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***[VP] Today, we're coming back for another helping of the First Amendment. We sliced it up so we could chew on each portion of this hearty Amendment one at a time. Today's dish: freedom of the press. Get out your fork and knife—because it is a big one.***

***When the constitution was drafted, the “press” meant newspapers. Today, it's newspapers, TV, radio, your favorite movie blog, your least favorite movie blog, and global media conglomerates.***

***Has the constitution kept up with all that change? Well our guide to this question is Elizabeth Skewes, chair of the journalism department at the University of Colorado at Boulder. And Elizabeth thank you so much for joining us.***

[ES] It's a pleasure. Thank you for having me.

***[VP] “Congress shall make no law abridging the freedom of speech or of the press.” What does freedom mean in this context?***

[ES] Well when we're talking about freedom particularly in terms of freedom of the press the reason it was put in the Constitution is because even as the founders were framing our government they realized that government needed a watchdog and freedom of the press was instituted into the Constitution so that the media could have more unfettered ability to write things about people in government that they might not like and that they would be protected as a result of this constitutional amendment to say what needed to be said to give the public the information that it might need in order to make informed decisions.

***[VP] Were there any limits to what the press could say?***

[ES] Not really not at that point. Again our elected leaders at that point realized that a free press was an essential arm of a democratic form of government.

***[VP] So then did public officials, politicians, have no recourse at all for holding the press to account for proving the burden of truth?***

[ES] Well I mean it's interesting how that developed because the area of “truth” really gets into libel law. So if somebody who is a public official believes that the press had said something that was untrue about them they could pursue a libel case but libel law even as it exists today says that it is very hard for somebody in a position of prominence in the public eye, an elected official a public figure a celebrity a sports star. It's very difficult for somebody who is in the public eye to mount a successful libel case in fact because they have fairly free access to the media.

So again in some more recent cases courts have said because public officials have such free access to the media they have a pretty big microphone. They have to hit a much higher standard of proof and that's what comes out of New York Times versus Sullivan, this actual malice standard that says that in order to be successful in a libel case a public figure has to show that the news publication knew that the information that they were publishing was not true but published it anyway, or published it with just no attention to standards of good reporting. I mean none at all. What they called reckless disregard for the truth.

***[VP] Right. So I want to go back to that case for just a minute. You mentioned New York Times versus Sullivan, this was started in the year 1960 during the civil rights movement. The New York Times publishes a full page ad: Heed Their Rising Voices. Explain the ad if you would.***

[ES] So the ad, two things interesting about it, first is that it was an ad rather than news content right. So you've got this full page ad that appears taken out by the civil rights movement. It's saying that the Martin Luther King's arrest in Montgomery Alabama was just part of this larger campaign to destroy him and you've got a city commissioner in Montgomery who says well this is libelous this is maligning my reputation. So he sued the New York Times and sued some black ministers who were endorsing the ad, and the ad did have factual errors. They couldn't say that everything in the ad was true.

But the court went on to say well because this was a matter of such public importance, the civil rights movement and Dr. Martin Luther King, and even though there were false statements in the ad, because of the importance of the public discussion.

False information is OK. As long as it’s not got that actual malice that it was an honest mistake. Essentially there was no intent to libel.

***[VP] In Sullivan, it sounds like a news outlet in this case was not expected to be kept in check, 100 percent accurate all the time.***

[ES] Well and some of that is a recognition that the news business you're trying to get the information as correctly as you can in a very tight timeframe. In 1964 you're producing an edition for the next morning you may have several hours right. Today you may have 15 minutes to report the news and you may not always get it exactly right. It may be the best you could do in the time that you had. And so the courts are trying to recognize that the pressures the time pressures the news may mean that sometimes mistakes will get made but unless they're made with intent unless they're made with malice it doesn't rise to the level of libel.

***[VP] Let's talk about some of the other things we hear about freedom of the press, like sources and protecting sources. Is that covered under freedom of the press?***

[ES] Sources are our anonymity. When a reporter agrees to give a source kind of that anonymity, and we've seen reporters voluntarily go to jail to protect a source. It's called privilege and that privilege while a reporter may grant it to a source doesn't mean that courts can't compel the reporter to testify before a grand jury or to testify in some other kind of legal proceeding. The courts have said that in the main case and this is Branzburg vs. Hayes, it's a 1971 case.

But basically the court landed on the idea that testifying before a grand jury in that particular case isn't violating a First Amendment right because you can still publish the information and you have other avenues of getting the information and your commitment to your sources is your commitment not the government's commitment.

***[VP] Times versus Sullivan dealt with public figures and the people who place themselves in the public eye. How about private citizens? What did the court say about whether the press can pry into a private life?***

[ES] Well there's been some development along that, the courts have recognized several different types of figures people when it comes to libel cases and one is the public figure that we've talked about and those are the household names. It's the president of the United States. It's Kim Kardashian and David Beckham. People that you just recognize. Right. And those people have to hit the actual malice standard.

And then there are private figures and the ones that you're talking about, the average citizen, most of us are considered to be private figures. Courts have said well private citizens really just need to meet this negligence standard rather than malice. Did the journalist the news publication just do kind of a lousy job of reporting the story? They didn't do their due diligence. And in that case if you're a private citizen and you can meet that standard and the information was false and it did damage to your reputation then then you're going to be probably successful.

***[VP] But in the Internet era there's the ability for anybody to publish, you know, can anyone call themselves a reporter and be protected or is there some kind of standard that has to be met?***

[ES] No, publication even to one other person is considered publication, if I publish something on my Facebook page about somebody else that is libelous, I can be held responsible for that. And interestingly enough Facebook will not be held responsible.

***[VP] How about in cases of national security, can the media freely report on issues which the government may deem sensitive or crucial to keeping the nation safe?***

[ES] That one gets a little trickier. The primary case in this is the Pentagon Papers case and in that case you had Daniel Ellsberg who was involved in drafting the Pentagon Papers, the Department of Defense study that was critical of U.S. policy in Vietnam. He leaked those publications to the New York Times because government wasn't talking about the findings in the Defense Department report. The New York Times started publishing them and the government went and sought an injunction and got one from the U.S. District Court, the New York Times had to stop publishing.

But Daniel Ellsberg thought the information was so important that he leaked the information, the same report, to the Washington Post. The Post started publishing, government got an injunction and the post had to stop publishing and then Ellsberg because again he thought this was so important went ahead and leaked it to the Boston Globe and The Globe started publishing the Pentagon Papers.

And by that point the court had started to step in and make some some rulings regarding this and the New York Times case ultimately that wound its way to the U.S. Supreme Court. And at the Supreme Court level the court ruled in favor of the New York Times because they recognized that despite the fact that the government didn't want this published it wasn't a threat to national security and that was the bar that had to be met.

Simply because government doesn't want something published doesn't mean it will not be published. This case recognized the balance that needed to be found between a free press and protecting national security. But it said that the government has to prove that national security would be threatened.

***[VP] We know that candidate and now President Donald Trump frequently charged the press as dishonest, disgusting scum, says he's going to loosen libel laws to make it easier to sue the press, that he'd use federal government's power to challenge broadcasting licenses of NBC, CNN, or other TV and radio networks. So how about that? Does the executive have the power or ability to weaken libel laws or to pull back on freedom of the press in terms of licensing?***

[ES] He may have more impact in terms of licensing because that comes through regulatory agencies Federal Communications Commission, much more difficult in the case of libel law, because libel law, in order to change libel law he would have to suggest language that would have to go through the House of Representatives and the Senate before it got to his desk to sign. But even that is going to run up against constitutional law which is the highest form of law because you have the First Amendment and the courts have long favored this idea of a free and open marketplace of ideas that is supported by a free and open press.

***[VP] Professor Skewes, we've been given a lot of opportunities to reflect on investigative journalism and how the news media is changing in the Internet online marketplace. So going forward what do you think we should be thinking about in terms of the concept of freedom of the press?***

[ES] Well I think a couple of things. A lot of the law that has established freedom of the press and established what you mean by libel and establish the idea of prior restraint, in some ways is going to be harder to live with or harder to sustain. If you think about prior restraint again Ellsberg goes from one publication to the next to get the Pentagon Papers out. Edward Snowden or Chelsea Manning just send something off to Julian Assange and it's done. Right.

***[VP] The toothpaste is out of the tube.***

[ES] Exactly. And so prior restraint is the idea of it is still very valuable the reality of it may be much more difficult. But I do think that people need to be aware and especially in a social media area era excuse me that libel is something that any of us can do. Libel involves publication to one other person. So again people who are active on Facebook on social media need to be aware that that what they do may have repercussions as well.

Publication, the press is now no longer as you suggested the legacy media. It's all of us. It's anybody with a cell phone and a Twitter account.