



Defamation 1: Constitutional Analysis

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TORTS - Constitutional Law Defamation Flow Chart

FIRST AMENDMENT APPLICABILITY:

Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern?

NO → the First Amendment does not come into play, just analyze under the common law

GO ON TO
COMMON LAW
ANALYSIS

YES → the First Amendment does come into play

Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?

PUBLIC OFFICIAL OR PUBLIC FIGURE → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

PRIVATE PERSON RE MATTER OF PUBLIC CONCERN → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must, either:

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OR

prove **negligence** (not taking the care the reasonable person would in concerning the truth or falsity of the statement) plus **actual injury**, such as lost wages or sales

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ANALYSIS
(modifying elements and
defenses as advised)

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Realothenicals...

Public official?

- U.S. naval officer, rank of captain, skipper of a destroyer escort
- **Yes.**
Arnheiter v. Random House (9th Cir. 1978)

Public official?

- Police officer with duties as a “normal street patrolman” of the lowest rank in a town of 30,000
- **Yes.**
Gray v. Udevitz (10th Cir. 1981)

Public official?

- Police informant who received no salary, but was reimbursed some expenses
- **No.**
Jenoff v. Hearst (4th Cir. 1981)
- But noting: “We do not rely solely on Jenoff’s lack of formal government position for our conclusion that he is not a public official. It is conceivable that an individual holding no formal public position, and standing in no employment or even contractual relationship with government, nevertheless may participate in some governmental enterprise to such an extent that the policies underlying *New York Times Co. v. Sullivan* ... would demand that he or she be classified a public official.”

Public official?

- Financial aid director at a public college
- **Yes.**
Van Dyke v. KUTV (Utah 1983)



Realothenicals...

Public figure?

- Bose - makers of the heavily advertised Bose Wave Radio
- **Yes.**
Bose v. Consumers Union (Consumer Reports magazine) (U.S. 1984)



Public figure?

- Telemarketer of subscriptions to newsletters employing 500 telephone representatives and reaching 15,000 customers per week
- **Yes - limited-purpose public figure.**
American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania (Pa. 2007)

Public figure?

- Government contractor that provided civilian interrogators for U.S. Army intelligence brigade
- **Yes.**
CACI Premier Technology, Inc. v. Rhodes
(4th Cir. 2008)

Public figure?

- Larry Klayman, founder and former chair of Judicial Watch, a public-interest law firm; frequent guest on TV, cable, radio; and has "celebrity status within the non-profit legal/political community"
- **Yes - general-purpose public figure.**
Klayman v. Judicial Watch (D.D.C. 2009)

Public figure?

- Rev. Norwood Thompson, Jr., pastor of the First Zion Baptist Church in New Orleans, civically active, and the subject of some local media coverage regarding his activities
- **Yes - general-purpose public figure.**
Thompson v. Emmis Television Broadcasting
(La. App. 2005)

Public figure?

- Local television news reporter who broadcast more than 1,000 stories, participated in at least four public charitable events and considered herself a local celebrity.
- **No.**
Wayment v. Clear Channel Broadcasting (Utah 2005)

Public figure?

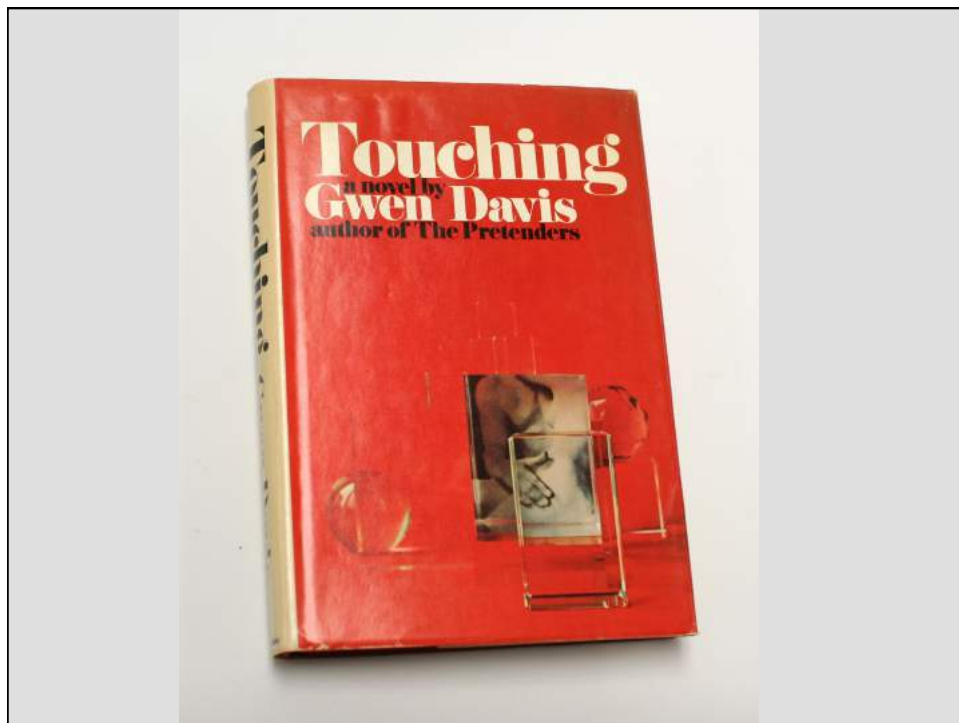
- Owner of business that customized jetskis who posted to internet news group rec.sports.jetski and who was interviewed by *SPLASH* magazine
- **Yes - limited-purpose public figure.**
Hibdon v. Grabowski (Tenn. App. 2005)
- Court noted that rec.sport.jetski is an internet site that “is accessible worldwide.”

"Hibdon himself knowingly and consciously sought publicity for his jet ski business by his initial postings on rec.sport.jetski. The controversy began following Hibdon's posting on the news group of the success of his jet ski modifications, prior to the publishing of the defamatory statements made by the Defendants. The controversy was “public” due to the international reach of the Internet news group rec.sport.jetski, the national circulation of *SPLASH* Magazine, as well as the significance of the claims being asserted by Hibdon [“builder of some of the fastest jet skis on planet Earth”].”
Hibdon v. Grabowski (Tenn. App. 2005)

IMPORTANT NOTE:
confusing ≠ confused

Remember: If you find it all confusing, it doesn't mean you are confused; it's actually a leading indicator that you understand.

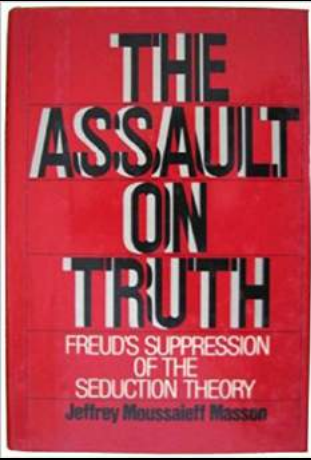
Bindrim v. Mitchell



Bindrim v. Mitchell

- See the elements of defamation at play.
- Get a feel for the elasticity of the elements.
- See the policy implications.
- Have an explanation for the habitual “entirely fictional” movie admonition.

**Masson v.
New Yorker**



THE NATIONAL BESTSELLER

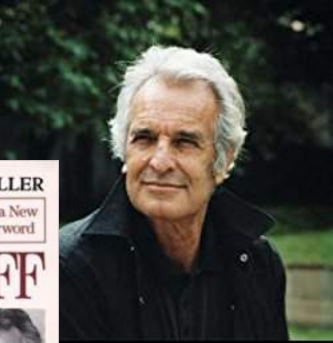
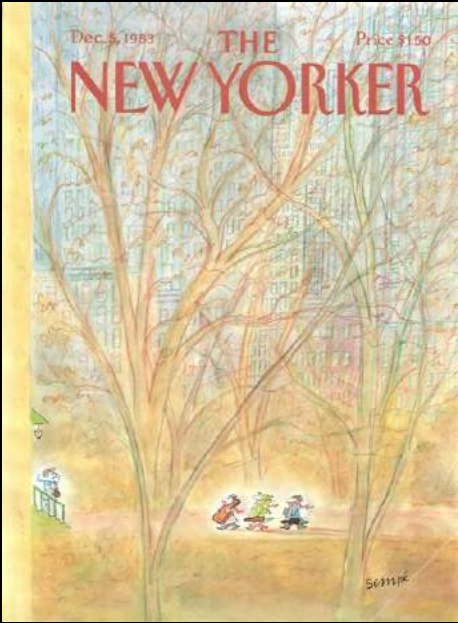
JEFFREY MOUSSAIEFF MASSON With a New Afterword

Author of *The Assault on Truth*

FINAL ANALYSIS

The Making and Unmaking of a Psychoanalyst


"A terrific story, full of passion, insight, wit and revelation."
—*New York Times Book Review*

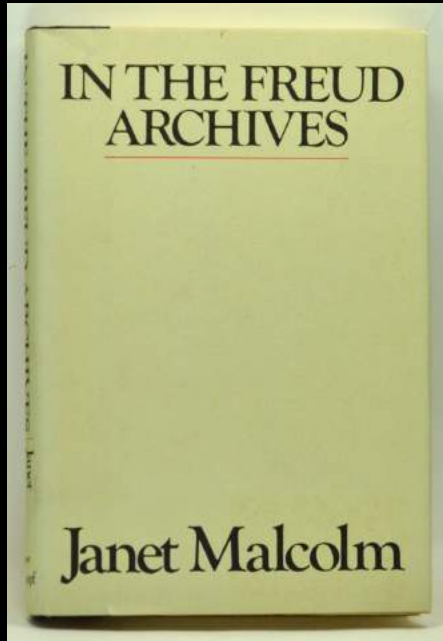



Dec. 5, 1983 THE NEW YORKER Price \$1.50

ANNALS OF SCHOLARSHIP
TROUBLE IN THE ARCHIVE-1

In the wilderness, a young man named Jeffrey Moussaieff Masson... *[The rest of the article text is illegible due to blurriness]*





CONTRIBUTORS

JANET MALCOLM



Janet Malcolm has been writing for *The New Yorker* since 1963, when the magazine published her poem "Thoughts on Living in a Shaker House."

For nearly ten years, Malcolm wrote *About the House*, a column on interiors and design. From 1975 until 1981, she wrote a photography column. Throughout her career, Malcolm has contributed a variety of pieces, including Profiles, Reporter at Large articles, and book reviews.

Malcolm is the author of eight books. "[Diana and Nikon](#)," (1980), her first, is a collection of essays on photography. "[Psychoanalysis: The Impossible Profession](#)," (1981) is an expanded version of her Profile of the psychoanalyst Aaron Green, and "[In the Freud Archives](#)," (1984) is based on her two-part article on the psychoanalyst Jeffrey

Moussaieff Masson. "[The Journalist and the Murderer](#)," (1990), about a lawsuit brought by a convicted murderer against the author of a book on his crime, examines the relationship between writer and subject; it was first published in 1989 as a two-part article in the magazine. "[The Purloined Clinic](#)," (1992) is a collection of essays and criticism from *The New Yorker* and *The New York Review of Books*. "[The Silent Woman: Sylvia Plath & Ted Hughes](#)," (1994) explores the life and work of Sylvia Plath and is based on an article that originally appeared in the August 23 & 30, 1993, issue of *The New Yorker*. In "[The Crime of Sheila McGough](#)," (1999), Malcolm focuses on the American legal system. "[Reading Chekhov](#)," (2001) weaves together close readings of Chekhov's works with scenes from the Russian writer's life and her own travels in Russia. In the fall of 2007, Malcolm published a book titled "[Two Lives: Gertrude Stein and Alice B. Toklas in War and Peace](#)," based on three articles she wrote about Stein and Toklas that appeared in the magazine.

Malcolm was born in Prague and emigrated with her family to the U.S. in 1939. She lives in New York.

Masson v. New Yorker

- Get a feel for how the First Amendment imposes itself on defamation doctrine.
- Get a strong grasp of the meaning of actual malice.
- See the values at play with protecting freedom of expression in the defamation context.
- Have a springboard for thinking about journalistic ethics and how that relates to the law.

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