

Boom! Lawyered: [Clarence Thomas Wants to Blow Up Defamation Law](#)

Imani Gandy: Hello Fellow Law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast, hosted by the legal journalism team that really wants to just mute the conversation on the 2020 Democratic primary. It is too much.

Jessica Pieklo: Too much.

Imani Gandy: I'm Imani Gandy.

Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary and analysis on the web. And the team Legal podcast is part of that mission. So, a big thanks to our subscribers and a welcome to our new listeners.

Imani Gandy: This week, the Supreme Court declined to take up the appeal of Katherine McKee. She's the woman who publicly accused Bill Cosby of raping her 40 years ago. Clarence Thomas agreed with the Supreme Court's decision to deny cert in that case, but in doing so, he issued a rather alarming concurring opinion. His opinion makes it pretty clear that he really wants to loosen the standard for libel against public figures, and basically leave it to the states to create their own patchwork First Amendment jurisprudence. Essentially, it's the latest dystopian free speech opinion from Clarence Thomas. And in this episode we're going to talk about what in the world is going on with Clarence Thomas and his interpretation of the First Amendment.

Jessica Pieklo: Seriously, what in the world, indeed? We're also going to talk about how Thomas's vision of the First Amendment would be a gift to Trump, who has been relentlessly, I mean relentlessly attacking the press as the enemy of the people. Trump and his fellow conservatives would love nothing more than to be able to weaponize libel lawsuits in order to garner more favorable press coverage. And what Thomas did was essentially give them a pathway to weaponize the First Amendment to do so.

Imani Gandy: All right, Jess. So, this is going to be a whale of an episode. So, where do we begin?

Jessica Pieklo: Okay, so let's begin with Clarence Thomas declaring war this week on one of the most key First Amendment rulings of the 20th century. That's a case called New York Times versus Sullivan. And it's a case that established the actual malice standard for defamation lawsuits involving public figures. Thomas said that the Sullivan decision has no basis in the constitution as it was understood by the people who drafted it. You know, all the way back then.

Imani Gandy: He's obsessed with 18th century values, which is bonkers to me since 18th century values had nothing of value to offer black people like Clarence Thomas. But I digress. What did he say about it?

Jessica Pieklo: This is what he said. He said, "New York Times in the court's decisions extending it, were policy driven decisions masquerading as constitutional law." It's constitutional cosplay, Imani.

Imani Gandy: Yeah. I want to have like a "Yeah Jan" moment. Can we just change it to "Yeah Clarence?"

Now, we mentioned a couple of legal terms of art. Don't worry about it. We're going to tell you what actual malice means. We're going to talk to you about who counts as a public figure. But suffice it to say that Donald Trump is just loving Clarence Thomas right now, because Thomas is interpretation of First Amendment law would permit Trump to more easily shut down his critics in the press, and to control the kind of press coverage that he receives.

Jessica Pieklo: It's so true. And this opinion is just the latest in a really scary vision that Thomas has offered of free speech. I mean, most recently he wrote the majority opinion in *NIFLA v. Becerra*, that was the California case involving those so-called crisis pregnancy centers. And their claims that a California law that ... Remember this Imani?

Imani Gandy: Mm-hmm (affirmative).

Jessica Pieklo: ... required, they disclose they weren't actually medical clinics, that violated their free speech.

Imani Gandy: Oh no.

Jessica Pieklo: Well, we covered that case way back then, you should go listen to the episode. And at the time we predicted that if CPCs won, conservatives would make the same arguments and do things like challenge conversion therapy bans. Well, we were right. They are. So, we also have an actual example of what Thomas' visions would be if they're implemented. And we're going to talk a little bit about that too.

Imani Gandy: And the vision is just not good.

Jessica Pieklo: Not Good. No.

Imani Gandy: Like, if you want to turn off the episode now just be like, "It ain't good," and just go and have a glass of whiskey. But no, stay tuned because we're going to get into it.

Jessica Pieklo: Why are we mad about this? Why should our listeners care so much?

Imani Gandy: All right, so strap in. This is going to be a doozy.

Jessica Pieklo: All right.

Imani Gandy: I just want to make sure our listeners are prepared, get the proper goggles. Maybe put on some ... like a helmet, some gloves. I don't know.

Jessica Pieklo: It's good because it's been a while since we did a really like meaty First Amendment dive, and it feels good. I'm like, I'm going to zip up my sweatshirt here.

Imani Gandy: I'm going to push my glasses up on my nose. So, New York Times versus Sullivan is a case that involved in advertisement and the legal defense fundraiser for Dr. Martin Luther King. The ad said that, "Southern violators had answered Dr. King's peaceful protests with intimidation and violence." Now, there were multiple factual errors in this ad, specifically regarding the way in which the police had responded to a protest on a college campus in Montgomery, Alabama, the number of times that Montgomery Alabama officials arrested Dr. King, and the police involvement in the bombing of King's home, which nearly killed him, his wife and his child. Now, a man named L.B. Sullivan, he was the commissioner of public affairs for the city of Montgomery, he took offense at the characterization of the police and other officials in the ad.

He wasn't too keen on the Yankee New York Times running an ad that called these folks Southern "violators." And even though none of these "Southern violators" were named, this man Sullivan filed the lawsuit. Now, that lawsuit went all the way to the Supreme Court, and the Supreme Court held unanimously, that public officials have to prove, "Actual malice by news publications in order to succeed in their libel claims."

Jessica Pieklo: So, wait a second. Actual malice, what does that mean?

Imani Gandy: Actual malice means a statement made with a reckless disregard for the truth.

Jessica Pieklo: Okay, so further translate, that's still lawyer talk.

Imani Gandy: You mean you don't know what reckless disregard for the truth means you non-lawyers listening out there? [laughs] So, essentially actual malice means you have to publish something that you know is false, and you have to not give a shit whether or not what you said is true.

Jessica Pieklo: Yeah, that's a pretty clear synopsis. It's either false or you don't give a shit if it's true. That's actual malice.

Imani Gandy: Essentially what Thomas wants to do is get rid of the federalization of the First Amendment and throw it all back to the states. And that's really concerning because given the times in which we live, right? Donald Trump is president, white supremacists in the White House, civil rights for marginalized people are just up for grabs, permitting states to chill newspaper coverage of protests and government action in response to these protests is very worrisome. It basically chills the ability of journalists, of activists, and of others to speak truth to power.

Jessica Pieklo: Absolutely. I mean, imagine if journalists face the threat of a libel lawsuit every time they were to report on credible allegations of sexual assault facing a potential Supreme Court nominee, for example. I mean, that is a serious thing to think about, and that is a very real possibility in this world that Thomas put forth this week.

Imani Gandy: And in fact it's actually what the world was like before New York Times versus Sullivan, right? We were in the throes of this civil rights upheaval. There were Southern states that were really not happy about news organizations, particularly national news organizations like the New York Times that we're focusing on efforts in the South to basically bring civil rights to black people. And because of the ways in which these papers would criticize Southern officials, the Southern officials got really pissed off and started filing defamation lawsuits by the dozens in order to prevent this sort of critical coverage of civil rights efforts in the South.

And so when the Supreme Court, in New York Times versus Sullivan, adopted this actual malice standard, it drastically reduced the financial exposure that these newspapers were facing in light of these, mostly frivolous, defamation claims. Right? And so this actual malice standard ended up making it really difficult for public officials to use these claims to suppress criticism from their opponents. Criticism from people who thought, hey, civil rights is a good thing and maybe you ought to stop water hosing black people and siccing dogs on them, and the like.

Jessica Pieklo: Yeah. Nationalizing that coverage helped further the conversation and really put the pressure on when necessary to get Congress and L.B.J. and everybody in that time to do the shit they needed to do. Too late, but still did it. Like that ... The press's role in that is just without question.

Imani Gandy: Thomas claims in his concurring opinion that the states are equipped to strike a balance between, "Encouraging robust public discourse and providing a meaningful remedy for reputational harm." But that's not true. I mean, that's just ahistorical, that's not how it worked during the civil rights era.

Jessica Pieklo: Not at all. And it's also a really messed up understanding of federalism, right? The First Amendment is a federal right. A federal right.

Imani Gandy: Federal.

Jessica Pieklo: Federal. States should not be in the business of regulating federal rights without some underlying federal standard, right? I mean, that is the entire purpose of applying the 14th Amendment to the states. The entire purpose is to say, "Yo, some uniformity when we're dealing with federal rights."

Imani Gandy: Most First Amendment Scholars view New York Times versus Sullivan as the most important First Amendment Supreme Court decision, especially when it

comes to protecting free speech, and ensuring a free press. And so, fostering a free press, this post Sullivan world that we'd been living in for like 50 years, it really changed the way that journalists were able to operate in terms of gathering news. In terms of producing commentary, in terms of writing op eds. And if Thomas were to have his way, if we were to send all of this First Amendment stuff back to the states, then journalists are going to be swamped with libel suits, and that's going to produce a chilling effect, right?

I mean, if you think about it, news outlets would have to fact check every statement made by every reporter, every op ed columnist, and even every advertiser. And now while you may think, "Well, duh, I mean, shouldn't they be fact checking these statements anyway?" Let's be clear, most reputable news organizations do fact-check those kinds of things. But there are oftentimes where you're reporting things that you don't necessarily know are factual, that you may have gotten on background. And so if those things turn out to be false, even if you publish them, not with actual malice, you could be liable. You could have to pay hundreds of thousands, even millions of dollars in damages.

And now you have to remember that this also applies to advertisements. So, now we're requiring news organizations to fact check their advertisers, because that's what New York Times versus Sullivan was about, right? I said up front. It was about this advertisement that was criticizing Montgomery officials brutality against Dr. King, and other civil rights leaders and activists.

Jessica Pieklo: And I mean, it's not just ads, right? If we were to undo Sullivan, people would be able to sue then over satire and parody. So, imagine our current climate, right? Trump would be suing SNL for libel because of Alec Baldwin's impressions of him like yesterday. They would be like 10 lawsuits in already, right?

Imani Gandy: Yeah, they really would. And you know how thin-skinned he is, he gets so upset every time there's an impression of him, he goes to Twitter and starts talking about low energy SNL, and the failing SNL, and all of the nonsense little clichés that he likes to use. But aside from that, I mean, aside from the death of satire and parody, which is basically all that's keeping us going in this horrible presidency-

Jessica Pieklo: I mean, you're not wrong.

Imani Gandy: Really, really. I mean, that's like the only thing we can look forward to these days. But if you think about, if you're a person who likes to read US weekly, for example, or People Magazine, or watch E! Television, entertainment journalism would essentially be dead in the water. Because any rumor or any piece of gossip that was published, and that turned out to be damaging and false would be ... Any rumor or piece of gossip that turned out to be damaging and false would become a basis for a lawsuit. And so that means celebrities and politicians and public figures would be filing all of these lawsuits just to keep their names out of the paper.

Jessica Pieklo: Say what you will about entertainment journalism, but I mean, we all need our outlets, right? And the actual malice standard is super important because, look, public figures are open for public debate. That's part of putting yourself out there. And journalists have a responsibility to both inform and sometimes entertain. And the idea of just shutting people down if you have money and power is wrong. If you believe in the First Amendment, you believe in free press. It's wrong regardless of the kind of journalism.

Imani Gandy: Precisely. And think about Gawker, right? Hulk Hogan was able to take Gawker down, and that ended up being something about privacy. But we're getting into a situation where people who have money can shut down publications, because they don't like the coverage. And that's something we should all be concerned about.

Jessica Pieklo: I mean, if you happen to be a Catholic high school kid wearing a MAGA hat, you might see the Washington Post for millions and millions and millions of dollars in this world. I don't know.

Imani Gandy: For example! But the point is, is we live in perilous times. We live in perilous times under a president who has shown extreme hostility toward the press. He's essentially waging war with the press. Now, he is a public figure and right now in order to file a lawsuit and to succeed in that lawsuit, he would have to prove that news publications are publishing stuff about him with actual malice. Stuff that they know is not true, and stuff that they think might not be true, but they had can't really be bothered to give a shit. Now, if Donald Trump can sue the press for publishing supposedly defamatory information without having to prove actual malice, then he's going to have a way easier time shutting down the press by threatening baseless lawsuits.

And again, actual malice means something was published with knowledge that the information was false, or with reckless disregard of whether or not it was false. And a lot of time that is not what's happening, but that's what's happening in Trump's head. You're sitting there watching Fox News and tweeting, and just freaking out about all of the things that people are saying about him. Some of them are rumors, some of the may be unsourced, but most of it is not published or said with actual malice.

Jessica Pieklo: Yeah. If Clarence Thomas got his way, the vision that Donald Trump wants for his ability to go after the press is exactly the vision that he would get. And that is terrifying.

Imani Gandy: So let's talk about the case, the procedural recap. What has happened so far?

Jessica Pieklo: Okay. Yeah. More specifically, let's talk about this Cosby case that prompted Thomas's opinion and his call to up-end this unanimous bedrock of First Amendment Law.

Imani Gandy: Here we go. So, the facts of the case are actually quite simple. Katharine McKee publicly accused Bill Cosby of raping her 40 years ago. She told her story to the New York Daily News. McKee claimed that in response to this public accusation, Bill Cosby's attorney wrote and leaked a defamatory letter that deliberately distorted her personal background in order to "Damage her reputation for truthfulness and honesty, and further to embarrass, harass, humiliate, intimidate, and shame her." She says, essentially, that he deliberately damaged her reputation. Now, the lower court held that McKee was a limited purpose public figure, and therefore had to show actual malice.

Jessica Pieklo: Okay, let's break down this legal standard a little more for the listeners. We've talked about actual malice, right? That's a statement that's made with a reckless disregard for the truth. But Imani, what the hell is a limited purpose public figure?

Imani Gandy: All right, so public figures are public figures, right? That's pretty self-explanatory. We're talking about politicians, celebrities, and financial, big wigs like Jeff Bezos, for example. These are public figures. A limited purpose public figure, now those are people who are not otherwise public figures, but who by virtue of their action, somehow thrust themselves into the public sphere. So, for example, the lower court in this Cosby case said that by publicly accusing Cosby of rape, McKee had thrust herself into the forefront of the controversy regarding sexual assault allegations involving Bill Cosby.

Jessica Pieklo: Okay. So that seems pretty straightforward. This is a case about accusing someone of rape.

Imani Gandy: Right. And whether or not those accusations make you a public figure for purposes of a libel lawsuit.

Jessica Pieklo: Okay.

Imani Gandy: So the case is straightforward. In order to avoid being required to prove actual malice, in other words, that when Cosby's attorneys wrote the allegedly defamatory statements, they did so with actual malice, McKee asked the Supreme Court to reconsider the lower court's ruling that she was a public figure for a limited purpose. Right? She didn't want to have to go into court and prove that she had written these statements with actual malice. She wanted to go in under the regular First Amendment Standard, which is like negligence or something, right?

Jessica Pieklo: Right. And I mean that makes sense because it's not like when she was doing all of this at the time the idea was, hey, I want to go thrust myself into the spot, like this is to be super fun. I mean, that's why most people don't report again celebrities for example. So that all makes sense.

Imani Gandy: Right. She just wanted to get her story out there. But in doing so, she ended up in the spotlight.

Jessica Pieklo: So, that's what the court was ruling on in this case. But what's Thomas's opinion here really about that? What's he doing Imani?

Imani Gandy: Thomas Essentially wants to make defamation law a free for all. He wants to throw it back to the states and then let the chips fall where they may.

Jessica Pieklo: And this is really important, because journalism is under siege right now. So, this opinion in this media climate is so important, right? We have corporate consolidation in local newsrooms. We have things like Sinclair Media broadcasting, basically whatever the administration has asked them to broadcast. And so on the one hand we have pressure to not get good critical coverage out there. And if Thomas were to get his way, pressure on those outlets that are trying to really not cover that. I mean, it would change the way most political coverage happens, right?

Imani Gandy: Yeah. It really would. And we also have to think about the fact that conservatives have all of the money, right?

Jessica Pieklo: All of it.

Imani Gandy: They got all of the money, and Citizens United, you know that case?

Jessica Pieklo: Yeah.

Imani Gandy: The case that said that money is speech. That case changed political speech possibly forever. So, we have dark money interests like the Mercers, and the Koch brothers whom Clarence Thomas is all hard eyes for. They can basically spend as much money as they want to in order to get their messages and their policies in place. And right now the political press is a firewall against that. It's a firewall against rich one-percenters, rich conservative one-percenters specifically spending money to tweak political coverage and get the coverage that they want. Thomas has declared war on that as well.

Jessica Pieklo: And like we've talked about in previous episodes, these sorts of opinions can be used to plant seeds for legal advocates for the direction of justice think the law should go. Are those advocates listening? I mean, Thomas is really influential in conservative legal circles, so I bet they are. And this is also going to give Roberts a big chance to prove how much he loves precedent, don't you think?

Imani Gandy: Yeah. I mean, just the fact that Thomas wants to just toss out 50 years worth of First Amendment precedent, a case that has been so crucial in the shaping of a free press in this country is very concerning. And it's right in Roberts' wheelhouse. I mean, how much do you care about precedent, homie? Let us know.

Jessica Pieklo: Exactly. I mean, this does tie into this larger narrative that we have with the Roberts court right now. And part of that is the value of precedent, right Imani?

Imani Gandy: Yeah. Right. I mean, we've talked a lot about precedent. We've talked a lot about the importance of stare decisis, which is essentially Latin code for precedent. As if Latin code is a thing, but you know what I'm talking about. But when asked about key issues, for example, abortion rights, same sex marriage, and even Brown versus Board of Education, which I don't know if you recall, but there was a judicial nominee, Wendy Vitter, who basically refused to say whether or not Brown versus Board of Education was rightfully decided. When it comes to these key issues, issues that they like to call cultural issues, conservatives will often tout stare decisis in their confirmation hearings for example.

We saw that with Kavanaugh when he talked about, "oh, well, I think Roe v Wade is precedent and I respect precedent. And next question please," because they don't really want to answer those questions because deep down they don't really care that much about precedent when it comes to things that they don't like. And the things that they don't like? Abortion, same sex marriage, voting rights, a whole host of civil rights issues that affect everyone.

Jessica Pieklo: And it really fits into Thomas's larger vision that he has of sort of a free speech for me, but not for thee, right? Like, who gets a free speech protections in Thomas's world is really telling and really chilling. And this is the Becerra case that I mentioned earlier at the beginning of the show, right? That was the California case that involved some of our usual suspects here. We've got the alliance defending freedom, and we've got anti-choice activists. Like I said, we'd covered the case in a previous episode, so for really like in depth go listen to it. It's ... That was a really good one, right?

Imani Gandy: It was if we do say so ourselves.

Jessica Pieklo: You know, but I mean, some of the key the points to just to remind listeners that, California had this law that required reproductive health care clinics to disclose certain facts. Like whether or not they were licensed, and whether or not they had actual doctors on staff. And the law also required these facilities to post a notice that California law, in some cases we'll cover contraception and abortion. So, real basic like truth in advertising kind of stuff, right?

Imani Gandy: Right. Right. Don't lie to your patients.

Jessica Pieklo: If you're not licensed, like say you're not licensed. That's kind of relevant information that patients would have access to. Right? It seems really straightforward. But religious conservatives, being as they are, challenged the law arguing effectively that it violated their free speech rights, right? That they said effectively they have a free speech right to lie to patients, and Thomas sided with them. And his opinion says basically you can fuse your religious

ideology and meld it into a free speech claim that is religious dogma and free speech law. And voila! Here we are. We have evangelicals who have crafted a right to lie. And at the time we said it's not just crisis pregnancy centers, right? It's not just going to be reserved to this. We're going to see this morph into other areas. And we are, because now we're seeing successful challenges to so-called conversion therapy bands, based on this NIFLA case, right? Actually citing Thomas.

And so there's no free speech right for abortion patients in Thomas's world. There's no free speech right for providers. There's no free speech right for gay kids to not be subjected to this. And so that's just ... that's terrifying.

Imani Gandy: It is terrifying. And another thing that's terrifying is we have to talk about how this is going to affect people who are survivors of sexual assault and abuse. Right? I mean, I can't help but think that Thomas might be a little bit bitter about his confirmation hearing.

Jessica Pieklo: Geez, you think a little projection going on here, Justice Thomas?

Imani Gandy: Just a tad. Because if it weren't for this case, New York Times versus Sullivan, which Thomas wants to up-end, Thomas could have sued Anita Hill and kind of silenced her, and made his confirmation hearing process a lot more smooth. And I think it's also relevant that Cosby's lawyers are Trump's lawyers. And Trump is always in trouble with someone or another talking shit about someone, or having shit talked about him. And so the fact that Cosby's lawyers are Trump's lawyers, it just it makes me feel a little bit icky inside. You know what I mean? Like, it's just hard not to read this stuff with Clarence Thomas, and Anita Hill, and Bill Cosby, and Donald Trump. It's hard not to read all of this in the #MeToo era, and think that it's not super relevant to how sexual assault survivors, sexual abuse survivors, people who have been harassed in the workplace, are going to be able to vindicate their rights in the courts. They already have such a hard time when it comes to reporting, and coming forward, and Thomas wants to make it even harder.

Jessica Pieklo: And that's what makes his particular version of originalism, for whatever the hell that is, that's what makes it so dangerous, right? Because completely devoid of the context of the world that we live in, of the day-to-day realities of things, it's crafting this 18th century ideology that is completely divorced from real life, and real life consequences. And um, so, um, what do we do with this? Like whose fault is this? Who can I be mad at about it?

Imani Gandy: Exactly. If you want to write a sternly worded letter, I would suggest writing one to George Bush, right? H.W. He's the reason that Thomas is on the bench.

Jessica Pieklo: He is, right?

Imani Gandy: With a huge assist by the way, from the likes of folks like Joe Biden, right? I mean, Joe Biden really, really botched Thomas' confirmation hearing when it came to not following all of the threads in terms of the harassment that Clarence Thomas allegedly meted out against some of his employees.

And thanks to those guys, Thomas has had the ability to craft a really scary vision of constitutional free speech, which has up until now mostly been on the fringes. But he has just thrust it right into the middle of the constitutional conversation. And now I think we can expect a lot of other conservatives who've never really thought about, hey, maybe we should get rid of libel law except to the extent that they've been listening to Donald Trump yap about how much he wants to do so. But you know, folks in the Federalist Society, I guarantee this is going to be a key issue for them now. This is going to be something that they super focus on.

Jessica Pieklo: Absolutely. Because the reality is the fringe is catching up to Thomas and has become mainstream in conservative legal circles now. I mean, former Thomas clerks by far dominate the rank of Trump's judicial nominees, including possible SCOTUS short-lister, Amy Coney Barrett, who we've talked about before on the show. And so when it comes to the future vision of conservative jurisprudence, Clarence Thomas is at the center of it. And wow, this week did he give us a nightmare?

Imani Gandy: He really did. And I also want to point out that he sort of stepped into Scalia's shoes, right? I mean, before the court was centered on Scalia, and now the court is becoming very centered on Thomas. And especially with Thomas being black, and especially with the views that he has that are very harmful for black people, we're entering a very, very concerning area when it comes to Supreme Court jurisprudence.

Jessica Pieklo: Yikes.

Imani Gandy: Yikes indeed. I mean, another fun buzzkill episode from Imani Gandy and Jessica Mason Pieklo. If you'd like to follow up on this conversation with us on Twitter, you can do so by following me @angryblacklady. You can follow Jess @hegemommy, H-E-G-E-M-O-M-M-Y. You can follow Rewire.News @Rewire_News, and you should join our Facebook group. Answered the question, we will let you write in and we can talk more about this really depressing way in which Thomas is now the face of the supreme court.

Jessica Pieklo: It's so sad.

Imani Gandy: It's so sad. We'll see you crying and screaming on the tubes.

Jessica Pieklo: On the tubes. Boom Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our executive producer. And the Rewire.News editor-in-chief is Jodi Jacobson.