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Commentary

Political Defamation and Democracy

Daniel J. Kornstein, New York Law Journal

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Our 2016 presidential election campaign, already filled with ugly insults and sordid character assassination, raises questions about democracy. For example, are democracies by their nature susceptible to demagogues? Does negative campaigning discourage good, eminently qualified people from entering public life? Is there a line past which negative campaigns should not cross?

Should political candidates and their operatives be exempt from the ordinary rules governing defamation? If so, why? Or, put another way, should political candidates be liable in tort for their false defamatory remarks during a campaign?

Political campaigns have historically enjoyed broad protection because of the First Amendment. But does free speech outweigh every other countervailing value in this context?

Political candidates, especially candidates for president, are by definition either public officials or public figures. They come within the "actual malice" rule of *New York Times v. Sullivan*, which held that a public official cannot recover for libel unless he or she can prove, by clear and convincing evidence, that the statement in question was made either with actual knowledge of its falsity or made in reckless disregard of its truth or falsity. This standard erects a high but not impossible bar for public figure defamation plaintiffs.

To prove "actual malice," such plaintiffs would have to show that the speaker did not exercise the standard of care needed in the circumstances. The standard of care post-*Sullivan* has evolved mostly in media cases. Should the same standard of care apply to political campaigns? How much investigation should candidates or their organizations be required to do before making an accusation? Is simply repeating an unsupported allegation from a publication like the National Enquirer enough care?

Political campaigns are full of both facts and opinions, but only false statements of fact can be defamatory; statements of opinion can never be defamatory. Although the line between fact and opinion can sometimes be blurry, most of the time we can tell the difference. But one cannot change a statement of fact into a mere opinion by a verbal mask, by saying, for

example, that, "It is my opinion that Hillary Clinton murdered Vince Foster," or "I think Donald Trump is a bigamist." Both of those statements are still implied statements of fact.

To run for political office is to expose oneself to criticism, criticism that is often biting and trenchant. But criticism is not the same thing as a false and defamatory statement of fact. It is one thing to say an opponent is a poor leader, it is another to accuse him or her of embezzling money, or of voting one way on a particular measure when he or she voted the other. It is neither criticism nor discussion of public affairs to say, as a candidate in a local Texas primary for a top education post recently said of President Obama, that he was in his youth "a drug-addicted gay prostitute."

For a public figure plaintiff—such as a political candidate—who meets the *Sullivan* test, damages can be presumed without actual pecuniary loss: damage to reputation and standing in the community, personal humiliation, and mental anguish and suffering. For spoken words, like those in a presidential debate or at a political rally, the rules of slander per se, which require no special damages, kick in. Injuring a person in his or her business, trade or profession is a category of slander per se. So is an allegation of financial irresponsibility or unreliability, commission of a crime, acting immorally or unethically, demonstrating professional incompetence. But can we really say that calling someone "unqualified" or a "disaster," while surely intended to injure a politician, is actionable defamation?

In the context of a negative political campaign, almost everything a candidate says impugns the professional competence of another candidate. That is why it is said.

The most important factor in this analysis may be a matter of history, tradition, and how we define democracy. From the beginning of our nation's origins, political campaigns have been free-swinging, rough-and-tumble affairs. As far back as the presidential campaigns of 1796, 1800, and 1804, venom over flowed and good manners took a holiday. The Broadway hit "Hamilton" captures some of that mood.

The language of political campaigns is supposedly understood in context as rhetorical hyperbole, not always literally true, but something said and understood for dramatic effect to influence voters. So defamatory campaign comments get a legal pass from the law of defamation under a sort of election campaign privilege.

And yet, and yet ... one wonders. Should a candidate falsely accused of wrongdoing by a rival not have any recourse other than answering back? The response to the accusation usually gets far less attention and is ineffective; the epithet or accusation sticks and its effect lingers.

But still, one has to ask whether it is fair or right, even under our vital and salutary First Amendment regime, for political candidates to defame one another without punishment except from the voters. Do we seriously want to create an absolute privilege for any kind of comments about public officials? Some say yes, because criticism of high public officials supposedly amounts to criticism of the government, for which there should never be liability, lest we revive the discredited and discarded crime of seditious libel. More important, perhaps, can political defamation affect the outcome of an election? We hope not, but the current presidential campaign forcibly presses the issue.

The problem comes down to a choice between important competing values. Throughout defamation law, only two values usually compete for dominance and are often balanced. One of those values is free speech, the other is individual reputation. But there is a third value unique and highly relevant to the political defamation arena.

The third value here is the electoral process itself. We proudly boast of our democracy; we have even justified some recent overseas military actions in the name of "exporting democracy." But the heart of democracy, the crowning glory of our political system, the essence of self-government, is the electoral process itself. This too is a constitutional value, embedded in the very fabric of that organic document's structure, the major premise of its political theory.

What if that electoral process is so tainted that the voters—the people—are defrauded? Is political defamation any less a threat to democracy than stuffing ballot boxes, excluding voters, gerrymandering voting districts, or engaging in dirty tricks?

Choosing among these three values—free speech, individual reputation, and the validity of self-government—is not easy. The choice may be agonizing, but it is worth thinking about, especially these days.

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