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New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

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1. Allow additur if the increased award is set at the highest amount a jury could award, similar to the New York procedure;[41]
2. Adopt the Wisconsin practice of giving both parties the option —the defendant to pay the highest amount, or plaintiff to accept the lowest amount the jury could award as a matter of law;[42]
3. Allow additur only in cases involving liquidated damages;
4. Permit additur only in action in which there is no constitutional right of jury trial, such as condemnation proceedings.[43]

If additur is to be denied altogether, the court should consider the possibility of new trials on the issue of damages alone under Rule 59 of the Montana Rules of Civil Procedure.

In view of the historical trend toward increasing supervision of the courts over jury verdicts, and the almost universal acceptance of remittitur, it is difficult to justify rules which favor correction of an excessive award but not of an inadequate award. When wisely used in civil actions, additur avoids the delay and expense of a new trial, and furthers the legitimate objective of bringing litigation to a speedy and expeditious end.

GARY L. DAVIS.

PRIVILEGE TO DEFAME: THE UNITED STATES SUPREME COURT HAS ESTABLISHED A NEW AND IMPORTANT AREA OF CONSTITUTIONAL LAW.— Petitioner, the New York Times, carried a full page advertisement on March 9, 1960, entitled, "Heed Their Rising Voices."[1] The advertisement made several false and defamatory statements of fact concerning the activities of the Montgomery, Alabama police. Respondent, the commissioner of police in Montgomery, brought an action for defamation in Alabama state court, alleging that the statements referred to him in his official capacity. The trial court found the publication "libelous per se" and upon proof that the statements were "of and concerning" him, the respondent was awarded $500,000, the full amount for which he sued.[2]

[41] *Supra* note 15.
[42] *Supra* note 16.
[43] *Accord, Kennesaw* decision, *supra* note 31.

[1] This was an editorial advertisement submitted by a group of civil rights advocates for the purpose of raising money for the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. See appendix of majority opinion for full text of the advertisement. New York Times Co. v. Sullivan, 84 S. Ct. 710 (1964).

[2] At the time this decision was handed down, there were pending in the state courts of Alabama eleven suits against the respondent in which the aggregate damages sought were $5,600,000. *New York Times Co. v. Sullivan, supra* note 1, at 734.

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The decision was upheld by the Alabama Supreme Court.[3] On certiorari the United States Supreme Court, *held,* reversed. The publication of a false and defamatory statement of fact about a public official acting in his public capacity is protected by the constitutional guarantee of freedom of the press unless actual malice is shown.[4] *New York Times Co. v. Sullivan,* 376 U. S. 254 (1964).

Defamation of public officials has always presented unique difficulties.[5] All courts realize that members of society must be given some license to go beyond the traditional limits of defamatory speech when criticizing official activity of public employees. The license is founded upon the high value, both social and political, of free and unfettered discussion of matters of public concern. The courts do not agree, however, on the degree to which the license should be extended.

Prior to the instant case, the majority of state courts had adopted the doctrine of "fair comment" or "fair criticism." This rule gave a party discussing a matter of public interest, as in this case the activities of a public official, the right to make any criticism or statement of opinion so long as it did not contain a misstatement of fact.[7] A "conditional privilege," on the other hand, was granted by a minority of the courts to discussions of public officials.[8] Materials published upon issues which are conditionally privileged could contain false statements of opinion or fact as long as there was neither evidence of actual malice nor excessive publication. The scholarly consensus apparently favors the view adopted by the minority.[9]

A conditional privilege is founded upon the public policy which recognizes the necessity of transmitting true information whenever it is reasonably necessary for the protection of interests of the public. "In order that such information may freely be given, it is necessary to afford protection against liability for misinformation given in an honest and reasonable effort to protect or advance the interests in question."[10]

The instant case rendered obsolete the debate between proponents of

[3]New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962).

[4]Justices Black, Douglas, and Goldberg concurred in reversing the Alabama court. They did not, however, agree with the majority that the existence of the constitutional protection should depend upon the speaker's state of mind. The concurring justices thought the privilege, which the Constitution required, must be absolute.

[5]Noel, *Defamation of Public Officers and Candidates,* 49 COLUM. L. REV. 875, 903 (1949).

[6]See cases Annot., 110 A.L.R. 412 (1937); Annot., 150 A.L.R. 358 (1944).

[7]1 HARPER AND JAMES, TORTS § 5.28 (1956); PROSSER, TORTS § 110 (3rd ed. 1964); RESTATEMENT, TORTS § 606, comment *b* (1938). See generally 1 HARPER AND JAMES, TORTS § 5.28 (1956); Hallen, *Fair Comment,* 8 TEX. L. REV. 41 (1929).

[8]It appears from counting those cases reviewed in Annot., 110 A.L.R. 412 (1937), Annot., 150 A.L.R. 350 (1944), and in Noel, *supra* note 5, that less than one-quarter of the jurisdictions which have considered this issue are in accord with the minority.

[9]HARPER AND JAMES, *op. cit. supra* note 7, at § 5.26; PROSSER, *op. cit. supra* note 7, at § 110; Noel, *supra* note 5, at 891-896, 897, 903 (1949); Hallen, *supra* note 7, at 61 (1929); Smith *Charges Against Candidates,* 18 MICH. L. REV. 1, 115 (1919).

[10]3 RESTATEMENT, TORTS, Scope Note §§ 593-605 at 240 (1934).

"fair comment" and "conditional privilege." As stated by Professor Prosser:

> [T]he minority position has just been vindicated and that of the majority completely overthrown by a decision of the Supreme Court of the United States declaring that the constitutional guaranty of freedom of the press includes the qualified privilege of making false statements of fact about such individuals [public officers].[11]

This qualified privilege created by the Supreme Court is defeasible only upon proof of actual malice.

The Court's decision to extend protection of the first amendment to defamatory misstatements about public officials may cause several serious problems. One such problem which the Court fails to discuss in the instant case arises from a danger inherent in too great freedom to publish. This danger comes not from occasional abuse of the duty upon the public and press to comment on public matters, but rather from the fact that such expanded freedom may facilitate organized and concerted attacks on public officials by the use of personal vilification and calculated lies. The use of libel in such campaigns can have a devastating effect on political institutions and parties, minority groups, and public persons.[12]

The Court's interpretation of the first amendment[13] is principally responsible for its decision in the instant case. The rule established is the result of several well-reasoned steps arrived at after consideration of an "impressive array of history and precedent."[14] The Court reasoned as follows:

1. Freedom of expression upon public questions is secured by the first amendment. This freedom and the present case must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[15] Such debate is fundamental to the American system of government.[16]

[11]PROSSER, *op. cit. supra* note 7, § 110.

[12]See Riesman, *Democracy and Defamation: Fair Game and Fair Comment*, 42 COLUM. L. REV. 1086, 1282 (1942). Professor Riesman explains how the European fascists took advantage of public discontent and ineffective libel laws, using calculated falsehoods and smear to make a mockery of public people and political institutions. This weapon was very effectively used by the Nazi party in their climb to power in pre-World War II Germany. Are our new libel laws strong enough to stem such activity should it begin in the United States today? For further examples of possible problem areas, see notes 20 and 27 *infra*.

[13]U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[14]*New York Times Co. v. Sullivan, supra* note 1, at 735 (Goldberg, J., concurring).

[15]*Id.* at 721.

[16]Whitney v. California, 274 U.S. 357, 375-376 (1927) (concurring opinion).

2. Neither factual error nor injury to the official reputation will remove the constitutional safeguard.

3. "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate."[17]

After determining that there was sufficient public interest to require constitutional protection, the Court went on to hold the "balance fair between public need and private right"[18] by qualifying the privilege given according to the publisher's state of mind.

> The constitutional guarantees require, we think, a federal rule recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is, with reckless disregard of whether it was false or not.[19]

This qualification was made without reference to precedent or other authority.[20]

Although the instant case is significant because it overturned the law in a large number of states, the more interesting issue involved is: What are the possible ramifications of this positive entry into the field of defamation via the Constitution? The means used by the Supreme Court to establish this constitutional privilege, as compared to the means used to establish like privileges through tort law, should afford some idea of the possible extension of this doctrine.

The privileges that have been developed through tort law are the result of a balancing process used by the courts. That balancing is one of the basic issues underlying the extension of such privileges is well illustrated by a statement from Harper and James' work on torts:

> In the law of defamation, as elsewhere, we find a continuous comparison of the social value of interests involved and the probable effect thereon of license or restraint upon statement and discussion. Immunity is granted or withheld on the principle of the residuum of social convenience deriving from the protection of one interest at the expense of another.[21]

[17] *New York Times Co. v. Sullivan, supra* note 1, at 722.

[18] Coleman v. McKennan, 78 Kan. 711, 98 Pac. 281, 292 (1908).

[19] *New York Times Co. v. Sullivan, supra* note 1, at 726.

[20] The fact that no persons may state falsehoods with actual "malice" may prove but a small measure of protection for the public official. Mr. Justice Black says: "'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove." *New York Times Co. v. Sullivan, supra* note 1, at 733 (concurring opinion). The difficulty of proving malice in certain fact situations is easily imaginable. Consider a case in which the crusading newspaperman becomes a martyr as he pursues a popular cause against a greedy politician. A jury's investigation of the journalist's state of mind probably would not be conducive to justice in this situation. Where the defaming publisher is backed by a strong community sentiment, he may indeed have a de facto, absolute privilege.

[21] 1 HARPER AND JAMES, *op. cit. supra* note 10, at § 5.25.

This same proposition was stated by the Michigan court in *Lawrence v. Fox* when the court said: "The ultimate problem in the law of defamation is the balancing of one man's interests against another man's acts."[22] Thus, in tort law, a balance must be struck between an interest which deserves protection—of publisher, receiver, or general public—and the possible injury which may result from a particular publication. The social value of the various interests will determine the precise point at which balance is obtained which in turn dictates the degree of privilege to be granted. The interest which underlies discussion of public officials is the proper selection and direction of our public servants. Opposed to this is an interest based on the necessity of not discouraging qualified men from entering public service for fear of attack on their reputations. The former of these interests is believed to be of greater social value. To insure that this interest is given protection commensurate with its greater value, the right of fair comment or a conditional privilege is extended to statements made in its behalf. Efficient operation of the legislative, administrative, and judicial branches of government are interests of such great value that absolute privileges are given to statements made within their scope.[23]

The Supreme Court has used a balancing process on many occasions.[24] It is believed by some to be the very basis of determining first amendment freedoms. Mr. Justice Frankfurter, with regard to the interpretation of the first amendment, has said:

> Absolute rules would eventually lead to absolute exceptions and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interests of national security, are better served by candid and informed weighing of competing interests within the confines of a judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.[25]

Such weighing of competing interests must have been used by the Court to arrive at its decision in the instant case. On one hand the Court found a high value in unrestricted discussion of the activities of public officials. On the other there was the possibility of harm to the reputation of public officials by false and defamatory attacks. The fact that the Court qualified the right to speak on these matters is strong evidence

[22]Lawrence v. Fox, 357 Mich. 134, 97 N.W.2d 719, 720 (1959).

[23]The Supreme Court itself has indulged in tort law balancing. In Barr v. Matteo, 360 U.S. 564, 575 (1959), the Court held that an utterance of a federal officer is absolutely privileged if made "within the outer perimeter" of his duties. In this case the Court saw the public interest which deserved protection as the "fearless, vigorous, and effective administration of policies of government."

[24]There seems to be considerable discussion concerning ad hoc balancing of interests under the first amendment. A good survey of the problems and the cases in which such balancing has been used is found in Frantz, *The First Amendment in the Balance,* 71 YALE L. J. 1424 (1962).

[25]Dennis v. United States, 341 U.S. 494, 524-525 (1951) (Frankfurter, J., concurring).

that the rule as finally set down by the majority is the result of an informed evaluation of the various interests.

The balancing processes employed to find constitutional and tort privileges are essentially the same. An examination of balancing, however, does not fully explore the issues which are relevant to a meaningful comparison of the two approaches.

Prior to the instant case libelous publications had not been considered as being within the scope of the first amendment.[26] As far as the Constitution was concerned, publishers of defamatory material were responsible, both civilly and criminally, for any injury to the reputations of others. In the instant case, however, the Court found it necessary to expand the traditional area of speech protected by the first amendment.[27] Libelous statements will now be protected if they are made upon proper occasions. The nature of these occasions must be gleaned from the instant case.

The Court initially stated that all discussion upon public questions qualifies for first amendment protection. But, this assertion is so broad and poorly defined that it is of little value. The Court was more specific when it said that "the present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would clearly seem to qualify for the constitutional protection."[28] On the basis of this statement, the advertisement should have qualified for constitutional protection even though no public official was involved. Should not all similar discussion of issues of immediate public concern be granted constitutional protection? The Court answered yes when it declared that the Kansas decision, *Coleman v. MacKennan*,[29] established a "like rule." The Court quoted with approval from the Kansas opinion that "this privilege extends to a great variety of subjects, and includes matters of public concern."[30] While the Court in the instant case was not called upon to

[26]2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927) "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation or pecuniary interests of individuals."

Mr. Justice Frankfurter, for the majority in Beauharnais v. Illinois, 343 U.S. 250, 255-256 (1952) said: "There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, and libelous, and the insulting or 'fighting words' . . . ." In the majority opinion of *New York Times Co. v. Sullivan, supra* note 1, at 710 n.6, seven cases are cited in which the Court had announced with clarity that the common law liability for libel and slander did not abridge the freedom of speech or press.

[27]It is an interesting speculation as to the effect the decision in the instant case might have upon those classes of speech that have been lumped together with libel by COOLEY, *op. cit. supra* note 24; *Beauharnais v. Illinois, supra* note 26; Cantwell v. Connecticut, 310 U.S. 296 (1940); and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), all of which held such classes were not deserving of constitutional protection.

[28]*New York Times Co. v. Sullivan, supra* note 1, at 721.

[29]*Supra* note 18.

[30]Instant case at 727; quoting from *Colman v. MacKennan, supra* note 1, 98 Pac., at 285.

consider matters beyond those which pertain directly to public officials, the decision contains a basis from which constitutional protection might be granted to all manner of discussion in significant areas of public concern.[31]

Tort law has also recognized that debate upon issues of public concern deserves special protection. Because the two approaches to matters of privilege are similar in this additional respect, the large body of tort law which now defines matters of public concern should be used to determine those areas in which libel will be given constitutional protection.[32] Among those matters which tort law has found to be of sufficient public concern to receive some protection are the activities of public employees,[33] work to be paid for out of public funds,[34] management of institutions such as schools,[35] and admission or disbarment of attorneys.[36] Private enterprise becomes a proper subject for public comment to the extent that it affects the public interest.[37] Even comment upon artistic works is said to come within the scope of public concern.[38] While it is not suggested that all of the matters mentioned above must be adjudged matters of public concern for constitutional purposes, they should be considered as areas of possible constitutional protection.

The important elements and methods of analysis necessary to the determination of privilege are the same in both tort and constitutional law. The first step the courts must take, using either approach to privilege, is to determine whether the particular discussion pertains to matters of public concern. If so, this discussion is drawn within an area to which

[31]Pedrich, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581 at 591-593 (1964), in a more lengthy discussion, came to nearly the same conclusion.

[32]3 RESTATEMENT, TORTS §§ 606, 608, 610 (1938) illustrates a wide range of public activities which are looked upon as matters of public concern. The issues of public concern considered by the restatement would seem to be substantially the same as those subjects which should enjoy constitutional protection. Numerous occasions and fact situations which have been considered of sufficient public concern to be granted some degree of privilege are considered in PROSSER, *op. cit. supra* note 10, at § 110, and in HARPER AND JAMES, *op. cit. supra* note 10, at § 5.26.

[33]Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139, 72 A.L.R. 913 (1930), (High School football coach).

[34]Bailey v. Charleston Mail Ass'n., 126 W.Va. 292, 27 S.E.2d 837, 150 A.L.R. 348 (1943).

[35]Clarke v. McBain, 299 Mo. 77 252 S.W. 428 (1923).

[36]Kennedy v. Item Co., 197 La. 1050, 3 So. 2d 175 (1941); Spriggs v. Cheyenne Newspaper, 63 Wyo. 416, 182 P.2d 801 (1947).

[37]Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955). The affairs of a private corporation are matters of public concern, particularly so with respect to operations that will cause large unemployment. The Connecticut court quoted with approval from *Coleman v. MacKennan, supra* note 18, at 289, that this rule "must apply to all officers and agents of government, municipal, state, and national; to the management of all public institutions, educational, charitable, and penal; to conduct of all corporate enterprises affected with a public interest, transportation, banking, insurance; and to innumerable other subjects involving public welfare."

[38]In Carr v. Hood (K.B. 1808), as reported in Tarbart v. Tipper, 1 Camp. 350, 355, 170 Eng. Rep. 981, 983 n. (K.B. 1808), Lord Ellenborough established a rational for granting a privilege to the work of literary critics. He stated that literary critics do a great public service by checking the dissemination of bad taste and preventing people from wasting both time and money upon trash.

protection is granted. The license to publish, however, does not become absolute because this discussion is within the favored sphere. Freedom of speech and the right to defame will then be tempered to the extent a balance is achieved between public and private interests.

It is submitted that because the elements and methods of analysis which form the basis of the constitutional approach to privilege are substantially the same as those used by the tort approach, the privileges required by the Constitution should correspond to those which have been developed through tort law. The instant case, by extending the freedoms guaranteed by the first amendment, has created a new foundation upon which an extensive body of privileges may be built.[39]

BRUCE L. ENNIS.

LEGAL AID PLANS OF LABOR UNIONS ARE AN EXERCISE OF FIRST AMENDMENT RIGHTS AND DO NOT CONFLICT WITH LEGAL ETHICS.—The defendant labor union operated a Legal Aid Department whereby union representatives and investigators advised injured union members to retain a particular attorney. The representatives and investigators occasionally carried blank contracts of employment and photos of settlement checks from previous lawsuits to persuade injured members to engage the attorney. The attorney's contingent fee was set by the union and from it the attorney paid for the investigative services performed by the union.[1] The Montana Bar Association charged the union and several nonresident attorneys with a conspiracy to engage in the unauthorized practice of law in Montana. The trial court enjoined defendant union from fee fixing, practicing law and soliciting claims. Defendant lawyers and their agents were enjoined from soliciting. Plaintiff alleged in part that the decree rendered in the trial court was inadequate because it allowed defendant union to continue investigating claims and recommending law-

[39]November 23, 1964, the Supreme Court handed down a sequel to the instant case. Garrison v. Louisiana, 33 U.S.L. WEEK 4019 (1964). Appellant, the District Attorney of Orleans Parish allegedly defamed eight judges of the criminal district court of the parish. He was convicted of criminal defamation. The court overturned the Louisiana decision, applying the same standard to criminal libel prosecutions as applied to civil action in the instant case. It said "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Garrison v. State of Louisiana, supra* at 4022.

In the *Garrison* case the Court recognized for the first time that deliberate falsehood may be used as an effective political tool. However, this issue was passed over summarily as the Court indicated that their limitation of the right to comment by "actual malice" would take care of any such problems. See notes 12 and 20, *supra.*

[1]The court did not state the facts in the instant case but said they were essentially the same as in Hildebrand v. State Bar of California, 36 Cal.2d 504, 225 P.2d 508 (1950); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (1952); *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958). The statement of facts here is composed from facts common to those three cases. The activities of the union as described will hereinafter be referred to as the "plan."