

# Does Melania Trump's libel suit really threaten a free press?

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**Editor's Note:** Marc J. Randazza is a Las Vegas-based First Amendment attorney and managing partner of the Randazza Legal Group. Follow him on Twitter: [@marcorandazza](https://twitter.com/marcorandazza). The opinions expressed in this commentary are solely those of the author.

CNN —

During the presidential campaign, Donald Trump famously fired a broadside at the First Amendment by promising to “open up the libel laws.” Today, his wife, Melania Trump, has a case pending against writers who she says defamed her, and some speculate that this is only the beginning of the Trump family war on the First Amendment.

But is it really? I don't think so.

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Let's look at this case:

In their zeal to tear Donald Trump down, some attack his wife. (Even the Mafia doesn't attack wives or children; many of those who hate Donald Trump fail to reach the mob's decency level.) So, given our profound national commitment to freedom of expression, Melania Trump will need to have thick skin as the wife of a president.

She may not need to this time.

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In 1964, Justice William Brennan wrote, in the [landmark defamation case](#) *New York Times v. Sullivan*, that our Constitution demands that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”



Because of that, someone like Melania Trump cannot win a defamation claim unless she proves “actual malice.” As I explained in an [article last February](#), this test has nothing to do with our everyday understanding of the word “malice.” It means that the defendant – the writers, in this case – published the statement knowing it was false or with a reckless disregard for the truth.

Establishing this is a challenge, but not one that we have deemed insurmountable, as the Sullivan decision left adequate legal space for even the most famous plaintiff to prevail.

In the Maryland case, Melania Trump accepted the Sullivan challenge and brought suit against the UK-based Daily Mail and an American blogger, Webster Tarpley. Both had reported that she previously worked as an escort – a claim she credibly denies.





Following a historic 2016 presidential election, Melania Trump is preparing to become the next first lady of the United States. It's too soon to know what she'll choose to do with her time as FLOTUS, although she has previously expressed interest in using her position to

advocate against cyberbullying. But as the newest in a long line of first ladies, she'll have some big shoes to fill ...

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Despite anything that one might want to say about her husband, falsely accusing Melania Trump of being, essentially, a prostitute is (and should be) legally sanctionable.

Americans should have broad latitude to criticize, mock, and investigate public figures. However, that does not mean that there are no limits. Even Justice Brennan did not go that far.

It's telling that Melania Trump didn't sue the Daily Mail in the UK. The UK has a much lower standard for proving defamation, and it would have been a friendlier place to bring the claim. It's hard to imagine that her expensive lawyers didn't consider that. That they likely did suggests a high degree of confidence that she was confident confronting Sullivan head-on.



And what about the US-based Tarpley? He wrote in a statement in September that “her lawsuit is a blatant attempt to intimidate not only me, but journalists of all stripes into remaining silent with regard to public figures” and that the “lawsuit is a direct affront to First Amendment principles and free speech in our democratic society.”

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Tarpley is over-playing his hand. I haven't seen anyone shy about criticizing any of the Trumps. Nobody appears to have been “silent.” This case, if successful, will do no violence to the First Amendment, nor will any responsible writer likely fear the Trumps. You can say whatever you like about Mrs. Trump, if it is your opinion, or even a reasonably-sourced erroneous statement of fact.



But Tarpley may have trouble on that score: he raises the defense that he was “only repeating rumors” about Melania Trump. While “rumors” are not a reasonable source, some courts recognize the defense of “neutral reportage.” That defense lets you get away with sourcing a “rumor,” but only if you report it as such, and the publication is “reasonable.”

Is that the case here? If I were defending him, I wouldn't want to rely on that defense.

So is Melania Trump off limits? Absolutely not.

Our democracy depends upon, as Brennan wrote, robust free speech and free press rights. In America, *New York Times v. Sullivan*'s “actual malice” standard matters more than anything else. If we lose the right to criticize the rich, powerful, and famous in wide-open debate, we cannot say that we are free.

But even as I am disgusted at those who would take away those rights, I'm repelled by those who would try to invoke them to excuse their own irresponsibility and malice.

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You can say Mrs. Trump is a plagiarizer. You can say she's a “skank” if you are as classless as that. You can say she's an idiot (although, I question whether that term applies to a woman who speaks five languages fluently). Such attacks are petty and small, but in the United States you have the right to be petty, small, offensive and even insulting toward Mrs. Trump and anyone else you like.



What you don't have the right to do is to lie about her in a defamatory way. Sullivan will give you no shelter if you simply wish to shout "free speech" without knowing what that means.

Unless the defendants have some reasonable basis to support their reliance on these "rumors," Melania Trump should prevail. And, that is not a bad thing. In fact, it is a good thing to show that journalism remains free, but it still needs to exercise some responsibility.

Mrs. Trump doesn't need her husband to "open up the libel laws" to get there. If you want to make the specific claim that Mrs. Trump is a former escort, you had better have something more to back it up with than your dislike for her husband and the assertion that you're repeating a "rumor."

If you have a reasonable source, even if you're wrong, the First Amendment will wrap its loving arms around you and protect you from the cold. But if not, you don't deserve its help.