Media Law & Ethics

RU COMS 400 Unit 5 Libel

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revolutionsincommunication.com/law

On Track: Unit 5

- Read Unit 5 Libel on web site
- Take Quiz 5 on libel
- Assignment Libel hypothetical
  - Next week (we need to go over this in class)
- FIRAC case reviews in class / Assn 4

Structure of this section:
Overview, the Sullivan standard, post-Sullivan cases, historical cases,

Current / recent libel suits ?

- Mann v Steyn
- Dominion v Fox
- Trump v NY Times, WP
- Cardi B v Latasha Kebe
- Alex Jones v Sandy hook parents
- Crystal Seymour v Lawrence Fox
- Amber Heard/Johnny Depp
- Others?

What is libel?

- **A libel suit is a civil case …**
  - (not criminal in the US or Europe).
- In which a plaintiff seeks to recover damages by filing a complaint in court
- For injury to reputation
- Plaintiffs in media cases are usually the subjects of news reporting
- Respondents / defendants are usually members of the news media and organizations they work for

Libel is a civil action

- Citizen to citizen
  - Even public officials file civil suits
  - Ex: NY Times v Louis B Sullivan (police commissioner for Birmingham, AL)
- Differs from the crime of *lèse-majesté* or *lèse nation* in other countries
  - Lèse is "injury" to head of state or nation
  - Criminal charge brought by government
  - Was on books in UK and other EU countries until recent years
  - Still enforced in Russia, Middle East, Thailand, Cambodia, etc.

lèse-majesté

- **"I myself am Europe!" - political cartoon by Fritz Behrendt criticizing Charles de Gaulle's political ambitions, June 1962**

Libel as opposed to slander

- Defamation is a harmful false statement
- Traditionally, libel is defamation made through writing or pictures, while …
- Slander is defamation made orally or through spoken communication
- However, broadcast radio or TV defamation is usually considered libel
- And slander is usually considered to be malicious neighborhood-level defamation

What is US libel? Five elements

- Identification
- Defamation (harm to reputation)
- Publication (or broadcast)
- Damages
- Fault – which can be …
  - Negligence – about a private person or
  - Malice – public figure (NYT v Sullivan, 1964)
    - *Knowingly publishing falsehood, or*
    - *Reckless disregard for the truth*

Libel & privacy law: Public vs private people

	Public Figure	Private Person
Defamatory falsehood	Plaintiff must prove **actual malice** (as in NYT v. Sullivan)	Plaintiff must only prove **negligence** under state laws guided by federal court decisions.
Defamatory truth	**False light, publication of private facts, intrusion, misappropriation suits are possible.** Defenses: Public interest, official record, consent.	**False light, publication of private facts, intrusion, misappropriation suits are possible.** Defenses: Public interest, official record, consent.

Libel – main defenses

- Truth
  - Burden of proof is on the plaintiff, not the media defendant
- Privilege
  - Government's mistakes aren't a problem for the news media
- Fair Comment & Criticism
  - Opinions and commentary about public events and people are not usually libel
  - Various tests for separating fact & opinion (Ollman v Evans, etc)

Libel – main defenses

- How do courts weigh Fair Comment?

a) **The precision and specificity** of the statement. (Calling someone a "fascist" is indefinite, and therefore an opinion; saying they have AIDS would be specific).

b) **The verifiability** of the statement is important in proving it a fact or an opinion.

c) **The literary context** in which the statement is made. The Onion might be treated differently from the Wall Street Journal.

d) **The public context** of the statement, for example, as part of the political arena, would tend more to be protected opinion.

Libel – other defenses

- Correction / retraction = mitigation
- Neutral reporting
- Right of reply
- Libel-proof plaintiff
- Rhetorical hyperbole
- Statute of limitations
- Death of plaintiff

Libel – NOT defenses

The word "allegedly" does not offer any protection.

Official attribution does not protect reporters unless a specific charge is documented.

Claims of opinion do not shield a malicious statement of fact.

Unofficial court documents may not be privileged.

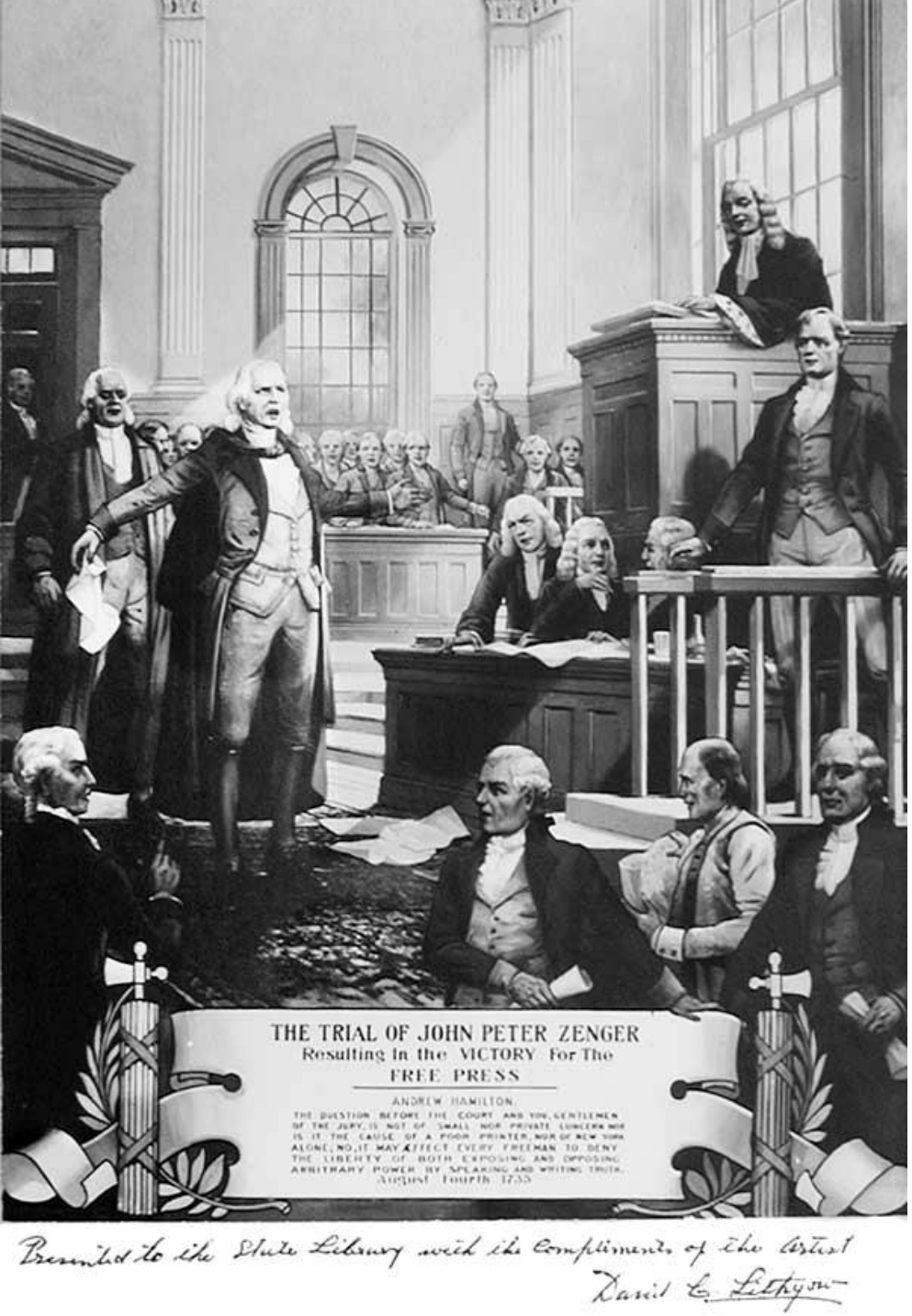
Typical US libel suit

In 2016, these four people were sued for speaking out against pollution being generated by a waste management company in their Alabama town. In 2017, a federal court dismissed the lawsuit after the ACLU intervened. This shows that the US Constitution provides strong protection for freedom of speech.

History of libel

- State laws allowed civil suits for damage to reputation in early 1800s.

The hope was to give an alternative to duels following the death of Alexander Hamilton in a duel with Aaron Burr in 1804



The truth was recognized as a defense in a libel case –

Zenger, 1735

But at first, rules favored plaintiff

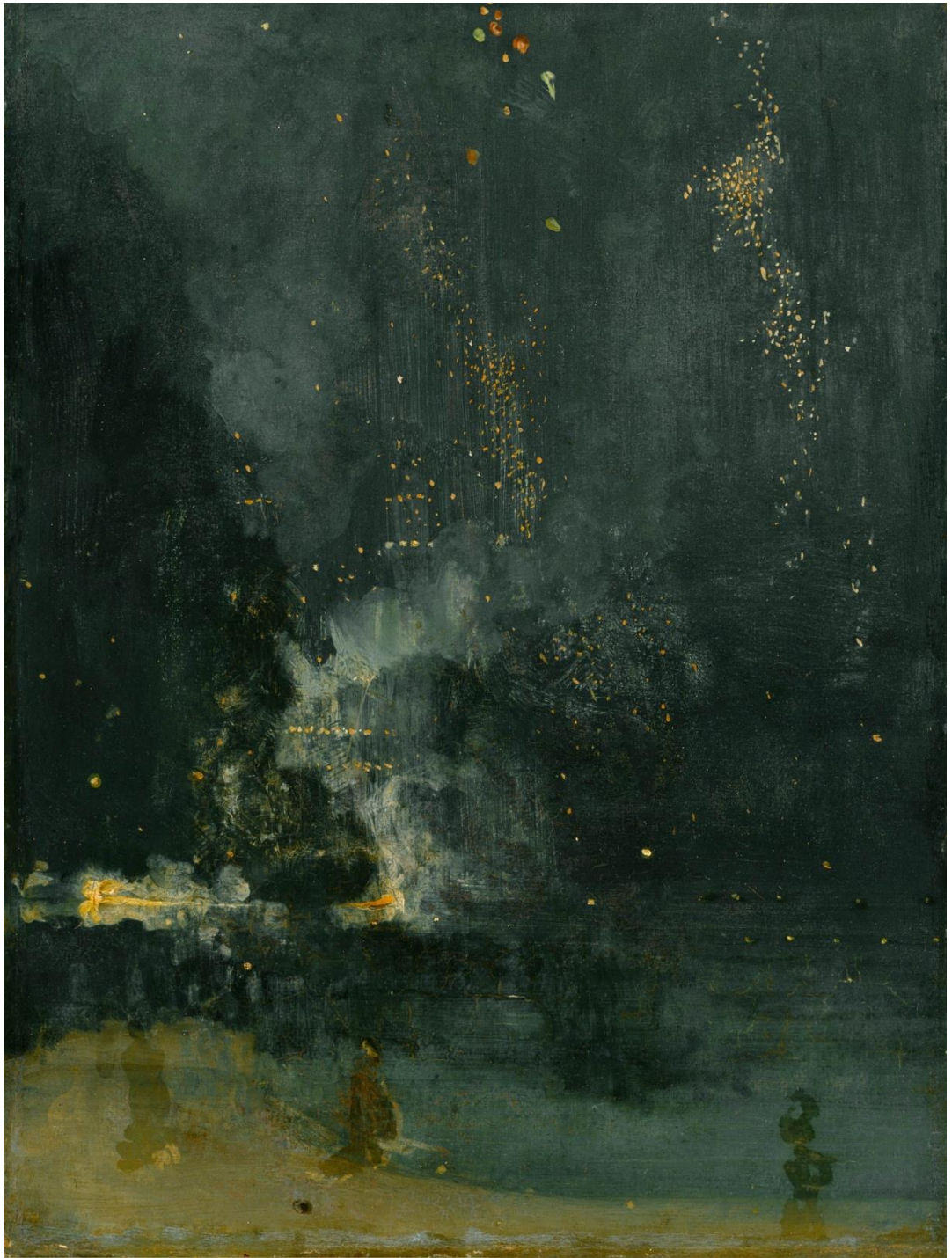
- The **burden of proof** was on the publisher (defendant), not the plaintiff.
- Cases were judged on "**strict liability**" standard — any defamation would mean a loss for publisher
- **Harm was assumed** to a plaintiff's reputation; there was no need to prove general damages.
- **State laws,** not the federal constitution, prevailed

Whistler v Ruskin, 1878

**(British case)*

I never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face.
-- Ruskin

James McNeill Whistler sued John Ruskin for 1,000 pounds. After a long trial, the jury found Ruskin guilty but awarded Whistler only one farthing.

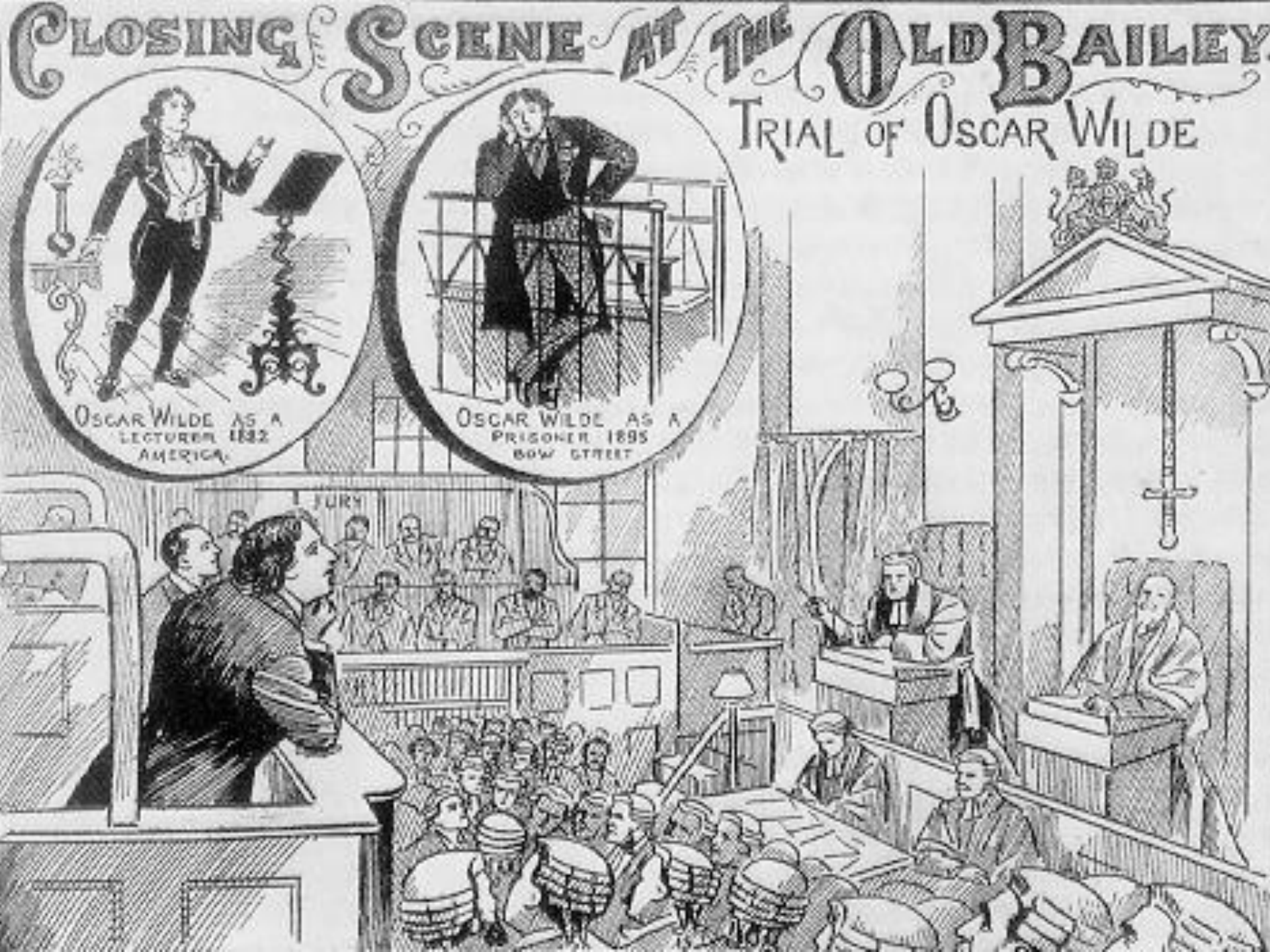


Oscar Wilde v M. of Queensbury

- (British case)
- 1895, Wilde brought a libel suit against the Marquis of Queensbury, the famous boxing rules champion, for insulting him in public, calling Wilde "a sodomite" — a derogatory term for homosexual.
- If he lost, the marquis would have had to spend two years in jail.
- Instead, witnesses proved that Wilde was a homosexual and he was sentenced to prison

Closing Scene at the Old Bailey

Trial of Oscar Wilde



The Cherry Sisters were an infamously poor-quality singing act. They were often criticized, but when they thought one Iowa critic went too far, they sued for libel.

"Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35.

... Their long, skinny arms, equipped with talons at the extremities, swung mechanically, and soon were waved frantically at the suffering audience. The mouths of their rancid features opened like caverns and sounds like the wailings of damned souls issued therefrom..."

Cherry v Des Moines Leader, 1901

Cherry sisters decision:

- *Freedom of discussion is guaranteed by our fundamental law and a long line of judicial decisions... Surely, if one makes himself ridiculous in his public performances, he may be ridiculed by those whose duty or right it is to inform the public regarding the character of the performance.*
- *Mere exaggeration, or even gross exaggeration, does not of itself make the comment unfair. It has been held no libel for one newspaper to say of another, "The most vulgar, ignorant, and scurrilous journal ever published in Great Britain."*
- *A public performance may be discussed with the fullest freedom, and may be subject to hostile criticism and hostile animadversions, provided the writer does not do it as a means of promulgating slanderous and malicious accusations.*

Annie Oakley

Two Chicago newspapers belonging to William Randolph Hearst published an entirely false article on August 11, 1903, headlined "Famous Woman Crack Shot … Steals to Secure Cocaine." The story said Oakley had been sentenced to 45 days in a Chicago prison for stealing to support her drug habit.

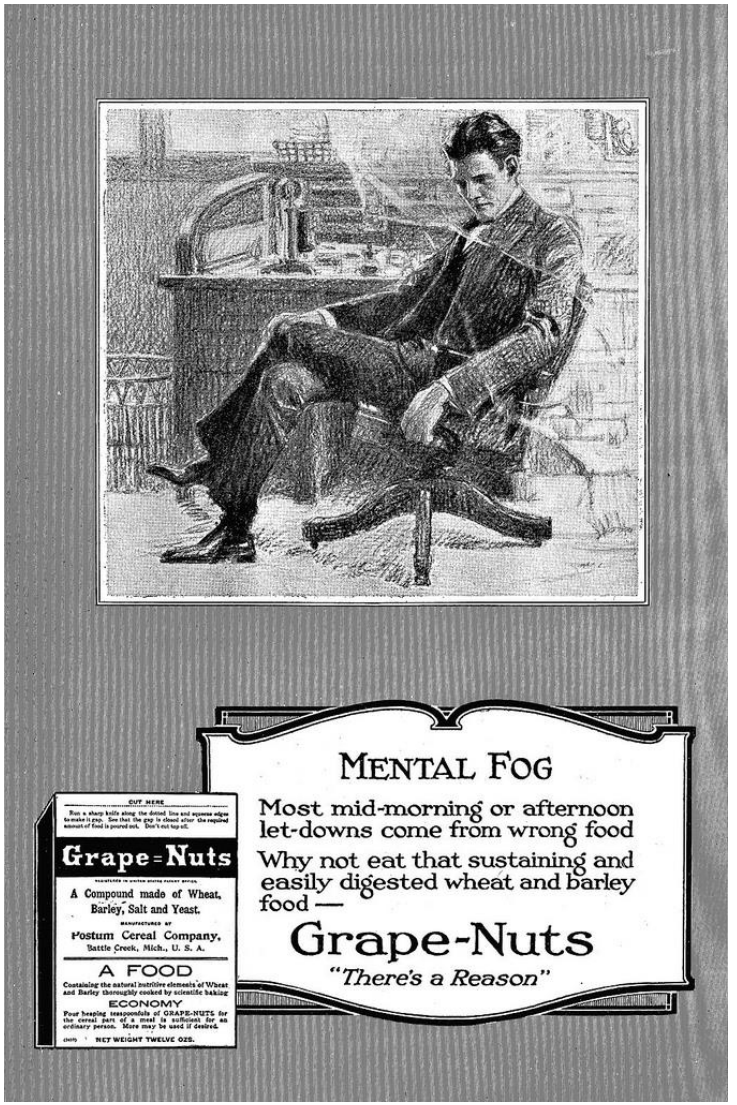
She was in New Jersey at the time of the story, and she was not a cocaine user. She embarked on a series of 55 libel suits against newspapers that printed the story, winning all of them but losing money in the process.

Collier v Postum 1908 – 1912

Charles W. Post, whose Post cereal company made Postum, claimed that eating Grape Nuts would "obviate the necessity of an operation for appendicitis." (The ad to the left shows the style of Postum's advertising, although this was about 1920 and doesn't make the medical claim for Grape Nuts.)

Reacting to the claim about appendicitis, Peter F. Collier, publisher of Collier's magazine, said Post was engaged in "potentially deadly lying."

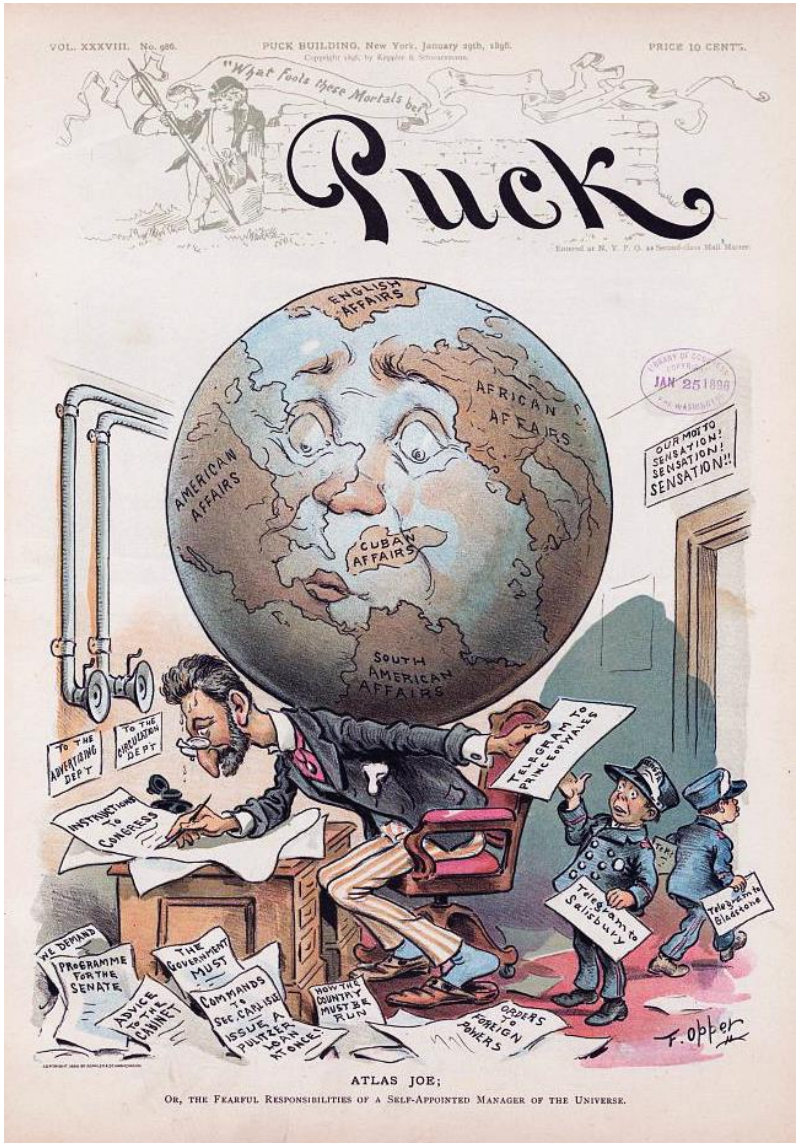
When Post launched a campaign of intimidation in response, claiming that Colliers tried to extort money in return for its silence, Collier sued Post for libel and was awarded $50,000 damages.



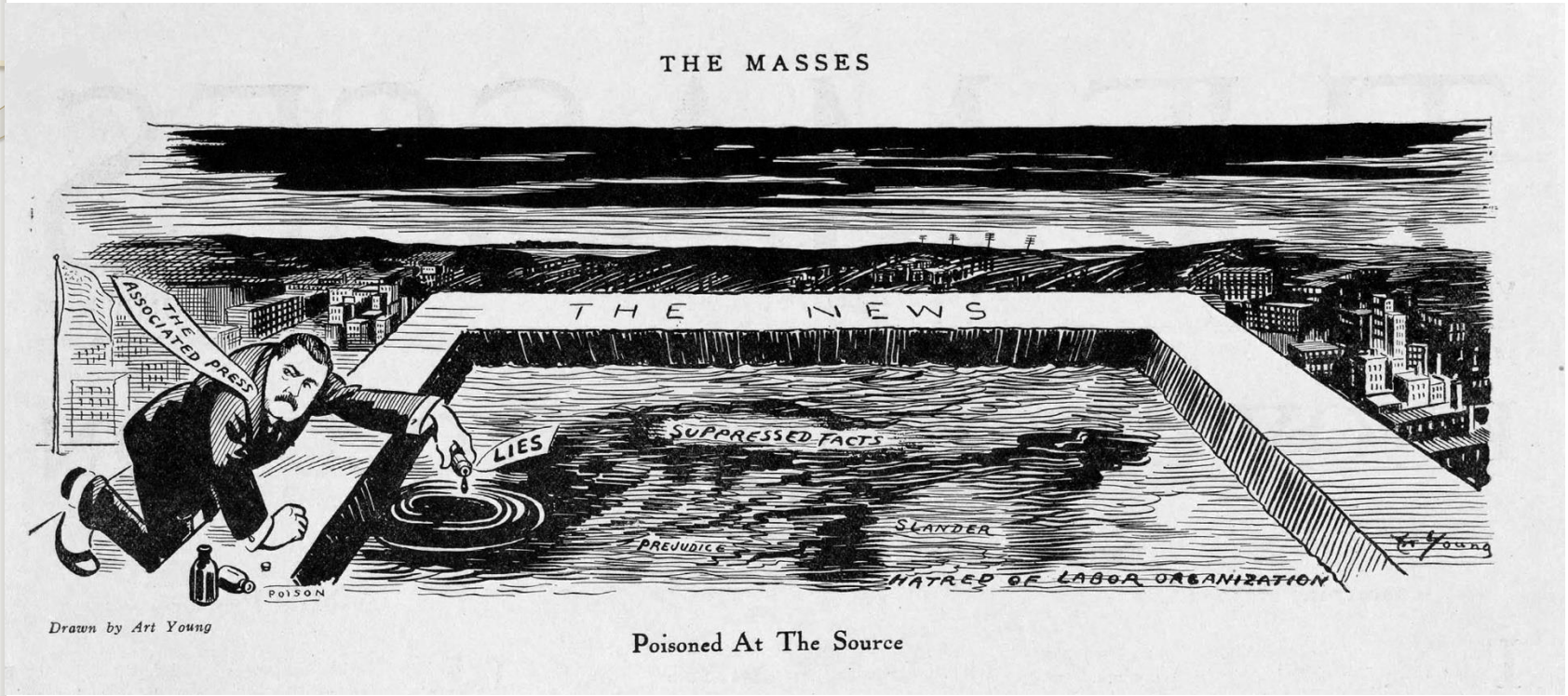
US v Press Publishing Co (World)

President Teddy Roosevelt sues Joseph Pulitzer and the NY World for allegations of bribery over the Panama Canal. Courts throw the lawsuit out in 1909.

In addition to fighting for freedom of the press throughout the United States, Pulitzer fought what he considered Roosevelt's attempts "to re-establish the principle of the odious Alien and Sedition laws and to create here the doctrine of lese-majesty." Pulitzer also said: "The country has gone crazy under Roosevelt's leadership in extravagance for the war idea. All my life I have been opposed to that so-called militarism."



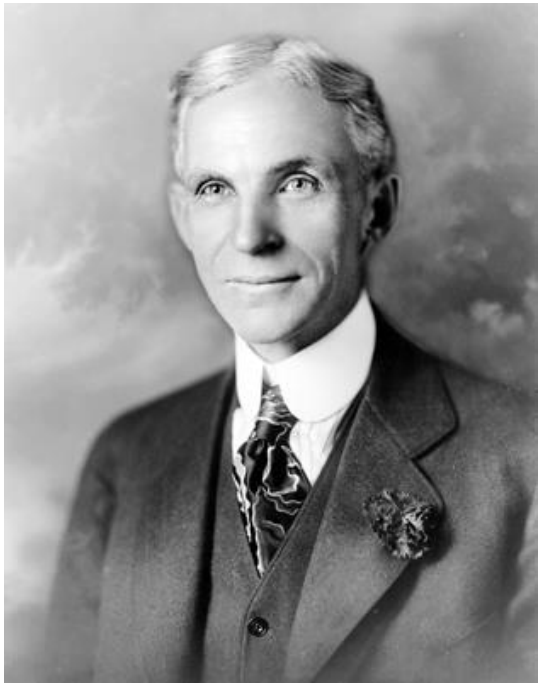
AP v The Masses magazine



The Masses, a socialist magazine, criticized The Associated Press reporting of the mine conflicts in West Virginia in their July 1913 issue. AP responded with a libel suit, and the New York authorities also filed criminal charges. After vehement criticism, AP dropped the lawsuit a year later.

Henry Ford v Chicago Tribune

In 1916, Ford warned employees they could lose their jobs if they volunteered to fight with the US national guard against Mexican revolutionaries.



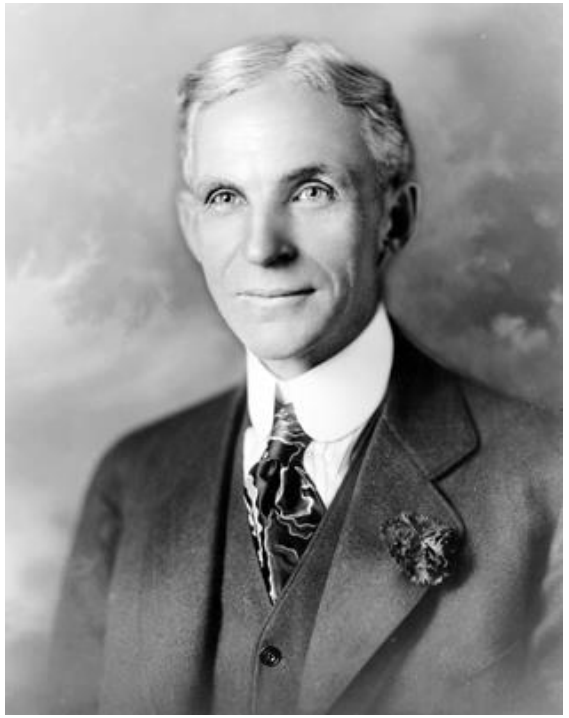
"Flivver Patriotism" says Chicago Tribune, calling him "not only an ignorant idealist but also an anarchist enemy of the nation."

Henry Ford v Chicago Tribune

Ford sues for libel 1919

Tribune lawyers put Ford on the witness stand for nine days. They show that Ford is an ignorant rube. For example, he thinks chile con carne is a military unit.

Ford wins, but the jury awards him only six cents.



Before Sullivan, injustice prevailed

Libel suits were often filed to suppress criticism of the white establishment in the American South. (See Aimee Edmondson's 2019 book "In Sullivan's Shadow.")

In October 1949, John Henry McCray, editor of the SC Lighthouse, reported a death row interview. He was charged with criminal libel and forced to serve two months on a chain gang in 1954, even though white newspapers ALSO reported the inmate's statement without penalty. McCray shut down the newspaper soon afterwards

In 1955, a Florida NAACP official suggested that a state legislator helped communism by proposing to abolish public schools rather than integrate them. Florida courts ordered the NAACP official to pay $15,000 in fines.

Top Four libel cases

- NY Times v Sullivan, 1964
  - Establishes "actual malice (reckless disregard)" standard for public officials
- Curtis v Butts, 1967
  - Defines "reckless disregard" for the truth
- Associated Press v Walker, 1967
  - Protects "hot news" as not reckless
- Gertz v Welch, 1972
  - Defines public figure

Before Sullivan, libel suits were easy

- The **burden of proof** was on the publisher. (Note: *In Canada and some other nations, the burden is still on the publisher. Britain changed its legal preference for the plaintiff in 2010.*)
- Before Sullivan, a case was judged under a "**strict liability**" standard — defamation under any circumstances would result in judgement against the media.
- **Harm was assumed** to a plaintiff's reputation; there was no need to prove general damages.

Why is this important today?

- Why is it important that the Sullivan decision turned the law towards justice?
- Who today believes that libel law should be returned to the states?

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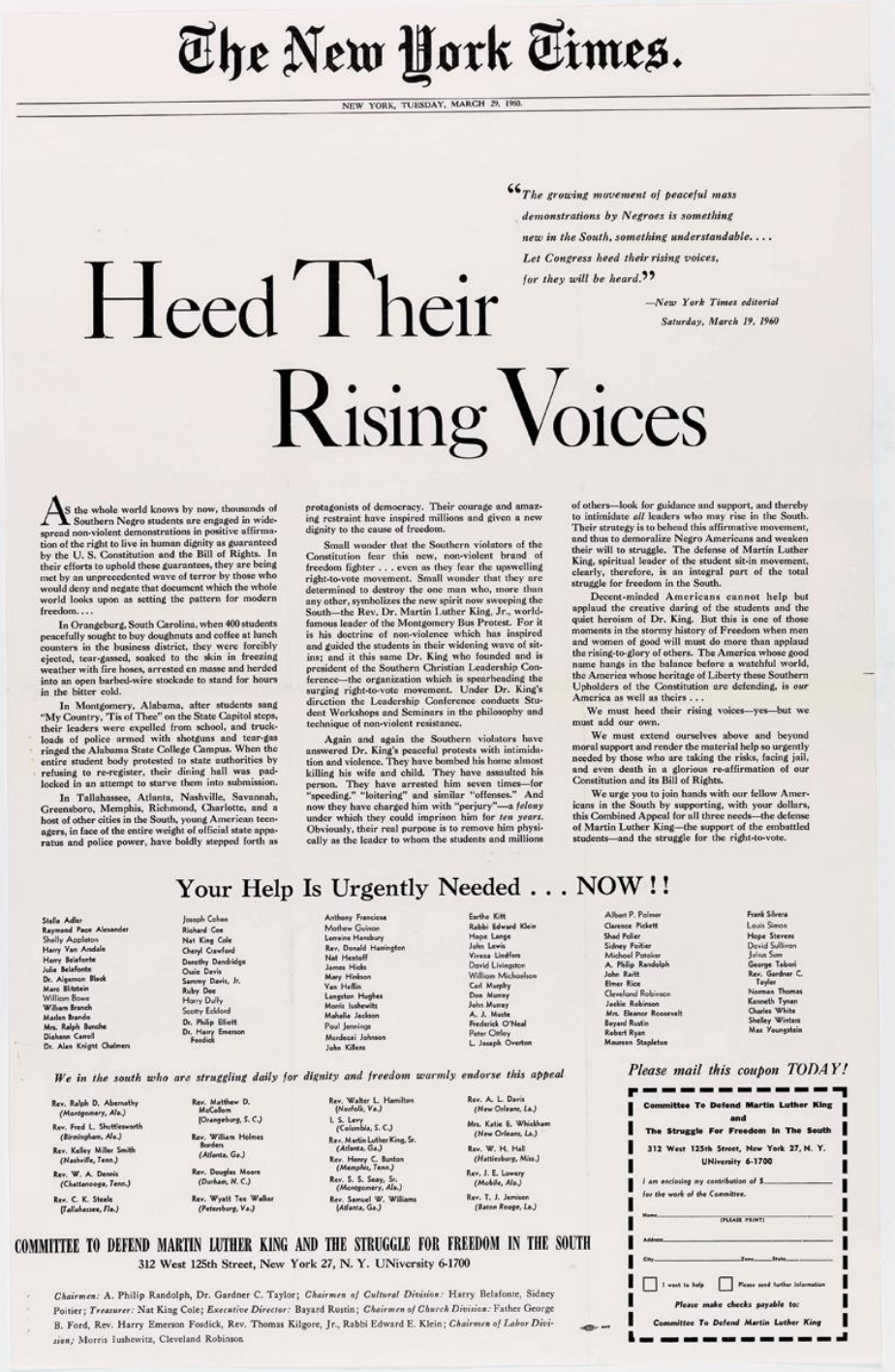
NY Times v Sullivan, 1964

- 1960 civil rights ad
- Are minor inaccuracies defamatory?



The New York Times.

NEW YORK, TUESDAY, MARCH 29, 1960.

"The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable. . . . Let Congress heed their rising voices, for they will be heard."

—New York Times editorial Saturday, March 19, 1960

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the upswelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their strategy is to behend this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of Freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is *our* America as well as theirs . . .

We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed . . . NOW!!

Stella Adler
Raymond Pace Alexander
Shelly Appleton
Harry Van Arsdale
Harry Belafonte
Julie Belafonte
Dr. Algernon Black
Mans Blitstein
William Bowe
William Branch
Marlon Brando
Mrs. Ralph Bunche
Diahann Carroll
Dr. Alan Knight Chalmers

Joseph Cohen
Richard Coe
Nat King Cole
Cheryl Crawford
Dorothy Dandridge
Ossie Davis
Sammy Davis, Jr.
Ruby Dee
Harry Dufty
Scotty Eckford
Dr. Philip Elliott
Dr. Harry Emerson Fosdick

Anthony Franciosa
Mathew Guinan
Lorraine Hansbury
Rev. Donald Harrington
Nat Hentoff
James Hicks
Mary Hinkson
Van Heflin
Langston Hughes
Morris Iushewitz
Mahalia Jackson
Paul Jennings
Mordecai Johnson
John Killens

Eartha Kitt
Rabbi Edward Klein
Hope Lange
John Lewis
Viveca Lindfors
David Livingston
William Michaelson
Carl Murphy
Don Murray
John Murray
A. J. Muste
Frederick O'Neal
Peter Ottley
L. Joseph Overton

Albert P. Palmer
Clarence Pickett
Shad Polier
Sidney Poitier
Michael Pataker
A. Philip Randolph
John Raitt
Elmer Rice
Cleveland Robinson
Jackie Robinson
Mrs. Eleanor Roosevelt
Bayard Rustin
Robert Ryan
Maureen Stapleton

Frank Silvera
Louis Simon
Hope Stevens
David Sullivan
Julius Sum
George Tabori
Rev. Gardner C. Taylor
Norman Thomas
Kenneth Tynan
Charles White
Shelley Winters
Max Youngstein

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal

Rev. Ralph D. Abernathy (Montgomery, Ala.)
Rev. Fred L. Shuttlesworth (Birmingham, Ala.)
Rev. Kelley Miller Smith (Nashville, Tenn.)
Rev. W. A. Dennis (Chattanooga, Tenn.)
Rev. C. K. Steele (Tallahassee, Fla.)

Rev. Matthew D. McCollom (Orangeburg, S. C.)
Rev. William Holmes Borders (Atlanta, Ga.)
Rev. Douglas Moore (Durham, N. C.)
Rev. Wyatt Tee Walker (Petersburg, Va.)

Rev. Walter L. Hamilton (Norfolk, Va.)
I. S. Levy (Columbia, S. C.)
Rev. Martin Luther King, Sr. (Atlanta, Ga.)
Rev. Henry C. Bunton (Memphis, Tenn.)
Rev. S. S. Seay, Sr. (Montgomery, Ala.)
Rev. Samuel W. Williams (Atlanta, Ga.)

Rev. A. L. Davis (New Orleans, La.)
Mrs. Katie E. Whickham (New Orleans, La.)
Rev. W. H. Hall (Hattiesburg, Miss.)
Rev. J. E. Lowery (Mobile, Ala.)
Rev. T. J. Jemison (Baton Rouge, La.)

COMMITTEE TO DEFEND MARTIN LUTHER KING AND THE STRUGGLE FOR FREEDOM IN THE SOUTH
312 West 125th Street, New York 27, N. Y. UNiversity 6-1700

Chairmen: A. Philip Randolph, Dr. Gardner C. Taylor; *Chairmen of Cultural Division:* Harry Belafonte, Sidney Poitier; *Treasurer:* Nat King Cole; *Executive Director:* Bayard Rustin; *Chairmen of Church Division:* Father George B. Ford, Rev. Harry Emerson Fosdick, Rev. Thomas Kilgore, Jr., Rabbi Edward E. Klein; *Chairmen of Labor Division;* Morris Iushewitz, Cleveland Robinson

Please mail this coupon TODAY!

Committee To Defend Martin Luther King and The Struggle For Freedom In The South
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I am enclosing my contribution of $_____ for the work of the Committee.

Name_____ (PLEASE PRINT)

Address_____

City_____ Zone_____ State_____

☐ I want to help ☐ Please send further information

Please make checks payable to:
Committee To Defend Martin Luther King

The Alabama trial …

- The Montgomery circuit-court judge who presided over the trial, with a jury of twelve white men, was a leader of his state's efforts against desegregation.
- He enforced a segregated courtroom, in which some prospective jurors came dressed in Confederate uniforms.
- He used "Mr." to address white lawyers but not Black lawyers, and declared that the trial would be ruled by "white man's justice . . . brought over to this country by the Anglo-Saxon Race."

Sullivan reaffirms 1st Amendment

- *"… Debate on public issues should be uninhibited, robust and wide-open, and ... may well include vehement, caustic and sometimes unpleasantly sharp attacks on public officials."*
- For a public official to successfully sue for libel, he or she would have to prove "actual malice," — either
- a) knowingly publishing something false or
- b) reckless disregard for the truth.

Modifying Sullivan

- What is reckless disregard?
  - AP v Walker, 1967
  - Curtis v Butts, 1967
- Who is a public figure ?
  - Gertz v Welch 1974
- What is a fact and what's an opinion?
  - Ollman v Evans, 1977
  - Milkovich v. Lorain Journal, 1990

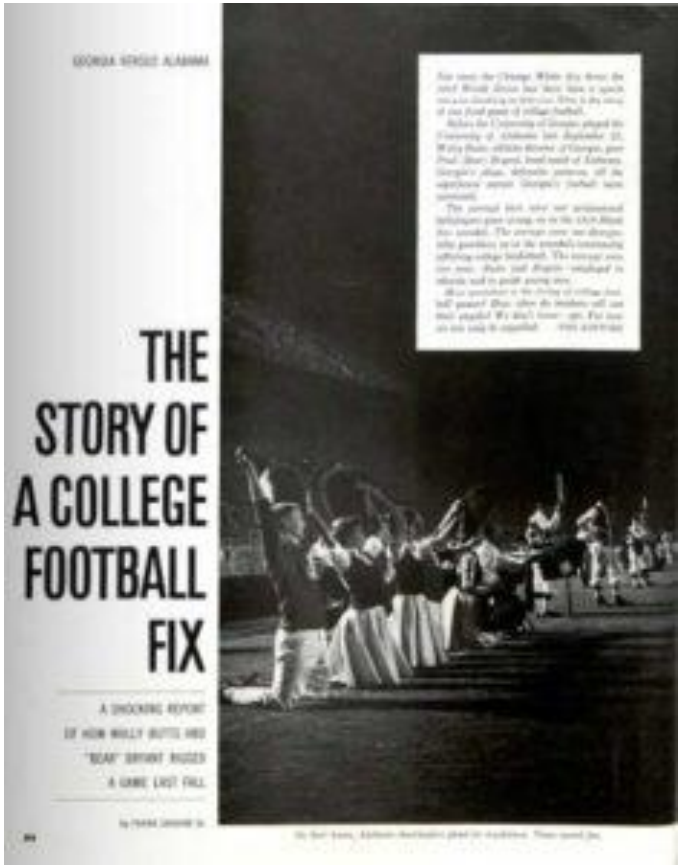
AP v Walker, 1967

- What is reckless?
- Gen. Edwin Walker was a controversial figure in the 1960s who opposed civil rights and denounced President John Kennedy as a communist while serving as a general in command of US troops in Europe.
- Walker was present at the University of Mississippi protesting the admission of black students, and the Associated Press reported that Walker had "led a charge of students against federal marshals" and that he had "assumed command of the crowd."

AP v Walker, 1967

These statements were held to be false and defamatory in appeals court, but the US Supreme Court applied the Sullivan test and said that Walker would have had to prove "actual malice," not merely negligence.

The AP won the suit because an honest mistake made in a “hot news” situation involving a public figure is not reckless disregard.



Curtis v Butts, 1967

With the main editor of the Saturday Evening Post off on vacation, a substitute editor printed a story that said famed football coach "Bear" Bryant conspired with another coach, Wally Butts, to "fix" a game.

The report was based on an overheard telephone call, without corroboration. The magazine (owned by Curtis Publishing Co.) had plenty of time to check facts.

The Supreme Court said that the circumstances of a report, including the time element, are important in determining **reckless disregard.**

Gertz v Welch, 1973 public figure

- Elmer Gertz, a Chicago civil rights attorney, represented the family of a young man killed by a Chicago police officer.
- Robert Welch, in a John Birch Society magazine, claimed Gertz was part of a communist conspiracy to discredit American police departments.
- Gertz sued for libel in 1969. He said he was **not a public figure** and the court agreed. Thus, Gertz only had to prove **negligence,** and not **malice** as would be required in the case of a public official or public figure.

Gertz v Welch, 1973

- Also, the case set a requirement of **fault** on the part of the media, rather than "strict liability." In other words, the media has to be guilty of something beyond a mere falsehood. There has to be some mistake or problem.
- The Supreme Court said Gertz "had achieved no general fame or notoriety in the community," despite some public service in his past, and therefore did not meet the *Sullivan* test.
- "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."

Distinguishing opinion and fact

- Ollman v Evans, 1977
  - Conservative columnist Rowland Evans called Bertell Ollman a marxist with no standing in the profession. The courts said that Ollman could not recover because Evans' opinions were grounded in fact.
- Michael Milkovich v. Lorain Journal Co, 1990
  - Columnist said a coach lied in court
  - Coach successfully sued for libel
  - Courts said an opinion could be based on fact
  - Facts and opinions could be distinguished by Verifiability, Common meaning, Journalistic context, and Social context

Recent cases & trends

- Emotional distress doesn't count as libel
  - Flynt v Falwell, 1989
- Privilege and press releases
  - Hutchinson v Proxmire, 1979
- SLAPP and veggie libel
  - Texas Beef v Oprah Winfree, 1998
- Changing views of defamation
  - Simmons
- Pyrrhic victories
  - Shockley, Nestle, McLibel

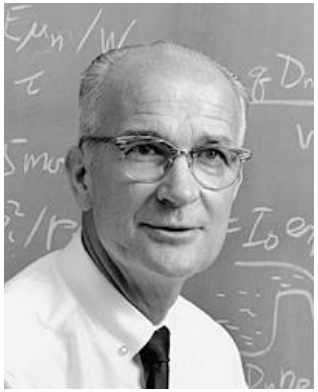
Flynt v Falwell

- Context: Trade war between Penthouse & Hustler magazine
- Jury did not convict on libel but did convict on Va state law: *"Intentional infliction of emotional distress"*
- Supreme Court held that this was not a replacement for the Sullivan standard

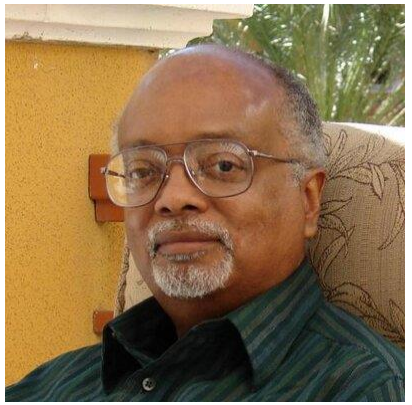
Public Relations

- **Hutchinson v Proxmire, 1979**
- The doctrine of **privilege** is confined to floor debate, not press releases issued by U.S. senators. The case occurred when Sen. William Proxmire gave a "Golden Fleece" award to a scientist working on a federal grant and publicized it in a press release.

Shockley v Witherspoon, 1984



Atlanta Constitution columnist Roger Witherspoon interviewed William Shockley and wrote about his admiration for Nazis and their way of sterilizing Jews and people of color.



The article appeared in the Atlanta Journal in 1981 and Shockley sued for libel. Witherspoon produced an audio tape of the conversation in which Shockley very clearly says that he admired the Nazis. Shockley won the suit due to instructions by the judge but the jury awarded only one dollar in actual damages.

Shockley Wins $1 in Libel Suit
New York Times (1923-Current file); Sep 15, 1984; ProQuest Historical Newspapers: The New York Times pg. 8

Shockley Wins $1 in Libel Suit

ATLANTA, Sept. 14 (AP) — A Federal jury returned a verdict today in favor of the physicist William Shockley in a libel suit against The Atlanta Constitution and a former employee, but it awarded the scientist only $1 in actual damages and no punitive damages.

Mr. Shockley was seeking $1.25 million in damages against Cox Enterprises Inc., which owns the newspaper, and a reporter, Roger Witherspoon, alleging that a 1980 column libeled him by comparing his controversial proposal for voluntary sterilization of the "genetically disadvantaged" with Nazi genetic experiments in World War II.

The scientist, who shared a Nobel Prize in physics in 1956 for his role in the invention of the transistor, said he would talk to his attorneys about whether to appeal the decision.

"The verdict is inadequate," Mr. Shockley said. "The Constitution has not in any way been punished for libel, and this will encourage the press to take equal freedom in libeling others."

'Close to Winning'

Al Norman, an attorney for the newspapers and for Mr. Witherspoon, declared, "To the extent of 50 cents apiece, we came out close to winning. Total victory would have been zero."

Mr. Witherspoon, now a free-lance writer, said he did not "view it as a loss."

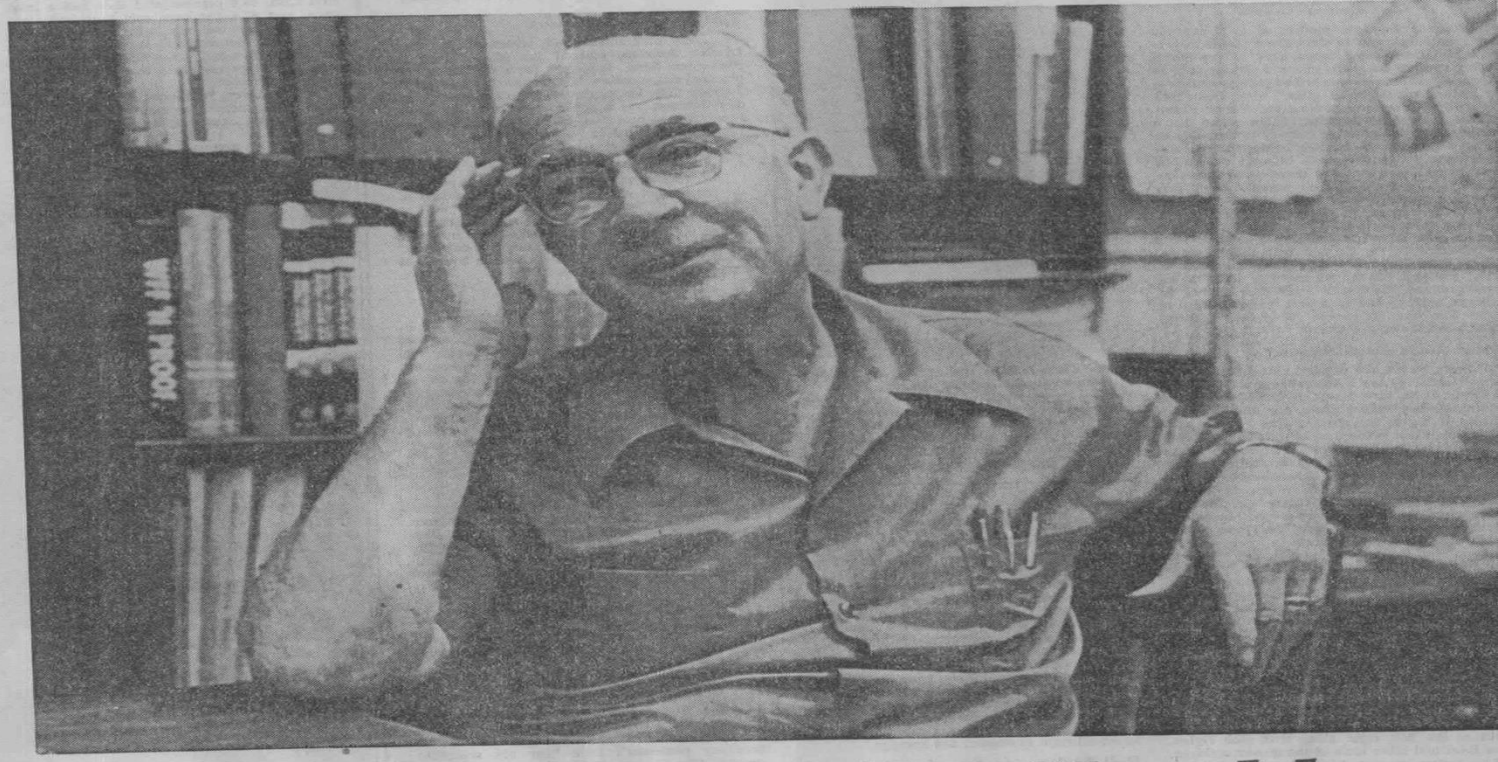
"If they had thought I was reckless or was out to get the guy, anything other than give him a fair shake," the writer said, "he would have gotten a heck of a lot more than a buck, and there would have been punitive damages as well."

The six-member jury, which included five whites and one black member, deliberated for about three and a half hours, after hearing Judge Robert Vining of the United States District Court tell them that only the alleged libel, not Mr. Shockley's genetic theory, was on trial.

Mr. Shockley has contended that, for genetic reasons, blacks as a group are intellectually inferior to whites as a group. He has proposed financial rewards for the "disadvantaged" who voluntarily undergo sterilization.

The judge had instructed the jurors that Mr. Shockley was a public figure who, in order to recover damages, had to prove the article made false statements and that it was published with reckless disregard for whether they were true or false.

ATLANTA CONSTITUTION



Designer Genes By Shockley

Roger Witherspoon
Health and Science Writer

Nobel laureate William Shockley's genetic theories envision the manipulation of races to eliminate people deemed intellectually inferior

NO ONE doubts the brilliance of William Bradford Shockley, who, along with two Bell Laboratories colleagues, invented the transistor in 1954, before they even knew how it could be used. They had the foresight to see the need for the little device which has since revolutionized the world.

He shared a Nobel Prize in 1956 for his part in that discovery, and has spent his time since then soaking up the sun around Stanford University in California and looking for problems which *may or may not have solutions.* Fifteen years ago Shockley, the professional engineer and amateur geneticist, thought he found a problem no one had the guts to look at — the reason for the disparity of scores between whites and blacks on standard, academic IQ tests.

Blacks, he said, were simply less intelligent. And they inherited this trait. And the disparities in educational opportunity, the disparities in job opportunity, the orientation of tests and testers, the effects of disparate environments had nothing to do with the fact that blacks scored 15 points or so less than whites on abstract reasoning tests — at least, not in Shockley's world. Blacks were an underclass because they were born to an underclass. Racism had nothing to do with it. Opportunity had nothing to do with it. Great Society and poverty programs could have no effect on it. Period.

The fact that the National Academy of Sciences and most geneticists disagreed with him did not deter the man. They w wrong, he said, and would one day have to admit it.

So he began his lonely pilgrimage, making enemies, gathe ink, refining his theories.

In time, he became old hat.

"There goes Shockley," said the critics, *"the intellectual ist."* He should have stuck with the field he knew best — engi ing.

And when it appeared he was finally fading from the sc he would come up with a refinement, a new wrinkle, another a ment, and because *he is a Nobel laureate he was always scru* evaluated — even though his theories were outside his field.

And now he is back. He has refined his ideas and ca through to develop The Plan. And he launched his latest prop by participating in another media event — donating his 70- old sperm to a special sperm bank which will supposedly gen gifted kids from brilliant parents. He knows he is not the be donors — at his age, sperm deteriorates genetically and the of defects increases.

But he didn't donate for the kids. He donated for the licity. The idea, he said, "is to get the whole area of discussio from under the rug and into the area of objective discuss Again.

See SHOCKLEY, Pag

Changing ideas of defamation

- Is it defamatory to say someone is gay or transgenered? Not any more.
- Simmons v National Enquirer, 2017

- "Principles of freedom of speech and press may protect their prerogative to mock and degrade the LGBTQ community," Simmons' attorney, Neville Johnson, says … "But freedom to speak is not freedom to defame. Mr. Simmons, like every person in this nation, has a legal right to insist that he not be portrayed as someone he is not. Even the most ardent supporter of sexual autonomy and LGBTQ rights is entitled to be portrayed in a manner that is truthful."
- Court holds: "… mis-identification of a person as transgender is not actionable defamation, absent special damages."

Climate change (ongoing)

- Mann v Steyn, National Review
  - In 2012, Michael Mann climate scientist accused of "deception" and "engaging in data manipulation" comparable to the Sandusky sex scandal, "except that instead of molesting children, he has molested and tortured data."
  - In 2018 case goes forward. Judges say accusations of fraud "go to the heart of scientific integrity. They can be proven true or false. If false, they are defamatory. If made with actual malice, they are actionable."
  - In Feb 2024, a federal court finds for Michael Mann, but questions of fact-finding vs opinion remain for the appeals courts.

Small examples

- Rappleyea v. WDBJ, 2001
  - Toys R Us guard on TV, being arrested under a citizens warrant for molesting a child.
  - The TV station did nothing wrong but was forced to go through the libel trial anyway
- Murray Energy v The Gazette, 2012
  - Reporter Ken Ward sued for article that called Bob Murray a "coal criminal" Murray had been convicted for safety violations that killed six miners in 2006. Murray's suit was dismissed.

SLAPP suits

- Texas Beef Group v. Oprah Winfrey, 1998
- Green group v Schaeffer (Waste suit) 2017
- ABC v Food Lion 1997 - $5.5 mm overturned, no injury from publicity
- ABC v BPI 2017
- Murray Energy v The Gazette, 2012
- Andrew Weaver v National Post, 2015 (Canada)

BPI v ABC 2017

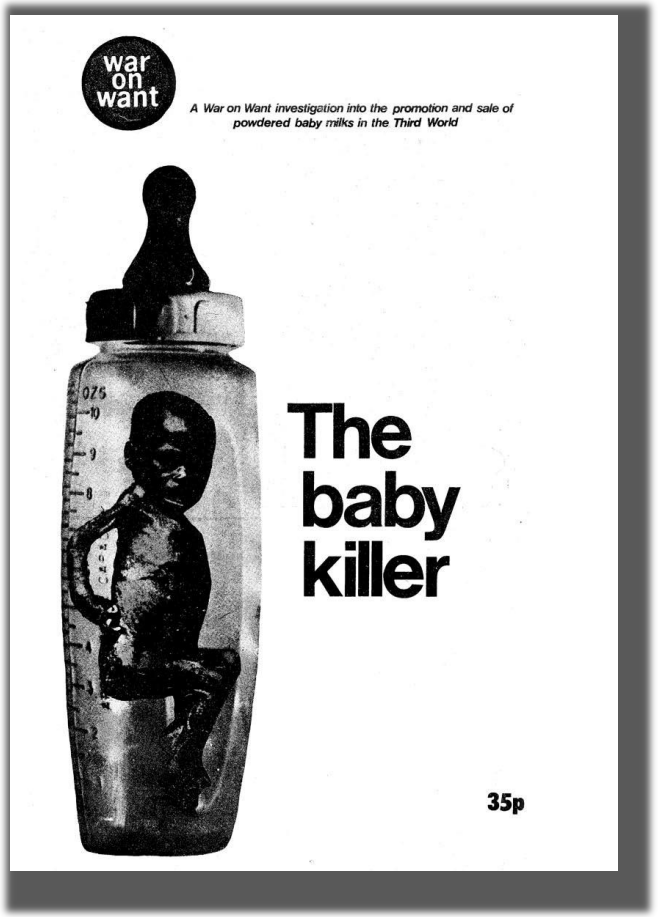
- A meat processing company sued ABC news following the broadcast of a report on "pink slime," the residue of butchering, which the company prefers to call "lean finely-textured beef." The company sued for libel and under a state law prohibiting product disparagement. The case was settled out of court in 2017, with terms undisclosed, but it seemed before the settlement that BPI would not be able to prove actual malice under the Sullivan standard.

Nestle infant formula libel suit

In 1974, a group of doctors and international activists charged that millions of babies in developing countries were dying of malnutrition and disease because they were being fed expensive infant formula. Mothers could not stop using the formula once they started.

In 1976, Nestle sued European translators of "The Baby Killer" for libel. The Swiss court said that the comments about Nestle's business were fair, but that the title "Baby killer" was libelous.

Nestle won a judgement of one Swiss Franc.

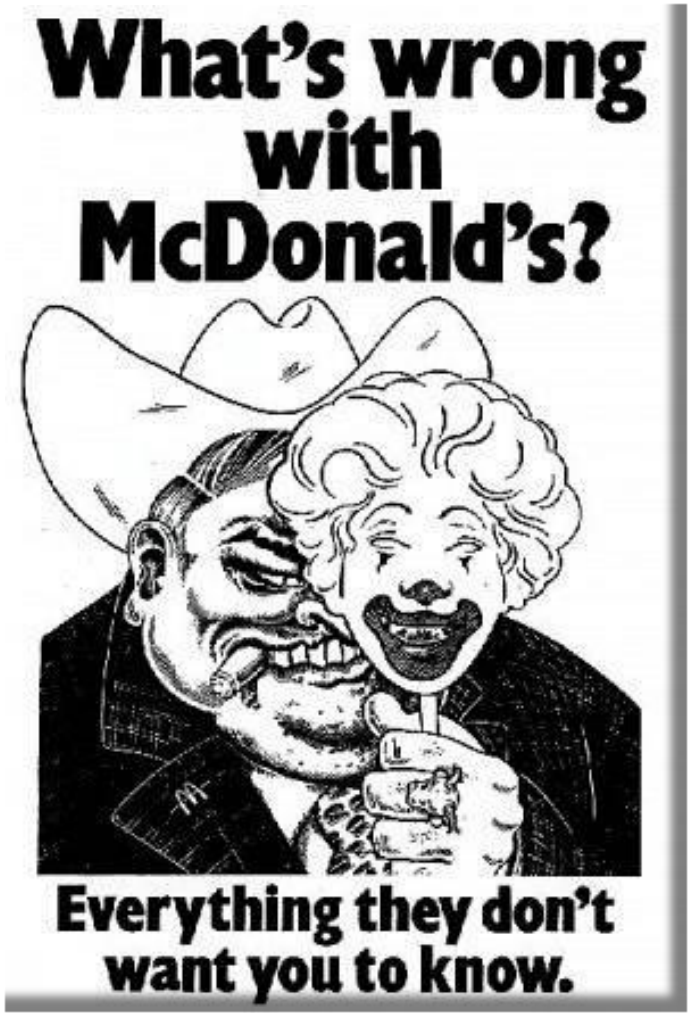


The McLibel case

McDonald's Corporation v Steel & Morris 1997 – 2005

British case over critical fact sheet British court found that some criticism was true, some libelous. Court awarded 40,000 pounds to McDonalds.

In 2005, the European Court of Human Rights reversed the British courts and awarded 57,000 pounds to Steel & Morris. The ECHR said and the fact sheet should have been protected by Article 10 of the European Convention on Human Rights, which protects the right to freedom of expression.



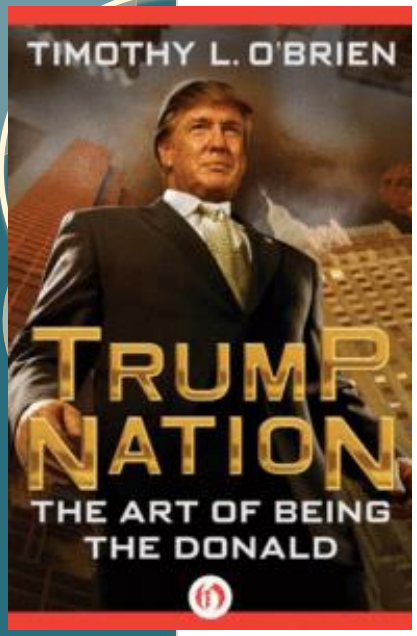
Internet libel – CDA 230

- CDA = Communications Decency Act 1996
- Section 230 immunizes internet service providers if they carry information provided by others.
- EFF calls it "one of the most valuable tools for protecting freedom of expression and innovation on the Internet."
- "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230).

Internet libel – CDA 230

- Zeran v AOL, 1997 upheld CDA 230
  - Falsely tied to messages celebrating Oklahoma City bombing of 1995, subjected to harrassment
  - Sued AOL for not responding, but court found AOL not responsible under CDA 230

- Seaton v TripAdvisor, 2013
  - Court found TripAdvisor not responsible
  - A list of "dirtiest hotels" was not libelous but is "clearly unverifiable rhetorical hyperbole," and that a reasonable person "would not confuse a ranking system, which uses consumer reviews as its litmus, for an objective assertion of fact."



Trump's libel suits

Donald Trump has filed over 4,000 lawsuits over 30 years, according to the Media law resource center. He never wins outright, but many suits were settled before trial.

2005 — TrumpNation: The Art of Being the Donald was a 2005 biography of Donald Trump was the subject of a $5 billion lawsuit against author Timothy L. O'Brien. It was dismissed in 2009, and an appeals court affirmed the decision in 2011.

In 2020, then-president Trump sued the New York Times and Washington Post for libel because they criticized his relationship with Vladimir Putin. The suits were dismissed.

No similar libel suit by a president had been filed since 1909, when Teddy Roosevelt sued the New York World company for disclosures of bribery over the Panama Canal treaty. That suit was also dismissed.

Ruby Freeman, Shaye Moss

- Shaye Moss and her mother, Ruby Freeman were election workers in Georgia in 2020.
- Members of Trump's camp, including Rudy Giuliani, created the false story that the two Black women, working at a ballot center, had hidden suitcases full of fake Biden ballots under a table and added their contents to the vote count late at night, when election observers had left.

Freeman & Hold won a judgment of $148 million on Dec. 15, 2023.

Re-examining libel law?

- **Justice Clarence Thomas has called for re-evaluation of libel laws** —
- He says NYT v Sullivan was a policy-driven decision masquerading as constitutional law."
- "The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm," Thomas said.

READ media law resource center

- New York Times v. Sullivan: The Case for Preserving an Essential Precedent, Media Law Resource Center, March 2022.
- Constitutional interpretation true
- Previous use of libel law suppressive
- Sullivan was meant to address calculated falsehoods, not protect the reputations of powerful people

Review

- What are the 5 elements of libel?
- What are the 3 main defenses?
- What is "actual malice"?
- What is a SLAPP suit?
- How was libel law originally used against civil rights at the state level?
- What cases defined the new approach to libel that protected rights of citizens?

Hypothetical libel analysis

- **Elements:** Are the 5 elements of libel present? (Publication / Broadcast; Identification; Defamation; Fault; and Damages).
- **Defenses:** Can any of the main libel defenses be applied? (Truth, Privilege, Fair Comment & Criticism)
- **Public / Private**: Is the plaintiff a public figure or a private figure? (Will we apply the Sullivan "actual malice" standard or is this a private person suing for simple negligence?)
- **Cases:** What similar cases are there that can help guide your decision making process?
- **Mitigation:** If you have made a mistake, what can you do to mitigate damages?
- **Motion to Dismiss**: If you are in a strong position, should you ask the court to dismiss the case before it goes to trial?
- **Ethical issues:** Even if you are in the clear legally, have you considered the ethical issues such as minimizing harm and having compassion for those who may be affected adversely.

Hypotheticals 1

- The student government association president tells the student newspaper editor that she doesn't have permission to quote the SGA president in an open session of the SGA. She threatens to sue for libel if she is quoted. How worried should the editor be ?
- The Blessed Punks, billed as a Christian folk rock group, play on campus, and the review for your student publication says that the only religious part of the experience was the wailing of damned souls coming from the stage. The university decides not to invite them back, saying students didn't like them, and citing your review. They sue for libel. Are you in trouble?

Hypotheticals 2

- A retired high school teacher, Mary Sue Smith, is arrested and charged with shoplifting. She suffers ridicule from other teachers in the area. You publish the story and the facts are recorded accurately from the police blotter. She sues for invasion of privacy and libel.
- Lets say the same high school teacher is inaccurately identified on your web site. Its not Mary Sue Smith, it's Mary Roberta Smith. You check the police blotter and sure enough, you made a mistake when you wrote down the name. You had a few days to check it, but you didn't. So now Mary S. Smith is suing for libel. What do you do?

Hypotheticals 3

- In court testimony, the president of your university says that Frank Mann, a scientist at your university, has been engaged in criminal fraud for using state funds to pursue research into climate change. You publish the story accurately, and meanwhile, the university president backs off and says it was all just a misunderstanding. Now the professor is suing your publication for libel.
- An article accusing the mayor of dealing drugs has appeared on one of your news organization's blog sites. As the editor, you ask a part-time reporter about it, and it turns out that the allegations were made by a confidential source and the reporter did not believe they were true, but he didn't like the mayor anyway.
- An advertisement for a local Trump group during an election accuses a democratic state legislator of "high treason." The reason for the accusation appears to be support for gay rights and opposition to gun rights. The state senator sues for libel. How will the courts treat this?

Thank you

Is Sullivan the best we can do?

- When it comes to protecting public discourse amid technological transformation, a healthy polity can't give up on fine-tuning the ground rules. Democracy dies in defeatism.

Palin v NY Times 2022

- Editorial in 2017 linked her to gun violence, esp. a 2011 AZ shooting
- Within one day, the NY Times mitigated
- Harbinger of more challenging legal landscape for press; change from 70s and 80s pro-press philosophy of courts
- Justices Clarence Thomas and Neil Gorsuch want to re-think the Sullivan standard and return more power to state courts