

INTERNET LIBEL

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Use your laptop, save a tree. Of course, you'll be laughing at me if it decides to sleep in the middle of my presentation, which has happened before. It's funny what Bob says about the link between the law of libel and the law of pornography. Or the law of obscenity, I guess I should say to be more precise. In the course of my work for the Electronic Frontier Foundation I did a lot of work in the beginning of my eight years at EFF on sysop liability or service-provider liability and, of course, we had to deal with issues like defamation and copyright infringement. And then suddenly as if Congress had a sense that perhaps I was getting bored with this stuff, so they passed the Communications Decency Act and gave me a whole new range of issues to talk about at some length.

Yet, of course, the connection really is there and I agree with Bob that *Smith versus California* is the leading case and a very important one. If you look at the announcement of our topics here, you see that Bob is listed as talking about third-party liability and Internet liability, and we were nervous about who was going to talk first and how much of each other's material we were going to cover. He covered 80 percent of mine so I'm winging it here.

Many of you have heard of the Matt Drudge libel case. *Blumenthal versus Drudge*. Sidney Blumenthal is a former journalist who now works at the White House where, entertainingly enough, he is now a champion of the First Amendment thanks to having been subpoenaed by Ken Starr. But before this he was the subject of online reports by Matt Drudge, an Internet gossip columnist. Matt Drudge is a conservative, a Clinton hater. He likes gossip. He is a self-taught journalist, makes certain kind of mistakes that you might not make if you worked for a regular newspaper. Yet although he makes such mistakes, I have to say it is not the case, despite what you may read in the columns about him, that newspapers are necessarily any better than Matt Drudge at getting the facts rights. And if you read his coverage of the Monica Lewinsky scandal, it's fascinating, fascinating to see how often Drudge has been right. (Let me digress here in stance of press professionalism because everybody's relying on unnamed sources which—we all believe from the days of Watergate—is something you ought to be able to do, but who's doing the leaks? And part of the media story is who are the unnamed sources and what are their agendas and none of the press can actually do the story because they're compromised. They

promised they wouldn't tell who the leaks are. So we'll never actually know, so you see them chasing their tails a lot on the news shows.)

Matt Drudge published an online article about Sidney Blumenthal in the summer of 1997 in which he said that GOP operatives inside the Beltway think they've got a trump card in dealing with this guy Blumenthal because (they said) he has a history of spousal abuse and there are court records that show that he has this history. So (the GOP guys were reported to say) attempts to go after republican operatives because of **their** spousal abuse — I don't know how common this is among politicians but apparently it's a hot topic these days— can be countered by the attack on the new White House guy, Sidney Blumenthal. Well, just one problem with this story. Blumenthal apparently has no history of spousal abuse. Part of the story Drudge got right. It was the case that this rumor about

Blumenthal was being circulated about inside the Beltway, but as you know, it's a matter of well-settled defamation law that merely repeating a rumor, even if you label it as such, which Drudge did in his Internet report doesn't allow you to escape defamation liability. You can get hammered for repeating a rumor. Even if you're not the originator of the content, you're still the originator for this purpose because by spreading it you may damage somebody's reputation by further circulating something that's not true. And, of course, dealing with the issue of how to balance what the court has consistently recognized as a valid interest in reputation against the First Amendment protections has been a problem, but we've also seen a series of working solutions to that problem dating from the ground breaking case *Times versus Sullivan*.

Now for those of you who are jurisprudential historian types, it's worth notice that the libel case *Times versus Sullivan* relies pretty extensively on the reasoning of the obscenity case *Smith versus California*, which shows you Bob's right. Follow the pornography cases. The problem with Drudge is that he's a one-man -operation. In a sense he symbolizes what we all hoped the Internet would give us, which is a world of people who can talk to large audiences without the intermediation of a publisher, and without having to have a lot of money. Thanks to the Internet, as Bob has pointed out, you have immense amounts of access to large audiences. Which means you have an immense amount of opportunity to defame people, to say things about people that are false.

But I don't think we have to make cyberspace a new jurisdiction (which some have proposed) to deal with these issues. I think that if you apply well-understood, longstanding American libel-law principles to this case, you'll learn something about the Drudge case that has not been widely reported which is that Drudge is very likely to win. Drudge is going to win the case and I'll explain why. I'll also explain why you don't know this, why the case has been reported the way it has. Although I say Drudge is likely to win, it might be better, technically, to say that Blumenthal is not going to win. Here's why.

First of all, part of it has to do with the public-figure doctrine. This doctrine, which derives primarily from *Times versus Sullivan* and *Gertz versus Robert Welch, Inc.*, provides, *inter alia*, that public figures cannot recover from merely negligent reporting. I know that your tort-law instincts may have trouble dealing with the fact that you can do something negligent and just get away with it, but this is in fact the balance that was first struck by Justice Brennan in *Times versus Sullivan*. According to *Times*, if you are a public official (this doctrine was later extended to public figures) and people reporting on you are negligent—that is to say they do not meet the standard of care for a reasonably prudent person in the same or similar circumstances—well, it's your tough luck. Our society and our legal system are going to tolerate that. If you are a public official or a public figure, to recover against a media defendant at least, you have to prove "actual malice" which, as you know, is either that you knew what you were saying was false or you were reckless as to whether it was true or false. In other words, you didn't care if you got the story right.

Now, Sidney Blumenthal, whatever he is, is clearly a public figure. (The lesson Monica Lewinsky has recently learned is that anyone who works for the White House can become a public figure. You don't even have to get a paycheck.) So if you work for the White House, and certainly if you work for the White House in Sidney Blumenthal's role, you're a public figure. And I want to talk about why we distinguish between public figures and private figures. In *Gertz versus Robert Welch, Inc.* the court explained why we say that public figures have a greater burden to bear. The fact is that public figures have a lot more access to media institutions—this is exactly what the court says. The court says, first of all, when people say bad things about you, your number one remedy is not to sue, not to take it to court. Instead, it's self-help—you can actually speak out against the person who spoke badly about you. That's your number one remedy. Of course, if you're a normal Joe, you know, and the *New York Times* said something bad about you, you can stand up speak on street corners for centuries and never undo what the *New York Times* said, if it was libelous. Because of this imbalance in access to mass media, the Court has said, we allow libel suits under the First Amendment. But libel lawsuits are the second choice. It's choice B.

Now, the Drudge case is fascinating to me because when Drudge was notified in what *Vanity Fair* terms a "harshly worded letter: from Blumenthal's lawyer that he had libeled a client and that he should do a retraction, and that if he did a retraction (and, by the way, disclosed his sources for this story) Drudge might not be a defendant in a libel suit. That was what he was told. And Drudge retracted very, very quickly. He retracted in about a day, and the retraction, because Drudge is increasingly a must-read guy inside the Beltway and among the professional press, made news. This was fascinating to watch. Because the traditional press tends to look at Internet startups as amateur hour, which, of course, it is. And so with the attitude of "Don't try this journalism

stuff at home!:" they look at the Drudge case and say now we've taken this guy down a notch, he's getting sued, this guy's getting hammered for not being a professional journalist.

And they wrote this story again and again. It was mentioned in Howard Kurtz' media column in the Washington Post at least three times, and because of that the retraction became a story bigger than the original item was. Now remember that the whole purpose of libel law is that, as the defamee, the libelee you can't correct what this mass media has done to you. Here you have Matt Drudge working on the Internet, a mass medium, saying something, retracting it—and, what's more, he retracted it in a way that makes it hard to get. You can't go to AOL and retrieve the story. He pulled it from the archive, and it's very hard to get through search engines. When I had to get a copy so I could write about it, I had to write his lawyer, e-mail his lawyer and get a copy.) He retracted it and it was a fairly effective retraction it turns out. The subsequent news coverage about the retraction meant that almost everyone who heard about this case learned at the time they heard about it that Drudge had retracted. So a much larger audience than Drudge's subscription list and whoever saw it on America Online saw the correction, saw Drudge's admission that he was wrong.

Now, let's go back to the notion that the court advances in *Gertz*, which is that the first remedy in a case of defamation is more speech—answering speech. I believe that the way to understand that is that the court is to say that it is at least theoretically possible in the marketplace of ideas that you can have an effective retraction or an effective answer to the damaging speech. At least theoretically possible. As it happens, it used to be practically impossible because private individuals normally were not members of what C.Wright Mills calls the power elite—if you weren't a Kennedy or a Rockefeller, you couldn't be counted upon to have access to major media institutions.

Now we live in a world which, thanks to the Internet, all sorts of people have access to mass media. And the question that we have to face is not just whether you believe the Internet is, cyberspace is a new jurisdiction or whether you believe cyberspace is an extension of the real world. It is also whether the balances that underlie libel law have shifted. And I think it has. Because, if you think about it, what meaningful damage has been done to Sidney Blumenthal? I mean, I told you the story here, and the way I told it to you here, which is that I told you simultaneously what was said about him and that there was a retraction, and that's how most people heard about it. What's more, almost certainly you can't find a person who was reading Drudge, who was reading Matt Drudge and read about Blumenthal and then went off into the mountains and just missed the retraction somehow and has still missed it in the more than days since the retraction became a national news story. And you have to find enough of those people to say this is the damage to Blumenthal's reputation. I think you do. There's no presumed damages here in the absence

of proof of malice on Drudge's part. And, by the way, there is no evidence to believe that Drudge had actual malice as the courts understand that term.

I think one of the telling details about the case is the fact that when Blumenthal decided to file a lawsuit against Drudge and, by the way, against America Online which carried Drudge on one of its channels, Blumenthal then announced, and had it backed up by the White House press office, that the President of the United States and the Vice President of the United States had both talked with Blumenthal about the case and they both backed their guy. Normally when your reputation is damaged, your employer fires you or does some terrible thing to you. When your employer comes out in the national press and takes time to give a press conference and talk to the press office and say this guy is our guy and we're standing behind him, at least you know your reputation with the boss hasn't been hurt. And I submit it's very hard to document in any way that this guy's reputation has been hurt, and that's why I think Matt Drudge is going to win.

Now, you might find that not very heartening because you might find it to be the case that you thought Drudge deserved a hit. And I'm not sure that he didn't deserve to be criticized for what he did. But I've spoken to Drudge and to Drudge's lawyer and what I'm told, which I have reason to believe is that Drudge went and talked to other sources. He couldn't reach Blumenthal himself, he says, but he quotes in the story White House sources that these rumors about Blumenthal are "pure fiction." (Admittedly, this is an amateur's way of balancing the story. But amateurishness is not actual malice.)

I find it quite heartening that Drudge is going to win and this is why. Journalism is a place where you can make serious mistakes but it's also not rocket science. I don't think there's anybody in this room who is incapable of doing journalism. You basically get people's names right, you get their quotes right, the facts right and you're careful and you check things. If the promise of the Internet as a mass medium is going to be fulfilled, it's got to mean that any one of us can decide to be a journalist if he or she wants to. And if that's true, it means that some of the people who decide to be journalists are not going to be good ones. They'll be negligent. And they'll make mistakes. And in the process of learning to be good journalists, some will be not so good journalists. And if the breathing space for robust public debate that Justice Brennan is trying to establish for us is to mean anything, I think it does mean allowing breathing spaces for the Matt Drudges of the world, and I think that's what the court will find. Thank you.