

**PRIVACY (AND OTHER CAUSES OF  
ACTION) AGAINST DISINFORMATION  
AND DEEPPAKES**

*Russell L. Weaver\**

INTRODUCTION.....	574
I. CAUSES OF ACTION FOR DEFAMATION, PRIVACY AND INTENTIONAL INFLICTION OF MENTAL & EMOTIONAL DISTRESS .....	576
<i>A. Invasion of Privacy</i> .....	576
<i>B. The Tort of Defamation</i> .....	578
II. DEVELOPMENT OF THE <i>NEW YORK TIMES</i> ' ACTUAL MALICE STANDARD.....	580
III. EXTENSION OF THE ACTUAL MALICE STANDARD TO INVASION OF PRIVACY AND INTENTIONAL INFLICTION CASES.....	585
IV. THE ACTUAL MALICE STANDARD'S IMPACT ON LITIGATION .....	590
V. DEFAMATION LITIGATION TODAY: A SHIFTING LANDSCAPE? .....	594
CONCLUSION .....	598

---

\* Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law. Professor Weaver wishes to thank the University of Louisville's Distinguished University Scholar program for its ongoing support for his research.

## INTRODUCTION

The internet has fundamentally altered the nature of communication.<sup>1</sup> Prior to the internet, there were lots of mass communications technologies, including the printing press,<sup>2</sup> telegraph,<sup>3</sup> radio,<sup>4</sup> television,<sup>5</sup> cable,<sup>6</sup> and satellites.<sup>7</sup> However, these technologies were not easily accessible by ordinary people because they were owned and controlled by “gatekeepers,” -- individuals or corporations who had the power to control the use of those technologies.<sup>8</sup> The internet, coupled with the development of personal computers, smart phones and social media platforms, has transformed communication because it has enabled ordinary people to easily communicate with each other regarding the issues of the day.<sup>9</sup> However, the internet and social media platforms have also created the potential for mischief.<sup>10</sup> Not only can ordinary people use the new technologies to try to influence society and government,<sup>11</sup> but they can also use them to disseminate disinformation<sup>12</sup> and deepfakes.<sup>13</sup> “The explosion of artificial-intelligence technology makes it easier than ever” to create deceptive content, including deepfakes.<sup>14</sup>

---

<sup>1</sup> See RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY (forthcoming Mar. 2025).

<sup>2</sup> See *id.* at xii-xiii.

<sup>3</sup> See *id.* at xiv.

<sup>4</sup> See *id.* at xv-xvi.

<sup>5</sup> See *id.* at xvi-xvii.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 3.

<sup>9</sup> See *id.* at 37.

<sup>10</sup> See *id.* at 73-74.

<sup>11</sup> See *id.* at 73-74, 85.

<sup>12</sup> See generally Fernando Nuñez, *Disinformation Legislation and Freedom of Expression*, 10 U.C. IRVINE L. REV. 783 (2020).

<sup>13</sup> See Bradley Waldstreicher, *Deeply Fake, Deeply Disturbing, Deeply Constitutional: Why the First Amendment Likely Protects the Creation of Pornographic Deepfakes*, 42 CARDOZO L. REV. 729 (2021). Deepfakes often involve videos that have been manipulated with sophisticated software. See Cade Metz, *Internet Companies Prepare to Fight the ‘Deepfake’ Future*, N.Y. TIMES (Nov. 24, 2019), <https://www.nytimes.com/2019/11/24/technology/tech-companies-deepfakes.html> [<https://perma.cc/NA2Y-46SJ>].

<sup>14</sup> See Robert McMillan et al., *New Era of AI Deepfakes Complicates 2024 Elections*, WALL ST. J., <https://www.wsj.com/tech/ai/new-era-of-ai-deepfakes-complicates-2024->

There is lots of disinformation on the internet. Examples include Alex Jones, the founder of Infowars,<sup>15</sup> who claimed that the Sandy Hook massacre of school children was a hoax.<sup>15</sup> There was also an allegation that former presidential candidate Hillary Clinton was running a child sex ring out of a pizzeria,<sup>16</sup> and an allegation that the Pope had endorsed Donald Trump.<sup>17</sup> Deepfakes have also proliferated. During the New Hampshire Democratic primary in 2024, a “deepfake” phone call used the voice of President Joe Biden to discourage voters from casting ballots in the primary election by telling them that it was important to vote in November but not in the primary.<sup>18</sup> Someone released a deepfake of then-Speaker of the House Nancy Pelosi which made her appear to be inebriated and slurring her words.<sup>19</sup> Likewise, a deepfake of Taylor Swift made her appear to be engaging in pornographic acts.<sup>20</sup>

Unquestionably, disinformation and deepfakes can impact privacy and reputational interests, but is there an effective judicial remedy for these harms? This article examines the possibility of recovering for disinformation or deepfakes against the original creator under any one of three different theories: invasion of

---

elections-aa529b9e [https://perma.cc/9PSN-FEJT] (last updated Feb. 15, 2024, 12:31 PM).

<sup>15</sup> See Elizabeth Williamson & Emily Steel, *Sandy Hook Families Are Fighting Alex Jones and the Bankruptcy System Itself*, N.Y. TIMES (Mar. 18, 2023), <https://www.nytimes.com/2023/03/18/us/politics/alex-jones-bankruptcy.html> [https://perma.cc/A3FZ-7CQ8].

<sup>16</sup> See Jennifer Ludden, *Armed Man Threatens D.C. Pizzeria Targeted by Fake News Stories*, NPR, (Dec. 5, 2016, 4:37 PM), <https://www.npr.org/2016/12/05/504467162/armed-man-threatens-d-c-pizzeria-targeted-by-fake-news-stories> [https://perma.cc/AK6T-BE7Q].

<sup>17</sup> See Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 674 (2017); Jessica Stone-Erdman, *Just the (Alternative) Facts, Ma'am: The Status of Fake News Under the First Amendment*, 16 FIRST AMEND. L. REV. 410, 410 (2017).

<sup>18</sup> See McMillan et al., *supra* note 14.

<sup>19</sup> See Tiffany Hsu, *Worries Grow that Tik-Tok is New Home for Manipulated Video and Photos*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/technology/tiktok-deepfakes-disinformation.html> [https://perma.cc/N2AD-RQGJ].

<sup>20</sup> See Kate Conger & John Yoon, *Explicit Deepfake Images of Taylor Swift Elude Safeguards and Swamp Social Media*, N.Y. TIMES (Jan. 26, 2024), <https://www.nytimes.com/2024/01/26/arts/music/taylor-swift-ai-fake-images.html> [https://perma.cc/V8DC-TQ6R]. Some commentators believe that the Swift images were created on 4chan as part of a challenge to see if A.I. safeguards could be evaded. See Tiffany Hsu, *A.I. Images of Swift Rose From 4chan*, N.Y. TIMES, Feb. 7, 2024, at B1.

privacy, defamation, and intentional infliction of mental and emotional distress. Of course, other parties may have potential liability. Social media platforms, where disinformation or deepfakes are often published, are probably protected by Section 230 of the Communications Decency Act.<sup>21</sup> Those who relay disinformation or deepfakes may have potential liability as publishers. However, because of space limitations, the focus of this article is on the original creator.

The article also examines the U.S. Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*,<sup>22</sup> which constitutionalized defamation law and imposed the so-called "actual malice" standard, thereby making it difficult for individuals to recover in suits for defamation.<sup>23</sup> Since the actual malice standard has also been applied to suits for invasion of privacy and intentional infliction of mental and emotional distress,<sup>24</sup> it poses a potential barrier to recovery in cases involving disinformation and deepfakes.

## I. CAUSES OF ACTION FOR DEFAMATION, PRIVACY AND INTENTIONAL INFLICTION OF MENTAL & EMOTIONAL DISTRESS

Although the actions for invasion of privacy, defamation, and intentional infliction of mental and emotional distress are all theoretically available in cases involving disinformation or deepfakes, they are designed to protect very different interests, and each comes with its own limitations.

### A. *Invasion of Privacy*

The tort of invasion of privacy is a relatively new tort. In the U.S., its roots can be traced to a seminal law review article written by Samuel D. Warren and Justice Louis D. Brandeis in 1890.<sup>25</sup> In that article, they express concern regarding the media's probing

---

<sup>21</sup> See 47 U.S.C. § 230.

<sup>22</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>23</sup> See RUSSELL L. WEAVER ET AL., *THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH* 183-200 (Carolina Acad. Press eds., 2006)<sup>supra</sup>.

<sup>24</sup> See, e.g., *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>25</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

into “the sacred precincts of private and domestic” lives and worry that the media’s editorial practices overstep the boundaries of decency and propriety.<sup>26</sup>

Following the Brandeis and Warren article, Professor William Prosser sought to establish the parameters of a new tort of invasion of privacy.<sup>27</sup> His article influenced the drafters of the Restatement<sup>28</sup> and led to the development of a tort action which applies in a variety of context, for example when (1) a defendant appropriates, for his own advantage, plaintiff’s name or likeness; (2) a defendant intrudes on plaintiff’s seclusion, solitude, or ‘private affairs; (3) a defendant discloses embarrassing private facts about the plaintiff; and (4) a defendant publishes information about the plaintiff which casts plaintiff in a false light in the public eye.<sup>29</sup>

The tort of invasion of privacy might be used in a couple of different ways when disinformation or deepfakes are involved. For example, if a defendant appropriates a plaintiff’s name or likeness for his own benefit, falsely suggesting that plaintiff endorses defendant’s product or business, a plaintiff might be able to recover for the misappropriation. Likewise, if disinformation or deepfakes place plaintiff in a “false light” in the public eye. such as suggesting Nancy Pelosi was drunk when she was not or suggesting Taylor Swift engaged in bawdy escapades, a plaintiff subject to such disinformation or deepfakes might be able to recover on a false light theory.

However, two caveats are in order. At least one U.S. court has required a plaintiff to sue for defamation rather than invasion of privacy when the case was actionable in defamation.<sup>30</sup> In a jurisdiction that takes such an approach, the defamation and invasion of privacy actions effectively merge into a single cause of action. The other caveat is that the tort may be subject to a heightened burden of proof if the plaintiff is a public official or public figure<sup>31</sup> or the case implicates a matter of public interest.<sup>32</sup>

---

<sup>26</sup> *Id.* at 195-96.

<sup>27</sup> See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>28</sup> RESTATEMENT (SECOND) OF TORTS §§ 652A–652E.

<sup>29</sup> See RUSSELL L. WEAVER ET AL., *MASTERING TORT LAW* 284 (Carolina Acad. Press eds., 3rd ed. 2022)<sup>47</sup>.

<sup>30</sup> See *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994).

<sup>31</sup> See *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967).

<sup>32</sup> See *Snyder v. Phelps*, 563 U.S. 443, 452 (2011).

In other words, the “actual malice” standard used in defamation cases might apply.<sup>33</sup>

### *B. The Tort of Defamation*

The tort of defamation has a long history in the English common law and in American jurisprudence.<sup>34</sup> The tort was designed to protect the plaintiff’s reputational interests.<sup>35</sup> Thus, a plaintiff could seek recovery when a defendant’s statement(s) lowered the plaintiff’s standing in the community; affected the plaintiff’s esteem, respect, goodwill, or confidence; or incited “adverse, derogatory, or unpleasant feelings against the plaintiff.”<sup>36</sup>

Historically, to prevail in a defamation action, a plaintiff was required to prove four elements: (1) that a false and defamatory statement was made; (2) that the statement was made of and regarding the plaintiff; (3) that the statement was published to others; and (4) that the plaintiff suffered injury as a result.<sup>37</sup>

A distinction was made between “slander” and “libel.”<sup>38</sup> Slander involved oral statements, whereas libel involved written statements, signs, or pictures.<sup>39</sup> Generally, while slander actions required proof of injury, libel was actionable without a specific proof of loss because damage to the plaintiff’s reputation was presumed.<sup>40</sup>

The common law also distinguished between ordinary slander and “slander *per se*.”<sup>41</sup> Slander *per se* was committed when the defendant suggested any of four things: “that the plaintiff committed a criminal offense, suffered from a loathsome or venereal disease, engaged in conduct incompatible with his or her profession, or (in the case of a woman) had been unchaste.”<sup>42</sup> Slander *per se* was also actionable without proof of damage.<sup>43</sup>

---

<sup>33</sup> See *Time, Inc.*, 385 U.S. at 387.

<sup>34</sup> See WEAVER ET AL., *supra* note 23, at 17-34.

<sup>35</sup> See WEAVER ET AL., *supra* note 29, at 269.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 270.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 271.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

For the purposes of this article, it is unnecessary to review all of the ins and outs of the tort of defamation. However, it is important to emphasize that although “truth” has always been a defense to a defamation action, the common law placed the burden of proving truth on the defendant.<sup>44</sup> In other words, if the jury could not decide whether an allegedly defamatory statement was true or false, the law allowed the plaintiff to recover damages.<sup>45</sup> Thus, to the extent that there was a clash between the plaintiff’s individual reputation interests and the societal interests in speaking freely, “the common law cut the balance decisively in favor of the [plaintiff’s] reputation.”<sup>46</sup>

The tort of intentional infliction of mental and emotional distress does not have the same common law pedigree as the tort of defamation.<sup>47</sup> On the contrary, it was first recognized in the middle of the twentieth century.<sup>48</sup> The tort has three elements: (1) the defendant intentionally or recklessly caused emotional distress; (2) the conduct was “outrageous;” and (3) the defendant’s conduct caused severe emotional distress to the plaintiff.<sup>49</sup>

Disinformation and deepfakes can also be actionable under this tort because the dissemination of disinformation or deepfakes may cause the plaintiff to suffer severe mental and emotion distress. Suppose, for example, that the “disinformation” suggests that the plaintiff engaged in criminal or immoral conduct, or consider the deepfake of Taylor Swift depicting her engaging in pornographic conduct. However, as with the torts of privacy and defamation, there is a constitutional overlay because the actual malice standard comes into play.<sup>50</sup> Thus, we turn to an examination of that standard.

---

<sup>44</sup> See *WEAVER ET AL.*, *supra* note 29, at 274.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 22.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See generally* *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

## II. DEVELOPMENT OF THE *NEW YORK TIMES*' ACTUAL MALICE STANDARD

Until relatively recently, defamatory statements received no special protection under the First Amendment to the U.S. Constitution. In dicta, the U.S. Supreme Court's decision in *Chaplinsky v. New Hampshire* rejected the idea that defamatory speech was entitled to special constitutional protection.<sup>51</sup> While the Court acknowledged that, "freedom of speech and freedom of the press . . . are among the fundamental personal rights and liberties which are protected by [the First Amendment, through] the Fourteenth Amendment,"<sup>52</sup> the Court made clear that "the right of free speech is not absolute at all times and under all circumstances."<sup>53</sup> Indeed, the Court recognized that 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 problem."<sup>54</sup> The Court viewed defamatory speech as one of the unprotected categories, declaring that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>55</sup>

In 1952, in *Beauharnais v. Illinois*, the Court reaffirmed the *Chaplinsky* dicta in upholding an Illinois criminal statute that prohibited anyone from publishing, presenting, or exhibiting in any public place a publication that:

"portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."<sup>56</sup>

When *Beauharnais* was prosecuted for distributing a petition to the Mayor of Chicago and the city council that was regarded as

---

<sup>51</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

<sup>52</sup> *Id.* at 570 (quoting *Lovell v. Griffin*, 303 U.S. 444, 450 (1938)).

<sup>53</sup> *Id.* at 571.

<sup>54</sup> *Id.* at 571-72.

<sup>55</sup> *Id.* at 572.

<sup>56</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 251 n.7 (1952).

disparaging African-Americans, he was criminally prosecuted.<sup>57</sup> The Court upheld the law, rejecting Beauharnais' free speech claim, and concluding that the statute involved a form of "group libel."<sup>58</sup> The Court reaffirmed the idea that defamatory speech is not protected under the First Amendment.<sup>59</sup>

However, *Beauharnais* would not stand the test of time as the Court's landmark decision in *New York Times* eventually constitutionalized defamation law.<sup>60</sup> That case involved an advertisement printed in the *New York Times* entitled "Heed Their Rising Voices,"<sup>61</sup> which declared that, "as the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights."<sup>62</sup> It went on to allege that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom."<sup>63</sup> The advertisement then referred to a "wave of terror" by reciting certain alleged events.<sup>64</sup> The text concluded with an appeal for donations to "support the student movement, "the struggle for the right-to-vote," and the "legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery."<sup>65</sup> The advertisement was endorsed by sixty four individuals, many of whom were "widely known for their activities in public affairs, religion, trade unions, and the performing arts."<sup>66</sup> The advertisement then listed the names of those individuals, asserting that "we in the south who are struggling daily for dignity and freedom warmly endorse this appeal."<sup>67</sup> Included were the

---

<sup>57</sup> *Id.* at 252.

<sup>58</sup> *Id.* at 258.

<sup>59</sup> *Id.* at 255-57.

<sup>60</sup> See Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1153 (1993).

<sup>61</sup> *Sullivan*, 376 U.S. at 256.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

signatures of the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South,” and the Committee’s officers were listed.<sup>68</sup>

The case was tried under rules which tracked English common law defamation principles which were very pro-plaintiff.<sup>69</sup> For example, while Alabama provided for the defense of truth, it placed the burden of proving truth on the defendant.<sup>70</sup> If the defendant failed to satisfy that burden, or if the jury simply could not decide whether the allegation was true or false, the jury was required to render judgment in favor of the plaintiff.<sup>71</sup> Since the case involved libel, plaintiff was not required to provide proof of injury.<sup>72</sup> Finally, since the allegation was regarded as libelous *per se*, because it libeled plaintiff in his business or profession, proof of pecuniary loss was not required and damages could be presumed.<sup>73</sup> The jury rendered judgment in favor of Sullivan for \$500,000.<sup>74</sup>

In reversing the decision, the Court emphasized the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” and recognized that such debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>75</sup> Since the Court viewed freedom of discussion as critical to the effective functioning of the political process,<sup>76</sup> it constitutionalized

---

<sup>68</sup> *Id.*

<sup>69</sup> See WEAVER ET AL., *supra* note 23, at 17-18 (noting that “defamation liability could be imposed based on strict liability” and “courts presumed damages for libel”).

<sup>70</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

<sup>71</sup> *Id.* at 267.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 262.

<sup>74</sup> *Id.* at 256.

<sup>75</sup> *Id.* at 270.

<sup>76</sup> *Id.* at 269-270:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484. “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Stromberg v. California*, 283 U.S. 359, 369. “[I]t is

the law of defamation, rejecting *Chaplinsky* and *Beauharnais*'s conclusions that the First Amendment provides no protection for defamatory speech.<sup>77</sup> Since the Court believed erroneous statements are inevitable in free debate, it held that the First Amendment requires some "breathing space" for error.<sup>78</sup> In order to create that breathing space, the Court altered the burden of proof.<sup>79</sup> Under the English common law, as previously noted, the defendant was saddled with the burden of proof on the defense of truth, and the Court applied a preponderance of evidence standard.<sup>80</sup> The *New York Times* decision shifted the burden of proof to the defendant in defamation cases brought by public officials and elevated the standard from a preponderance standard to the actual malice standard, meaning plaintiff must prove defendant knew that the defamatory statement was false or acted in reckless disregard for truth or falsity.<sup>81</sup>

---

a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U.S. 252, 270, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N.A.A.C.P. v. Button*, 371 U.S. 415, 429. The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943).

<sup>77</sup> *Id.* at 265:

We may dispose at the outset of . . . the proposition relied on by the State Supreme Court—that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g., Alabama Code, Tit. 7, ss 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See *Ex parte Virginia*, 100 U.S. 339, 346-347; *American Federation of Labor v. Swing*, 312 U.S. 321.

<sup>78</sup> *Id.* at 271-272.

<sup>79</sup> *Id.* at 278.

<sup>80</sup> RUSSELL L. WEAVER ET AL., *supra* note 29, at 274.

<sup>81</sup> *New York Times Co.*, 376 U.S. at 279-80.

The *New York Times* decision was generally met with applause. After the decision was rendered, Alexander Meiklejohn declared the decision was “an occasion for dancing in the streets.”<sup>82</sup> Columnist Anthony Lewis in a law review article published some years later, referred to the decision as “thrilling.”<sup>83</sup>

Following the *New York Times* decision, the Court made further defamation distinctions, continuing to focus on the status of the plaintiff. For example, in *Curtis Publishing Co. v. Butts*<sup>84</sup> and *Associated Press v. Walker*,<sup>85</sup> the Court held that like public officials, “public figures” should be required to prove actual malice to recover for defamation. In *Gertz v. Welch*,<sup>86</sup> the Court held that a lower standard of proof should apply to private individuals even if they are involved in matters of public interest. *Gertz* involved a lawyer who was working on a high-profile case that potentially implicated the public interest.<sup>87</sup> In the Court’s view, public officials and public figures should be treated differently than private individuals because they either seek public attention or hold elected office, which means they voluntarily open themselves up to an increased risk of injury.<sup>88</sup> In addition, the Court emphasized that the first line of recourse against defamatory statements is “self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.”<sup>89</sup> Public officials and public figures “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”<sup>90</sup> In addition, the Court held that private individuals are “more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”<sup>91</sup> By contrast, a private citizen

---

<sup>82</sup> Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (1964).

<sup>83</sup> Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment,”* 83 COLUM. L. REV. 603, 625 (1983).

<sup>84</sup> 388 U.S. 130 (1967).

<sup>85</sup> *Id.*

<sup>86</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974).

<sup>87</sup> *Id.* at 325-26.

<sup>88</sup> *Id.* at 344-45.

<sup>89</sup> *Id.* at 344.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

has not relinquished “his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.”<sup>92</sup>

As a result, the Court held that as long as the states “do not impose liability without fault,” they have latitude to define the standard of liability for compensating private individuals for actual injury to their reputations.<sup>93</sup> However, they cannot impose presumed or punitive damages absent “a showing of knowledge of falsity or reckless disregard for the truth.”<sup>94</sup>

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>95</sup> a plurality of justices held that even lower standards should apply to defamation actions brought by private individuals involved in matters of purely private interest. In such cases, a plaintiff may recover presumed or punitive damages even without a showing of actual malice.<sup>96</sup>

### III. EXTENSION OF THE ACTUAL MALICE STANDARD TO INVASION OF PRIVACY AND INTENTIONAL INFLICTION CASES

The *New York Times* actual malice standard was subsequently extended to cases involving invasion of privacy. *Time, Inc. v. Hill*<sup>97</sup> involved a false light privacy case. The case involved a family who was held hostage by escaped convicts, and the article suggested that the family had acted heroically despite a brutal and desperate situation.<sup>98</sup> In fact, the convicts had treated the family with courtesy and respect.<sup>99</sup> The article detailed a play about a hostage situation which was depicted as a heart-stopping thriller, and the article stated that it was based on plaintiff's incident.<sup>100</sup> Plaintiff, one of the victims, sued claiming that Time Magazine depicted him in a false light, and a jury awarded plaintiff a judgment of \$50,000 in compensatory damages and \$25,000 in punitive damages.<sup>101</sup>

---

<sup>92</sup> *Id.* at 345.

<sup>93</sup> *Id.* at 347.

<sup>94</sup> *Id.* at 349.

<sup>95</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

<sup>96</sup> *Id.* at 763.

<sup>97</sup> *See generally* *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>98</sup> *Id.* at 377.

<sup>99</sup> *Id.* at 378.

<sup>100</sup> *Id.* at 377.

<sup>101</sup> *Id.* at 378-79.

However, the U.S. Supreme Court held that defendant could not be held liable absent compliance with the actual malice standard.<sup>102</sup> Finding no actual malice, the Court reversed the judgment.<sup>103</sup>

The actual malice standard was extended to intentional infliction cases in *Hustler Magazine, Inc. v. Falwell*.<sup>104</sup> That case involved Hustler Magazine, a pornographic publication, which published a parody of Jerry Falwell, a minister and a commentator on politics and political affairs.<sup>105</sup> The parody played off an advertisement by Campari Liqueur in which famous people talked about their “first times.”<sup>106</sup> The advertisements involved a double entendre in which famous people talked about the first time they drank Campari, and also referred to the first time that they had sex.<sup>107</sup> The Falwell parody suggested that the first time he drank Campari, and the first time that he had sex, was during a drunken incestuous affair with his mother in an outhouse.<sup>108</sup> The advertisement contained a disclaimer, “ad parody – not to be taken seriously[.]” and the magazine’s table of contents listed the ad as “Fiction; Ad and Personality Parody.”<sup>109</sup> Outraged by the content of the parody, Falwell sued Hustler for invasion of privacy and for intentional infliction of mental and emotional distress seeking compensatory and punitive damages.<sup>110</sup> The jury awarded Falwell \$100,000 in compensatory damages and \$50,000 in punitive damages.<sup>111</sup>

The case was appealed to the U.S. Supreme Court, where Falwell argued that he was entitled to recover because the parody was “patently offensive” and was “intended to inflict emotional injury” even though it “could not reasonably have been interpreted as stating actual facts” about him.<sup>112</sup> The Court disagreed, emphasizing that at “the heart of the First Amendment is the

---

<sup>102</sup> *Id.* at 390.

<sup>103</sup> *Id.* at 398.

<sup>104</sup> See generally *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

<sup>105</sup> *Id.* at 47-48.

<sup>106</sup> *Id.* at 48.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 48-49.

<sup>111</sup> *Id.* at 49.

<sup>112</sup> *Id.* at 50.

recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”<sup>113</sup> The Court also noted that the “robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are ‘intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.’”<sup>114</sup> As a result, the Court held that Falwell could not recover unless he satisfied the actual malice standard.<sup>115</sup>

The Court rejected Falwell’s argument that a different standard should apply because the parody was “outrageous” and imposed severe mental and emotional distress on him.<sup>116</sup> Analogizing to political cartoons, the Court refused to impose liability simply because the defendant was motivated by spite or ill will.<sup>117</sup> Indeed, the “appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events – an exploitation often calculated to injure the feelings of the subject of the portrayal.”<sup>118</sup> Further, “the political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters.”<sup>119</sup> Thus, Falwell could not recover unless he could establish that *Hustler Magazine* was motivated by “actual malice” as established in *New York Times*, which was impossible since *Hustler Magazine* had made clear that the fake advertisement was nothing more than satire.

Presumably, as it did in defamation cases, the Court would distinguish between different categories of individuals in intentional infliction cases. Since the Court applied the actual malice standard to a public figure (Falwell) in *Hustler*, one can reasonably assume that it will also be applied to public officials. In

---

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 51 (quoting *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C. J., concurring in result)).

<sup>115</sup> *Id.* at 56.

<sup>116</sup> *Id.* at 55.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 54.

<sup>119</sup> *Id.* (quoting LONG, *THE POLITICAL CARTOON: JOURNALISM’S STRONGEST WEAPON*, *THE QUILL* 56, 57 (Nov. 1962)).

addition, as in the defamation cases, one would assume that private individuals would be subjected to a lower standard of proof. However, the Court might very well follow its defamation precedents and distinguish between private individuals involved in matters of public interest and private individuals involved in matters of purely private interest.<sup>120</sup>

Even when a case involves a private individual, if the case sufficiently affects the public interest, the Court might choose to limit or preclude recovery. In *Snyder v. Phelps*, the Court held that the father of a deceased serviceman could not recover for protests that occurred near his son's funeral.<sup>121</sup> Phelps, the pastor of Westboro Baptist Church, and his congregation "believe[d] that God hates and punishes the United States for its tolerance of homosexuality," particularly in America's military."<sup>122</sup> The church conveyed its view by picketing, especially at military funerals.<sup>123</sup> After Lance Corporal Matthew Snyder was killed in Iraq, Phelps and members of his congregation decided to protest Matthew's funeral.<sup>124</sup> They carried signs which read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."<sup>125</sup> While Snyder's father did not see the protest during the funeral because police instructed the protestors to maintain distance between themselves and the funeral, he did see a video of the protests on the news that evening.<sup>126</sup> The father sued, claiming that the protest caused him serious mental and emotional distress, and he was ultimately awarded \$2.9 million in compensatory damages and \$8 million in punitive damages.<sup>127</sup>

In reversing the judgment, the U.S. Supreme Court held that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited,

---

<sup>120</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>121</sup> *Snyder v. Phelps*, 562 U.S. 443, 445 (2011).

<sup>122</sup> *Id.* at 448.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 448-49.

<sup>127</sup> *Id.* at 449-50.

robust, and wide-open.”<sup>128</sup> Indeed, “speech concerning public affairs is more than self-expression; it is the essence of self-government,”<sup>129</sup> and “occupies the ‘highest rung of the hierarchy of First Amendment values.’”<sup>130</sup> The Court held that speech relates to the public interest when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,”<sup>131</sup> or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”<sup>132</sup> However, the Court recognized that speech can be regarded as “private,” and therefore outside the protection of the First Amendment, when it affects only a purely private interest (like the credit report in *Dun & Bradstreet*).<sup>133</sup> Whether speech is public or private must ultimately turn upon the “content, form, and context’ of the speech. . . .”<sup>134</sup>

In *Snyder*, the Court concluded that Westboro’s speech was protected under the First Amendment.<sup>135</sup> The Court emphasized that Westboro’s signs clearly related to “broad issues of interest to society at large” rather than simply to matters of “purely private concern.”<sup>136</sup> While the messages “fall short of refined social or political commentary,” the Court acknowledged that they highlighted “the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy . . .” which are all “matters of public import.”<sup>137</sup> In addition, the signs were designed to set forth “Westboro’s position on those issues,” in a manner calculated “to reach as broad a public audience as possible.”<sup>138</sup> Even though some of the signs contained messages related to Matthew Snyder or the Snyders, the Court held that this

---

<sup>128</sup> *Id.* at 452 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>129</sup> *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

<sup>130</sup> *Id.* (quoting *Connick v. Myers*, 461 U. S. 138, 145 (1983)).

<sup>131</sup> *Id.* at 453 (quoting *Connick*, 461 U.S. at 146).

<sup>132</sup> *Id.* (quoting *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)).

<sup>133</sup> *See Snyder*, 562 U.S. at 453. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

<sup>134</sup> *Id.* at 444 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)).

<sup>135</sup> *Id.* at 454-56.

<sup>136</sup> *Id.* at 454.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

“would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”<sup>139</sup> The Court rejected the idea that the protest involved nothing more than an attack on the deceased soldier and his family.<sup>140</sup> Thus, while Westboro’s speech could be subjected to reasonable time, place, and manner restrictions, it could not be subjected to a damage award for intentional infliction of mental and emotional distress even though Snyder was a private person.<sup>141</sup>

#### IV. THE ACTUAL MALICE STANDARD’S IMPACT ON LITIGATION

So, how does the actual malice standard affect the ability of plaintiffs to recover in invasion of privacy, defamation, and intentional infliction cases involving deepfakes and disinformation? For many years, the actual malice standard had a profound impact in those cases. For example, in *Time, Inc. v. Hill, New York Times v. Sullivan*, and *Hustler Mag., Inc. v. Falwell*, the standard was outcome determinative. In *Time, Inc.*, the standard precluded recovery in a false light privacy case.<sup>142</sup> Even if Time, Inc. had been negligent, there was no evidence that the mistake was made knowingly or with reckless indifference.<sup>143</sup> In *Hustler Magazine*, since Hustler Magazine made clear that the advertisement was a parody, it was impossible to show that Hustler had made a false assertion of fact with actual malice.<sup>144</sup> In the *New York Times* case, the Court held that any error did not rise to the level of actual malice.<sup>145</sup>

Other than in those three cases the actual malice standard established in *New York Times* dramatically reduced the quantity of defamation litigation in the United States. Following the decision, many years elapsed during which “there were virtually no recoveries by public officials in libel actions.”<sup>146</sup> However, by the 1990s, many were beginning to question whether the *New York*

---

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 455.

<sup>141</sup> *Id.* at 456.

<sup>142</sup> *See generally* *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>143</sup> *Id.*

<sup>144</sup> *See generally* *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

<sup>145</sup> *See generally* *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

<sup>146</sup> Lewis, *supra* note 83, at 608.

*Times* decision was providing sufficient breathing space for expression. For example, in 1991, the Libel Defense Resource Center issued a press release suggesting there was a “dramatic increase in the already-high average of damage awards against media defendants in libel (and related) cases. Compared to the prior two-year period, the average award increased ten-fold, from \$432,000 in 1987-88 to just under \$4.5 million in 1989-90.”<sup>147</sup> Based on this data, Professor Richard Epstein observed that “the onslaught of defamation actions is greater in number and severity than it was in the ‘bad old days’ of common law libel . . . .”<sup>148</sup> In making that argument, Epstein relied on data collected by the Libel Defense Resource Center showing “a steady increase in defamation suits notwithstanding *New York Times*.”<sup>149</sup> The situation led some to argue that there should be a complete ban on defamation actions by public officials.<sup>150</sup>

At the time, the British provided far fewer protections to the press than did the U.S.,<sup>151</sup> but it appeared that the British press was very robust and aggressive.<sup>152</sup> Nevertheless, U.S. commentators, who were dealing with a press that had far greater protections, were expressing alarm and calling for much greater protections for the media. In an effort to better understand what was happening, I undertook a multi-year empirical project involving interviews with editors, reporters, and defamation lawyers (both plaintiff and defense) in an effort to better comprehend how defamation law affected journalism and reporting in the two countries.<sup>153</sup> Eventually, the project was extended to

---

<sup>147</sup> Alex Jones, *News Media’s Libel Costs Rising, Study Says*, N.Y. TIMES (Sept. 26, 1991), <https://www.nytimes.com/1991/09/26/us/news-media-s-libel-costs-rising-study-says.html> [<https://perma.cc/E26D-UBVV>].

<sup>148</sup> See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 783 (1986).

<sup>149</sup> *Id.*

<sup>150</sup> See Martin Garbus, *25 Years After “Times v. Sullivan”: What Remains to Be Done*, 201 N.Y. L.J. 2-3, 5 (1989) (“One idea advanced by Professor Isodore Silver, a libel law scholar, is to require the injured party to prove that the media intentionally tried to harm him – it would not be enough to show only that the media acted in reckless disregard of the truth.” He also notes: “I believe public officials and public figures should not be permitted to sue for libel.”); Lewis, *supra* note 83, at 614-24.

<sup>151</sup> See Weaver & Bennett, *supra* note 60, at 1161-62.

<sup>152</sup> See *id.* at 1165-69.

<sup>153</sup> See *id.*

Australia.<sup>154</sup> As Britain and Australia altered their defamation laws over time, the studies involved additional interviews, which made it possible to assess the impact of those changes.<sup>155</sup>

Ultimately, the study concluded that initial impressions regarding the impact of defamation laws were deceiving.<sup>156</sup> The British press was far less aggressive than it appeared to be.<sup>157</sup> A number of factors played into this analysis. For one thing, British media outlets were threatened with defamation suits,<sup>158</sup> and actually sued,<sup>159</sup> fairly frequently. If they lost, they faced the risk of having to pay the prevailing party's "costs" or attorney's fees. As a result, they implemented controls designed to protect themselves against liability. Most newspapers had so-called "night barristers" who would come in at the end of the day, after the paper had been laid out, and read through it looking for potentially defamatory material.<sup>160</sup> *The Guardian* had three lawyers devoted to that task.<sup>161</sup> If potentially defamatory material was found, the discovery would ignite a review process involving the lawyer, the editor, and the reporter.<sup>162</sup> The review process focused on a variety of issues, including the following: (1) Whether the statement was true? (2) Could the subject prove it? and (3) Was the subject likely to file suit?<sup>163</sup> But the British press would also focus on such considerations as whether a potential witnesses might go "wobbly."<sup>164</sup> Thus, much of the focus was not on whether a potentially defamatory allegation was true, nor the journalistic ethics of publishing the allegation, but on whether the newspaper had "legally admissible evidence" to support the allegations and how the newspaper would defend itself if sued.<sup>165</sup> A critical factor

---

<sup>154</sup> See WEAVER ET AL., *supra* note 23, at 131-180, 201-240.

<sup>155</sup> See *id.* at 201-240.

<sup>156</sup> See *id.* at 131-181; see also Weaver & Bennett, *supra* note 60, at 1169, 1186; Russell L. Weaver & David F. Partlett, *Defamation, Free Speech & Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57 (2006).

<sup>157</sup> See Weaver & Bennett, *supra* note 60, at 1164-1165, 1169-1179.

<sup>158</sup> See WEAVER ET AL., *supra* note 23.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1171-72.

<sup>161</sup> *Id.* at 1172.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See WEAVER ET AL., *supra* note 23, at 142-43.

<sup>165</sup> *Id.* at 142.

in many instances was the identity of the potential plaintiff.<sup>166</sup> If the subject of the statement was particularly unlikely to sue, the press would be more likely to publish a potentially defamatory allegation.<sup>167</sup> On the other hand, if the potential plaintiff was highly litigious, the newspaper might be very careful in its reporting.<sup>168</sup> The net effect was that the British media was not undertaking a significant level of investigative journalism.<sup>169</sup> Moreover, when the media took a hard-hitting stance, it would usually be in a context where the reporting was privileged, such as for statements made in Parliament, or there was overwhelming evidence, such as a defendant who had recently been convicted.<sup>170</sup>

The situation with the U.S. media at that time was dramatically different. Despite the Libel Resource Defense Center study and the allegations of Professor Epstein, the evidence showed that the U.S. media was relatively relaxed regarding the potential for defamation liability.<sup>171</sup> Compared to England, U.S. media outlets received far fewer threats of defamation lawsuits<sup>172</sup> and were sued far less.<sup>173</sup> When I asked one U.S. journalist how often he had been threatened with a defamation lawsuit, or had actually been sued, he replied that it had never happened to his knowledge (or, if it had, his employer never told him about it).<sup>174</sup> For one thing, U.S. lawyers had less incentive to sue.<sup>175</sup> Given the *New York Times* standards, the burden of proof made it difficult to recover.<sup>176</sup> Good lawyers undoubtedly decided that it was more profitable to pursue other types of cases, such as wrongful death and personal injury cases, where the burden of proof was much lower (a preponderance of the evidence) and the likelihood of recovery was much higher.<sup>177</sup> As a result, in the U.S., there were no night barristers combing through U.S. newspapers, no focus on whether a potential plaintiff

---

<sup>166</sup> *Id.* at 143.

<sup>167</sup> *Id.* at 142.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 149-150.

<sup>170</sup> *Id.* at 149.

<sup>171</sup> *Id.* at 246.

<sup>172</sup> See WEAVER ET AL., *supra* note 23, at 185.

<sup>173</sup> *Id.* at 185.

<sup>174</sup> *Id.* at 185-86.

<sup>175</sup> *Id.* at 200.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

was particularly litigious and very few editorial reviews were focused on whether they had “legally admissible evidence” to support their claims.<sup>178</sup> Most U.S. journalists were more concerned about journalistic ethics and whether it was fair or appropriate for them to make a particular allegation.<sup>179</sup>

Our research did produce legitimate questions regarding whether the *New York Times* decision provided too much protection to the media and too little protection for reputation.<sup>180</sup> Undoubtedly, the actual malice standard made it extremely difficult to win a defamation judgment against the media, which discouraged lawyers from bringing those cases.<sup>181</sup> As a result, it could be argued that the decision gives media outlets *carte blanche* to attack and potentially defame those running for public office.<sup>182</sup> Indeed, there was a risk that the decision might have encouraged shoddy journalism and discouraged good quality candidates from running for public office because of concerns that their reputations might be besmirched and that they may not have an adequate remedy.<sup>183</sup>

#### V. DEFAMATION LITIGATION TODAY: A SHIFTING LANDSCAPE?

Although the empirical evidence suggests that the actual malice standard made it quite difficult to recover in defamation cases, the tide seems to have turned in favor of recovery. In recent years, there has been a dramatic upsurge in the quantity of litigation and the size of defamation judgments. E. Jean Carroll obtained \$83.3 million in compensatory and punitive damages from a defamation judgment against Donald Trump.<sup>184</sup> Climate scientist Michael Mann was awarded \$1 million in a defamation action

---

<sup>178</sup> *Id.* at 190-93.

<sup>179</sup> *Id.* at 257-58.

<sup>180</sup> *Id.* at 255.

<sup>181</sup> *Id.* at 256.

<sup>182</sup> *Id.* at 256-57.

<sup>183</sup> *Id.* at 256-59.

<sup>184</sup> See Alex Swoyer, *E. Jean Carroll's \$83.3 Million Verdict in Trump Defamation Case could be Reduced, Experts Say*, WASH. TIMES (Feb. 8, 2024), <https://www.washingtontimes.com/news/2024/feb/8/e-jean-carrolls-833-million-verdict-in-trump-defam/> [https://perma.cc/FJT8-RVXW].

against two bloggers who attacked Mann’s work as fraudulent.<sup>185</sup> Fox News entered into a \$787.5 million settlement with Dominion Voting Systems regarding allegations that the 2020 presidential election was rigged.<sup>186</sup> In addition, the parents of children killed in the Sandy Hook school shootings recovered in a defamation lawsuit against Infowars’ Alex Jones.<sup>187</sup>

It is difficult to know how to evaluate this recent spate of defamation litigation and judgments. Perhaps the sky is falling, and the dire situation that Professor Epstein believed existed in the ‘80s has finally come to fruition. But there may be another explanation: the *New York Times* decision encouraged speakers to believe that they could say almost anything without fear of liability. Moreover, when the *New York Times* decision was rendered in 1964, few could foresee the rise of the internet or social media platforms, and the democratic nature (in the sense of enabling virtually everyone to engage in mass communication) of those technologies without editorial oversight. Thus, there are lots of “speakers,” like Alex Jones and the bloggers who defamed Mann, who feel emboldened to express their views. With the rise of the internet, it was perhaps inevitable that there would be more instances in which plaintiffs were able to satisfy the actual malice standard.

At the same time, there may have been an overall decline in the quality of media and journalistic standards. I have written elsewhere about how many ‘established’ media outlets do not provide quality reporting.<sup>188</sup> The most obvious violator is Fox News, as revealed by the Dominion Voting settlement.<sup>189</sup> Given the

---

<sup>185</sup> See Cristen Hemingway Jaynes, *Climate Scientist Michael Mann Awarded \$1 Million in Defamation Lawsuit*, ECOWATCH (Feb. 9, 2024), <https://www.ecowatch.com/climate-scientist-michael-mann-defamation-lawsuit.html> [https://perma.cc/H9DZ-KFXC].

<sup>186</sup> See Richard Luscombe et al., *Moscow Confirms Putin Interview with Tucker Carlson*, GUARDIAN (Feb. 7, 2024), <https://www.theguardian.com/world/2024/feb/07/moscow-confirms-putin-interview-with-tucker-carlson> [https://perma.cc/WN6M-9FJT].

<sup>187</sup> See Williamson & Steel, *supra* note 15.

<sup>188</sup> See Russell L. Weaver, *Remedies for “Disinformation”*, 55 U. PAC. L. REV. 185, 193 (2024).

<sup>189</sup> See Tiffany Hsu, *What’s Next for Dominion After Its \$787.5 Million Settlement With Fox News?*, N.Y. TIMES (Apr. 21, 2023), <https://www.nytimes.com/2023/04/19/business/media/dominion-fox-news-settlement.html> [https://perma.cc/WB8M-WBWF].

obvious bias evident in its reporting, it is difficult to take outlets such as National Public Radio seriously.<sup>190</sup> Perhaps the media has lost its focus on neutral and objective journalism and has become a bit too biased.<sup>191</sup> In addition, the actual malice standard may have emboldened the media and internet posters to believe that they are free to make reckless statements without fear of liability. In other words, the recent judgments and settlements may show that the actual malice standard is functioning fairly well. It allows defamation judgments when defendants say outrageous things they know are false, or they make those statements in reckless disregard for the truth, but otherwise is very protective.

Thus, it may be possible to recover in cases involving disinformation or deepfakes. Indeed, there was evidence that Fox News knew its allegations about the 2020 election were false. The same is true for the Alex Jones and the Sandy Hook' allegations and for the lawsuit brought by Michael Mann. Thus, defamation litigation may be worthwhile when a defendant makes outrageous allegations even though litigation may not be worth the candle when the situation is not so egregious. In the former contexts, recovery might be possible in privacy, defamation, and intentional infliction cases when someone's reporting or internet posts contain defamatory content.

However, even if the actual malice standard might be satisfied in a few cases, it is not clear that defamation litigation can be successfully pursued against the mountain of disinformation on the internet. For one thing, while some of those who post false information on the internet will be known, such as Alex Jones or the bloggers who defamed Michael Mann, a fair number will be anonymous. Second, some of the misinformation may be coming from outside the U.S., including from former governmental organizations like Russia's IRA,<sup>192</sup> and it may be extremely difficult, if not impossible, to effectively sue or recover against such individuals or organizations. Finally, it may be difficult or impossible to enforce any defamation judgment that is obtained. Some defendants may not have the financial wherewithal to satisfy

---

<sup>190</sup> See Weaver," *supra* note 187, at 193.

<sup>191</sup> See *id.* at 198.

<sup>192</sup> See FROM GUTENBERG TO THE INTERNET, *supra* note 1.

a judgment, and others, especially those located outside the U.S., may be difficult to pursue.

The *Falwell* decision suggests that public officials and public figures would have an uphill battle if they sued for intentional infliction of mental and emotional distress, but the burden may not be as difficult as it might seem. In *Falwell*, Hustler Magazine made clear that the advertisement was a parody and not true.<sup>193</sup> Because there was no false assertion of fact, Falwell could not recover against Hustler Magazine on a defamation theory. The same reasoning would apply to an intentional infliction or a false light privacy claim. By contrast, with deepfakes, the purpose of the depiction is to create the false impression that something is true which is not. Thus, the outrageousness and absence of a disclaimer might suggest that recovery would be possible.

However, if the deepfake relates to a matter of public interest or concern, the analysis might be affected. Recall that, in *Snyder v. Phelps*, the plaintiff was a private individual and there was no indication that the defendants' speech had been labeled a "parody." Nevertheless, defendants could not be held liable because they were speaking on a matter of public interest or debate.<sup>194</sup> As a result, if a potential defendant is using disinformation or deepfakes to make a political point, recovery might be difficult. For example, the Republican party put out a video that uses AI to depict the future if Joe Biden is reelected as President.<sup>195</sup> The video depicted China invading Taiwan, a financial crisis, a surge in illegal immigration to the U.S., and a dramatic uptick in crime.<sup>196</sup> In that situation, the video might be regarded as a political statement. Even though it might turn out to be inaccurate or to depict something that will never come to pass, it might be protected as a political statement. As a result, the First Amendment and its protection for matters

---

<sup>193</sup> See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 46 (1988).

<sup>194</sup> See *Snyder v. Phelps*, 563 U.S. 443 (2011).

<sup>195</sup> See Isaac Stanley-Becker & John Wagner, *Republicans Counter Biden Announcement with Dystopian, AI-aided Video*, WASH. POST (Apr. 25, 2023, 1:51 PM), <https://archive.ph/pizke> [<https://perma.cc/L848-5DN3>]; Alex Thompson, *First Look: RNC Slams Biden in AI-generated Ad*, AXIOS (Apr. 25, 2023), <https://www.axios.com/2023/04/25/rnc-slams-biden-re-election-bid-ai-generated-ad> [<https://perma.cc/C8ZK-U2BJ>].

<sup>196</sup> See GOP, *Beat Biden*, YOUTUBE (Apr. 25, 2023), <https://www.youtube.com/watch?v=kLMMxgtxQ1Y> [<https://perma.cc/RTV6-5H2D>].

related to the public interest may limit the ability of public officials, public figures, and even private individuals to recover for intentional infliction of mental and emotional distress. The preclusion might particularly come into play when a public official or public figure is being parodied in a deepfake designed to make fun of their political positions or highlight inconsistencies in their positions.

### CONCLUSION

The growth of the internet has led to a flood of disinformation and deepfakes. On first glance, the subjects of such posts can recover on one of three theories: invasion of privacy, defamation, or intentional infliction of mental and emotional distress. After all, if the suggestions regarding the potential plaintiff are untrue or a deepfake reveals an inaccurate portrayal of the potential plaintiff, the plaintiff may suffer reputational injury.

However, recovery may not be so simple. The holdings in *New York Times; Hustler Magazine; Time, Inc. v. Hill*; and *Snyder v. Phelps* reveal that these torts have been constitutionalized to some extent. As a result, in many cases, a plaintiff cannot recover absent a showing that the defendant acted with actual malice, meaning that plaintiff must show the defendant either knew the statement was false or acted in reckless disregard for truth or falsity. In addition, if defendant's depiction of plaintiff is labeled as a parody, or relates to a matter of public interest, it might be constitutionally protected because of the political content. As a result, the assumption that defendants could be held liable for disseminating disinformation or deepfakes might not be accurate.