

## Context Shouldn't be Everything: Online Libel and Evolving Standards of Liability

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RonNell Anderson Jones & Lyrissa Barnett Lidsky, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, Va. J. Soc. Pol'y & L. (forthcoming 2016), available at [SSRN](#).

Though it can be uplifting and life affirming to read law review articles written by people you almost always agree with, better cerebral benefits are usually obtained from reading the writings of people who challenge your ideas and force you to reconsider your views a bit. [Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World](#) by [Lyrissa Barnett Lidsky](#) and [RonNell Andersen Jones](#), forthcoming in the Virginia Journal of Social Policy and the Law, is an engaging article that taught me a lot about the state of online defamation litigation.

Both co-authors tend to be more libertarian about the First Amendment than I am, so I always learn a lot from reading their scholarship. I also appreciate their clear and accessible writing. The older I become, the less patience I have for tangled prose, poor organization and conclusions so thick with ambiguity you have to eat them with a fork. Though the previous sentence reflects my exercise of the opinion privilege, the bad writers responsible will remain unnamed, due to the actual malice that infuses those words. (A good companion piece to this excellent article is [The Death of Slander](#) by Leslie Yalof Garfield.)

Lidsky and Jones explicitly state that the goal furthered by their article is to assist future courts by providing specific guidance about adapting the opinion privilege and the actual malice rule to social media. The authors suggest applying the opinion privilege (the constitutional doctrine protecting statements that are unverifiable or cannot be interpreted as stating actual facts) broadly to social media expression with a detailed awareness of the internal and external contexts in which the speech occurred to allow unfettered expression to flourish.

The actual malice rule, however, needs to be read narrowly by courts, according to the authors. This is to prevent vengeful or delusional speakers from escaping liability when they engage in character assassination against public figures or public officials.

Lidsky and Jones spend the bulk of the article explaining and illustrating the importance of context for evaluating defamation claims based on speech that was uttered via social media. The article theorizes that courts that have addressed online defamation claims have stretched the opinion privilege a bit wider than it is typically deployed in traditional print media. The evidence is offered via summaries of cases that have been decided and reported. The judges rendering these opinions typically list various aspects of the contexts of the challenged speech as justifying a broad latitude for allowable opinion. Important contextual factors have included Twitter conversations in totality, use of informal language, use of social media venues that are "understood" to traffic in un-intermediated opinion, and to prize speed of information delivery over accuracy, use of supporting links, the signaling function of hashtags, and the goddamn frequent use of fucking expletives. Based on the cases reported by Lidsky and Jones, judges seem eager to avoid finding actionable defamation. The authors push back a little, reminding readers that "Defamation law should continue to play a role in preventing character assassination and guaranteeing that public discourse has at least some anchor in truth, even in the social-media age." (P. 21.)

Lidsky and Jones spend somewhat less time discussing actual malice, the standard derived from *New York Times Co. v. Sullivan*, which requires libel plaintiffs who are public officials to prove that a defendant published a defamatory statement with knowledge or reckless disregard of its falsity. As with the opinion privilege, actual malice is a subjective

determination that so far at least seems to be very context driven when the speech at issue is delivered over social media. What little case law so far exists suggests the possibility that actual malice may become even harder to prove in online venues. The authors caution readers here too, reminding us that libel that reaches large numbers of readers can have an enormous impact that may not be adequately addressed by judges who write angry and false allegations off as inevitable and unavoidable parts of the normative culture of social media platforms.

It would be reassuring to think that Internet users are so used to reading hyperbolic insults and allegations online that they do not take them seriously, as many judges seem to believe. But the well documented destructive impact that social media driven excoriation has had on individuals and businesses (see e.g. [these books](#)) suggests that the speech torts are legal tools that are more necessary than ever to regulate (or at least temper) some kinds of online speech. The authors were wise to remind judges of this fact, and I fervently hope their message is heard. This is a topic of terrific importance now and looking forward.

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