege, more than

See also, e.g., N.Y. Times Co. v. Dep't of State, No. 19-654-APM, Dkt. 32 (S.D.N.Y. July 9, 2019) (unpublished)

See, e.g., id. ¶¶ 7, 8.


See, e.g., id. ¶¶ 7, 8.

See Memorandum of Points & Authorities, supra note 37.

See id. at 16–21.

For instance, courts may consider a document “predecisional” within the meaning of the privilege if, among other things, “the government can pinpoint the specific agency decision to which the document correlates” and “establish that its author prepared the document for the purpose of assisting the agency official charged with making the agency decision.” Seife v. U.S. Dep't of State, 298 F. Supp. 3d 592, 614 (S.D.N.Y. 2018). In effect, this requires agencies to categorize and provide some level of detail about the records being withheld.

SenAte Report, supra note 17, at 8.

15. Memorandum from Office of the Att'y Gen. for Heads of Dep'ts & Agen-


16. President Obama's FOIA Memo-

randum and Attorney General Holder's FOIA Guidelines, Dep't of Justice, https://www.justice.gov/oip/blog/


18. Id.

19. Id.


22. Id. at *16–17 (“FEMA also does not provide any justification for how the agency would be harmed by disclosure as required by the FOIA Improvement Act of 2016. 5 U.S.C. § 552(a)(8)(A)(i). Absent a showing of foreseeable harm to an interest protected by the deliberative process exemption, the documents must be disclosed.”).


24. Id. at 78.

25. Id.

26. Id.

27. Id.


29. See id. at 100–01.


31. Id. at *3.

32. No. 19-5088 (D.C. Cir.).


34. Id. at 33.

35. See Machado Amici Brief, supra note 10.

36. See also, e.g., N.Y. Times Co. v. Dep't of State, No. 19-645-APM, Dkt. 23 (S.D.N.Y. July 9, 2019) (unpublished) (making conclusory finding that “there is a reasonable foreseeability of harm if the redacted material were to be disclosed”).

37. See Memorandum of Points & Authorities in Support of Defen-


38. Senate Report, supra note 17, at 8 (emphases added).

39. Id. at 3.


sence's reading, [the statute’s] reference to 'discretionary' federal involvement is mere surplusage, and we have cautioned against reading a text in a way that makes part of it redundant.”) (citing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).


42. See Second Supplemental Declar-


43. See, e.g., id. ¶¶ 9–13.

44. See, e.g., id. ¶¶ 7, 8.


46. See Memorandum of Points & Authorities, supra note 37.

47. See id. at 16–21.

48. For instance, courts may consider a document “predecisional” within the meaning of the privilege if, among other things, “the government can pinpoint the specific agency decision to which the document correlates” and “establish that its author prepared the document for the purpose of assisting the agency official charged with making the agency decision.” Seife v. U.S. Dep't of State, 298 F. Supp. 3d 592, 614 (S.D.N.Y. 2018). In effect, this requires agencies to categorize and provide some level of detail about the records being withheld.

49. Senate Report, supra note 17, at 8.


51. See, e.g., Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997) (setting out “a non-exclusive list of factors” for courts to use in determining whether an individual is an “employee” within the meaning of Title VII of the Civil Rights Act); Humphrey v. GlaxoSmithKline PLC, 905 F.3d 694, 707 (3d Cir. 2018) (concluding, in the context of the RICO statute, that “[w]hether an alleged injury to an intangible interest was suffered domestically is a particularly fact-sensitive question requiring consideration of multiple factors”).

52. Senate Report, supra note 17, at 3 (“For example, according to the Open-TheGovernment.org 2013 Secrecy Report, Federal agencies used Exemption 5, which permits nondisclosure of information covered by litigation privileges such as the attorney-client privilege, the attorney work product doctrine, and the deliberative process privilege, more than 79,000 times in 2012—a 41% increase from the previous year.”).


54. Id.

55. As of the date of this writing, it appears that only one decision, Cause of Action Institute v. DOJ, 330 F. Supp. 3d 336 (D.D.C. 2018), has considered the foreseeable harm standard in the context of the attorney-client privilege. The agency’s boilerplate assertions that disclosure would harm “full and frank” communications between DOJ and its client agencies won the day. Id. at 354–55 (citation and internal marks omitted).

56. 139 S. Ct. 2356 (2019).

57. Id. at 2361.


59. 498 F.2d 765 (D.C. Cir. 1974).

60. See FMI, 139 S. Ct. at 2367 (Breyer, J., dissenting).

61. Id. at 2363, 2366 (opinion of Gorsuch, J.).

62. Id. at 2363, 2366.

64. 498 F.2d 765.
74. 441 U.S. 281 (1979).
75. Id. at 319 n.49.
76. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1151 (D.C. Cir. 1987).
77. Bell, supra note 73.
79. Id. at 878.
the D.C. Circuit’s interpretation of this interrelationship between Exemption 4 and the TSA has been described—in dictum—as possibly ‘no longer accurate in light of [the] . . . more expansive interpretation of the scope of Exemption 4 [set forth] in Critical Mass; ’ Widnall, 57 F.3d at 1165 n. 2, it nevertheless remains the law.”).
84. Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 768 (D.C. Cir. 1974). The court left open the possibility that Exemption 4 embodied “other governmental interests.” Id. at 770 n.17.
85. See Food Mktg. Inst. v. Argus Leader, 139 S. Ct. 2356, 2364 (2019) (“Not only did National Parks inappropriately resort to legislative history, once it did so it went even further astray. The court relied heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted into law. Yet we can all agree that ‘excerpts from committee hearings’ are ‘among the least illuminating forms of legislative history.’”) (citations omitted); see also Am. Small Bus. League v. DOD, 2019 U.S. Dist. LEXIS 204425 (N.D. Cal. Nov. 24, 2019) (“This order may not use the FOIA amendment to circumvent the Supreme Court’s rejection of National Parks’s reliance on the legislative history in determining the scope of the term ‘confidential.’”).
86. FOIA Exemption 6 applies to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).
Enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.
Id. § 552(b)(7).
89. Id. at 15.
90. Id. at 28.
Copyright Act § 203 Termination of Transfers and Licenses: Could More Blockbusters Get Busted?

BY EVYNNE GROVER

Producers of some of the most profitable movies of the 1980s have recently been informed that their rights to make sequels are being cut off. The rights slayers are authors of copyrighted source material who are increasingly citing § 203 of the Copyright Act to terminate the grants and licenses they gave to movie studios that produced films based on their copyrighted source material. Impacted properties include The Terminator, Friday the 13th, and Die Hard. This disruption threatens to put an end date on producers’ longstanding permission to make sequels, reshape the Hollywood landscape of sure-thing blockbuster franchises, create uncertainty in business deals, create a cloud on title that hampers the ability to obtain media errors and omissions insurance, and set in motion the next wave of copyright litigation.

Section 203 permits an author who signed away rights to a creative work on or after January 1, 1978, to terminate that grant and cause the rights to revert back to the author, or the author’s heirs, giving the author or author’s heirs a fresh start in exploiting the creative work. “The termination right was expressly intended to relieve authors of the consequences of ill-advised and unrenumerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product,” while acknowledging “the possible disruption such exercise of the termination right might bring to long-established business dealings and the chains of title involving affected properties.” This article will explore the history and intent of the statute, the applicable and potentially applicable case law, and practical implications, especially from the perspective of film producers.

History and Intent of § 203

The Copyright Act of 1909 provided copyright protection to an author in an initial 28-year term, which the author could then renew for another 28-year term. The 1909 Act permitted exercise of the renewal even if the author had granted the rights in the initial copyright term to a publisher, permitting an author who was “originally in a poor bargaining position, to renegotiate the terms of the grant once the value of the work has been tested.” “When an author produces a work which later commands a higher price in the market than the original bargain provided, the copyright statute is designed to provide the author the power to negotiate for the realized value of the work” as “[a copyright] is by its very nature incapable of accurate monetary evaluation prior to its exploitation.” However, authors frequently assigned the renewal rights to publishers, which undercut the purpose of the two-pronged term. Once the Supreme Court held that renewal rights were assignable during the initial copyright term, publishers began to insist that authors assign both their initial and renewal rights to them in one transfer, which effectively eliminated the renewal right, and that second chance.

When Congress overhauled the copyright law with the enactment of the Copyright Act of 1976, the dual-term structure was replaced by a single copyright term for works created on or after January 1, 1978, lasting the life of the author plus 50 years. Although there was no renewal opportunity, Congress took another stab at creating a statutory structure that enables authors and their heirs to get a second chance to control and exploit their copyrighted work. Sections 203 and 304 of the Copyright Act of 1976 create a framework for the author or certain enumerated heirs to terminate transfers of copyrights or licenses and get that second chance.

Section 203, titled “Termination of transfers and licenses granted by the author,” provides for termination of “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will” for all works, other than works made for hire, under certain enumerated conditions. It was enacted as “a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.” Its detailed sections and subsections assert intricate commandments that may appear perfectly adequate in a vacuum.

Termination may be exercised at any time during a five-year period, beginning at the end of 35 years from the date of execution of the grant. However, if the grant covers the rights of publication of the work, the five-year period begins at the earlier of 35 years from the work’s publication or 40 years from the execution of the grant, whichever term ends earlier, which was designed to account for the years that may elapse between the signing of a publication contract and the eventual publication of the work. The termination can be effected by the author or certain of the author’s statutory heirs according to a framework that lays out a road map for various iterations of heirs and joint work situations.

Technical requirements of § 203

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termination notices include service upon the grantee or the grantee’s successor of a writing listing the effective date of the termination, not less than 2 or more than 10 years before the effective date; recordation in the Copyright Office; and compliance with the Register of Copyrights. The termination right is unaffected by “any agreement to the contrary, including an agreement to make a will or to make any future grant”26 and thus “cannot be waived in advance or contracted away.”27

Congress inserted a number of key limitations that protect the rights of grantees served with a termination notice.28 Most relevant is that a notice of termination does not cancel a grantee’s rights to exploit derivative works prepared under authority of the grant before termination.29 While a derivative work prepared by the grantee based on the now-terminated copyright grant or license “may continue to be utilized under the terms of the grant after its termination,” no further derivative works may be prepared.28 Thus, a studio that has invested 35 years of money and marketing into a film can continue to reap the benefits of that film, but it cannot base further works upon the original source material.

In addition, while “[a] further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination,”30 Congress created “[a]n exception, in the nature of a right of ‘first refusal.’”31 Specifically, it permits the original grantee or successors to enter into an agreement for such further grant at any time “after the notice of termination has been served.”32 Lastly, Congress clarified that a termination affects only the U.S. copyright interests covered by the grants and has no impact on “any other Federal, State, or foreign laws,”33 thus minimizing the scope of concerns of the original grantees.

The “work made for hire” exception acts as a further limitation,34 recognizing that “in the case of works made for hire the employer is considered the author of the work and is regarded as the initial owner of copyright unless there has been an agreement otherwise.”35 Section 101 of the 1976 Copyright Act codified a “work made for hire” in pertinent part as “(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”36

Analysis Under § 203 Requires Discussion of § 304

There is very little case law construing § 203 termination because “opportunities to execute termination notices under § 203 started to accrue ‘for the first time on January 1, 2013.””37 Due to the limited pool of § 203 case law, examination of § 203 will be viewed in part through the prism of case law analyzing termination under § 304, which pertains to the duration of copyrights that were already in existence on January 1, 1978, and the termination of transfers and licenses permitted for works that were in their renewal term on that date.38 In fact, “[m]ost existing case law on copyright termination pertains to § 304(c) because opportunities to terminate copyright grants became ripe under this statute earlier than grants subject to § 203.”39

As § 304, titled “Duration of copyright: Subsisting copyrights,” applies to copyrights existing on January 1, 1978, that were subject to the two-prong renewal structure, it is more expansive than § 203. Section 304 extended the life of existing copyrights initially by 19 years for a total of 75 years, and per 1998 amendment by another 20 years to a total of 95 years,40 and tackled the intricacies of renewal by the various categories of heirs and parties that could carry out the renewal. Section 304(c) is “a close but not exact counterpart” of § 203.41 This subsection, titled “Termination of Transfers and Licenses Covering Extended Renewal Term,” provides for termination of “the exclusive or nonexclusive grant of a transfer or license of copyright of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will” for all works, other than works made for hire, under certain enumerated conditions.42 The author or certain successors could terminate between 56 and 61 years after the work was copyrighted, or for a period of 5 years after January 1, 1978, whichever was later.43

The 1998 amendment added a further termination opportunity for copyrights still in their renewal term in 1998 where the § 304(c) termination right had already expired unexercised.44 Thus, § 304(c) differs from § 203 insofar as the scope of the rights that can be terminated, the timing of the initial grant at issue, and who may effect termination. However, the conditions and limitations of § 304(c) are similar to those provided in § 20345 and “identical words used in different parts of the same Act are intended to have the same meaning.”46

Case Law and Evolving Issues Under § 203

As the ability to terminate grants and licenses from the late 1970s and early 1980s ripens, the courts have been tasked with resolving a number of legal disputes, some resulting in settled law, and others currently in flux and suggesting further questions. Many of the key reported decisions pertain to termination of copyrights for musical compositions and sound recordings.47 Below is a sampling of relatively recent cases involving copyright termination that highlight the technical maze the courts must navigate, provide some key rulings to date, and foreshadow the issues that filmmakers should ponder.

• A dispute over rights to the song “Santa Claus Is Comin’ to Town” allowed the Court of Appeals for the Second Circuit to ruminate over a series of contracts under the various provisions of § 203 and § 304, determine whether a contract superseded an earlier contract to bring the source of rights into § 203 territory, calculate termination periods, and evaluate termination notice effectiveness.48 The songwriter’s heirs asked the court to rule on the effectiveness of termination notices served on a music publisher whose predecessor49 obtained
the rights. In 1934, the songwriter granted the copyright to the publisher, and separately granted the publisher the renewal rights in 1951. Shortly after sending the publisher a termination notice under § 304(c) in 1981, which rights derived from the 1951 renewal, the songwriter renegotiated with the publisher and granted the publisher all rights known or existing and all reversionary and termination interests. Encouraged by 1998 amendments adding a new termination right, the songwriter's heirs served a termination notice on the publisher under § 204(d) in 2004 purporting to terminate the 1951 agreement, leading to negotiations and agreement that § 203 provided the appropriate scheme. In 2007, the songwriter’s heirs served a termination notice under § 203 (later revealed to be unrecorded) purporting to terminate the 1981 agreement. Further negotiations stalled, and the publisher argued that the termination rights had already been exercised by the 1981 agreement. In 2012, the songwriter’s heirs served another termination notice under § 203 in the event the 1981 agreement was deemed to cover the right of a publication of the work, which would have made the 2007 notice premature. The heirs filed suit to obtain a judicial ruling as to the validity and enforceability of their copyright termination notice.

The court evaluated the language of the 1981 agreement under New York contract law pursuant to a choice of law provision in the 1981 agreement and determined that the parties intended for it to supersede, and substitute, for the 1951 agreement. Thus, the court held that the 1981 agreement replaced the 1951 agreement as the source for the publisher’s rights in the song, the heirs could terminate it under the applicable § 203, and that the 2007 termination notice was effective to terminate the 1981 agreement in 2016. The court also highlighted that the grantee is the only entity permitted to enter into a new rights agreement with the author before the effective date of a termination (during the window of time after service of the notice of termination), per the “existing-grantee exception,” which is intended to give the grantee “some advantage over others in obtaining the terminated rights.”

- When an Italian composer sought to terminate his prior assignment of the copyrights to scores for six Italian films that had been commissioned in the late 1970s and early 1980s, the grantee music publisher contested the termination on the ground that the scores were commissioned pursuant to the Italian law equivalent of works made for hire and thus not subject to the § 203 termination. The Court of Appeals for the Second Circuit held that Italian law does not recognize an allocation of authorship comparable to a work made for hire and that the assignment was subject to § 203 termination. The court also pointed out that the dispute involved only “the rights to reproduce the music in new recordings, to perform the music, or to sell the music for use in other films” and not the “use [of] the scores in the motion picture because [a] derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination.”

- A dispute between the heirs of singer/songwriter Ray Charles and the sole beneficiary of Charles’s estate, the Ray Charles Foundation, gave rise to an examination of standing to challenge copyright termination notices, and their validity and effectiveness. Charles conveyed his copyrights to a music publisher in the 1950s and renegotiated his copyright grants in 1980 pursuant to an agreement that provided him an advance payment and royalties. Charles set up the foundation for charitable purposes funded solely by royalties from his works. In 2002, Charles entered into agreements with a number of his heirs to fund a trust in exchange for their waiver of further claims against his estate. In 2010, a number of heirs filed multiple notices under § 203 and § 304(c) to terminate pre- and post-1978 grants authorized by Charles with respect to multiple compositions. The foundation sued to challenge the termination notices on grounds including that the compositions were works made for hire and the 1980 agreement satisfied the right of termination. The heirs argued that the foundation was without standing as it was really asserting the rights of the publisher and that authors and their heirs are intended beneficiaries of § 203, not grantees.

The court deemed the foundation’s lawsuit ripe, accepting as true the foundation’s representation that it felt the effects of the termination notices “in a concrete way” because the notices “created an enormous cloud over the future copyright ownership” of the works and made it “very difficult, if not impossible, to exploit the valuable copyrighted assets.” In addition, the court held that requiring different suits after each termination date had passed would be “an inefficient use of judicial resources.” Interests, the court noted that by the time of the district court’s order, the purported termination dates for 12 of the 51 works had passed and, as of the issuance of the subject opinion, the purported termination dates for 23 works had elapsed.

The court proclaimed that determination of the effectiveness of a termination notice can be made only by a court of law, as the Copyright Office does not issue or enforce notices of termination. In addition, the court held that the foundation had standing to challenge the heirs’ termination notices because the foundation was “litigating its own stake in the controversy.”
The court explained its conclusion, specifying that the termination notices “directly affect the Foundation’s right to royalties” and an effective termination notice “would deprive [the foundation] of the right to receive prospective royalties.”

Further, the foundation’s questions were deemed within the zone of interest contemplated by § 203(a) and § 304(c). The court also concluded that, although not expressly provided by the Copyright Act, an implied private cause of action exists under § 203 and § 304(c) termination provisions. After finding that termination would directly extinguish the foundation’s right to receive prospective royalties from the current grants, the court remanded the case for further proceedings.

- When comic book publishers challenged the copyright termination notices served by the heirs of comic book illustrator Jack Kirby, the Court of Appeals for the Second Circuit undertook a factually intensive inquiry to determine whether the drawings at issue were works made for hire. The heirs served termination notices seeking to terminate rights in 262 works created between 1958 and 1963 under § 304(c), and the publishers sought a declaration that the heirs had no termination rights under § 304(c)(2) because the works were “made for hire” by Kirby for the publisher, excepting them from the termination benefits of § 304(c). Kirby was a freelancer, was not paid a fixed wage or salary, did not receive benefits, and set his own hours, although he was closely associated with the publisher and worked in tandem under their direction.

  The court conducted its evaluation according to the case law interpreting “works made for hire” that was in effect when the works were created and the “instance and expense test,” which generally looks to whether the “employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out,” and whether the hiring party has invested resources in creation of the work. The test “turns on the parties’ creative and financial arrangement as revealed by the record in each case.”

  The court reconstructed the dispute via deposition testimony of the publisher, depositions and declarations of other comic book artists who worked for the publisher at various times, depositions of the heirs, and some documentary evidence.

  The court’s bases for finding that the works were at the publisher’s instance include that their relationship with Kirby was close and continuous, Kirby was kept busy with assignments from the publisher throughout the relevant time period, and Kirby created the relevant works pursuant to the publisher’s assignment and with the publisher specifically in mind. Further, the relationship, “however unbalanced and under-remunerative to the artist, is therefore what induced Kirby’s creation of the works.” While the question of expense was a closer call, the court found the publisher took on the risk of financial loss as it paid Kirby a sum certain for his work regardless of whether it was published or successful.

- Termination notice technical compliance was the subject of a very recent district court ruling that considered the bounds of adherence to the statutory and regulatory requirements. Musician and songwriter Jason Mtume sought to terminate a 1977 agreement in attempt to get back the copyrights to three sound recordings he had conveyed. The current assignee of the recording contract rejected the termination notices contending, inter alia, the notices did not comply with the Copyright Act, the recordings were not subject to § 203 termination because they were created pursuant to a grant contained in a 1977 agreement, and other potential authors might exist whose grants were not noticed for termination.

  The motion to dismiss focused on the purported invalidity of the termination notice for its failure to list the correct date of execution for the works as required by the Copyright Office. First, the court noted the sound recordings fit the category of “gap grants,” which are pre-1978 agreements concerning works that were not created until 1978, which are subject to the § 203 termination framework per a 2010 clarification from the Copyright Office. Second, the court evaluated the termination notices’ technical compliance. For example, it was noted that “date of execution of the grant” means “the date on which a written contract transferring the author’s rights to another party was signed,” but for gap works it means “the date on which the work was created,” and “creation” is different for sound recordings. In addition, the court questioned whether the lack of technical compliance may be “harmless error.” Further, the court also highlighted the need “for the existing assignee to receive reasonable notice of what rights of theirs are being affected through the exercise of the [artist’s . . . termination right].” As the dates listed on the termination notices did not seem to make sense, the court asserted the need for additional factual inquiry to examine whether the assignee was appropriately on notice, whether a different date would materially affect the termination, and whether the error was made in good faith.

- The screenwriter of the original Friday the 13th film was found to have successfully exercised his right to termination under § 203, enabling him to take back the rights he conveyed in 1979 to a production company pursuant...
to a contract.39 In response to Victor Miller’s filing of a number of notices terminating the grant of rights in the screenplay made to the production company, the production company and its successor filed suit contending the termination notices were invalid because the screenplay was a work made for hire, and thus the notices were a breach of his “employment agreement.”40 Miller sought a declaration of the validity of the termination. In a ruling that is currently subject to a pending appeal, the district court undertook a detailed examination of the relationship between Miller and the production company to consider the production company’s assertion that the screenplay was a work for hire,41 and other defenses raised.42

In finding the screenplay was not a work made for hire, the court looked to the Copyright Act’s work made for hire definition under § 101 under the Supreme Court’s agency law analysis,43 refusing to supplant it with a labor law analysis that was suggested by the producers.44 The court noted the contract at issue had no express agreement regarding work for hire status, or any other express arrangement regarding copyright, and that Miller did not prepare the screenplay as an employee within the scope of his employment. Some factors cited in the agency analysis include the production company failed to show that they closely controlled the details of Miller’s creative expression, or otherwise directed the performance of Miller’s daily activities; Miller did not receive traditional employee benefits; Miller was not treated as a traditional employee for tax purposes; Miller’s compensation was based on completion of the individual project rather than time worked; and, emphasized by the court as a key factor, the producers were unable to assign Miller additional projects unrelated to completion of the Friday the 13th screenplay.45

The court also found that the contributions of the producers did not deprive him of sole authorship.46 The court also rejected the production company’s statute of limitations defense, finding the few occasions where another entity was listed in a copyright notice did not equate with clear repudiation of ownership sufficient to trigger a copyright claim.47 One of Miller’s termination notices was deemed effective to terminate the 1979 grant notwithstanding that it contained certain incorrect addresses as the “error does not rise to the level of invalidation.”48 The court concluded that Miller’s “acquired copyright will extend to all copyrightable content in the screenplay” except for a single scene.49 In addition, the court clarified that the “termination notices apply only to the copyright in the screenplay for the first film, and did not purport to terminate a separate copyright in the adult Jason character present in later films. Adjudication of the status of any copyright in the adult Jason character will have to await a ripe dispute with respect to that issue.”50

On appeal, the production company asserts the court erred in failing to find that Miller was an employee by virtue of his membership in the Writers Guild of America (WGA), arguing that the production company, a WGA collective bargaining agreement signatory company, could hire him only by complying with the terms of the WGA collective bargaining agreement, which imposes employee status on a screenwriter.51 The production company cautions that the “decision threatens to upend that structure, disrupting long-settled relationships in the film industry and undermining the very benefits the WGA has so successfully negotiated for its members.”52

The production company also contends the district court misapplied the Supreme Court agency analysis factors, including failure to give weight to the terms of the WGA collective bargaining agreement applicable in light of Miller’s WGA membership and his “WGA-signatory employer.”53 Lastly, the production company asserts it was an error to find no express repudiation and deem the copyright notices not time-barred under the statute of limitations.54

Practical Implications

As the copyright termination notices roll in, what’s a purportedly terminated grantee or licensee to do? If a production company has spent some 35 years developing, advertising, and promoting the copyrighted work, its investment has likely caused, or at least substantially contributed to, the increased value, popularity, and recognizability of the work. The termination provisions are intended to benefit authors while acknowledging “the possible disruption such exercise of the termination right might bring to long-established business dealings.”55 In practice, a balanced middle ground is difficult to achieve. What options and considerations are available?

**Question the termination notice**

Upon receipt of a termination notice, there are many angles to explore to confirm whether the grant or license is subject to termination, and whether the termination notice is legally compliant.

- **Is it a work made for hire?**

Because a work made for hire is excepted from the termination provisions, it is important to evaluate the true owner of the original work and the conditions under which it was created. As demonstrated by the *Kirby* and *Miller* cases,56 it is important to determine when the work was created and which legal standard applies to evaluate work made for hire status. Regardless of which work for hire definition is applicable, key considerations will be whether there was an employment relationship, who had ultimate creative control over the work, who invested resources that were used to support the work, and how was the creator paid. In light of the time...

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that has likely elapsed since the grant, it is also important to consider what documents or witnesses are available to provide evidentiary support.

- **Was the original grant or license signed by the appropriate individual?** Was the subject grant or license signed, if after January 1, 1978, by the author? If not, then § 203 termination is not permitted. Is the grant susceptible of § 304(c) termination? If there are multiple authors or owners, was the termination signed by the majority of the authors who executed it or their heirs?

  Another angle of inquiry was highlighted in a recent class action lawsuit that takes issue with a recording company’s rejection of copyright termination notices. In a motion to dismiss, the recording company contends that certain contracts granting rights were not executed by the recording artists who executed the termination notices, but instead by their “loan-out” companies or other companies that agreed to furnish their recording services. This angle remains an open question.

- **What is the operative grant or license, and when was it executed?** Does § 304(c) or § 203 apply? Generally, if the operative grant or license was executed prior to January 1, 1978, § 304(c) applies, and if executed on or after January 1, 1978, § 203 applies. Depending on the applicable statute, termination might be permitted, or might not, and the window to exercise termination might have passed, or might not accrue for many years. The provisions are similar with respect to exercise of the rights, but their differences have critical impact on the overall analysis. Was there ever a contract that acted as a termination, such that § 203 would be inapplicable because an author can exercise the termination right only once? Was there ever a contract that superseded or replaced the original grant, as in the Baldwin case?

- **Is the termination notice compliant?** Was it sent in the appropriate time period? Does it contain the appropriate information? Does it give reasonable notice of what rights are being effected through the exercise of the termination right? Was it recorded in the Copyright Office before the effective date of termination? Might any errors be deemed “harmless,” as discussed in the Mtume case?

**Renegotiate**

As the original grantee has the effective “right of first refusal” per the “existing grantee exception,” if the work is important enough, the best choice may be to renegotiate a deal that gives the author or the author’s heirs a reasonable level of remuneration. Affirmatively acknowledging the value of the work and forging an amicable discussion may go a long way toward convincing the author or heirs to permit the production company to continue to develop the source work. It may be helpful to give credence to their emotional connection to the work, especially heirs, and how the work is their family legacy. Getting in early and cutting a deal after the termination notice has been served might be the best move to lock in the property. That eagerness could also harm any hard bargain negotiation approach, but the certainty and removal of the cloud could be worth it.

**Consider the option, and impact, of litigation**

Without question, terminations under § 203 will create a new wave of litigation, and we have already seen some of it. The courts have proclaimed themselves as the appropriate battleground. However, for all of the issues that have been crystalized in § 304(c) litigation and § 203 litigation, there are many more that will be raised and scrutinized over the coming years. As different fact patterns, contractual situations, and compliance questions arise, the courts will be busy weighing choice of law issues, language interpretation, parties’ intentions, and congressional intent, and attempting practical compromises, as well as reconstructing events from 35 years ago. There is a window for sending a notice of termination and it is effective 2 to 10 years after it is sent. The timing of these disputes could create a cloud of uncertainty, tying up projects in copyright purgatory.

**If the termination is valid, what remains?**

If the termination is valid, careful consideration must be given to assessing what rights remain versus what rights have been cut off. The right to make further derivative works is cut off 2 to 10 years after the effective termination notice because termination can be effective during a 5-year window and the notice can be served not less than two or more than 10 years before the termination date. That leaves a narrow window of time to make further derivative works and sets off a race to get in that one last sequel. The original grantee or any successor can continue to exploit the derivative works that were prepared under authority of the grant. “The critical point in determining whether the right to continue utilizing a derivative work survives the termination of a transfer of a copyright is whether it was ‘prepared’ before the termination.” The operative word preparation is likely to be the subject of debate in the coming years.

An interesting question arises for the production company that needs to promote the movie completed just before the termination date is effective. Even if the movie is made before the window closes, what about advertising and promotion? Can you exploit the works without creating additional derivative works? In this multiplatform digital world, movies are often promoted with supplementary material, games, and behind-the-scenes features. How do you make sure all marketing, promotional videos, and supplementary marketing material using the original source work are “prepared” before the window closes? What are the parameters of exploiting the original derivative work, and how do you do it without creating more?

Notably, the copyright termination has no impact on foreign rights, so the works can still be exploited outside of the United States. In fact, the right to make derivative works continues outside of the United States. The scope of any such rights must be determined with the benefit of skilled counsel.
addition, the copyright termination has no impact on trademark rights.

Considerations for subsequent grantees and licensees
The producer who wishes to purchase the rights from the author or heirs after termination has to consider the limitations on the purchase. As only the reverted U.S. copyrights can be purchased, any new works based on the copyrights can be exploited only in the United States or risk foreign litigation. In an international digital economy, that is no small feat. In addition, because any related trademarks will remain with the original grantees, the new purchaser will be limited in connection with marketing and merchandising. Accordingly, the reverted rights will likely have less value to new purchasers, as they are limited and come with their own sort of cloud. Also, remember that while the current grantee gets the “right of first refusal” before the grant is terminated, any new license with a new grantee is effective only if made after the effective date of the termination.

Impact that will be felt across the board
The steady stream of copyright termination notices is already having an impact on the business of making movies. It is a financial, strategic, and creative issue that will disrupt long-term plans and find its way into movie budgets. Current rights holders need to plan by taking inventory of their works that are based on grants and licenses of copyrighted source material. They need to thoroughly examine the chain of title of the rights to determine who executed the grant and when, assess whether termination could be available, anticipate the time permitted for receipt of termination notices, and anticipate when termination could be effective. Once the rights are understood and calculations performed, it will be easier to consider the value of the copyrighted source material, a timetable for additional material, a timetable for additional notices, and anticipate when termination notices is already having an impact on the business of making and insuring movies. It is a financial, strategic, and creative issue that will disrupt long-term plans and find its way into movie budgets. Current rights holders need to plan by taking inventory of their works that are based on grants and licenses of copyrighted source material. They need to thoroughly examine the chain of title of the rights to determine who executed the grant and when, assess whether termination could be available, anticipate the time permitted for receipt of termination notices, and anticipate when termination could be effective. Once the rights are understood and calculations performed, it will be easier to consider the value of the copyrighted source material, a timetable for additional works, and whether litigation expense or further license fees need to be built into production budgets.

Copyright termination notices are already having an impact on the clearance process for making and insuring movies. Clearance review, which previously might have been a clear-cut chain of title review or fair use assessment, now often must also navigate the academic labyrinth of termination rights and potential termination rights. Production companies want to invest in properties with a clear road ahead, and cloudy titles are not an easy sell, nor are they easily insurable.

There may also be issues with production schedules. Being “behind schedule” may already have significant monetary consequences for an ordinary filmmaker, but failure to “prepare” the derivative work before a rights cut-off could put the entire production and ability to exploit it at risk. Then there are the creative issues. Writers will need to become adept at drafting a production that uses elements that were added on by the production in sequels without using any of the copyrighted source material that reverted to the author or heirs.

Conclusion
The challenge of § 203 copyright terminations is how to enable high-stakes business transactions to proceed unimpeded by the uncertainty of clouded rights. We have the benefit of case law on § 304(c) and some on § 203, but even that will not be enough to completely guide the judiciary through a glut of lawsuits seeking guidance that will be critical to an entire industry. While there won’t necessarily be a race to the courthouse, intellectual property and entertainment lawyers will certainly be kept busy, in conjunction with production companies and their insurance brokers, who will need to address these issues. Enabled by § 203, it is a copyright owner’s prerogative to change his or her mind and attempt to “bust” the blockbuster.

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Endnotes
4. Id.
5. Id.
11. Id. at 218–19.
15. Baldwin, 805 F.3d at 20. For works created before January 1, 1978, the dual-term structure remained, but the renewal term was extended to seventy-five years from the date copyright was originally secured.
16. Ray Charles Found. v. Robinson, 795 F.3d 1109, 1112 (9th Cir. 2015); Baldwin, 805 F.3d at 19.
24. Id. § 203(a)(4); see also 37 C.F.R. § 201.10, Copyright Office regulations.
27. Id. at 126–27.
29. Id.
30. Id. § 203(b)(4).
31. Id.
32. Id.
33. Id. § 203(b)(5).
35. See id. at 121.
39. Ray Charles Found., 795 F.3d at 1113 (also highlighting in footnote 4 that § 203 and § 304(c) termination provisions have other differences not relevant to the ruling).
42. 17 U.S.C.A. § 304(c).
44. 17 U.S.C.A. § 304(d); Baldwin v. EMI Feist Catalog, Inc., 805 F.3d 18, 23 (2d Cir. 2015).
46. Penguin Grp. (USA) Inc. v. Steinbeck, 537 F.3d 193, 203 n.6 (2d Cir. 2008).
47. See Gardner, supra note 1.
49. The publisher and its predecessor are referred to interchangeably as “the publisher” for brevity.
51. Id. at 20.
52. Id. at 22–23.
53. Id. at 23.
54. Id. at 24.
55. Id.
56. Id.
57. Id. at 27–32.
58. Id.
59. Id. at 34.
60. Id. at 26.
62. Id. at 73.
63. Id. at 71 (citing 7 U.S.C. § 203(b)(1)).
64. Ray Charles Found. v. Robinson, 795 F.3d 1109, 1112–13 (9th Cir. 2015).
65. Id. at 1112.
66. Id.
67. Id. at 1113.
68. Id. at 1114.
69. Id. at 1115–16.
70. Id. at 1116–17.
71. Id. at 1117.
72. Id.
73. Id. at 1117–18.
74. See id. at 1119–20.
75. Id. at 1119.
76. Id. at 1119–23.
77. Id. at 1122.
78. Id. at 1124.
80. Id. at 127.
81. Id. at 125–26.
82. Id. at 137.
83. Id. at 139.
84. Id. at 140.
85. Id. at 140 n.10.
86. Id. at 141–42.
87. Id. at 141.
88. Id. at 142.
89. Id. at 143–44.
91. Id. at *1–2.
92. Id. at *2.
93. Id. at *2–3.
94. Id. at *3.
95. Id.
96. Id. at *4–5.
98. Id. at *5.
100. Id. at 292.
101. Id.
102. Id. at 294.
103. Id. (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)).
104. Id. at 296.
105. Id. at 296–31.
106. Id. at 312.
107. Id. at 315–16.
108. Id. at 319.
109. Id. at 320; see id. at 317 n.25 (noting Miller’s admission that he did not write one scene in which a motorcycle policeman arrives at the camp and cautions some of the children to behave, removing the scene from the realm of reverted rights).
110. Id. at 320.
112. Id. at 2.
113. Id.
114. Id.
120. See, e.g., Baldwin v. EMI Feist Catalog, Inc., 805 F.3d 18 (2d Cir. 2015).
122. See Gardner, supra note 1.
Ten Years Later: Pleading Standards and Actual Malice

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alongside and responding to it and influencing the application of substantive law.\(^{19}\)

The panel’s treatment of plausibility in \textit{Palin} demonstrates that 10 years after \textit{Iqbal} it’s time to recontextualize the application of plausibility to pleading actual malice. This article does so first by tracing the development of pleading standards and the adoption of the Federal Rules of Civil Procedure in 1938. It then pauses to assess defamation case law dealing with the interplay of substance and procedure before \textit{Twombly} and \textit{Iqbal}. Next, it distills \textit{Twombly} and \textit{Iqbal} and examines three implications of those cases in defamation law. Finally, after observing some recent trends, it maps the interplay of plausibility and actual malice.

A Brief History of Pleading

Today’s pleading standards are the product of the swing between formality and liberality, common law and equity, Lochner conservatives and New Deal Democrats.\(^{20}\) They allow redress for the injured and implicate rights under the Seventh Amendment, and they determine whether a defendant will be put to the expense of a defense.\(^{21}\) They are, broadly speaking, a reflection of society’s views of justice. As Roscoe Pound said, legal rules evolve to “bring the public administration of justice into touch with . . . changed moral, social or political conditions.”\(^{22}\)

Today it is easy to forget that before 1938 there were no federal rules of civil procedure, just a mishmash of state rules applied in federal courts.\(^{23}\) Initially, pleading was a matter of common law as much as the substantive law was, and although today’s pleading standards can be traced to the thirteenth century under Edward I, where it was about “bringing] the matter before the court with precision,” for all our sakes, we’ll jump forward to the modern story of pleading, England in the 1830s.\(^{24}\)

Pleading was in disarray. Years earlier, Parliament passed a law meant to liberalize common law pleading, titling it “An Act for . . . the Better Advance of Justice.”\(^{25}\) Contrary to its name, it increased the cost of litigation, and the complexity of pleadings, demurrers, and answers exploded.\(^{26}\) The Hilary Rules of 1834 were meant to bring order to that chaos.\(^{27}\) But the Hilary Rules, “with the theory that the desirable thing was more, better, and harsher rules calling for highly particularized and technical pleadings,” were an overcorrection.\(^{28}\) They were so hypertechnical that courts tossed cases for minor deviations from their dictates.

It’s in that context that David Dudley Field, the kind of person who talked about law as a “science,” set out to bring order to pleading in New York.\(^{29}\) For Field, procedure was the machinery by which rights predictably could be vindicated. As New York had just abolished chancery courts, his procedural rules (unlike most at the time) were to apply to almost all cases uniformly.\(^{30}\) Under them, parties could plead “in ordinary and concise language.”\(^{31}\) He adopted pleading a “cause of action,” that is, “to describe those grouping of facts to which legal consequences attach.”\(^{32}\) He made other changes, moving away from differing forms of an action and confining the amendment of pleadings and joinder of parties.\(^{33}\) While his code liberalized pleading compared to the Hilary Rules, “judicial discretion and legal flexibility” remained “anathema to Field.”\(^{34}\) So many states ultimately adopted the Field Code at one time, the majority of Americans lived under it.\(^{35}\)

Despite its improvements, it too would be reviled as “restrictive, confining, [and] formalistic.”\(^{36}\) In New York, the legislature added to it piece-meal until “it was a ‘conglomeration of petty provisions purporting to reach into every nook and cranny of practice and leading to an intolerable rigidity.’”\(^{37}\) Attempts to tidy it up were likewise despised “for being too long, too complicated, ‘too minute and technical, and lack[ing] elasticity and adaptability.’”\(^{38}\)

It was around this time that calls came for reforms at the federal level.\(^{39}\) The first priority was unhitching federal practice from idiosyncratic state procedural law. The view cultivated by reformers in the early 1900s was that “[f]ormal procedural rules were no longer appropriate to define, confine, and attempt to deliver substantive law in a predictable manner.”\(^{40}\) Procedure should “step aside and let the substance through.”\(^{41}\)

This view won out with the adoption of the Federal Rules of Civil Procedure in 1938.\(^{42}\) “The drafters of the Federal Rules recognized that the system they were creating lacked restraint.”\(^{43}\) But that was kind of the point: “Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial.”\(^{44}\) In this way, the Rules drafted in the midst of the New Deal would feed popular change sprouting up around the country: “The New Deal required courts to resolve new types of complex cases, for which procedural lines would be an outdated impediment.”\(^{45}\)

Under the Rules, it was hoped that “there [would] no longer be any fundamentals in procedure.”\(^{46}\) The Rules required only that plaintiffs plead “a short and plain statement of the claim showing that the pleader is entitled to relief,” and, unlike the Field Code, “avoid[ed] the ‘facts’ and ‘cause of action,’” requiring only a “claim” of relief.\(^{47}\) They also expanded discovery, enlarged remedies, and eased restrictions elsewhere. In short, they favored merits resolution.\(^{48}\)

In \textit{Conley v. Gibson}, a 1957 race discrimination case, the Court enunciated the liberality of the Rules. There, the Court held that courts must not dismiss a case unless it “appears beyond doubt that the plaintiff can prove \textit{no set of facts} in support of his claims which would entitle him to relief.”\(^{49}\) This “no set of facts” language would come to define pleading for decades. (Like everything else, \textit{Conley} too can’t be wrested from its time. Failing to recognize a liberal pleading requirement, three years after the Court decided \textit{Brown v. Board of Education},\(^{50}\) risked the dismissal of scores of civil rights
complaints by segregationist judges.\(^{51}\) As with prior reforms, the Rules also were met with criticism. Critics in the ’30s presciently complained the Rules would “increase . . . litigation based on suspicion rather than facts,” making it “cheaper . . . to settle for less than the cost to resist.”\(^{52}\) Defendants humorously summed up criticisms of the new Rule 8 as being “based on the view that [it] does not require the averment of any information as to what has actually happened.”\(^{53}\) Nevertheless, proposed revisions that would have mandated pleading facts constituting a cause of action à la Field were rejected. The Rules “permit the claim to be stated in general terms” and “discourage battles over mere form.”\(^{54}\)

The First Amendment and the Federal Rules

The Supreme Court began constitutionalizing defamation 26 years after adoption of the Rules.\(^{55}\) In New York Times Co. v. Sullivan, the Court held that public figure plaintiffs must prove actual malice to make out a claim. That is, they must prove by clear and convincing evidence that the defendant published with knowledge of falsity or a high degree of awareness of probable falsity. This provided the “breathing space” for robust public discourse guaranteed by the First Amendment with the understanding that it might “put[] a premium on ignorance” and “protect some erroneous publications.”\(^{56}\) Still, “the stake of the people in public business . . . is so great” that some abuse must be tolerated.\(^{57}\)

While an occasion for “dancing in the streets,”\(^{58}\) Sullivan had limitations. Actual malice “typically require[d] discovery,” making it not all that useful on an early motion.\(^{59}\) As one court noted early on: A “plaintiff is not required to include in its complaints the facts upon which proof of actual malice can be based; it need only plead actual malice itself.”\(^{60}\)

As a result, advocates started pushing for a recognition that, as with the substantive law, the First Amendment created “a constitutional zone of protection” procedurally as well—when it came to both pleading and other procedural matters implicated in cases touching on the First Amendment.\(^{61}\) Courts, it was argued, should consider these procedural matters “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”\(^{62}\)

The D.C. Circuit endorsed this approach in Washington Post Company v. Keogh. As Judge J. Skelly Wright put it in the settling dust of Sullivan: “In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate.”\(^{63}\) A purpose of Sullivan, after all, “is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government.”\(^{64}\)

The Eighth Circuit agreed, finding that “courts must keep this harmful [chilling] effect in mind and grant summary judgment in favor of libel defendants where, on close analysis, it is appropriate under the Federal Rules of Civil Procedure.”\(^{65}\) The Fourth and the Fifth Circuits did too, holding that “prolonging a meritless case through trial could result in further chilling of First Amendment rights.”\(^{66}\)

In 1976, the Ninth Circuit in Franchise Realty v. San Francisco Local Joint Executive Board stretched this logic to motions to dismiss. Although it professed that it was not “adopting a rule [of] so-called ‘fact’ pleading,” it held that “where a plaintiff seeks . . . relief . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.”\(^{67}\)

Just as the tack on this constitutional gloss on procedure was drying, the Supreme Court decided Hutchinson v. Proxmire.\(^{68}\) There, consistent with the trend, the district court observed that “summary judgment [on actual malice] might well be the rule rather than the exception.”\(^{69}\) While the Court was not called on to decide the issue, it dropped a footnote and observed: “Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called ‘rule.’”\(^{70}\) Indeed, “[t]he proof of ‘actual malice’ calls a defendant’s state of mind into question, and does not readily lend itself to summary disposition.”\(^{71}\)

The same year, in Herbert v. Lando, the Court rejected another run at constitutionalizing procedure.\(^{72}\) The defendant sought “a constitutional privilege foreclosing direct inquiry into the editorial process.”\(^{73}\) The Court declined to create one, favoring the general rule that “deposition-discovery rules are to be accorded a broad and liberal treatment.”\(^{74}\) Any “concern about undue and uncontrolled discovery” must be met with “changes in the present Rules” or through a trial judge’s “ample powers . . . to prevent abuse” under the Rules and Rule 1’s admonishment that they “be construed to secure the just, speedy, and inexpensive determination of every action.”\(^{75}\)

The Court also rejected First Amendment overlays on personal jurisdiction. In Calder v. Jones, it found that “such considerations would needless complicate an already imprecise inquiry.”\(^{76}\) At any rate, “the potential chill on protected First Amendment activity stemming from libel . . . actions is already taken into account in the constitutional limitations on the substantive law.”\(^{77}\) In Keeton v. Hustler, the Court was adamant: “[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction.”\(^{78}\) (Subsequent pushes for special treatment in other areas of the law faced a similar fate.\(^{79}\))

Other members of the Court were more sympathetic. Justice Thurgood Marshall, dissenting in Herbert, predicted that actual malice cannot “accomplish the ends for which it was conceived” without being “reassessed in light of the procedural realities under which libel actions are conducted.”\(^{80}\) Liberal procedure was a “tool[] for harassment and delay.”\(^{81}\) Litigation costs against “any plaintiff with a deep pocket and a facially sufficient complaint” are often ruinous.\(^{82}\) The public was harmed too: “Faced with the prospect of escalating attorney’s fees, diversion of time from journalistic endeavors, and exposure of potentially sensitive information, editors may well make publication judgments that reflect less the risk of liability than the expense of vindication.”\(^{83}\)

Despite this, what the Court hinted at in Hutchinson in 1979, it had made explicit: Procedural rules applied
generally across causes of action irrespective of the First Amendment. Courts thus distanced themselves from Keogh and its progeny. On motions to dismiss, they greenlit poorly pleaded claims of actual malice, and the Ninth Circuit was forced to admit the “tension” between Franchise Reality and the Court’s subsequent decisions. On summary judgment, courts held that a “dispute of material fact does not disappear merely because a media defendant is being sued.” Times were not good.

**Other Procedural Developments in Defamation Law**

Two procedural battles were won, however: *Bose v. Consumers Union, Inc.* about the standard of appellate review from appeals in defamation cases, and *Anderson v. Liberty Lobby, Inc.* about evidentiary burdens on summary judgment. They (and, really, *Anderson*) demonstrate how demanding substantive standards indirectly manifest through generally applicable procedure even within a framework that rejects direct First Amendment effects on procedure. In this way, they foreshadow *Twombly* and *Iqbal.*

*Bose* came to the Court after the First Circuit reversed a finding of actual malice. In reversing, that court “held that its review of the ‘actual malice’ determination was not ‘limited’ to the clearly-erroneous standard of Rule 52(a).” The Supreme Court argued that such a finding while affirming the decision. Rule 52 “means what it says.” The Court noted, however, that “the clearly-erroneous standard of Rule 52(a) . . . does not prescribe the standard of review to be applied in reviewing a determination of actual malice.” Consistent with cases like *Sullivan,* the Court found that it had an obligation in public figure defamation cases to “make an independent examination of the whole record.” Without that, courts risked letting the “appellate court would start with the evidence and make its own findings of fact.” Under the former, “the appellate court starts with the findings of fact . . . made by the trial judge, and simply ensures that there is record evidence to support those findings by . . . clear and convincing proof.” Thus, independent examination did not so much as interfere with Rule 52 as it ensured the proper application of law to fact.

Two years after *Bose,* the parties in *Anderson* asked the Court to decide “whether the clear-and-convincing-evidence requirement [of *Sullivan*] must be considered by a court ruling on a motion for summary judgment under Rule 56.” The D.C. Circuit, in an opinion authored by then Judge Antonin Scalia, determined based on *Hutchinson* that the district court erred by considering *Sullivan’s* convincing clarity requirement on a motion for summary judgment. The Court disagreed: “[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.”

Recounting Rule 56, the Court explained that “this standard provides that the mere existence of some alleged factual dispute . . . will not defeat an otherwise properly supported motion”; “the requirement is that there be no genuine issue of material fact.” To determine what facts are “material,” resort must be made to “the substantive law” of the claim. To determine whether an issue was “genuine,” a court must ask whether “the evidence is such that a reasonable jury could return a verdict for the non-moving party.”

*Anderson* implicated the latter inquiry. Under that prong, when a defendant makes a motion for summary judgment, a judge asks “whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.” Because the focus is on the “fair-minded jury,” it “unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.” Similarly, “where the First Amendment mandates a ‘clear and convincing’ standard, the trial judge . . . should consider whether a reasonable factfinder could conclude . . . that the plaintiff had shown actual malice with convincing clarity.”

Notably, the holding in *Anderson* was “not . . . confined . . . to First Amendment cases.” As such, the Court did not run afoul of what it called *Hutchinson’s* “acknowledgment of the general reluctance to grant special procedural protections to defendants in libel . . . actions in addition to the constitutional protections embodied in the substantive law.”

Still, defendants in defamation actions were very much the beneficiaries of *Anderson’s* rule, which, paired with *Sullivan,* tended to negate *Hutchinson’s* observation that actual malice “does not readily lend itself to summary disposition.” As plausibility pleading after it, *Anderson* raised the procedural bar in defamation cases through reinterpretation of a generally applicable rule.

**Twombly**

*Twombly,* like everything else, was a product of its time. In the early 2000s, appellate courts handled 60,847 cases; district courts over 230,000. By 2007, when *Twombly* was decided, district court cases had surpassed 250,000. As more people turned to federal courts, *Twombly* signaled the Court’s impatience with plaintiff-friendly pleading requirements.

*Twombly* was an antitrust case. The question was whether a claim was plausible “when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition” but did not allege “factual context suggesting agreement, as distinct from identical, independent action.” This was important because the Sherman Act...
did not prohibit parallel, independent conduct that restrained the market; it prohibited “restraints effected by a . . . conspiracy.”

Off the bat, the Court recognized that Rule 8 does not require “detailed factual allegations” but emphasized that complaints must contain sufficient factual allegations “to raise a right to relief above the speculative level.” In the antitrust context, a complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made.” The existence of parallel conduct that “could just as well be independent action” does not “without more . . . suggest conspiracy,” the Court wrote. Thus, while parallel conduct made out a possible claim, it did not make out a plausible claim without additional pleaded facts.

These observations required the Court to retire Conley’s “no set of facts” language. That language, it wrote, was not “a pleading standard.” Were it, “a wholly conclusory statement of claim,” like, for example, an allegation that defendants entered into an illegal agreement, “would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” That risked leaving “the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement.”

Plaintiffs in Twombly alleged two sets of facts supporting an unlawful agreement. Each, however, boiled down to parallel conduct. Moreover, after surveying the characteristics of the market at issue, the Court found that, in each instance, there was an “an obvious alternative explanation” for the conduct alleged—namely, the ordinary market behavior of regional monopolies. In light of the explanation, the Court concluded that plaintiffs did not plead “enough facts to state a claim to relief that is plausible on its face” despite pleading facts from which a court could infer agreement.

Pragmatic concerns supported this approach: “It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.” Moreover, “[i]t is no answer to say that a claim . . . , if groundless, be weeded out early in the discovery process through ‘careful case management,’ given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” This is to say nothing of the “threat of discovery expense . . . push[ing] cost-conscious defendant to settle even anemic cases” instead of paying to get to summary judgment. Thus, “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope” of success.

Justice John Paul Stevens was not having it. In light of the circumstantial evidence of parallel conduct, he asked, “Does a judicial opinion that the charge is not ‘plausible’ provide a legally acceptable reason for dismissing the complaint? I think not.” The Court and petitioners’ legal team are no doubt correct that the parallel conduct alleged is consistent with the absence of any contract, combination, or conspiracy, Stevens wrote. “But that conduct is also entirely consistent with the presence of the illegal agreement alleged in the complaint.” As Stevens saw it, “Rule 8 was directly responsive” to the failure of technical pleading under the Hilary Rules and the Field Code. The majority’s opinion, nevertheless, countenanced this “stuff of a bygone era.”

Stevens also rejected the pragmatic reasoning. The “fear of the burdens of litigation does not justify factual conclusions supported only by lawyers’ arguments.” At any rate, the case was a “poor vehicle for the Court’s new pleading rule” because proof of conspiracy is “largely in the hands of the alleged conspirators.” Moreover, the Sherman Act meant to “encourage, rather than discourage, private enforcement of the law,” making it “more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.”

Iqbal

Two years later, in Iqbal, the Court dismissed another case on pleading grounds. There, Javid Iqbal brought a Bivens action against Robert Mueller, John Ashcroft, and others. His claims arose out of his apprehension after 9/11 and the alleged existence of a policy of holding, for long periods, individuals designated “high interest.” Under Bivens, government officials have no vicarious liability, and, thus, a plaintiff must plead that each official has violated the Constitution “through the official’s own individual actions.”

The Court found Iqbal failed to do so. It first observed that “Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” Rule 8 “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Unadorned things include “labels and conclusions,” “a formulaic recitation of the elements of a cause of action,” and “naked assertion[s]” devoid of “further factual enhancement.”

Moreover, while facts consistent with liability are necessary, they are not sufficient. Facts “merely consistent with” a defendant’s liability will “stop[ ] short of the line between possibility and plausibility.” Instead, a plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Such an inference cannot be drawn where facts consistent with liability are “more likely explained by, lawful . . . behavior.”

Pulling from Twombly, the Court instructed lower courts deciding motions to dismiss to engage in a two-step process. First, a court should identify the unadorned matter and discard it. Then, a court should take the remaining well-pleaded factual allegations, accept them as true, and then determine whether they plausibly give rise to an entitlement to relief.

As to the first prong, the Court found as conclusory and thus not entitled to an assumption of truth Iqbal’s allegations that petitioners “knew of, condoned, and . . . agreed to subject [him]” to maltreatment because of his race or religion, that Ashcroft was the
“principal architect” of the policy, and that Mueller was “instrumental” in implementing it. The allegations could be boiled down to allegations of “nothing more than a formulaic recitation of the elements” of his claim. The Court emphasized, “It is the conclusory nature of [Iqbal’s] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”

The Court then recounted the well-pleaded allegations that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11” and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” According to the Court, “these allegations [we]re consistent with [defendants] purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin.”

But, the Court wrote, “given more likely explanations, they do not plausibly establish this purpose.” In light of the identities of the 9/11 hijackers, “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose . . . was to target neither Arabs nor Muslims.” As between that “obvious alternative explanation” for the arrests, . . . “and the purposeful, invidious discrimination [Iqbal] asks [the Court] to infer, discrimination is not a plausible conclusion.”

Iqbal’s complaint, the Court recognized, was different than Twombly’s. “In Twombly, the complaint alleged general wrongdoing that extended over a period of years, whereas here the complaint alleges discrete wrongs . . . by lower level Government actors.” If those wrongs were “condoned by” Ashcroft and Mueller, they “could be the basis for some inference of wrongful intent on petitioners’ part.” Still, Rule 8 did not require the Court to credit that inferential leap where the “complaint d[id] not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind.” And the Court rejected Iqbal’s argument that Rule 8 be relaxed when pleading intent under Rule 9.

As the Court had in Twombly, it also emphasized the pragmatic reasons for its holding. “The basic thrust of the qualified-immunity doctrine,” the Court wrote, “is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’” Qualified immunity existed in no small part because it is “counterproductive to require the substantial diversion of government officials] that is attendant to participating in litigation.”

Justice David Souter, the author of Twombly, wrote the dissent. According to him, the majority overextended: “Twombly does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true.” Instead, Twombly “made it clear . . . that a court must take the allegations as true, no matter how skeptical the court may be.” The only allegations that could be discounted were “fantastic” ones: “claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”

There were two problems with the majority opinion, Souter said. First, “the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct.” Iqbal alleged he was beaten and held against his will for an extended period of time and alleged Ashcroft’s and Mueller’s involvement in his detention, after all. Second, the majority erred by viewing the factual allegations in isolation and rejecting some (like Ashcroft being the “principal architect” of the discriminatory policy) as conclusory. Souter explained, “Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination . . . he alleges that they helped to create the discriminatory policy he has described.”

Souter’s dissent also characterized Iqbal as an extension of Twombly not only because it applied Rule 8 to allegations under Rule 9. Iqbal also held unlike Twombly that, in the face of pleaded facts consistent with unlawful conduct, a court on a motion to dismiss can still reject a plaintiff’s preferred inference if there is an obvious alternative lawful explanation. In other words, while Twombly requires a complaint “to suggest plausibility,” Iqbal requires a complaint to suggest “a reasonable inference of plausibility.” Said in yet another way, “Iqbal may eliminate a range of arguably weak but potentially meritorious cases, not merely meritless actions.”

Actual Malice After Twombly and Iqbal

Whatever the vagaries as between Twombly and Iqbal, there is no doubt that they fundamentally altered the standard on motions to dismiss. As Professor Subrin said, “[It] is preposterous to argue that what the Supreme Court did in Twombly and Iqbal is anything other than a drastic departure from what the drafters of the Federal Rules intended and what has been the requirement for complaints since the Rules became law in 1938.”

The departures head in three directions. One requires plaintiffs to plead “facts” to suggest a reasonable inference of a plausible claim, which applies with special force to claims that are substantively rigorous. Another deputizes district courts to exercise their “judicial experience and common sense” to determine whether there is an “obvious alternative explanation” to the pleaded conduct. And a third permits courts to consider case-specific burdens were weak cases allowed to proceed.

Each implicates Sullivan. Actual malice makes it difficult to plead facts supporting a reasonable inference of a plausible claim because it is a demanding, subjective standard that does not readily lend itself to proof through direct evidence. Moreover, facts consistent with actual malice are likely explained by obvious alternative explanations as professional news organizations are not in the habit of publishing knowing falsehoods. Finally, letting weak defamation cases proceed risks a chilling effect on protected speech resulting from expensive discovery unlikely to support a meritorious cause of action.

Because actual malice is such a daunting standard, courts often need only address the implications of the
first of these departures. Indeed, although actual malice lacks “one infallible definition,” we know what constitutes direct evidence of it: unsubstantiated reliance on anonymous sources, “obvious reasons to doubt the veracity of the informant,” and publishing allegations that are “so inherently improbable” that only a reckless person would have done so.

We also know what courts should not “place too much reliance on” and none of which alone would be sufficient to make out actual malice: a generalized failure to investigate, a desire to increase profits, deviations from professional standards, refusals to correct, misunderstandings, “personal spite, ill will or a desire to injure plaintiff,” and immaterial fabrications, among other things. Much like parallel conduct in the antitrust context, each is only consistent with actual malice, not alone suggestive of it.

In Pippen v. NBCUniversal Media LLC, for example, former Chicago Bulls small forward Scottie Pippen brought suit against multiple news organizations that falsely “reported that he had filed for bankruptcy.”

The court found that complaint failed to state a claim by pleading conclusory allegations that defendants acted with malice. This was so even where the reporters could have easily searched PACER to discover the falsity of the allegation: “[F]ailure to investigate is . . . insufficient to establish reckless disregard for the truth.”

And, despite Pippen alerting defendants after publication that he was not bankrupt, “actual malice cannot be inferred from a publisher’s failure to retract a statement once it learns it to be false.”

Likewise, in Biro v. Conde Nast, Peter Paul Biro sued over an article “rais[ing] questions about the trustworthiness” of his fingerprint authentication of art. He alleged that defendants failed to “investigate and determine the validity” of the statements, failed to include information about his “many satisfied clients,” and relied on anonymous and biased sources. The Second Circuit rejected these allegations. First, a failure to investigate, which is not direct evidence of actual malice, is different than a naked “reliance on anonymous or unreliable sources without further investigation,” which “may support an inference of actual malice.”

But none of the relevant portions of the article were based solely on such sources. Moreover, Biro pleaded no facts “prompt[ing] the . . . defendants to question the reliability” of any source. Finally, accepting that the article was one-sided, that was not evidence of actual malice.

Then there are those cases that require courts in the face of pleaded facts to assess whether an inference of actual malice drawn from them is reasonable. In Schatz v. Republican State Leadership Committee, the plaintiff alleged that a political organization “had basically branded him a criminal” in a flyer, which also contained a “fine-print footnote . . . referencing two newspaper articles.” Although Schatz argued that those articles placed side by side with the flyer demonstrated the defendant published with actual malice, the First Circuit disagreed. It rejected Schatz’s preferred inference that the articles were inconsistent with the flyer, thus demonstrating actual malice: “[W]hat the [defendant] said sync[ed] up with or at least was not out of line with what the stories said.”

And in Michel v. NYP Holdings, Inc., the founding member of the band The Fugees alleged that Page Six defamed him by reporting, among other things, that his charity foundation bounced a check. The crux of the plaintiff’s argument was that he had “no relationship with the Foundation” and that the foundation’s president sent defendants an email stating that the plaintiff was “not a board member.” The Eleventh Circuit affirmed dismissal. The email allegation, the court stated, was “significant” as it “purport[ed] to show that two days before the article was published the defendants had actual knowledge that [the plaintiff] was not a board member.” Even so, it declined to credit that inference in light of other research evident on the face of the article, namely, that “[s]ources inside the Foundation and the Foundation’s own . . . website” showed the plaintiff’s involvement with the foundation.

This was especially so because the complaint alleged “[n]o facts . . . giving[ ] rise to an inference that any of these sources were as dubious as an unverified anonymous phone call” nor that it was “inherently improbable that Michel would be affiliated with a charity focused on Haiti.”

Notably, channeling similar concerns in Twombly and Iqbal, the court also expressed concerns with letting the case proceed to discovery: “[A]pplication of the plausibility pleading standard makes particular sense when examining public figure defamation suits.” According to the court, “[i]n these cases, there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yetgroundless litigation.” “Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases,” the court wrote, “would constrict that breathing space in exactly the manner the actual malice standard was intended to prevent.”

Still, the court reversed the district court order denying the plaintiff an opportunity to amend his complaint, making it unclear what the import of these observations really was.

Ten years after Iqbal, it is clear enough that courts confronted with relatively sparse factual allegations of actual malice are willing to dismiss cases. But beyond that, matters get murkier. To be sure, the courts in Schatz and Michel felt free enough to disregard plaintiffs’ preferred inference from the pleaded facts. This is faithful to Iqbal: “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” What’s less clear is when a plaintiff’s preferred inference is unreasonable enough to be disregarded, how the obvious alternative explanation influences that inquiry, or, even, how to decide whether an alternative explanation is obvious enough.


Palin

Palin illustrates just how murky this pond really is. None of what follows is meant to say that Twombly and Iqbal are easy to apply in every case. They are not, especially when a plaintiff throws a lot of actual malice stones into the pond. But what it
does say is that courts cannot simply refuse to apply *Twombly* and *Iqbal* altogether or that they must necessarily defer to a plaintiff’s preferred inferences—too afraid to test the reasonableness of a plaintiff’s inferences.212 It was the Supreme Court in *Iqbal*, after all, that required courts to test the reasonableness of inferences drawn from pleaded facts.

The thrust of Palin’s complaint was that a *Times* editorial implied that she “incited Jared Loughner’s January 8, 2011, shooting rampage at a political event in Tucson, Arizona, during which he shot nineteen people, severely wounding United States Congresswoman Gabrielle Giffords.”213 James Bennet was the principal drafter of those statements. To support actual malice, Palin pleaded facts relating to Bennet’s background as an editor, from which she inferred that he should have known there was no evidence of incitement; Bennet’s failure to read an article hyperlinked in the editorial from which she inferred he purposefully ignored the truth; and his relationship with his brother, a senator subject to gun threats whose opponent was endorsed by Palin, from which she inferred personal bias.214

The Second Circuit found for Palin, holding that Bennet’s background gave “rise to a plausible inference that [he] was reckless when he published the editorial without reacquainting himself” with prior reporting.215 The court found that inference “strengthened” by the allegations relating to his brother, from which the court credited the inference that “Bennet had reason to be personally biased against Palin and pro-gun positions in general.”216 It also inferred that “it was arguably reckless for Bennet to hyperlink an article that he did not read.”217 Finally, it found that the prompt correction issued did not dispel these inferences because it could have been “issued after a calculus that standing by the editorial was not worth the cost of the public backlash.”218

That said, to borrow a phrase from the dissent in *Twombly*, Palin is a “poor vehicle” to understand the interplay between actual malice and *Twombly* and *Iqbal*.219 Initially, it is hard to separate the issues relating to Judge Jed Rakoff’s pre-answer evidentiary conference (a whole other discussion) from the actual malice inquiry. Also, as detailed in the *Times* brief for rehearing or rehearing en banc drafted by Lee Levine, Jay Ward Brown, and David Schulz on behalf of the *Times*, the court erred by equating “reckless disregard,” i.e., publication with a high degree of awareness of probable falsity, with common law recklessness. And, as also discussed in the brief, the panel failed to decide as a matter of law whether the challenged statements were provably false.

The panel’s decision in October 2019 to vacate its opinion and resus- cite it with modifications, perhaps in an attempt to stave off rehearing en banc (which was later denied), lends credence to the view of *Palin* as not exactly an artful exposition of pleading actual malice under *Twombly* and *Iqbal*. For example, rather than state “At a minimum, these allegations give rise to a plausible inference that Bennet was reckless when he published . . . ,”220 it stated in its reissued opinion, “At a minimum, these allegations give rise to a plausible inference that Bennet was recklessly disregarding the truth when he published . . . .”221 It also deleted altogether its observation that “In any event, under these circumstances, it was arguably reckless for Bennet to hyperlink an article that he did not read.”222

Despite this history, some general observations can be made about the pleading issues in *Palin*. First, the court, which chastised Rakoff for crediting Bennet’s testimony over the allegations, overcorrected, crediting Palin’s preferred inferences at every turn. It repeatedly refused to assess whether Palin’s inferences were reasonable, writing that was a job “for the jury—not the court.”223 The jury has nothing to do with this process though. Were there any doubt, look no further than *Twombly* and *Iqbal*. In both, the Court tested battling inferences—in *Twombly*, battling inferences springing from facts of noncompe- tition; in *Iqbal*, battling inferences arising from allegations defendants rounded up Arab Muslim men for long-term detention.224 But in neither case did the Court refuse to assess the reasonableness of the inferences to be drawn from the facts; and when it did so, it declined to credit the plaintiffs’ preferred inferences.

It was the dissent in *Twombly*, after all, that rebuked the majority for “draw[ing] factual inferences in the defendants’ favor at the pleading stage.”225 But, the majority said, for a complaint to be plausible, it must be based on reasonable inferences drawn from pleaded facts; said differently, a complaint must cross the line “between the factually neutral and the factually suggestiv e.”226 That was the whole point: One inference to be drawn from facts consistent with liability is that the defendant engaged in the miscon- duct alleged,227 but that’s not enough to draw a “reasonable inference that the defendant is liable for the misconduct alleged.”228 A complaint that asks courts to draw unreasonable inferences is, by definition, not well-pleaded.229

The court also failed to explain, even accepting the existence of some extreme departure from professional standards and bias, how these findings were suggestive of actual malice rather than merely consistent with it. Indeed, we know from the case law that “a public figure must prove more than an extreme departure from professional standards and . . . a newspaper’s motive in publishing a story” to support a finding of actual malice.230 But that’s essentially what Palin offered the court.

Finally, the panel also knotted up the alternative explanation inquiry. The obvious alternative explana- tion put forward by the *Times* was a mistake. In support, it noted that it promptly corrected the editorial. This did not matter, the panel said, because “[t]he test is whether the complaint is plausible, not whether it is less plausible than an alternative explanation.”231 True enough. But where a complaint is merely approaching plausibility or, said differently, merely consistent with liability, as Palin’s was at best, *Iqbal* teaches that “more likely explanations” negate an inference that it is, in fact, plausible.232

The “End” This article has contextualized pleading standards as a historical matter in hopes of understanding their application today. It has shown that pleading standards are products of their times—whether the Hilary Rules, the Field Code, the Rules, or *Twombly* and *Iqbal*. To understand them as
isolated from substance, or static, or as lacking any drama as the Second Circuit did in *Palin*, would be wrong. Procedure has and always will blow in the direction of the prevailing winds out of the law and society, and news organizations—like defendants of the past—should take heed of whether the wind is blowing at their backs.

One recent gust is a new crop of Federalist Society judges sitting on the federal bench. The common assumption seems to be that many are hostile to the media. That seems overwrought. Doctrinally, the restrictive nature of *Twombly* and *Iqbal* is likely appealing to little “c” conservative judges as a defense-friendly standard placing downward pressure on the liberality of the Rules. And, anecdotally, Justices Brett Kavanaugh and Neil Gorsuch have good track records in defamation cases. It was Justice Kavanaugh, for example, who noted that “[c]ostly and time-consuming defamation litigation can threaten . . . essential [First Amendment] freedom.” Justice Gorsuch, for his part, called material falsity “a First Amendment imperative.”

On the other hand, trust in media continues to languish in the United States. The cacophony of “fake news” charges certainly affects the public’s view of media and judges’ views too. Jane Kirtley has been pointed about it: “Judges are being very skeptical about the news media’s motives.” Others, like Floyd Abrams, who admits that the “days of the journalist as romantic hero are long over,” are more sanguine: “We might have won then some of the motions [in the 1970s] that we’ve always lost. But the law remains, at its core, favorable and it’s not—certainly not yet—a time for concern.”

There is some rustling that supports Kirtley’s appraisal over Abrams’s. A federal judge in Kentucky recently reinstated a lawsuit brought by Nicholas Sandmann against the *Washington Post* after first dismissing it. The Second Circuit, in an opinion that reduced the pleading standard down to a paragraph, recently reversed a district court opinion dismissing an IIED claim among others brought against Fox News by Seth Rich’s parents. And, in a recent opinion unsealing documents relating to Jeffrey Epstein, the Second Circuit cautioned of the media: “When faithfully observing its best traditions, the . . . media . . . ‘validates [its] claim of functioning as surrogates for the public,’ but “the media does the public a profound disservice when it reports on parties’ allegations uncritically.” This is not the stuff of *Sullivan*.

Moreover, the plaintiff’s defamation bar is savvier and better organized than it used to be. With a few high-profile wins in cases like *Erano* and *Hogan*, among others, these lawyers have found their footing. There are now CLEs led by high-profile plaintiff-side defamation litigators on how to file defamation complaints in the era of *Twombly* and *Iqbal*—CLEs teaching that a single allegation of one kind of actual malice is but one brick and urging lawyers to build a well-pleaded wall of bricks out of all kinds of actual malice allegations. As such, longwinded complaints building ever fantastical tales of actual malice to avoid dismissal should be expected.

The defense bar must respond to these developments, and history may provide a roadmap. Whether the First Amendment provided special protection on summary judgment was a central issue in *Anderson v. Liberty Lobby* when it came before the Supreme Court in 1985—just a year after *Bose*. Justice William Rehnquist asked David Branson, counsel for Jack Anderson, whether, in light of *Bose*, the Court should reconsider the footnote in *Hutchinson* questioning the validity of the “rule” in favor of summary disposition in libel cases.

Branson did not take the bait. Eschewing direct reliance on the First Amendment, he said: “[W]e believe that the proper reading of . . . the *Hutchinson* footnote is that it calls for a neutral application of the summary rules, and indeed, they should be neutral.” Based on that, Branson argued that “trial courts are required to apply the clear and convincing standard on a defendant’s motion for summary judgment under Rule 56,” and he spent the rest of his time explaining why the facts didn’t meet that standard. In short, he used a strict application of summary standards under the Rules to vindicate First Amendment values, rather than jumping straight to the First Amendment.

That procedure-centric approach—successful in *Anderson*—has merit today. First, if we credit that there is at least some backsliding in judges’ views of the trustworthiness of the news media, being too cavalier with First Amendment interests may be ill-advised, especially if those judges would otherwise be receptive to a strict application of the procedural standard even without First Amendment considerations. Second, the general applicability of *Twombly* and *Iqbal* is already a potent tool through which the strength of actual malice manifests itself. As in *Anderson*, there is a lot of protection to be found in the neutral application of those cases and that standard.

Yet, the defense bar often glosses over *Twombly* and *Iqbal*, going straight to argue the substance of the claim. Throw-away paragraphs about *Twombly* and *Iqbal* in briefs (and, as a result, opinions) on motions to dismiss are held up by little more than buzzwords—that complaints must be plausible, that courts need not accept conclusory allegations, that complaints must contain detailed factual ones. In doing so, the defense bar is leaving the powerful protection of *Twombly* and *Iqbal* on the floor and, worse, doing nothing to further the development of the intricacies of those standards in favor of defendants.

Defendants must begin to argue for the rigorous application of *Twombly* and *Iqbal*—not merely invoke those cases. And the Supreme Court has directed precisely how to do so. Courts must “begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth.” The court should discard any allegations that are “fantastic or delusional” (i.e., Justice Souter’s “little green men”) and any conclusory allegations, including the obvious and the less obvious (i.e., similar to Ashcroft being the “principal architect” of the policy or that Mueller was “instrumental” in implementing it). What’s left in the form of non-conclusory allegations is all on which the plaintiff can rely.

A court must next assess whether a claim is plausible. A defamation claim is “plausible” only “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the
misconduct alleged.\textsuperscript{248} To make out this showing, a plaintiff must plead facts that are direct or circumstantial evidence of actual malice. If a plaintiff fails to plead facts going to either or, for example, merely incanting that the “defendant acted with actual malice,” the complaint should be dismissed.

As a plaintiff will rarely be able to plead direct evidence of actual malice, most complaints that manage to plead any facts will rise or fall on circumstantial factual allegations. We know, however, that a single piece of circumstantial evidence standing alone does not constitute actual malice and thus cannot support a plausible claim.\textsuperscript{249} Thus, where a plaintiff pleads only that the journalist failed to investigate a claim, for example, such an allegation—even if sufficiently supported by underlying facts—would be insufficient to make out a well-pleaded claim.

Even if a plaintiff is able to plead some combination of circumstantial evidence, a court must, from those facts, be able to draw the reasonable inference of the presence of actual malice. There is no litmus test for when an inference crosses the netherworld between being reasonable and unreasonable. As the Court has recognized, the plausibility standard is a “context-specific” task.\textsuperscript{250} Where factual allegations are relatively muddling, however, inferences to be drawn from them are more likely to be unreasonable, as in \textit{Iqbal}. Moreover, we know that obvious alternative explanations can in some cases dispel a plaintiff’s preferred inferences.\textsuperscript{251}

Obviously, an analysis under \textit{Twombly} and \textit{Iqbal} becomes more complex as a plaintiff is able to pass through each successive layer of the plausibility standard. But the inquiry will never become clearer if litigants and courts simply choose to disregard it altogether. And beyond this jurisprudential concern, by disregarding a rigorous application of the plausibility standard, litigants and courts forget that “we are not engaged in a semantic application of words we are engaged in setting values, First Amendment values and the values of [the Rules].”\textsuperscript{252}

\textbf{Endnotes}

1. See Fed. R. Civ. P. 8(a)(2) for the only pun in this article.


6. \textit{Twombly}, 550 U.S. at 563 (“[T]he ‘no set of facts’ language] is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”).


10. \textit{Twombly}, 550 U.S. at 586 (Stevens, J., dissenting) (“Everything today’s major- ity says would . . . make perfect sense if it were ruling on a Rule 56 motion . . . .”); see also Richard A. Epstein, Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments, 25 WASH. U. L. & POL’Y 61 (2007).


12. Flowers v. Carville, 310 F.3d 1118, 1131 (9th Cir. 2002); see also Metabolite Int’l, Inc. v. Wornick, 264 F.3d 832, 848 (9th Cir. 2001) (“the issue of ‘actual malice’ . . . cannot be properly disposed of by a motion to dismiss”); Church of Scientology Int’l v. Behar, 238 F.3d 168, 173 (2d Cir. 2001) (same).


15. Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016); Biro v. Conde Nast, 807 F.3d 541, 544–45 (2d Cir. 2015); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013); Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, 674 F.3d 369, 377 (4th Cir. 2012).


17. Palin v. N.Y. Times Co., 933 F.3d 160 (2d Cir. 2019).

18. Id. at 163.

19. See Subrin, supra note 2, at 925 (“[T]he Federal Rules . . . are simultaneously an effect, cause, reflection, and symbol of our legal system, which is in turn an effect, cause, reflection, and symbol of the country’s social-economic political structure.”).


21. Stephen B. Burbank & Stephen N. Subrin, \textit{Litigation and Democracy: Restoring a Realistic Prospect of Trial}, 46 HARR. C.R.-C.L. L. REV. 399, 408 (2011); see also U.S. CONST., amend. VII (“In Suits at common law, . . . the right of trial by jury shall be preserved . . . .”); see also Cornett, supra note 9, at 730 (arguing that “the judge who decides the merits of a case on the face of the complaint is usurping the constitutional role of the jury”); Stephen B. Burbank, \textit{Pleading and the Dilemmas of Modern American Procedure}, 93 JUDICATURE 109, 109 (2009).


23. Since 1792, the Process Act had instructed federal courts to follow the procedural rules of state courts as of 1789. Act of May 8, 1792, ch. 36, 1 Stat. 275. The Conformity Act of 1872 instructed federal courts to “conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like cases in the courts of record of the State within which such circuit or district courts are held.” Act of June 1,
40. "discovery rules are to be accorded pleading[...]. . . was designed to minimize the role of the, as the Court has put it, ‘heightened pleading standard’ applied by [the lower court] in the case at bar.” 6. 28 U.S.C. § 2072(b). (Once Congress passed the Defamation Enforcement Act, the proponents of a uniform system of procedure secured the merger of law and equity with the promise that the Federal Rules of Civil Procedure 1912—then-existing rules seen as “simple, efficient, and . . . freeing judges from procedural technicalities” for courts sitting in equity—would be the basis of the new procedural rules for all cases. Subrin, supra note 2, at 940. 
40. At Common Law And Under the CodeS
42. Subrin, supra note 2, at 939.
43. Carlisle, supra note 35, at 18–19.
44. Subrin, supra note 2, at 940.
45. Id. at 951.
46. Id. at 944.
47. Id.
48. This truly is a brief history. Left out: 26. Subrin, supra note 20, at 329.
27. Subrin, supra note 2, at 934.
29. Subrin, supra note 20, at 316.
30. Subrin, supra note 2, at 977.
31. Id. at 934.
32. Subrin, supra note 20, at 329.
33. Subrin, supra note 2, at 934.
34. Id.
35. Id. at 939.
37. Subrin, supra note 2, at 939.
38. Carlisle, supra note 35, at 18–19.
39. Subrin, supra note 2, at 940.
40. Id. at 951.
41. Id.
42. Subrin, supra note 2, at 975.
44. Subrin, supra note 2, at 974.
45. Id.
46. Id. at 976.
47. A. Benjamin Spencer, The Restrictive Ethos in Civil Procedure, 78 Geo. Wash. L. Rev. 353, 354 (2010) (“notice pleading[...]. . . was designed to minimize greatly the number of cases dismissed on the pleadings”).
48. 353 U.S. 41, 45–46 (1957); see also Hickman v. Taylor, 329 U.S. 495, 507 (1947) (“disclosure rules are to be accorded a broad and liberal treatment”).
50. A. Benjamin Spencer, Pleading Civil Rights Claims in the Post-Conley Era, 52 How. L.J. 99, 104 (2008) (noting that “a liberal pleading standard became all the more important . . . as civil rights claims flooded into the system”).
51. Subrin, supra note 2, at 980.
54. Subrin, 376 U.S at 272; St. Amant, 390 U.S. at 731.
55. St. Amant, 390 U.S. at 732.
58. Ariz. Biochemical Co. v. Hearst Corp, 302 F. Supp. 412, 417 (S.D.N.Y. 1969) (“[I]t is not for this court on a motion to dismiss to determine whether in fact Hearst was motivated by actual malice.”).
62. Id.
63. Schuster v. U.S. News & World Report, Inc., 602 F.2d 850, 855 (8th Cir. 1979); see also Teutler v. Meredith Corp., 455 F.2d 255, 257 n.1 (8th Cir. 1972) (“Because important First Amendment considerations are involved in defamation actions such as these, summary judgment procedures are particularly appropriate.”).
64. Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976); see also Southard v. Forbes, 588 F.2d 140, 145 (5th Cir. 1979) (“We bear in mind that a careful look at whether an eventual jury verdict could stand is especially appropriate in libel actions, because the very pendency of a lawsuit may exert the chilling effect. . . .”).
65. 542 F.2d 1076, 1082–83 (9th Cir. 1976) (emphasis added).
67. Id.
68. Id. at 120 n.9.
69. Id.
70. Id. at 176.
71. Id.
73. 75. Id.; see also Fed. R. Civ. P. 1.
76. Id.
77. Id.
79. In Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, a majority held that courts may not apply heightened pleading standards in civil rights cases premised on municipal liability. 507 U.S. 163, 167 (1993). “We think that it is impossible,” Chief Justice Rehnquist wrote, “to square the ‘heightened pleading standard’ applied by [the lower court] with the liberal system of ‘notice pleading’ set up by the Federal Rules.” Id. In Swierkiewicz v. Sorema N.A., a Title VII employment discrimination case, the Court held that “the Court of Appeals’ heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2),” which “applies to all civil actions, with limited exceptions.” 534 U.S. 506, 513 (2002).
80. 441 U.S. at 204 (Marshall, J., dissenting).
81. Id.
82. Id.
83. Id. at 205; see also id. at 197–98 (Brennan, J., dissenting).
84. We, Inc. v. City of Philadelphia, 174 F.3d 322, 328 (3d Cir. 1999) (collecting cases); see also Yiamouyiannis v. Consumers Union, 619 F.2d 932, 939 (2d Cir. 1980) (noting that the Hutchinson footnote “raise[s] serious doubt as to the continued legal viability of the proposition[ ] expressed in Keogh”).
85. Compare Morrone v. Middletown, 464 F. Supp. 2d 111, 117 (D. Conn. 2006) (whether assertion of actual malice was “ultimately tenable” was a “matter for discovery”); Klein v. Victor, 903 F. Supp. 1327, 1336 (E.D. Mo. 1995) (“Although the Court agrees that plaintiffs’ complaint is extremely poorly pleaded . . . when it is read liberally it appears she has properly

86. Flowers v. Carville, 310 F.3d 1118, 1130 (9th Cir. 2002).
89. 477 U.S. 242 (1986).
91. 466 U.S. at 492.
92. Id.; see also Fed. R. Civ. P. 52(a) (1983) (“Findings of fact shall not be set aside unless clearly erroneous. . . .”).
93. Bose, 466 U.S. at 498.
94. Id. at 514.
95. Id. at 499.
96. Id.
98. Bose, 466 U.S. at 499.
99. Id.
100. Id. (citing United States v. U.S. Gypsum Co., 333 U.S. 364, 394 (1948)); see also id. at 514 n.31 (noting that “many findings of fact . . . are irrelevant to” actual malice, that a court need only review “those portions of the record which relate to the actual-malice determination,” and that independent examination was “not equivalent to a ‘de novo’ review”).
102. Id.
103. Bose, 466 U.S. at 500 n.16.
105. Id. at 247.
106. Id. at 254.
107. Id. at 247–48.
108. Id.
109. Id.
110. Id. at 252.
111. Id.
112. Id. (emphasis added).
113. Id. at 257 n.1 (Brennan, J., dissenting).
114. Id. at 256 n.7 (majority op.) (citing Calder v. Jones, 465 U.S. 783, 790–91 (1984)).
117. Spencer, supra note 51, at 361.
121. Id. at 553.
122. Id. at 555.
123. Id.
124. Id. at 556.
125. Id. at 556–57.
126. Id. at 562.
127. Id. at 561.
128. Id. at 561–62.
129. Id. at 564–69.
130. Id. at 567.
131. Id. at 570.
132. Id. at 558.
133. Id. at 559.
134. Id.
135. Id. at 560.
136. Id. at 571 (Stevens, J., dissenting).
137. Id. at 572–73.
138. Id. at 573.
139. Id. at 575, 589.
140. Id. at 589.
141. Id. at 587 (citing Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)).
142. Id. at 586.
143. Id. at 587.
145. Id. at 676.
146. Id. at 678–79.
147. Id. at 678.
148. Id.
149. Id.
150. Id.
151. Id. at 680.
152. Id. at 679.
153. Id.
154. Id. at 680–81.
155. Id. at 681.
156. Id.
Key to Stating a Plausible Claim in the Setting the Locks:

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Anderson News, L.L.C. v. Am. Media, 

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competing inferences rises to the level of an

“obvious alternative explanation”

and Hayden v. Paterson, 594 F.3d 150, 169 (2d Cir. 2010) (dismissing claim based on

obvious alternative explanation, with

Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012) (“[O] n a Rule 12(b)(6) motion it is not the province

do not prevent the plaintiff's desired inference from qualifying as reasonable unless at least one of those

competing inferences rises to the level of an

“obvious alternative explanation”).

See, e.g., Schatz v. Republican State Leadership Comm., 669 F.3d 50, 57 (1st Cir. 2012) (“T]he inference that he asks

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stretch for us to credit, even at the pleading

stage.”).


Id. at 171.

Id. at 171.


Palin v. N.Y. Times Co., 923 F.3d at 171.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.
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