

1965

## Constitutional Law - Freedom of Speech and of the Press - Criminal Liability for Criticism of Public Officers

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### Recommended Citation

Gerard B. Rickey, Note, *Constitutional Law - Freedom of Speech and of the Press - Criminal Liability for Criticism of Public Officers*, 19 Sw L.J. 399 (1965)  
<https://scholar.smu.edu/smulr/vol19/iss2/12>

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#### IV. CONCLUSION

The court in *Weingarten* correctly applied the Texas law. The problem with this case, however, is not the correctness of the decision, but the almost impossible burden it places on a tenant trying to protect his exclusive location when dealing with a developer who works through horizontally aligned multiple corporations. The use of multiple corporations in real estate developments provides the developer with substantial economic benefits, and restrictive covenants in shopping center leases allow a tenant an advantageous exclusive location. Under the tax law, however, the benefits cannot be realized unless each corporation is a separate and distinct business entity, while the Texas antitrust law will not allow uniform restriction of a development unless each corporation attempting to restrict its own land has a property interest in the land leased. It appears that both reject horizontal incorporation. The Commissioner disapproves of separate corporations organized to develop individual sections of a subdivision, and the Texas antitrust law refuses to permit corporations organized in this manner to restrict the entire subdivision.

A method through which it might be possible for both the developer and the tenant to obtain the desired advantages would be to have the developer avoid horizontal incorporation as was used in *Weingarten*, and organize his corporations on a *vertical* basis, leaving title to the entire subdivision in one corporation. This would allow complete restriction of the subdivision by the title corporation,<sup>71</sup> while at the same time the vertical pattern of incorporation with the divisions made along functional business lines would apparently allow the developer the valuable tax advantages made available by multiple incorporation.

*Don E. Williams*

## Constitutional Law—Freedom of Speech and of the Press—Criminal Liability for Criticism of Public Officers

### I. BACKGROUND

At common law the cost for speaking one's mind too freely could

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<sup>71</sup> The title corporation should perform some function other than holding title, because title holding is not considered a valid business purpose for a separate corporation. See *Esrenco Truck Co.*, 22 CCH Tax Ct. Mem. 287 (1963).

run high. Truth was no defense in a libel action.<sup>1</sup> Furthermore, if an unlucky defendant in seventeenth century England defamed a public official, the law was even more harsh, for the infamous Star Chamber held libel "against a magistrate or other public persons an even greater offence."<sup>2</sup>

The United States flirted briefly with this approach in the Sedition Act of 1798<sup>3</sup> which punished any false, scandalous and malicious writing against the federal government. Predictably, the law brought a storm of protest and stirred some of the nation's most famous phrase-makers to take up their pens against it.<sup>4</sup>

Today, as a result of two recent Supreme Court decisions,<sup>5</sup> American law has come around a full 180 degrees from the Sedition Act and made criticism of public officers one of the safest of pastimes. Previous case law gave only tangential consideration to libel of public officers. For instance, in one decision the Court declared, "When statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."<sup>6</sup> The Court did not deem it necessary to decide what remedy did, in fact, exist; and, as it later pointed out,<sup>7</sup> none can be implied from that case.<sup>8</sup> Numerous decisions have contained general statements proclaiming that libel is not constitutionally protected speech.<sup>9</sup> None of these cases dealt with libel against public officials, and it was on this ground that they were distinguished in the case of *New York Times Co. v. Sullivan*.<sup>10</sup> The *Times* case was the Court's first direct confrontation with the question of liability for statements directed against public officials. The Court felt that it wrote on a "clean slate" and was "compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law."<sup>11</sup> Thus, the

<sup>1</sup> Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U.L. Rev. 1, 5 (1964).

<sup>2</sup> "The Case de Libellis Famosis," 3 Coke 254 (1826 ed.), 77 Eng. Rep. 250 (Star Chamber 1606).

<sup>3</sup> Ch. 74, § 2, 1 Stat. 596 (1798).

<sup>4</sup> See Madison's Address, January 23, 1799, reproduced in *Garrison v. Louisiana*, 379 U.S. 64, 83-88 (1964).

<sup>5</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

<sup>6</sup> *Pennekamp v. Florida*, 328 U.S. 331, 348-49 (1946).

<sup>7</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>8</sup> *Pennekamp v. Florida*, 328 U.S. 331 (1946).

<sup>9</sup> *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48 (1961); *Roth v. United States*, 354 U.S. 476, 486-87 (1957); *Pennekamp v. Florida*, 328 U.S. 331, 348-49 (1946); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Near v. Minnesota*, 283 U.S. 697, 715 (1931). In *Beauharnais v. Illinois*, for example, the Court said, "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts to consider the phrase clear and present danger." 343 U.S. 250, 266 (1952).

<sup>10</sup> 376 U.S. 254, 269 (1964).

<sup>11</sup> *Ibid.*

Court held that the state cannot arbitrarily denominate certain statements directed against public officials as "libelous" and thereby attach consequences to their utterance free of first amendment limitation.<sup>12</sup> Having decided that defamation of public officials is to some degree constitutionally protected, the essential question becomes the scope of this protection.

## II. NEW YORK TIMES RULE

When the Supreme Court stepped into this seldom-litigated area,<sup>13</sup> it made a far-reaching decision affecting not only the future rights of public officers but also the law as it existed in many states. *New York Times Co. v. Sullivan*<sup>14</sup> involved a civil libel action which arose out of what was described as an "acute and highly emotional"<sup>15</sup> clash between pro- and anti-segregation forces in Montgomery, Alabama. The libelous material appeared in a *New York Times* advertisement soliciting funds for the Committee to Defend Martin Luther King, Jr. The advertisement charged that in Montgomery "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College campus" and that the college dining hall "was padlocked in an attempt to starve them (Negro students) into submission."<sup>16</sup> At the trial it was proved that these statements were either false or not entirely accurate. Police Commissioner Sullivan convinced the jury that they would be read as referring to him.

Alabama civil libel law offered few defenses. It provided that in suits by public officers, truth "may be offered in evidence."<sup>17</sup> If the defendant made a good faith mistake and ran a retraction, the public official could recover only actual damages.<sup>18</sup> If the defendant's statement was "libel per se," he had no defense unless he could persuade the jury that the stated facts were true in *all their particulars*.<sup>19</sup> As in most American states, the defendant's privilege of "fair comment" depended upon the truth of the facts upon which the comment was

<sup>12</sup> *Ibid.*

<sup>13</sup> Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875, 893 (1949). Professor Noel says there was probably little litigation because rare was the politician who was "clean" enough to brave any "dirt" which a defendant might dig up.

<sup>14</sup> 376 U.S. 254 (1964).

<sup>15</sup> *Id.* at 293.

<sup>16</sup> *Id.* at 257.

<sup>17</sup> Ala. Code tit. 7, § 908 (1940).

<sup>18</sup> Ala. Code tit. 7, §§ 914, 915 (1940).

<sup>19</sup> *Alabama Ride Co. v. Vance*, 235 Ala. 263, 178 So. 438 (1938). In Texas, publications about public officials are treated differently than publications about individuals, in that a rather vigorous and untrue condemnation of an official as an official is not libelous per se unless it charges him with an offense for which he may be removed from office. *Herald-Post Co. v. Hervey*, 282 S.W.2d 410 (Tex. Civ. App. 1955) *error ref. n.r.e.*

based.<sup>20</sup> The jury was instructed that the statements in the *Times* were libelous per se, and that the law therefore "implies legal injury from the bare fact of publication itself" and "falsity and malice are presumed."<sup>21</sup>

These rules, the Supreme Court said, were far too restrictive to be consistent with the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."<sup>22</sup>

The constitutional guarantees require, we think, 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'—*i.e.*, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>23</sup>

### III. GARRISON V. LOUISIANA

The recent and well-written decision of *Garrison v. Louisiana*<sup>24</sup> extends the *New York Times* rule into the field of criminal libel. The source of the litigation was a dispute between the district attorney of Orleans Parish, Louisiana, and eight judges of the parish criminal district court. In an interview with the press, Garrison had charged:

The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints. . . . This raises interesting questions about the racketeer influences on our eight vacation-minded judges.<sup>25</sup>

The Louisiana Criminal Defamation Statute provided:

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.

. . . A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false . . . where the publication or expression is a comment made in the reasonable belief of its truth, upon . . . the conduct of a person in respect to public affairs.<sup>26</sup>

Louisiana, as will be noted, followed the criminal libel rule of a

<sup>20</sup> *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 61 So. 345 (1913).

<sup>21</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 262 (1964).

<sup>22</sup> *Id.* at 270.

<sup>23</sup> *Id.* at 279.

<sup>24</sup> 379 U.S. 64 (1964).

<sup>25</sup> *Id.* at 66, 67.

<sup>26</sup> La. Rev. Stat. Ann. §§ 14:47-49 (1950).

majority of states that truth is not a complete defense<sup>27</sup>—the opposite of the rule in civil libel. The privilege to comment on public affairs was circumscribed by a requirement that the defendant show a reasonable belief in the truth of his statements.<sup>28</sup>

Garrison was sentenced by a court other than the one he had attacked to pay 1,000 dollars or spend four months in the parish prison. The Louisiana Supreme Court affirmed.<sup>29</sup> The United States Supreme Court reversed, applying the *New York Times* rule which, said the Court, “absolutely prohibits punishment of truthful criticism” and “forbids the punishment of false statements unless made with knowledge of their falsity or in reckless disregard of whether they are true or false.”<sup>30</sup>

The Louisiana Supreme Court had avoided the public life issue by finding that the district attorney’s charges were “not criticisms of a court trial or of the manner in which any of the eight judges conducted his court” but “*personal* attacks upon the integrity and honesty of the eight judges.”<sup>31</sup> The United States Supreme Court, however, felt the statements were not “a purely private defamation” because of possible consequential effects in that area. “Of course,” the Court agreed, “any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation.”<sup>32</sup> The Court stated further that “a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office.”<sup>33</sup>

*Garrison* not only reaffirms but elaborates on the *New York Times* rule. It is now possible to analyze the rule fully as it applies to both civil and criminal libel. Considerations to be examined are (1) truth as a defense, (2) requirement of “actual malice” or knowing or reckless falsehood and (3) the minority argument that the protection is too weak and too easily overcome.

#### A. Truth As A Defense Under The Times Rule

Truth as a complete defense is specifically incorporated in the *Times* rule. Noted scholars have argued against truth as a complete defense because it gives immunity to malicious defamers even for libelous publications that reveal forgotten misdeeds or that do not impute criminal or immoral acts.<sup>34</sup> In its *Garrison* decision, however,

<sup>27</sup> Prosser, *Torts* § 95, at 630 (2d ed. 1955).

<sup>28</sup> See note 26 *supra*.

<sup>29</sup> 24 La. 787, 154 So.2d 400 (1963).

<sup>30</sup> 379 U.S. 64, 78 (1964).

<sup>31</sup> *Id.* at 76. (Emphasis added.)

<sup>32</sup> *Id.* at 77.

<sup>33</sup> *Id.* at 78.

<sup>34</sup> Ray, *Truth: A Defense to Libel*, 16 Minn. L. Rev. 43, 58 (1931).

the Supreme Court remarked, "In any event, where 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."<sup>35</sup>

The Court gave consideration to its holdings that federal officers enjoy an absolute privilege for defamatory publication within the scope of official duty.<sup>36</sup> Since absolute immunity for federal officers is secure, the Court felt it would be an unjust preference over the public they serve if critics of official conduct did not have a fair equivalent of immunity. The interest in the dissemination of truth was held to support both these findings. The first and fourteenth amendments were found by the majority to embody a national interest in free public debate. Self-censorship stemming from the fear of making a statement punishable by law, the Court declared, would prevent the interchange of ideas necessary to bring on political and social changes desired by the people.

### B. *Knowing or Reckless Falsehood*

Immunity from libel prosecution, broad as it may be, is not unlimited. The rule applied in *New York Times* and *Garrison* does not permit the use of false statements made with "actual malice," *i.e.*, false statements knowingly or recklessly made.<sup>37</sup> In discussing knowing (calculated) falsehood, the *Garrison* Court said, "The use of the known lie is at once at odds with the premises of democratic government. . . ."<sup>38</sup> The Court noted that a lie is of such slight social value as a step to truth that any benefit from it is clearly outweighed by the social interest in order and morality.<sup>39</sup> A "lie" embodies a degree of malice which cannot be protected. False statements made in reckless disregard of the truth, the Court felt, also contain the high degree of awareness of probable falsity which amounts to the "actual malice" required in *New York Times*. Only when such "actual malice" is found does the public interest require that civil or criminal sanctions be imposed upon false statements.

On the other hand, the Court asserted, utterances honestly believed serve the public by contributing to the free interchange of ideas and the ascertainment of truth. Accordingly, the Louisiana statute,<sup>40</sup> found by the trial court to punish false statements against public officers not made in the reasonable belief of their truth, is

<sup>35</sup> 379 U.S. at 72-73 (1964). See *State v. Burnham*, 9 N.H. 34, 42, 43 (1837).

<sup>36</sup> *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959).

<sup>37</sup> See text at note 23 *supra*.

<sup>38</sup> 379 U.S. at 75 (1964).

<sup>39</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>40</sup> La. Rev. Stat. Ann. §§ 14:47-49 (1950).

unconstitutional.<sup>41</sup> The Court explained that such a standard dispenses with ill-will as a prerequisite for punishment and that it allows sanctions to be taken instead on the ground that ordinary care would have revealed the statement false.<sup>42</sup> Thus, the difference between the reasonable belief standard and the reckless disregard of truth standard is an important one. Although such a line between false statements honestly believed and false statements maliciously made is a fine one and one difficult for a jury to ascertain, in is one that the Supreme Court feels the interest in democratic government requires.

### C. Concurrence

The three concurring justices<sup>43</sup> believed that the Constitution accords citizens and the press an unconstitutional freedom to criticize official conduct. In the heat of public controversy, they contended, it may not be difficult to show that a defendant acted with malice, *i.e.*, with knowledge that a statement was false or with reckless disregard of whether it was false. Thus, argued Mr. Justice Douglas, if the nebulous "reckless disregard of truth" standard is all that need be met, freedom of speech is soon turned "pale and tame."<sup>44</sup> He urged instead that "it is time to face the fact that the only line drawn by the Constitution is between 'speech' on the one side and conduct or overt acts on the other."<sup>45</sup>

In *New York Times*, Mr. Justice Goldberg questioned the distinction by which the federal officer has an absolute immunity<sup>46</sup> but one criticizing him has only limited immunity. No answer was given in the opinions. Possibly, the rationale of this distinction may be that it is desirable to encourage individuals to seek office and to perform their duties without fear of possible liability for statements made in an official capacity. Furthermore, a disgruntled electorate may in many cases refuse to reelect public officials if they are guilty of irresponsible defamation.

## IV. CONCLUSION

With the *Garrison* case clarifying many questions concerning *New*

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<sup>41</sup> The Louisiana Supreme Court affirmed the conviction on the ground that evidence supported the trial court's finding of ill-will, but the trial court also rested conviction on the additional ground that the statement was made without such a reasonable belief in the truth.

<sup>42</sup> *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

<sup>43</sup> Justices Douglas, Black, and Goldberg.

<sup>44</sup> 379 U.S. at 81 (1964).

<sup>45</sup> *Id.* at 82.

<sup>46</sup> See text at note 36 *supra*.



*York Times*, the rule of the latter case may now be stated more specifically. Despite any state law or private interest involved, the Constitution limits punishment for defamation of a public official in the conduct of his duties to statements which are knowingly or recklessly false. The rule applies whether a criminal or a civil action is involved. Truth is a complete defense. Under the *Times-Garrison* rule, false statements made without reasonable belief in their truth are not punishable unless they amount to deliberate falsehoods or are made with reckless disregard for their truth.

Manifestly, *New York Times* and *Garrison* have eliminated much existing state libel law. In Texas, since truth is a complete defense to criminal libel,<sup>47</sup> the law with respect to discussion of public officers meets constitutional standards insofar as truth statements are concerned. With respect to false statements, however, the law fails to meet constitutional standards because of the manner in which malice is defined. The Texas rule is that malicious intent may be *inferred* by the jury from the published matter and that proof of actual malice is not necessary.<sup>48</sup> *Garrison* requires proof of *actual* malice before false statement can be punished.

Truth is also a complete defense in Texas civil libel,<sup>49</sup> but, again, the Texas act seems invalid when false statements are considered. Though actual malice, including such utter recklessness as to indicate a disregard of the consequences,<sup>50</sup> is necessary for punitive damages, it is not required for actual damages. Statutes of many other states also fail to meet this particular constitutional test of actual malice. Thus, *New York Times* and *Garrison* have, in effect, rewritten the libel law as it applies to public officers in a majority of states.<sup>51</sup>

A question still remains as to whether the *Times* rule protects statements made against political candidates.<sup>52</sup> It seems certain that fairness in election campaigning would require that the rule apply uni-

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<sup>47</sup> Tex. Pen. Code Ann. art. 1284(6), 1290(1), (4) (1953).

<sup>48</sup> *Alsup v. State*, 91 Tex. Crim. 224, 238 S.W. 667 (1922). The decision followed the ideas expressed in Tex. Pen. Code Ann. art. 1228 (1953). The article provides, "The word 'malicious' is used to signify an act done with evil or mischievous design, and it is not necessary to prove any special facts showing ill feeling." Possibly the statute might be construed to require actual malice, and thus be counted constitutionally sound, since Art. 1287 of the Penal Code provides that the libelous statement cannot be presumed to have been made with intent to injure "from the mere fact that such would be the natural result, thereof, unless it appear from other facts that the statement was in fact made with that intention."

<sup>49</sup> Tex. Rev. Civ. Stat. Ann. art. 5431 (1958), *Clough v. News Publishing Co.*, 58 S.W.2d 1033 (Tex. Civ. App. 1933) *error dismissed*.

<sup>50</sup> *Houston Chronicle Publishing Co. v. Quinn*, 184 S.W. 669 (Tex. Civ. App. 1916) *error ref.*

<sup>51</sup> Prosser, *Torts* § 95, at 622 (2d ed. 1955).

<sup>52</sup> Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875, 898 (1949).