We Can Fix Defamation Law While Respecting 1st Amendment

By **Victor Schwartz** (March 29, 2021)

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The law of defamation is complex and centuries-old. Its basic purpose is to protect an individual's reputation against falsehoods. I have studied this area of law for over 40 years, and for much of that time, defamation law has received comparatively little attention among tort law topics, but that appears to be changing.

Recent Wall Street Journal editorials,[1] including a March 22 editorial board piece titled "Reconsidering Times v. Sullivan,"[2] and a thought-provoking March 19 judicial opinion by U.S. Circuit Judge Laurence Silberman are poised to breathe new life into, and scrutiny of, defamation law.

In Tah v. Global Witness Publishing Inc.,[3] Judge Silberman of the U.S. Court of Appeals for the District of Columbia Circuit authored a dissenting opinion questioning the constitutional requirement that public officials and public figures prove that a defendant acted with "actual malice" in publishing a false statement.

He argued in favor of greater latitude to infer actual malice based on the circumstances of a case. Judge Silberman went further, though, openly urging the overruling of this standard on the basis it has "no relation to the text, history, or structure of the Constitution."

Judge Silberman added that he had "little regard for holdings of the [Supreme] Court that dress up policymaking in constitutional garb." He also expressed doubt that the court "would invent the same rule" in light of the "very different circumstances" surrounding media today.

These developments come on the heels of other recent criticisms of current defamation law, including U.S. Supreme Court Justice Clarence Thomas' 2019 concurrence in the denial of the certiorari petition in McKee v. Cosby.[4]

In this author's view, the law of defamation can be improved to legitimately protect the reputation of public officials and public figures, while respecting both First Amendment freedoms of speech and of the press.

From Times to Butts to Today

As many readers know, the Supreme Court in New York Times Co. v. Sullivan in 1964[5] created the current constitutional barrier under the First Amendment with respect to claims by public officials alleging they were defamed by a published libel about their performance in office. The court held that to bring a successful claim, the public official had to show the defendant (e.g., newspaper) made the false statement with actual malice, meaning the defendant either knew the statement was false or acted with reckless disregard for the truth.

It is extraordinarily hard to prove "actual malice," creating what Judge Silberman referred to as a "famously daunting" standard and what Justice Thomas referred to as an "almost impossible standard."

Nevertheless, three years after the Times case, in Curtis Publishing Co. v. Butts,[6] the court in a plurality opinion extended the Times holding to "public figures." The plurality opinion expressed the view that public figures have such an impact on public life that First Amendment freedom of speech and press protections should curb their ability to bring defamation suits.

These decisions were rendered more than 50 years ago when there were few national media outlets, the highly respected New York Times being a principal one. Open-ended defamation laws could have financially crushed the New York Times. In that regard, the court's decision to erect barriers and avoid such an outcome was understandable at the time.

Much has changed in the media dissemination of news and information in the past half-century. There are now myriad media sources and avenues to obtain information. At the same time, the tarnishing of public officials' reputations has become a game of sport for many on both ends of the political spectrum. Celebrities and other public figures fare no better with tabloid journalism and social media.

Reputations have been tarnished unfairly and those persons have struggled to overcome the high bar set by the Supreme Court in an era totally different from today. The court's jurisprudence may even chill highly qualified persons from entering public office or pursuing careers in the public spotlight where their reputations are left so vulnerable to false attacks.

Improving the Supreme Court's Outworn Defamation Jurisprudence

The Supreme Court may have taken a wrong legal turn in Times and Butts in its sincere effort to avoid a potential chilling effect on the freedom of speech and of the press. Putting defamation law on a more balanced legal path, though, is not easy because these cases have become deeply ingrained as settled law.

There are other ways to achieve the court's desired objectives of protecting First Amendment rights without effectively barring public officials and figures from bringing successful defamation actions to protect their reputation. One way would be to restructure an action to both modify the required showing and curb the amount of damages a public official or figure could recover.

Instead of requiring a showing of "actual malice" — again, an almost impossible burden of proof — First Amendment rights could be safeguarded by establishing a less-demanding negligence standard while sharply limiting damages. Both the Times and Butts cases involved large noneconomic damage awards that threatened the viability of prominent newspapers, likely prompting the court to erect such an onerous burden in the first place.

Under a negligence standard, a journalist or other entity publishing an allegedly defamatory statement would be judged on whether he or she acted in an objectively "reasonable" manner as someone in the same or similar circumstances. The public official or figure would still need to prove the statement was false and that it caused reputational harm.

Damages, however, would be limited to actual damages, namely direct monetary losses due to the defamatory statement. Other types of damages, such as emotional harm or other noneconomic damages or punitive damages, would not be allowed absent a showing of actual malice.

Achieving such a change in law through the judiciary, as Judge Silberman noted, would be "difficult." It would likely involve a long and protracted struggle. A case involving a defamed

individual seeking economic losses would have to work its way up to, and be accepted for review by, the Supreme Court, and then the court would need to be persuaded to overrule key parts of Times and Butts.

Another path is federal legislation that creates a defamation cause of action with a negligence standard allowing recovery of actual damages, and expanding the available damages where actual malice is shown. This update to the law of defamation would provide a far more appropriate fit for today's media climate.

When one makes a wrong turn, one cannot get on the right track until turning again, this time in the correct direction. It is time for the either Congress or the Supreme Court to better tailor the law of defamation to modern times and fairly protect those whose reputations are damaged with virtual impunity.

Victor E. Schwartz co-chairs the public policy group at Shook Hardy & Bacon LLP. He is the co-author of the torts casebook "Prosser, Wade & Schwartz's Torts" (14th ed. 2020).

[1] Glenn Harlan Reynolds, "How to Restore Balance to Libel Law," Wall St. J., March 24, 2021, available at https://www.wsj.com/articles/how-to-restore-balance-to-libel-law-11616603215 .

[2] Ed. Board, "Reconsidering Times v. Sullivan," Wall St. J., March 22, 2021, available at https://www.wsj.com/articles/reconsidering-times-v-sullivan-11616454219?page=1 .

[3] Tah v. Global Witness Publishing, Inc., No. 19-7132 (D.C. Cir. Mar. 19, 2021).

[4] McKee v. Cosby, 139 S. Ct. 675 (2019).

[5] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[6] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).