The Catholic Lawyer

Volume 11
Number 1 *Volume 11, Winter 1965, Number 1*

Article 9

Comment: Libel and the Public Official

NOTES AND COMMENTS

COMMENT: Libel and the Public Official

A study of the law of criminal libel[1] is significant because no other segment of the law reflects, with such unique precision, the evolution of the right to freedom of speech in a democratic society. In order to understand the law as it developed, its historical background must be examined. In addition, an analysis of the most recent Supreme Court decision in this area, *Garrison v. Louisiana*,[2] is essential in order to understand precisely what the law of criminal libel is today.

History

In England the first courts to assume jurisdiction over libels were the ecclesiastical tribunals.[3] Soon, however, secular courts pre-empted the field because of the inadequacy of the punishment imposed by the Church.[4] As society became increasingly complex, statutes were passed giving royal judges the authority to punish false statements made against the "great men of the realm."[5] The rationale offered for these enactments was the need to preserve the people's loyalty to their rulers, and hence to stabilize the government. These statutes were significant in that for the first time the primacy of a ruling group could be maintained by controlling the communication of ideas.[6]

In 1606 the Star Chamber decided the case of *De Libellis Famosis*,[7] which has become the foundation of all subsequent cases involving criminal libel. It was held that all statements which tended to create breaches of the peace, especially those directed at the government or its ministers, were criminally libelous. Since the Star Chamber was not concerned with the truth or falsity of the statement, the government was endowed with a potent weapon for crushing political criticism.[8] An accurate maxim of the time was "the greater the truth, the greater the libel."[9]

In 1641, the common-law courts replaced the Star Chamber. These courts added an oppressive procedure. The judge, rather than the jury, would make the determination of whether the statement was libelous. The jury was permitted to determine only the fact of publication.[10] "Thus a royally appointed judge became the ex post facto arbiter of the extent of freedom

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[1] The term "criminal libel" embodies both seditious libel (libel directed against the government and/or governmental officials) and personal libels which directly cause breaches of the peace. This article will consider only the *seditious* area of the law, as criminal prosecutions of personal libels are practically nonexistent due to the popularity of the tort action. Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295 (1958).

[2] ——U. S. —— (1964).

[3] The Church assumed the power to punish libels based upon its jurisdiction over sexual offenses. See Donnelly, *History of Defamation*, 1949 WIS. L. REV. 101, 103-04.

[4] The usual ecclesiastical punishment constituted a public acknowledgment of the baselessness of the imputation. *Ibid.*

[5] 3 Edw. 1, c. 34 (1275).

[6] Kelly, *supra* note 1, at 298.

[7] 77 Eng. Rep. 250 (1606).

[8] Kelly, *supra* note 1, at 301.

[9] *Ibid.*

[10] *Ibid.*

of speech."[11]

Reform of the law of criminal libel was initiated by English liberals in the latter half of the nineteenth century. The efforts of this group culminated in the passage of Fox's Libel Act,[12] which revested the jury with the right to determine the intent of the publisher as well as the fact of publication. Further liberalization occurred in 1843, with the passage of Lord Campbell's Act.[13] This act provided that a *true* statement published for the public benefit was not criminally punishable. This is still the law in England today and was the majority view in the United States until the decision in *Garrison v. Louisiana*.[14]

Early American decisions adopted the English common-law concept of criminal libel with respect to statements concerning public officials or governmental conduct.[15] A literal reading of the first amendment, which prohibits laws abridging freedom of speech and press, would appear to abolish the common-law concept of criminal libel. However, judicial opinion indicated that the first amendment merely prohibited "prior restraint" and did not alter the common-law doctrine of criminal libel.[16]

The short-lived Alien and Sedition Acts of 1798,[17] however, did change, at least to some extent, the common-law concept of criminal libel in the United States. These acts made it a crime to speak or write any statement which tended to defame the Congress or the President. Contrary to the common-law doctrine, truth could now be pleaded as a defense.

After the repeal of the Alien and Sedition Acts, the case of *People v. Croswell*[18] laid the foundation for a new approach to the law of criminal libel. The lower court, applying the common-law doctrine, had convicted the defendant-newspaper editor of libeling President Jefferson. Upon motion for a new trial the defendant argued that freedom of speech embodies the "right to publish, with impunity, truth, with good motives for justifiable ends, though reflecting on government, magistracy, or individuals."[19] The motion was denied. However, the New York Legislature, recognizing the soundness of the defendant's argument, enacted a statute which made truth, published with good motives and for justifiable ends, a complete defense.[20] The statute applied to statements concerning public officials, as well as to those directed against private individuals. Two years later a Massachusetts court, following New York precedent, held that truth published with the "honest intention of informing the people" was not actionable libel.[21] As a result of these cases the majority of states enacted statutes adopting the "truth with good motives" formula.[22]

This formula, although liberalizing the common-law rule, did not completely engender today's concept of the first amendment protection. The "good motives" limi-

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[11] *Ibid.*

[12] 32 Geo. 3, c. 60 (1792).

[13] 6 & 7 Vict. c. 96, § 6 (1843). See Comment, *Libel: The Illinois Truth Defense,* 56 NW. U.L. REV. 547, 549 (1961).

[14] —— U.S. —— (1964).

[15] Trial of John Peter Zenger, 17 Howell's St. Tr. 672 (N.Y. 1735); Kelly, *supra* note 1, at 306-07.

[16] *E.g.,* Commonwealth v. Blanding, 3 Pick. 304 (Mass. 1825); Respublica v. Oswald, 1 Dallas 319 (Pa. 1788). For a discussion of this early period, see WARREN, HISTORY OF THE AMERICAN BAR 236-39 (1911).

[17] Ch. 63, 1 Stat. 570, ch. 74, 1 Stat. 596 (1798).

[18] 3 Johns. Cas. 337 (N. Y. Sup. Ct. 1804).

[19] *Id.* at 352.

[20] N.Y. Sess. Laws 1805, ch. 90, § 2.

[21] Commonwealth v. Clap, 4 Mass. 163 (1808).

[22] Comment, *supra* note 13.

tation did not offer protection to truthful statements made with "actual malice."[23] As a practical matter, when a popular political figure was the object of a defendant's remarks, it was almost impossible for the defendant to establish lack of malice.[24]

Libel Today

Although the "truth with good motives" formula was the majority view, a number of states gave greater latitude to the defense of truth when the defamation concerned public officials.[25] In *State v. Burnham,*[26] a New Hampshire court held that it would not apply the "good motives" formula to statements made by the defendant about the conduct of certain public officials. The court stated that

> it has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion—a legal right to make a publication—and the matter true, the end is justifiable and that, in such case, must be sufficient.[27]

Thus, there was some conflict in the law which was not resolved until 1964 when the United States Supreme Court decided the case of *Garrison v. Louisiana.*[28]

In *Garrison,* the appellant had been convicted of criminal libel, under the Louisiana criminal defamation statute,[29] for disparaging the official conduct of eight criminal court judges. Under the statute, an individual could be prosecuted if he uttered *true* statements with actual malice.[30] The Supreme Court reversed the state court conviction and held that the statute employed unconstitutional standards when applied to criticism of public officials.[31]

In stating that the "truth with good motives" formula was unconstitutional, the Court indicated that a person who made a truthful statement concerning a public official had complete immunity from criminal prosecution. The Court, however, did not limit its opinion to this issue, but held further that immunity would attach even were the statement false, provided that it had not been made with "actual malice." In reaching this conclusion, the Supreme Court relied on its decision in *New York Times v. Sullivan,*[32] decided earlier in the same year.

(a) The Times Case

In *Times,* a *civil* suit was brought by a public official to recover damages for defamatory criticism of his official conduct. Even though the jury had been instructed that truth was a complete defense, the Supreme Court declared that this was an inadequate protection under the requirements of the first amendment. It held that a state could constitutionally award damages in libel actions to public officials against critics of their official conduct only

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[23] In the area of civil libel, however, truth had been held to be a complete defense. PROSSER, TORTS § 111 (3d ed. 1964).

[24] Noel, *Defamation of Public Officers and Candidates,* 49 COLUM. L. REV. 875, 893 n. 90 (1949).

[25] See Garrison v. Louisiana, —— U.S. ——, —— (1964).

[26] 9 N.H. 34, 31 Am. Dec. 217 (1837).

[27] *Id.* at 221.

[28] Garrison v. Louisiana, —— U.S. —— (1964).

[29] LA. REV. STAT. tit. 14, § 47 (1950).

[30] *Ibid.*

[31] Garrison v. Louisiana, *supra* note 28, at ——. Technically it is still possible to have a criminal prosecution for true statements, made with malice, by an individual, when directed against another "individual." See Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[32] New York Times v. Sullivan, 376 U.S. 254 (1964).

when the statement was false *and* made "with knowledge that it was false or with a reckless disregard of whether it was false or not."[33]

The *Times* decision thus substantially changed the law of *civil* libel in regard to statements concerning public officials. Thereafter, all truthful statements and all false statements made in good faith were constitutionally protected. In granting a privilege to honestly made erroneous statements, the Court recognized that several state courts had adopted a similar rule.[34] For example, in *Coleman v. MacLennon*[35] a newspaper publisher was sued for libeling a candidate for public office in relation to his official conduct. The trial court instructed the jury that even if the words were false, the plaintiff could not recover unless he proved actual malice. On appeal, the trial court's instruction was sustained: "The public benefit from publicity is so great, and the chance of injury to private character so small that such discussion must be privileged."[36]

In explaining the necessity for the adoption of this rule by the Supreme Court, Mr. Justice Brennan, writing for the majority, pointed out that "compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to a comparable 'self-censorship' "[37] and would oblige the individual to make statements which " 'steer far wider of the unlawful zone.' "[38] The Court concluded that, since such a restriction would dampen the vigor and limit the variety of public debate, it was "inconsistent with the First and Fourteenth Amendments."[39]

The *Times* decision is consistent with the rationale of the cases which have granted immunity to statements made by public officials concerning other public officials or governmental conduct.[40] This latter immunity was granted because the Supreme Court recognized that greater benefit to society could be derived by permitting a public official to bring to light encroachments upon the democratic freedoms, notwithstanding the possibility of injury to the reputation of individuals occasioned by false statements. Since an individual has as great an interest in the proper function of our government as the public official, he too should be afforded an analogous privilege.[41]

(b) The Garrison Case

Since the *Times* case involved the constitutional limitation on civil libel actions brought by public officials, the appellee in *Garrison* argued that the rationale for that holding could not be applied to the law of criminal libel since the history and purpose of these areas differed markedly.[42] The Court rejected this argument. Whether the libel is criminal or civil, it must satisfy constitutional standards. Hence, the case law in the area of civil libel could be interposed in cases dealing with criminal

[33] *Id.* at 279-80.
[34] *Id.* at 280.
[35] 78 Kan. 711, 98 Pac. 281 (1908).
[36] *Id.* at 724, 98 Pac. at 286.
[37] New York Times v. Sullivan, *supra* note 32, at 279.
[38] *Ibid.*
[39] *Ibid.*
[40] The immunity granted an official in the scope of his office, however, is not limited merely to statements made concerning other public officials or governmental activity, but is general in nature. *Cf.* Barr v. Matteo, 360 U.S. 564 (1959); Whitney v. California, 274 U.S. 357 (1927).
[41] New York Times v. Sullivan, *supra* note 32, at 282.
[42] Garrison v. Louisiana, *supra* note 28, at ——.

libels.[43]

Several conclusions can definitely be deduced from the *Garrison* decision. A criminal libel statute in order to be consistent with the constitution cannot impose a criminal penalty for (1) a truthful statement, irrespective of the motive or intent of the maker; or (2) a false statement made in good faith. However, if the false statement is made with actual malice or with reckless disregard of its falsity, no immunity will attach. In that event, the burden of proving either actual malice or the wanton disregard as to its falsity would be upon the prosecution.[44] Thus, the *Garrison* and *Times* decisions have their greatest impact in the widening of the protectible area to include the innocent false statement.

Conclusion

The language in the *Times* and *Garrison* opinions indicates that the rationale for the expansion of free speech was to insure the uninhibited debate on matters of public concern. It is, therefore, submitted that the rationale of these decisions should be applied to any case involving an issue in which the public has a substantial interest. It would be fatuous to assert that "public concern" is limited solely to an interest in the proper functioning of government, especially when there are many areas, apart from the administration of government, in which the public has a vital interest. Consider the magnitude of the controversy and public concern engendered by the issues of race relations, union management, labor strikes, and closing laws. The emotional nature of debate on those matters is certainly no less intense than debate in the area of government operation, and the issues involved are certainly no less important. It appears equally compelling, therefore, that the safeguards espoused in *Times* and *Garrison* be applied to these areas to insure debate and permit the free dissemination of ideas regarding vital issues. This result seems within the realm of future realization since the Court is already profoundly committed "to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."[45]

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[43] *Id.* at ——.

[44] Although the *Times* case involved only a newspaper defendant, it appears that the rule announced by the Court would apply with equal vigor to a case involving an "individual" defendant. This conclusion is supported by the generic nature of the language in *Times* coupled with the Court's application of the *Times*' rule to an "individual" defendant in *Garrison*.

[45] New York Times v. Sullivan, *supra* note 32, at 270.