The Volokh Conspiracy

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Do Ordinary Speakers Have Lesser First Amendment Rights Than Newspapers Do?

"Yes," the Minnesota Supreme Court said in 1980 – now it's being asked to reconsider that.

Eugene Volokh – Apr. 21, 2018, 4:40 p.m.

I have long argued that the answer is "no" -- that the "freedom of the press" is the freedom of all to use mass communication technology (the printing press and its heirs) and not just the freedom of a particular industry (the institutional media). The Supreme Court agrees, as do most lower courts. But a few states do deny non-institutional-media speakers the same First Amendment protections that the institutional media gets; and Minnesota is one of them.

Thus, in the recent *Maethner v. Someplace Safe, Inc.*, the Minnesota Court of Appeals held that a libel plaintiff could recover presumed damages (i.e., damages not supported by specific evidence of lost business opportunities or other harms stemming from injury to reputation) even without a showing that the defendants knew the statements were false or likely false. In *Gertz v. Robert Welch, Inc.* (1974), the Supreme Court held that this was not allowed when it comes to statements on matter of public concern, even when the plaintiff is a private figure. But Minnesota precedents say that this doesn't apply to speech outside the institutional media.

Here, Someplace Safe ("a nonprofit organization that provides advocacy and other services for victims of violence and domestic abuse") gave a "Survivor Award" to a woman, and published an article by the woman in which she described her "surviving domestic violence." Her ex-husband sued, saying that the article would be understood by reasonable community members as accusing him of having abused the ex-wife. The appellate court let the case go forward, reasoning partly that "[t]he media, and related concerns to protect constitutional rights under the First Amendment, were not involved."

The defendants have recently asked the Minnesota Supreme Court to review the case, and I filed an application to file an amicus brief -- with invaluable help from local counsel John Arechigo, as well as my student Jason Lawler -- on behalf of our own Dale Carpenter (formerly of the University of Minnesota), Prof. Raleigh Levine (Mitchell Hamline), Prof. Greg Sisk (St. Thomas), Scott Johnson (of the Powerline blog), and myself. In Minnesota, such an application technically seeks leave to file a brief in the case if and when the court grants review, but in practice it sometimes explains why review would be helpful. Here is the heart of what we say:

Applicants support the position of Appellants on Issue 1 set forth in the Someplace Safe petition. In their brief, they plan to argue the following:

[1.] Though this Court's precedent in libel actions, *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 258 n.5 (Minn. 1980), concludes that the Free Press Clause applies differently to media and nonmedia speakers, the U.S.

Supreme Court has long held that the First Amendment protects the "press" not as an industry but as a technology, covering all people who use the printing press and its technological descendants.

Most recently, in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court expressly endorsed the view that "the institutional press" has no "constitutional privilege beyond that of other speakers," *id.* at 352 (internal quotation marks omitted). And in the process the Court endorsed the view of five concurring and dissenting Justices in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which specifically rejected a media/nonmedia distinction in libel cases.

Indeed, the principle that nonmedia speakers are entitled to the same protection as media speakers is firmly established. In *New York Times Co. v. Sullivan* itself, the Court reversed an award of presumed damages against both the *Times* and several nonmedia defendants, applying the same "actual malice" test to both. 376 U.S. 254, 279-80 (1964). That holding in turned relied, *id.* at 280-82, on *Coleman v. MacLennan*, 98 P.281 (Kan. 1908), which noted that "the present consensus of judicial opinion is that the press has the same rights as an individual, and no more." *Id*. at 286. And immediately after *New York Times v. Sullivan*, the Court applied its holding to two nonmedia defendants. *See Garrison v. Louisiana*, 379 U.S. 64, 64-67 (1964) (statements made by a district attorney at a press conference); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (statements made by an arrestee in a private letter to the sheriff and in a press release to wire services, *see Henry v. Pearson*, 158 So. 2d 695, 696 (Miss. 1963)).

Unsurprisingly, media and nonmedia speakers are treated equally in other areas of First Amendment law as well. In leafletting cases, the Court expressly extended the Free Press Clause to nonmedia defendants, writing, "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). The Court likewise refused to grant to the institutional media a "constitutional right of special access to information not available to the public generally," *Pell v. Procunier*, 417 U.S. 817, 833 (1974) (citation omitted), or any special privileges for claims involving copyright law, labor law, and many other areas of the law. *See* Eugene Volokh, *Freedom for the Press as an Industry or Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459, 506-21 (2012) (citing the cases on this point, and discussing them in detail).

Even before the Internet age, the media/nonmedia distinction was thus condemned by the Supreme Court as creating an unsound inequality of constitutional rights. And as the Internet makes lines between professional media and nonmedia speakers are getting ever more blurred, the media/nonmedia distinction becomes especially unsound and unworkable.

[2.] Eighth Circuit caselaw likewise requires a showing of "actual malice" in such cases. "The fact that . . . *Gertz*involved media defendants . . . is in our view irrelevant to the question of what level of constitutional protection [the defendant's First Amendment] right is to receive." *In re IBP Confidential Bus. Documents Litig.,* 797 F.2d 632, 642 (8th Cir. 1986). If the defendants in this case were not citizens of Minnesota, and thus removed the case to federal district court, they would have been immune from presumed damages absent a showing of "actual malice."

[3.] Every other federal circuit court to consider this issue has likewise held that the First Amendment applies equally to media and nonmedia speakers in defamation actions. "[A] First Amendment distinction between the institutional press and other speakers is unworkable." *Obsidian Fin. Grp., LLP v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) (so holding in an Internet speech case). "Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the 'media.'" *Snyder v. Phelps,*580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd,* 562 U.S. 443 (2011). *See also Flamm v. Am. Ass'n of Univ. Women,* 201 F.3d 144, 149 (2d Cir. 2000); *Avins v. White,* 627 F.2d 637, 649 (3d Cir. 1980); *Garcia v. Bd. of Educ.,* 777 F.2d 1403, 1410 (10th Cir. 1985); *Davis v. Schuchat,* 510 F.2d 731, 734 n.3 (D.C. Cir. 1975).

[4.] Indeed, even Minnesota Court of Appeals cases sometimes follow the federal lead in such matters, and state that, "[w]ith matters of public concern . . . recovery of presumed damages cannot be permitted on less than a showing of the *New York Times* actual malice standard." *State v. Turner*, 864 N.W.2d 204, 209 (Minn. Ct. App. 2015) (citing *Gertz*); *see also C.S. McCrossan v. Poucher*, 1992 WL 213468, *1 (Minn. Ct. App. 1992) (nonprecedential) (citing the *Gertz* test as authoritative in a case involving a private figure plaintiff, a nonmedia defendant, and speech on a matter of public concern); *Strauss v. Thorne*, 490 N.W.2d 908, 914 n.1 (Minn. Ct. App. 1992) (Crippen, J., concurring in part, dissenting in part) (noting tension between *Stuempges* and *Dun & Bradstreet*).

[5.] Plaintiff Kurt Maethner should therefore be unable to recover presumed damages in this case absent a showing of "actual malice"—knowledge or reckless disregard that the statements were false. That is what the Court held for statements on matters of public concern, even about private figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). "[T]he treatment of battered women" is a matter of public concern. *Diesen v. Hessburg*, 455 N.W.2d 446, 450 (Minn. 1990). Likewise, "sexual abuse of children by their parents" is "certainly of public concern." *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 26 (Minn. 1996). It follows that abuse of women by their spouses is, too.

Yet the court below did not require a showing of "actual malice." In this, the court followed this Court's lead in *Stuempges* (see Someplace Safe Pet. Add. 40), which—five years before *Dun & Bradstreet*—held that *Gertz*"applies only to media defendants." 297 N.W.2d at 258 n.5. The *Stuempges* decision may have reached the right result on its facts, which appeared to involve a matter of purely private concern—*Dun & Bradstreet* held that, in private-concern cases, a showing of "actual malice" is not required for presumed damages. But the media/nonmedia distinction that *Stuempges* adopted was expressly rejected by a majority of the Justices in *Dun & Bradstreet*, and has since then been rejected by the majority opinion in *Citizens United*.

We express no view on whether the ex-husband was indeed libeled by the ex-wife and by Someplace Safe; we argue only that the same First Amendment rules should be applied here as they would be to institutional media defendants.

UPDATE: Just to be clear, we're speaking here of *First Amendment* protections. Legislatures can add statutory protections in addition to those offered by the Constitution, and those sometimes specially target the institutional media, or even particular kinds of media (such as newspapers but not books): Classic examples are some states' newsgatherer's privilege statutes, as well as some statutes that let newspapers or broadcasters reduce their exposure to damages if they publish a prompt retraction. We express no opinion on whether such statutes are a good idea; we say only that the Constitution itself protects various publishers equally. (That includes any *First Amendment* newsgatherer's privilege; courts are divided on whether such a privilege exists, but those that do almost exclusively extend it to non-media-industry newsgatherers as well as professional journalists, see pp. 523-25 of this article.)