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Libelous Ridicule By Journalists

James M. Naughton* and Eric R. Gilbertson**

HE LAUGHS BEST who laughs last—especially if he chuckles in print. Everyone who knows his elementary cliches is aware that the pen is mightier than the sword. What some forget, however, is that the quill can tickle you to death.

You laugh? Which is more devastating: a four page leaflet attacking the Alabama labor record of George C. Wallace, or a simple inquiry, "Spiro T. Who?"

Indeed the written word has impact. In a sense that is why it is protected by the Constitution. And, for the same reason, that is why someone gets hauled into court every so often in a defamation suit.

Public officials in particular are sensitive about their images in print. Some of them are known to use locker room language to describe anyone who questions their actions on paper. One Cuyahoga County, Ohio, political figure spent half an hour on the telephone not too many months ago complaining to a friend about the way he had been treated in an article making fun of his actions.

James Reston, executive editor of *The New York Times*, noted in his book, *The Artillery of the Press*,¹ that leaders of the United States foreign policy establishment should face a "relentless barrage of facts and criticism, as noisy but as accurate as artillery fire." What Reston did not note is that the most devastating artillery in mankind's verbal arsenal is that which is loaded with laughter.

When it touches on a social or political theme, "Pogo" can have more pop than the crackle of editorial rifle fire on Page One. An Art Buchwald column wondering aloud whether there really is a J. Edgar Hoover can start a national flap. And there are few things more cutting than a Conrad cartoon, such as the one noting an order by newly-elected Gov. Ronald Reagan to cut everything in the California budget 10%; the cartoon showed Reagan carrying his head under his arm.

Is it liable to be libel? No, thank God.

Not since the 1964 ruling by the United States Supreme Court in *Sullivan v. New York Times*,² a landmark decision which—taken with subsequent rulings opening the *Sullivan* application to public figures other than officials—makes criticism of public officials privileged unless "actual malice" is involved.

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¹ Reston, *The Artillery of the Press*, p. vii (Introduction) (Harper & Row, New York, 1967).

² 84 S.Ct. 710, 376 U.S. 255, 11 L.Ed. 2d 686 (1964).

“Fair Comment” Rule

Before *Sullivan*,³ jesting in print could be perilous. The test in *Pignatelli v. New York Tribune, Inc.*,⁴ in 1921, was whether the plaintiff was exposed to ridicule, because, it was held, “ridicule in and of itself, if it has harmful results, is enough.” Nearly a century earlier, the court, in *Donoghue v. Hayes*⁵ was equally exacting: “The principle is clear that a person shall not be allowed to murder another’s reputation in jest.”

The rule applied to newspapers and other news-bearing public media was generally that all items which were “fair comment” on matters of public concern were privileged and protected from libel actions.⁶ The rule was strongly conditioned, however, by the requirement that this “fair comment” be concerned solely with the material that was of public concern. In *Buckstaff v. Viall*,⁷ the court found that an editorial article, defaming the plaintiff, went too far in a personal attack to remain within the privilege. The editorial, entitled “A Prayer to Bucksniiff,” an obvious reference to Dickens’ contemptuous character Pecksniff, sarcastically referred to the plaintiff, a State Legislator, as “His Majesty Bucksniiff,” a “legislative God,” and “his third Ward Omnipotence.” In requesting his “Grace” to aid in the passing of certain amendments, “while it is within thy mighty power to defeat the will of the people,” the Editor alleged that Buckstaff was conceited, pompous, etc., and went beyond “fair comment” on matters of public concern.⁸

The extent of the privilege was probably best stated in *Trigg v. Sun Printing and Publishing Co.*,⁹ when the court distinguished between fair comment on matters of public concern, and defamation. There it was stated that “criticism deals only with such things as invite public attention or call for public comment,” and that, “It never attacks the individual, but only his work.” Under this rule, the courts have held as actionable a cartoon and article inferring that a State Legislator used undue influence (liquor and money) in passing a bill,¹⁰ a printed article inferring that a foreign nobleman was in the United States to avoid working,¹¹ and an item in a weekly gossip column charging that the plaintiff exemplified “typical Yankee thrift” by alleging that he built his own casket and dug his own grave (at an early age) to avoid the ex-

³ *Ibid.*

⁴ 117 Misc. 466, 172 N.Y.S. 605 (1921); rule also stated in *Trigg v. Sun Printing and Publishing Co.*, 179 N.Y. 144, 71 N.E. 739 (1904); and *Powers v. Dargin Snow Publishing Co.*, 154 Me. 108, 144 A. 2d 294 (1958).

⁵ *Hayes Irish Exchequer* 265, 266 (1831).

⁶ *Buckstaff v. Viall*, 84 Wis. 129, 54 N.W. 111 (1893); *Trigg v. Sun Printing and Publishing Co.*, *supra* note 4.

⁷ *Buckstaff v. Viall*, *supra* note 6.

⁸ *Ibid.*

⁹ 179 N.Y. 144, 71 N.E. 739 (1904).

¹⁰ *Randall v. Evening News Association*, 79 Mich. 266, 44 N.W. 783 (1890).

¹¹ *Pignatelli v. New York Tribune Inc.*, 117 Misc. 466, 172 N.Y.S. 605 (1921).

pense.¹² All were held libelous *per se* and outside this "fair comment" privilege.

Not until some time later was there any evidence of a change in this posture. A Massachusetts court, in 1948, held, in *Hartman v. Boston Herald Traveller Corp.*,¹³ that "fair comment may be severe and include ridicule, sarcasm and invective." More important, the ruling stated that "severity and vigor in expression . . . are not to be confused with malice in motive." Similarly, a Federal court in 1955 determined that ridicule of a self laudatory brochure put out by a candidate for public office "did not exceed fair comment" on a matter of public concern.¹⁴

Effects of *New York Times v. Sullivan*

Granting that the critique is of a public figure, since *Sullivan*¹⁵ he is fair game. It seems likely that this ruling, while not specifically indicating it, would permit (so long as malice is not involved) ridicule of a public official as well as straightforward criticism. Because of overriding importance in keeping open channels of criticism and debate, the court held, all criticism of public officials in their official capacity is at least conditionally privileged.

Sullivan provided that the only ground for an action by a public official would be through proof of "actual malice," a showing of "reckless disregard for the truth," or actual knowledge that a story was false.¹⁶ As it was, two members of the Supreme Court—Justices Black and Douglas—held in a concurring opinion that there should be an absolute right to criticize public officials, with no recourse to an action for damages even if actual malice was shown.¹⁷

Even to a newspaperman, the position staked out in *Sullivan* by Justices Black and Douglas appears a bit extreme. There is no constitutional guarantee against reckless publishers; surely there should not be freedom to commit wholesale assault on the character of a public personality without the slightest regard for the truth.

The *Sullivan* rule was taken a bit further by the Supreme Court in *Curtis Publishing Co. v. Butts*.¹⁸ There, it was held that the privilege of criticising public officials set forth in *Sullivan* should also apply to comment on certain individuals who become a "public figure" by reason of a substantial public interest in their activities. The rationale for this decision again rested on the overriding public interest in maintaining,

¹² Powers v. Dargin Snow Publishing Co., *supra* note 4.

¹³ 323 Mass. 56, 80 N.E. 2d 16 (1948).

¹⁴ Mark J. Hammett v. Times Herald Inc., 227 F. 2d 328 (4th Cir. 1955), *cert. denied* 76 S.Ct. 546, 350 U.S. 996 (1955).

¹⁵ *Sullivan v. New York Times Co.*, *supra* note 2.

¹⁶ *Ibid.*

¹⁷ *Id.*

¹⁸ 87 S.Ct. 1975, 388 U.S. 130 (1967).

free from fear of legal repercussions, the channels of public debate and comment on issues related to public interest. The fact that a person was unwittingly, or even unwantingly, thrust into the position of a "public figure" will not aid him in bringing suit.

The plaintiff in *Butts* was held to be a public figure by reason of his position as Athletic Director at the University of Georgia.¹⁹ Other cases have determined that a "public figure" may be a professional baseball player,²⁰ a schoolteacher involved in a public controversy,²¹ a high school football coach,²² a well-known advocate of strong political views even though not a candidate for office,²³ and the law partner of a public official who becomes involved in a political campaign.²⁴

Actual Malice

The key to determination of libel in a post-*Sullivan* courtroom is whether malice is involved. *Butts* was held to have proven actual malice because the *Saturday Evening Post* published accusations about game fixing based solely on a telephone conversation that supposedly was overheard by a somewhat less than impeccable source.²⁵ This was such "wanton and reckless indifference" as to the truth and constituted such an "extreme departure from the standards of investigation and reporting adhered to by responsible publishers," that actual malice could be implied from its publication.²⁶

"Actual malice" is, however, an extremely difficult standard of guilt to prove. Barry Goldwater, the 1964 Republican nominee for the Presidency, brought suit against the publishers of *Fact* magazine for their allegations that he was suffering from mental illness and therefore was unfit to hold that office.²⁷ This case was remanded for a trial court to determine whether or not actual malice was present. Drew Pearson, however, was unsuccessful in his suit against an Alaskan publisher who called his columns "garbage," and him a "garbage man."²⁸ Public figures, everywhere, might then be warned by the knowledge that those who dish it out in turn become public figures and must be able to take it.

That seems wonderfully poetic. The critic should have a sincere

¹⁹ *Ibid.*

²⁰ *Warren Spahn v. Julian Messner Inc.*, 21 N.Y. 2d 124, 233 N.E. 2d 840 (1967); *Cepeda v. Cowles Magazines and Broadcasting Co.*, 392 F. 2d 417 (9th Cir. 1968).

²¹ *Ramsey v. Zeigner*, 79 N.M. 457, 444 P. 2d 968 (1968).

²² *Hoepfner v. Dunkirk Printing Co.*, 254 N.Y. 97, 172 N.E. 139 (1930).

²³ *Walker v. Courier Journal*, 246 F. Supp. 231 (W.D. Ky. 1965).

²⁴ *Gilberg v. Goffi*, 251 N.Y.S. 2d 823, *affd.* 260 N.Y.S. 2d 29, 207 N.E. 2d 620 (1965).

²⁵ *Curtis Publishing Co. v. Butts*, *supra* note 18; the source was an insurance salesman who was currently on probation for issuing bad checks.

²⁶ *Ibid.*

²⁷ *Goldwater v. Ginzburg*, 261 F. Supp. 784 (S.D. N.Y. 1966).

²⁸ *Drew Pearson v. Fairbanks Publishing Co.*, 64 Alaska 2d 245, 413 P. 2d 711 (1966).

belief in his commentary, a desire for fairness, a search for results rather than mere rhetoric and, above all, a thick skin. He who throws balls had better own a catcher's mitt. One of the authors of this comment has carried on a running critique over the last several years with a local political figure who does not return telephone calls, yet the author felt compelled to offer the politician a chance to write a newspaper column during the author's vacation. (The offer was rejected.)

It seems readily apparent that since ridicule is among the most potent forms of criticism, the Supreme Court would undoubtedly include it under the privilege of the *Sullivan* rule. Thus, the pinprick of satire or sarcasm would have to be caused by a mean, cantankerous, lowdown lout with malice in mind, to be actionable by a public figure whose performance was being questioned.

Though pre-*Sullivan* in date, the decisions in *Hammet* and *Hartman* were founded on a rule not far short of that in *Sullivan*. There, the courts held that ridicule of a political candidate²⁹ and a professor involved in a "Peace Now" movement³⁰ was privileged under the "fair comment" rule and as such was not actionable. The court ruled that there was no proof of actual malice in a newspaper's ridicule of a self laudatory brochure put out by a political candidate,³¹ and held that merely because the language used in ridiculing the professor involved in the Peace movement was a bit robust,³² actual malice was not established.³³

In *Joe Julian v. American Business Consultants*,³⁴ the court held that under the "fair comment" rule, "even if the publication holds one up to public ridicule, contempt, and reproach it is not actionable if the facts form a reasonable basis of inference."³⁵ Our problem then is not so much one of whether ridicule is protected, but rather, *what* ridicule is protected.

It was a key concern prior to *Sullivan* that criticism—whether tongue in cheek or an outright razzberry—be directed at a public posture rather than a personal attribute. In *Trigg v. Sun Printing & Publishing Assn.*,³⁶ a series of articles ridiculing an English professor at the University of Chicago was ruled libelous because it presented the instructor as

²⁹ Mark J. Hammett v. Times Herald Inc., *supra* note 14.

³⁰ Hartman v. Boston Herald Traveler Corp., *supra* note 13.

³¹ Mark J. Hammett v. Times Herald Inc., *supra* note 14. The court here held that the newspaper's query "like to go with him steady?" following a report of the self laudatory brochure did not infer that he was a homosexual.

³² It might be noted in *Hartman* that at the time the plaintiff was engaged in the "Peace Now" movement, it may not have been too terribly popular (1943-4).

³³ Hartman v. Boston Herald Traveler Corp., *supra* note 13.

³⁴ 155 N.Y.S. 2d 1, 2 N.Y. 2d 1, 137 N.E. 2d 1 (1956).

³⁵ In *Julian*, the article allegedly made the plaintiff, a radio and television performer, look like a communist dupe. The date, 1956, again may give us some perspective on the decision as it places the case in the closing years of the McCarthy era.

³⁶ *Supra* note 4.

“illiterate, uncultivated, coarse and vulgar,” when the comments might just as easily have been directed at the professor’s work. The court spelled out a boundary which even *Sullivan* may not have crossed: “Criticism deals only with such things as invite public attention or call for public comment” and, “It never attacks the individual, but only his work.”³⁷

It is clear that decisions such as *Buckstaff*³⁸ (sarcastic prayer to a State Legislator) would be overruled by *Sullivan*,³⁹ and perhaps even the decisions in *Randall v. Evening News Association*⁴⁰ and *Pignatelli*.⁴¹ But the decision in *Trigg*⁴² leaves a haunting doubt. In distinguishing clearly between criticism of one’s public position and attacks on a person himself, we are left with the possibility that undue abuse of a public figure’s person, as opposed to those things “which invite public attention or call for public comment,” may be open to redress through a libel suit.

A plaintiff bringing such a suit would, however, have the burden imposed by *Sullivan* of establishing “actual malice.” It could be argued that attacks on the person, rather than his public work, are evidence of actual malice by their very nature, since by definition personal traits, etc., are not objects which demand public criticism, whereas public work does. The inherent difficulty here, however, lies in determining which characteristics of a public figure, particularly of a public official, do in any way affect his public posture and consequently, his public activities. Certainly conceit, immaturity, or dishonesty, all would have a profound effect on the capability of a public official in the performing of his work. It might even be convincingly argued that a Southern drawl or ski-slope shaped nose could profoundly influence the diplomatic and political skills and acceptability of a high level public official, and as such are privileged items of criticism for Journalists.

Conclusion

Proof of actual malice, or even establishing that an attack in ridicule bears no relation to public conduct, seems at best, extremely difficult to bring out. The public interest in protecting itself, through criticism of those in prominence, weighs much more heavily on the scales of justice than does the interest of public figures in protecting themselves from personal attack. So go ahead and draw your cartoons, Conrad. Keep sticking pins in the kewpie dolls of America, Art Buchwald. And tell it like it is, Pogo.

³⁷ *Ibid.*

³⁸ *Buckstaff v. Viall*, *supra* note 6.

³⁹ *New York Times Co. v. Sullivan*, *supra* note 2.

⁴⁰ *Randall v. Evening News Association*, *supra* note 10.

⁴¹ *Pignatelli v. New York Tribune Inc.*, *supra* note 11.

⁴² *Trigg v. Sun Printing and Publishing Co.*, *supra* note 4.