Supreme Court Nominee Elena Kagan: Defamation and the First Amendment

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Summary

Defamation is the publication of a false statement of fact that injures another person's reputation. Modern defamation law incorporates First Amendment protections in the form of imposing a higher burden on plaintiffs who challenge statements about public officials, public figures, or matters of public concern. The modern framework of defamation stems from the Supreme Court's decision in *New York Times v. Sullivan*, in which the Court overturned a libel judgment against civil rights activists for their criticism of actions and policies by government officials in Birmingham, Alabama. Because the allegedly defamatory speech was critical of a government official or policy, the Court required the plaintiffs to prove by clear and convincing evidence that the defendant had acted with actual malice. Since then, the Court has extended similar protections to speech about public figures and speech concerning matters of public concern.

In articles published in 1993 and 2000, then-assistant law professor Elena Kagan argued that, while *Sullivan* was rightly decided, it is not clear that its extension beyond attacks on official conduct or policy provides significant protection of core First Amendment values to justify the cost to individuals that have suffered reputational injury. Kagan noted that the scope of public figures or matters of public concern is expansive and has grown to include cases of celebrity gossip, and she argued that protection of these statements is far removed from the central meaning of the First Amendment, namely "to protect against all infringements the right of a sovereign people to criticize the government policy and public officials." Additionally, the increased complexity of defamation litigation detracts from the speech-promoting effects of the actual malice standard.

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This report discusses prior writings by Supreme Court nominee Elena Kagan on the interaction of defamation law and the First Amendment of the Constitution. It is based on two articles on defamation law written by Kagan during her academic career at the University of Chicago Law School and the Harvard Law School. The most recent of these articles is from 2000, and Kagan has not revisited this topic in any published writings since then. Thus, these two articles appear to represent her most extensive examination of the interaction between the First Amendment and defamation law.

The first article, published in 1993 in *Law & Social Inquiry*, is a book review of *New York Times* columnist Anthony Lewis' *Make No Law: The Sullivan Case and the First Amendment*.[1] As a book review, the purpose of Kagan's 1993 article may differ from other types of legal writings in that it is not intended solely to argue for a particular understanding of the law, but also to provide background and critical analysis against which readers may evaluate the book's content. The second is an article published in 2000 in the *Encyclopedia of the American Constitution* entitled "Libel and the First Amendment."[2] The *Encyclopedia* was intended by its editors to be "a single comprehensive reference work treating the subject [the American Constitution] in a multidisciplinary way."[3] Authors for this publication were encouraged to "use the essay form, expressing their own views as they wish."[4] Both pieces were published by Kagan in her role as a legal scholar, rather than as an advocate or official.

New York Times v. Sullivan

Kagan's observations about the modern state of libel law under the First Amendment follow largely from her reading of the Court's decision in *New York Times v. Sullivan*,[5] the seminal case establishing First Amendment limits on defamation law.[6] In *New York Times v. Sullivan*, the Court held that the First Amendment did not permit states to impose strict liability for libel in the case of statements criticizing the official conduct of a public official. Instead, the Court held that a plaintiff must establish, through clear and convincing evidence, that the defendant had acted out of actual malice. In other words, the Court required the plaintiff to prove that the defendant had made the injurious statement "with knowledge that it was actually false or with reckless disregard of whether it was false or not."[7]

In her 1993 article, Kagan argues that understanding the circumstances involved in *Sullivan* is critical to understanding the basis of the Court's decision. The suit was brought after the *New York*

[1] Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 LAW & SOC. INQUIRY 197 (1993). LAW & SOCIAL INQUIRY is an "interdisciplinary, peer-reviewed academic journal" featuring articles by "legal academics and social scientists from around the world." AMERICAN BAR FOUNDATION, *Law & Social Inquiry*, available at http://www.americanbarfoundation.org/publications/lawsocialinquiry.html.

[2] ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1608-1609 (Leonard W. Levy & Kenneth L. Karst, eds., 2nd ed. 2000).

[3] *Id.* at vii.

[4] *Id.* at xix.

[5] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[6] Slander and libel are both examples of defamation, or the issuance of a false statement that causes injury to another person's reputation. Slander refers to transitory statements, such as spoken words, while libel applies to statements in more permanent media, such as writing.

[7] *NYT v. Sullivan*, 376 U.S. at 280.

Times published an advertisement by a number of civil rights supporters and activists describing alleged racially motivated abuses perpetrated by government officials in the southern states. Sullivan, an elected commissioner from Montgomery, Alabama, successfully sued the newspaper and individual defendants in state court. Based on these facts, Kagan posits that "[t]he complaints may have charged 'defamation,' but the underlying reality was of governmental suppression of critical speech.... To treat them simply as libel suits was to miss the point."[8] Implicitly, this seems to suggest that there are some libel suits that are simply libel suits, and as such do not implicate the First Amendment. Kagan argues that, by contrast, "*Sullivan* relie[s] upon two essential predicates: a certain kind of speech and a certain kind of power relationship between the speaker and the speech's target."[9] In other words, the use of libel law to silence criticism of government officials or policies was the focus of the Court's attention in *Sullivan*.

Post-*Sullivan* Decisions

The Court's extension of its holding in *Sullivan* proceeded incrementally, but deliberately.[10] Kagan describes the trajectory of the Court's post-*Sullivan* jurisprudence as originating from the initial ruling "to protect against all infringements the right of a sovereign people to criticize government policy and public officials" to ultimately providing "some level of constitutional protection to libelous speech extending far beyond attacks on official conduct."[11]

Expansion of Scope of Protections

For example, in *Curtis Publishing Company v. Butts*,[12] the Court held that the First Amendment similarly barred strict liability for defamation of "public figures"[13] who were not public officials. In *Gertz v. Robert Welch, Inc.*, the Court again applied a balancing test to justify barring strict liability for defamation of private individuals regarding matters of public concern.[14] One significant consequence of these extensions, as identified in Kagan's writings, is that "the actual

[8] Kagan, *supra* note 1, at 204. The *Sullivan* Court similarly noted the plaintiff's potential ulterior motive: "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations." *NYT v. Sullivan*, 376 U.S. at 269.

[9] Kagan, *supra* note 1, at 209.

[10] As Justice Harlan noted in one of the Court's earlier opportunities to revisit this issue, "the modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 148 (1967).

[11] Kagan, *supra* note 2, at 1608.

[12] *Curtis Pub. Co. v. Butts*, 388 U.S. at 130. The two plaintiffs in this case were the University of Georgia athletic director, accused of fixing a game, and an individual who was present at a riot resulting from federal desegregation of the University of Mississippi.

[13] Kagan offers an informal definition of "public figures" as "[e]veryone the reader has heard of before and a great many people he hasn't." Kagan, *supra* note 1, at 210. The Court's definition is traditionally characterized as persons of "pervasive fame or notoriety" and those who inject themselves or are drawn into public controversy. *Gertz v. Robert Welch*, 418 U.S. 323, 351 (1974).

[14] *Gertz v. Robert Welch*, 418 U.S. at 323. This case dealt with the defamation of a private attorney who had brought a civil suit on behalf of an individual murdered by a police officer.

malice standard today governs most libel cases, although the occasional plaintiff manages to escape its strict proof requirements."[15]

In its post-*Sullivan* cases, the Court appears to have been motivated by what Kagan describes as a desire to promote free debate "by removing the press' fear of liability for inevitable errors."[16] In describing its own analysis, the Court noted that the interest at issue was not the value of the defamatory speech, but the cost of any potential chilling effect that may accompany the unrestrained enforcement of defamation law:

> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." ... And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.[17]

Kagan's Views

Kagan's writings, while skeptical of the justification for the Court's extensions, do not appear to dispute the need to reconcile the competing interests of a free press and defamation victims. Instead, her writings raise a number of points that might affect how the relevant harms and benefits are valued in such a balance. Specifically, she questions whether "uninhibited defamatory comment [is] an unambiguous social good ... That is, does it truly enhance public discourse"[18] or is the Court's post-*Sullivan* extension an "arguably miserable accommodation of competing interests"?[19]

Because the cost of modern defamation law on the defamed individual's interests is generally acknowledged by all, Kagan's answer to this question generally deals with the other side of the balance: the extent to which the protections improve public discourse. Her points resolve into two general points about the social value of the Court's extension of *Sullivan*. First, she suggests that the current defamation restrictions extend beyond the point necessary to address the core issue identified in *Sullivan*. She asks,

> Why is the Supreme Court's libel jurisprudence an example of praiseworthy incremental decision making if it extended constitutional protection from cases that "really did engage the central meaning of the First Amendment" to cases that (impliedly) did not?[20]

[15] Kagan, *supra* note 2, at 1608.

[16] *Id.* at 1609.

[17] *Gertz v. Robert Welch*, 418 U.S. at 340 (citing 4 J. Elliot, Debates on the Federal Constitution of 1787, p. 571 (1876)).

[18] Kagan, *supra* note 1, at 206.

[19] Kagan, *supra* note 2, at 1609.

[20] Kagan, *supra* note 1, at 211.

In her view, "[w]hether this trade-off makes sense may depend on whether the speech at issue lies at the core of First Amendment protections, as was true in *Sullivan*, or nearer to its periphery, as in the many libel cases involving celebrity gossip."[21]

Second, she questions "whether the trade-off is in fact a trade-off—whether, that is, the public gets the uninhibited debate promised for the price paid."[22] Here, she supports her scrutiny empirically based upon the effects that the Court's extension of *Sullivan* has had. One such effect is what Kagan labels the "tendency to sensationalize political discourse."[23]

> When the press stops worrying about the accuracy of defamatory statements, it may start covering subject matter not readily amenable to determinations of truth or falsity; that subject matter, whether true or false, often ranks high in sensationalist content.... And, arguably, such expression—the obvious example here is speech concerning the private and sexual lives of political figures—distracts from and devalues the kind of discourse *Sullivan* meant to promote.[24]

Another more practical consequence identified by Kagan has been an increase in the "sheer complexity" of defamation litigation and the accompanying legal costs to defend against it. Because the increased uncertainty and costs may work at cross-purposes with the protections afforded to the press, "[c]urrent libel law thus may thwart the correction and remedy of false defamatory statements without in any way lessening the self-censorship that the *Sullivan* Court acted to prevent."[25]

Analytic Alternatives Suggested by Kagan

As an alternative to the existing defamation framework, Kagan suggests an analytical approach that examines the content of the allegedly defamatory speech:

> One approach, articulated in various ways by both the Justices and commentators, would apply the actual malice rule to all (but only) those cases involving speech on governmental affairs—or, stated more broadly, speech on matters of public importance—or, stated still more broadly, speech on matters of public concern or interest.[26] This approach emerges from viewing *Sullivan* as primarily a case about the speech necessary for democratic governance.

Under such a standard, Kagan suggests that false statements made about celebrities, who may be currently classified as public figures, might not be afforded First Amendment protections.[27] She suggests that such an approach would limit only those defamation actions involving that speech which is necessary for citizens to act in their intended sovereign capacity.

Kagan also suggests looking to the "respective power of the speaker and the subject and the relation between the two" to determine which defamation suits implicate First Amendment

[21] Kagan, *supra* note 2, at 1609.

[22] *Id.*

[23] Kagan, *supra* note 1, at 207.

[24] *Id.*

[25] Kagan, *supra* note 2, at 1609.

[26] Kagan, *supra* note 1, at 212.

[27] *Id.* at 213.

concerns. In support of this alternative, she notes that "Chief Justice Warren understood *Sullivan* as resting on the simple presence of power—whether governmental or private did not matter—and the fear of its abuse."[28]

It should also be noted that Kagan's writings are not wholly critical of the Court's post-*Sullivan* defamation jurisprudence. She recognizes the "perceived necessity of using categorical rules"[29] with respect to the First Amendment and concedes that the analyses she offers as an alternative manner of striking the necessary balance, namely "the connection of speech to self-government or the relationship between the power of a speaker and a subject ... resist reduction to simple categorical rules." [30] Consequently, she writes that "the failures of the Court's libel law decisions ultimately may derive from just these problems rather than from a simple failure to respect the underpinnings of *Sullivan*."[31]

Additionally, despite her critiques of modern defamation law, Kagan acknowledges that "the Court's libel law doctrine by now has acquired, seemingly despite itself, *the virtue of stability*—an achievement itself likely to prevent any ambitious reform proposals from making headway."[32]

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[28] *Id.* (citing *Curtis Pub. Co. v. Butts*, 388 U.S. at 163-64 (Warren, C.J., concurring).

[29] Kagan, *supra* note 1, at 214. The need for categorical rules in this situation has also been commented on by the Court:

> Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis.... But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. *Gertz v. Robert Welch*, 418 U.S. at 343-344.

[30] Kagan, *supra* note 1, at 214.

[31] *Id.*

[32] Kagan, *supra* note 2, at 1609 (emphasis added). Whether this statement refers to her perspectives as a legal practitioner or to her views on the importance of *stare decisis* is not addressed in her writings on defamation.