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Newsroom: Logan On Trump And Libel Law 01-03-2017

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Newsroom

Logan on Trump and Libel Law

Professor David Logan discusses why Trump's threat to "open up libel laws" is ill-informed -- and why that may not matter in terms of its ability to chill zealous reporting.

David A. Logan, professor of law and former dean of RWU Law, who has studied and written extensively about First Amendment issues, contibuted this piece to RWU's First Amendment Blog:

Among President-elect Donald Trump's many ill-informed campaign statements was that he was "going to open up libel laws."

Where to begin? First, libel law was, and remains, state law. Second, while federal legislation does impact pockets of libel law (most notably, the Communications Decency Act protects websites from liability for merely hosting defamatory statements posted by third parties), the primary reason why politicians have trouble winning libel actions is not federal statutes but rather the First Amendment.

This is grounded on events half a century ago, when powerful state and local politicians in the South tried to deter the national media from publishing unflattering reports of their harsh response to the Civil Rights movement. The strategy was to file libel actions based upon what were often minor inaccuracies in news reports, but which could yield libel trials presided over by pro-segregation state judges and decided by juries with deep hostility to "outside agitators" like the national media. The idea was that the mere threat of such litigation would intimidate the media and deter zealous reporting. (Indeed, juries awarded record-

setting amounts of damages and in response the New York Times pulled its reporters from Alabama during the pendency of litigation.)

Beginning with *New York Times v. Sullivan (1964)*, the U.S. Supreme Court has recognized that such civil litigation represented a serious threat to robust reporting on important public matters. To limit the "chilling effect" of such lawsuits, the court interposed an array of doctrines that made it very difficult for public officials and other powerful "public figures" to win damages for libel, even if a published statement was false and damaging to reputation.

Of course, President Trump will fill at least one Supreme Court vacancy (Justice Scalia's seat), and while that single vote might result in rollbacks of abortion rights and other constitutional decisions dear to progressives, there is no evidence that any of the current justices are interested in revisiting -- let alone gutting -- the powerful protections of zealous reporting provided by *New York Times v. Sullivan* and its progeny.

But it turns out that these First Amendment barriers to vexatious lawsuits against the media might be porous. Consider the lawsuit brought by pro wrestler Hulk Hogan against the salacious website Gawker for publishing videotapes of Hogan having sex with a friend's wife. Even though the tapes were embarrassing and unflattering to Hogan's public image, they were not false, so a libel action was not a possibility. Rather, Hogan sued for "invasion of privacy," a basis for liability which the court has dealt with only occasionally, and with far less clarity than libel law. In fact, the court has never expressly said that the First Amendment protects all truthful statements, and has suggested that even a truthful statement can be the basis of damages awards if not "newsworthy." With that zone of uncertainty in place, a Florida trial judge let Hogan's case to go to a jury, which returned a verdict for $140 million in damages. When the trial judge insisted that Gawker post a jaw-dropping bond of $50 million in order to appeal, bankruptcy was the logical response.

While few mourn the passing of a lowbrow website, the case has a troubling backstory and perhaps is a snapshot of a chilling view of the future. It turns out that Hogan was not alone in trying to bring Gawker to its knees; the litigation was underwritten by Silicon Valley billionaire Peter Thiel, who Gawker attempted to out as gay in 2007. The Hogan/Thiel tag team had the resources to exploit a gap in the law and raise the specter of expensive-to-defend lawsuits -- along with the possibility of huge damage awards, pursued by swells with an ax to grind and the assets to make even the most well-insured media outlet think twice before publishing unflattering truthful information.

This is where Donald Trump returns to the stage. It is not clear that existing constitutional protections would stop him from suing a media outlet for playing the "Access Hollywood" tape that recorded him

saying that he likes to "grab women by the pussy" or if another source revealed even more distasteful comments about women and minorities than those revealed during the presidential campaign. It turns out that the truth of those statements provides a publisher with uncertain protection from not just the risk of punitive jury awards (imagine the case being decided by a jury deep in Red State America), but the considerable cost of defending claims brought by deep-pocketed and litigious adversaries. Indeed, this is exactly what happened: Hogan's claim was heard in his hometown, Tampa, while his lawyers played up that Gawker was based in New York City. And to tie this all up in a bow, it turns out that Peter Thiel was one of only a handful of Silicon Valley moguls to support Trump's candidacy.

Because Gawker settled the case (for $31 million), we do not know whether a higher court would have reversed the judgment, or have significantly reduced the amount of damages owed. But the message is clear, and ominous: Donald Trump may not be able to "open up libel laws," but that may not be necessary in order to chill zealous reporting.