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Libel - Public Officials - Recovery for Libel of Public Official Requires Proof of Actual Malice

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utilized the federal removal statute to obtain jurisdiction over controversies in which they were powerless to grant the remedy demanded. If the purpose of section 301 were carefully examined, one could not fail to see that the federal courts should foster the availability of injunctive relief in state courts as it is the remedy which best effectuates the aforementioned policy. Any extension of federal court jurisdiction by the use of the removal statute in cases of this type will have a detrimental rather than a beneficial effect upon the purpose of the Taft-Hartley Act, to make unions effectively suable.

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LIBEL—PUBLIC OFFICIALS—RECOVERY FOR LIBEL OF PUBLIC OFFICIAL REQUIRES PROOF OF ACTUAL MALICE.

New York Times Co. v. Sullivan (U.S. 1964)

Petitioner newspaper published a paid political advertisement attacking the segregationist attitude in the South and asking for monetary aid in the fight against segregation. Several false statements were made in the advertisement and, although no one was specifically mentioned, the respondent police commissioner sued the newspaper and those indorsers of the article upon whom service could be obtained. The trial judge instructed the jury that the statements were libelous per se, leaving the jury with the problem whether the reading public could interpret the statements as references to plaintiff. At the same time, the jury were told that truth was a defense, but granting the obvious inaccuracies in the content of the advertisement, the case at trial turned on the question as to how the reader might understand the statements. The jury returned a verdict of $500,000 against all defendants, and the Supreme Court of Alabama affirmed the judgment,[1] dismissing all constitutional claims of the defendants.[2] The United States Supreme Court reversed, and *held* that the First and Fourteenth Amendments require that a public official, in order to recover for a defamatory falsehood, must prove that the statement was made with actual malice, and further that there was no evidence of actual malice present in this case. *New York Times Co. v. Sullivan*, ... U.S. ....., 84 S.Ct. 710 (1964).

1. New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962).

2. The petitioner objected to the trial judge's charge to the jury on the grounds that they violated both the First and Fourteenth Amendments to the United States Constitution. Both the trial judge and the Alabama Supreme Court rejected these contentions; the latter court did so with the all too brief statements that "[t]he First Amendment of the U.S. Constitution does not protect libelous publications" and "[t]he Fourteenth Amendment is directed against State action and not private action." *Id.* at 676, 144 So. 2d at 40.

Freedom of speech and press, although within the area of interests safeguarded by the due process clause of the Fourteenth Amendment,[3] is not absolute.[4] But even though speech and press may be curtailed by the states, the extent to which they can interfere and in what areas, have consistently remained constitutional problems.[5] Certain areas of speech, such as defamation and obscenity, were thought to be clearly outside the area protected,[6] with the proviso, at least as to obscenity, that the Supreme Court had the right to define the constitutional extent of the protection.[7] As an adjunct to the freedom of speech and press, the right to distribute and to receive literature are protected.[8] Moreover, speech or the distribution of literature which may lead to illegal activity often eludes state control.[9] The Supreme Court has been careful to preserve the constitutionally protected rights by condemning prior restraints and laws directed at unprotected speech, but which could likely cause inhibitions on the exercise of the protected rights.[10] The obvious point is that the Supreme Court believes that freedom of speech and press exist in a world of conflicts and need breathing space in order to survive.[11]

The Court's analysis in the instant case was rather simple but prolonged. The majority said that since the founders of our country recognized "the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[12] Citing Madison,[13] the Court said that some degree of abuse is to be expected and that therefore "erroneous statement is inevitable in free debate" and "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive'."[14] Similarly, the injurious nature of the speech

3. See, *e.g.*, Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444 (1936); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931); Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925).

4. See, *e.g.*, Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303 (1951); Whitney v. California, 274 U.S. 357, 47 S.Ct. 641 (1927).

5. There is still no solution to the question whether an *ad hoc* balancing of interests is the proper approach to the First Amendment. See Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962), and a reply, Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962), and a rejoinder, Frantz, *Is the First Amendment Law? — A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963).

6. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957); Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

7. Roth v. United States, 354 U.S. 476, 487, 77 S.Ct. 1304, 1310 (1957).

8. Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943); Schneider v. Town of Irvington, 308 U.S. 147, 60 S.Ct. 146 (1939). *But cf.* Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920 (1942).

9. Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364 (1962); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

10. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631 (1963); Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665 (1948).

11. NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338 (1963).

12. Whitney v. California, 274 U.S. 357, 376, 47 S.Ct. 641, 648 (1927). The concurring opinion of Mr. Justice Brandeis is considered the "classic formulation" of the purpose of the First Amendment.

13. 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876).

14. New York Times Co. v. Sullivan, 84 S.Ct. 710, 721 (1964).

is no defense where a public official is involved.[15] Thus, since neither misstatement nor defamatory content remove the constitutional protection, the existence of both will not suffice.[16] If the states could not impose criminal penalties upon such speech, they could not allow civil remedies for the same type of speech the fear of which "may be markedly more inhibiting than the fear of prosecution under a criminal statute."[17]

Granting the major premises, it is still to be determined what protection the defendants were to be afforded. The Court was instantly faced with the *Beauharnais*[18] case and dicta in other cases to the effect that libel is not protected,[19] having slight if any social value. In *Beauharnais*, the court sustained a criminal libel statute as applied to a publication held to be defamatory to a racial group and liable to cause violence and disorder. The Court, however, distinguished that case on its own language. The Court in *Beauharnais* indicated that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel."[20] It was apparently felt that the instant case presented such a situation and the Court noted that only one other case presented the question of the limitations upon the power to award damages for libel of a public official.[21] The Court in that case was evenly divided, and thus there was no precedent restricting the instant decision.

Although urged by counsel for defendant that no attack on an official's reputation in his official capacity could be the subject of a libel suit under the First Amendment,[22] the majority was reluctant to extend the protection beyond a privilege conditioned on the lack of actual malice. Seemingly, the majority felt this was sufficient to insure the emergence of truth without completely precluding vindication of unjust injury.

Mr. Justice Goldberg on the other hand, argued that without an absolute privilege, the fears of a plaintiff-minded jury and the burdens of a lawsuit were adequate to inhibit the ardor of the press.[23] In opposition to such a privilege, it may be argued that if the privilege is made absolute, good men will not wish to run the risk of libelous attacks on their official conduct, and thus will shy away from political life. Similarly, it may be argued that the privilege could engender scathing attacks on the best candidate thereby allowing the less qualified to win elections. In answer to these criticisms, it may be argued that the privilege, if absolute, will leave truth unfettered, allow the public to hear and learn as much as

15. *Id.* at 722.
16. *Ibid.*
17. *Id.* at 724.
18. Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725 (1952).
19. Times Film Corp. v. City of Chicago, 365 U.S. 43, 48, 81 S.Ct. 391, 394 (1961); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 769 (1942).
20. 343 U.S. 250, 263-64, 72 S.Ct. 725, 734 (1952).
21. Schenectady Union Pub. Co. v. Sweeney, 316 U.S. 642, 62 S.Ct. 1031 (1942), *affirming per curiam* Sweeney v. Schenectady Union Pub. Co., 122 F.2d 288 (2d Cir. 1941).
22. 32 U.S.L. WEEK 3250 (U.S. Jan. 14, 1964).
23. New York Times Co. v. Sullivan, 84 S.Ct. 710, 734 (1964) (concurring opinion).

possible about public issues and personalities and better prepare them to exert an intelligent voice in public affairs.[24] The majority, however, was not convinced by the need for an absolute privilege and were satisfied to require only a showing of actual malice.

Mr. Justice Goldberg further argued that even if the injured public official would have no right of redress in the courts, he still had the power to rebut any falsehoods by himself using the freedom of speech and press.[25] However, damage once done is often difficult to rectify. Especially is this true where the damage is done by libelous attacks on character. Retractions of falsehoods seldom find the prominence or acceptance enjoyed by the original story. Another weakness of this argument is that it presupposes the ability of the injured party to rebut the statements. In many cases, this may be all but financially impossible for a public official unless highly ranked.

Thus, on the basis of a finding that neither defamatory effect nor inaccuracy of the statements will justify damages for libel, the majority declared that "[t]he constitutional guarantees require . . . 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'. . . ."[26] The Court went on to define "actual malice" as "knowledge that it was false or with reckless disregard of whether it was false or not."[27] This constitutional test seems clear on its face in both its meaning and effect upon state defamation laws. Where the action involves official conduct of a public official, the burden of proof is clearly upon him to prove actual malice.

The decision by its terms applies only to criticism of "official conduct" of "public officials." There is some scant indication, however, that the tenor of the opinion might be broad enough to include certain other situations[28] if and when the situation presents itself. For example, since government action is not taken in the abstract, but is the product of many private persons and relationships, it would seem that, to have the effect intended, the privilege as defined by the case must extend also to criticism of such private persons who influence government action. Thus, where

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24. The opposing arguments are found in a plethora of state and federal cases collected in 150 A.L.R. 358 and 110 A.L.R. 412. The leading articles are: Hallen, *Fair Comment*, 8 TEXAS L. REV. 41 (1929); Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949); Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413 (1910).

25. New York Times Co. v. Sullivan, 84 S.Ct. 710, 739 (1964) (concurring opinion).

26. *Id.* at 726.

27. *Ibid.*

28. An indication that future application of the precedent may be broader than the terms in which it was stated is found in the Court's citation, with apparent approval, of language from a state court decision laying down a similar rule. In that case, Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908), the State Attorney General was running for re-election. His official conduct was allegedly libeled by a newspaper and he sued. The trial court required a finding of actual malice, and the Kansas Supreme Court approved this principle, but did not limit its discussion to public conduct. It said: "This privilege extends to a great variety of subjects and includes *matters of public concern, public men* and *candidates for office*." (Emphasis added). *Id.* at 723, 98 Pac. at 285.

private persons are caught in the line of fire of the protected criticism, it would seem that they would bear the same burden of proof as the official involved in this case.

In addition, although the analysis is confined to terms such as "official conduct," the decision could conceivably be a basis of argument for limitations on most defamation actions involving matters of public concern. The Supreme Court has held that not only political debate is protected, but also discussions of sex, economic and social problems. If one facet of speech and press regarding public issues merit a privilege, it would seem that the other facets merit a similar privilege. If social utility is to be the test many discussions on nonpolitical topics are certainly socially useful and should be included within the privilege. And if, as Chafee contends, a most important end of society and government is the discovery and spread of truth on subjects of general concern,[29] the instruments of speech and press, in order to be encouraged to ferret out truth, must be given some measure of privilege greater than merely being allowed to print the truth.

Though this case is not direct authority, it is interesting to ponder, in light of this case, what result would have been reached had the situation been reversed. If, for instance, an integration leader had been suing a newspaper for alleged defamatory statements as to the motivation of the plaintiff's actions, it would not be a great extension of the instant doctrine to include such actions within the privilege. Though the plaintiff would not be a "public official," it would seem that his "public conduct," designed as it is to bring about political and social change, should be no less subject to criticism than that of a public official.[30]

On the other hand, the opinion can be narrowed by approaching the First Amendment as protecting certain speech, more socially useful, to a greater degree than other speech, not so useful. Thus political speech is more protected than entertaining speech. And, on the sliding scale of values, it may be said that no speech should enjoy the same immunities from governmental interference as political speech. Thus, the Court has used a balancing of interests technique in declaring that political speech was privileged, but only so privileged that the publisher's actual malice in publishing defamatory falsehoods will destroy the privilege.

It is interesting to note and remember here that this case involved an advertisement advocating social reform, paid for by a minority group. On the face of the opinion, the Court had little trouble with this fact and summarily dismissed the contention that it would have any bearing on the outcome.[31] Had the majority reached an opposite result and upheld the

29. CHAFEE, FREE SPEECH IN THE UNITED STATES 31 (1941).

30. Note again the Court's citation with approval of the privilege as granted in Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908), which extended to matters of public concern, public men and candidates for office. Surely integration leaders are public men involved with matters of public concern.

31. The argument that "commercial" advertisements are not protected speech was based on Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920 (1942). In that case, a city ordinance forbidding distribution of advertising matter was upheld even as to handbills which had commercial advertising on one side and a protest against certain