

KEYNOTE ADDRESS: FAKE NEWS, WEAPONIZED DEFAMATION AND THE FIRST AMENDMENT

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The issue of false speech has been part of the United States since early American history. In 1798, Congress passed the Alien and Sedition Act that made it a federal crime to falsely criticize the government or government officials. Individuals were prosecuted and convicted for saying things much more tame than what you hear on the late night talk shows on a daily basis. Many years later, in 1964, the Supreme Court in *New York Times v. Sullivan* held that the Alien and Sedition Act had been held unconstitutional by the court of history. The idea of a court of history is a very romantic notion, but it does not erase the reality that Congress passed, and the President signed, a law that criminalized false speech.

Now when I say the issue of false speech is not new, that it has been around throughout American and throughout world history, I think it has taken on a new dimension because of the Internet. I believe that the Internet is the most powerful medium for communication to be developed since the printing press. The Internet truly democratizes the ability to reach a mass audience. In the past, in order to reach a mass audience, a person had to be rich enough to own a newspaper or get a broadcast license. Now, anyone with a smartphone or even just access to a library as a modem can immediately reach a large audience. This then means that there is the ability to spread false information or fake news much more quickly than ever before. It also makes it possible to do this with regard to defamatory speech.

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figure. The Court has indicated that a public figure is one who thrusts himself or herself in the limelight. A public figure is one who likely has access to media to respond to any attack. Beyond that, the Court has not given guidance with regard to who constitutes a public figure. Also, what about someone who is a public figure for some purposes but not others? What about someone who is an involuntary public figure?

The third category is if the plaintiff is a private figure and the speech involves a matter of public concern. Private figures are obviously those that are not public officials or public figures. The Supreme Court has never defined what constitutes a matter of public concern. Matters of public concern seem to be matters in which the public has a legitimate interest. The Court has said that in this category the plaintiff can recover compensatory damages if the plaintiff proves falsity of the statement and negligence on the part of the speaker. That is, the speaker was not as careful as a reasonable speaker would have been. To recover punitive damages in this category requires proof of actual malice.

The fourth category is if the plaintiff is a private figure and the speech does not involve a matter of public concern. There has been very little case law as to this category, at least with the Supreme Court. The major case is *Dun & Bradstreet v. Greenmoss Builders*. There, the Court stated that for

