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## Actual Malice: Twenty-Five Years After *Times v. Sullivan*

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**ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES v. SULLIVAN*.**  
By *W. Wat Hopkins*. New York: Praeger Publishers. 1989. Pp. xi,  
215. \$39.95.

In *New York Times Co. v. Sullivan*,<sup>1</sup> the Supreme Court attempted to protect media libel defendants by formulating the actual malice rule. Under this rule, plaintiff public officials must prove knowledge of falsity or reckless disregard for the truth in order to prevail in a libel suit. As *W. Wat Hopkins*<sup>2</sup> observes, however, “[twenty-five] years after *Times v. Sullivan*, much remains unknown about actual malice” (p. x).

Hopkins’ systematic study of the actual malice rule, *Actual Malice: Twenty-Five Years After Times v. Sullivan*, attempts to discover some of what “remains unknown about actual malice” (p. x) in three main areas: (1) the history of the actual malice rule prior to *New York Times v. Sullivan* (pp. 47-89); (2) the way lower courts define and apply the rule (pp. 133-59); and (3) the question of the rule’s continued viability in modern libel law (pp. 161-91). In addition, Hopkins supplies a thorough discussion of the facts and judicial opinions in *New York Times v. Sullivan*, and a brief history of its progeny, providing necessary background for a reader unfamiliar with libel law. Hopkins’ examination of the antecedents to the actual malice rule and his study of how lower courts currently apply the rule make the strongest contributions to the existing literature. But Hopkins’ proposals to reform libel law fail to add much to similar recent proposals.

After describing the landmark *Sullivan* case (pp. 11-24), Hopkins examines the antecedents to the actual malice rule — the common law doctrines of the fifty states (pp. 47-89). Following the *Sullivan* decision, the Court received criticism for adopting the minority rule, which protected false statements of fact made in good faith (pp. 75-76). Much of the early commentary on *Sullivan*, in fact, focused on the apparent adoption of the minority rule and paid little attention to the actual malice rule itself (pp. 75-76).

However, Hopkins’ examination of the pre-*Sullivan* case law of the fifty states reveals that more states afforded some protection to false statements of fact than did not (p. 76). In fact, twenty-four states provided some protection for false statements of fact, while only fifteen states provided no protection (p. 76). (The remaining eleven states were undecided (pp. 197-98).) This surprising discovery is perhaps the most valuable contribution of *Actual Malice*. It indicates that Justice

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1. 376 U.S. 254 (1964).

2. *W. Wat Hopkins* is Assistant Professor of Communication Studies at Virginia Polytechnic Institute.

Brennan had a much stronger foundation in the common law for the actual malice rule than he indicated in the majority opinion (p. 86). With this foundation in mind, Hopkins proceeds to examine *Sullivan* itself.

Following a careful analysis of Justice Brennan's opinion in *Sullivan* (pp. 91-114) and a brief description of the Supreme Court's development of the actual malice rule over the past twenty-five years,<sup>3</sup> Hopkins summarizes his comprehensive study of how lower courts have applied the actual malice rule (pp. 133-59). A Westlaw computer search by Hopkins yielded nearly 1300 post-*Sullivan* cases where malice was mentioned in the headnotes preceding the case (p. 135). Slightly more than 400 of these cases involved a determination of whether actual malice existed (p. 135).

Hopkins' examination of those 400 cases leads him to conclude that lower courts properly apply the actual malice rule (p. 152). Although libel cases are fact-specific, making the boundaries of the actual malice rule hard to determine, Hopkins finds that courts almost uniformly follow "the guidance of the Supreme Court" (p. 152). In addition, lower courts have filled gaps in the rule with near uniformity (pp. 136-52). Hopkins' empirical findings strongly dispute the common criticism that judges misapply the actual malice rule.<sup>4</sup>

In the final chapter, Hopkins suggests some reforms for the law of libel, adding to the "score[s] of other alternatives . . . suggested by judges, attorneys, scholars, and journalists."<sup>5</sup> Both plaintiffs and media defendants have sharply criticized the actual malice rule.<sup>6</sup> Plaintiffs complain that it is nearly impossible to win a libel suit of any kind, while media defendants argue that the present system encourages frivolous suits, which cost the media large amounts of money to defend.

Public figures claim they cannot adequately protect their reputa-

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3. Pp. 115-32. For discussion of the development of libel law since *Sullivan*, see generally L. FORER, A CHILLING EFFECT 60-70 (1987); W. OVERBECK & R. PULLEN, MAJOR PRINCIPLES OF MEDIA LAW 76-122 (2d ed. 1985).

4. E.g., Brill, *Redoing Libel Law*, AM. LAW., Sept. 1984, at 1 (arguing that the actual malice rule is frequently misapplied by judges).

5. P. 7. For analyses of some of the proposed reforms, see L. FORER, *supra* note 3, at 322-35; R. SMOLLA, *SUING THE PRESS* 238-57 (1986); Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847 (1986); Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986). Statutory reform may be unnecessary; creative use of existing doctrine could solve the more common problems cited by libel plaintiffs and defendants. See, e.g., Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287 (1988).

6. For discussion of the complaints of plaintiffs and defendants, see L. FORER, *supra* note 3, at 29-30; R. SMOLLA, *supra* note 5, at 238; Barrett, *supra* note 5, at 857-58; Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789 (1986); Dienes, *Libel Reform: An Appraisal*, 23 U. MICH. J.L. REF. 1, 13 (1989); Franklin, *supra* note 5, at 809; Kaufman, *Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation*, in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* 1, 6-7 (E. Dennis & E. Noam eds. 1989); Comment, *Gertz and the Public Figure Doctrine Revisited*, 54 TUL. L. REV. 1053, 1087-89 (1980).

tion because, as plaintiffs, they must meet a nearly impossible burden of proof in order to prevail in litigation (p. 8). Public officials argue that because their reputation for integrity is important to their position, the inability to vindicate a damaged reputation impairs the functioning of government (pp. 8, 37). Most plaintiffs are unsympathetic to media criticism of the actual malice rule because plaintiffs do not vindictively desire to punish the media. A recent and prominent study of libel suits discovered that, before filing a libel suit, most plaintiffs first contact the media to request a retraction.<sup>7</sup> Most plaintiffs, then, sue to restore their reputation, not to seek money damages.

Media defendants often complain about the costs of defending a libel suit. These high costs, they argue, lead to self-censorship and, in extreme cases, to the abandonment of investigative reporting (p. 35). The root of the cost problem is the massive amount of discovery that has been allowed in libel cases since the landmark ruling in *Herbert v. Lando*<sup>8</sup> (pp. 30, 173). *Herbert* held that a libel plaintiff, in attempting to prove a reckless disregard for the truth, may inquire into the state of mind and editorial processes of the alleged defamer.<sup>9</sup> Ironically, by setting such a high burden for libel plaintiffs, the Court's protection of libel defendants has worked to the media's detriment, because the higher burden of proof raises litigation costs substantially for both parties.<sup>10</sup> Justice Black predicted this eventuality in his *Sullivan* concurrence.<sup>11</sup>

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7. P. 37 (citing R. BEZANSON, G. CRANBERG & J. SOLOSKI, *LIBEL LAW AND THE PRESS* 5 (1987)).

8. 441 U.S. 153 (1979). *Herbert v. Lando* itself provides an example of the massive amount of discovery common under the present rules. One deposition of a television news producer required 26 sessions and lasted over one year. *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977); see also W. OVERBECK & R. PULLEN, *supra* note 3, at 110; Barrett, *supra* note 5, at 857-58; Epstein, *Was New York Times v. Sullivan Wrong?*, in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS*, *supra* note 6, at 121, 143-44; Kaufman, *supra* note 6, at 8; Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 610-11 (1983); Garbus, *New Challenge to Press Freedom*, N.Y. Times, Jan. 29, 1984, § 6 (Magazine), at 34.

9. Pp. 30-31, 173; see also C. LAWHORNE, *THE SUPREME COURT AND LIBEL* 97 (1981); Case Comment, *Constitutional Law — First Amendment — Defamation Plaintiffs May Inquire into Editorial Process to Establish "Actual Malice" Under New York Times — Herbert v. Lando*, 99 S. Ct. 1635 (1979), 14 SUFFOLK U.L. REV. 31, 32-34 (1980). For general discussion of *Herbert v. Lando*, see Note, *Herbert v. Lando: The Defamation Plaintiff's Burden of Proof and His Access to the Editorial Process*, 9 CAP. U. L. REV. 97 (1979); Case Note, *Constitutional Law — Herbert v. Lando: Advancing the New York Times Co. v. Sullivan Standard Through State of Mind Discovery in the Editorial Process*, 3 GEO. MASON L. REV. 189 (1980); Note, *Constitutional Law — Self Censorship After Herbert v. Lando: The Need for Special Pre-Trial Procedure in Defamation Action*, 58 N.C. L. REV. 1025 (1980).

10. See Kaufman, *supra* note 6, at 8; Lewis, *supra* note 8, at 610.

11. 376 U.S. 254, 293 (1964) (Black, J., concurring). Justice Black warned: "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment.

In addition to prohibitive litigation costs, media defendants cite two other problems with the status quo. First, they argue that the legal system encourages lawsuits because a plaintiff can get legal representation on a contingency fee basis.<sup>12</sup> Second, defendants argue that juries misapply the actual malice rule, even in clear cases, to the benefit of plaintiffs (p. 7). Misapplication of the rule<sup>13</sup> leads to frequent appellate review and, consequently, raises the costs of litigation (p. 175). Hopkins fails to draw one fairly obvious inference from this phenomenon: many juries, feeling that the actual malice rule overprotects the press at the expense of innocent citizens' reputations, may return verdicts which nullify the law.

Hopkins correctly observes that any change in the actual malice rule must balance two major interests: (1) the protection of free expression and (2) the protection of an individual's reputation (p. 163). The critical question is whether the current system properly balances these interests and, if not, how it might do so. Hopkins first proposes that the actual malice rule should remain the rule for public officials (pp. 176-79). For other individuals, however, the rule should apply only if the defamatory material is of "public concern" (p. 176). Thus, for all plaintiffs who are not public officials, whether the actual malice rule applied would depend on the type of speech, rather than on the status of the defendant. Currently, "public figures," as well as public officials, must prove actual malice.<sup>14</sup>

Hopkins' proposal appears to make sense because the actual malice rule seeks to protect free debate on public issues (pp. 176-77). In addition, classifying a plaintiff as a public or private figure presents a court with one of the most difficult challenges in libel law.<sup>15</sup> The public figure rule, however, assumes that any information about a public figure constitutes a public issue worthy of public debate. Therefore, application of Hopkins' rule may, in substance, produce outcomes consistent with the current rule, because any statement about a public figure could be considered to be of "public concern." If the new rule produces outcomes consistent with the status quo, there is no reason

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12. P. 38. But because most plaintiffs seek a retraction before filing suit, this criticism may be predicated upon a misunderstanding of plaintiffs' motivations. True, plaintiffs can more easily afford to bring libel suits due to contingent fee arrangements. However, a typical plaintiff files a lawsuit only as a last resort. See *supra* note 7 and accompanying text.

13. It is juries who misapply the rule. Trial judges generally apply the rule correctly. See *supra* text accompanying note 4. Therefore, although summary judgment motions and jury instructions usually reflect correct applications of the actual malice rule, jury verdicts may not. Correct application of the rule by appellate courts, however, checks the mistakes of juries.

14. For a general discussion of the public figure doctrine, see C. LAWHORNE, *supra* note 9, at 47-57; R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 12-15 (1980); B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION 189-284 (1985); Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709 (1978); Comment, *supra* note 6.

15. See Skene, *Expensive Speech* (Book Review), 14 FLA. ST. U. L. REV. 993, 999 (1987).

to change the current rule. In addition, it is not clear that a court can identify matters of public concern any better than it can determine a plaintiff's public or private figure status. Instead of offering any basis upon which courts could make this determination, Hopkins essentially admits this difficulty: "Exactly what 'matters of public concern' are is beyond the scope of this study" (p. 179). Thus, Hopkins fails to justify shifting the focus from the status of the defendant to the subject matter of the allegedly defamatory material.

Hopkins also proposes a right-of-reply statute (pp. 182-86). This proposal resembles one originally made by Marc Franklin.<sup>16</sup> Under Hopkins' version, the potential plaintiff must submit evidence of falsity to the publisher and be refused a reply before initiating a libel action (p. 184). If the parties cannot agree on a satisfactory reply, then a libel suit may be filed. At trial, however, the plaintiff may only introduce the same evidence of falsity previously presented to the publisher at the right-of-reply stage (p. 185). In every case, the loser pays all legal fees (p. 185). Finally, if the press loses the suit, it may avoid paying actual damages by publishing the reply after the trial (p. 185).

Hopkins does not adequately explain how this proposal improves the present system. The problems created by the actual malice rule do not necessarily require a statutory solution. In fact, the parties may essentially attain Hopkins' right-of-reply system under the present law.<sup>17</sup> Because most libel plaintiffs seek a retraction before filing suit,<sup>18</sup> the press already has an opportunity to avoid most libel suits by negotiating with potential plaintiffs. Because a statute may needlessly constrain the outcomes possible under such negotiation, there is no reason to abandon the current rule.<sup>19</sup> The present system, under which the press publishes a retraction on its own terms, should seem less intrusive to the press than negotiated *replies* under Hopkins' proposed statute. Moreover, Hopkins fails to explain why a statute would cause the press to publish replies when it can already avoid most suits by the less intrusive mechanism of retractions. One possible explanation is that, under the proposed statute, a reply would preempt the suit entirely. However, the parties can negotiate to avoid suit under the present system.<sup>20</sup> Thus, the press currently inflicts most of the eco-

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16. Pp. 181, 184-85. For Franklin's original proposal, see Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983). See also Barrett, *supra* note 5; Franklin, *supra* note 5.

17. See Leval, *supra* note 5, at 1298-301.

18. P. 37; see *supra* note 7 and accompanying text.

19. It would be misleading to argue that there will be fewer libel suits if all plaintiffs are forced to negotiate. It is the media *defendants* who refuse to negotiate, not plaintiffs. Moreover, Hopkins' statute only requires negotiation, not settlement. Those plaintiffs who failed to seek a retraction before the passage of Hopkins' statute would merely refuse to settle under the statute. The statute, therefore, is unlikely to change the behavior of plaintiffs.

20. See Leval, *supra* note 5, at 1298-301.

nomic damage on itself by stubbornly refusing to negotiate before suit is filed.<sup>21</sup> Hopkins may be admitting as much when he suggests that until such a statute is adopted, an ombudsman should negotiate with potential plaintiffs and respond to their complaints (p. 186). Overall, Hopkins fails to demonstrate that the goals of his proposal require a statute, and that such a statute would change the litigious environment at all, inasmuch as media defendants are unlikely to print retractions.

Moreover, Hopkins' proposal treats plaintiffs unfairly. Hopkins admits that one valid criticism of the current system is that it inadequately protects the reputations of defamed individuals (p. 8). Hopkins' proposed statute makes it even more difficult for a plaintiff to protect her reputation. Awarding attorney fees to the winner of the suit discourages the very thing the statute was designed to encourage — publishing a retraction. If the press knows that it is likely to prevail ultimately on the merits in a lawsuit,<sup>22</sup> it will avoid publishing retractions to send a message to future plaintiffs. By such action the media defendant warns future plaintiffs it will litigate and win, and losing plaintiffs will pay large legal fees. Only the richest of public figures could afford to pay attorney fees when they lose a libel suit. Hopkins' proposal not only provides a further weapon to the press — the threat of large economic losses for trying to vindicate one's damaged reputation — it also takes away the very factor (the threat of large litigation costs) which might encourage the press to negotiate before litigation in the first place.

Hopkins' statute imposes further inequities on plaintiffs. First, plaintiffs cannot use discovery to prove the falsity of information; they must present their entire case to the defendant before filing suit. This

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21. See L. FORER, *supra* note 3, at 33 (many criticisms of the media's arrogance are justified). Professors Bezanson, Cranberg, and Soloski found that

[n]early all of the plaintiffs [in the empirical study] said that they were angered or dissatisfied by their contact with the media. Especially noteworthy is the vehemence with which the plaintiffs described their reaction to their post-publication contact with the media. . . . Most of the plaintiffs told us that it was more than the rejection of their requests for a retraction, correction, or apology that angered them; it was the way they were treated by the media.

Bezanson, Cranberg & Soloski, *The Economics of Libel: An Empirical Assessment*, in THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS, *supra* note 6, at 22, 26. Bezanson, Cranberg, and Soloski also note that the media admits that they are rude, arrogant, and do not handle complaints well. *Id.* at 26-30; see also Nadel, *Refining the Doctrine of New York Times v. Sullivan*, in THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS, *supra* note 6, at 157 (the press deals unsympathetically, if not arrogantly, with potential plaintiffs). But see R. ADLER, RECKLESS DISREGARD 15 (1986) (arguing that the media refuses to settle to protect journalistic freedom and integrity). For a refutation of the latter position, see Nadel, *supra*, at 160 (refusing to settle to protect journalistic freedom and integrity "seems to be mere rationalization").

22. Hopkins would retain the actual malice standard for suits involving matters of public concern. Media defendants would therefore continue to prevail in high percentages. See, e.g., Kaufman, *supra* note 6, at 6-7. Moreover, we should keep in mind that most verdicts against the media are overturned on appeal. The media's complaint is with the cost of the litigation, not with their rate of success.

provides an additional advantage to the defendant, who knows exactly what evidence will be used at trial; the plaintiff does not know what the defendant will use to refute this evidence. Second, the proposal discourages prelitigation retractions because the press may avoid paying damages by printing a posttrial retraction. Because the defendant already has such a high chance of winning a libel suit (about ninety percent<sup>23</sup>), adding the ability to avoid paying damages when it loses will encourage the press to avoid settlements.

Ultimately, Hopkins' proposal does not make much sense. His goals can be accomplished under the present system, and his proposed statute may operate contrary to those goals. Furthermore, the statute provides additional protection for the press and unfairly punishes plaintiffs. Instead of adopting Hopkins' proposal, we should maintain the present system. The solution to the burden of libel litigation on the press is readily available: media defendants may avoid suit by negotiating with potential plaintiffs. Instead of providing more rules for litigation, the present system's disincentives to litigation should no longer be ignored.

— David G. Wille

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23. R. BEZANSON, G. CRANBERG & J. SOLOSKI, *supra* note 7, at 243; Dienes, *supra* note 6, at 13.