Final Research Paper

Polarization and Technology as Challenges to *New York Times v. Sullivan*

Roblyn Powley

Media & Communication, St. John Fisher College

COMM 346: Media Law and Ethics

Dr. Bicket

April 21, 2022

Section 1. Introduction

In early 2022, The New York Times prevailed in a New York appeals court, defending itself against libel claims brought by former Alaska governor and Vice Presidential candidate Sarah Palin. Both the judge and jury in the case concluded that the case should be dismissed, with the judge stating "no reasonable jury could find that Sarah Palin proved" the Times had acted with "actual malice," (Peters, 2022). Less than one month after her case was dismissed, Palin filed for appeal in U.S. District Court. The concept of actual malice as referenced by the judge in Palin's case was born out of the 1964 *New York Times v. Sullivan* appeal, the decision which established that a public figure plaintiff must prove not only falsity, but that the defendant or publisher was aware of the falsity, or else disregarded the real possibility of falsehood, in a libel case. Prior to *Sullivan*, segregationist leaders in the Jim Crow south, frequently utilized libel suits as a tool to dampen press coverage of civil rights issues. The Court's ruling in favor of the Times was a win for civil rights leaders, and also effectively made it harder for public officials to successfully bring libel suits against members and institutions of the press.

In July of 2021 two current sitting Supreme Court justices each took an opportunity to express unfavorable opinions of the long-standing actual malice rule, utilized since *Sullivan* as a critical determinant in United States libel cases (Liptak, 2021). Taking issue with the Court's decision not to hear a particular libel case, Justice Thomas and Justice Gorsuch each suggested in their dissents that the court should reconsider *New York Times v. Sullivan.* Both justices commented on how different the media landscape is now than it was in the time of *Sullivan*, suggesting that the old rule couldn't adequately be applied when so many more sources of information are available, but not necessarily reliable (Liptak, 2021).

Though the justices comments were prior to Palin's recent case, and the two events occurred independently of one another, they are related. The worlds of journalism, public figures, and politics do look different in the 21st century than they did almost 60 years ago, and taken together, these events can help understand *Sullivan* in 2022, and consider whether this once stable rule will likely remain so.

Section 2. Objective

In the decades since *New York Times v. Sullivan*, the ruling has remained the cornerstone of United States libel law. In more recent years, as *Sullivan* has celebrated its 50th anniversary and beyond, a question arises of whether this ruling is outdated and has outlived its usefulness, or if it is as flexible and applicable as ever. And even if it remains applicable and useful, there still at least two sitting justices who are openly hostile to the ruling. This analysis will consider two main categories of challenges that Sullivan faces: the changing digital media landscape, and the politicization and polarization of the Supreme Court, and will ultimately argue that these challenges will likely prove to be too great, and that significant changes to U.S. libel law are likely on the horizon.

Section 3. Literature Review

This literature review will discuss the actual malice rule generally, address scholarly assessment of the *NYT v Sullivan* ruling at its 50th anniversary in 2014, and consider some potential challenges to the ruling.

The *Sullivan* ruling, with the majority opinion written by Justice Brennan, required that a public official plaintiff prove "actual malice" in a libel case, which the court defined as requiring

knowledge of, or reckless regard for, whether the published information was false or not. (Moro, 2012). The implications of the ruling were significant, helping “foster a new era in watchdog journalism” (Johnson, 2014). The ruling also set the United States on a different course than some of its peers, and is used as a reference point to compare and contrast various international libel laws (Youm, 2014).

A number of scholars revisited *Sullivan* in 2014 at the time of the ruling’s 50th anniversary. In the years since the ruling, courts have had a number of difficulties and on occasion have contradicted one another. While libel suits against traditional media outlets were down significantly, the volume of legally actionable online speech was increased (Armijo, 2014). Speech has grown more polarized, causing difficulties for courts (Johnson, 2014). Both Johnson (2014) and Armijo (2014) point out that continued advances in communications technology and social media will pose further challenges for courts. Armijo also argues that these digital advances have expanded the areas of tort law affected by media and communications law. Scholars disagreed at the time on the stability of *Sullivan*, suggesting it would survive into the next century due to its simplicity (Johnson, 2014) or offering words of caution for future courts (Armijo, 2014).

Johnson (2014) argues that past attempts to force fairness have failed, referencing specifically the elimination of the fairness doctrine and right of reply, and that Sullivan is simple and practical. However more defamation is being published than ever before (Armijo, 2014). While many experts agree that Sullivan’s protections extend beyond traditional media defendants, difficulties will likely arise when trying to determine actual malice. Since precedent is based on the functions and processes of traditional media, social media defendants will have little in common with news organizations, making comparisons challenging (Lidsky and Jones,

2016). Courts of the future will be well served to consider the context of any speech, specifically related to the digital medium and forum (Armijo, 2014). Many forums exist specifically to solicit opinion, and others may have a distinctly irreverent or offensive tone that differs from forums presenting news or more traditional media (Lidsky and Jones, 2016).

Determination of actual malice is subjective (Lidsky and Jones, 2016) and partisan divides on the court appear to effect justices' views on topics such as strict scrutiny and even general case framing, which determines precedent (Calvert, 2020). In a review of Supreme Court rulings from 2018-2019, Calvert (2020) noted a number of cases featuring multiple dissents, and suggests that having many dissenting opinions can weaken a ruling. A more fractured court might mean a minor change to court make up could result in a reversal (Calvert, 2020). There is also danger of courts in different jurisdictions deciding which defendants constitute media differently, setting confusing or conflicting precedent (Moro, 2012), and justices can often contradict themselves in relation to their own stated philosophies (Silver and Kozlowski, 2012) making decisions difficult to predict.

Though stare decisis has long been considered an implicit rule, the court does occasionally go against precedent, including as recently as the Citizens United decision in 2011. The Supreme Court has not ruled on a libel case since the 1990s and there have been few cases regarding press rights or actual malice in the 21st century (Gutterman, 2018). The current Supreme Court is strongly polarized and has yet to hear a case relating to libel and actual malice in the context of the internet or social media. Recent precedent is scant and inconsistent, making it difficult to predict how justices might view the connections and overlap between traditional and non-traditional or social media defendants. It seems likely that the court may soon decide to again hear a libel case, opening up the option to revisit Sullivan, potentially dramatically

remaking libel law in the United States. Scholars provide little in the way of concrete predictions, but in the 8 years since 2014, many have noted potential challenges to the ruling.

Section 4. Discussion and Analysis

Silver and Kozlowski (2014) do a deep analysis of the decisions and dissents of three justices who each purport themselves to be an "originalist" in their views of the Constitution and the exercise of their responsibilities as justices of the Supreme Court. But ultimately in their comparisons, what they find is that the one thing these three "originalists" have in common is their inconsistency in applying an originalist philosophy to their own rulings. Each utilized, or utilizes, the philosophy to achieve different types of results in different types of cases, and to the benefit or detriment of different kinds of petitioners- sometimes even contradicting themselves. One of these justices, Clarence Thomas, currently sits on the bench. Thomas frequently cites the founding fathers and the traditions common to life in America at the time of the Revolution in his opinions protecting corporate political donations, and protecting the value of commercial speech, but in 2007 he pointed to 19th century public schools as the basis of an argument that the Court should overturn *Tinker v. Des Moines*, the over 40 year old ruling establishing that public school students maintain their rights to freedom of speech and expression even while on school grounds. In 2019, over two years before his more recent comments on Sullivan, Thomas was making an originalist argument against the ruling, and the concept of actual malice. In a concurring opinion at the time he said "There appears to be little historical evidence suggesting that the New York Times actual-malice rule flows from the original understanding of the First or Fourteenth Amendment" (Liptak, 2019).

In his more recent comments Thomas pointed to disinformation and conspiracy theories, saying those who perpetuate lies have been protected from what should be the traditional remedy for falsehood: libel suits (Liptak, 2021). Joining Thomas in his assessment that *Sullivan* should be revisited was Neil Gorsuch, the first Supreme Court Justice appointed by Donald Trump. As both president and as a private citizen, Donald Trump has long been openly hostile to American libel laws and the principle of actual malice. Like Thomas, Gorsuch indicated that he felt the 1964 decision had gone too far in the years since, becoming essentially protection for the press to publish falsehoods. He also pointed to the changes in the news industry brought by time and technology.

Thomas' words and actions from the bench could be construed as partisan and he is indeed one of nine current justices who consistently appear politically divided. As Calvert pointed out, a divided court is a weaker court as it makes the overturning of previous rulings more likely. Justice Thomas points to originalism as his judicial philosophy, but appears to read his constitutional history in such a way that is predictably politically skewed. He shares the bench with stalwart conservatives, inexperienced Trump-appointees, and a few comparatively left leaning Democratic-appointees. This current court could easily be seen to lean in favor of the interests of a private citizen if it meant potentially dampening the power of the media, with whom the political right has an increasingly adversarial relationship.

An originalist like Thomas looks at the unbridled spread of falsehoods and disinformation online and considers it through a lens of what our forebears would do when presented with an, at least obliquely, similar situation; however one could also look at them as one facet of a prism of digital complications facing future courts. These complications represent the other most pressing challenge to the standing of the New York Times v. Sullivan ruling.

Key among these complications is the basic idea that online speech offers more people more opportunities to share information with others. That information may be positive or negative, important or trivial, flattering or unsavory, true or false, and little about the process of posting it online resembles the processes and mores of the traditional press, and the functions of the traditional press are at the heart of United States libel law. The internet offers a broad range of forums for the sharing of information and opinion. Each of these forums has its own set of rules and expectations. Some are designed specifically to solicit opinions about goods, services, or experiences. Others may ostensibly present news, but publish content that primarily editorializes, or operate an open comment section for users. A forum like newyorktimes.com, the digital presence of an established publication, will have different guidelines for what is published there that it does for public commenters on its Facebook posts.

A fundamental question that courts may have to answer is one of who constitutes a journalist. The divisions between press, private citizen, and public figure becomes indistinct when everyone has access to the means to share information instantaneously. Libel suits against traditional media have gone down in recent years (Armijo, 2014), indeed the Supreme Court hasn't ruled on a libel case since the 1990s (Gutterman, 2018), but more libelous speech than ever is being published. Eventually more cases will find their way into the courts that feature non-traditional libel defendants. Social media defendants will not have the structure of establishment press processes to turn to in their defense; things like a trusted network of sources, information verification, or a professional code of ethics were not utilized, so courts will have to decide when digital sharing becomes news publication, and when a poster becomes press.

Each online forum and individual defendant will need to be considered independently by courts as cases arise, which will result in narrow, possibly varied rulings that do little to help

establish precedent, especially as cases span different jurisdictions. There is little precedent related to press rights or actual malice established in the 21st century, so courts and judges will truly be facing new territory as cases are heard and decided. A lack of applicable precedent means as cases move through the process of appeal to higher courts, those judges will have little to look towards, even if they were inclined to.

Section 5. Conclusion and Future Research

Courts are not required to hold to precedent, and justices with deeply held political leanings or connections may have little interest in considering a scattered set of only narrowly applicable rulings, especially in a case that could have lasting repercussions on the function of the traditional media, and has the potential to benefit the types of private citizens and public figures that most frequently have found themselves losing libel cases in recent decades. This year's *Sarah Palin v. New York Times* case is complicated by the unique circumstances of its dismissal, which may mean it does not end up in the hands of the Supreme Court as a potential actual malice battleground. However the climate seems ripe for a potential future case to fill that role. Further analysis could be done by reviewing the judicial philosophies of the other sitting Court justices, and comparing these with their case history and written opinions and dissents. This may reveal patterns and motivations and help predict individual justices relative friendliness to different types of defenses in free speech related cases. *Sullivan* was created as a direct result of political leaders utilizing libel suits to dampen the power of the press; the current climate of leaders and justices who openly advocate for fundamental change to the ruling, set against a backdrop of rapidly changing technology and information sharing practices which don't fit into existing libel precedent, sets the stage for the *Sullivan* ruling to be struck down.

Section 6. REFERENCES

Armijo, E. (2014). Communication Law, Technological Change, and the New Normal. Communication Law and Policy, 19(4), 401-416.

Calvert, C. (2020). Dissent, disagreement and doctrinal disarray: free expression and the Roberts court in 2020. William & Mary Bill of Rights Journal, 28(4), 865-918.

Gutterman, R. S. (2018). Actually a renewed stand for the first amendment actual malice defense. *Syracuse Law Review, 68(3),* 579-606.

Johnson, B. E. (2014). Is the New York Times Rule Relevant in a Breitbarted World. Communication Law and Policy, 19(2), 211-226.

Lidsky, L., & Jones, R. (2016). Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World. Virginia Journal of Social Policy & the Law, 23(2), 155-178.

Liptak, A. (2019, Feb. 19). Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling. *The New York Times*. https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html

Liptak, A. (2021, July 2). Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision. *The New York Times*. https://www.nytimes.com/2021/07/02/us/supreme-court-libel.html

Moro, N. (2012). Toward a Model Law of Internet Libel: Protecting Citizen Journalists with Actual Malice. Journal of Media Law & Ethics, 3(2/4), 33–62.

Peters, J. W. (2022, Mar 01). Judge says Sarah Palin ‘Failed to prove her case’ against the Times. *New York Times.* https://www.nytimes.com/2022/03/01/business/media/sarah-palin-new-york-times-trial.html

Silver, Derigan & Kozlowski, Dan V. (2012). The First Amendment Originalism of Justices Brennan, Scalia and Thomas. Communication Law and Policy, 17(4), 385-428

Kyu Ho Youm (2014) The “Actual Malice” of New York Times Co. v. Sullivan: A Free Speech Touchstone in a Global Century, Communication Law and Policy, 19:2, 185-210