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PROVING RACISM: *GIBSON BROS. INC. V. OBERLIN COLLEGE* AND THE IMPLICATIONS ON DEFAMATION LAW

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I. INTRODUCTION

Within a day of the election of Donald Trump in 2016, a seemingly innocuous event occurred in the small college town of Oberlin, Ohio: an Oberlin College student visited a local business, Gibson's, and attempted to use a fake ID to buy a bottle of wine, with two more bottles hidden under his shirt.[1] The man at the counter, Allyn D. Gibson Jr., confronted the student, and although there are conflicting accounts of what happened next, parties agree that Gibson Jr. chased the student out of the store, and the two of them engaged in a physical altercation.[2] The police arrived and arrested the student, who is Black, and his two friends, also Oberlin students.[3]

This incident is not the focus of this Casenote. Rather, this Casenote examines the constitutional, racial, and legally-complicated questions that arose from the protest and boycott that followed and the lawsuit filed by Gibson's[4] against Oberlin College. The lawsuit ultimately asks the question: is being called a "racist" actionable as a defamation claim? This Casenote argues that for purposes of defamation law, "racist" is not a verifiably false statement, and thus, should be considered constitutionally protected opinion speech.

The case in question, *Gibson Bros., Inc. v. Oberlin College*,[5] sits on appeal in the Ninth Appellate District of Ohio. Defendants Oberlin College and then Dean of Students Meredith Raimondo (referred to collectively as "Oberlin") appealed the Lorain County Common Pleas verdict, listing three assignments of error.[6] Among other arguments,

* *University of Cincinnati Law Review*, Managing Editor. As an initial disclosure, the author would like to note that he was enrolled at Oberlin College at the time these events took place and had lived in the town for many years before, but this Casenote is based on the facts and law of the case itself, as filed, and the author's academic interpretation of such.

1. Entry and Ruling on Def.'s Mot. Summ. Judg. at 1, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019).

2. *Id.*

3. *Id.* at 2.

4. This Casenote uses "Gibson's" to refer to the company and named plaintiff in this case. While the key players in the company have the last name "Gibson," the focus of this Casenote is on the business itself.

5. Brief of Appellant Oberlin College at 1, Gibson Bros., Inc., et al., v. Oberlin College, et al., Nos. 19CA011563 and 20CA011632, 9th Dist. (consolidated) (Ohio Ct. App. 2020).

6. *Id.*, Def.'s App. Br. 1.

Oberlin contends the trial court erred by denying their motions for summary judgment and judgment notwithstanding the verdict as for the libel claim because the "student publications contained [constitutionally protected] opinions, and Oberlin did not publish them."[7]

This Casenote looks to defamation more generally and the constitutional restrictions on defamation law before diving into the case at hand. Part II first discusses defamation law and its interpretation in Ohio, before turning to a discussion of the particulars of the *Gibson Bros., Inc. v. Oberlin College* case. Part III argues that being called a "racist" cannot be a verifiable fact for the purposes of defamation law and then looks at the trial court's reasoning in this instant case before ultimately arguing the Ninth District should reverse the trial court's decision.

II. BACKGROUND

The American understanding and application of defamation law has varied over time. This Part will first discuss defamation law generally before turning to the constitutional limitations on defamation law. Then, we turn to defamation law in Ohio, followed by the specifics of *Gibson Bros. Inc. v. Oberlin College* case itself.

A. Defamation, generally

Sometimes the best explications come from outside of the law. At the outset of its discussion of defamation, the Supreme Court of the United States in *Milkovich v. Lorain Journal Co.* begins with *Othello*. Iago, speaking to Othello, says:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.[8]

Iago, while not a lawyer himself—although some would posit that he has the appropriate demeanor—touches on a key aspect of defamation: a

7. *Id.* Oberlin also appeals the denial of their motions for summary judgment and judgment notwithstanding the verdict for the intentional infliction of emotional distress and tortious interference claims, as well as the trial court's denial of a motion for a new trial, and the trial court's failure to cap damages. *Id.* While these issues are fascinating in their own right, given the political landscape of Northeast Ohio, this Casenote focuses on more specific issues of this case.

8. 497 U.S. 1, 12 (1990) (*quoting* WILLIAM SHAKESPEARE, OTHELLO act III, sc. 3, 1. 154-160).

person's reputation, or good name, can be stolen the same as coin. But, unlike monetary assets, a person's reputation is "the immediate jewel of their souls;"[9] it is personal and of utmost internal importance. The Court in *Milkovich* writes "[d]efamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements."[10] In short, defamation law is intended to provide redress to people whose reputation has been damaged by false statements.[11]

Generally, there are two categories of defamation: libel and slander.[12] Libel is written defamation, while slander is spoken.[13] At their core, both forms consist of "[t]he publication of anything which is injurious to the good name or reputation of another person, or which tends to bring him into disrepute."[14] Over time, defamation has been understood to require a false statement: "[i]njury to one's reputation caused by another's false communication."[15] Defamation law falls under tort liability rather than criminal culpability.

B. Constitutional Limitations on Defamation

The First Amendment of the Constitution of the United States reads, "Congress shall make no law . . . abridging the freedom of speech. . . ."[16] As the plain language indicates, this Amendment focuses on preventing Congress from enacting legislation that would limit speech, but the Supreme Court in *New York Times v. Sullivan* held the First Amendment also limits the ability of the government to impose tort liability for speech.[17] If the government can impose liability for certain kinds of speech, it would effectively be limiting speech.

In *Sullivan*, an elected commissioner for Montgomery, Alabama, sued the *New York Times* for an advertisement it ran criticizing the Montgomery police for their mistreatment of civil rights demonstrators.[18] Although the advertisement included some false statements about the events,[19] the trial court instructed the jury that the statements were

9. *Id.*
10. *Milkovich*, 497 U.S. at 12 (citing L. Eldredge, Law of Defamation 5 (1978)).
11. *Id.*
12. *Defamation*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).
13. *Id.*
14. *Id.*
15. *Defamation*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012).
16. U.S. CONST. amend. I
17. 376 U.S. 254 (1964).
18. *Id.* at 256.
19. *Id.* at 258-59. ("It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro

libelous per se, and that damages could be presumed.[20] The jury awarded a $500,000 verdict to Sullivan.[21]

The Supreme Court, however, held that holding the New York Times civilly liable violated the First Amendment: "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."[22] The Court found the statute in question "abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments."[23]

The relevance of *New York Times v. Sullivan* to this Casenote is not that Gibson's occupies the same public status as the Montgomery Commissioners, or a public official, but rather that *Sullivan* is the primary example of the Supreme Court limiting the availability of tort liability because of the First Amendment implications. Following *Sullivan*, the Supreme Court made clear that these restrictions on tort liability are not limited solely to public figures. In *Gertz v. Welch*, the Court drew a clear line between "public" and "private" individuals and held the *Sullivan* standard "defines the level of constitutional protection appropriate to the context of defamation of a public person."[24] In so holding, the Court also directed that states have an interest in "compensating injury to the reputation of private individuals," and therefore "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[25]

Although *Sullivan* provides the backdrop to this case—and is cited and quoted regularly by Oberlin—if Gibson's is considered private, rather than public, then *Gertz* requires that state law govern the claims. Thus, an examination of defamation law in Ohio is in order.

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students staged a demonstration on the State Capitol steps, they sang the National Anthem and not 'My Country, 'Tis of Thee.' Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time 'ring' the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.").

20. *Id.* at 262. It is worth noting that the trial court in the case at issue in this Casenote also instructed the jury that the statements were libelous per se, although incorrectly.

21. *Id.* at 278, n.18.

22. *Id.* at 283.

23. *Id.* at 268.

24. Gertz v. Robert Welch, 418 U.S. 323, 342 (1974).

25. *Id.* at 343, 347.

C. Defamation Law in Ohio

Article I, Section 11 of the Ohio Constitution reads, "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."[26] These ideals, "guided by the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'" are "not only an integral part of the First Amendment Freedoms under the federal Constitution but are independently reinforced in Section 11, Article I of the Ohio Constitution . . ."[27] In fact, "[t]he intent is to avoid self-censorship, whereby overbroad defamation standards result in the stifling of important non-defamatory material."[28] The Ohio Constitution is specific in its intention to avoid overbroad defamation liability.

In Ohio, to establish a claim of libel, a plaintiff must show:

> (1) that a false statement of fact was made,
> (2) that the statement was defamatory,
> (3) that the statement was published,
> (4) that the plaintiff suffered injury as a proximate result of the publication, and
> (5) that the defendant acted with the requisite degree of fault in publishing the statement.[29]

While all five elements are necessary for a successful claim, this Section focuses primarily on the first element, that "a false statement of fact was made."[30]

If the statement made is not a fact, but rather an opinion, it cannot support a libel claim because "an opinion as a matter of law cannot be proven false."[31] Courts have held that opinions carry constitutional importance, and "[h]owever pernicious an opinion may seem, we depend for its correction not the conscience of judges and juries but on the

26. OHIO CONST. art I, § 11.

27. Scott v. News-Herald, 496 N.E. 2d 699, 702 (Ohio 1986) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).

28. *Id.* at 245 (citing *Gertz*, 418 U.S. at 340).

29. Pollock v. Rashid, 690 N.E.2d 903, 908 (Ohio Ct. App. 1996) (formatting added for clarity). It is worth mentioning—although discussed in more detail later in the Casenote—that initially Gibson's sued Oberlin for, among other things, libel *and* slander. The trial court granted Oberlin's motion for summary judgment as to the slander claim, but not the libel (which itself raises questions examined later), but a Reader should rest assured that the similarities between actions for libel and slander allow for a discussion of the solely the former that informs that latter. *See, e.g.*, OHIO REV. CODE ANN. § 2739 (Lexis 2021).

30. *Id.*

31. Wampler v. Higgins,752 N.E.2d 962, 977 n.8, (Ohio 2001). Or, as an aspiring artist once said to an aspiring poet (and the author's father), "I can't be wrong; I'm making it up."

competition of other ideas."[32] The legal system need not regulate opinions; other, competing opinions will. Despite some qualifications of the fact-opinion determination at the federal level,[33] when analyzing a libel claim, Ohio courts are to ask the question of whether the statement should be categorized as a fact or an opinion.[34]

This determination of whether a statement is a fact or an opinion is of utmost significance. If the statement is an opinion, generally, it is "accorded absolute immunity from liability under the First Amendment."[35] To determine whether a statement is a fact or an opinion, "[t]he test . . . is an objective one based on a totality of circumstances and on the specificity, verifiability, general context, and social context of the words used."[36] The application of this test is expectedly broad. For example, in *Wampler v. Higgins* the court writes:

> . . . it is often appropriate to begin an assessment of the totality of the circumstances by analyzing "the common usage or meaning of the allegedly defamatory words themselves. We seek in this branch of our analysis to determine whether the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications. A classic example of a statement with a well-defined meaning is an accusation of a crime[,]" whereas "statements that are 'loosely definable' or 'variously interpretable' cannot in most contexts support an action for defamation. . ." "Readers are . . . considerably less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning."[37]

Even at this initial stage of the analysis, the court uses at least three different phrases to attempt to clarify the distinction: (1) the "common usage" of the statement, (2) whether the statement "has a precise meaning," and (3) whether it "gives rise to clear factual implications."[38]

Not surprisingly, and as discussed more in Part III, this distinction gets fuzzy, and its importance makes the ambiguity all that much more difficult to parse through. As exemplified by *Gibson Bros.*, determining whether a statement is a fact or an opinion is no simple ask of a court.

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32. *Id.* at 967-68 (quoting *Gertz*, 418 U.S. at 339-40).

33. For a thorough discussion of these developments, see *Id.* at 967-69.

34. *Id.* at 970.

35. *Id*. at 973 n. 4 (quoting Scott v. News-Herald, 496 N.E.2d 699, 705 (Ohio 1986)) (internal quotations omitted).

36. Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 430 (Ohio 2003) (citing *Wampler*, 752 N.E.2d at 977).

37. *Wampler*, 752 N.E.2d at 978 (emphasis added).

38. *Id.*

D. Gibson Bros., Inc. v. Oberlin College

As mentioned briefly in Part I, this case arises out of a separate, criminal case.[39] On November 9, 2016, there was "an incident" involving three Black Oberlin College students and an employee of Gibson's Food Market and Bakery.[40] The white employee, Allyn D. Gibson Jr., suspected one of the students of attempting to steal wine while purchasing a different bottle of wine with fake identification.[41] The employee confronted the student, and pursued the student out of the store, across the street, and into a nearby park, Tappan Square.[42] As the trial court writes, "[t]he details of the [ensuing] physical altercation are in dispute, but as a result of the physical altercation, Mr. Gibson detained [the student] until Oberlin police officers arrived on the scene."[43] After the arrival of the police, only the students were arrested.[44]

That evening, other Oberlin College students began organizing a protest outside the Gibson's location.[45] The protests began the next morning and continued for two days.[46] Per the trial court:

> During the protest, protestors held signs, chanted, and distributed a flyer that stated in part that Gibson's is "a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." Some of the facts regarding distribution of the flyer are in dispute, but deposition testimony was presented indicating protesters and Oberlin College staff distributed copies of the flyer and/or utilized college copy machines to make additional copies of the flyer. Also during the protests, [Defendant Dean] Meredith Raimondo handed a copy of the flyer to Jason Hawk, a reporter from the Oberlin News Tribune.[47]

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39. Entry and Ruling on Def.'s Mot. Summ. Judg. at 2, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019). Before going further into the discussion of the particulars of this case, it is worth mentioning that the facts referenced in this section come primarily from the Judge John R. Miraldi's "Entry and Ruling on Defendants Oberlin College and Meredith Raimondo's Motions for Summary Judgment." *Id.* It is of utmost importance to recognize here that the facts listed have not been presented to the jury. This Casenote relies on the trial court's statement of facts solely in an attempt to find a middle ground between the two parties. Whenever possible, this Casenote indicates where there may be disagreement between the parties as to specific facts.

40. *Id.* at 1.

41. *Id.*

42. *Id.*

43. *Id.*

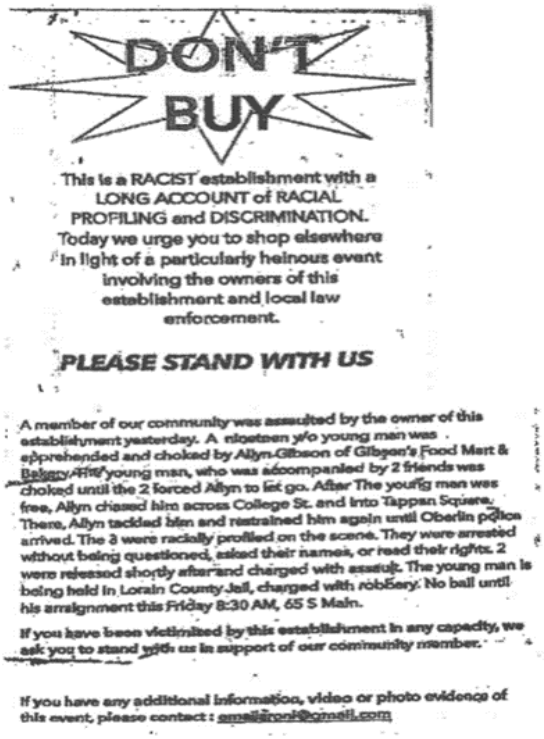
44. *Id.* at 2.

45. *Id. See also* Dustin Stephens, *A protest against racism, and a $31.5 million defamation award*, CBS NEWS (Nov. 3, 2019, 9:52 AM), https://www.cbsnews.com/news/oberlin-college-and-gibsons-bakery-a-protest-against-racism-and-a-31-5-million-dollar-defamation-award/

46. Entry and Ruling on Def.'s Mot. Summ. Judg. at 2, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019).

47. *Id.* Despite the acknowledged dispute, the judge includes mention of the deposition testimony because this paragraph appears within a ruling on a motion for summary judgment presented by the

The Flyer, emblazoned with the words "DON'T BUY," asked the reader to "PLEASE STAND WITH US," and stated that "[a] member of our community was assaulted by the owner of this establishment yesterday."[48]



DON'T BUY

This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION. Today we urge you to shop elsewhere in light of a particularly heinous event involving the owners of this establishment and local law enforcement.

PLEASE STAND WITH US

A member of our community was assaulted by the owner of this establishment yesterday. A nineteen y/o young man was apprehended and choked by Allyn Gibson of Gibson's Food Mart & Bakery. The young man, who was accompanied by 2 friends was choked until the 2 forced Allyn to let go. After The young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until Oberlin police arrived. The 3 were racially profiled on the scene. They were arrested without being questioned, asked their names, or read their rights. 2 were released shortly after and charged with assault. The young man is being held in Lorain County Jail, charged with robbery. No bail until his arraignment this Friday 8:30 AM, 65 S Main.

If you have been victimized by this establishment in any capacity, we ask you to stand with us in support of our community member.

If you have any additional information, video or photo evidence of this event, please contact : [redacted]@gmail.com

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That evening, Oberlin College's Student Senate, a student run organization, passed a resolution supporting the boycott.[50] It read:

> Yesterday evening, reports of an incident involving employees of Gibson's Food Market and Bakery and current Oberlin College students began to circulate. After further review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts.

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defendants, and is thus indicating a dispute of material fact. It is worth nothing, however, that later in this ruling, the judge seems to accept this telling of events as true, rather than for purposes of summary judgment.

48. Gibson Bros. Inc. v. Oberlin College, Nos. 19CA011563 and 20CA011632 (consolidated), (9th Dist. 2020), Appellants' Brief at 7. Given the importance of this Flyer, it will remain capitalized throughout this Note.

49. Complaint at 10, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019).

50. *Id.*

> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from sustaining further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by police officers.
>
> Gibson[']s has a history of racial profiling and discriminatory treatment of students and residents alike. Charged as representatives of the Associated Students of Oberlin College, we have passed the following resolution.[51]

The resolution continued by asking students to "immediately cease all support, financial and otherwise, of Gibson's Food Market and Bakery" and called on Oberlin's administrators to "condemn by written promulgation the treatment of students of color by Gibson's."[52] This resolution was posted in the Student Senate's own locked bulletin board in the student union on Oberlin's campus.[53]

Nearly a year later, the Gibsons filed an eight-count suit against Oberlin College and Dean Raimondo including, among others, one count of libel and one of slander for the allegations that Gibson's was a racist establishment.[54] On Oberlin's motion for summary judgment, Judge John Miraldi granted the motion as to two of the counts, including slander.[55] The trial itself was bifurcated into two phases, one for compensatory and one for punitive damages.[56] In the compensatory phase, the jury found against both Oberlin College and Dean Raimondo for the libel claim.[57] The jury also found that the defendants did not act with "actual malice."[58]

After their motions for judgment notwithstanding the verdict were denied, Oberlin appealed to the Ninth District Appellate Court.[59] Oberlin

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51. *Id.* at 7-8.

52. *Id.* at 8. Anecdotally, the author of the Casenote, who lived in Oberlin for two decades and was attending Oberlin College at the time of these events, would note that beyond the contracts between Oberlin College and Gibson's for doughnuts and baked goods, most of Gibson's business appeared to come from members of the surrounding community who were not associated with the college.

53. Entry and Ruling on Def.'s Mot. Summ. Judg. at 2, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019).

54. *Id.* at 3. In total, the Gibson's sued for (1) libel, (2) slander, (3) tortious interference with business relationships, (4) tortious interference with contracts, (5) deceptive trade practices, (6) intentional infliction of emotional distress, (7) negligent hiring, retention, and supervision, and (8) trespass. *Id.*

55. *Id.* at 22.

56. Gibson Bros. Inc. v. Oberlin College, Nos. 19CA011563 and 20CA011632 (consolidated), (9th Dist. 2020), Appellants' Brief at 3.

57. *Id.*

58. *Id.* While not necessary for this Casenote's discussion, this detail is included for those defamation scholars who are interested in the context beyond this Note's focus.

59. *Id.*

argued: "Libel requires a false statement of fact published with the requisite degree of fault by the defendant. As a matter of constitutional law, both student publications [the Flyer and the Resolution] contained opinions, and Oberlin did not publish them, let alone do so with malice."[60] After oral arguments in November of 2020, the parties now await a decision from the Ninth District.

III. DISCUSSION

While the Ninth District has a wide range of questions before it, this Casenote focuses now on a particular aspect of the case: can allegations of racism be verifiable facts for the purposes of a defamation suit? First, we examine semantics: is there a difference between being ***a*** racist and ***being*** racist? Then, we ask whether either interpretation can be a verifiable fact for the purposes of defamation law. Finally, we highlight that this lawsuit could be seen as just another in a long line of cases where plaintiffs attempt to use defamation suits to silence those who speak about their racist acts.

In its appellate brief, Oberlin argues "[a]llegations of 'racist' behavior are subjective and unverifiable descriptions of one's experiences and perceptions."[61] Looking to *Wampler*, Oberlin submits that in most situations, terms that are "loosely definable" or "variously interpretable" cannot support an action for defamation.[62] Indeed, Ohio courts have held that "accusations of ethnic bigotry are not actionable."[63]

The crux of Oberlin's argument, specific to this issue, rests on the fact that the trial judge asked whether the term "racist" is "pejorative," rather than if it is a verifiable fact:

> The trial court erred by asking whether "racist" is "pejorative," rather than whether it is factual. Whether a statement is negative—and thus defamatory—has nothing to do with whether it is a verifiable statement of fact. An accusation of racism is a *viewpoint*, not a data point. Indeed, in the context of a protest in which students and other community members shared their subjective experiences, these accusations are classic

60. *Id.* at 1.

61. *Id.* at 14 (citing to Lennon v. Cuyahoga Cty. Juvenile Court, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶31; Condit v. Clermont Cty. Rev., 675 N.E.2d 475, 478 (Ohio Ct. App. 1996)).

62. *Id*. (quoting Wampler v. Higgins, 752 N.E.2d 962,978 (Ohio 2001)).

63. *Condit*, 675 N.E.2d at 478 (("the word 'fascist' is 'loose[]' and "ambiguous and cannot be regarded as a statement of fact because of the 'tremendous imprecision' of meaning and usage of the term") citing to Buckley v. Littell, 539 F.2d 882, 891-895 (2nd Cir. 1976); Stevens v. Tillman, 855 F.2d 394, 402 (7th Cir. 1988) (the term "racist" is "hurled about so indiscriminately that it is no more than a verbal slap in the face . . . not actionable unless it implies the existence of undisclosed, defamatory facts")).

expressions of opinion.[64]

For purposes of a defamation suit, if someone calling another person a "racist" is a viewpoint, as Oberlin argues, then it should be considered an opinion, not a verifiable fact, entitled to First Amendment protection.

A. Racism as a Fact

Oberlin's argument presents us with important and difficult questions: for the purposes of defamation law, can a person be *a* racist? For a defamation claim, the plaintiff must prove the defendant made a *false* statement of fact. How should courts determine whether or not an accusation of racism is true or false?[65] This Section looks at whether racism can be "true" given its subjective nature. Section B then asks whether or not it is a fact that can be verified.

The difficulty here, of course, is that racism is deep-seated because "Americans believe in the reality of 'race' as a defined, indubitable feature of the natural world."[66] But racism is not only deep-seated but also multi-layered. On its page titled, "Being Antiracist," the National Museum of African American History & Culture lays out four types of racism: individual racism, interpersonal racism, institutional racism, and structural racism.[67] Individual racism "refers to the beliefs, attitudes, and actions of individuals that support or perpetrate racism in conscious and unconscious ways."[68] Interpersonal racism includes public expressions of racism between individuals.[69] Institutional racism involves "discriminatory treatments, unfair policies, or biased practices based on race [within an organization] that result in inequitable outcomes for whites over people of color . . ."[70] These three types of racism all fit within, and contribute to, structural racism, "the overarching system of racial bias across institutions and society."[71]

64. Gibson Bros. Inc. v. Oberlin College, Nos. 19CA011563 and 20CA011632 (consolidated), (9th Dist. 2020), Appellants' Brief at 15 (emphasis added; internal citations omitted). On first glance, it does appear that the trial judge does misstate that law here. On second glance, this Author comes to the same conclusion as the first.

65. This Casenote is admittedly and purposefully narrow in its discussion of racism within defamation law. The Author is aware of the limitations of such a discussion in the confines of this Casenote, as well as his own limitations, and intends to remark primarily on the facts of the case at hand, rather than the extensive and important discussion of systemic racism's impact and existence within the law more generally.

66. TA-NEHISI COATES, BETWEEN THE WORLD AND ME 7 (2015).

67. *Being Antiracist*, NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE, https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist (last visited Mar. 24, 2021).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

These types of racism are not solely overt or intentional, but sadly, they often are now more than ever. As recounted by a Capitol Police Officer Harry Dunn during the January 6, 2021 insurrection, "I got called a [n-word] a couple dozen times today protecting this building. . . Is this America?"[72] Sadly, the answer to Dunn's question is "yes," and the overtness of that racism is not limited to such extreme moments.

But the nature of racism in America is that it is often inherent, implicit. Explicit intention is not required for an act to be racist. As Ta-Nehisi Coates writes, referring to the portrayal of the boys in "The Dukes of Hazzard" as "two outlaws, driving a car named the General Lee, must necessarily be portrayed as 'just some good ole boys, never meanin' no harm."[73] Coates continues:

> But what one "means" is neither important nor relevant. It is not necessary that you believe that the officer who choked Eric Garner set out that day to destroy a body. All you need to understand is that the officer carries with him the power of the American state and the weight of an American legacy, and they necessitate that of the bodies destroyed every year, some wild and disproportionate number of them will be black.[74]

The difficulty Coates identifies here is that racism is so often *not* an intentional, conscious act. That is not to say that overt, intentional racism does not happen frequently, but rather that this more covert racism exists both subconsciously in the form of inherent bias as well as silently, internally. These "quiet" forms of racism are harder to spot on their face—yet, these quiet forms are those that perpetrate institutional and systemic racism and are often bubbling so close to the surface that it takes little effort for them to go from covert to overt.

As Richard Thompson Ford writes, "state of mind is not the sine qua non of wrongful discrimination. A decision can be motivated by bias but not be discriminatory," and "invidious discrimination need not involve bias or animus."[75] As Ford writes, "the most obvious type of discrimination is *facial* discrimination," which is "a policy that explicitly assigns preferences or shabby treatment on the basis of race."[76] While it

72. Pierre Thomas, Victor Ordonez, and Eliana Larramendia, *Capitol Police officer recounts Jan. 6 attack: Exclusive*, ABC NEWS (Feb. 22, 2021, 11:29 AM), https://abcnews.go.com/Politics/capitol-police-officer-recounts-jan-attack-exclusive/story?id=76036587.

73. Coates, *supra* note 66 at 103.

74. *Id.*

75. RICHARD THOMPSON FORD, THE RACE CARD 180 (2008). It is worth mentioning that Ford's theory has received criticism from other critical race theorists, and specifically for his acknowledgement of institutional racism, or "racism without racists" as he calls it, but his suggestion that connecting individuals to these larger forms of racism is "playing the race card." *See* Sumi Cho, *Post-Racialism*, 94 Iowa L. Rev. 1589, 1636, (2008-2009). As Cho notes, Ford's approach "to achieve integration caters to white normativity and sets a high bar for determining actually-existing racists." *Id.* at 1637.

76. Ford, *supra* note 75.

might be the most obvious, it is also the rarest, says Ford, "[b]ecause the law flatly forbids it with very few exceptions, few people pass facially discriminatory laws or adopt facially discriminatory policies."[77] This too applies to individuals: while facial, open racism still occurs all too regularly, it is usually easy for others to see. The quiet racism is more subtle.

Ford also recognizes that while the motivations of actors, including those engaging in quiet racism, may be helpful in examining discriminatory actions, discriminatory intent is ultimately cyclical. Referring to the Supreme Court case *Palmer v. Thompson*, where the town of Jackson, Mississippi closed all of its public swimming pools rather than integrating them, Ford noted:

> [t]he decision [to close all the pools] has a discriminatory effect because of its social meaning. That social meaning is a statement that blacks are inferior and their presence will ruin the public pools. But that statement doesn't injure Jackson's black population because *they* might be convinced that it's true; it injures them directly because they will, correctly, believe *that other people believe it*. The direct injury is not that of propaganda, it is that of an insult. And an insult is insulting because it reflects the speaker's attitudes—her intent.[78]

For Ford, a discriminatory effect is linked to discriminatory intent, even in situations where the effect is not blatant. In *Palmer*, in theory, the decision to close all the pools has an equal effect on both the white and Black people of Jackson, but as Ford argues, this effect is embroiled with the discriminatory intent, through its social meaning. Quiet racism, we can elaborate, is not always so obvious.

This is the difficulty for defamation law: quiet racism, whether conscious or subconscious, is difficult to prove as a verifiable fact. As stated above, to sufficiently support a defamation claim, the plaintiff must show that a false statement of fact was made.[79] The statement must be both "false," and "of fact." In theory, a person accused of being racist could claim that their action was not internally motivated by race. For example, if a white man who killed six women of Asian descent is accused of being racist, is it enough for him to say that the killings were not motivated by race?[80] Or, could a white cop who killed a black woman

77. *Id.* Ford is writing here primarily about government action, but his reasoning here also applies to private individuals.

78. *Id.* at 183 (original emphasis).

79. Scott v. News-Herald, 496 N.E.2d 699, 702 (Ohio 1986) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).

80. *Atlanta Shooting Suspect Says Sex Addiction, Not Racial Hatred, Spurred Attack*, VOA NEWS (March 19, 2021 2:13 AM), https://www.voanews.com/usa/atlanta-shooting-suspect-says-sex-addiction-not-racial-hatred-spurred-attack. This, of course, is an even more complicated issue, given the fetishization of Asian women.

in her own bedroom say that the shooting "was not a race thing," and therefore arguments that he is a racist are false because of his internal mindset?[81] In each of these examples, whether the racism is individual, interpersonal, or institutional, if either of these white men brought a defamation suit against someone who called them a racist, would the court be willing to accept their own statements that they were not motivated by race? Should the court give any weight at all to these men's mental state when determining whether the statement made was false? Put another way, does the consideration of mental state automatically make the statement an opinion, or can it still be a fact?

The flipside of the coin poses additional difficulty. A person may experience racism from another person, even if the latter person had no intention of being, nor any idea that their actions were, racist. Is this person still a racist? With the permeation of institutional and systemic racism in the United States, racist acts occur every day where the perpetrator claims not to be racially motivated. But those acts are still affecting people of color and are built on systemic racism. Take, for example, microaggressions. Columbia Professor Derald Wing Sue, PhD, said that "[i]t's a monumental task to get white people to realize that they are delivering microaggressions, because it's scary to them."[82] He continues, "[i]t assails their self-image of being good, moral, decent human beings to realize that maybe at an unconscious level they have biased thoughts, attitudes and feelings that harm people of color."[83] Similarly, there are many studies where:

> . . . well-intentioned whites who consciously believe in and profess equality unconsciously act in a racist manner, particularly in ambiguous circumstances. In experimental job interviews, for example, whites tend not to discriminate against black candidates when their qualifications are as strong or as weak as whites'. But when candidates' qualifications are similarly ambiguous, whites tend to favor white over black candidates, the team has found.[84]

Even white people who profess equality fall into racist habits and actions. And these situations are objectively racist: the outcomes and decisions were motivated by race, but there is no verifiably intentional racism.

In *Gibson Bros*., when Oberlin students accuse Gibson's of being a

81. *Breonna Taylor: Officer in shooting says it 'was not a race thing'*, BBC NEWS (Oct. 21, 2020), https://www.bbc.com/news/world-us-canada-54634793.

82. Tori DeAngelis, *Unmasking 'racial micro aggressions',* 40 MONITOR ON PSYCHOLOGY 42 (Feb. 2009), https://www.apa.org/monitor/2009/02/microaggression.

83. *Id.*

84. *Id.*

"racist establishment,"[85] is it enough for Gibson's to say, "No, we're not racist"? Is such a response enough for people of color who have experienced what they perceive to be racist acts perpetrated by Gibson's? When determining whether or not Gibson's is racist, and thus if the statement in the Flyer is not false, should the trial court have examined the experience of Gibson's or those who have experienced the racism? Should the court look to both? Can subjective experience be the foundation for a fact, as opposed to the more logical description as an opinion?

Clearly, there is a hole in defamation law. And most defamation suits filed on behalf of plaintiffs accused of being racist fall into this "quiet" racism category.[86] Courts cannot rely on the internal mental states of plaintiffs to determine if they were racially motivated. Whether the racism is internal and personal, or inherent and systematic, or both, proving a racist state of mind is difficult. Similarly, a person may perform racist acts without ever being aware that their actions are racist. There may even be times when an action was inherently motivated by race, but both the perpetrator and the victim were unaware that it was. Does racism require one of the players, either perpetrator or victim, to perceive the racism? How are courts expected to balance this when ruling on a defamation claim? In these instances of quiet racism, how are courts expected to determine whether the statement that "this person is a racist" is true or false, for purposes of the first prong of a defamation claim? What should they look to?

B. "Racist" as a Verifiable Statement

In the fact versus opinion distinction, it is now worth noting that the existence of two differing experiences of the same action should swing the lever swiftly towards that of opinion and thus also towards constitutional protection. Can something be a "fact" if there are two differing internal views on it?[87] Each party has their own experience of the event, and both parties are "correct" in their own internal interpretation, but they are fully subjective interpretations. To be a "fact" within defamation law, it must be an "objective" interpretation. This certainly supports the argument that "racist" is a statement of opinion,

85. Complaint at 10, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019).

86. *See, e.g.*, Webber v. Ohio Dep't of Pub. Safety, 103 N.E.3d 283 (Ohio Ct. App. 2017); Lennon v. Cuyahoga County Juvenile Court, 2006-Ohio-2587, 8th Dist. (Ohio Ct. App. 2006); Gueye v. U.C. Health, No. 1:13-cv-673, 2014 U.S. Dist. LEXIS 141834 (S.D. Ohio 2014); Butler v. City of Cincinnati, No. 1:17-cv-00604, 2020 U.S. Dist. LEXIS 132032 (S.D. Ohio 2020).

87. Criminal defense lawyers certainly would say so.

rather than fact.

But the difficulty does not end so easily there, compounded by the observation we are still in only the first element of defamation. In a defamation claim, the statement made must not only be false, but it must also be a verifiable fact. Given the subjective nature of the word "racist"[88] what would a court use to verify the existence of racism for this fact? Need there be intent by the actor? Or experience by the receiver? We need not mirror the argument made in the Section above, given the similarity, but it is worth noting explicitly that this second question has the same difficulties as the first.

C. Gibson Bros. Inc. v. Oberlin College, Applied

In the instant case, the trial court held the language in the Flyer and the Resolution were facts, and not opinions for purposes of defamation law.[89] Judge Miraldi applies a four-factor analysis to determine whether the statements were protected opinions.[90] The factors are: (1) the "specific language used"; (2) "[w]hether the statement in question is verifiable"; (3) the "general context of the statement"; and, (4) the "broader context in which the statement appeared."[91]

Applying the first factor to the Flyer, Judge Miraldi held "[t]he specific language that '[Gibson's] is a racist establishment with a long account of racial profiling and discrimination' is pejorative."[92] He made the same determination as to the Resolution: "[t]he accusations of racism, racialized violence, and a history of discrimination along with the implication that students of color are met with hate are pejorative."[93]

This is not entirely accurate. While there are many factors listed in *Scott*, none involve whether or not a statement is "pejorative."[94] Instead, *Scott*, relied on by Judge Miraldi, described the "specific language" factor more akin to "common usage."[95] The "specific language factor" used by the *Scott* court is not meant to determine whether the statement was pejorative, but rather whether a court can infer a clear statement of fact

88. As discussed *supra*, Part III(A).

89. Entry and Ruling on Def.'s Mot. Summ. Judg. at 9, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019).

90. *Id*. at 7.

91. *Id*. (*quoting* Scott v. News-Herald, 496 N.E.2d 699, 706 (Ohio 1986)).

92. *Id*. (original capitalization re-formatted).

93. *Id*. at 15.

94. Scott v. News-Herald, 496 N.E.2d 699, 705 (Ohio 1986). In fact, the word "pejorative" does not appear once in the *Scott* opinion.

95. *Id.*

from the common interpretation of words used.[96] Even if we applied this incorrect "pejorative" factor, many courts think the word "racist" is too "watered down" to be the source of a defamation claim.[97]

As for the second factor, whether the statement is verifiable, Judge Miraldi focused on the Flyer's use of the words "long account" but does so in a somewhat strange manner.[98] The sentence in question in the Flyer—and similar language and interpretation in the Resolution—reads that Gibson's has a "long account of racial profiling and discrimination."[99] Judge Miraldi then remarked that "a noted synonym for account is the word history."[100] He then provides the Webster definition for "history" as "an established record,"[101] which he uses to skew the statement in the Flyer as imputing on the publisher "knowledge of a documented past history of such activity."[102]

Before turning to the more pressing question of the difficulties of verifying racism as a fact, it is worth noting that if Judge Miraldi had simply looked to the definition of the word "account", which was included in the Flyer verbatim, Webster's would have told him that "account" actually has its own definition: "a statement or exposition of reasons, causes, or motives."[103] This definition touches on intention and other internal forces that, if applied as it should have been, changes the analysis considerably.

But even if we play out Judge Miraldi's interpretation, what would it

96. *Id*. In *Scott*, the court inferred a statement that "H. Donald Scott committed perjury" from "some nine sentences and a caption" which implicated that Scott "lied at the hearing after having given his solemn oath to tell the truth." *Id.*

97. *See*, *e.g.*, Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988) ("Accusations of 'racism no longer are 'obviously and naturally harmful.' The word has been watered down by overuse, becoming common coin in political discourse. . . . Language is subject to levelling forces. When a word acquires a strong meaning it becomes useful in rhetoric. A single word conveys a powerful image. When plantation owners held blacks in chattel slavery, when 100 years later governors declared 'segregation now, segregation forever,' everyone knew what a 'racist' was. The strength of the image invites use. To obtain emotional impact, orators employed the term without the strong justification, shading its meaning just a little. So long as any part of the old meaning lingers, there is a tendency to invoke the word for its impact rather than to convey a precise meaning. We may regret that the language is losing the meaning of a word, especially when there is no ready substitute. But we serve in a court of law rather than of language and cannot insist that speakers cling to older meanings. In daily life 'racist' is hurled about so indiscriminately that it is no more than a verbal slap in the face; the target can slap back. It is not actionable unless it implies the existence of undisclosed, defamatory facts, and Stevens has not relied on any such implication.").

98. Entry and Ruling on Def.'s Mot. Summ. Judg. at 10, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019).

99. *Id.*

100. *Id.* (emphasis added for clarity).

101. *Id*.

102. *Id.*

103. *Account*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/account (accessed Mar. 26, 2021).

mean to have a documented history of racism as a verifiable fact? As discussed above, there is difficulty in designating racism as a fact and verifying that fact.[104] In his analysis, Judge Miraldi applied *Scott* to the question of whether the statement made in the Flyer was a verifiable fact: "the Supreme Court of Ohio in *Scott* stated "[i]f an author represents that he has private, first-hand knowledge which substantiates the opinion he expresses, the expression of opinion becomes as damaging as an assertion of fact."[105] Judge Miraldi reasoned that the language in the Flyer, the "long account of racial profiling and discrimination," is akin to the assertion that there exists an established record of these racist acts: "the accusation that Gibson's has a '*long account* of racial profiling and discrimination' goes beyond implication and directly tells the reasonable reader that the author's previous statement . . . is supported by a lengthy and potentially documented record of racial profiling and discrimination."[106] For Miraldi, the implication of this record is what makes the statement defamatory: "[t]he implication of the undisclosed facts supporting the statements of the flyer make them damaging as an assertion of fact."[107]

This argument is severely lacking. Judge Miraldi has first handpicked a tenuous synonym, relied on that definition as gospel, and then misapplied the law to that incorrect definition. Miraldi seems to be arguing that the phrase "long account" insinuates to a "reasonable reader" that there exists a "clear established record of verifiable instances of racial profiling and discrimination." Or, in other words, there is an implication of possible defamatory statements, undisclosed, but verifiable, and these implied-undisclosed-and-verifiable statements are contained in an established record, all contained in the words "long account."

The previous sentence is nearly unreadable, purposely so; Judge Miraldi's argument is so convoluted and complex that it is difficult to put simply. The paradox of his argument is perhaps best exemplified in a single sentence: "[t]he implication of the undisclosed facts supporting the statements of the flyer make them as damaging as an assertion of fact."[108] Here, Miraldi states that undisclosed facts are implied, which makes them as damaging as if they were assertions of fact. But as he concedes in the same sentence, they are not assertions of fact: they are implied, undisclosed facts. Miraldi relies on *Scott* to argue that the author of the

104. See, *supra*, Part III, Section A.

105. Entry and Ruling on Def.'s Mot. Summ. Judg. at 9, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019) (quoting Scott v. News-Herald, 496 N.E.2d 699, 707 (Ohio 1986)).

106. *Id*. (emphasis in original).

107. *Id.*

108. *Id.*

Flyer has "private, first-hand knowledge which substantiates the opinions he expresses."[109] But as *Scott* (and Miraldi) note, where this statement "lacks a plausible method of verification, a reasonable reader will not believe the statement has specific factual content."[110] Miraldi quotes this specific line, but then ignores it in his analysis. He implies that the "plausible method of verification" is the "length and potentially documented record of racial profiling and discrimination."[111] But this "record" he refers to is based on his false equivalency between the words "account" and "history." Even by his own reading, there is a substantial difference between the "implication of . . . undisclosed facts" and a "documented record of racial profiling and discrimination."[112] If, under *Scott*, the analysis hinges on a "plausible method of verification," there is a vast difference between the plausibility of implied, undisclosed facts, and a documented record.

Even if we humor Judge Miraldi and accept momentarily that a defamation claim can be based on a statement that there exists other defamatory facts, we are left with the same problem. Say there is a "documented record of racial profiling and discrimination"; each instance in that "record" has the same problem detailed above: it is a subjective experience. To verify the existence of a record, in theory, the court would need to look at each individual instance on that record and determine whether or not it was actually racist. And then we fall again into our same issue, that verifying racism as a fact, especially for the purposes of defamation, is nearly impossible.

So, even humoring Judge Miraldi as to the Flyer, his reasoning is left no better. The basis of the defamatory statement, in Miraldi's mind, is the "long account of racial profiling." This is the verifiable fact required for a defamation claim. Yet, even that "verifiable fact" is only itself a fact if it contains verifiable instances of racism. The reasoning catches its own tail, only to turn itself inside-out.

As for the Student Senate's Resolution, Judge Miraldi applies much of the same analysis. While there are fewer definitional hoops to jump through this time—the Senate Resolution does state that, "Gibson's has a *history* of racial profiling and discriminatory treatment of students and residents alike"[113]—Judge Miraldi's reasoning fails for the same reasons as above: this "history," like the long account, is theoretically full of subjective, unverifiable statements.

109. *Id*. (quoting *Scott*, 496 N.E.2d 699, 707).

110. *Scott*, 496 N.E.2d 699, 707.

111. Entry and Ruling on Def.'s Mot. Summ. Judg. at 10, Gibson Bros. Inc. v. Oberlin College, No. 17-CV-193761, Lorain Cty. C.P. (April 22, 2019).

112. *Id.*

113. *Id*. at 15.

While Judge Miraldi relies, partially, on *Scott* to conclude the writers of the Flyer and the Resolution are implying that they each have first-hand knowledge that substantiates the opinion, which makes the opinion a fact for the purposes of defamation law, a slightly further reading of *Scott* renders this argument useless. As stated in *Scott*, the implication of first-hand knowledge must have a "plausible method of verification."[114] In each instance, the record Miraldi refers to is not verifiable in the first place, let alone "plausibly" so. As mentioned in the Sections above, verifying instances of racism to the degree required to call them a "fact" is nearly impossible. It is incredibly subjective. And without this plausible method of verification, Judge Miraldi's conclusion loses all strength. These statements are not facts, but opinions, and thus are constitutionally protected. Hopefully, Ohio's Ninth District will see this hole and render judgment for Oberlin.

IV. CONCLUSION

While this Casenote has focused primarily on one particular case, and the hole in defamation law the case hinges on, there are larger ramifications. As the NAACP notes in their amicus brief filed in the *Gibson Bros. Inc. v. Oberlin College* case, using tort law, such as defamation, to silence the voices of those fighting for civil rights has a long history in this country.[115] In cases such as *New York Times Co. v. Sullivan*[116] and *NAACP v. Claiborne Hardware*[117] the Supreme Court "recognized this tactic for what it was: an attempt to silence and intimidate civil rights leaders through the misuse of the court system."[118]

This Casenote is not insinuating any motive of discriminatory intent on behalf of the Gibsons for filing this suit.[119] But the questions raised by the suit that they did file have a larger impact. As the NAACP writes, "[u]pholding liability for Oberlin College in this case would be a sharp departure from the long-settled understanding of the First Amendment [. . .] and upend the protections for free speech that the NAACP has worked

114. *Scott*, 496 N.E.2d 699, 707 (quoting Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984)).

115. Gibson Bros. Inc. v. Oberlin College, Nos. 19CA011563 and 20CA011632 (consolidated), (9th Dist. 2020), Amicus Brief filed by the National Association for the Advancement of Colored People (NAACP), 2.

116. 376 U.S. 253 (1964).

117. 458 U.S. 886 (1982).

118. Gibson Bros. Inc. v. Oberlin College, Nos. 19CA011563 and 20CA011632 (consolidated), (9th Dist. 2020), Amicus Brief filed by the National Association for the Advancement of Colored People (NAACP), 2.

119. This is, after all, only a law review article, and if a court holds that calling someone a racist *can* be the basis for a defamation claim, a writer must tread lightly.

to secure for over sixty years."[120] Looking back to the civil rights movement and the continued fight for racial equality, "civil liability–when not carefully circumscribed—can easily become an impermissible limitation of free speech."[121]

That, truly, is what is at stake here. If a defamation claim can be based on someone calling another person a racist, civil liability becomes the basis to silence voices. The majority of this Casenote has focused on the impossibility, legally, of racism being a verifiable fact, namely the subjective nature of which makes it unverifiable. But it is this same notion that fuels the policy rationale: allowing those—especially those in power—who do not see their actions or words as racist to be protected by civil liability from being called a racist inhibits any potential progress as we fight for racial equality.

As a matter of law, being called a racist should not be the basis of a defamation claim. As a matter of justice, it cannot.

120. Gibson Bros. Inc. v. Oberlin College, Nos. 19CA011563 and 20CA011632 (consolidated), (9th Dist. 2020), Amicus Brief filed by the National Association for the Advancement of Colored People (NAACP), 13.

121. *Id.*