Libel in Social Media
By Cameron Ryan

Libel is defined as “a statement or representation published without just cause and tending to expose another to public contempt.”¹ Libel has been present throughout the course of our country’s history. According to some, libel poses a threat to free speech. And we have seen it change with the centuries, particularly with the advent of technology. Defamation laws had to expand with Facebook and Twitter inviting the global opinion and publishing it in an unedited version to the public. Since this advancement of globalization through the internet there has been a whole new class of statutes dealing with defamation in cyberspace - particularly on social media. By analyzing the history of anti-defamation laws, we can get a better grasp on the needed development of libel laws in a digital age.

A Brief History Of Libel

The New World’s courts encountered libel for the first time in the Crown v. Peter Zenger case in New York, in 1735. In 1733, the New York Weekly Journal was established by former Judge Lewis Morris, and the attorneys of William Smith and James Alexander who, “through articles, satire and lampoons, accused the Cosby administration of tyranny and violation of the people's rights.”² Consequently, Governor Cosby wanted to shut the newspaper down. Peter Zenger, the journal’s printer, was accused of publishing “seditious libel”.³ However, through the defense of his attorneys, William Smith, James Alexander, and the

³ Id.
appointed Cosby loyalist John Chambers, he was found not guilty. The New York Weekly Journal was not guilty because they published truthful information which the prosecuting attorney failed to disprove. With Alexander’s closing statement reiterating the importance of liberty under the Crown, truth as a defense to defamation won the day. A long time passed before another landmark libel case appeared. Finally, two hundred and thirty-nine years later, in 1974, libel was brought to the forefront once again in *Gertz v. Robert Welch*.⁴

*Gertz v. Robert Welch* would set a powerful standard for libel cases in America. It set the standards for libel cases concerning both private citizens and public citizens. The case concerned Plaintiff, Elmer Gertz, an attorney who represented the family of a man shot and killed by police Officer Nuccio. The defendant in this case represented a magazine that published what the plaintiff considered libelous statements about himself. In the underlying case of the young man, Nelson, who was killed by Officer Nuccio, the state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family then retained Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.⁵

Gertz was able to successfully win the case for the Nelson family. But an article was published afterwards which was entitled, “FRAME-UP: Richard Nuccio And The War On Police.”⁶ The Supreme Court noted that in the magazine article, Gertz was criticized as being part of a communist campaign to undermine the authority of police officers, and

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⁵ Id.
⁶ Id.
that Gertz was a "Leninist" and a "Communist-fronter." When the libel case reached the Supreme Court, it was with the judicial finding by the general trial judge and the court of appeals that the publication was protected, since Gertz was technically a public figure. Therefore, the *New York Times Co. v. Sullivan* libel case conclusion held true, the publisher was protected. However, a publisher is protected from libel only on “the grounds that the defamatory statements concern an issue of public or general interest.” In the end, the Supreme Court held that the petitioner was not a public figure, due to the absence of any kind of general fame or notoriety that Gertz could claim. Rather, “the public figure question should be determined by reference to the individual's participation in the controversy giving rise to the defamation. Petitioner's role in the Nuccio affair did not make him a public figure.” Through *Gertz v. Robert Welch*, there was a standard of applicability concerning how libel laws affected a public or private individual. The courts provided a succinct legal definition for both. *Gertz v. Robert Welch* can be crucial in determining how libel applies to each person, from businessman to congressman to paperboy.

The third historic case needed to show how libel is processed in American courts is *Harte-Hanks Communications v. Connaughton*, in which Daniel Connaughton sued Harte-Hanks Communications for defamatory statements. Connaughton was running for Municipal Judge of Hamilton, Ohio. A grand jury witness named Thompson reported to a Harte-Hank Communications employee, “that Connaughton had used "dirty tricks" and offered her and her sister jobs and a trip to Florida "in

\[\text{7 Id.} \]
\[\text{10 Id.} \]
appreciation" for their help in the investigation.”\textsuperscript{11} The investigation referred to the bribery charges brought against the incumbent judge’s Director of Court Services. When faced with these remarks, Connaughton went to court. The case eventually made its way to the Supreme Court who had to refine the malice test to ensure there was no more confusion. Despite the New York Times v. Sullivan case, there was an issue when deciding whether the publisher maliciously and intentionally published the information, regardless of whether the figure is of public or general interest. In the end, the Supreme Court ruled in favor of Connaughton because the article had passed the malice test by willfully ignoring the need to validate and investigate the defamatory statements. Justice John Paul Stevens opined:

“Actual malice, instead, requires at a minimum that the statements were made with a reckless disregard for the truth. And although the concept of "reckless disregard" cannot be fully encompassed in one infallible definition, St. Amant v. Thompson, 390 U. S. 727, 730 (1968), we have made clear that the defendant must have made the false publication with a "high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U. S. 64, 74 (1964), or must have "entertained serious doubts as to the truth of his publication.”\textsuperscript{12}

The Supreme Court affirmed what the lower courts had decided by showing that the newspaper failed to investigate the validity of the comments. Harte-Hanks Communications v. Connaughton provided precedent for other liability cases in considering the interpretation of the elements required to meet the malice test.

\textsuperscript{12} Id.
The Transition to Online Defamation and Social Media

In 1995, a notable online defamation case was decided, *Stratton Oakmont Inc. vs Prodigy Services Company*, over alleged defamatory statements published on their Bulletin Board. On the Prodigy Money Talk website, an unidentified user posted the following: “STRATTON OAKMONT, INC. ("STRATTON"), a securities investment banking firm, and DANIEL PORUSH, STRATTON's president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.;...the Solomon-Page offering was a "major criminal fraud" and "100% criminal fraud"; (c) PORUSH was "soon to be proven criminal"; and, (d) STRATTON was a "cult of brokers who either lie for a living or get fired."

Today, the legacy of Stratton Oakmont, Inc. still rocks the economic world with its scandal. The petitioner held that Prodigy Services Company had knowledge of the malicious comments published on their forum and that they were a publisher for purposes of determining liability. The court defined a publisher is one who has some editorial control over content, and that those who repeat or otherwise republish a libelous statement is subject to the same liability standard as if he had originally published it. In its defense, Prodigy claimed that Board Leaders may remove messages that violate its Guidelines but that Board Leaders do not function as editors. PRODIGY argued that the Court should not decide issues that can directly impact this developing communications medium (Bulletin Boards on the internet) without the benefit of a full record. However, it failed to describe what further facts remain to be developed on the issue of whether it is a publisher.

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15 Id.
Court ruled in favor of the petitioner, Stratton. They found:

“It is PRODIGY's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher. PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice”\(^{16}\)

However, the findings of this case were later reversed due to the Communications Decency Act, 47 U.S. Code § 230.\(^{17}\) Under Title 47, U.S. Code § 230 protects Internet Service Providers (ISPs) against the publications, or republication of libel and other malicious messages from third parties that may appear on their forums. Under this law, Congress holds that, “(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”\(^{18}\) ISPs from 1996 onwards, if interactive, are now protected, unlike Prodigy’s position in the case against Stratton Oakmont, Inc. ISPs are not subject to legal recourse that may follow from libel. Instead, the petitioner would sue the person who posted the libel. Furthermore, to prove malice, they must establish the fact that the petitioner is a public figure, and that the statement is false. ISPs must follow some requirements in order to be eligible for this legal of protection, but if there are many people accessing the website and able to publish on it, the protection offered by the Communications Decency Act is essential.

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\(^{16}\) Id.
Jacobus v Trump is a great example of the current status of libel, the requirements to prove it, and the level of liability that could attach. 

**Jacobus V. Trump: Online Defamation in a Modern Case**

In 2015, Cheryl Jacobus, a political strategist and public relations consultant “received a message from nonparty Jim Dornan, then working for the [Trump] campaign, asking if she would be interested in becoming the campaign's communications director.” Over the course of time, Donald J. Trump announced his run for the presidency as a republican candidate. After several interactions, Cheryl Jacobus declined the offer to work for the campaign. This decision from the plaintiff was reached after a second interest meeting with Trump Campaign Chairman, Corey Lewandowski, and Jim Dorman:

“As Lewandowski's agitation mounted, Dornan left the meeting, and, soon after, plaintiff also excused herself. According to plaintiff, she then decided that she could not work for Lewandowski, and shortly thereafter, in reply to a text from Dornan, advised him that working with Lewandowski would be too difficult”

Further ahead on the campaign trail, the plaintiff appeared on CNN along with a Trump supporter to discuss Trump's claims that his campaign was self-funded. CNN's investigation found that one third of his campaign funds came from other sources. The defendant reacted later that same date on Twitter with, “Great job on @donlemon tonight @kayleighmcenany @cherijacobus begged us for a job. We said no and she went hostile. A real dummy! @CNN.”

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20 Id.
21 Id.
22 Id.
In response, the plaintiff’s lawyer sent a cease and desist letter in response, to which two days later Trump’s twitter account published the following; "Really dumb @CheriJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!"23 In April 2016, the plaintiff then filed legal action against the defendant alleging that the statements made were libelous and sought to defame her, and to accuse her of “unprofessional conduct”24

The court had to determine whether Jacobus was a public figure, which would affect the standard applied to evaluate the defendant’s actions. The court determined that because she is a very active political commentator, the plaintiff holds the status of a public figure. Furthermore, the matter is of public concern due to the nature of the exchange (social media), and that the defendant reacted by “attacking the plaintiff with demeaning, sometimes sexually charged, comments and graphics, including insults aimed at her professional conduct, experience, qualifications, and her purported rejection by Trump.”25 Furthermore, the fact that she was harassed on Twitter and that the messages were aimed at her professional conduct added to the notion that Trump defamed the plaintiff. However, the judge granted the defendant’s motion to drop the case for the following reasons.

To begin with, the judge first went on about what constitutes a defamatory statement. The rules of having an “actionable” defamatory statement require, “(1) a false statement, and (2) publication of it to a third party, (3) absent privilege or authorization, which (4) causes harm, unless the statement is defamatory per se, in which case harm is presumed.”26

23 Id.
24 Id.
25 Id.
26 Id.
The judge goes on to say that the tweet was imprecise. “Words have been characterized as ‘imprecise’ when they are ‘indefinite and ambiguous’ and cannot be proved true or false because of their ‘subjective, relative meanings.’”27 Additionally, the judge writes, “Consequently, "New York courts have consistently protected statements made in online forums as statements of opinion rather than fact.” 28

Words like “beg”, “Major loser”, and “hostile” all have different implications of negative action. Because the Twitter post was a matter of opinion, a message with words having multiple meanings, that opinion can neither be proven as true nor false, and the Twitter post does not constitute a defamatory statement.

Conclusion and Opinion

Defamation, libel, and slander on the internet are just as complicated as their physical brethren. Libel and defamation have always teetered between the thin line of free speech and slander. Despite cases like Jacobus v. Trump29, and Crown v. Peter Zenger30 being centuries apart, they are united by the fact that both deal with the American ideal – freedom of speech. While the trial of Peter Zenger was the first foray into defining defamation, Jacobus v. Trump is the product of an evolving body of law dealing with cases concerning actionable defamation. Ultimately, online forums are places of opinion, not fact.

A publisher’s exposure to liability was addressed as well. Initially, U.S. courts held publishers accountable for hosting forums with messages

27 Id., citing Parks, 131 AD2d at 63, citing Ollman v Evans, 750 F2d 970, 983 (DC Cir 1984), cert. denied 471 US 1127 (1985).
28 Id.
29 Id.
defaming a person’s character. They also outlined the responsibility of users concerning their comments online. Through an evolutionary process, the definition of libel has morphed to include our modern technology. Ensuring that libel claims are thoroughly vetted is important. By requiring that the actionable message contained malice even when a plaintiff is a public figure, the U.S. court system has done its best to avoid infringing on our First Amendment rights. As the world changes, it is our duty to update laws in favor of citizens with reason, context, and with clarity.