

## Second Thoughts: A Response to David A. Logan's *Rescuing Our Democracy by Rethinking New York Times v. Sullivan*

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*New York Times v. Sullivan*<sup>1</sup> (*NYT*) was not wrongly decided. In its time and context, it was a necessity. I do not understand Professor Logan to be saying otherwise; his point is that the time and context are very different now, and what may have been right in 1964 may be wrong now.<sup>2</sup> With that I agree.

It is easy to forget just how bad the bad old days were. Before *NYT*, libel law as inherited from England was so myopically focused on detail that it countenanced a half-million-dollar award for publication of a statement whose gist was undeniably true: Southern officials were indeed violating the rights of African-Americans.<sup>3</sup> Some of the details were false and, standing alone, were defamatory.<sup>4</sup> But it was the larger, truthful message that outraged Commissioner Sullivan and other officials in the South.<sup>5</sup> And the law of defamation was so byzantine that it allowed Sullivan (who was not identified in the statement) to claim that most of misdeeds attributed to unidentified “Southern violators” had not happened, but if they had occurred, he would have been understood to be one of the perpetrators.<sup>6</sup>

The common law in 1964 offered scant protection for error. For example, even reporting of arrests and criminal charges was perilous; accurate reports of judicial proceedings were usually privileged, but reporting on the actions of police and prosecutors were not—so editors were told not to publish anything about arrests and charges until a court acted.<sup>7</sup> Even opinions could be actionable

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<sup>1</sup> 263 U.S. 254 (1964).

<sup>2</sup> David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 761–63 (2020).

<sup>3</sup> See *New York Times Co.*, 263 U.S. at 256.

<sup>4</sup> *Id.* at 258–59.

<sup>5</sup> *Id.* at 258.

<sup>6</sup> *Id.*

<sup>7</sup> See David A. Logan, *Essay, Libel Law in the Trenches: Reflections on the Current Data on Libel Litigation*, 87 VA. L. REV. 503, 503–04 (2001).

if they implied the existence of defamatory facts.<sup>8</sup> Worse, libel law was state law, with many state-to-state variations.<sup>9</sup> This may have been tolerable when news was largely the province of city newspapers, but, at the time of *NYT*, national TV networks, national newsmagazines, and regional and national papers were becoming dominant.<sup>10</sup> For them, evaluating the legal perils they might face in different jurisdictions was daunting.

Libel law needed to be nationalized. Perhaps that would have been better left to federal legislation, but subsequent experience with proposals that would have made far smaller incursions into state prerogatives suggests that was not likely to happen; proposals for a national retraction statute<sup>11</sup> and a federal shield law to protect confidential sources have failed repeatedly in the years since 1964.<sup>12</sup>

*NYT* nationalized libel law significantly. The new constitutional rules did not trump all state law, but they created a national floor that made it feasible to publish (or broadcast) regionally or and nationally.<sup>13</sup> No matter what state's law might control, and whatever the local peculiarities of that law, media and other speakers knew they could rely on the constitutional rules.<sup>14</sup> Without those protections, much of our history would have been different. The strategy of the civil rights movement was to force the rest of the nation to pay attention to what was happening in the South; that is why its leaders bought an ad in the *Times*.<sup>15</sup> Without fearless coverage by the national media, that strategy could not have succeeded. The trajectory of the Vietnam war was altered by disclosure of the lies that were being told—disclosures might have remained hidden if the press had not had the protections of *NYT*. The *Washington Post* probably could not have exposed the Watergate scandal if it had faced the pre-1964 libel law. Professor Logan is right: *NYT* changed the political culture of America—but in many respects, those changes were for the better.

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<sup>8</sup> See Logan, *supra* note 2, at 765 (noting that Alabama libel law “made any printed misstatement that harmed reputation not just actionable but potentially the basis for a large damages award”).

<sup>9</sup> *A Closer Look at New York Times v. Sullivan*, UM NEWS (Feb. 22, 2019), <https://news.miami.edu/stories/2019/02/a-closer-look-at-new-york-times-v-sullivan.html>.

<sup>10</sup> See, e.g., STEVE M. BARKIN, AMERICAN TELEVISION NEWS: THE MEDIA MARKETPLACE AND THE PUBLIC INTEREST 35–45 (2003).

<sup>11</sup> See Elad Peled, *Constitutionalizing Mandatory Retraction in Defamation Law*, 30 HASTINGS COMM. & ENT. L.J. 33, 58–64 (2007) (detailing one such scholarly proposal for a federal retraction statute).

<sup>12</sup> See Federal Shield Law Efforts, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/federal-shield-law/> (last visited Oct. 24, 2020) (detailing more recent Congressional efforts for a national statute).

<sup>13</sup> *New York Times Co.*, 263 U.S. at 283–84 (1964).

<sup>14</sup> See Logan, *supra* note 2, at 763–67.

<sup>15</sup> See *id.*

The decision was also a political necessity; every member of the Court recognized that. The health, if not the life, of our first truly national newspaper was threatened by multiple judgments awarded by hometown juries in favor of segregationists and affirmed by sympathetic judges.<sup>16</sup> Other national media, most notably CBS, were similarly threatened.<sup>17</sup> Imagine the consequences if the Supreme Court had affirmed Sullivan's judgment, or even passively preserved it by denying certiorari: other Southern politicians and judges would have been emboldened and the civil rights movement (and the media who were helping that movement succeed by covering it) would have been intimidated if not neutered.

The posture in which the case reached the Court was responsible for some of the problems that Professor Logan identifies. It was far from an ideal case for major changes in libel law—a useful reminder that the Court's ability to choose the vehicle for its most dramatic innovations is limited. The Court's usual disposition of erroneous judgments—simply reversing and remanding—was not an option; on remand the Alabama courts most likely would have found for Sullivan again. To avoid that, the Court announced two of the new rules that Professor Logan decries. It avoided allowing a future jury to decide whether actual malice had been proved by holding that judges (including justices of the Supreme Court) must independently review the evidence to decide if it could support such a finding.<sup>18</sup> The Court concluded that it could not.<sup>19</sup> To facilitate that conclusion, the Court adopted a second new rule: a finding of actual malice had to be supported by “clear and convincing” evidence.<sup>20</sup> If the usual preponderance of evidence standard controlled, and if reasonable minds could differ, even appellate courts would have to give considerable deference to the findings below.<sup>21</sup> Under the new standard, whether reasonable minds could differ did not matter; the Court could decide for itself whether the evidence was clear and convincing.<sup>22</sup>

As Professor Logan says, these two changes “fundamentally altered the procedural rules for defamation litigation.”<sup>23</sup> If the decision had merely adopted the actual malice requirement, it would not have greatly affected libel litigation; it would have just prescribed some new language that had to be included in the

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<sup>16</sup> *Id.*

<sup>17</sup> Martin Garbus, *New Challenge to Press Freedom*, N.Y. TIMES (Jan. 29, 1984), <https://www.nytimes.com/1984/01/29/magazine/new-challenge-to-press-freedom.html>.

<sup>18</sup> Logan, *supra* note 2, at 772.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See* *Harte-Hanks Commc'n Inc. v. Connaughton*, 491 U.S. 657, 661 n. 2 (1989).

<sup>22</sup> Logan, *supra* note 2, at 772.

<sup>23</sup> *Id.* at 789.

jury instructions. But independent review and convincing clarity meant that few cases would ever reach a jury. Since judges would have to ultimately decide the actual malice question anyway, they could now do so on pre-trial motions for summary judgment. They did not have to wait for a jury determination, because the question was whether the evidence showed actual malice with convincing clarity, and that was a question for judges to answer ultimately.<sup>24</sup>

These two rules, employed in anticipation of resistance by the Alabama courts, proved to be at least as important as the actual malice standard itself. Courts in other states turned out to be recalcitrant also. Over the next ten years, the Court reversed fourteen judgments that failed to fully comply with the new legal regime prescribed by *NYT*.<sup>25</sup> Professor Logan notes that decades later, apparently many lower courts still were not complying, as indicated by a high rate of reversals on appeal.<sup>26</sup> Judges' reluctance to accept *NYT*'s easy disregard of jury findings may arise from centuries of history. In the eighteenth century, reforms of libel law took the crucial issues in defamation cases away from judges and gave them to juries.<sup>27</sup> These were hailed in both England and America as major victories for freedom of speech and press, because jurors were expected to be more attentive to those freedoms than judges.<sup>28</sup> Thus, for many judges, *NYT* and its progeny were a repudiation of received historical wisdom.

The cases that followed did more than *NYT* itself to create the "miasma" that Professor Logan decries.<sup>29</sup> As he says, *NYT* was firmly rooted in the desire to promote discussion about matters related to self-government.<sup>30</sup> But as time passed, the Court and lower courts drifted farther and farther from that objective. The first step was to extend the *NYT* protections to suits by public employees far less important than L. B. Sullivan: to those who appear to the public to have "control over the conduct of governmental affairs."<sup>31</sup> Next were candidates for public office, no matter how lowly;<sup>32</sup> then private individuals who "shape events

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<sup>24</sup> *Id.* at 791.

<sup>25</sup> See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PENN. L. REV. 487, 488 n.2 (1991) for a list of all of the Supreme Court cases decided in the ten years following the *NYT* decision. Of the 27 heard at the time of publication of Anderson's article, the fourteen decided between 1964 and 1974 were all reversed. *Id.*

<sup>26</sup> Logan, *supra* note 2, at 793.

<sup>27</sup> Anderson, *supra* note 25, at 539.

<sup>28</sup> That was the key reform of the 1735 *Zenger* case, one of the icons of press freedom in the United States. See THE TRIAL OF JOHN PETER ZENGER: AUGUST 4, 1735 47–48 (1765).

<sup>29</sup> Logan, *supra* note 2, at 761.

<sup>30</sup> *Id.* at 775.

<sup>31</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1965).

<sup>32</sup> *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971).

in areas of concern to society at large”;<sup>33</sup> then people who become famous simply for their success in sports, arts, or business.<sup>34</sup> Eventually, the *NYT* regime applied to nearly anyone whose activities attract media attention.

The result of the *NYT* decision, and the hundreds of cases that are often called its “progeny,” was that most libel cases ended with summary judgment for defendants.<sup>35</sup> This did more than anything to free media from the chill of libel law, because it greatly reduced the cost of defending. And by fostering a perception that suing for libel is futile, it exacerbated the debasement of public debate that Professor Logan describes.<sup>36</sup>

Of course, the decision is not entirely responsible for that debasement. Professor Logan identifies other important causes: the advent of the internet and social media,<sup>37</sup> increasing partisanship in politics,<sup>38</sup> growing hostility toward government (much of that earned by official mendacity),<sup>39</sup> and distrust of the news media, much of that earned by arrogance and unresponsiveness of the media outlets themselves.<sup>40</sup> These forces cannot be entirely disaggregated—often one of them was triggered or exacerbated by the others. But change requires us to start someplace, and the diminished law of libel is a good starting point.

My own nomination for the place to start is Section 230 of the Communications Decency Act, which absolves internet platforms of legal responsibility for the content posted on their sites.<sup>41</sup> It was passed because Congress was told it was necessary if internet companies were to monitor their platforms for child pornography; that was how it was smuggled into something called the Communications Decency Act.<sup>42</sup> It was *not* necessary for that purpose, and in fact the companies still do very little of that monitoring. Replacing Section 230 with some sensible rules as to the responsibilities of platforms for the content they host would do much to clean up the social media morass.

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<sup>33</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 337 (1974) (citing *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 163 (1967) (Warren, J. concurring)).

<sup>34</sup> *See, e.g., Chuy v. Philadelphia Eagles Football Club*, 525 F.2d 265, 1280 (3d Cir. 1979) (en banc) (professional football player); *James v. Gannett Co.*, 353 N.E.2d 834, 839 (N.Y. 1976) (belly dancer).

<sup>35</sup> *See Anderson, supra* note 25, at 498.

<sup>36</sup> Logan, *supra* note 2, at 812–13.

<sup>37</sup> *Id.* at 800.

<sup>38</sup> *See id.* at 796–97.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 47 U.S.C. § 230 (2016).

<sup>42</sup> *See id.* 231(a)(1) (2016).

Section 230 is also on Professor Logan's list of targets,<sup>43</sup> but I would move it to the top of the list. Changing the constitutional law of defamation would take a long time. The Supreme Court could overrule *NYT* with one decision, but just as it took a generation or more to build up all of its accoutrements, so it would take many years to decide how many of those to undo, and to what extent. Section 230 can be changed just by an Act of Congress, though that is easier said than done. Not only would it encounter the opposition of technology companies that have become the behemoths of the economy (in part because of their lack of accountability). It also would disappoint millions of people who might find their defamatory falsehoods on Twitter, Facebook, and similar platforms blocked if those services had to take responsibility for them.<sup>44</sup> But there seems to be some political momentum to address the evils of Section 230, while reforming the constitutional law of libel seems to lack much of a constituency.

But Professor Logan is correct to say that *NYT* needs to be revisited. Some might fault him for not offering more detailed prescriptions for change, but the brevity of that section of his paper may be a virtue. We all have our own ideas about what needs to be saved and what changed. Extensive recommendations might distract us from his central demand—we must recognize that the world of *NYT* no longer exists. Understanding how much politics, news, and public discourse have changed is an essential prerequisite to reforming libel law.

At the same time, it is important to also understand how much attitudes about reputation have changed. Reputation has acquired a bad name. Its importance was once acclaimed by everyone from Shakespeare<sup>45</sup> to Donald Trump.<sup>46</sup> Now bad reputation, at least in the eyes of the general public, seems to have few consequences. People with reputations tarnished by reported (or even confirmed) transgressions can be elected to high office, exalted in popular culture, or esteemed as sports heroes. To be sure, reputation still matters in many subcultures: in professions where advancement or referrals depend on peer esteem, in businesses where the now-ubiquitous consumer reviews can mean success or failure, and among cliques of teenagers where inclusion and exclusion are the coin of the realm. But in the society at large, reputation no longer has the power it once had.

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<sup>43</sup> Logan, *supra* note 2, at 811.

<sup>44</sup> To say nothing of the opposition of one person who with the stroke of a pen could preserve his freedom to Tweet falsehoods.

<sup>45</sup> "Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial. My reputation, Iago, my reputation!" WILLIAM SHAKESPEARE, *OTHELLO, THE MOOR OF VENICE* act 2, sc. 3.

<sup>46</sup> "I really value my reputation and I don't hesitate to sue." Michael Kruse, *The 199 Most Donald Trump Things Donald Trump has ever Said*, POLITICO (Aug. 14, 2015), <https://www.politico.com/magazine/story/2015/08/the-absolute-trumpest-121328>.

Whether the law's diminished protection of reputation is a cause or effect of this is not clear. Probably it is both. Many people have become skeptical (or cynical) about the validity of untarnished reputations. Some seem to believe that everyone's character is flawed; others seem to believe that anyone who has achieved fame must have cheated or lied along the way. People with these views will not welcome changes in law that make it harder for the media and others to confirm their suspicions. An even greater impediment may be the intellectually fashionable view that truth is merely a social construct: if one person's falsehood is another person's truth, there is little room for a body of law that insists that falsity can be proved. However valid that view may be as a cosmic matter, on the ground it is nonsense: we distinguish between truth and falsity every day of our lives.

Professor Logan's article is perceptive, timely, and courageous. He will face some vituperation for questioning a decision as iconic as *NYT*. But he has initiated a much-needed conversation.