Distortion of Communication tion Technology

shed on the Internet: the Sullivan Rule

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Abstract

The United States Supreme Court has ruled on several cases concerning the publication of misinformation, either intentional or unintentional. In the leading case, *New York Times* v. Sullivan, the Court ruled that public figures can recover damages for misinformation by proving "actual malice" from the publisher. As "publication" on the Internet provides the ability to quickly and anonymously modify text, this presentation will suggest that the Court should review Sullivan in light of the new technology.

Keywords: Defamation, Anonymous defmation, Libel, Cyber-libel, Sullivan rule, Misinformation, Actual malice

Introduction

In order to sue for defamation, public officials must prove that the information was published, was about them and that the publisher was acting with "actual malice" towards their victims. Commentators have debated whether this actual malice rule, set forth in 1964 by the United States Supreme Court in *New York Times* v. Sullivan, works in favor or against the freedom of the speech and press guarantees of the First Amendment[1]. Does the actual malice rule "chill" the speech of a dissenter or propagate the number of defamation cases in the court? While both sides of this debate have valid arguments, the Internet has raised new issues and problems for public officials, thus suggesting that the time has come to revisit and revamp the Sullivan rule for the Internet Age.

The need for an updated policy was made clear in a recent episode concerning United States Senator and presidential candidate Joseph Lieberman. According to numerous e-mail and web/Internet reports, Lieberman penned an 'Open Letter to the French People,' in which he expressed his contempt for French tolerance of recent acts of anti-Semitism. The letter is highly personal and emotional, stating that the Senator "remember[s] the ecstasy, the flowers, the kisses with which the French people greeted their American and British liberators from Nazi terror," yet continues that "the French are part of the problem of world terrorism today." The open letter concludes by asking that "all Americans with integrity of character must boycott France. I hope large numbers of you will join me in this." Finally, the letter ends with the following statement: "If this e-mail is forwarded by just 1/2 of all recipients it could reach 10,000,000 Americans in a matter of days. Let's make the French remember!"

This open letter points to three important issues relating to defamation and specifically Internet-based defamation. First, the Senator never penned this letter. Second, the real author is anonymous and is hiding behind the

secrecy of cyberspace; and third, it was disseminated to tens of millions in a very short time. Senator Lieberman's office has told various news agencies that it has turned the investigation over to local authorities to determine the source of this letter; however, regardless of the outcome of the investigation, the Senator is a victim of a new type of defamation: anonymous misinformation published on the Internet.

Upon learning of the falsity of the letter, the potential damage to the Senator's reputation is obvious, and this type of activity could undermine his candidacy. Further, today the person defamed is Senator Lieberman, this begs the question: Which public official will be the victim of the next act of anonymous defamation? The Internet provides the ability to disseminate news quickly, but, as detailed above, it also permits the movement of false, misleading and malicious information with little, or no, impediment.

Under the rule first announced in *New York Times* v. Sullivan, a public figure can recover damages from a news organization for harms attributable to its reporting only by proving "actual malice." Subsequent court decisions have determined that this phrase does not mean ill will or "malice" in the ordinary sense of the term, rather "actual malice" has come to mean statements that were made with a "reckless disregard" for the truth. The Sullivan rule further differentiates between public officials (figures) and private figures. For private figures, there is no actual malice standard for libel; rather any false statement is actionable.

It has been common for those who are classified as public figures to fight back when the tabloid press has presented them in a negative and false manner. Any story that can be proven to hurt a person's reputation is actionable (e.g., Eastwood v. *National Enquirer*). However, the new perpetrator is not the large media organization, rather it is the cyber-defamer that sits in front of a monitor anywhere and creates the misinformation that will be sent across the globe in a matter of keystrokes.

This paper examines the history of the Sullivan rule and details the shift from the defendant Tabloid to defendant Corporate News Organization to defendant Internet user. As our legal system is based on the right for the victim to face his or her accuser, methods for legal remedies will be discussed. Further, the need for a stronger Sullivan rule coupled with stronger guarantees of the anonymous privacy rights of both public and private figures will be detailed.

Defamation

The laws relating to defamation are a balancing act between the Right of Free Speech and Right to the Protection of one's reputation. When the media become concerned that they will be prosecuted for publishing material that may be deemed defamatory by a public official, the media also needs to know that it can be protected. However, public officials also need to know that the press cannot take aim at them because they disagree with a policy or program. For both the press and the public official, the right to "publish" needs to be protected, otherwise the checks and balances built into our system will fail to work.

The Law of Defamation

In 1942, the Court held in Chaplinsky v. New Hampshire that statements of libel were not within the purview of the First Amendment as:

> There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words. Those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well ob-

> served that such utterances are no essential part of any expression of ideas..." (page 19)

In Chaplinsky, the Court maintained that this type of speech encompassed no essential part of any expression of ideas, any benefit to permitting this type of speech is outweighed by social interests in order and morality. Thus, for the Plaintiff to bring a successful case of libel, all that was needed is proof that the story: (1) had been published; (2) was "of and concerning" the Plaintiff, and (3) that it was defamatory. For the defendant, truth was the only absolute defense. In addition to Federal law, this rule also became the rule of law in many States. However, in 1964 the Court was given another opportunity to examine this body of law.

New York Times v. Sullivan

In March, 1960, *The New York Times* ran a full-page advertisement placed by a pro civil rights group containing language that graphically described the conditions facing the Black population and the pro civil rights workers in the South (Lewis, 1991). Later, it was discovered that there were some factual errors in the accounts described in the advertisement.[2] Sullivan, a commissioner in Montgomery, Alabama, sued *The New York Times* and others for defamation, claiming that since he supervised the Police, he had been libeled in two paragraphs of the *Times'* ad.

Even though Sullivan's name was never mentioned in the ad, the Alabama trial court ruled in favor of Sullivan stating that he "need only to prove that the statement was false and that it referred to him." The jury awarded Sullivan $500,000. This ruling was affirmed in the Court of Appeals and the Alabama Supreme Court.

The United States Supreme Court had several options for overturning both the Alabama decision in Sullivan and Chaplinsky. Some possible strategies included that (1) Sullivan was not mentioned by name in the original advertisement; (2) only actual damages could have been awarded; or (3) newspapers are simply third-party publishers, in this case merely republishing an advertisement written and paid for by another organization.

While the United States Supreme Court did reverse the Alabama decision, the Court created a new rationale for its decision. The Court noted that debate on public issues should be uninhibited, robust, and wide-open, yet some possibility of error is inevitable. The Court seemed to suggest that Chaplinsky and subsequent decisions did not protect the Press Freedoms that are necessary to bring an awareness of the adverse situation to the attention of the general public.

More importantly, the Sullivan decision set forth a new standard for issues of libel: had the defendant published the material with "actual malice?" To prove actual malice, the Plaintiff needs to have knowledge that the text that was published was false and/or that it was published with reckless disregard of whether it was false or not. The Plaintiff must prove this by clear and convincing evidence. The Sullivan test also looks to whether the text is "of and concerning," placing the burden of proof to prove falsity on the Plaintiff.

It is curious why the Court created such a high standard for this type of action. It appears that the Justices were concerned that permitting actions of libel to stand using the Chaplansky rule might deter public speech, encouraging the opposite actions of the traditional notion of free speech and robust expression. The deterrent effect of damage awards - without the need to prove pecuniary loss - is so great as to severely chill public criticism. This is the exact type of speech that is both fostered and protected under First Amendment.

From Sullivan, we can learn that First Amendment protections do not turn upon the truth, popularity, or social utility of ideas and beliefs involved. Rather, they are based upon the theory that erroneous statements are inevitable in free debate and must be protected if such freedom is to survive. Only where malice is involved should such protections cease.

Curtis Publishing v. Butts and Associated Press v. Walker

The Supreme Court stated that the same privilege to make statements about public officials exists for statements made about public figures, using these two defendants as examples. Butts, the former head football coach and present athletic director at the University of Georgia, was found to be a public figure. Walker, a retired Army Officer, had led Federal Troops during the school desegregation riots. Regarding Walker, the Court held that many individuals who do not hold public office at a particular moment are nevertheless involved in the resolution of important public questions and, by their fame, shape events in an area of concern to society at large. Moreover, as a class these public figures have a ready access as public officials to mass media of communication, both to influence and to counter criticism of their views and activities.

In Rosenbloom v. Metromedia, Inc, the Court extended the "actual malice" protection given to the media to private individuals engaged in a public matter. The Court believed that "if a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved. Ironically, this rule was quickly voided, as the Court decided to give more protection to private individuals.

With Gertz v. Robert Welch, Inc., the Court began to place limits on the defamation cause of action, finding that where a defamed person is neither a public official nor a public figure, free speech considerations are not as strong. Private individuals are more susceptible to harm than are public figures, as private figures have fewer outlets by which to correct the defamatory information. The Court retracted the rule in Rosenbloom, suggesting that involvement in a public issue, by itself, does not bring a private individual within the class covered by Sullivan. Further, the Court left the matter to the States to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual." Justice Powell stated in Gertz that for public figures, the damage award could go no further than compensation for actual injury. However, as a private figure is "more vulnerable to harm" there is a compelling reason to permit them to recover punitive damages.

Another attempt was made at defining who is a public figure and exactly what is a matter of public concern in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. Dun & Bradstreet, a publisher of financial information, mistakenly printed that the respondent had filed for bankruptcy. The jury awarded the respondent $50,000 in actual damages and $300,000 in punitive damages. The Supreme Court affirmed this judgment. The Court stated that this type of information was not a "matter of public concern," and therefore:

> there is no potential interference with a meaningful dialogue of ideas concerning self-government. While such speech is not totally unprotected by the First Amendment, its protections are less stringent. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages." (page27.)

Defamation and the Internet

Collins (2001) asserts the communication over the Internet is "characterized by the transfer of signals from computers in indeterminate locations to other computers in indeterminate locations via routes that are indeterminate." This unique feature of the Internet presents new avenues for the transmission of ideas but also new opportunities to those who wish to defame.

One example of the use of the Internet to defame occurred in August, 1997. Sidney Blumenthal was hired to serve as a Special Assistant to President Clinton. The day before he was scheduled to start this position, the following message appeared via the Internet on a web page of *The Drudge Report*, published by Matt Drudge.

> The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting Republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up.
>
> The accusations are explosive.
>
> There are court records of Blumenthal's violence against his wife, one influential Republican, who demanded anonymity, tells the DRUDGE REPORT.
>
> If they begin to use [Don] Sipple and his problems against us, against the Republican party...to show hypocrisy, Blumenthal would become fair game. Wasn't it Clinton who signed the Violence Against Women Act?
>
> One White House source, also requesting anonymity, says the Blumenthal wife-beating allegation is pure fiction that has been created by Clinton enemies. [The First Lady] would not have brought him in if he had this in his background assured the well placed staffer. This story about Blumenthal has been in circulation for years.
>
> Every attempt to reach Blumenthal proved unsuccessful.

This story appeared on web page of *The Drudge Report* (www.drudgereport.com) and as such, was available to any user of the Internet who read the site on the evening of Sunday, August 10, 1997. Further, through an agreement between Matt Drudge and American On-Line ("AOL") an Internet service provider, this information was instantly available to all AOL users. On Monday, August 11, 1997, after contact from Blumenthal's attorney, Drudge removed the story from his web page and issued a retraction. At a later date, he publicly apologized to the Plaintiffs. Blumenthal and his wife brought an action against both Drudge and AOL.

In its April 22, 1998, opinion, The District of Columbia Circuit Court wrote an extensive definition of what the Internet is and how it has changed human communication. The court noted that:

> The near instantaneous possibilities for the dissemination of information by millions of different information providers around the world to those with access to computers and thus to the Internet have created ever-increasing opportunities for the exchange of information and ideas in "cyberspace." This information revolution has also presented unprecedented challenges relating to the privacy and reputation rights of individuals,...and to competition among journalists and news organizations for instant news, rumors and other information that is communicated so quickly that it is too often unchecked and unverified. Needless to say, the legal rules that will govern this new medium are just beginning to take shape.

The Action against AOL centered on Section 230(c) of the Communication Decency Act of 1996[3] and a Motion for Summary Judgment was granted in favor of the service provider, as there was no evidence that AOL had any role in the creation of the message. Noting that this case was different from the traditional libel case, the trial court held that it did not need to decide what would have been the case had the *Washington Post* pub-

lished "Drudge's story without doing anything whatsoever to edit, verify, or even read it." Citing Zeran v. American On-line, Inc., the opinion stated that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone or alter content are barred." However, the Zeran decision continues, suggesting that section 230 does not protect the culpable party, the person who posts the defamation, from eventual litigation.

In dicta, the opinion's author, Judge Friedman, suggested that if he were writing the opinion before the statute had been enacted, he would have ruled otherwise, finding that the contractual agreement between AOL and Drudge should have imposed liability on AOL for the content of the web page.

Recently, Weber (1998) suggested that the Internet resembles Dodge City before the arrival of Wyatt Earp. With the arrival of a modern day cyber-Earp will come a history of law that deals with issues that are similar, yet different; published, yet not printed. Reder and O'Brien (2002) believe that in cyberspace, everyone is a publisher yet no one is an editor.

Thus, in order to bring law and order to the Internet, it becomes essential that Judges understand the limits of the past regulations to the current situation. The protections that are at issue in cyberlibel are the same as in traditional defamation lawsuits, since they arise from the protections granted to citizens by the First Amendment to the United States Constitution.

Weber (1998) suggests that if a person is defamed on a computer bulletin board, that person often has the ability to post a rebuttal, and as such, should be held to the Sullivan standard of "actual malice in order to recover monetary damages." The argument suggests that the ability to counter a message is similar to the ability that a public official has in attracting the media exposure required to correct an inaccurate message. Using this analysis, everyone with a computer and a modem is now a public figure, suggesting that the dual-model is no longer viable.

A new twist to the debate comes in the case of Senator Lieberman. In all the examples mentioned above, the identity of the defamer is known. For Senator Lieberman, the identity of his defamer is unknown. Thus, we are confronted with a new action of anonymous-defamation which is combination of defamation law and criminal activity and which presents the courts with new challenges. In Columbia Insurance Co. v. Seescandy.com, the Court noted that "with the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely on-line. The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information." The issue is how to combine criminal activities with freedom of speech guarantees. As Reder and O'Brien (2002) discuss, the courts need to decide whether or not they need to order the identification of Internet posters or to permit them to remain anonymous. Citing to Bates v. City of Little Rock, the court will not disclose the identity in cases where that would harm the exercise of a fundamental right, such as Freedom of Speech. However, for any suit to progress through the court system, the identity of the accused must be known, hence, there is a struggle between these two legal requirements.

In the matter of In re Subpoena Duces Tecum to America Online, Inc, the Plaintiff wanted to know who was posting "defamatory material misrepresentations and confidential information" about their firm on the Internet and sued AOL to disclose the identity in order to file suit against them. The Virginia State court noted that its ruling was "governed by a determination of whether the issuance of the subpoena ... and the potential loss of the anonymity of the John Does would constitute an unreasonable intrusion on their First Amendment rights."

The Virginia Court created a three-part test to help determine whether to disclose the information. The rule states that:

> A court should only order...[an ISP] to provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleading or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of [actionable] conduct...and (3) the subpoenaed identity information is centrally needed to advance that claim."

The court ruled against AOL, suggesting that in this case, there was a compelling state interest that outweighed the limited intrusion on the First Amendment rights of any innocent subscribers. However, as Reder and O'Brien assert, this is still an open question, as most state and no federal courts have yet determined how to deal with anonymous Internet users. Reder, et al cite to the Public Citizen Litigation Group statement that the court "must develop a test for the identification of anonymous posters which neither makes it too easy for vicious defamers to hide behind pseudonyms, nor makes it too easy for a big company to unmask its critics by the simple device of filing a complaint which manages to state a valid claim for relief under some tort or contract theory" (page 217).

The Federal Courts may have their first opportunity to confront the anonymous-defamation cases with the actions against Senator Lieberman. One can argue that the Sullivan rule no longer applies, as the actual malice standard seems redundant in a case of anonymous defamation. If, as detailed above, actual malice means a reckless disregard for the truth and a high degree of awareness of the probable falsity of the statement, then the posting of a fictitious letter would fall into the standard's purview.

Under the Sullivan rule, actual malice is defined by what the Court determines is the "not the ordinary sense of the term," in this cyber-defamation, it should be. Malice is defined by Webster (2003) as the desire to harm another or to do mischief or the state of mind shown by the intention to do, or intentional doing of something unlawful. One likely does not post anything to the Internet by accident, and the posting of a letter claiming to be written by someone other than the author falls into the traditional definition of malice. As such, the Sullivan test is unnecessary in this case.

Further, since the identity of the poster is unknown, there is not way for a retraction or correction to be made. In the Drudge case, an apology and retraction appeared on the web site. By contract, the progress through cyber-space of an e-mail letter is almost impossible to follow, and the ability to get the retraction or correction to everyone that read the initial message is, quite honestly, impossible and impractical. The damage has been done, and the remedy is inconsequential. There are web sites (ex: www.urbanlegend.com) dedicated to alerting Internet users to fraud, and a statement about the falsity of the Lieberman letter can be found on the site. However, setting up a policy for verifying all e-mail posting on such a site is not only unruly, but also unrealistic.

In 1890, an article entitled The Right to Privacy written by Samuel Warren and Louis Brandeis made the following prediction:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be left alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops.

The message remains relevant and should serve as a wake-up call again today, as the spread of misinformation on the Internet will permit defamatory information to be "proclaimed from the monitors." It is time to revise the

Sullivan standard in light of this new problem in order to insure that anonymous-defamation does not become a common form of defamation against public officials.

Endnotes

1. The First Amendment provides in relevant part that "Congress shall make no law abridging the freedom of speech or of the Press...

2. The two paragraphs are:

1. In Montgomery, Alabama, after students sang "My Country, Tis of Thee" on the State Capital 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 protected to state authority by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

2. 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 changed him with perjury - a felony under which they could imprison him for ten years..."

3. 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.

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Biography

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