

Absence of actual malice:
Protecting the reputations of public figures
while upholding the First Amendment

Glenn T. Hubbard

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The issue of steroid use in Major League Baseball came to the forefront of national news coverage in early 2005, after former big leaguer Jose Canseco released a tell-all book. During his publicity campaign to promote the book, Canseco made explosive allegations about former teammates and some players he had played against. He described injecting steroids into many of baseball's best-known players, and he named names.¹ Following Canseco's appearance on *CBS's 60 Minutes* came a flood of denials from most of the players he had named, or from their lawyers. The common theme of the denials was that Canseco was lying – that his story was made up purely to bolster his book sales. Bob Woodward and Carl Bernstein popularized the phrase “non-denial-denial” in connection with the Watergate story in the 1970's,² but these were different: *categorical* denials. Canseco's allegations, according to several ballplayers he named, were absolutely, patently false.

So why were there no lawsuits? Because truth is a defense. Evidence has emerged since 2005 showing that in most cases the steroid allegations were correct. Only one player, Raphael Palmiero, was reported to have seriously considered legal action, but he was among those implicated in later criminal cases and has been threatened with perjury charges in connection with claims he made before a congressional committee. But what if one of those accused in Canseco's book had been innocent? In order to make a libel case, a plaintiff must show publication, identification, falsity, fault, and damage – all of which appeared to be present in the Canseco allegations. There's no question the claims were published and no question that specific players were identified. There's also little argument that in the current climate of professional sports, a player accused of steroid use suffers a damaged reputation, which in turn could result in a substantial

monetary loss. The only remaining questions are falsity and fault. Assuming for the sake of argument that the denials were correct and that Canseco's claims are false, there should have been some evidence to support falsity – perhaps proof that the players were in different cities at the times Canseco claimed to have injected them (proof that at least one player was reported to possess), or possibly clean blood tests dating back to the time periods in question. As for fault, it's clear that the ballplayers were public figures and would be held to the higher of two standards, having to prove *actual malice*. This is likely true despite the fact that Canseco himself is not a news organization – although there is contradictory case law on the subject. In *Chuy v. Philadelphia Eagles Football Club*,³ a player suing his former NFL team was required to meet the same actual-malice standard as if he'd been suing a media company. Other cases, to be discussed later, have indicated otherwise. But if held to the actual-malice standard, players suing Canseco would have to prove, with clear and convincing evidence, that he either knew his statements were false at the time he made them⁴ or, at the very least, he entertained serious doubts⁵ about their truthfulness. On the surface, though, this wouldn't have seemed difficult either. Canseco claimed that he personally stepped into restroom stalls with other players and stuck needles into their buttocks. If such a charge could have been proven false, it logically follows that Canseco would have *known* he was lying about them.

Whether the players in question could also have sued news organizations such as *CBS's 60 Minutes* is a bit more complicated, but not entirely different. The elements of libel are still the same, and news organizations can be held liable for republishing defamatory statements. But the burden of proving fault against a media organization could be more difficult. If CBS *knew* that Canseco's story was false, they probably

wouldn't have aired it. Certainly they might have entertained serious doubts about its veracity, but it could be difficult for a plaintiff to prove those doubts in court. Typically, to show *reckless disregard*, witnesses are called from inside a news organization to testify about the editorial process. The problem for plaintiffs is that the very same testimony that could show the entertaining of doubt might also vindicate the reporters and editors by revealing the extent of their attempts to be responsible and fair. If initially serious doubts resulted in vigorous fact checking, those doubts might have been eliminated by the time of publication. Even so, if a baseball player's reputation has been seriously hurt by the publication of a false statement, it would seem the ideal scenario for a libel suit.

Some legal experts, though, say it is unlikely that any such suits would be filed in matter's such as the Conseco case. The conventional wisdom in the legal community seems to be that a libel suit by a public-figure plaintiff is an uphill battle, to say the least. "A good plaintiff's libel lawyer would say, 'Don't waste your time,'" said Washington libel attorney Lee Levine in a recent edition of the New York Times⁶: "I think the players would get that advice regardless of whether what Canseco said is true." Another attorney quoted in the same article agreed that such a suit would be a difficult proposition: "Would I sue? I think I might, but only if I'm completely innocent," said First Amendment lawyer Floyd Abrams⁷, saying a player couldn't win if he tried to split hairs on whether a certain chemical qualified as a steroid. But Abrams also acknowledged that the Canseco case could be a natural for a libel suit: "If this is a complete fabrication, I think this is what libel law is all about."

Still, the word is out that the actual malice standard protects defamatory statements against public figures most of the time. The 1981 movie *Absence of Malice*⁸ formed the basis for the popular understanding of libel law. The character played by Paul Newman was clearly a victim of defamation, but it was understood that there was nothing he could do about it. Is this right? Is it even an accurate reading of the case law on the subject? Some would say no. Furthermore, some say there's been a legal trend in the past 20 years to protect reputations more strongly⁹.

This paper looks at libel law pertaining to public figures, assessing whether the protection of reputation is, or should be, a higher priority in the modern American legal system. Through a survey of recent case law, this paper assesses what changes have already taken place and what changes might be on the horizon in this complex area of communications law.

Striking a Balance

Libel law is, at best, a balancing act. In simplest terms, libel torts exist to protect reputations. In the United States it has long been held that the First Amendment does not apply to defamatory falsehoods – that the interests of the republic are not served by the infliction of harm to people's reputations through the publication of false statements.¹⁰ But nothing in life is ever that simple. With legal protections come legal restrictions. Attempts at protecting victims of false publication could very easily overreach, limiting publications that are true. Although courts grappled with the question long before *New York Times v. Sullivan*,¹¹ Justice Brennan's 1964 opinion set the standard, both literally and figuratively, for how the First Amendment implications of libel law would be

considered by future courts and legal scholars. It tipped the balance in favor of free speech and press by making it harder for public officials to win defamation suits than for private persons. An oversimplified view might be that it set a national standard for how First Amendment concerns and the protection of reputation should be sorted out in the courts; but it really did no such thing.¹² The Court's majority opinion acknowledged that lower courts had to be allowed plenty of leeway because it was impossible to anticipate every lawsuit that would come up. However, some scholars argue that the Court unwittingly created a bigger mess with more questions unanswered than resolved.¹³

In his *Sullivan* opinion, Justice Brennan addressed what was a very real concern at the time, that while it was important to protect reputation, libel law needed to be carefully limited in order to prevent a chilling effect on press freedoms and political speech critical of those in power. The concern was particularly timely in the 1960's after Senator Joseph McCarthy, just a decade earlier, had abused his power, conducting a communist "witch-hunt" that threatened to destroy any individual or organization calling his methods into question.¹⁴ Ultimately it was a free press, courageously exemplified by *CBS's* Edward R. Murrow, among others, that exposed McCarthy's tactics as unfair, unscrupulous and damaging to American freedoms. After this episode in American history, the legal community was sensitized to the need for a strongly protected free press that did not fear criticizing government leaders.¹⁵

Brennan's interest in protecting press freedoms informed his opinion in *Sullivan* and laid the groundwork for the many libel rulings that followed:

"We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

Even before *Sullivan*, there was a significant body of case law favoring press freedoms over protection of reputation. The Supreme Court had denied certiorari in *Sweeney v. Patterson*,¹⁶ a 1942 case in which the 2nd District Federal Appeals Court stated, “Whatever is added to the field of libel is taken from the field of free debate.”

When he wrote the majority opinion in *Sullivan*, Brennan clearly considered U.S. history to be on his side, even quoting one of the authors of the Constitution, James Madison, in support of his position:

“Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this truer than in that of the press.”

In *Sullivan*, Brennan laid out what has become known as the actual malice standard, which was intended to make it more difficult for public officials to win libel suits than for private persons. His rationale was that those with greater power to affect public policy deserved more scrutiny than others, and therefore the press should be less inhibited from reporting on them negatively – even if it meant false information occasionally slipped into the public sphere. He further reasoned that public officials likely had more access to the media than private persons, thus having greater opportunity to set the record straight if libeled. Thirdly, he argued that by accepting the trappings of power and prestige, public officials had simply assumed greater risk – that potential defamation was just part of the price of being a public official. Under *Sullivan*, a public official plaintiff would have to prove that a false statement was published with “knowledge of its falsity” or with “reckless disregard” for whether it was false or not. In

the case of private persons, the libel standard would be that a falsehood was published with mere “negligence” – a substantial legal difference. In *Sullivan*, the Court specified that actual malice must be established through “clear and convincing” evidence, not just a “preponderance” thereof. They did not, however, clarify exactly what this meant.¹⁷ Later, the Court specified that a media outlet must have entertained “serious doubts”¹⁸ about the veracity of a claim in order to have “recklessly disregarded” the truth. These and several other rulings^{19 20 21} clearly favored media defendants in libel suits and were consistent with Brennan’s stated intentions in *Sullivan*. They also extended the scope of the actual malice rule to include so-called public figures and eventually limited purpose public figures as well. The Court changed direction somewhat in *Gertz v. Welch*,²² restricting the number of circumstances in which actual malice applied, but they still maintained the principle that public officials and public figures should meet a higher burden when suing for libel.

Even though it provides substantial protections for the press, many still argue that libel law has an excessive chilling effect on news reporting.²³ Roy Leeper²⁴ wrote in 1998 that “ac hoc decision making” on the part of courts around the country has created confusion in the news media about what can be safely reported, just as it has complicated a potential plaintiff’s decision of whether or not to sue. Furthermore, the requirement that plaintiffs prove fault has taken the emphasis away from what seems on the surface to be the real issue in a libel case: falsity. As a result, a news organization’s methods and editorial decision-making are questioned even more thoroughly in a many cases than the end product. Legal emphasis is diverted away from a supposedly defamatory statement’s accuracy or lack thereof and from whether it truly did harm.

There is no doubt that libel litigation costs are high and jury damage awards often exceed six figures.²⁵ Based on such numbers, it's not difficult to imagine how a news organization could be discouraged from running with a controversial story – even if its editors are confident about the accuracy of the facts presented. But it bears mentioning that the great majority of legal experts who have written on the matter are just that: legal experts – not journalists. The extent to which news organizations are chilled from aggressive investigative journalism can hardly be shown purely through a search of available case law. Some journalists interviewed for this article²⁶ have suggested that there is no fear of a libel suit as long as the reporter is conscientious about checking his facts. If someone reports a falsehood that is damaging to a public official's reputation, the argument goes, that reporter “deserves what he gets.” After all, the courts have been quite clear that a harmless inaccuracy – the result of an honest mistake by a well-meaning reporter – does not rise to the level of libel. A truly defamatory statement is not likely to be reported accidentally; chances are it's the result of painstaking research. If this research turns out to be errant, perhaps the reporter rightfully should be “chilled” from publishing it. It's a far cry for the staunchly pro-First Amendment stance exemplified by Brennan, but one could argue that times have changed or that the pendulum has swung too far from protecting reputation. This could be a scenario in which a chilling effect is not necessarily a bad thing.

Despite frequent victories for plaintiffs at the trial level, it is rare that libel victims are compensated substantially.²⁷ This is because most libel awards are either overturned or significantly reduced at the appellate level.²⁸ Many legal scholars have acknowledged this tendency in recent years²⁹ and have begun to look for ways to correct the situation.³⁰

They argue that, despite any ongoing concerns about protecting press freedoms, a system that fails to adequately punish defamation brings its own set of problems possibly as bad, if not worse, for the health of the republic. Many potential candidates rule out running for office because they fear having their names dragged through the mud.³¹ Some politicians already in office leave prematurely because the climate is too toxic. Voter turnouts have gone down substantially in the past 25 years, and many attribute this phenomenon to the nastiness of the political atmosphere.³² Certainly not all of these problems are the fault of the news media, but tort law that errs on the side of allowing certain defamatory falsehoods to go unpunished could not possibly help the situation. Moreover, it is not just a few defamatory falsehoods that are allowed under the actual malice standard; it's most of them, according to David Anderson in his essay, "Is Libel Law Worth Reforming":

"The upshot is that the vast majority of those whose activities are likely to attract media attention – and who therefore are at risk of being defamed in the media – are subject to the actual malice rule and the phalanx of other rules that surround it."³³

Anderson also explained how the evolution of libel tort law has rendered the public figure distinction increasingly a moot point. This is because in order to collect assumed damages and/or punitive damages, most states require that the actual malice standard be met – even by private persons. Very few plaintiffs sue only for actual damages, because such damages are generally small. As a result, the *Sullivan* actual malice standard is a prominent factor in a great majority of libel cases. To clear things up, some commentators³⁴ have suggested the elimination of the public figure/private person distinction and, along with it, the actual malice standard. In his paper "Refocusing Libel Law," Roy Leeper³⁵ suggested replacing the *Sullivan* standard with a

“gross irresponsibility” standard that would apply in all libel cases. He said this would better facilitate redress for plaintiffs, because it would be weaker than actual malice, but it would be stronger than mere negligence – providing greater protections for the press in cases involving private persons.

Protecting Reputation

In a number of recent cases, courts at the appellate level have made increased efforts to provide redress for plaintiffs classified as public figures or public officials. An October, 2004 decision by the Pennsylvania Supreme Court³⁶ rejected the concept of *neutral reportage*, ruling that a newspaper can be held liable for publishing defamatory statements made by public officials. The case came out of Parkersburg, Pennsylvania, where the Chester County Daily Local published allegations from a council member that the council president and a borough mayor were homosexuals and child molesters. The trial court applied the neutral reportage principle in granting summary judgment for the media defendant, but this ruling was overturned on appeal. In upholding the Appeals Court ruling, the Pennsylvania Supreme Court came down strongly on the side of protecting reputation, interpreting U.S. Supreme Court cases as supporting their argument:

“We conclude that the existing case law from the U.S. Supreme Court indicates that the high Court would not so sharply tilt the balance against the protection of reputation, and in favor of protecting the media, so as to jettison the actual malice standard in favor of the neutral reportage doctrine.”³⁷

The Pennsylvania Court directly shot down the idea of neutral reportage and, at the very same time, the notion that the news media deserve special protection:

“In fact, in terms of fashioning legal standards in these defamation matters, the Court has not declared that a media defendant is owed even a scintilla more protection than a private citizen-defendant.”

In *Kaelin v. Globe Communications Corp.*,³⁸ the 9th Circuit Court of Appeals reversed summary judgment for the tabloid *National Examiner*, which had run a headline saying, “Cops Think Kato Did It!” Even though O.J. Simpson’s friend Kato Kaelin was considered a public figure, the Appeals Court ruled that his libel case could go forward, saying there was sufficient evidence of actual malice to take the case before a jury. Evidence had been presented that the paper’s editor expressed concern over the headline’s misleading nature before it ran – evidence that could amount to “serious doubts.”

In a reversal of a lower court’s finding, a New York Appellate Court ruled³⁹ that a record producer formerly married to a famous singer was not a public figure. The plaintiff had sued the *New York Daily News* for republishing comments by singer Melba Moore about her divorce. The Court also ruled that the *Daily News* had gone outside the realm of its *fair report* privilege (which allows the publication of official reports) by merging defamatory quotes Moore made directly to the paper with other quotations from a federal complaint she filed against her ex husband.

The fair report privilege was also put to the test in *Tucker v. Philadelphia Daily News*⁴⁰. Pennsylvania’s intermediate appellate court ruled that the defendant newspaper had “overly embellished” what was included in a federal complaint against rapper Tupac Shakur in a way that defamed the plaintiff. Delores Tucker was an anti gangsta-rap

activist who had previously sued Shakur after he had referenced her by name in some of his rap lyrics. Because one of her claims in the original suit was “loss of consortium,” the *Philadelphia Daily News* story implied her complaint was mainly sexual in nature. The appellate court ruled that the report created a “false impression” and was not covered by the fair report privilege because of its embellishments. The court overturned a lower court’s dismissal of the libel suit. This ruling is especially interesting because of the “false impression” language. It could support future libel claims where there are not directly false statements but only inaccurate implications. Such a precedent could be very bad news for media defendants.

A defamation suit by former Congressman Gary Condit against columnist Dominick Dunne has made it past the summary judgment stage.⁴¹ Condit claims Dunne slandered (the California term for libel) him in appearances on three national talk shows in late 2001 and early 2002. This case could yield important rulings on the subject of republication and opinion. After a disclaimer that he could not vouch for the authenticity of the information, Dunne reported that Condit had expressed at dinner parties his desire to “get rid” of Chandra Levy, a 24-year-old bureau of prisons employee to whom he had been linked romantically. Condit consistently denied any involvement in Levy’s death and was eventually cleared by detectives investigating the case. Dunne is arguing that his reports amounted to “speculation, theories, opinions and musings,” and are not actionable statements of fact. Condit is seeking one million dollars in compensatory damages, and ten million in punitive damages.

Judges have been the plaintiffs in two recent libel cases with significant implications for media defendants and, by extension, the free press. In *Huckabee v. Time*

*Warner Entertainment Co., LP.*⁴², the Texas Supreme court lowered the burden required for plaintiffs to get a case past summary judgment, from presenting “clear and convincing” evidence of actual malice, to presenting evidence sufficient to create a “genuine issue of material fact.” This makes it more difficult for media defendants to get out from under libel claims quickly and inexpensively. The *Huckabee* case is an example of the murky distinction between statements of fact and opinion. Judge Huckabee sued over an *HBO* documentary that alleged he had failed to consider the best interests of children in family court rulings. *HBO* claimed the documentary’s negative pronouncements about the Texas family court system, centering on one particular courthouse where Huckabee was the only judge, were statements of opinion and not actionable statements of fact. They further claimed that Huckabee had not been specifically named in the documentary. Huckabee claimed actual malice on the grounds that key facts had been omitted in the statements, giving the viewer a false impression, and demonstrating a “reckless disregard for the truth” on the part of the *HBO* producers. Ultimately, much of the Texas Supreme Court’s ruling favored *HBO*, granting summary judgment on the issue of actual malice, but its abandonment of the “clear and convincing” standard at the summary judgment phase represents a sea change. It’s a significant step away from media protection, in the direction of protecting reputation.

Another case involving a judge as plaintiff was decided by a Massachusetts trial court in early 2005,⁴³ resulting in an award of \$2.1 million. Superior Court Judge Earnest Murphy sued the *Boston Herald*, claiming the paper had defamed him when it reported that he was insensitive to victims in some of the cases he heard. Specifically, one of claims in question quoted the Judge as saying, “Tell her to get over it,” in reference to a

rape victim. The plaintiff argued that the statement was not only misquoted, but also taken out of context. The actual quote, according to court records, was that he hoped the young woman wouldn't "go through life as a victim," and that "she's got to get over it." Murphy's attorneys were able to convince a jury that the *Herald* had recklessly disregarded the truth, in part by showing evidence of common-law malice and tying it to the paper's journalistic practices. The reporter who authored the story in question had appeared as a guest on a national television talk show, commenting on Judge Murphy's conduct and stating unequivocally that Murphy had made the "get over it" comment. At trial, the reporter's appearances in the national media became evidence of "ill will," the common-law definition of malice – a key element in the granting of punitive damages – and supporting evidence in showing "reckless disregard for the truth."

The trial-level outcome of the Murphy case is perhaps not surprising, given that a majority of media defendants lose libel cases before they get to the appellate courts.⁴⁴ Needless to say, there's much still to be decided in the case and much more to be written. But one point that emerges at this early stage supports the notion that the supposed chilling effect on the free press is not all it's cracked up to be. After the jury verdict was handed down, the publisher of the *Boston Herald* commented on whether his paper would think twice before engaging in negatively tinged investigative journalism in the future: "We believe the First Amendment allows news organizations to provide uninhibited coverage of government and public figures, and we will continue to cover them vigorously," said Patrick J. Purcell.⁴⁵ Whether his were mere words of defiance in the face of a legal defeat or a genuine commentary on the chilling effect of libel law is impossible to determine, but it is worth noting.

Favoring Media Defendants

The current situation is not all bad for media libel defendants. In *Dolcefino v. Turner*,⁴⁶ a former Houston Mayoral candidate won a jury verdict in his suit claiming that he was libeled in two different news broadcasts. The reports had linked him to a multi-million-dollar insurance scam, but the Texas Appeals Court ruled that such news coverage involved “core” speech, with direct bearing on the candidate’s fitness for office. The ruling stated that the principle of actual malice was “heightened” because of the political nature of the news coverage, and that the burden had not been met by the plaintiff. They cited the Supreme Court’s *Tornillo*⁴⁷ decision, saying the omission of certain facts favorable to the plaintiff did not constitute actual malice.

Michael Jackson filed a defamation suit⁴⁸ in connection with a report on the show *Hard Copy* claiming the existence of a videotape of the pop star molesting a young boy. The California Appeals Court stated that *New York Times v. Sullivan* “does not require that the reporter hold a devout belief in the truth of a story being printed” in order to avoid an actual malice finding. Moreover, a speaker’s “healthy skepticism” about a story does not amount to actual malice, according to the ruling. *The Hard Copy* reporter testified that she believed her source was credible and the information was accurate.

A jury originally awarded eight million dollars to a plaintiff accused in a 20/20 segment of scamming real estate investors⁴⁹. The 11th Circuit Court of Appeals vacated the verdict, rejecting the jury’s finding of actual malice. The appeals court found that, despite evidence of wrongdoing in ABC’s handling of the story, they clearly had made concerted efforts to verify their claims before airing them. It appears in this case that the

jury was swayed by the apparent shadiness of *ABC's* tactics and failed to look objectively at evidence showing no “serious doubts”⁵⁰ on the part of the network’s producers.

Republican political operative Keith Gray sued the publishers of a book on influential lobbyists that he said defamed him eight times⁵¹. The 1st Circuit Court’s ruling amounted to a virtual slam-dunk for the media defendant. Among the points in the ruling were that many of the claims were non-actionable opinion rather than statements of fact; the plaintiff was a public figure; that the plaintiff failed to show actual malice; and the defendant did not have to reveal the identity of a source for some of the allegedly defamatory claims. Of particular interest was the court’s ruling that prepublication denials by the subject of a story are not sufficient to create serious doubts necessary to prove actual malice.

Who is or is not a Public Official?

Though many legal scholars say the role of the public official/public figure distinction has been minimized in recent years,⁵² it still makes a difference, both in how libel suits are tried and in the outcome of many cases.⁵³ Perhaps more importantly, the question of whether someone is a public figure is central to the popular perception that libel suits are virtually impossible for those in the public eye to win. Rulings on public figure status have always varied dramatically depending on jurisdiction,⁵⁴ and a comparison of recent cases shows that the level unpredictability in this area has not waned.

In *Sanders v. Hearst Corp.*,⁵⁵ a former congressional liaison suing the *San Francisco Examiner* was declared a public official. This was in spite of the fact that he

was not well known in the community and held no direct authority to determine public policy. The court stated that his influence was still strong enough to warrant public official status.

Unlike rulings in other jurisdictions, the Ohio Supreme Court ruled that a school principal was not a public official, in *East Canton Education Ass'n v. McIntosh*.⁵⁶ The court further wrote that a principal did not assume a role of special prominence in society and did not thrust himself into a public controversy by seeking out the media to “trumpet” his case.

A private citizen working as an unsalaried peace officer taking part in drug stings was ruled to be a public official by the Texas Court of Appeals.⁵⁷ Part of the justification was that he had at one time pleaded guilty to “official misconduct” which, the court reasoned, a private citizen could not have done. The Texas appeals court also ruled that a court-appointed psychologist was a public official.⁵⁸ The explanation was that such a person had as much power as a family law judge, because he could decide visitation cases.

Who is or is not a Public Figure?

A jury ruled that former pro football player Jim Kelley’s agent was a public figure.⁵⁹ The New York appeals court affirmed the ruling. Kelley had written in his autobiography that he “learned his lesson the hard way about whom to trust and whom not to trust in business.” His former agent claimed not to be a public figure, an argument the appeals court described as “substantial,” but they refused to overturn because they said the plaintiff had failed to prove the element of falsity during the jury trial.

The owner of a political opposition research firm was declared a limited-purpose public figure by a federal court in Maine.⁶⁰ Because the plaintiff had been involved in previous campaigns in the state and had stirred debate on the use of opposition research firms, the court ruled he was part of a preexisting controversy. They said he had voluntarily become involved with the issue, and the fact that he was not well known did not prevent his being classified as a public figure.

An Ohio Court of Appeals stepped into the question of whether a criminal defendant is a public figure.⁶¹ They said because an attempted murder is particularly heinous, someone charged with such a crime is a limited public figure, even though other criminal defendants are not classified as such. By repeatedly stabbing his wife, the defendant put himself at the forefront of the “controversy” surrounding the crime, according to the court.

A TV news reporter who covered the raid on the Branch Davidian compound near Waco Texas was ruled a limited purpose public figure pertaining to news reports questioning why the raid failed.⁶² The reporter had followed law enforcement on the raid and been interviewed several times about his role in the story.

Opinion

A question frequently associated with defamation of public officials and public figures is whether the statements at issue are fact or opinion. The so-called opinion defense has generally been upheld, with courts noting that only fact can be false, and therefore opinion cannot be considered libelous. The New York Court of Appeals addressed the issue twice in the 1990’s, ruling in *Elliot Gross v. New York Times Co. et*

al⁶³ that a medical examiner exonerated of any criminal wrongdoing could seek redress after a series of articles questioning his professional conduct. The articles quoted colleagues of Medical Examiner Eliot Gross, charging that he had produced inaccurate autopsy reports on suspects who had died in police custody. The New York court overturned the case's dismissal by a lower court and ruled that the defamatory claims had been assertions of fact that could be considered libelous. In handing down the ruling, the court noted, however, that there was no "special rule" making all criminal assertions questions of fact. Justices specified that, in this case, the assertions were actionable. In its ruling, the New York court cited *Hotchner v Doubleday & Co.*,⁶⁴ stating that if a statement of opinion is accompanied by a recitation of facts, it can be subject to libel litigation.

If the opinion defense can be superceded when questionable statements are accompanied by a recitation of facts, it is possible that a flood of libel suits could apply the same argument. It could threaten many kinds of political speech,⁶⁵ as well as the news media's reporting thereof. This is one area where the possibility of a chilling effect on free speech and press seems very real. The New York court addressed similar issues in *Silsdorf v Levine*⁶⁶, a case they cited in the later Eliot Gross matter, as they attempted to clarify the distinction between fact and opinion:

To illustrate, if the statement "John is a thief" is actionable when considered in its applicable context, the statement "I believe John is a thief" would be equally actionable when placed in precisely the same context. By the same token, however, the assertion that "John is a thief" could well be treated as an expression of opinion or rhetorical hyperbole where it is accompanied by other statements, such as "John stole my heart," that, taken in context, convey to the reasonable reader that something other than an objective fact is being asserted. Indeed, it has already been held that assertions that a person is guilty of "blackmail," "fraud," "bribery" and "corruption" could, in certain contexts, be

understood as mere, nonactionable "rhetorical hyperbole" or "vigorous epithets"

But despite the New York court's attempts to explain the distinction, there is plenty of room for varied interpretations of precisely what statements of opinion might be subject for libel action. Talk radio, for instance, is filled with "rhetorical hyperbole." It is safe to assume that not every statement made during a given talk show is 100 percent factual – and that many statements have the effect of damaging certain people's reputations. Is talk radio merely opinion? Perhaps not. Many talk hosts pride themselves on being arbiters of the truth.⁶⁷ Some have regular segments, often at the beginning of their programs, in which they review the day's happenings, purporting to give their listeners a clear representation of the facts – less filtered, they claim, than what comes from the "biased" news media.⁶⁸

The current political climate in the U.S., in which ideology becomes the source of increasingly venomous rhetoric, could bring these questions to the courts with much greater frequency than before. Already, a libel suit has been filed in connection with the "Swift Boat" controversy during the 2004 Presidential campaign.⁶⁹ A University of Delaware professor claims he was libeled in a film that aired on Sinclair Broadcasting's 64 stations, alleging fraud on the part of Senator John Kerry and other Vietnam vets who later protested the war. Images of Kenneth J. Campbell appear in the film, along with narration claiming he and others were "discovered as frauds," who "never set foot on the battlefield, or left the comfort of the States, or even served in uniform." The disposition of this case could have an impact on how defamatory claims are viewed in the courts when those claims take the form of angry political speech purporting to be factual. It is

ironic that possibly the best defense – for talk radio hosts, newspaper columnists, and for the producers of the anti-Kerry film – might be to claim that their supposed statements of fact really weren't statements of fact at all, but mere hyperbolic opinion. Indeed the line between protected political speech and irresponsible journalism is not nearly as distinct as it might have been when Justice Brennan wrote his *Sullivan* opinion.

Significantly, the 9th Circuit Court of Appeals recently handed down a ruling on a related hot topic concerning the reporting of defamatory political speech.⁷⁰ They decided that bloggers (web loggers), website operators, and email list editors could not be held liable for republishing the defamatory statements of others. This is a departure from the existing case law pertaining to traditional journalists – legally setting these internet operators apart. The ruling places bloggers in a separate legal category from the mainstream press, which can be successfully sued for defamatory quotes (as in the Eliot Gross case above) and is generally not protected by a neutral reportage defense.

Perhaps the most notable libel case against a talk-radio host to date did not directly pertain to comments the host made on the air. In *Wells v. Liddy*,⁷¹ a former secretary with the Democratic National Committee sued Watergate conspirator turned radio host G. Gordon Liddy for defaming her during public speeches. Liddy had embraced an alternate theory of the Watergate break-in, alleging that a call-girl ring was being operated out of the DNC headquarters in 1972. The theory was that White House attorney John Dean had ordered the break-in to uncover the ring and bolster his own reputation in the Nixon administration. In describing the theory, Liddy named Ida Maxine Wells as a key organizer of the prostitution ring. She sued, claiming that the statements were false and that her reputation was damaged. She was initially declared a

limited purpose public figure, but this ruling was overturned by the 4th Circuit Court of Appeals. In ruling on the matter, the appeals court prescribed a new test for determining public-figure status:⁷²

1) The plaintiff is a central figure in a “significant public controversy” and the alleged defamatory statement has arisen in the course of the public discourse about the public matter;

2) The plaintiff must have “assumed the risk of publicity” by taking action or failing to take some action in a situation in which a reasonable person would understand that publicity likely would inhere;

3) The controversy must have existed prior to the publication of the defamatory statement;

4) The plaintiff must have retained public figure status at the time of the alleged defamation.⁷³

Even though it ultimately became a private-plaintiff libel case, *Wells v. Liddy* still dealt with the question of what a prominent talk show host could get away with claiming in public. The case was in the federal courts for more than five years, with the U.S. District Court generally ruling in Liddy’s favor and the appellate court reversing. Among the rulings eventually reversed were, in addition to the declaration of Wells as a public figure, the finding of insufficient evidence that Liddy acted negligently, and two different summary judgments dispensing the case in Liddy’s favor – one of which coming after a hung jury. The case was remanded for another trial in July of 2002, and the jury returned a verdict in Liddy’s favor yet again.⁷⁴ It is significant to note that, although the case appears to have ended in victory for Liddy, several Federal Appeals Court rulings went

against him. The court's reversal of two summary judgments in the defendant's favor could serve as further evidence that the balance in libel law is tipping toward plaintiffs.

Political Speech

In light of what many perceive to be a decline in the civility of political campaigns, it is worth mentioning legal scholarship in an area of defamation law where the defendant is not a news medium^{75 76}. If there is a trend toward favoring reputation over First Amendment concerns, it works against more than just the free press. Some recent cases have shown promise for libel plaintiffs against political advertisers, on the basis that defamatory speech is not protected by the First Amendment. This is one area where the courts have historically been even more protective of free speech than in news media libel cases. Tort laws and statutes have allowed hardly any regulation of political speech whatsoever, obviously because the First Amendment is so clear on the subject. Section 315(a) of the Communications Act⁷⁷ prevents any broadcaster from censoring political ads, and the Supreme Court had put its weight behind this type of rule in 1959's *Farmer's Educ. & Coop. Union v. WDAY Inc.*⁷⁸ More recently, though, the Court has ruled, in *Libra v. City of Litchfield*⁷⁹, that libel is not protected speech, and has even lent its support to the idea that the actual malice standard should not apply to non-media defendants⁸⁰. One could easily find a trend here, from staunch support for the First Amendment, to greater consideration of reputation and possibly a cleansing of the political process.^{81 82}

Conclusion

It is hardly an arguable point in American jurisprudence that the First Amendment is important and that the protections of speech and press, cornerstones of freedom, must be maintained. Constitutional law is fraught with difficult balances, often characterized by subtle shifts in tort rulings over time. The Pennsylvania Supreme Court's opinion in *Purcell v. Westinghouse*⁸³ explained reputation in a way that illustrated the difficulty of libel law, and foretold what some say is the shift that has followed:

“A man's good name is as much his possession as his physical property. It is more than property, it is his guardian angel of safety and security; it is his lifesaver in the sea of adversity, it is his parachute when he falls out of the sky of good fortune, it is his plank of rescue in the of personal disaster.”

Whether there has been an empirically measurable movement toward reputation over First Amendment concerns across the entire legal system is not clear; the volume of legal research required to make such a determination with any scientific certainty is beyond the scope of this paper. The Media Law Resource Center, an organization that watches litigation against the media,⁸⁴ says the total number of such suits has actually gone down since the 1980's – a fact that might not be surprising in light of the high litigation costs and the relatively low success rates for plaintiffs historically. That same organization points to an increase in trial-level victories for media defendants, but as this paper shows, there have been significant shifts in the other direction at the appellate levels. Regardless of what trends may or may not exist, many legal scholars are calling for significant changes in libel law. They say libel torts as they stand now are, at best, a wash: not adequately protective of free speech or reputation. Most agree that it would take another landmark ruling by the Supreme Court to clear up the confusion and

ambiguities of current libel law. It is impossible to guess whether the high court will actually take on the task in the foreseeable future, but there are several current cases – many of which have been outlined in this paper – for which the Supreme Court could grant certiorari and make new law. Should “actual malice” be maintained? Should “fault” continue to be the central issue in libel cases or should the focus be returned to falsity and damage, where many say it should be? Should public figures still be afforded less protection than private persons? Will the opinion defense survive? What about the fair report privilege and neutral reportage? Will the Supreme Court clear up the substantial inconsistencies in libel torts from state to state? This is a paper that ends with more questions than it starts with, because the more one studies libel law, the less certain he is about its application. Still, there are six compelling points that emerge from the case law:

1) The opinion defense is in some jeopardy. If attaching statements of fact to statements of opinion removes the protection for those opinions, almost any potentially defamatory statement of opinion could come under scrutiny.

2) Reporters must be very careful in exercising the fair report privilege. Any embellishment of the facts contained in an official report, even if those facts are from reliable sources, can override the privilege. On a related note, neutral reportage is not likely to be revived any time soon, if ever. To be on the safe side, reporters should view questionable statements from public officials the same way they view those from anyone else: as facts either to be verified properly or left out of their stories.

3) It is anybody’s guess who is a public figure or public official and who isn’t. The courts are all over the place on these designations. Prudent reporters should

probably assume that most subjects are not public figures. Prudent libel plaintiffs should assume that they are.

4) A public figure/official designation does not guarantee victory for the defendant.

5) A private person designation does not guarantee victory for the plaintiff.

6) Reporters should think very carefully about what they say, if anything, on talk shows about controversial stories they're covering. The *Murphy v. Boston Herald* case could be the first of many in which the content of a show like the *O'Reilly Factor* becomes evidence in a trial.

Jose Canseco, his publisher, and possibly even some media outlets that carried interviews with him, could have faced defamation suits over his allegations, but only if the would-be plaintiffs had been confident in their abilities to prove falsity – which was obviously not the case – and clear on how their public-figure status would affect their chances of winning – which was *highly* doubtful. Students in high school civics classes are taught that libel suits are for people who have been hurt by the publication of false statements. The reality is not nearly that simple.

¹ New York Times, February 18, 2005, Section D, column 1.

² Bob Woodward & Carl Bernstein, *All the President's Men*. New York: Touchstone (1974).

³ 431 F. Supp. 254 (E.D. Pa. 1977).

⁴ *New York Times v. Sullivan*, 376 U.S. 254 (1964);

⁵ *St. Amant v. Thompson*, 390 U.S. 727, 732-33 (1968).

⁶ New York Times, February 18, 2005, Section D, column 1.

⁷ *Id.*

⁸ *Absence of Malice*, directed by Sydney Pollack, Columbia/Tri-star studios (1981).

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- ⁹ Thomas Kane, “Malice, Lies and Videotape: Revisiting *New York Times v. Sullivan* in the modern age of political campaigns.” *Rutgers Law Journal* (30), 755 (1999).
- ¹⁰ *New York Times v. Sullivan*, 376 U.S. 254 (1964).
- ¹¹ *Id.*
- ¹² David Anderson, “Is Libel Law Worth Reforming?” 140 U. PA. L. REV. (1991).
- ¹³ Roy Leeper, “Refocusing Libel Law: Gross Irresponsibility and *Naantaanbuu v. Abernathy*.” *Communications & the Law*; Vol. 20 Issue 3, p67 (1998).
- ¹⁴ Michael Klarman, “Rethinking the civil rights and civil liberties revolutions,” 82 Va. L. Rev. 1 (2002).
- ¹⁵ *Id.*
- ¹⁶ 128 F.2d 457, 458, *cert. denied*, 317 U.S. 678 (1942).
- ¹⁷ David Anderson, “Is Libel Law Worth Reforming?” 140 U. PA. L. REV. (1991).
- ¹⁸ *St. Amant v. Thompson*, 390 U.S. 727, 732-33 (1968).
- ¹⁹ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).
- ²⁰ *St. Amant v. Thompson*, 390 U.S. 727 (1968).
- ²¹ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).
- ²² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
- ²³ Richard Lubinski, *Libel and the First Amendment: Legal History and Practice in Print and Broadcasting*. New Brunswick: Transaction (1987).
- ²⁴ Roy Leeper, “Refocusing Libel Law: Gross Irresponsibility and *Naantaanbuu v. Abernathy*.” *Communications & the Law*; Vol. 20 Issue 3, p67 (1998).
- ²⁵ *Id.*
- ²⁶ Personal interviews with Kristofer Cook, reporter, *News 14 Carolina*, Charlotte, NC; Chris Wohlwend, freelance reporter, *New York Times*; Jeff Henderson, News Director, 700 *WLW* radio, Cincinnati, OH.
- ²⁷ Roy Leeper, “Refocusing Libel Law: Gross Irresponsibility and *Naantaanbuu v. Abernathy*.” *Communications & the Law*; Vol. 20 Issue 3, p67 (1998).
- ²⁸ David Anderson, “Is Libel Law Worth Reforming?” 140 U. PA. L. REV. (1991).
- ²⁹ *Id.*
- ³⁰ Evan Richman, “Deception in Political Advertising: the clash between the First Amendment and defamation law.” *Cardozo Arts and Entertainment Law Journal* (16) 667 (1998).
- ³¹ *Id.*
- ³² William Marshall, “False Campaign Speech and the First Amendment.” U. PA. L. REV vol. 153, 285 (2004).
- ³³ David Anderson, “Is Libel Law Worth Reforming?” 140 U. PA. L. REV. (1991).
- ³⁴ *Id.*
- ³⁵ Roy Leeper, “Refocusing Libel Law: Gross Irresponsibility and *Naantaanbuu v. Abernathy*.” *Communications & the Law*; Vol. 20 Issue 3, p67 (1998).
- ³⁶ *Norton v. Glenn*, 860 A.2d 48, 2004 Pa. LEXIS 2467 (Pa., 2004).
- ³⁷ *Id.*
- ³⁸ 162 F.3d 1036, 27 Med. L. Rptr. 1142 (9th Cir. 1998).
- ³⁹ *Huggins v. Moore*, 253 A.D.2d, 689 N.Y.S.2d 21, 27 Med. L. Rptr. 1691 (N.Y. App. Div. 1st Dep’t, June 22, 1999).
- ⁴⁰ *Tucker v. Phila. Daily News*, 848 A.2d 113, 2004 Pa. LEXIS 1193 (Pa., 2004).

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- ⁴¹ Condit v. Dunne, 02 Civ. 9910.
- ⁴² 19 S.W.3d 413 (TEX. 2000).
- ⁴³ Murphy v. Boston Herald Inc., Suffolk Co. Mass Superior Court, Feb. 18, 2005.
- ⁴⁴ Jeremy Cohen, Diana Mutz, Vincent Price, & Albert Gunther, “Perceived Impact of Defamation: an experiment on third-person effects.” *Public Opinion Quarterly*, vol. 52 161 (1988).
- ⁴⁵ Greg Gaitlin, “Herald vows 1st Amendment fight; Jury awards judge \$2.1M in libel case.” *The Boston Herald*, Feb. 19 (2005).
- ⁴⁶ 987 S.W. 2d 100 (Tex. App., 14th Dist. 1998).
- ⁴⁷ Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 261 (1974).
- ⁴⁸ Jackson v. Paramount Pictures Corp., 80 Cal. Rptr. 2d 1 (Cal. App.2d Dist. 1998).
- ⁴⁹ Levan v. Capital Cities/ABC Inc., 190 F.3d 1230 (11th Cir. 1999), Cert. Denied, 68 U.S.L.W. 3547 (2000).
- ⁵⁰ Id.
- ⁵¹ Gray v. St. Martin’s Press, Inc., 221 F.3d 243 (1st Cir. 2000).
- ⁵² David Anderson, “Is Libel Law Worth Reforming?” 140 U. PA. L. REV. (1991).
- ⁵³ W. Wat Hopkins, *Actual Malice: Twenty-five years after Times v. Sullivan*. New York: Praeger (1989).
- ⁵⁴ Id.
- ⁵⁵ 27 Med. L. Rptr. 1733 (N.D. Cal., Feb 22, 1999).
- ⁵⁶ 709 N.E. 2d 468 (Ohio 1999), reconsideration denied, 86 Ohio St. 3d 1421 (Ohio, 1999).
- ⁵⁷ The Hearst Corporation v. Tucker, No. 08-98-00148-CV (Tex. App., El Paso, Jun.24, 1999).
- ⁵⁸ HBO v. Harrison, 983 S.W. 2d 31 Tex. App., 14th Dist. 1998).
- ⁵⁹ Faigin v. Kelley, 1999 U.S. App. Lexis 16668 (1st Cir., Jul. 19. 1999).
- ⁶⁰ Norris v. Bangor Publ’g Co., 1999 U.S. Dist. LEXIS 8795 (D. Me., Jun 11, 1999).
- ⁶¹ Talley v. WHIO TV-7, 27 Med. L. Rptr. 1470 (Oh. Ct. App., Montgomery Cty., Nov. 6, 1998).
- ⁶² WFAA-TV Inc. v. McLemore, 978 S.W. 2d 568, 26 Med. L. Rptr. 2385 (Tex. 1998), cert denied, 119 S. Ct. 1358 (1999).
- ⁶³ Elliot Gross v. New York Times Co. et al, 96 N.Y.2d 716; 756 N.E.2d 78; 730 N.Y.S.2d 790; (2001).
- ⁶⁴ 434 US 834.
- ⁶⁵ William Marshall, “False Campaign Speech and the First Amendment.” U. PA. L. REV vol. 153, 285 (2004).
- ⁶⁶ 59 NY 2d 8, 16, cert denied 464 US 831
- ⁶⁷ D.L. Paletz. *The Media in Politics: Contents and Consequences* (2nd ed.). New York: Longman (2002).
- ⁶⁸ Id.
- ⁶⁹ Campbell v. Sinclair Broadcasting Group. Cited from wire service reports (2004).
- ⁷⁰ Batzel v. Smith, 333 F.3d 1018, 2003 U.S. App. LEXIS 12736 (9th Cir. Cal., 2003).
- ⁷¹ 528 U.S. 1118; 120 S. Ct. 939; 145 L. Ed. 2d 817; 2000 U.S. LEXIS 615; 68 U.S.L.W. 3459 (2002).
- ⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Evan Richman, “Deception in Political Advertising: the clash between the First Amendment and defamation law.” *Cardozo Arts and Entertainment Law Journal* (16) 667 (1998).

⁷⁶ William Marshall, “False Campaign Speech and the First Amendment.” U. PA. L. REV vol. 153, 285 (2004).

⁷⁷ 47 U.S.C. § 315(a) (1988).

⁷⁸ *Farmers Educ. & Coop. Union v. WDAY, Inc.* 360 U.S. 525 (1959).

⁷⁹ 893 F. Supp. 1370 (C.D. III. 1995).

⁸⁰ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749 (1985).

⁸¹ *Great Coastal Express, Inc. v. Ellington*, 334 S.E. 2d 846 (Va. 1985).

⁸² *Swengler v. ITT Corp.*, 993 F.2d 1063 (4th Cir. 1993).

⁸³ 191 A 2d. 662 (1963)

⁸⁴ Media Law Resource Center, “Trails Against the Media, 1980-2004.” PDF document From the MLRC website.