Volume 12 | Issue 4 Article 1

1967

The Press, Privacy, and Public Figures - A Symposium - Introduction

Donald W. Dowd

Villanova Law Review
VOLUME 12 SUMMER 1967 NUMBER 4

THE PRESS, PRIVACY, AND "PUBLIC" FIGURES — A SYMPOSIUM

INTRODUCTION

DONALD W. DOWD†

FOR THE LAST TWO YEARS it has been the objective of the Villanova Law Review's Annual Symposium to bring together representatives of the press and the bar for a freewheeling examination of a problem of mutual concern. Last year the focus of the program was on problems of *A Free Press and A Fair Trial;*[1] this year, on the implication of the recent cases of *New York Times v. Sullivan*[2] and *Time, Inc. v. Hill*[3] on the law of defamation, privacy, and the constitutional right of a free press.

Our procedure this year, as last, was to invite distinguished exponents of varying views to deliver short papers which served as a basis for discussion. In order to preserve an atmosphere of informality and out-spoken criticism we have made no attempt to transcribe the entire proceedings, but we hope that the presentation of these papers, although they make no pretense of being exhaustive, will further stimulate the interchange of ideas and opinions which were found so valuable at the Symposium.

We have not asked those who presented these papers to expand them for publication, but in light of recent Supreme Court holdings in *Curtis Publishing Co. v. Butts and Associated Press v. Walker,*[4] which were handed down several weeks after the Symposium, certain minor modifications either in the text of the papers or by way of addendum have been made.

It was my privilege to act as moderator for both this year's and last year's Symposium. The role of the moderator is to moderate, not

---

† Professor of Law, Villanova University. A.B., Harvard University, 1951, LL.B., 1954.

1. 11 VILL. L. REV. 677–741 (1966).
2. 376 U.S. 254 (1964).
3. 385 U.S. 374 (1967).
4. 87 Sup. Ct. 1975 (1967).

to dictate; so I again find myself in the unusual role of a listener rather than a speaker. The opportunity to write a brief introduction to these papers will not be taken to redress the balance. I shall limit my observations to those aspects of the papers which I found most significant and a few words about the post-Symposium developments in the Supreme Court.

Professor Nelson, a teacher of would-be journalists and a wise observer of the working press, presents no rosy picture of the press as constantly endeavoring at the highest level of professional responsibility to advance the great freedom of the press and the public's right to know. He is well aware that from time to time newspaper men, like lawyers, abuse their privilege and overstep the limits of their freedom. But he is justly concerned whether or not a working member of the press can know what these limits are.

The law of defamation was filled with subtleties which would confound lawyers and judges to say nothing of editors and reporters. The newsman was plagued not only by the eternal question of what is truth, but the enigmatic problem of what is opinion, what is fact, and such questions as what is fair comment, what is malice — real, constructive or implied — what are the differences between the law of New York and Pennsylvania? Out of this briar patch of problems Professor Nelson sees emerging from *New York Times v. Sullivan,* a simpler, more easily understood limit on what the press can and cannot do — the requirement of *actual malice* in order to find liability. Obviously this rule, like its predecessors, cannot be automatically applied, but it is relatively narrower than the former rules and has the advantage of being national in scope. Whether or not the concept of recklessness will produce a new series of conflicting standards and modifications so as to dispell the dream of comparative order and peace advanced by Professor Nelson is a very open question. The recent development of a variant on the *New York Times* rule for "public figures," suggested by the majority in the *Butts* case,[5] indicates the kind of problem that may still be ahead of us.

One further observation on Professor Nelson's presentation may be in order. Although the briar patch of the law of defamation was confusing, this confusion was by no means always to the detriment of the press. It may well be that the very intricacy of the law was one of the chief advantages of the press in such actions and that there were some very clever rabbits in the briar patch. If the reporters were confused, so often were the plaintiffs, and defense counsel, experienced and wise in the intricacies of the law, often won the day. Long before

5. See *Id.* at 1991.

New York Times the press seemed to be doing very well in staving off the destruction threatened by libel actions. In fact many observers noted that it was the rare plaintiff who prevailed.[6]

It is perhaps not surprising that the quality and success of the defenses available to the press were not stressed by one of the most eminent members of the defense bar, Mr. Arthur Hanson, General Counsel of the American Newspaper Publishers Associations. Clearly the *New York Times* rule may not only mean that newspapers will continue to prevail in such actions, but that discouraged plaintiffs will not even enter the list at all, and no newspaper's lawyer is going to take the position that it is better to be sued and win than never to be sued at all.

Although Mr. Hanson recognizes the fact that newspapers can go too far, he is quite naturally loathe to circumscribe the press for any more than the most blatant abuses. Mr. Hanson holds that some damage to individuals may be the not too excessive cost of a vital press and the public's right to know. Those who put themselves in the public eye must "assume the risk" of being hurt by the comment and criticism of the press. To a large extent Mr. Hanson's view seems to strike a responsive cord with most, if not all, members of the Supreme Court, and especially with the civil libertarians, Justices Black and Douglas, who would go even further than Mr. Hanson in granting the press immunity. Yet it is strange that this doctrine should gain such wide support in a legal world that has largely rejected the concept that an injured worker should be denied compensation for the good of industry, that the damages of an injured seaman should be limited by the needs of maintaining a maritime fleet, or that the liberty of an individual can be sacrificed to the general need of a society to feel secure against crime or against subversion. The current trend of the law has been toward the idea that it is society as a whole that should bear the burden for societal benefits, not that the unlucky individual who has suffered damage should be without recourse, and the rights of an individual are not to be abridged because of the competing claims of larger conglomerations of power — the government, industry, or, one might have thought, the press.

Mr. Green, a lawyer for plaintiffs in this type of action, was keenly aware, quite naturally, of the losses suffered by individuals in the name of abstract principles such as freedom of the press and the public's right to know. He asked whether the advantage of the circulation of negligent falsehoods to the public is so great that a man can be told that the loss of his job, reputation, his possibilities of success in life,

6. Green, *Regenerative Process In Law*, 33 IND. L.J. 166, 173–76 (1958), in GREEN, THE LITIGATION PROCESS IN TORT LAW 106–09 (1965).

can all be shunted off as non-compensable. Posing the question in this fashion, indicates the poignant situation of the loser in the battles against the press, but one wonders whether or not many more plaintiffs will in fact lose under the new rules than under the old. May not "reckless disregard" be in the long run as secure a reed as lack of fair comment? The effect of the *New York Times* case may be only to indicate more clearly to would-be plaintiffs the limitations to their possibility of success; limits which may have existed even under the prior law. May not the *New York Times* and *Butts* cases prove more significant as establishing an underlying constitutional framework from which other techniques of correcting gross abuses which imperil the press may be more easily fashioned. Once the broad constitutional groundwork has been laid, the Court may find it more feasible to strike down verdicts by juries which are prejudicial or which are so excessive that they imperil the life of a newspaper. Mr. Justice Harlan in *Butts* clearly suggests that this road is open to the Court.[7]

One aspect of the problem of restricting actions against newspapers which has not been acknowledged by the Court is the possibility that the law suit itself is an instrument of free speech. The action against the newspaper is newsworthy and facts which come out in such actions may well advance the cause of free exchange of ideas by giving dissenters not only their day in court, but their day in the sun.

Lastly, where do we go from *Butts*? The Supreme Court has made it clear, as all the participants in the Symposium anticipated, that the *New York Times* rule would not be limited to public officials. Apparently, the Chief Justice and Justices Brennan and White would apply the *New York Times* rule to public figures. Justices Black and Douglas, although dissatisfied with the *New York Times* rule, would certainly not support a more permissive plaintiff's rule, but Justices Harlan, Stewart, and Fortas would in the case of public figures (though not public officials and apparently not in privacy actions) support a lesser rule of *"highly unreasonable conduct* constituting an extensive departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[8] In the opinion of these justices the publication of false statements under such circumstances could be the basis of a libel action even though it did not amount to "recklessness" under the *New York Times* rule. Although this view was incorporated in the majority's opinion in *Butts,* it does not seem to be the view of the majority of the present Court.

The majority of the Court, however, does seem to adhere to the view that it is appropriate to make a distinction between "hot" news,

7. 87 Sup. Ct. 1975, 1994 (1967).
8. *Id.* at 1991. (Emphasis added.)

such as in *Walker,* and feature muck-raking, such as in *Butts,* in order to determine whether or not a publication is reckless. The acceptance of this distinction indicates that the concept of recklessness is not one of intent or animus, but rather of extreme carelessness. This in turn would suggest that in fact the standards of investigation and reporting adhered to by responsible publishers should be relevant not as a modification of the *New York Times* doctrine for public figures, but as a consideration in any case in which the *New York Times* rule is applicable.

The Court was split on whether, in the light of its newly enunciated standards, the evidence and instructions in the *Butts* case were sufficient to find libel. Although this question is of considerable interest as an aspect of the problem of judicial review, and the effect of new constitutional doctrine in the cases in which they are developed, the resolution should not be significant in the development of the new rules. It is clear that although the instructions and evidence in the *Butts* case were held sufficient so as not to necessitate a new trial, the actual instructions in *Butts* would be inadequate in any future cases. It could not be said that even the majority, which was satisfied that Butts should not be retried, in any way adopted the notions of recklessness that were developed by the lower courts in that case. A conservative trial judge in all cases involving public figures would find it necessary to give instructions based on the *New York Times* rule and further instruct that the jury should consider whether the publication involved "hot news" or not, and might even go so far as to suggest to the jury that they consider professional standards in determining recklessness.

Notwithstanding the fact that there was no discussion of them in *Butts,* some of the more interesting questions that remain to be considered are what is a "public figure" and what is a matter "of public concern." The Court has not indicated any limits on these concepts, but it may be safely hazarded that the Court will not read them restrictively and that few plaintiffs will succeed in avoiding the application of the *New York Times* rule. The Court, therefore, has fashioned a new law of libel for the press, and although the sweep of the *New York Times* rule is very wide, and many old distinctions and problems have been outstripped in the process, many new problems lay ahead.