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Fromm/Great Free Speech Cases/Carcieri/Session 4
Defamation, IIED, cont'd

New York Times v. Sullivan (1964)

F/P: Sullivan, a police commissioner in Montgomery, Alabama, brought a civil suit for libel in State court. It was based on a paid, full page advertisement the Times had run. Title "Heed Their Rising Voices," the ad was ten paragraphs long. It stated that thousands of southern Negro students were engaged in non-violent demonstrations in support of civil rights, and that they were being met with a "wave of terror" by their opponents. The basis of Sullivan's claim was the text in paragraph three, which claimed, e.g., that police armed with shotguns and teargas "ringed" a public college campus in Montgomery and padlocked the dining hall in order to starve the students into submission, and the text in paragraph six, which stated, e.g., that Dr. Martin Luther King's home had been bombed and that he had been arrested seven times. All these claims were false or misleading. Dr. King had been arrested only four times, for example, and three of those arrests, as well as the bombings, took place before Sullivan's tenure on the commission. The trial judge instructed the jury that the ad was "libelous per se," such that the Times would be liable if the jury simply found that it had in fact published the ad and that the statements were "of and concerning" Sullivan. The jury so found, it awarded him $500,000, and the Alabama Supreme Court affirmed this judgment.

I: Whether an ad by critics of a public official's official conduct forfeits its First Amendment protection due to the falsity of some of its statements and its alleged defamation of that official.

H: No, judgment reversed. "A public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

R: "Erroneous statement is inevitable in free debate and must be protected if the freedoms of expression are to have the breathing space they need to survive."

R: The 1798 Sedition Act has been rejected in the court of history, insofar as Congress repaid fines levied in its prosecution and President Jefferson pardoned those convicted and sentenced under it.

R: Since fear of damage awards may be more inhibiting than fear of prosecution, a State may not accomplish through the civil law of libel what is constitutionally forbidden through the criminal law.

R: Since a rule forcing the critic of official conduct to guarantee the truth of all its factual assertions creates self-censorship, the Alabama rule is not saved by its allowance of the defense of truth.

R: The evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, thus insufficient to show the recklessness required for a finding of actual malice.

R: Since the ad mentions only the police, and does not even obliquely refer to Sullivan as an individual, the jury finding that the ad was "of and concerning" Sullivan is unsupported.

Hustler Magazine v. Falwell **(1988)**

F/P: Falwell, a nationally known minister and commentator on politics and public affairs, sued Hustler in Federal Court for invasion of privacy, libel, and intentional infliction of emotional distress (IIED). The suit was based on a Hustler parody of an advertisement for Campari Liqueur entitled "Jerry Falwell Talks About His First Time." The parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was clear by the end of each interview that this meant the first time they had sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler chose Falwell as a featured celebrity and printed an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The parody suggested that Falwell was a hypocrite who preached only when he was drunk. In small print at the bottom of the page, the ad contained the disclaimer, "Ad parody – not to be taken seriously." The magazine's table of contents also listed the ad as "Fiction: Ad and Personality Parody." The District Court ruled in Falwell's favor on the IIED claim, and the Fourth Circuit Court of Appeals affirmed.

I: "Whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most."

H: No; "Public figures and public officials may not recover for the tort of IIED by reason of publications such as this one without showing in addition that the publication contains a false statement of fact which was made with actual malice .... Such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."

R: The parody "could not reasonably have been interpreted as stating actual facts about (Falwell)."

R: "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of public figures who are intimately involved with important public questions."

R: "In the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment ....Thus, while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures."

R: "Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subject to damages awards without any showing that their work falsely defamed its subject."

R: While Falwell claims that the parody of him is so outrageous as to distinguish it from traditional political cartoons, the Court doubts that any principled standard exists to distinguish protected from unprotected speech in this area, and "the pejorative description 'outrageous' does not supply one."

***United States v. Alvarez* (2012)**

F/P: The federal Stolen Valor Act made it a crime to falsely claim receipt of military decorations or medals, provides an enhanced penalty if the Congressional Medal of Honor is involved. At a meeting of a water district board in Claremont, California, of which he was a members, Xavier Alvarez stated, "I'm a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." None of this was true. Alvarez pled guilty to a violation of the Act and reserved his right to appeal. The Ninth Circuit reversed his conviction.

I: Whether the Stolen Valor Act, which targets falsity and nothing more, violates the Free Speech Clause.

H: Yes

R: "Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few "historic and traditional categories of expression long familiar to the bar." Among these categories are advocacy intended, and likely, to incite imminent lawless action (see *Brandenburg*); obscenity (see *Miller*); defamation (see *New York Times*); speech integral to criminal conduct; so called "fighting words" (see *Chaplinsky*); child pornography (see *Ferber*); fraud (see *Virginia Board of Pharmacy*); true threats; and speech presenting some grave and imminent threat the government has the power to prevent. Absent from those few categories there is no general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."

R: "The Act by its plain terms applies to a false statement made at any time, in any place, to any person … without regard to whether the lie was made for the purpose of material gain."

R: Government power to enact such a content-based restriction would include "governmental authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."

R: Although the goals of the law are compelling (e.g., recognizing and expressing gratitude for acts of heroism and sacrifice in military service and fostering morale, mission accomplishment, and esprit de corps among service members), the Act is necessary to achieve those goals. "The government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. (Indeed), the outrage and contempt expressed for Alvarez' lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose. The remedy for speech that is false is speech that is true. This is the ordinary course in a free society."