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Defamation and the First Amendment, Actual Malice, and the Free Press

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Defamation lawsuits are in the news—and in court—lately. Voices from politics, news, and even corporations have alleged that they are the victims of false and injurious statements, producing no shortage of headlines. Consider these high-profile examples:

- Alex Jones and his media network, Infowars, which spread information that the 2012 Sandy Hook School shooting was a hoax and that affected families were actors, have been found liable for damages to the families across three separate trials that are still ongoing.

- Former President Donald Trump sued CNN in October 2022, claiming the network's use of "The Big Lie" in reference to the 2020 presidential election has been used over 7,700 times since January 2021, causing damage to him and his supporters.

(Brian A. Pounds/Hearst Connecticut Media via AP, Pool)

Plaintiff Robbie Parker drops his head as a jury verdict is read in Waterbury, Conn., on Oct. 12, 2022. The verdict declared Alex Jones and his company must pay $965 million to 15 plaintiffs harmed by his lies about the Sandy Hook massacre.

(AP Photo/Steve Helber, Pool, File)

Actors Amber Heard and Johnny Depp in Virginia's Fairfax County Circuit Courthouse, May 16, 2022, during their high-profile defamation trial.

- Dominion Voting Systems and competing manufacturer Smartmatic are suing Fox News, Newsmax, Trump administration associates Rudy Giuliani and Sidney Powell, former Overstock CEO Patrick Byrne, and MyPillow CEO Mike Lindell for various public claims across assorted media outlets about faulty voting machines in the 2020 presidential election. These cases are ongoing.

- Johnny Depp and Amber Heard captured the nation's attention in June 2022 during their very public defamation trial. Jurors awarded $15 million in damages to Depp and $2 million to Heard.

- In the UK, what has been dubbed "Wagatha Christie" involved Rebekah Vardy, wife of Leicester City Football Club member Jamie Vardy, paying £1.5 million ($1.7 million) to Colleen Rooney, wife of Vardy's former teammate Wayne Rooney, for leaking libelous stories to the newsmedia.

- Rapper Cardi B won a $4 million defamation lawsuit earlier in 2022 against a YouTube personality named Latasha Kebe, or Tasha K, who in 2019, posted a video that was deemed harmful to Cardi B as a public figure.

- Sarah Palin, the former governor of Alaska and 2008 Republican vice-presidential candidate, has been pursuing a defamation case against *The New York Times* since 2017. She points to an editorial, retracted shortly after it appeared, which wrongly connected her rhetoric to a mass shooting that occurred many months later.

These examples from current events offer real world and popular culture access points for talking about legal concepts of defamation and libel. More so, they offer access points for discussions about the U.S. Supreme Court, free speech, free press, and the First Amendment.

Is the U.S. Supreme Court in the Mix?

The U.S. Supreme Court is once again a central venue for these challenges. On June 27, 2022, the Supreme Court denied certiorari, or declined to hear the case, to *Coral Ridge Ministries Media, Inc., dba D. James Kennedy Ministries v. Southern Poverty Law Center*. In this case, Coral Ridge Ministries, a Christian nonprofit in Alabama, argued that it was defamed by the Southern Poverty Law Center (SPLC) when the SPLC publicly labeled Coral Ridge an "Anti-LGBT hate group" based on espoused views on human sexuality and marriage. This designation, Coral Ridge argued, led to monetary loss, as the organization was denied participation in the Amazon Smile program, which has a policy against allowing hate groups to benefit from

the charity program. The SPLC argued that its "hate group" designation is protected by the First Amendment. Because Coral Ridge conceded that it is a "public figure," in order to prove defamation under law, Coral Ridge is required to demonstrate three things about the SPLC's hate designation: (1) that it is "provably false," (2) that it is "actually false," and (3) that the SPLC acted with "actual malice." Typically, defamation is simply "a false statement that subjected a person or party to hatred, contempt, or ridicule." The emphasis is on the outcome rather than the intent of the author. Determining the intent of the author is a much higher standard of proof required when the subject is a "public figure." So, in its bid for certiorari, Coral Ridge asked the Supreme Court to reconsider the "actual malice" standard, which the Court ultimately declined to do. However, with the Court's denial of certiorari, Justice Clarence Thomas issued a dissent, arguing that the Court *should* consider the standard. In fact, Justices Thomas and Gorsuch, and to some extent Justice Kagan, have shared similar views.

The *Coral Ridge* example, and the array of examples in the national media, provide opportunities for conversations about defamation under law, legal standards, and First Amendment protections for media, particularly in this time of instant communication and fake news. The standards have real implications for journalists, news outlets, and contemporary understandings of the First Amendment and how it can change over time.

What Is the "Actual Malice" Standard?

"Actual malice" is a legal standard that emerged in 1964 from the landmark Supreme Court decision *New York Times v. Sullivan*. In 1960, *The New York Times* ran a full-page advertisement paid for by civil right activists. The ad openly criticized the police department in Montgomery, Alabama, for its treatment of civil rights protestors. Most of the descriptions in the ad were accurate, but some were false. The police commissioner, L. B. Sullivan, sued *The New York Times* in Alabama court. Sullivan argued that the ad had damaged his reputation, and he had been libeled. (Libel is written defamation.) The Alabama court ruled in favor of Sullivan, finding that the newspaper ad falsely represented the police department and Sullivan. After losing an appeal in the Supreme Court of Alabama, *The New York Times* took its case to the U.S. Supreme Court, arguing that the ad was not intended to hurt Sullivan's reputation and was protected under the First Amendment.

The Supreme Court unanimously ruled in favor of the newspaper. The Court noted America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Free and open debate about the conduct of public officials, the Court stated, was more important than occasional, honest factual errors that might hurt or damage public officials' reputations. Justice William J. Brennan, writing for the Court, held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

In his concurring opinion, Justice Hugo Black wrote,

> I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials…. An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

Is There a Difference Between Public Figures and Public Officials?

One year after the *Sullivan* decision, in 1965, two cases from Southern college campuses came before the Court that raised questions on defamation as it relates to *public figures* who are not *public officials*.

In one case, *Curtis Publishing Co. v. Butts*, Wally Butts, a college football coach, was accused of conspiring to fix a major game by giving crucial information to the other team.

The Saturday Evening Post, published by Curtis Publishing Company, contained a story about the incident saying that Butts was under investigation and "would likely never" work in college football again. Butts sued Curtis for libel and a jury awarded him $60,000 in general damages and $3 million in punitive damages. After *New York Times Co. v. Sullivan* was decided, Curtis requested a new trial. The Court denied the request, noting that *New York Times Co. v. Sullivan* did not apply because Butts, while a public figure, was not a public official.

In the second case, *Associated Press v. Walker*, an AP reporter published an eyewitness account of a riot on a university campus over the enrollment of an African American student– James Meredith. The story asserted that Edwin Walker took command over the crowd and personally led the uprising against federal marshals, who had been dispatched to enforce Meredith's court-ordered enrollment. Walker, a decorated military veteran, denied the claims, stating that he had not taken part in challenging the federal marshals. Walker sued the Associated Press for libel. The jury found in his favor, but the judge refused to award punitive damages, finding that there was no malicious intent—or "actual malice."

The issue before the Court, then, was whether public figures, like public officials, must also prove "actual malice" before they may recover damages in defamation actions. In a 5–4 decision, the Court ruled that public figures must show that a statement was made "with knowledge that it was false or with reckless disregard for whether it was false or not," or, malice, the same standard to which public officials are held under *New York Times Co. v. Sullivan*.

In the opinion by Justice John Marshall Harlan II, the Court reasoned:

> A "public figure" who is not a public official may recover damages for defamatory falsehood substantially endangering his reputation on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

The Court concluded that Curtis Publishing Co.'s investigation of its allegations against Butts failed to meet this standard. The company printed a questionable source's allegations without any attempt to verify claims, and the story in question was not a pressing event or immediately newsworthy. The Court affirmed the lower courts' denials of retrial. The situation in *Butts* contrasted with *Walker*, where the Associated Press relied on a correspondent at the scene of an event that was immediately newsworthy. In turn, the Court upheld the decision of the judge in Walker's case to deny Walker's claims to damages.

In his concurring opinion, Chief Justice Earl Warren noted that public figures are those that are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large ... "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities.

What About Private Individuals?

A decade after the Supreme Court considered public figures and public officials, in 1974, another case, *Gertz v. Welch*, asked the Court to determine whether the same standards for proving defamation in court applied to private individuals.

The case concerned Elmer Gertz, an attorney, hired by a family to sue a police officer who had killed the family's 19-year-old son. A magazine, *American Opinion*, published by the conservative Robert Welch, accused Gertz of being a part of a conspiracy to discredit local police agencies. It claimed that Gertz was a "Communist-fronter," that he had framed the officer during the criminal trial, and that he had a lengthy criminal record himself. Gertz sued for libel, won a jury verdict, and was awarded $50,000. However, the judge found that Gertz had not met the actual malice standard for libel that the Supreme Court established in *New York Times v. Sullivan*. Consequently, the trial judge overturned the jury

verdict and damages award. The Court of Appeals for the Seventh Circuit affirmed the trial judge's ruling.

The Supreme Court, in a 5-4 decision written by Justice Lewis F. Powell, ruled that the actual-malice standard only applies to public officials or public figures and does not apply to private individuals. The Court decided that individuals have to prove some level of fault by the publisher and actual damage to the individual's reputation but that the actual-malice standard in *Sullivan* would place too heavy a burden on private individuals. The Court determined that private individuals are less able to rebut false statements than public figures and officials because they have less access to channels of mass communication and are therefore more vulnerable to published falsehoods. Public officials accept and understand the risk of public scrutiny when they take office. In contrast, private individuals never signed up for public scrutiny.

The Court left it to the states to determine the appropriate standard of care for publishers that defame private individuals; today, almost all states have defamation laws to criminalize injurious statements against private individuals.

This decision was not unanimous. Justice William Douglas dissented, arguing:

> I have stated before my view that the First Amendment would bar Congress from passing any libel law.... With the First Amendment

> made applicable to the States through the Fourteenth, I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress.... In our federal system, we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory....

In a separate dissent, Justice William Brennan noted that debates can't flourish if states can impose minimal thresholds of fault on publishers for defaming private individuals. Justice Brennan would have applied the actual malice standard to Gertz as a private individual.

Is it Time to Re-examine the Actual Malice Standard?

In recent years, there have been many calls for re-examining the actual malice standard. In the most recent Supreme Court dissent, Justice Thomas described *Coral Ridge* as "one of many [cases] showing how *New York Times* and its progeny have allowed media organizations and interest groups to cast false aspersions on public figures with near impunity." He went on to describe the actual malice standard as "almost impossible" to meet, such that "Coral Ridge could not hold SPLC to account for what it maintains is a blatant falsehood."

Justice Neil Gorsuch wrote extensively in 2021 (*Berisha v. Lawson*) about the need for the Court to revisit the actual malice standard. He sees it as an outdated standard that has evolved into something removed from its original intent:

> No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation.... It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary to ensure that dissenting or critical voices are not crowded out of public debate. But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands. ... over time, the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability.

As a law professor in 1993 and 2000, Justice Elena Kagan argued that, while *Sullivan* was rightly decided in 1964, it is not clear that its extension beyond attacks on official conduct or policy provides significant protection of core First Amendment values to justify the cost to individuals that have suffered reputational injury. She noted that the scope of public figures, in particular, has grown to include cases of celebrity gossip, and she argued that protection of these statements is far removed from the central meaning of the First Amendment, namely "to protect against all infringements the right of a sovereign people to criticize the government policy and public officials."

Examining the actual malice standard as the legal benchmark for certain cases of defamation is an engaging and provocative entry into contemporary questions about free speech, free press, and the First Amendment. Teachers interested in discussing this and similar concepts in the classroom, will find resources from the American Bar Association Division for Public Education at: **https://tinyurl.com/abafreepress**.

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