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NEW YORK TIMES RULE EXTENDED TO CRIMINAL LIBEL

Defendant, a district attorney, issued a statement to the press accusing eight parish judges of laziness, inefficiency in office, taking excessive vacations, and hindering his enforcement of the state's vice laws. Louisiana convicted defendant[1] of a violation of a Criminal Defamation Statute,[2] rejecting his argument that the statute violated the first amendment guarantee of free speech. On appeal to the United States Supreme Court, *held*: The first amendment is violated by a state statute which permits punishment of (1) truthful criticism of public officials, or (2) false statements about public officials made with ill will, but without knowledge of the falsity or not in reckless disregard of their truth or falsity. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

Examination of the history of criminal libel reveals a lack of contemporary justification for its retention. At common law, the function of criminal libel was to punish speech which could injure the state by causing breach of peace.[3] Because a true statement may cause a breach of peace as well as a false statement, truth was no defense to criminal libel prosecutions.[4] The United States Supreme Court has only once considered a criminal libel statute prior to the principal case.[5] However, the recent landmark decision of *New York Times Co. v. Sullivan*,[6] held that a public official may recover civil damages "for a defamatory falsehood relating to his official conduct" only if he "proves that the statement was made with 'actual malice'—that is, with knowledge that

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[1] State v. Garrison, 244 La. 787, 154 So. 2d 400 (1963).

[2] LA. REV. STAT. §§ 14:47-49 (1951).

§ 47. Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

(3) To injure any person . . . in his . . . business or occupation.

§ 48. Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

Where such a publication or expression is true, actual malice must be proved in order to convict the offender.

§ 49. A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false . . . :

(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

(a) The conduct of a person in respect to public affairs . . . .

[3] Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295, 301 (1958).

[4] *Ibid.*

[5] Beauharnais v. Illinois, 343 U.S. 250 (1952). The Court in *Beauharnais* restricted itself to a consideration of the scope of the statute, which was classified as a group defamation statute, and accepted unquestioningly the idea that criminal libel raised no constitutional issues

[6] 376 U.S. 254 (1964)

it was false or with reckless disregard of whether it was false or not."[7] The rationale of the *New York Times* rule as stated in the principal case is that criticism of public officials is the "essence of self-government."[8] The "self-government" rationale of the principal case provides a hitherto-missing basis for defining "public official" and "official conduct."

In the principal case the Court reasoned that the historical justification for criminal libel is no longer valid.[9] The Court balanced the need for protection of society from breach of peace against the first amendment guarantee of free expression, and concluded that a criminal libel statute—to be constitutional under the first amendment—must meet a "clear and present danger of" breach of peace test. No "clear and present danger" test was written into the statute in the principal case. Furthermore, the Louisiana Supreme Court did not apply this test in construing the statute. Consequently, the statute was unconstitutional on its face and as interpreted.[10] The Court went on to consider the fact that the conviction was based upon a libel of public officials, and examined it in view of *New York Times*. The *New York Times* rule was clarified by the Court in the principal case to require a balancing of the public interest in knowing the truth about its public officials against the official's private interest in protection of reputation.[11] The public interest in truth was found to be superior, and the privilege to publish truth is absolute without regard to motivation. However, the Court found that the private interest in protection of reputation increased when the criticism was false, and the motives of the speaker were defamatory.[12] Consequently, the Court found that the private interest was superior to that of the public interest when the information was false and the speaker knew of, or spoke in reckless

[7] *Id.* at 279-80

[8] 379 U.S. at 75

[9] "[U]nder modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation . . . ." *Id.* at 69. (Quoting Emmerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 924 (1963).

[10] But Louisiana's rejection of the clear and present danger standard as irrelevant to the application of its statute . . . coupled with the absence of any limitation in the statute itself to speech calculated to prevent breaches of the peace, leads us to conclude that the Louisiana statute is not this sort of narrowly drawn statute. 379 U.S. at 70.

[11] [W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth. *Id.* at 73.

[12] The tenor of the Court's discussion was centered around castigation of the deliberate lie. *Id.* at 74-75. No other situation where the private interest would be clearly superior was hypothecated.

disregard of, its veracity.[13] Justices Black, Douglas, and Goldberg argued in concurring opinions that the first amendment affords an absolute privilege to criticize official conduct. Justice Douglas attacked the major loophole in libel of public officials—the meaning of "reckless disregard."[14] He feared that a jury will be unable to apply the standard of "reckless disregard" in the specific and limited manner intended by the majority,[15] and that the application of criminal libel statutes will not be successfully limited to specialized cases.[16]

The principal case poses anew the question, Who is a public official?[17] The solution must be applicable on both a horizontal and vertical plane. Horizontally, the problem is whether figures from such areas as business, labor, and entertainment are within the definition. For example, is a baseball player[18] or newspaper columnist[19] a public official? Vertically, the problem is whether lower-rank officials and employees are within the definition; is a policeman[20] a public official?

Analysis of the Court's use of a conditional rule to protect criticism of public officials suggests that the definition of a public official may be found in the Court's rationale that criticism of public officials is the essence of self-government. The significance of this rationale is that the privilege should be applicable only when there exists a reason why the public should know the information. Coupling this rationale with the Court's recognition of the public-private distinction indicates that, definitionally, a public official should be someone involved in the gov-

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[13] "Hence the knowingly false statement and the false statement made with reckless disregard, do not enjoy constitutional protection." *Id.* at 75.

[14] "If 'reckless disregard of the truth' is the basis of seditious libel, that nebulous standard could be easily met." *Id.* at 81.

[15] "Unless speech is so brigaded with overt acts of that kind there is nothing that may be punished; and no semblance of such a case is made out here." *Id.* at 82.

[16] "If malice is all that is needed, inferences from facts as found by the jury will easily oblige." *Id.* at 81.

[17] This question is particularly relevant because of the recent case of Baer v. Rosenblatt, 203 A.2d 773 (N.H. 1964), *cert. granted*, 380 U.S. 941 (1965), in which counsel are directed to argue the question whether, at the time of respondent's employment as supervisor of a county recreation area, he was a "public official."

[18] *E.g.*, Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), in which the court refused to extend the *New York Times* decision to public figures other than public officials.

[19] *E.g.*, Pearson v. Fairbanks Publishing Co., 33 U.S.L. WEEK 2307 (Alaska Super. Ct., 4th Jud. Dist., Nov. 25, 1964), in which it was held that Drew Pearson was a public official because the *New York Times* decision also applies to public criticizers.

[20] *E.g.*, Tucker v. Kilgore, 388 S.W.2d 112 (Ky. 1965). The court refused to apply *New York Times* because the defamatory statements were not directed at the policeman's official conduct as a policeman, but at his fitness and character as a man. The court stated: "The freedom of 'uninhibited, robust, and wide-open' debate on public issues guaranteed by the 1st Amendment cannot sensibly be turned into an open season to shoot down the good name of any man who happens to be a public servant." *Id.* at 116.

erning process.[21] Self-government would not be advanced by expanding the term to include non-governmental public figures.

The "vertical" problem of deciding which lower-rank officials and employees within government are public officials may also be answered by application of the Court's rationale. A person's job title should not be determinative of whether he is a public official but rather the degree of his involvement in the governing process. As the involvement of a person in the governing process increases so also does his effect upon self-government increase, in turn increasing the public interest in his activities and the applicability of the *Garrison* privilege.

Two problems remain to be resolved. One is posed by the involvement in the governing process of private figures such as lobbyists and newspaper reporters. The rationale behind the proposed rule will frequently require that such private figures be treated as public officials.[22] The second problem is posed by individuals on government payrolls who are not part of the governing process, *e.g.*, football coach at a state-supported university[23] or the supervisor of a county recreation area.[24] State courts have evolved immunity tests[25] in the analogous area of torts by public employees which might be applied to solve the problem of which government employees are public officials.[26] Dean Prosser considers these tests to be cumbersome and unworkable.[27] They are equally unsatisfactory in the context of the rationale of the principal case, that criticism of public officials is the essence of self-

[21] *But see* Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 592 (1964), where the author argues that the first amendment should protect discussion on all matters involving some degree of "public participation." This proposal seems to suffer from undue generality, and ignores the interests balanced by the Court in *New York Times* and *Garrison*.

[22] This would justify the Alaska court's treatment of Drew Pearson as a "public official." See note 19 *supra*.

[23] Butts v. Curtis Publishing Co., 242 F. Supp. 390 (N.D. Ga. 1965), in which a football coach was held not to be a public official. "To hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the 'public official' designation beyond that contemplated by . . . New York Times Company v. Sullivan. . . ." *Id.* at 394.

[24] Baer v. Rosenblatt, 203 A.2d 773 (N.H. 1964), *cert. granted*, 380 U.S. 941 (1965).

[25] The majority rule is that public employees are liable for torts only where the act is done maliciously, or for an improper purpose. PROSSER, TORTS § 126, at 1016 (3d ed. 1964). See generally Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937). The minority rule is that public employees are liable for torts committed while acting in a ministerial capacity but not while acting in a discretionary capacity. PROSSER, *supra* at 1015.

[26] Some states also have statutes which attempt to define public official. *E.g.*, WASH. REV. CODE § 42.22.020 (1961). In Butts v. Curtis Publishing Co., 242 F. Supp. 390 (N.D. Ga. 1965), a similar Georgia statute was before the court but it was found that a football coach was not within its scope. However, the court indicated that, if a football coach had been within the statutory defintion of public official, *New York Times* would have applied. *Id.* at 393-94.

[27] PROSSER, *op. cit. supra* note 25, at 1015-19.

government. The proposal that *Barr v. Matteo*,[28] which granted absolute immunity from defamation actions to all federal personnel acting within the "outer perimeter" of their "line of duty," be used as the definition of public officials is subject to the same criticism. Rather than striving for definitional perfection (with its consequent rigidity), the Court should simply define a "public official" as someone within the governing process and leave the definition of "governing process" to case-law development.

New York Times left the unanswered question of what constitutes official conduct. The Louisiana Supreme Court found the defamation in the principal case to be purely a private libel.[29] In reversing, the United States Supreme Court held that the statements of the district attorney constituted criticism of the official conduct of the judges, and that injury to private reputation was not relevant when the criticism is directed toward official conduct. The Court indicated that few statements would not bear in some way on one's official conduct: ". . . anything which might touch on an official's fitness for office is relevant."[30] The privilege thus protects far more than just discussion of "the official conduct of public officials."

The Court's treatment in the principal case of what constitutes official conduct is in accord with the rationale of the privilege. The concern is with advancing self-government by encouraging free expression, which would not be promoted by a rigid definition of official conduct. The effect of this approach awaits development. Problems of official conduct should be resolved by considering the position of the person who is the object of the criticism, and the relationship of the criticized conduct to his fitness for that position.

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[28] 360 U.S. 564 (1959).
[29] State v. Garrison, 244 La. 787, 834-35, 154 So. 2d 400, 417-18 (1963).
[30] 379 U.S. at 77.