

RODNEY A. SMOLLA

SUING

THE

PRESS

LIBEL, THE MEDIA, & POWER

WESTMORELAND v. CBS

CAROL BURNETT v. NATIONAL ENQUIRER

WILLIAM TAVOULAREAS v. WASHINGTON POST

LILLIAN HELLMAN v. MARY McCARTHY

ARIEL SHARON v. TIME

NEW YORK TIMES v. SULLIVAN

MISS AMERICA PAGEANT v. PENTHOUSE

JACQUELINE ONASSIS v. GALELLA

JERRY FALWELL v. HUSTLER

AND OTHER LANDMARK CASES

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Rodney A. Smolla

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TO LINDA

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SUING THE PRESS

1

The Thinning American Skin

It is disgusting, and it is a pack of lies. I—it hurts. It hurts, because words, once they are printed, they've got a life of their own. Words, once spoken, have a life of their own. How was I going to explain to my kids, my family, the people I care about?

Carol Burnett, testifying in
Burnett v. National Enquirer

But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.

Shakespeare, *Othello* (III, iii, 160–162)

CAROL BURNETT TOOK the witness stand. With her voice slightly trembling and with tears in her eyes, she explained to the jury why she sued the *National Enquirer*.¹ Her testimony was reported live by the Cable News Network, and the highlights were repeated on the three major network evening news broadcasts:

Q. (Burnett's Attorney): When was the first time you had any knowledge of that article or the contents of that article?

A. (Carol Burnett): I believe that it was the day that it came out

Q. What was your reaction?

A. Well, I was absolutely—I was stunned. . . . I felt very, very angry. I started to cry. I started to shake.

William Westmoreland, retired commander of American forces in Vietnam, approached the microphones at the Navy Club in Washington, D.C., to announce that he was commencing a \$120 million libel suit against CBS News. A documentary broadcast by CBS and narrated by Mike Wallace entitled *The Untold Story: A Vietnam Deception* had accused Westmoreland of complicity in a conspiracy to doctor intelligence estimates on the strength of enemy forces in Vietnam.² As in Carol Burnett's case, the Gen-

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eral's remarks were controlled but emotional, seeping with retributive bitterness:

I am an old soldier who loves his country and have had enough of war. It was my fate to serve for over four years as senior American commander in the most unpopular war this country ever fought. I have been reviled, burned in effigy, spat upon. Neither I nor my wife nor my family want me to go to battle once again.

But all my life I have valued "duty, honor, country" above all else. Even as my friends and family urged me to ignore CBS and leave the field, I reflected on those Americans who had died in service in Vietnam. Even as I considered the enormous wealth and power that make CBS so formidable an adversary, I thought too of the troops I had commanded and sent to battle, and those who never returned.

It is, therefore, with the very greatest reluctance, and consciousness of the long and bitter legal battle I am about to engage in, that I have advised my attorneys, the Capital Legal Foundation, to bring suit in South Carolina, my home state, against CBS for libel. At this moment, correspondent counsel in South Carolina is filing our complaint against CBS requesting damages for libel. There is no way left for me to clear my name, my honor, and the honor of the military . . .

The only question is whether CBS had an obligation to be accurate in its facts before it attempted to destroy a man's character, the work of his lifetime. I trust the American judicial system and an American jury will fairly evaluate what I and those in positions of responsibility said and did, and I am pleased to put my reputation and honor in their custody.³

William Tavoulareas, the feisty, iconoclast president of the Mobil Oil Corporation, did not appreciate a story by the *Washington Post* stating that he had "set up" his son Peter in business. The story strongly implied that Tavoulareas had acted in violation of ethical business standards, and perhaps even federal securities law. Tavoulareas tried for a frustrating year to get the *Post* to retract its story, but ultimately felt forced to take the *Post* into court for libel. Tavoulareas stated:

I tried to get them to admit their mistakes. But they're so damned arrogant. I kept telling them I'd sue. But they said I wouldn't because they'd drag me through the mud in discovery. Well, I know my reputation and my integrity, and I knew they'd get nothing on me. I said, "you don't know me. I'm gonna sue."⁴

A comedienne, a general, a corporate executive, each a classic American self-made success story, each wounded by the media, and each striking back, through courtroom attacks that became a cause célèbre, taking on meanings much larger than the lawsuits themselves. They are among the most visible symbols of an astonishing cultural movement. America is in the midst of an explosion of litigation aimed against the media. Americans

who feel that their reputations have been impugned or their privacy invaded by the broadcast or print media have increasingly resorted to litigation for vindication. Much of this litigation in recent years has been launched by well known cultural figures, many seeking staggering sums of money. Burnett, Tavoulaareas, Westmoreland, Woody Allen, Clint Eastwood, Mohammed Ali, Paul Laxalt, Ralph Nader, Norman Mailer, Wayne Newton, Elizabeth Taylor, Jerry Falwell, E. Howard Hunt, Shirley Jones, Lillian Hellman, Johnny Carson: the list of famous Americans who have taken to suing publishers, broadcasters, reporters, writers, and advertisers in recent years reads as if it were randomly generated from *Who's Who*.⁵ The media has been in the uneasy position of continuously reporting about itself as victim, as the lawsuit for libel or invasion of privacy has become one of America's newest growth industries.⁶

Every week a new suit against the media seems to appear, many of the suits brought by politicians, entertainers, sports stars, writers, corporate executives, and other prominent social figures who have themselves previously profited from media attention. And plaintiffs today have no shyness about asking for staggering sums in their complaints. William Westmoreland's complaint against CBS sought \$120 million, but there are countless other impressive demands. Former Israeli Defense Minister Ariel Sharon claimed \$50 million in his libel suit against *Time* magazine, at one point claiming that *Time* had committed a "blood libel" in a story which implied that testimony before the Israeli investigatory commission into the Phalangist massacres at the Sabra and Shatilla concentration camps in Lebanon in 1982 had put at least part of the responsibility for the massacres on Sharon.⁷ Carol Burnett asked for \$10 million in her suit against the *National Enquirer*. Beverly Hills physician Robert Fader filed suit for \$20 million against *Washington Post* editor Bob Woodward for statements made in Woodward's book on John Belushi, *Wired—The Short Life and Fast Times of John Belushi*, in which Woodward wrote that Dr. Fader prescribed drugs to Belushi and other patients for no valid medical reasons and without regard to his patients' welfare. Norman Mailer sought \$7 million in his suit against the *New York Post*, claiming that the newspaper defamed him in reports about the trial of prisoner/writer Jack Henry Abbott. Senator Paul Laxalt sought \$250 million against the *Sacramento Bee* for stories linking him to a grand jury investigation of casino operations in Nevada. Former Philadelphia Mayor William J. Green sought \$5.1 million from a CBS television station for reporting that he was under federal criminal investigation. Lillian Hellman sought \$2.25 million against fellow writer Mary McCarthy after McCarthy said on the Dick Cavett Show that Hellman was "terribly overrated, a bad writer and a dishonest writer," and that "every word she writes is a lie, including 'and' and 'the'." Feminist attorney Gloria Alfred filed a \$10 million suit against a California State Senator because

of a press release that characterized Alfred as a “slick butch lawyeress.” Former Governor Edward J. King of Massachusetts filed a \$3.6 million suit against the *Boston Globe* for articles, editorials, and political cartoons that King alleged implied he was unfit and incapable as governor. Governor William J. Janklow of South Dakota filed a \$10 million suit against *Newsweek* for an article allegedly implying that he had raped an Indian girl. Actress Shirley Jones and her husband, actor Marty Ingels, sought \$20 million from the *National Enquirer* for a story alleging that Jones had severe drinking problems. Nathaniel Davis, former United States ambassador to Chile, and two of his ex-assistants filed a \$150 million suit against the makers of the movie *Missing*, alleging that the 1982 film implied that the American embassy was connected with the killing of an American freelance writer during the 1973 coup d’etat in Chile. The owners of the Rancho LaCosta resort in California sought a record breaking \$552 million from *Penthouse* magazine for an article claiming that the resort was a hangout for mobsters. And in what may be “the most unkindest cut of all,” a group of justices from the Pennsylvania Supreme Court have sued the *Philadelphia Inquirer* for libels allegedly arising from *Inquirer* stories critical of the justices’ judicial conduct!

The million dollar libel suit has become the newest American status symbol. It seems at times that everybody who’s anybody has a libel suit going on the side. The awards many juries are willing to return indicate that the American public is not shocked by the size of the judgments these plaintiffs are seeking. A Washington, D.C. jury awarded Mobil Oil president William Tavoulareas \$2 million in his suit against the *Washington Post*; writer Jackie Collins was awarded \$40 million against a Larry Flynt distributing company; Kimerli Jane Pring, Miss Wyoming of 1978, was awarded \$26 million by a Wyoming federal court jury in a suit against *Penthouse* magazine; and even E. Howard Hunt of Watergate infamy managed to win a \$650,000 damage award from a federal jury in Miami against a weekly newspaper called the *Spotlight*, for a story that linked Hunt to the assassination of John F. Kennedy.⁸ Most of these jury awards ultimately get reduced or eliminated altogether by the trial judge or on appeal, but the uninhibited willingness of juries to shower plaintiffs with gigantic awards indicates that something very new has infiltrated the popular mood, and the mere *threat* that one of these huge awards will make it through the legal maze untouched hangs like a litigation time bomb over writers, publishers, and broadcasters of every variety from *Penthouse* to the *New York Times*.⁹

The newfound national fascination with libel and privacy suits is worth studying for what it reveals about current American culture, and for what it reveals about the influences of cultural trends on the fabric and workings

of the American legal system. The libel litigation explosion provides an unusually revealing glimpse into the relationship between changes in American law and larger patterns of national life. The new invigoration of the law of defamation and invasion of privacy is in part the result of changes in legal doctrine, but it is even more a reflection of changes in the attitudes and frustrations of contemporary Americans.

The current explosion of litigation against the media poses a long list of intriguing questions. Why do plaintiffs sue the press? Is it money they seek? Vengeance? Restoration of honor? How important is the protection of reputation in our society, and how important should it be?¹⁰ Are libel suits a manifestation of a growing recognition of a new form of "civil right," a manifestation of concern for human dignity that is primarily directed at protecting emotional and mental tranquillity? Or are libel suits a sign of a new national narcissism, a narcissism that provokes violent responses to excessive media criticism of individuals and national institutions? Is the libel litigation explosion a symptom of a society that has grown emotionally flabby and plastic; a society that has developed a slavish and prudish devotion to decorum and self-image? Is there anything unhealthy in too much preoccupation with protecting reputation? Is America becoming too concerned with image, too thin-skinned, too removed from the rough and ready individualism that once would have regarded a libel suit as a wimpy response to criticism?¹¹ Or is the media's trouble in court primarily of its own making? Has the press grown too powerful, too arrogant, too oracular in tone? When the press makes errors that injure reputations, are the errors usually innocent, or are they often the result of careless or even reckless work? How often are press errors the consequence of conscious, malicious, evil deception? What do our recent experiences with major libel suits tell us about the American judicial system? How does the legal system determine the "truth" in a libel suit? How often is what purports to be a battle over "truth" really a battle of competing ideologies? Are some libel suits really less concerned with errors of fact than with a desire to punish those with opposing political, moral, or religious viewpoints? Have libel suits become a way of striking out against the fringe elements of the media? Do they provide a vehicle for a sort of puritanical backlash against *Penthouse* or the *National Enquirer*, a backlash that later comes to subtly infiltrate attitudes towards the *Washington Post* or CBS News? Are some disputes over "truth" not appropriate for litigation? Are juries able to follow the law as judges instruct them to in libel litigation, or do they apply their own version of justice? ("Their own" version of justice, of course, may well reflect values shared by many Americans, even if they are not the "approved" values of the legal system.)

What sorts of emerging cultural attitudes, biases, and perceptions are shaping jury verdicts? What is the social cost, in terms of court time, legal fees, and other “societal overhead” of libel litigation? Are the social costs worth the social benefits? What is the toll that anti-media litigation takes on First Amendment values? To what extent does it diminish the courage and the ardour of writers, publishers, or broadcasters? On the other hand, to what extent does it encourage greater accuracy, and greater fairness in news reporting, serving the strong societal interest in providing a “check and balance” on the fourth estate that might not otherwise exist? What alternatives, if any, exist to the present legal process for arbitrating conflicts between individual privacy and free expression?

These are the questions this book explores, by examining a large sampling of recent suits brought against the media. The defendant in a contemporary libel or invasion of privacy suit may be a pillar of mainstream media respectability—the *New York Times* or CBS News—or a media outlet that is on the fringe of the orthodoxy spectrum—the *National Enquirer* or *Hustler*. The defendant may be a small town daily newspaper—the *Alton Telegraph*—or an individual writer—Mary McCarthy, or Andrew Greeley. The issues litigated may range from disputes of serious national debate—the conduct of the Vietnam War or the events surrounding the disappearance of a young American writer during the overthrow of Salvador Allende Gossens in Chile. Or the disputes may be of less historical moment—whether fantasies about the sexual life of a fictional beauty queen were meant to refer to a real beauty pageant contestant. But to the plaintiffs who bring these suits, and the lawyers who try them, all of the issues are likely to seem quite serious. More significant for all of us, these suits express the escalating conflict in our increasingly mediatized society between the right of the people to know all and the right of persons to be let alone.

In examining the provocative episodes of media litigation in the chapters that follow, it is worth asking repeatedly how important the protection of reputation and privacy really is, and on the other hand how important to American society is a media so free of the threat of litigation that it can participate in the most wide-open, robust, and uninhibited discussion of issues important, or simply of interest, to the nation as a whole. Abstract discussion of these conflicts easily degenerates into the recitation of pat clichés and reflexive biases. Some find no value more sacred in the constellation of American liberties than free speech, and they react with instant hostility to any hint of censorship. Others dislike the press with all the intensity of Richard Nixon. To some the libel explosion is one of the greatest threats to civil liberties in America today. To others the sight of the pretentious, self-appointed guardians of truth forced by suits to

explain why they wrote what they did is a welcome swing in the pendulum of justice. When the focus is shifted from the abstract to the particular, however, there is some hope of dissolving these clichés and prejudices in a bath of more careful and critical examination. An important element of that examination is a willingness to look at modern libel litigation from perspectives that go beyond an examination of the methods of the media. Although the media's behavior is an enormously important component in the whole story (and it receives substantial attention in this book), there are other components as well, components that deal more with the victims of libel, and with the changing cultural perceptions held by each of us as voracious consumers of the media's output.

Today, perhaps more than ever, Americans just don't trust the press. Statistics tell at least part of the story. A recent Harris survey indicated that only about 20% of those polled responded affirmatively to the question of whether they have a great deal of confidence in people running the media. A *Newsweek* poll in October 1984 revealed that television journalism ranked at the bottom of the confidence pile among Americans, with a 26% rating that placed it behind organized religion (which topped the list at 64%), the military (58%), banks, the Supreme Court, public schools, Congress, big businesses, and organized labor. Newspapers fared better; their 34% confidence rating managed to just top Congress, big business, and labor. Seven in ten Americans, however, believe that the nation's most influential papers are biased. And this statistical portrait reveals only part of the national mood.¹²

In the aftermath of Vietnam and Watergate, the American press grew in glamour, power, and profitability, but not in heartfelt esteem. College students flocked to journalism departments in hopes of becoming new Bob Woodwards or Carl Bernsteins, new Leslie Stahls or Tom Brokaws. But somehow, the growing power, glamour, and influence of the media has also been matched by growing suspicion. The evidence indicates that Americans have grown more distrustful of the media, more suspicious of the media's neutrality, and more alert to the possibility that the media may at times be influencing the course of national agendas rather than merely recording and reporting events. Americans have witnessed the power of the media, and are at once attracted to and wary of it.

In recent years highly publicized and embarrassing mistakes have plagued even the most estimable of media outlets. Perhaps the best known is the debacle at the *Washington Post*, in which Janet Cooke won the 1980 Pulitzer Prize for stories published in the *Post* about an 8-year-old heroin addict, stories presented as factual reportage that were later uncovered as inventions of Janet Cooke's imagination. The incident prompted *Washing-*

ton Post editor, Ben Bradlee, to ask “How are you going to protect yourself against pathological liars?”—a question of some irony, for it is this question many libel plaintiffs in effect claim to have asked themselves before bringing suit against news organizations. There are many other recent examples of such mistakes.

Newsweek in 1983 printed Hitler’s “diaries” as a cover story one week, writing that “genuine or not, it almost doesn’t matter in the end,” and two weeks later admitted in embarrassment that they were frauds. The story of the fraud perpetrated on the American and European presses over the fake diaries became as big a story as the diaries themselves. In 1981, Associated Press reporter Gloria Ohland resigned over misattributed quotes and material lifted from a California magazine account of a 200 mile-per-hour “banzai” car ride down a freeway in the heart of Los Angeles. The *New York Times Magazine* ran a story in 1981 about Khmer Rouge guerrillas by Christopher Jones, a 24-year-old freelancer who faked a trip (expenses and all) from Spain to Cambodia. After Jones was caught because he had lifted material virtually verbatim from an André Malraux novel, *Times* Executive Editor A.M. Rosenthal said his newspaper had suffered a “lapse” in its “procedures.” And in an incident that seemed to drive home the public suspicion that getting a good story sometimes obsesses the press to the point of inhumanity, a reporter and cameraman in Jacksonville, Alabama filmed away for a full 37 seconds as a man set himself on fire with the camera rolling. They were the only witnesses to the gruesome scene, and they got the story before they tried to save him. Although the press is usually criticized for being too emotionally involved in the stories they report, in this case the public outcry was against what seemed to be a callous detachment.¹³

These examples are nothing new—the press has been making mistakes from its earliest days, and like any human enterprise, always will. But the mistakes grate against the public sensibilities more than they once did, perhaps because of the sense these days that the establishment press takes itself so seriously.

Our image of reporters is different than it used to be. Reporters once wore hats with greasy bands like Indiana Jones; their sports jackets were rumped, they drank a lot and they didn’t get paid much. As Walter Cronkite has nicely put it, “we knew Archie Bunker better than the bankers,” and the new “better class of reporters” has taken its toll in “the loss of the common touch.” Reporters for the *New York Times* or the *Washington Post* may make \$60,000 a year, and television network journalists routinely pull down incomes in six figures. Back in the days when journalism was a seedier business, Americans knew to take the news as we used to take our french fries—with heavy doses of salt. One of the sacred cultural clichés