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Protecting the Right to Criticize Government: A Proposal for a Symmetry of Defamation Privileges

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PARTICIPATORY democracy, particularly when practiced on the local level, depends on the existence of a populace willing to be both informed and engaged. The private citizen who is sufficiently interested in or concerned about the activities of government to attend and to speak at meetings of governmental bodies plays a number of important roles—watchdog, critic, surrogate for segments of the population not in attendance, sounding board for the public officials who convene the meeting, even potential candidate for public office. Because of the significance of the participation of a private citizen in governmental affairs, legal rules and principles that could act as a disincentive to such participation ought to be scrutinized closely, and such rules should be forced to bear a substantial justificatory burden. Among the attitudes with which one should approach such rules is a receptiveness to reform proposals that alleviate the deterrence to participation without creating significant substantive or administrative problems of their own.

It is the dual thesis of this article that the potential for defamation litigation against a private citizen who speaks out about government could act as such a disincentive to such participation ought to be scrutinized closely, and such rules should be forced to bear a substantial justificatory burden. Among the attitudes with which one should approach such rules is a receptiveness to reform proposals that alleviate the deterrence to participation without creating significant substantive or administrative problems of their own.

The Problem: Insufficient Protection for the Critic of Government

The United States Supreme Court’s decision twenty-three years ago in *New York Times Co. v. Sullivan* transformed the law of defamation from a common law strict liability tort to an action in which constitutional principles now often require a showing of a particular kind of fault-as-to-falsity, the misnamed “actual malice” of the *Sullivan* decision. Under the regime of constitutional rules derived from *Sullivan* and its progeny, a defamation plaintiff who can be characterized as a public official or a public figure must prove by clear and convincing evidence that the defamatory communication was made under circumstances that show that the defendant either knew the material was false or published the material with reckless disregard of whether it was true or false. Absent such a showing by the plaintiff, a defendant who has published defamatory material about a public plaintiff is deemed to be entitled to a constitutional protection from liability.

One might object to the shape of the current law of defamation, and from different perspectives might contend that its line of development would have been better if the Supreme Court had been either more restrictive or more expansive in its recognition of the First Amendment privilege beginning in the *Sullivan* case. An important range of issues surrounds the question of how far beyond the core of the *Sullivan* fact pattern the specific type of constitutional protection recognized in that case ought to be extended. Those issues, significant though they are, lie outside the scope of this article, for the problem presented by the potential liability of the citizen-critic of government is squarely within that *Sullivan* core. An examination of this problem reveals that, however well-intentioned the thrust of the *Sullivan* opinion, the solution adopted by the Supreme Court in that case fails to provide adequate protection for the critic of government.

The central concern of the *Sullivan* decision was the manner in which a civil action for defamation could be analogized to the criminal prosecution for seditious libel. In the hands of a public official, the defamation lawsuit could be an effective means of stifling criticism of official conduct. Instead of deciding that criticism of public officials was absolutely privileged, the Court created a qualified or conditional constitutional privilege that could be defeated only by clear and convincing evidence of “actual malice.” The goal of the *Sullivan* court—to create a “breathing space” within which vigorous and robust debate about matters of public concern could take
place— is served only indirectly by the rules adopted in that decision, through what might be seen as a false target approach. Rejecting the argument in favor of recognizing a constitutional immunity for speech about official conduct, the Court was nevertheless unwilling to allow the difference between truth and falsity to serve as the determinant of liability vel non. The critical issue of “actual malice”—whether there was known or reckless falsity in what was published about the plaintiff—was developed as a “safer” basis for determining liability, an issue that could be left to judicial factfinders with a greater assurance of reliable and accurate conclusions than would be the case if the decision were to be solely on the truth or falsity of the material. The expectation of the Sullivan majority apparently was that anyone wishing to say something about the official conduct of a public official would be undeterred by a libel standard that made liability turn on the one thing that the publisher could control, that is, the publisher’s own state of mind regarding the truth or falsity of the communication.

There is a degree of naivete in the Sullivan opinion that makes the decision less compelling as the source of a rule of law than it may be as an expression of political aspirations. While it is true that the avoidance of liability for defamation of public officials would no longer be permitted to turn solely on the ability of a publisher to persuade a jury of the truth of the published matter, the post-Sullivan critic of official conduct would still be subject to litigation on the issue of whether that critic published known or recklessly false statements about the plaintiff. To suppose that the constitutional protections afforded to the defamation defendant by the Sullivan opinion would remove the deterrent effect of the law of defamation is to fail to perceive the extent to which the fact or even the threat of litigation can be as powerful a weapon against a critic as would be the ultimate imposition of liability itself.

One might contend that the defamation defendants best served by the Sullivan rules are those media entities that have the resources and the professional interest in resisting defamation claims to the fullest. With effective legal counsel either in-house or on call, and with a fairly high stake in establishing and maintaining the credibility of its publishing enterprise, such a defendant may very well receive from the Sullivan opinion just the assurance that the Court wanted to create. Sullivan ignores, and the Sullivan progeny have not adequately protected, those potential critics of government officials who have neither the resources nor the institutional stake in the outcome that would make worthwhile the costly and often emotionally draining litigation of a defamation claim. Understanding that the prospects of actually being liable to the person whose conduct one wants to criticize are fairly low may be less than totally reassuring to someone who also understands that the subject of the criticism has it within his or her power to drag the critic into the expensive and risky arena of a defamation lawsuit.

If the deterrent effect of defamation litigation actually does pose a problem for critics of government, one could further suppose that the problem is greatest at the lower levels of government. The severity of the adverse effects is enhanced for at least two reasons: first, critics at the lower levels of government are less likely to have the resources or the inclination to fight defamation claims, and second, the necessity for ordinary citizens’ vigilance and outspoken discussion of government conduct at this level is arguably even

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greater than it is at higher levels. When the President of the United States engages in wrongdoing, we can take some comfort from the fact that institutions such as the Washington Post will serve as a watchdog. When a city council or a county board of supervisors is about to act, the most effective check on those local officials may be the private citizen with sufficient knowledge and concern to speak out. At this level, even the media entity which has the resources to defend a defamation claim may have to rely primarily on information from individuals who would themselves be subject to the deterrent effect hypothesized here.

The Solution: A Symmetry of Privilege

If the state of affairs just outlined is a matter of legitimate concern, as I believe it is, what can be done about it? One solution—leave it to the United States Supreme Court as a matter of interpretation of the federal constitution—seems to be both short-sighted and unproductive. While recent defamation decisions of the Court do not call for the cries of anguish issued from some quarters of the media, their lawyers, and other critics of the Court, neither is it realistic to expect the Court to be inclined to extend significantly beyond their current borders the constitutional protections already recognized. If reform is to be effective, it must occur at the state level. I will outline in the remainder of this article the basic contours of a solution to the problem I have described, and then point out the multiple options that exist for the implementation of this solution. In this way, the right to criticize government can be given greater protection than it currently enjoys by virtue of the federal constitutional guarantees of free speech and press.

The fundamental reform that needs to be put into place can be described as a principle of symmetry of privilege. Understanding the nature and the operation of this principle requires an appreciation of a set of privileges that do not depend on the Sullivan line of cases for their provenance. Although the privileges created as part of the constitutional law of defamation may receive the most attention today, a separate set of common law privileges has existed in one form or another since well before the United States Supreme Court's initial efforts toward the constitutionalization of this tort action in 1964. These common law privileges can be identified and distinguished in two ways: first, on the basis of their origin, and second, on the basis of their strength. Privileges may arise as a result of what is being said—content privileges—as well as who is saying it—status privileges. The strength of the privilege may be either absolute or qualified. The combination of a privilege of a particular origin with a particular strength determines the scope of the common law protection from liability for defamatory falsehoods.

The privileges that are relevant to the problem addressed here are those that attach to a person by virtue of the public office he or she holds. For a variety of legitimate reasons, many public officials are granted an absolute immunity from defamation claims based on statements that are made in the course of their duties. A matter of constitutional import for federal and state legislators under the constitutional "speech and debate" clauses, these privileges have been extended by common law to officials in the judicial and executive branches of government. The absolute immunity enjoyed by a public official means that once the occasion for the privilege is established, a defamation claim based on that statement must be dismissed, without any further inquiry into the motives, the good faith, or the fault-as-to-falsity of the person making the statement.

A recent decision of the Circuit Court for the Seventh Judicial Circuit, in Newport News, illustrates the operation of the relevant privilege, and serves as a nice model for explaining the symmetrical privilege advocated here. An attorney whose clients challenged a proposed city ordinance banning topless dancing appeared before the Newport News City Council and stated that he had affidavits placing two members of the council at parties where such entertainment had occurred. One of the council members so accused responded with the statement that the attorney was a liar. Two days later, the attorney sued the council member for defamation. Circuit Judge Douglas M. Smith recently dismissed the action, ruling that members of the city council were protected by an absolute privilege. Judge Smith's decision with regard to the privilege of the council member is eminently defensible both as a matter of law and as a matter of sound public policy.

The problem being considered by this article would be encountered in what might be described as the "flip side" of the lawsuit that was actually filed as a result of this incident. Suppose that, instead of the attorney suing the city council member, the councilman had sued the attorney for the statements made about the councilman. In that situation, the attorney would have had the protection of the constitutional privileges flowing from the Sullivan decision, but as mentioned earlier, that protection consists only of a qualified or a conditional privilege. If the councilman could prove that the attorney knew that the allegations were false or that the attorney was reckless with regard to the truth or falsity of the allegations, the constitutional privilege recognized in Sullivan would
be defeated. Even if the councilman were unable to make the showing of knowing or reckless falsity, defending the lawsuit could pose a substantial financial and emotional burden to the person who spoke out at the council meeting, particularly in a situation in which the speaker is not an attorney, and thus is likely to view the prospect of litigation with greater trepidation.

The consideration of this relatively uncomplicated fact situation reveals the asymmetrical nature of the privileges that operate in this setting. The councilman as a defamation defendant enjoys an absolute privilege, while the person who addresses the council has, as a defamation defendant, only a qualified privilege. Although the ultimate result may turn out to be the same in both cases, and neither defamation lawsuit may succeed, it is at least plausible to assume that the prospect of having to defend such a lawsuit with only the protection of a qualified privilege may act as deterrent to someone who has either information to present or an opinion to express at a meeting of a local governmental body.

That deterrent effect can be removed by the recognition of a symmetrical privilege in this situation. Under a rule of law establishing this privilege, at any time that a statement about a government official is made on an occasion on which the official would enjoy an absolute privilege, the person making the statement would also enjoy an absolute privilege. Just as the public official's motives, good faith, or "actual malice" would not be open to judicial questioning, so too would the critic of government under these circumstances be protected from such judicial scrutiny. The privilege proposed here is in that way different from, and because it is more protective of speech arguably superior to, any common law privilege of "fair comment," which is only a qualified or conditional privilege and thus might be defeated by the appropriate showing.

Implementing the Solution

The absolute privilege of government officials is either already part of Virginia law or readily inferable from existing cases and constitutional provisions. The reform of defamation law advocated in this article would simply extend to the critic of government the same absolute privilege that would be enjoyed by a government official who had made the same or similar remarks about the critic on a privileged occasion. The remaining question that needs to be addressed is the method of implementation of this symmetry of defamation privileges.

One way of developing a solution to the problem would be to propose legislative action creating the kind of privilege for government critics proposed here. For a variety of reasons, this solution might prove to be less desirable than would be a judicial recognition of the privilege. As each session of the legislature confirms, reform proposals that address specific and discrete problems can be caught up in a process in which such efforts become entangled in the maneuvers of those who have other agendas to serve. Furthermore, despite the presence of so many lawyers in the legislature, the careful legislative drafting that is designed to deal with a particular problem in a precise manner is too often wanting. Finally, human nature suggests that the least likely of all the proposals to move to the top of the legislative agenda is one that might be seen as directly contrary to the self-interest of government officials.

If legislative action is arguably not the best way of implementing the reform proposal offered here, the question then becomes whether the reform can be put into place through judicial action. In this case, it would seem fairly clear that an affirmative answer might be given to that question on at least one of two grounds. First, the most plausible method of implementation of the new symmetrical privilege would be the adoption of a common law rule to that effect. Such a step would be in keeping with the centuries old common law development of the tort of defamation. Tort law in general, and the law of defamation in particular, is a loss-distribution/risk-allocation mechanism which can accommodate the needs and respond to the problems of a particular time and place. Should the courts decide that the potential deterrent effect on critics of government should be eliminated, a common law tort rule putting into place the privilege outlined here would remove that deterrence.

A court might decide for some reason that the adoption of a common law rule recognizing the privilege would not be an appropriate addition to the body of defamation law that has already become so heavily weighted with constitutional considerations. It might also be the case that a court could decide that such a privilege is so necessary a part of the law of defamation that it ought to be beyond the reach of modification or elimination by the legislature in the normal course of its activities. In either of those two events, the free speech guarantee of the state constitution would serve as a hook on which the judicial announcement of the privilege could be hung. Just because the United States Supreme Court has apparently run the scope of protection under the federal constitution out to its limits, there is no reason why the courts of Virginia should be content with a state constitutional guarantee of free speech that is too weak to serve the important goal of protecting a citizen's right to speak.
out in the most important way imaginable in our system of government—acting as a critic of the performance of government officials—an activity which was characterized by the Supreme Court in the \textit{Sullivan} case as rising to the level of a duty of citizenship.\footnote{See, e.g., \textit{Schauer, Public Figures}, 25 \textit{W. & MARY L. REV.} 905 (1984).}

\section*{Conclusion}

Participation in open debate about public affairs is too important a matter to be subjected to deterrent effects from rules of law that can be fairly easily modified to remove such effects. While this article admit­tedly provides no more than a sketch of a particular problem and a proposed method of solving that problem, \textit{consideration of the issues raised} in this article may serve to alert members of the profession to a need to expand the scope of current thinking and debate about the blend of federal constitutional and state tort law that determines the contours of the contemporary law of defamation. Although the last quarter-century has seen important and impressive efforts to use the federal constitution to promote vigorous discussion of public issues, it may well be the case that the momentum is shifting to the arena of state tort law rules. Should such a shift occur, it needs to be recognized that the purposes underlying the constitutional developments are not necessarily put in jeopardy, and that in fact those purposes may be better served by tort rules tailored to particular interests and problems.

\textbf{FOOTNOTES}

\begin{enumerate}
\item 376 U.S. 254 (1964).
\item The \textit{Sullivan} decision requires that defamation plaintiffs who are public officials claiming damages for defamatory statements relating to their official conduct must prove that the defamatory material was published with what the Court called “actual malice,” which the Court defined as knowledge of falsity or reckless disregard of truth or falsity. \textit{See id.} at 279-80. This “actual malice” is “actually” a form of knowledge or awareness that would be more properly referred to as scienter, or fault-as-to-falsity.
\item \textit{See generally LeBel, supra note 3, at 254-64.}
\end{enumerate}