Criticizing Presidential Candidates: An Absolute Privilege

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> [I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.[1]

I. INTRODUCTION

The words of *Coleman v. MacLennan*,[2] penned over one hundred years ago, ring as true today as they did when written. Of course, since *Coleman* was decided, the way people and publications express themselves have changed in a number of ways. For example, print media has largely been replaced by electronic media. Many publications have online versions or publish exclusively in electrionic form, and individuals can broadcast their opinions to large segments of the population via a growing number of social media platforms. Despite such changes, the proposition that individuals should be able to freely express their thoughts on candidates for office remains a bedrock principle of our democracy.

And yet, one of the most surprising things about the 2016 presidential election is that the constitutional protections afforded to such expressions of thought have come under attack by Republican presidential candidate Donald Trump, who has threatened to sue those who publish defamatory comments about him. Trump's behavior affords us an opportunity to reflect both on the current state and the underlying purpose of the constitutional framework of defamation law. His actions also warrant a reaffirmation of the principle that, in order for our democracy to function, individuals and publications should feel able to freely comment and discuss the qualifications and flaws of all presidential candidates without fear of repercussions.

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1. Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908).
2. 98 P. 281, 286 (Kan. 1908).

In order to protect and foster such discussion, we must establish an absolute privilege under the First Amendment that protects speech from presidential candidates' retaliatory defamation lawsuits when that speech involves matters of public concern about candidates. While this slightly expands the current constitutional protections for allegedly defamatory speech, it also allows the appropriate breathing room for freedom of expression during a presidential election.[3] Absolute privilege would make clear to presidential candidates that they will not succeed in bringing defamation lawsuits against individuals or publications for comments on matters of public concern.

First, this Article examines Donald Trump's criticism of both the state of defamation law and the publication of defamatory comments about him during the 2016 presidential election.[4] Second, it briefly traces the evolution of the modern constitutional standards different plaintiffs must meet in order to be successful in a defamation lawsuit.[5] Third, this Article considers how a potential claim by Trump would fit into the existing constitutional framework governing defamation suits.[6] Finally, it explains why an absolute privilege against presidential candidates' defamation suits is proper and consistent with existing constitutional principles.[7]

II. DONALD TRUMP AND THE CRITICISM OF CURRENT DEFAMATION LAW

During his unconventional presidential candidacy, Republican nominee Donald Trump has repeatedly railed against what he perceives as unfair media coverage. Trump has gone so far as to say that defamation laws need to change in order to make it easier for plaintiffs to be successful in defamation suits. Trump has stated:

> One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected.[8]

It is unclear how Trump intends to ease libel laws—whether by a constitutional amendment or by appointing judges who would change the

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3. *See* NAACP v. Button, 371 U.S. 415, 433 (1963) (noting, "First Amendment freedoms need breathing space to survive").

4. *See infra* Part II.

5. *See infra* Part II.

6. *See infra* Part IV.

7. *See id*.

8. Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26 2016), http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 [http://perma.cc/ C7TB-99TB].

current defamation standards. Trump is correct, however, when he says that someone in his position has almost no chance of winning if he or she brings a defamation lawsuit.[9]

Despite these longs odds, Trump threatened to sue the New York Times and other media outlets for publishing accounts of women who claimed that Trump treated them inappropriately.[10] As Trump's attorney wrote to the New York Times, "Your article is reckless, defamatory and constitutes libel per se. It is apparent from, among other things, the timing of the article, that it is nothing more than a politically-motivated effort to defeat Mr. Trump's candidacy."[11] For its part, the New York Times responded:

> [I]f [Trump] believes that American citizens had no right to hear what these women had to say and that the law of this country forces us and those who would dare to criticize him to stand silent or be punished, we welcome the opportunity to have a court set him straight.[12]

Such threats and recriminations over defamation law are unheard of in a modern presidential campaign between a major party's presidential candidate and a major newspaper. This letter demonstrates the importance of constitutional bariers to defamation suits in the face of threats of legal action. Given Trump's threats, it is important to examine the current state of defamation law, and see how it can be strengthened to deal with those who would use demation suits as a way of silencing detractors.

III. THE CURRENT CONSTITUTIONAL FRAMEWORK

Despite Trump's criticism of defamation law, the current constitutional framework does indeed allow presidential candidates to bring defamation lawsuits. Trump is correct, however, that it would be extremely difficult for him to bring a successful defamation lawsuit. To understand the current system, it is necessary to briefly trace the history and evolution of modern defamation law.

The modern framework of defamation law is a little more than fifty years old. For nearly the first two hundred years of United States history, defamation law had nothing to do with the Constitution.[13] Instead, defamation followed a common law tradition dating back centuries to a time when defending one's

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9. *See id.* (noting public persons must prove actual malice or reckless disregard to succeed in libel suit).

10. Letter from Marc E. Kasowitz, Att'y, Kasowitz, Benson, Torres, & Friedman LLP, to Dean Baquet, Exec. Editor, N.Y. Times (Oct. 12, 2016), https://assets.donaldjtrump.com/DemandForRetraction.PDF [http://perma.cc/S6T9-338M] (threatening pursuit of "all actions and remedies" if article not retracted).

11. *See id.*

12. Letter from David E. McCraw, Vice President and Assistant Gen. Counsel, N.Y. Times, to Marc E. Kasowitz, Att'y, Kasowitz, Benson, Torres, & Friedman LLP (Oct. 13, 2016), http://www.nytimes.com/interactive/2016/10/13/us/politics/david-mccraw-trump-letter.html.

13. *See* Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment*," 83 COLUM. L. REV. 603, 604 (1983) (noting Supreme Court went 170 years without recognizing First Amendment protection against libel actions).

character was given greater value than modern notions of freedom of expression.[14] However, in 1964, in the landmark case *New York Times v. Sullivan*,[15] the Supreme Court found that defamation suits against public officials implicate the First Amendment freedom of speech.[16] Through this opinion, the Supreme Court began a line of cases that constitutionalized defamation law and removed it from a purely common law tradition.

The Court decided *Sullivan* during the civil rights era when Southern officials used defamation suits in state courts against Northern newspapers like the New York Times to discourage reporting on the civil rights movement. Montgomery Public Safety Commissioner L. B. Sullivan filed a lawsuit against the New York Times in Alabama state court for what he claimed were defamatory statements the newspaper published in an advertisement.[17] Unsurprisingly, Sullivan won in Alabama state court, and the New York Times appealed all the way to the Supreme Court.[18]

The Supreme Court ruled that the First Amendment, as incorporated to the states through the Fourteenth Amendment, is implicated in a defamation lawsuit brought by a public official or individual running for public office when the defamatory statement is made regarding official conduct.[19] After finding that First Amendment protections are implicated, the Court held that such suits require a plaintiff to show actual malice by the party making the defamatory statement.[20] The Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[21]

Through its opinion in *Sullivan*, the Supreme Court launched a revolution in defamation law and made it much more difficult for officials and those runnings for office to successfully bring defamation lawsuits.[22] In *Curtis Publishing Co. v. Butts*,[23] the Supreme Court held that a heightened standard should apply in defamation lawsuits by so-called public figures.[24] The Court

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14. *See generally* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903) (explaining early European defamation law severely punished slanderers).

15. 376 U.S. 254 (1964).

16. *See id.* at 269 (holding libel claims "must be measured by standards that satisfy the First Amendment").

17. *See id.* at 256-259.

18. *See id.* at 256.

19. *See Sullivan*, 376 U.S. at 279-80.

20. *See id*.

21. N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

22. *See id.*

23. 388 U.S. 130 (1967).

24. *See id.* at 155 (requiring public figure to show "highly unreasonable conduct" to succeed in defamation lawsuit). The Court wrote that such conduct must rise to level of "constituting an extreme

was divided, however, about what this heightened standard should be.[25] In creating the separate analytical category of public figures, the Supreme Court recognized that it was not only public officials and those running for public office that should be open to greater public scrutiny, but also public figures who are neither elected officials nor running for public office. Although the public figure category is not clearly defined, it would almost certainly encompass a major party presidential nominee such as Trump.

In a subsequent decision, the Supreme Court held that the standard articulated in *Sullivan* should apply when private figures bring defamation lawsuits on matters of public concern, and declined to apply the heightened standard applicable to lawsuits brought by public figures.[26] Later, the Supreme Court pulled back on constitutionalizing defamation law in holding that the *Sullivan* standard would not apply to defamation lawsuits brought by private figures on matters of private concern.[27] These nuances of broader defamation law are beyond the scope of this article, but it is clear that the standard created by *Sullivan* is meant to apply to presidential candidates such as Donald Trump.

IV. ANALYZING TRUMP'S POTENTIAL CLAIM AGAINST THE NEW YORK TIMES

Trump's belief that it is too difficult for public figures like himself to bring defamation lawsuits is rooted in the actual malice standard. While not impossible to prove, a public figure must show that a publisher knew that a statement was false and still published it, or that it published the statement in a reckless disregard for the truth.[28] Trump's threat of bringing a lawsuit against the New York Times demonstrates why this is a difficult standard to meet.

In order to be successful in a lawsuit against the New York Times, Trump would have to prove either that the newspaper knew the women's statements about Trump were false, or that it published the statements with a reckless disregard for the truth. Even if the New York Times knew the women's statements were false, it seems unlikely that New York Times reporters would confirm that they knew this, yet nonetheless choose to publish their accounts anyway.

Because the actual knowledge standard is nearly impossible to prove, estasblishing reckless disregard for the truth seems to be a more promising option. However, this argument is easily rebutted, as the New York Times

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departure from the standards of investigation and reporting ordinarily adhered to by responsible pubishers." *See id.*

25. *See id.* at 162 (Warren, C.J., concurring) (arguing *Sullivan* "actual malice" standard should apply).

26. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (holding actual malice necessary for private plaintiff to recover punitive damages beyond amount of injury). The Court held that the states should be allowed to create their own standards for private individuals' defamation lawsuits. *See id.* at 347.

27. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759-61 (1985) (holding punitive damages permissible in defamation suits of private concern without showing actual malice).

28. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (establishing actual malice or reckless disregard standard).

attempted to corroborate the women's accounts through others who became aware of the incidents long before Trump was a presidential candidate.[29] Moreover, for Trump, there is the inconvenient fact that he was recorded in 2005 during the taping of an Access Hollywood episode describing his inappropriate behavior towards women.[30] As a result, it is unlikely a court would hold that the New York Times recklessly disregarded the truth when it published the women's accounts.

Interestingly, the respective letters by Trump and the New York Times demonstrate that both parties recognize the current constitutional standard and are attempting to posture ahead of any potential lawsuit. For Trump, his attorney states "you apparently performed an entirely inadequate investigation to test the veracity of these false and malicious allegations," which seems like an attempt to set up a potential reckless-disregard-for-the truth argument.[31] The New York Times, for its part, responded, "Our reporters diligently worked to confirm the women's accounts" and "did what the law allows: . . . published newsworthy information about a subject of deep public concern."[32] The newspaper's rhetoric seeks to demonstrate that the New York Times believes it did not recklessly disregard the truth. Instead, the New York Times would argue that it commented on a matter of public concern that implicated a public figure.

Given Supreme Court precedent on the matter, Trump was likely correct when he stated that it would be nearly impossible for someone like him to sucessfully sue a newspaper for defamation. Any reform of the defamation standards as he has called for would require the Supreme Court to overturn *Sullivan* and later cases, or require a constitutional amendment. Despite Trump's promises to change defamation law, neither a constitutional amendment nor a Supreme Court reversal seem likely. To the contrary, First Amendment protections against defamation suits should expand rather than contract.

V. AN ABSOLUTE PRIVILEGE FOR MATTERS OF PUBLIC CONCERN REGARDING A PRESIDENTIAL CANDIDATE

Absolute privilege should apply to defamation suits brought by individuals running for public office. Under absolute privilege, if a presidential candidate like Trump were to bring a defamation lawsuit regarding a matter of public

29. *See* Megan Twohey & Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. TIMES (Oct. 12, 2016), http://www.nytimes.com/2016/10/13/us/politics/donald-trump-women.html.

30. *See* David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eeed4_story.html [http://perma.cc/QF5H-LCWK].

31. Letter from Kasowitz, *supra* note 10.

32. Letter from McCraw, *supra* note 12.

concern, the case would be automatically thrown out. This kind of absolute privilege already exists in certain limited contexts. For example, statements made by judges while acting in their official capacity are covered by absolute privilege.[33] Absolute privilege would nip a potential lawsuit in the bud because statements made about a presidential candidate on a matter of public concern would not be permitted to be the subject of a defamation lawsuit.

There already is some support in *Sullivan* for adopting such absolute immunity. In Justice Black's concurrence, joined by Justice Douglas, he wrote that there should have been absolute immunity for the New York Times, arguing, "I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms . . . ."[34] Justice Goldberg also wrote a similar concurrence in which Justice Douglas joined stating, "In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."[35]

As a result, three of the justices that voted in favor of *Sullivan* were in favor of an absolute privilege for statements made about public officials regarding their official duties. Given that these justices believed that absolute immunity should apply to suits by local officials, it is not much of a stretch to say that a similar rule should also be applied to candidates for the highest office in the land. Such an application should be recognized as a necessary sacrifice on the part of a few voluntarily candidates for president in order to allow maximum freedom of expression during the campaign.

Moreover, limiting the scope of the immunity to matters of public concern would offer at least some protection to the presidential candidates. Arguably, almost anything that a presidential candidate does is a matter of public concern, including their personal indiscretions. However, there needs to be at least some sort of standard governing whether something is a matter of public concern. For example, if a newspaper publishes an article asserting that a presidential candidate killed someone by strangling that person, it would clearly be a matter of public concern. However, if there was no previous discussion of the topic and no corroboration in the article beyond the statements of the article, it is not a legitimate matter of public concern—at least where the absolute privilege is concerned. Something would be a matter of public concern only if there is a reason beyond the statement for the public to be concerned. For Trump, the accounts of the women in the New York Times article are a matter of public concern in light of the Access Hollywood tape.

It could be argued that the current standard of actual malice strikes the right

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33. *See generally* Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 460 (1909) (explaining absolute privilege necessary in judicial proceedings).

34. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 293 (1964) (Douglas, J., concurring).

35. *Id.* at 298 (Goldberg, J., concurring).

balance between protecting freedom of speech and allowing candidates for president to have some protection against defamatory statements. However, while the New York Times could likely defend defamation lawsuits, smaller publications and individuals might be intimidated by the threat of a lawsuit and not make statements about presidential candidates on matters of public concern. This not a theoretical concern given the threats Trump has made during this presidential election. Indeed, in other countries, heads of states can and do bring defamation cases against those whose speech they do not like.[36]

An absolute privilege on matters of public concern against defamation lawsuits by presidential candidates would help promote a healthy and robust discussion during presidential elections. Even if there is an increase in potentially defamatory statements as a result, the marketplace of ideas will help to distinguish the truth.[37] This is the way American democracy was intended to deal with criticism against candidates for its highest office, rather than being stifled by threats from those that hope to lead this country.

VI. CONCLUSION

The 2016 presidential election had many surprises, and the renewed threat of defamation lawsuits to free speech is one of the most disturbing. As the history of constitutional protections against defamation lawsuits demonstrates, there needs to be sufficient breathing room for criticism of presidential candidates on matters of public concern. An absolute privilege against presidential candidates bringing defamation lawsuits on matters of public concern will both follow the tradition of the First Amendment and help protect our democratic society.

36. *See Bolivian President's Criminal Defamation Suit Threatens Press Freedom*, COMMITTEE TO PROTECT JOURNALISTS (Aug. 4, 2016), https://cpj.org/2016/08/bolivian-presidents-criminal-defamation-suit-threa.php [http://perma.cc/6JSD-GJGW] (elaborating on Bolivian president's defamation lawsuit against journalist).

37. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (setting forth constitutional theory that public discourse constitutes best test of truth).