A Crisis of Democratic Accountability

Public Libel Law and the Checking Function of the Press

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If the laws of each age were formulated systematically, no part of the legal system would be more instructive than the law relating to defamation. Since the law of defamation professes to protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion, the estimate formed of the relative importance of these objects, and the degree of success attained in reconciling them, would be an admirable measure of the culture, liberality, and practical ability of each age. Unfortunately the English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.

Van Vechten Veeder, 1903

Introduction

Our opening passage raises timeless concerns with defamation principles and representative government, and what lies to be accomplished with future reform. For the comparatist, it also hints at the problems underlying this most 'devilishly difficult' of legal topics. Writing in the Columbia Law Review at the start of the twentieth century,[1] the distinguished New York City attorney (and later Federal Court Judge) Van Vechten Veeder could not have known how prophetic his critique of defamation law was to become. Besides the peculiarity of defamation law's three 'galloping presumptions' (ie falsity, malice, and damages), at the core of Veeder's concerns were the broader social effects of judicial efforts to 'optimally balance' free expression and reputation. Among the concerns prompting an eventual shift away from conventional strict liability principles, defamation law's restraining effects on newspapers were to play a vital role, both in America and abroad.

This liberalisation of defamation principles of course began with the US Supreme Court's seminal public libel decision in *New York Times v Sullivan*.[2] Adopting a categorical approach originating in English law,[3] a politician or public official was entitled to recover damages for defamatory statements of fact relevant to their public status only if 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'.[4] Some 30 years later, courts in Australia, New Zealand, Britain, and Canada began revising qualified privilege principles to provide ostensive 'middle ground' solutions, aiming to split the difference between defamation law's strict liability framework and America's more press-friendly approach.

When observed from a broader comparative law perspective, a curious feature of this international judicial dialogue has been a universal rejection of the

[1] Van Vechten Veeder, 'The History and Theory of the Law of Defamation I' (1903) 3 *Columbia Law Review* 546, 546.

[2] 376 US 254 (1964). 'Public libel' refers to the use of defamation law in cases involving defamatory statements of fact on matters of public interest published to a mass audience, where the plaintiff is a politician, public official, or influential public figure or corporation.

[3] See *Wason v Walter* (1868) LR 4 QB 73; *Briggs v Garrett* 111 Pa St 404 (1886); *Jackson v Pittsburgh Times* 152 Pa 406 (1893); *Klos v Zahorik* 113 Ia 161 (1901); *Coleman v MacLennan* 78 Kan 711 (1908). For relevant commentary, see George Chase, 'Criticism of Public Officers and Candidates for Office' (1889) 23 *American Law Review* 346; Van Vechten Veeder, 'Freedom of Public Discussion' (1910) 23 *Harvard Law Review* 413; John E Hallen, 'Fair Comment' (1929) 8 *Texas Law Review* 41. See also Ian Loveland, *Political Libels: A Comparative Study* (Oxford, Hart Publishing, 2000).

[4] Sullivan (n 2) 279–80.

'actual malice' rule outside America.[5] What little scholarly attention has focussed on this outcome appears satisfied that such doctrinal heterogeneity simply reflects the natural incidents of cultural and political relativism, raising nothing more concerning than the comparatist's expectation of disagreement among common law jurisdictions attempting to solve similar problems through variations in legal doctrine and technique.[6] Indeed, Professor Mark Tushnet has detailed these multiple grounds for rejecting the 'actual malice' rule by identifying a broad range of 'principled' and 'institutional' (or strategic) accounts. Tushnet further subdivides these 'strategic' reasons into the following subgroups: country-specific; context-specific; institution-specific; cultural; and legal. Yet despite clarifying courts' apprehensions with the 'actual malice' rule, focussing on these descriptors invites a deeper and far more disquieting concern. That is, there would appear to be no principled standard or 'selection theory' for public libel doctrine *at all*.

Our present enquiry thus takes sharp leave of Professor Tushnet at this opening diagnostic moment. Organised around the importance of 'democratic accountability' and its current manifestation in free expression theory and institutions of representative government,[7] this comparative study is comprised of nine chapters structured around four interrelated themes. Part A introduces the problem of public libel law. Chapter one opens by reviewing defamation law's strict liability framework and the characteristic obstacles experienced by the press when reporting on public officials and pleading the defences of justification and qualified privilege. It then summarises the main sources and principles of public libel law. Despite unique institutional settings and doctrinal approaches, each of our comparators has proceeded by reflexively dismissing foreign decisions (principally *Sullivan*), and by undertheorising freedom of expression rationales. Significantly, where courts and legislatures have appealed to such rationales, they too often refer generically to 'democratic' theory, emphasising its least relevant features.

Chapter one therefore concludes by highlighting a more troubling concern for public libel jurisprudence than presently acknowledged in constitutional law scholarship. Namely, whether or not reasons are specified for rejecting the 'actual malice' rule, courts and legislators typically provide no justification for adopting

[5] See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (HCA) 135–38; *Lange v Atkinson and Australian Consolidated Press NZ Ltd* (1997) 2 NZLR 22 (HC) 36–37 (Elias J); *Hill v Church of Scientology* [1995] 2 SCR 1130 [127]–[131], [137]; *Grant v Torstar Corp* [2009] 3 SCR 640 [85]–[86]; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) 201–03 (Lord Nicholls), 208–11 (Lord Steyn).

[6] See Mark Tushnet, '*New York Times v. Sullivan* Around the World' (2014) 66 *Alabama Law Review* 337. See also Paul Horwitz, 'Introduction: Still Learning from *New York Times v. Sullivan*' (2014) 66 *Alabama Law Review* 221.

[7] As developed in Part C, 'democratic accountability' refers to citizens' capability (as 'owners' of government) to hold to account their political representatives (who exercise powers of collective decision-making and action), public officials, and influential public figures and corporations, through a nation's multidimensional network of accountability mechanisms and extra-governmental institutions, particularly its institutional press.

doctrinal alternatives other than denying America's approach. Despite efforts by the Judicial Committee of the Privy Council and New Zealand courts to establish a practicable framework, results have been unconvincing, failing to synthesise a broad array of legal, constitutional, and media factors. Above all, no explanation has been provided for how such factors alone, or in combination, are meant to steer judges to 'optimal' and predictable doctrinal solutions. Providing another example of its richly-deserved reputation for aggregatory and anomalous growth, in simplest terms, this liberalisation of public libel law appears to have occurred without any external criteria or 'selection theory'.

Building on such introductory matters, chapter two identifies two methodological barriers to principled and effective public libel regulation. Both have operated behind the scenes to compromise our use and understanding of democratic theory. More precisely, widespread failures to marshal democratic theory are due (at least partially) to incomplete articulations of the 'core' justifications for free expression, and misguided efforts to subsume prevailing rationales under various single-valued approaches. Importantly, both developments have marginalised the *checking function of the press*—the free expression value most relevant to public libel cases and strengthening accountability mechanisms in representative systems. Chapter two therefore provides much-needed overviews of the two democratic models at the heart of our enquiry: Alexander Meiklejohn's democratic 'self-governance' rationale and Vincent Blasi's 'checking value' of the press.[8] As both models represent our point of departure for assessing democratic theorising in public libel jurisprudence, an early and precise understanding of their contrasting features is essential.

Shifting our attention to the latest instances of doctrinal confusion, Part B contains a comprehensive comparative law analysis of public libel doctrine across our five common law comparators. It details the theoretical and doctrinal errors of leading courts and legislatures, particularly their legal methodologies (eg ad hoc balancing, categoricalism), and their understanding and use of free expression justifications. This analysis reveals that the primary deficiency in public libel law is a persistent and widespread disregard of accountability concerns and the checking function of the press. Such undertheorising manifests in three distinct but interrelated forms, each the focus of its own chapter.

Chapter three begins by investigating the unusual doctrinal approaches endorsed by Australian and American courts. Following the US Supreme Court's adoption of the 'actual malice' rule in *Sullivan*, the High Court of Australia justified its novel 'responsible journalism' defence by appealing to an indeterminate implied rights doctrine based on an unsound transplantation of Canada's

[8] See Alexander Meiklejohn, 'Free Speech and its Relation to Self-Government' in *Political Freedom: The Constitutional Powers of the People* (New York, Harper & Row, 1948); Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245; Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) *American Bar Foundation Research Journal* 521.

pre-Charter jurisprudence. Most controversially, Australia's implied rights methodology purportedly rejects free expression theorising altogether. Considered together, American and Australian public libel doctrines provide a fitting introduction to our doctrinal analysis by emphasising the importance of employing a complete inventory of free expression values when regulating public libels, whether endorsing a categorical approach, or any form of ad hoc balancing.

Chapter four then examines the indifference of leading common law courts and legislatures to such imperfect references to democratic accountability and the checking function rationale as actually do exist in public libel jurisprudence. In particular, both the UK Supreme Court and the New Zealand Court of Appeal have discounted significant sources of domestic and international jurisprudence resonant with the checking function's fundamental premises and concerns. Along with New Zealand's disquieting judicial bias against the press, Britain's highest courts have essentially ignored important developments by the European Court of Human Rights in endorsing political criticism and the 'watchdog' role of the institutional press.[9]

Chapter five concludes Part B by examining the systematic and widespread conflation of the checking function with Meiklejohnian theory. As discussed in chapter two, despite their distinct emphases and assumptions, judges, legislators, and legal scholars have frequently construed these models as synonymous, showing little regard for their potentially sweeping implications for public libel doctrine and reform. Although this confusion is prevalent amongst all of our comparators, it is most instructively exhibited by UK authorities and the Supreme Court of Canada. In the case of Canadian public libel doctrine, an ambiguous understanding of 'democratic' theory has been methodologically embedded by omitting the checking function from the Court's inventory of free expression values. This has left Canadian courts little choice but to shoehorn accountability concerns into a Meiklejohnian framework and to appeal, awkwardly and unconvincingly, to less relevant theoretical justifications.

Part C signals an important shift in emphasis to 'system-building' by introducing a fresh approach for addressing the errors exposed in Parts A and B, and for reintroducing accountability and the checking function into public libel jurisprudence. Based on recent advances in public accountability theory, this revised framework is proposed as a workable 'selection theory' for the improved design and tailoring of public libel doctrine. Chapter six begins by arguing that the root of public libel law's undertheorising lies in the complex relationships between 'democracy', 'representation', and 'accountability'. At least since the publication of Hanna Pitkin's classic work on representation, the role of accountability in

[9] 'Institutional press' refers to only those print, broadcast, and digital news organisations and individuals—comprising well-organised, well-financed, professional critics—that are *independent*, *adversarial*, and *powerful* enough to serve as a worthy counterforce to government and influential private actors. See generally Part C; Blasi (n 8) 541.

representative government has called for greater clarity.[10] Yet despite the efforts of political theorists,[11] 'accountability' theory has been slow to establish its own tradition of academic analysis.

Aptly, a 'minimal conceptual consensus' has emerged in public accountability scholarship,[12] which reflects recent and widespread efforts to organise accountability research into a framework for systematic analysis. Besides clarifying the core meaning of accountability as a 'virtue' and 'mechanism', this conceptual stabilisation has also accentuated the multifaceted nature of 'accountability' and its overriding need for normative political criteria. Chapter six consequently examines the connections between accountability and 'neo-republicanism',[13] a political theory leveraging to a remarkable degree the implications of public accountability's emergent analytical framework. Along with offering a useful metacriteria for assessing the various mechanisms and regimes in accountability theory, this 'gas-and-water-works' republicanism benefits from the more rigorous analytical development found in public accountability scholarship and its implications for refining democratic institutional design.

Interposing public accountability theory with neo-republicanism also leads to a viable method for connecting public libel law and the institutional press to broader webs of accountability in representative systems. Chapter seven accordingly undertakes the task of formulating a revised analytical framework for public libel jurisprudence. Following an examination of accountability dysfunctions and the empirical evidence supporting the 'checking function' of the press, a revised framework is formulated by combining the effects of two sets of accountability mechanisms. The 'primary' set represents a jurisdiction's *fixed* elements of political and constitutional design, including its electoral structure, parliamentary/presidential structure, federal/unitary structure, mechanisms of legislative scrutiny, and specific form of judicial review. By contrast, the 'secondary' set represents those *dynamic* mechanisms supplementing a nation's basic accountability structure, including its government auditors, independent regulators, and direct public access mechanisms. Both sets of accountability mechanisms provide the aggregate background against which public libel doctrine must be matched.

Part D tests our revised analytical framework by applying it to the UK and its newly-updated public libel doctrine. Chapter eight's analysis of Britain's primary

[10] See Hanna Fenichel Pitkin, *The Concept of Representation* (California, University of California Press, 1967). See also Bernard Manin, *The Principles of Representative Government* (Cambridge, Cambridge University Press, 1997); Philip Pettit, 'Varieties of Public Representation' in Ian Shapiro and others (eds), *Political Representation* (Cambridge, Cambridge University Press, 2010).

[11] See, eg, Philippe C Schmitter and Terry Lynn Karl, 'What Democracy is … and is Not' (1991) 2(3) *Journal of Democracy* 75; Philippe C Schmitter, 'The Ambiguous Virtues of Accountability' (2004) 15(4) *Journal of Democracy* 47.

[12] See generally Mark Bovens and others (eds), *The Oxford Handbook of Public Accountability* (Oxford, Oxford University Press, 2014).

[13] See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, Oxford University Press, 1997); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge, Cambridge University Press, 2012).

and secondary accountability mechanisms reveals the following. First, besides benefitting from alternative sources of political information generated by mechanisms of legislative scrutiny, the UK is still beset by general transparency concerns associated with its parliamentary-unitary structure and convention of ministerial responsibility. Second, this informational discrepancy between government and citizens is not fundamentally altered by Britain's secondary accountability mechanisms, ie its independent auditors, regulators, and direct public access mechanisms. Specifically, due to an attenuated bandwidth of audit inputs and effectiveness, the effects of restricted citizen access to the Parliamentary Ombudsman, and an expansive exemption regime undermining access to information under British legislation, there remains a strong need for auxiliary mechanisms to fill aggregate shortfalls in government transparency.

After outlining the UK's basic accountability profile, chapter nine then provides our project's main law reform recommendations. When judged against the undertheorised basis for Britain's public libel regime, the most appropriate doctrinal match for its accountability profile requires, at a minimum, adopting a generic qualified privilege similar in effect to the 'actual malice' rule. What is more, an absolute privilege for political speech cannot be ruled out. This is deeply ironic since, alongside a pattern of discounting accountability concerns in leading cases, Britain's public libel jurisprudence exhibits a firm reluctance to privilege political speech, which is further fueled by misunderstandings around categorical defences. Alternatively, Britain's new defence of 'Publication on Matter of Public Interest' can be reformed by introducing presumptions of 'public interest' and 'reasonable belief' rebuttable on 'clear and convincing' evidence in public libel cases involving plaintiff politicians, public officials, and influential public figures and corporations. As confirmed in Part B, such plaintiff-driven amendments are essential for ensuring suitable doctrinal footholds for the checking function and accountability concerns in free speech litigation involving media defendants.

Still, despite their logical and prescriptive force, such sweeping law reform proposals raise significant concerns with institutional competence and the need for further research and methodological refinement. Although the recommended approach to public libel doctrine benefits adjudication by placing the defamation inquiry—perhaps for the first time—on a more sophisticated and suitable theoretical foundation, the UK Parliament may be better equipped to refine Britain's public libel doctrine due to its greater resources and enlarged scope of review. After all, the more granular and extensive the analysis of accountability effects, the more clearly and confidently public libel doctrine can be matched to *actual* institutional settings.

Similarly, although our revised framework can identify gross mismanagement of public libel doctrine and establish justifiable ranges of possible alternatives, the analysis and results reported in Part D are unavoidably preliminary. As discussed in chapter seven, a more complete accountability assessment must also consider a jurisdiction's media structure and any relevant contextual factors affecting its accountability profile and embodiments of the checking function of the press.

Above all, an accountability assessment along these lines must still be balanced against a jurisdiction's commitment to 'reputation'. Such factors will invariably affect public libel doctrine in potentially drastic ways.

In the end, while much work remains in developing our public libel methodology, the theoretical repositioning required by our revised framework provides a long overdue and promising foundation for undertaking this process of methodological refinement. Although inspired by the Privy Council's conviction that comparative analysis helps to 'clarify and refine' issues and options in public libel jurisprudence, such innovative constitutional insights can only be transformed into a workable method by theoretically recasting and contextually reinstating the checking function of the press. While accountability concerns were arguably implicit in the New Zealand Court of Appeal's comparative law deliberations, its failure to explicitly reference public accountability theory not only constrained its identification of relevant accountability mechanisms, but, most critically, how they might *interrelate*, both with legal doctrine, and amongst themselves.

For instance, as revealed in chapter one, an unstated premise of the Court of Appeal's analysis was that New Zealand required a *more* press-friendly doctrinal approach than England or Australia because its accountability mechanisms were in fact stronger. By stark contrast, the prescriptions under our revised analytical framework necessitate a *less* press-friendly solution under such circumstances, the opposite of what the New Zealand Court of Appeal ultimately preferred. A more cautious assessment of the cumulative effects of accountability mechanisms at multiple levels of abstraction would appear to have been the missing piece of the puzzle all along. At last, while Van Vechten Veeder's opening critique must surely remain valid, it is hoped that at the conclusion of this comparative law study defamation law might be found less absurd in theory and perhaps even less mischievous in its practical operation.