

MODULE 5

Defamation and Emotional Distress

New York Times v. Sullivan · Gertz v. Robert Welch · Hustler v. Falwell · Snyder v. Phelps

First Amendment Law · Fall 2026 · Professor Jorge R. Roig

Where we are on the map

Still in the disfavored categories: now the ones that began as torts.

MODULE 1

First Amendment Values

Truth • democracy • autonomy • tolerance

MODULE 1

Speech vs. Conduct

Pure speech • expressive conduct • government speech

MODULE 2

Content-Based vs. Content-Neutral

Strict against intermediate — and the exceptions

MODULES 4-6

Disfavored Categories

Incitement • solicitation of crime • threats • fighting words • defamation • commercial • sexual speech

MODULE 7

Place of Speech

Public forum doctrine. Where it happens does the work.

MODULE 3

Four Facial Failures

Prior restraint • vagueness • overbreadth • compelled speech

THROUGHOUT

Related Protections

Press • assembly → association • petition — and the religion clauses

Two state-law torts, rebuilt by the First Amendment.

Libel before 1964

Historically not protected. The only defense was truth.

THE TORT

- A false statement of fact.
- Harm to reputation.
- Falsity and damages presumed.

THE CATEGORY

- Chaplinsky, 1942: “the libelous.”
- “Never thought to raise any Constitutional problem.”

THE DEFENSE

- Truth.
- Proved by the speaker.

Historically not protected. Then came Sullivan.

New York Times v. Sullivan

A civil-rights advertisement, a Montgomery commissioner, a \$500,000 verdict.

THE AD

- “Heed Their Rising Voices,” 1960.
- Small errors: arrested “seven times,” not four.

THE VERDICT

- \$500,000, the full amount claimed.
- Truth was a defense — and not enough.

Debate on public issues should be “uninhibited, robust, and wide-open.”

Sullivan: actual malice

What a public official must prove to recover for criticism of official conduct.

1

Knowledge of falsity

The speaker knew it was false.

2

Reckless disregard

“Of whether it was false or not.”

NOT SPITE, NOT ILL WILL

- A state of mind about the truth — shown with “convincing clarity.”

Sullivan and seditious libel

The Sedition Act of 1798, judged at last.

THE ACT, 1798

- A crime to publish “false, scandalous and malicious” writing against the government.
- Truth was a defense.

THE LESSON

- A truth defense did not save it.
- An official's libel suit can do the same work.

The attack on the Act “has carried the day in the court of history.”

Public figures: Curtis Publishing

A football coach and a retired general, 1967.

THE CASES

- Butts: a coach accused of fixing a game.
- Walker: a general at a campus riot.

THE RULE

- Actual malice extends to public figures.
- Including celebrities.

Those who, “by reason of their fame, shape events in areas of concern to society at large.”

Gertz: private individuals

A civil-rights lawyer called a “Leninist” in a John Birch Society magazine.

WHY DIFFERENT

- Less access to the channels of communication.
- They did not assume the risk.

THE RULE

- No liability without fault.
- No presumed or punitive damages without actual malice.

My board: “negligence at least.” The Court: “without fault.”

Who is a public figure?

Gertz's two kinds — and why Gertz himself was neither.

ALL-PURPOSE

- Pervasive fame or notoriety.
- Celebrities.

LIMITED-PURPOSE

- Steps into a particular controversy.
- Public for that issue only.

ELMER GERTZ

- Well known in some circles.
- Not a public figure.

He did not “thrust himself into the vortex” of the issue.

Who sues, and what they must prove

The defamation rules, sorted by plaintiff and by subject.

Public official	Sullivan, 1964	Actual malice, with convincing clarity.
Public figure	Curtis Publishing, 1967	Actual malice.
Private person, public issue	Gertz, 1974	At least fault. Actual malice for presumed or punitive damages.
Private person, private issue	Dun & Bradstreet, 1985	Presumed and punitive damages without actual malice.

Sullivan (1964) · Curtis Publishing (1967) · Gertz (1974) · Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985) (not assigned).

Opinion and hyperbole

Protected — but not because the speaker says “I think.”

PROTECTED

- What cannot reasonably be read as stating actual facts.
- Parody. Rhetorical hyperbole.

NOT SAVED BY THE LABEL

- “In my opinion Jones is a liar.”
- It implies a provably false fact.

Milkovich, 1990: no “wholesale defamation exemption” for opinion.

Hustler v. Falwell: the parody

A liquor-ad parody, and a jury that split the claims.

THE JURY

- Libel: no. Not believable as fact.
- Emotional distress: yes. Damages awarded.

THE COURT

- A public figure needs a false statement of fact,
- made with actual malice.

The fine print: “ad parody — not to be taken seriously.”

Hustler: why not “outrageous”?

The tort's own test, and why the Court would not use it here.

THE TORT

- Outrageous conduct.
- Severe emotional distress.

THE PROBLEM

- “Outrageousness” turns on the jurors' tastes or views.

THE TRADITION

- Nast and Boss Tweed.
- Washington drawn as an ass.

A test that tracks the jury's taste cannot govern political speech.

Snyder v. Phelps: the funeral

A private person's grief, and speech on public issues.

THE VERDICT

- Emotional distress, intrusion, conspiracy.
- \$2.9 million, plus punitive damages.

THE COURT, 8-1

- Public concern: content, form and context.
- Public land, 1,000 feet away.

“We cannot react to that pain by punishing the speaker.”

Commercial speech: a preview

The top right corner of the board. Module 5A.

CENTRAL HUDSON, 1980

1. Lawful and not misleading?
2. A substantial interest?
3. Directly advanced?
4. No more extensive than necessary?

ON MY BOARD

- Intermediate scrutiny.
- Reliance, so truth.
- Puffery: the commercial cousin of hyperbole.

Here, a falsehood can be protected. There, it never is.

For discussion: the neighborhood blog

A hypothetical. Every rule in this module is in play.

THE FACTS

- A false post: a board member “took kickbacks.”
- A baker called “a fraud who poisons children.”
- A realistic fake video, labeled “parody.”
- The baker's ad: “The best bread in New York.”

QUESTIONS FOR DISCUSSION

1. Actual malice, or just careless?
2. Is the baker a public figure? Fact or opinion?
3. Is a believable parody still a parody?
4. Is the ad puffery?
5. Can the family sue for emotional distress?

Module 5 on one slide

One line per rule.

THE LINE, ONE RULE AT A TIME

- Public officials: actual malice (Sullivan).
- Public figures and celebrities: actual malice (Curtis Publishing).
- Private persons: at least fault (Gertz).
- Opinion: no label protects a provable falsehood (Milkovich).
- Parody of a public figure: actual malice for distress, too (Hustler).
- Public issues in a public place: protected, even when they wound (Snyder).

Next — Module 5A: commercial speech.

Next: Module 5A — Commercial Speech; then Module 6 — Sexual Speech, and a Category the Court Refused to Create.