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## How Far May Newspapers Go in Criticizing?

Richard Szilagyi\*

ANY WRITTEN or printed article which is false and is conveyed by publication to third parties is defamatory or "libelous." That is, it is actionable if it tends to subject the plaintiff to hatred, scorn, ridicule, public contempt or disgrace; or if it induces a substantial number of respectable community members to avoid, shun, or deprive him of their friendly association, even though the defamation imputes no moral turpitude to him.<sup>1</sup>

Despite a long history of judicial decisions and numerous discussions and writings by the legal profession, there are few areas of the law so unsettled as the law of libel. Since World War I, state courts and the United States Supreme Court have been increasingly concerned with the problem of freedom of speech and press.<sup>2</sup> The struggle which has ensued involves the conflict between protection of the individual and protection of the inherent right of free speech and press.

This controversial task of social engineering has been dropped in the lap of the United States Supreme Court and involves neither a unique nor an obscure principle of law. The fundamental problem underlying the law of defamation is the "balancing and weighing" of one man's interest against the act of another.<sup>3</sup> This problem is immediately recognizable as being common to all areas of tort law. In theory, defenses are similar to those for assault, battery or trespass; we speak of justification or excuse, whereas with defamation, we speak of fair comment or privilege.

A right or liberty to prepare and publish has been created from the common law, federal and state guarantees of freedom of the press. The press enjoys this guarantee by virtue of the First Amendment to the United States Constitution, and it is applicable to the states by incorporation of the Fourteenth Amendment. It has for the greater part arisen from the historical struggles of the common people for free expression of their thoughts and beliefs in order to bring about political and social reform.

There is no particular need at this point in our history to advance the argument that it is necessary in a free institution that the press itself

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<sup>1</sup> New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964); See also, 53 C.J.S. Libel and Slander, § 1 and § 13 (1948); Street, Law of Torts, 298-301 (2d ed. 1959); Brown v. DuFrey, 1 N.Y. 2d 190, 134 N.E. 2d 469 at 470 (1956); DeMeo v. Community Newspapers, Inc., 263 N.Y.S. 2d 244 at 247 (1965); Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A. 2d 440 (1955).

<sup>2</sup> Shapiro, Freedom of Speech: The Supreme Court and Judicial Review, 5 (1966); Lawrence v. Fox, 357 Mich. 134, 97 N.W. 2d 719 (1959).

<sup>3</sup> Prosser, Torts, 15 (3d ed. 1964); Lawrence v. Fox, *supra* note 2 at 720.

be free. There is no question today that it is. The only question that is really left to be decided is how free.

In light of recent United States Supreme Court decisions, it appears that the courts are so zealous in protecting this freedom, that they are overlooking the need to protect the individual's right against *carte blanche* defamation which may be injurious to his reputation, as well as to his career.

Reputation in our society is recognized by most persons as a valuable possession. Standards of proper living set by members of the community in which one lives have an important bearing on an individual's economic and social well being. If an individual's reputation is good, it leads to confidence, trust, business success, power and office. Any false accusation against a member of this community in violation of this standard is necessarily injurious.<sup>4</sup> As so aptly stated by William Shakespeare:

Who steals my purse, steals trash; 'tis something, nothing;  
'twas mine, 'tis his, and has been slave to thousands;  
But he that filches from me my good name  
Robs me of that which not enriches him,  
and makes me poor indeed.<sup>5</sup>

The right of self-expression, originally defined as a natural right, has become a civil right, or a right guaranteed or established by government.<sup>6</sup> Society, by necessity, had to place limitations and modifications on this natural right of self-expression to prohibit unwarranted exercise of abuse of this liberty. The guaranties of freedom of expression in effect by 1792 in ten of the fourteen states which had ratified the Constitution, gave no absolute immunity for every utterance. Thirteen of the fourteen states provided for the right to bring a cause of action in libel as a statutory crime.<sup>7</sup> Today all the states have made provisions in their respective Constitutions for freedom of the press and the responsibility for the abuse of that liberty.<sup>8</sup>

Basically there are two distinct types of libelous publications, libel *per se*<sup>9</sup> and libel *per quod*<sup>10</sup> which must be treated differently insofar as pleadings and proof of damages are concerned:

<sup>4</sup> 1 Seelman, *Law of Libel and Slander in the State of New York* 1 (1964).

<sup>5</sup> Thayer, *Legal Control of the Press* 181 (2d ed. 1950); Shakespeare, *Othello*, Act 3, Sc. 3.

<sup>6</sup> Thayer, *op. cit. supra* note 5 at 66.

<sup>7</sup> 1 Seelman, *op. cit. supra* note 4.

<sup>8</sup> See Thayer, *op. cit. supra* note 6 at 76-84, citations to statutes.

<sup>9</sup> 53 C.J.S., *Libel and Slander*, §§ 8, 41 (1948): Libel *per se*—A publication respecting a person's reputation, trade, or business is libelous *per se* if it appears that the publication in and of itself, without the benefit of an innuendo, casts upon a person's character in such a manner as to expose him to ridicule, hatred, or contempt, or detrimentally affects him in his business, trade or profession.

<sup>10</sup> *Ibid.* Libel *per quod*—A publication which is not libelous on its face, but is  
(Continued on next page)

In libel per se, the plaintiff must allege in his petition charging libel, the words and phrases that are libelous in the publication. No proof of special damages is required. Damages are presumed as a matter of law. It is within the sole province of the court and not the jury to determine whether or not the publication is libelous per se. If the words are capable of an innocent construction, the court is so bound to hold.<sup>11</sup>

In libel per quod, the plaintiff must not only plead the extrinsic facts which give rise to the action for libel, but he must also allege and prove special damages. If a publication can, by extrinsic facts, or innuendo, be considered either non-libelous or libelous, the question may be submitted to the jury for determination.<sup>12</sup>

The difficulty that the plaintiff encounters when he brings an action for libel under a state statute can best be illustrated by a review of the following recent libel cases.

*The New York Times v. Sullivan*<sup>13</sup> is the leading case in a defamation action brought by the plaintiff who was an elected police commissioner of the City of Montgomery, Alabama against *The New York Times*. Basis for plaintiff's action was the publishing of an "editorial" advertisement which communicated false information, projected certain opinions, protested untrue abuses, and recited grievances which defamed the plaintiff. It was further alleged that the publication was made with reckless irresponsibility in that the defendant knew that the publication was false from information contained in their own files.

The third and a portion of the sixth paragraph of the publication were the basis of Commissioner Sullivan's claim of libel.

In Montgomery, Alabama, after students sang "My Country Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

\* \* \* \* \*

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for speeding, loitering and similar offenses. And now they have charged him with perjury—a felony under which they could imprison him for ten years.<sup>14</sup>

(Continued from preceding page)

alleged to be so by innuendo or extrinsic facts which is injurious to the plaintiff as described in libel per se above.

<sup>11</sup> *Ibid*; See also, *Nichols v. Item Publishers, Inc.*, 309 N.Y. 596, 132 N.E. 2d 860 at 862 (1956).

<sup>12</sup> *Ibid*; *Roth v. Atex Products, Inc.*, 35 Misc. 2d 136, 229 N.Y. 2d 916 (1962).

<sup>13</sup> *New York Times Co. v. Sullivan*, *supra* note 1.

<sup>14</sup> *Id.* at 714.

The newspaper article did not mention Commissioner Sullivan by name, but since he supervised the police department, he contended that the word "police" referred to him, thereby accusing him of "ringing" the campus with police and padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he further contended that since arrests are normally made by the police; the seven arrests of Dr. King, the other described acts of the Southern Violators, answering Dr. King's protests with "intimidation and violence" by bombing his home and assaulting his person and charging him with perjury, were accusations against the Montgomery police department, hence to him as Commissioner.<sup>15</sup>

The evidence at the trial substantiated plaintiff's claim that some of the statements contained in the publication were inaccurate and false. The Negro students who staged the demonstration on the state capitol steps sang the national anthem; the nine students were expelled by the state board of education, not for leading a demonstration, but for demanding service at a lunch counter in the Montgomery County Court House on another day; not the entire student body but most of it, had protested the expulsion, not by refusing to register, but by "boycotting" classes on a single day; and that nearly all the students returned the following semester. It was also brought out that the dining hall had not been padlocked at any time, but students who had not pre-registered or requested temporary meal tickets may have been barred. Police had been deployed near the campus in large numbers but at no time did they "ring" the campus, nor were they called in for aid in connection with the demonstration as the article implied.<sup>16</sup>

Dr. King had been arrested four times, not seven; three of the arrests took place before Commissioner Sullivan took office and the claim of assault was in connection with his arrest for loitering which took place years earlier. Although it was true Dr. King's house had been bombed twice while his family was inside, both events "antedated" Sullivan's term of office. The police had on those occasions made every effort to bring the guilty party to justice.<sup>17</sup>

The trial judge submitted the case to the jury under instructions that the statements in the article were "libelous per se" and were not privileged, therefore damages were presumed as a matter of law from the bare fact of the publication itself. In accord with the Alabama law, in a libelous statement per se, "falsity and malice are presumed . . .", therefore, general damages need not be alleged or proved but are presumed.<sup>18</sup> The trial court awarded plaintiff Sullivan damages of \$500,000,

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.* at 715.

<sup>18</sup> *Id.* at 716.

affirmed on appeal and affirmed by the Alabama Supreme Court. Due to the constitutional issues involved, the United States Supreme Court granted certiorari.

The United States Supreme Court reversed the judgment stating that the rule of law applied by the Alabama Court was “. . . constitutionally deficient for failure to provide the safeguards for freedom of speech and press that are required by the First and Fourteenth Amendments in a libel action brought about by a public official against critics of his official conduct.”<sup>19</sup> To support this decision the Supreme Court stated that the constitutional guarantees prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct “. . . unless he proves 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.”<sup>20</sup> Apparently the Supreme Court gave little weight to respondent’s argument that *The Times* had news items from prior occasions concerning events alleged in the “editorial.” Had they troubled themselves to peruse these articles, they could have easily ascertained that the “editorial” contained false material. This certainly would have sustained the Commissioner’s allegation that *The Times* reacted with recklessness and irresponsibility, hence libelous per se.

The United States Supreme Court held the Alabama Statute as unconstitutional, being inconsistent with the federal rule on the theory that the Constitution limits a state’s power to award damages for libel in actions brought by public officials against critics of their official conduct unless actual malice can be proved.

Alabama law only requires proof of actual malice for an award of punitive damages. Where general damages are concerned, malice is presumed. The Alabama rule is the general rule regarding libel actions, but by placing the press in an untouchable position regarding criticism of public officials, it leaves the plaintiff without a right to bring an action for injuries caused by false and defamatory publications.

License to criticize is one thing; but liberty without responsibility for wrongful use is quite another.<sup>21</sup>

The Alabama law does not permit a public officer to recover punitive damages in a libel action concerning his official conduct unless he has first made a written demand for public retraction and the defendant either fails or refuses to respond. Plaintiff Sullivan made such a demand and was refused. *The Times* did run a retraction on request of the Alabama Governor stating, however, that “. . . didn’t want anything published by *The Times* to be a reflection on the State of Ala-

<sup>19</sup> *Id.* at 728.

<sup>20</sup> *Id.* at 726.

<sup>21</sup> Thayer, *op. cit. supra* note 6 at 1.

bama . . ." <sup>22</sup> and that by the time the Governor had requested the retraction, *The Times* had learned more factual details concerning the "editorial" which by implication was an admission that all of the statements in the newspaper article were not true. Fair comment, not truth, was used as a defense by *The Times*, therefore, it is assumed that the newspaper had knowledge of the inaccurate statements in the article.

The United States Supreme Court, commenting on the privilege to criticize a public official's conduct, relied upon the decision in *Bridges v. California*,<sup>23</sup> which said in part:

It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.

A further substantiation of this principle was pointed out by referring to Mr. Justice Brandeis' concurring opinion in *Whitney v. California*,<sup>24</sup> in which he stated:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Interpreting these two cases in light of other previous cases which dealt with the First Amendment guarantees, The United States Supreme Court held that criticism on public issues should be ". . . uninhibited, robust, and wide open . . ." <sup>25</sup> even to the point of being ". . . vehement, caustic, and . . . unpleasantly sharp attacks on government and public officials." <sup>26</sup> Admitting that inaccurate statements could be made under the climate of free debate, The United States Supreme Court felt that protection of free expression outweighed any injury which might result to the plaintiff unless he can prove that the defamation or criticism was made with actual malice.

Malice, even as defined by the United States Supreme Court, is an elusive, abstract concept, difficult to prove and difficult to disprove. The requirement that malice be proved provides at best an evanescent protection for the plaintiff. It certainly does not place him on an equal basis in a trial where large syndicated newspapers employ expert libel attorneys with almost unlimited funds in which to continue their defense through the State court to the United States Supreme Court if necessary.<sup>27</sup>

<sup>22</sup> *New York Times Co. v. Sullivan*, *supra* note 1.

<sup>23</sup> 314 U.S. 252 at 270, 62 S.Ct. 190 at 197 (1941).

<sup>24</sup> 274 U.S. 357 at 375, 47 S.Ct. 641 at 648 (1927); *A. S. Abell Co. v. Kirby*, 277 Md. 267, 176 A.2d 340 (1961).

<sup>25</sup> *Id.* at 721.

<sup>26</sup> *Ibid.*

<sup>27</sup> Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 876 (1949).

Implied in the decision of *The Times* case, and intimidated by Mr. Justice Black's concurring opinion in which he said, "I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct,' but completely prohibit a State from exercising such power"<sup>28</sup> . . . is the concept that regardless of the grounds of malice as a right to recover damages in a libel action, the individual defendants have an absolute, unconditional, constitutional right to publish an article containing any criticisms whatsoever against government agencies and officials. Likewise, this theme was stated in the *City of Chicago v. Tribune Co.*,<sup>29</sup> ". . . no court of last resort in this country has ever held, or even suggested, that prosecution for libel on government have any place in the American system of jurisprudence."

The Supreme Court of Arizona reversed its Superior Court judgment awarding damages of \$154,000 to candidates for city office in a libel suit against the *Arizona Republic*,<sup>30</sup> a daily newspaper which printed statements which were aimed at creating the impression that if the plaintiff candidates were elected, the city would be opened to vice. The reversal was based upon the following:

- (1) Determination on whether a newspaper publication is libelous per se or per quod, the entire article must be considered, not only as to the exact language used, but in the light of its overall intent and meaning under all circumstances surrounding its publication;
- (2) If an occasion for a privileged communication exists, publication should be considered to have been made in the exercise of privilege and the burden then shifts to plaintiff to prove falsity and that the defendant was motivated by malice in fact in publishing the defamatory article;
- (3) When an article is published under a privileged occasion, malice cannot be inferred but must be proven;
- (4) Personal motive, such as newspaper's desire to defeat candidates for city offices, was not sufficient evidence of malice as would destroy privilege.

In *Ponder v. Cobb*,<sup>31</sup> The Supreme Court of North Carolina held ". . . a privileged occasion is an occasion when for the public good, and in the interest of society, one is freed from liability that would otherwise be imposed upon him by publication of defamatory matter." Mr.

<sup>28</sup> *New York Times Co. v. Sullivan*, *supra* note 1.

<sup>29</sup> 307 Ill. 595 at 607, 139 N.E. 86 at 90 (1923).

<sup>30</sup> *Phoenix Newspapers, Inc. v. Choisser*, 82 Ariz. 271, 312 P. 2d 150 (1957).

<sup>31</sup> 257 N.C. 281, 126 S.E. 2d 67 (1962).



Justice Black in *The Times* case also recognized that the rules set forth in the majority opinion had no application where a public official's private life was under attack, or in matters regarding private citizens. In *Conkwright v. Globe News Publishing Co.*,<sup>32</sup> the opposite view was held. Here the newspaper article stated that the plaintiff, who was coaching the Houston Receivers, "... shouldn't be coaching anything . . . ." This was held to be privileged on the basis that the comments were reasonable and the criticism concerned matters of *public interest*. Therefore, unless the plaintiff could prove the statements were made with malice he could not recover for libel.

Pending final adjudication by the United States Supreme Court of *The Times* case, a jury in New Hampshire Superior Court returned a verdict in favor of a county official in a libel case,<sup>33</sup> against a newspaper columnist who allegedly imputed "mismanagement and speculation." Plaintiff and county commissioners were in charge of county ski recreation facilities in New Hampshire. The New Hampshire Supreme Court affirmed the award, finding that *The Times'* case which had since been decided, no bar.

The United States Supreme Court, relying on its decision in *The Times* case, reversed the New Hampshire Supreme Court and granted petitioner a retrial on the basis that respondent failed to prove that the newspaper column was "... of and concerning him" so as to make out an action for libel.<sup>34</sup>

Mr. Justice Brennan stated in the opinion that the "... column on its face contains no clearly actionable statement."<sup>35</sup> The respondent, in order to recover, must prove by extrinsic facts that the innuendo implied in the newspaper column was directed at him and that the words were in fact defamatory, causing injury to his reputation and/or profession. Mr. Justice Brennan expressed his view that, "What happened to all the money last year? And every other year?"<sup>36</sup> could be taken

<sup>32</sup> 398 S.W. 2d 385 (1965).

<sup>33</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669 at 672 (1966). In *Garrison v. State of Louisiana*, 378 U.S. 64, 85 S.Ct. 209 (1964), the U.S. Supreme Court held that in the absence of sufficient evidence that the attack focused on the plaintiff, an otherwise impersonal attack on governmental operations will not establish a cause of action for libel.

<sup>34</sup> *Rosenblatt v. Baer*, *supra* note 33 at 673.

1. Mr. Justice Brennan held that in order for the Plaintiff to recover damages, the Plaintiff must show that the claimed implication in the column was made specifically "... of and concerning him" which *New York Times v. Sullivan*, *supra* note 1, established as precedent. Also the trial court erred in its instructions which permitted him to recover on the mere fact that he was one of a small group acting for an arm of the government, not all of whom were implicated, but all were cast with suspicion.

2. Instructions to the jury which permitted them to find that negligent misstatements of fact would defeat privilege of a newspaper reporter when the article criticized a public official's conduct concerning his office were erroneous.

<sup>35</sup> *Id.* at 672.

<sup>36</sup> *Ibid*; Decision sets forth the pertinent parts of the published column.

to imply "speculation," or they could also be read, in "context" merely to laud the new administration for doing an excellent job.<sup>37</sup>

During the course of the trial, respondent had offered into evidence, extrinsic proofs to establish the connection between the article and himself, and to supply information that would justify his allegations that the column had a defamatory meaning. "These proofs were that the column greatly exaggerated any improvement under the new regime . . . his witnesses testified they read the column as imputing mismanagement and speculation during respondent's tenure."<sup>38</sup>

Based on that imputation, the respondent offered two theories for recovery.

1) If the jury found that the column cast suspicion indiscriminately on the relatively few members of the former management group, regardless of whether or not it was found that the implication of malfeasance was specifically at or concerned plaintiff, an award of damages would be proper. New Hampshire law allowed plaintiff recovery under these conditions, and

2) That the article, when read, referred specifically to plaintiff as "the man in charge" at the club and who was responsible for its "financial affairs." Several witnesses testified to support this allegation.<sup>39</sup>

Mr. Justice Brennan disposed of plaintiff's first contention by reiterating the opinion stated in *The Times* case. He stated that the words ". . . 'of and concerning him' . . ." were rejected as being inconsistent with the First and Fourteenth Amendments and the proposition followed by the Alabama court, which was: in measuring the performance or lack of performance of groups, criticism or compliment is usually attached to the officer or official in charge of the group. To allow the jury to connect the statements made in the publication with the plaintiff on the above presumption alone was to ". . . invite the spectre of prosecutions for libel on government, which the constitution does not tolerate in any form." In order to support a cause of action in libel, evidence must be presented to prove that the attack was "specifically directed" at the plaintiff.<sup>40</sup> Were the statements in the article at issue, a definite direct attack upon the Commissioners and Plaintiff, or if the article stated that the entire club management were dishonest, the United States Supreme Court might allow recovery by any member of the group although no decision was made as to this point.

Plaintiff's second theory was also rejected by Mr. Justice Brennan as the article did not specifically direct its impact upon him, but basically discusses the method of operations of the local government.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Id.* at 673.

<sup>40</sup> *Ibid.*

The main issue involved in the case was the determination of whether or not the Plaintiff was a public official under the definition set forth in *The Times* case. The U. S. Supreme Court ruled that he was, the jury instructions therefore, were erroneous, and privilege is given to critics conditioned upon defeasance only upon plaintiff showing reckless disregard for the truth. Mere showing of negligence is not enough to defeat this privilege.

In *Time, Inc. v. Hill*,<sup>41</sup> the New York Court of Appeals affirmed a verdict in favor of plaintiff Hill for \$30,000 compensatory damages against the publishers of *Life* magazine on allegations that they falsely published a new play representing the experience suffered by plaintiff and his family. The play, *The Desperate Hours*, was fictional and did not represent the true account of the events that took place on September 11 and 12, 1952, but the magazine account implied that the play was a re-enactment of the Hill experience and used the family name.

The United States Supreme Court, in a 5-4 decision held that a play which is connected to an actual experience or incident is sufficient to label it as public interest, thereby bringing the article within the ". . . scope and protection afforded by constitutional guaranties of speech and press."<sup>42</sup> Although the action was brought as an invasion of privacy, the Court equated this to a libel action, since both involve character or reputation and both depend upon exposure to the public view.

Mr. Justice Brennan stated in the opinion that a verdict for libel based upon matter of public interest would not be sustained except on a finding of ". . . knowing or reckless falsity in publication of the article, and since the jury had not been clearly instructed to that effect . . ." the judgment was set aside and the case remanded.<sup>43</sup> The United States Supreme Court based their opinion upon *New York Times v. Sullivan*.<sup>44</sup>

Justices Black and Douglas concurred in the result of the *Time, Inc.* case, as it was in accord with the views held in *The Times* case, but they stated that the protections of speech and press are too constricted by the current view of the application of the balancing or weighing doctrine to our constitutional freedoms. This permits liability to result from a jury determination of knowing and reckless falsity.<sup>45</sup> They believe that *The Times* view was too narrow, and thus it would be only a matter of time before that doctrine would ". . . pass away as its application to

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<sup>41</sup> 385 U.S. 391, 87 S.Ct. 534 (1967).

<sup>42</sup> *Id.* at 535.

<sup>43</sup> *Id.* at 547.

<sup>44</sup> *Id.* at 541-542.

<sup>45</sup> *Id.* at 547; See also *Garrison v. State of Louisiana*, 85 S.Ct. 209 at 219, 379 U.S. 82 (1964).

new cases proves its inadequacy to protect freedom of the press from destruction in libel cases."<sup>46</sup>

Mr. Justice Black stated that "Malicious and reckless disregard of the truth can never serve as effective substitutes for these First Amendment words: ' . . . make no law . . . abridging the freedom of speech, or the press . . . '"<sup>47</sup> By equating the Sixth Amendment guarantee of the right to counsel, which by modern interpretation has been held to be inflexible and unalterable to the First Amendment guarantees, Mr. Justice Black feels that in the foreseeable future, freedom of speech and press will be accorded the same protection, despite inaccuracies or errors in publication.

By applying *The Times* to the *Time, Inc.* case, the United States Supreme Court failed to distinguish the one major difference which underlies them, that the plaintiff in one case was a public official whereas the plaintiff in the other was a private citizen. It is also apparent that the decision in *The Times* case, of which the opinion went to great lengths to point out, was clearly centered upon the fact that the plaintiff was a public figure thereby automatically losing his right to complain of any defamatory remarks directed towards him in his official capacity. By failing to characterize the two distinctly different types of plaintiffs, it appears that the United States Supreme Court will apply its privilege doctrine whenever a news media is involved. It matters not whether a plaintiff is a public figure or a private citizen, or that his only appearance in the public limelight was during an unwilling and unfortunate incident which thrust him into the news. The Court also dispensed with plaintiff's argument as to the commercial aspect of a play, magazine and book which is quite different from an ordinary news article. It seems that there should be different consideration given to a newspaper publishing what it deems to be *news* and a magazine that editorially advertises a play or book for its own interests and directed more towards a *commercial* aspect than in furnishing news to the general public.

The United States Supreme Court, in striking down state statutes as being inconsistent with the guaranties of the First Amendment, are taking away the states' right to determine by their own legal process and jury trial, whether or not a publication made within their own jurisdiction, is libelous or not.

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<sup>46</sup> *Time Inc. v. Hill*, *supra* note 41 at 547.

<sup>47</sup> *Ibid.*

### Defenses

Some of the defenses available to the defendant in a libel action are "fair comment,"<sup>48</sup> "absolute privilege,"<sup>49</sup> "qualified privilege,"<sup>50</sup> and "truth."<sup>51</sup>

The defense of "fair comment," recognized by the courts in libel, refers to a right or privilege which is accorded to an author or newspaper to comment in good faith, fairly, and without malice or ill will upon matters of public interest. It generally amounts to justifiable opinion, based upon facts, about a person's work rather than his private life. It may be said to be akin to the "reasonable man" approach. Justification for this defense is said to be based on the interest of free discussion on matters of social interest in order to maintain a free and honest government.<sup>52</sup>

This defense was intended to provide an equilibrium between freedom of speech and press, and protection of individuals from defamatory abuse which may injure their reputation, profession, or social continuity. Ordinarily, it does not provide a privilege for misstatement of facts with these exceptions: if the misstatement is "immaterial,"<sup>53</sup> based upon "true facts,"<sup>54</sup> is "substantially" true,<sup>55</sup> of "public interest,"<sup>56</sup> involves "public" officers,<sup>57</sup> or is conditionally privileged based on "probable cause."<sup>58</sup> Fair comment extends to all members of the public, and must not be made with ill will or malice. The trend today is to expand this doctrine and to treat criticism against the government and any public official relating to political issues as an "absolute privilege" in order to give the press an "unbridled" freedom of expression.<sup>59</sup> "Privilege" exists in areas of public concern published for general information and malice must be proved in order for the plaintiff to recover.<sup>60</sup>

<sup>48</sup> Street, *Law of Torts*, 331 (2nd ed. 1959); Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev., 876 (1949). Thayer, *Legal Control of the Press*, 366-367 (2d Ed. 1950). *Fisher v. Washington Post Co.*, 212 A. 2d 335, 337 (1965); *A. S. Abell Co. v. Kirby*, 227 Md. 267, 176 A. 2d 340 (1962).

<sup>49</sup> Prosser, *op. cit. supra* note 3 at 795-805 (1964); *Phoenix Newspapers, Inc. v. Choisser*, 82 Ariz. 271, 312 P. 2d 150 (1957).

<sup>50</sup> *Id.* at 805-823.

<sup>51</sup> *Id.* at 823-828; *Mitchell v. Peoria Journal-Star Inc.*, 76 Ill. App. 2d 154, 221 N.E. 2d 516 (1966).

<sup>52</sup> Noel, *op. cit. supra* note 27 at 878 (1949); *Roth v. U.S.*, 354 U.S. 501, 77 S.Ct. 1304 (1957).

<sup>53</sup> Thayer, *op. cit. supra* note 5 at 330-338 (1950); *A. S. Abell Co. v. Kirby*, *supra* note 24.

<sup>54</sup> *Id.* at 369 (1950).

<sup>55</sup> Prosser, *op. cit. supra* note 3 at 825.

<sup>56</sup> Thayer, *op. cit. supra* note 5 at 363-396 (1950).

<sup>57</sup> *Ibid.*

<sup>58</sup> *Owens v. Graetzel*, 149 Md. 689, 132 A. 265 at 267 (1926).

<sup>59</sup> *The New York Times Co. v. Sullivan*, *supra* note 1; *Mitchell v. Peoria Journal-Star Inc.*, *supra* note 51 at 518.

<sup>60</sup> *Ibid.*

"Privilege" under the fair comment doctrine has been extended to critics of plays, art, books, and other literary works. In *Fisher v. Washington Post*,<sup>61</sup> the Court of Appeals in the District of Columbia held that "so long as comment is speaker's actual opinion based on fact about matter of public interest they are protected unless . . . grounded in malice or go beyond discussion of public works or acts if subject of opinion."

Absolute privilege involves conduct which may otherwise be actionable, but is blessed with immunity in instances where the social interest to be served is of the utmost importance. Under this doctrine, a defendant would escape liability without considering his conduct, motive, purpose, or interest. Absolute privilege has been extended to executive communications, judicial and legislature proceedings, consent of the plaintiff, husband and wife and political broadcasts.<sup>62</sup>

The United States Supreme Court has by its recent decisions, particularly in *The Times* case, extended the outer perimeter of this doctrine, by implication to include *any* public official within the scope of his official duties and to public interests which might be served. Although *The Times* case does not project this doctrine to private life, reputation, or character; private and public life are so intermixed as to make them for the most part so homogeneous that they are practically inseparable.

A qualified privilege, sometimes referred to as "conditional," or "defeasible" has been accorded to publishers in the advancement of their own interests, interest of others, common interests, communications to one who may act in the public interest, and reports of public proceedings.<sup>63</sup> The interest to be served is of a lesser degree than that found in absolute privilege, but it is justified because the information presented is beneficial to the general public.

Truth at common law, was no defense to criminal libel, even though the victim of a true but defamatory publication hadn't actually suffered harm to his reputation by the libel. The defamer was still punishable on the theory that this remedy would prevent a breach of the peace. In essence, it was felt that a defamatory statement could possibly enrage the victim so as to cause him to do violence to the defamer.<sup>64</sup>

Truth as a defense in a civil libel action exists in most state constitutions or statutes today under the term justification.<sup>65</sup> If the publication is made in good faith and for justifiable ends, it is a complete defense. Although not true in its early application, it is generally held

<sup>61</sup> *Fisher v. The Washington Post Co.*, 212 A. 2d 335 (D.C. 1965).

<sup>62</sup> Prosser, *op. cit. supra* note 3 at 795-805 (1964).

<sup>63</sup> *Id.* at 805-823; see also *Roth v. U.S.*, *supra* note 52 at 1311.

<sup>64</sup> *Garrison v. State of Louisiana*, *supra* note 33.

<sup>65</sup> *Seelman, op. cit. supra* note 4 at 214.

under modern interpretation that the publication need only be substantially correct in order to constitute a defense.

Prior to *The Times* and *Garrison*<sup>66</sup> cases, the comment or criticism had to be fair, without malice, and made in good faith; and the privilege did not embody the right to publish false facts, or to falsely attack a public official so as to impute to him acts of malfeasance or bad conduct in office. In *Garrison*, the United States Supreme Court expanded the absolute privilege doctrine accorded to public officials regarding their official conduct in civil libel actions to include criminal libel actions.<sup>67</sup> In declaring the Louisiana Criminal Libel Statute unconstitutional, as being inconsistent with the First and Fourteenth Amendment, the Court stated that provisions which permit punishment for true statements made with "actual malice" or false statements made with "ill will" against public officials conduct concerning his office do not meet the tests established in *The Times* case.<sup>68</sup> The opinion also set forth the rule that where criticism of public officials is concerned, criminal libel statutes must not serve separate and distinct interests from those which exist in a civil libel action, i.e., the constitutional safeguards of free speech and press must be guarded to provide uninhibited debate upon issues of public interest.<sup>69</sup> *Garrison* grants Federal officers an absolute privilege to make defamatory statements for publication in the press against public officials, official conduct, even though the statements contain "malice in the form of ill will," falsity, or even hatred as long as the Federal officer was acting within the scope of his employment and he honestly believed in the statements.<sup>70</sup>

Despite the United States Supreme Court's limitation that the Constitutional protection does not include those false statements which are made with knowledge that there exists a high degree of probability that they are false, or a lie knowingly and deliberately published, or a false statement made with reckless disregard of the truth; the *Garrison* decision seems to carry *The Times* definition of malice one step further by granting immunity for ill will when attributed to malice.

### Conclusion

Applying the principles outlined in the *New York Times* case, The United States Supreme Court has established by judicial decision, a privilege exists by virtue of our Constitution whereby a person has an absolute right to publish any statement concerning public officials or matters of public interest without liability under the protective cloak

<sup>66</sup> Noel, *op. cit. supra* note 6 at 876-877.

<sup>67</sup> *Garrison v. State of Louisiana*, *supra* note 33 at 212.

<sup>68</sup> *Id.* at 215-216.

<sup>69</sup> *Id.* at 212.

<sup>70</sup> *Id.* at 215; See also *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335 (1959); *The New York Times Co. v. Sullivan*, *supra* note 1.

of free speech and press. This immunization applies equally to both civil and criminal libel actions. Despite the wording in the opinions which seem to limit this absolute privilege to criticism of public officials and their official conduct, underlying principles can be found, especially in the concurring opinion, which does not so limit this principle. A review of cases since *The Times* was decided indicates that this subtly has been broadly applied to practically every case that has come up before the United States Supreme Court since *The Times* decision was handed down. The classical treatment of malice by our courts in libel actions has been discarded. Damages can no longer be presumed in libel per se. Actual malice must not only be proved, but the plaintiff must show that the defamer made the false statements contained in the publication with the knowledge that they were in fact untrue, or that they were made with utter disregard as to their falsity. An instruction to the jury which allows recovery on a showing that the defendant intended to inflict harm is not enough. A definition of malice which includes ill will, evil motive, or intention to injure is constitutionally deficient where criticism of public affairs and official conduct is involved.

In *The Times* case the United States Supreme Court failed to establish just how far down on the organization chart the privilege to criticize extends, but in *Rosenblatt* the United States Supreme Court expanded the traditional view in which only important high ranking officials were privileged to include at the very least, those officials who have substantial responsibility, or appear to the public to have control over the conduct and affairs of government. Implied from recent decisions is that immunity will be accorded to all who direct their criticism to even a mere shadow of public or general social interest.

Libel involves important social values in which society has a right and interest to protect in order to prevent punishing unwarranted attacks upon an individual's reputation, employment, or social status. It is time for our legal guardians to reconsider the individual's right for which the Constitution was also designed. Is it wrong to limit a newspaper's criticism of an individual to honest, ethical and reasonable bounds? If our courts have restricted a newspaper from publishing biased and prejudicial articles about an individual who is about to be tried by a jury for an alleged legal wrong which he has committed on the basis that this amounts to a pre-conviction; can we apply a lesser standard to an individual who is defamed unjustly. There is no question of the power of a newspaper in its ability to persuade the general reader. To the average reader a published article becomes fact by virtue of the publication. It is virtually impossible in our daily rush through life to verify everything that we read.

Where do you draw the line between public and private life? Is it illogical to assume that an individual who is unjustly injured in his public life is also injured in his personal affairs?



The fact that we are a nation of free people and given wide latitude in expressing opinions, diversity of actions, and promulgating controversial ideas with relative freedom, a limitation must be established. This freedom, which stems from our Constitution, can only exist as long as we recognize that there are responsibilities attached to every right. Our Supreme Court has indicated in recent decisions which cases libel actions will not lie. By one stroke of the pen the United States Supreme Court has all but wiped out responsibility of an individual to exercise due care when expressing his views. Although the opinions of these recent cases have intimated a few specific instances where a libel action would be constitutionally justified, this is mere speculation since no case has been submitted for a judicial decision. Plaintiffs, relying on the principles in *The Times* case, have amended their petitions to comply with these principles only to have their case reversed, remanded, or the verdict set aside due to technicalities and difficulties in proving that defendant acted with knowledge of the falsity or in utter reckless disregard of the truth or falsity.

Steps must be taken to allow legal redress for libelous injuries before our judicial decisions completely submerge this tort. Any solution should include fairness, honesty, and actions free of substantial negligence.

Unblemished reputation is our most cherished treasure, without this we have nothing!