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Recent Developments Concerning Constitutional Limitations on State Defamation Laws

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I. Introduction

Two recent cases, *New York Times Co. v. Sullivan*[1] and *Garrison v. Louisiana*,[2] have over-turned many aspects of state laws regarding the defamation of public officials. The importance of these two cases is due not only to the problems they have solved, but also to the potential confusion which they have created. The primary purpose of this discussion is to point out the practical effect which the decisions will have on state law, both statutory and decisional. This note is concerned primarily with those aspects of the law of defamation dealing specifically with the conditional or qualified privilege to criticize the official acts and qualifications of public officials and candidates. Several questions in this specific area are left unresolved by *Sullivan* and *Garrison*: (1) What classes of people will be analogized to public officials for the purposes of applying the rules announced in *Sullivan*? (2) When will the criticism be deemed directed toward the official conduct of the public official, rather than personal criticism, in order for the defendant to gain the protection of *Sullivan*? (3) Is the *Sullivan* privilege limited to the press or any other particular class whose relationship to the public is such that a duty exists within this class to inform the public, or is the privilege extended to all members of society? (4) Can a state continue to use its prior definition of malice in cases where the defendant has made no misstatements of fact but has only commented harshly on true facts? (5) Is the distinction between fact and comment abolished? (6) What is the proper instruction to the jury in a case involving both fair comment and misstatements of fact? (7) In order for the plaintiff to defeat the defendant's qualified privilege, is it necessary that plaintiff prove "actual malice" only by a mere preponderance of the evidence or must he show this actual malice by "clear and convincing proof"? (8) If plaintiff's burden is that of presenting "clear and convincing proof," what will be the practical effect of this change, especially in relation to the propriety of directed verdicts for the defendant both at the trial and appellate level? (9) What is the proper standard for determining if there has been a reckless disregard for the truth?

The true significance of these two decisions cannot be appreciated without a thorough examination of the prior law. After first examining the *Sullivan* and *Garrison* decisions, the prior state law will be

1. 376 U.S. 254 (1964).
2. 379 U.S. 64 (1964).

discussed, concluding with several predictions concerning the effect which *Sullivan* and *Garrison* will have on state law.

II. THE DECISIONS—*New York Times Co. v. Sullivan* AND *Garrison v. Louisiana*

A. *New York Times Co. v. Sullivan*

1. *Statement.*—Plaintiff, the elected police commissioner of Montgomery, Alabama, brought a libel action against the defendant newspaper[3] seeking damages, both actual and punitive, of 500,000 dollars. The action resulted from defendant's publication of an allegedly defamatory advertisement which contained several inaccurate statements,[4] most of which were relatively minor. There was evidence that defendant's secretary believed the advertisement to be "substantially correct,"[5] but it was proved that defendant could have checked on the truthfulness of the advertisement by looking into its own files, and thereby could have discovered the inaccuracies.[6]

The Alabama Supreme Court held that the publication was libelous per se, and no actual malice need be proved by plaintiff since defendant was unable to prove the truth of the statements.[7] Defendant, after having failed to show the absolute truth of the advertisement, sought the relief afforded by the fair comment privilege. This fair comment privilege has been defined as a qualified privilege which is extended to criticism of any public figure or public concern.[8] It has generally been limited to an honest expression of the writer's opinion and has not been extended to good faith misstatements of fact.[9]

3. The action was also brought against four Alabama clergymen who allegedly sponsored the advertisement. New York Times Co. v. Sullivan, *supra* note 1, at 256.

4. The inaccuracies can be listed as follows: "(1) The dining hall was never padlocked. (2) The students did not refuse to re-register. (3) Less than the entire student body protested. (4) The student leaders were not expelled for the protest on the capital steps. (5) The police at no time literally ringed the campus. (6) Although the police did appear near the campus on three occasions, it was never in connection with the protest at the capitol. (7) Dr. King had not been arrested seven times. (8) The charge that Dr. King was assaulted was flimsy and was based on a simple controverted instance of some years before." Kalven, *The New York Times Case: A Note on The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 199. See New York Times Co. v. Sullivan, *supra* note 1, at 258-59. For a copy of the advertisement referred to, see New York Times Co. v. Sullivan, *supra* note 1, following 292.

5. New York Times Co. v. Sullivan, *supra* note 1, at 286.

6. *Id.* at 287.

7. *Id.* at 262.

8. See PROSSER, TORTS § 110, at 812-14 (3d ed. 1964) [hereinafter cited as PROSSER] for a list of such subjects of public concern. See also notes 101-09 *infra*.

9. GATLEY, LIBEL AND SLANDER 354 (4th ed. 1953). Dean Prosser, who refers to both the fair comment privilege and the conditional privilege to assert misstatements of fact as the privilege of public interest or discussion, states that "three-fourths of the state courts which have considered the question have held the privilege of

However, a minority of courts have extended the privilege to good faith misstatements of fact which attack public officials[10] and candidates.[11] This extension of the fair comment privilege has often been referred to as the conditional privilege to assert good faith misstatements of fact.[12] But the Alabama Court followed the majority view which refuses to recognize a conditional privilege to assert misstatements of fact,[13] and also followed the established test that the defense of truth under the fair comment privilege must be measured by the strictest of standards.[14] The effect of this ruling was to leave the defendant with neither the fair comment privilege nor the conditional privilege to assert misstatements of fact to rely on as a defense.

The jury was instructed that punitive damages could be awarded even if plaintiff's allegations of actual damage were not proved.[15] The jury was required to find only two elements to hold defendant liable: (1) that the defendant published the article and, (2) that the statements were made "of and concerning the plaintiff."[16] The jury returned a verdict for the requested amount, 500,000 dollars.[17]

2. *Opinion.*—Defendant petitioned the Supreme Court of the United States on the ground that it had been denied its first amendment rights of freedom of the press as protected against state action by the four-

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public discussion is limited to opinion, comment or criticism, and does not extend to any false assertion of facts." PROSSER § 110, at 814.

10. Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955); Salinger v. Cowles, 195 Iowa 873, 191 N.W. 167 (1922); Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908); Stixe v. Beacon Newspaper Corp., 185 Kan. 61, 340 P.2d 396 (1959); Lawrence v. Fox, 357 Mich. 134, 97 N.W.2d 719 (1959); Clancy v. Daily News Corp., 202 Minn. 1, 277 N.W. 264 (1938); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962). "In general, a conditional privilege exists in any situation where there is a legal or moral duty to speak out, so that the publisher's conduct comes within accepted standards of decency and is not mere gossip." Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 889 (1949) [hereinafter cited as *Defamation of Public Officers*]. See RESTATEMENT, TORTS § 598, comment *b* (1938), for a view which would allow the conditional privilege only if there was a sufficient public interest to make the publication necessary. See also PROSSER § 110, at 815.

11. Coleman v. MacLennan, *supra* note 10 (plaintiff was a candidate for reelection).

12. See *Defamation of Public Officers*, at 888. For purpose of clarity in this article, a distinction will be made between the fair comment privilege and the conditional privilege to assert good-faith misstatements of fact.

13. New York Times Co. v. Sullivan, *supra* note 1, at 262. For a list of states which have adhered to this majority view, see *Defamation of Public Officers*, at 896 n.102.

14. Johnson Publishing Co. v. Davis, 271 Ala. 474, 494-95, 124 So. 2d 441, 457-58 (1960); Sharpe v. Stevenson, 34 N.C. 239 (1851); Kilian v. Doubleday & Co., 367 Pa. 117, 79 A.2d 657 (1951).

15. New York Times Co. v. Sullivan, 273 Ala. 656, 675, 144 So. 2d 25, 39 (1962). "The advertisement being libelous *per se*, it was not necessary to allege special damages in the complaint."

16. New York Times Co. v. Sullivan, *supra* note 1, at 262.

17. New York Times Co. v. Sullivan, *supra* note 15.

teenth amendment.[18] The defendant alleged that the awarding of the libel judgment was state action within the meaning of the fourteenth amendment.[19] The Supreme Court of the United States held for the defendant, reversing the state court judgment. A newspaper does not forfeit its constitutional right to freedom of the press by publishing an advertisement attacking the official conduct of a public official merely because it contains good faith misstatements of fact and/or because of its defamatory nature toward the official.[20] To defeat the conditional or qualified privilege to make statements concerning a public official, the plaintiff public official must prove that the misstatements were made with "actual malice," *i.e.*, that the statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not."[21] Plaintiff also has the burden of presenting evidence of this actual malice with "convincing clarity."[22] The Court went on to hold that this constitutional protection would likewise apply to defamatory attacks on certain agencies of government where the complaint is brought by the official in charge of that branch of government.[23]

3. *Rationale.*—The Court began its opinion by disposing of plaintiff's argument that the granting of damages for libel was not state action, making it very emphatic that this was an exercise of a "state rule of law" which imposed unconstitutional restrictions on the freedom of speech and the press; the fourteenth amendment applies to an exercise of state power regardless of the form it takes.[24] Next, the argument of plaintiff that there is no constitutional protection for libel[25] was

18. "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." New York Times Co. v. Sullivan, *supra* note 1, at 256.

19. *Id.* at 265. The Court accepted this contention by stating: "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Ibid.*

20. *Id.* at 254-55.

21. *Id.* at 280.

22. "[W]e consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands." *Id.* at 285-86.

23. "We hold that such a proposition [the Alabama Court's view that attacks on the government body will be transmuted into personal attacks on the officials of that body] may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." *Id.* at 292.

24. *Id.* at 265. See also note 19 *supra.*

25. The Supreme Court of the United States had made previous statements to the effect that libel can claim no constitutional protection. See Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (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); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Near v. Minnesota, 283 U.S. 697, 715 (1931).

rejected by the Court. "[L]ibel can claim no talismanic immunity from constitutional limitations."[26] The Court referred to several state statutes which restricted individual expression that the Court had previously held unconstitutional,[27] and classified Alabama's libel law within the same category.[28] This analysis sufficiently foreclosed the argument that libel was beneath constitutional protection.[29]

Mr. Justice Brennan expressed the basic rationale of the opinion when he stated:

> We consider this case 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.[30]

This rationale is premised on the policy that the free interchange of ideas and public discussion is the basic structure on which our democratic government is built, and any restriction of this "opportunity for free political discussion"[31] would be highly detrimental to our democracy. The Court went on to adopt the reasoning of those state courts which have adhered to what was a minority view,[32] as expressed by Judge Edgerton in *Sweeney v. Patterson*: "The interest of the public here outweighs the interest of appellant or any other individual."[33] If the defendant must guarantee the truth of all his factual assertions, the result will be a "self censorship" by which critics will be forced to "steer far wider of the unlawful zone,"[34] restricting the variety of public discussion.

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26. New York Times Co. v. Sullivan, *supra* note 1, at 269.

27. Among the previous state judgments which were struck down were: a civil contempt judgment based on an out of court publication criticizing the decision of a judge, Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941); a criminal conviction for violation of a state statute designed to prevent the incitement of insurrection [unless the inciting statements cause a reasonable apprehension of danger to organized government], Herndon v. Lowry, 301 U.S. 242 (1936); a criminal conviction for violation of a state law holding it illegal for groups to assemble as a Communist organization, DeJonge v. Oregon, 299 U.S. 353 (1936); a criminal conviction for breach of the peace resulting from defendants' action of marching around the state house and strongly voicing their views on integration, Edwards v. South Carolina, 372 U.S. 229 (1962).

28. New York Times Co. v. Sullivan, *supra* note 1, at 269.

29. "It [libel] must be measured by standards that satisfy the First Amendment." *Ibid.*

30. *Id.* at 270.

31. Stromberg v. California, 283 U.S. 359, 369 (1931).

32. For a list of states following the minority view, see New York Times Co. v. Sullivan, *supra* note 1, at 280 n.20. For a discussion of the reasoning of the minority view, see text accompanying notes 73-77 *infra*.

33. 128 F.2d 457, 458 (D.C. Cir. 1942) (speaking for a unanimous court in dismissing a congressman's libel suit resulting from a newspaper article charging him with anti-Semitism).

34. Speiser v. Randall, 357 U.S. 513, 526 (1947). See also New York Times Co. v. Sullivan, *supra* note 1, at 279.

The Court also seemed to buttress its decision with the rule laid down in *Barr v. Matteo*:[35] statements made by a federal public official are absolutely privileged if made "within the outer perimeter" of his duties if the public official is sued for libel by a private citizen.[36] It seems that a majority of the states have adopted either this or a similar rule which holds that the official's statements are protected unless the plaintiff can prove the defendant public official made the statement with actual malice.[37] There was an implication that the public would be discriminated against if it were not allowed the same or a similar immunity as the public official. In making the comparison between the citizen and public official, the opinion stated: "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer."[38]

B. *Garrison v. Louisiana*

1. *Statement.*—The defendant was convicted of criminal defamation under the Louisiana Criminal Libel Statute;[39] which statute denied the defense of truth if the statements were made with actual malice,[40] as defined in previous Louisiana decisions as "hatred, ill will, enmity, or a wanton desire to injure."[41] The statute also punished false statements made with ill will or made without a reasonable belief in their truth.[42] The conviction was the result of defendant's allegedly defamatory criticism of eight judges of the criminal district court.[43] Defendant was convicted on the trial court's finding that the statements were made with ill will and also that they were not made with a reasonable belief in their truth.[44]

35. 360 U.S. 564 (1959).

36. *Id.* at 575.

37. 1 HARPER & JAMES, TORTS § 523, at 429-30 (1956). For a recent case upholding this rule, see Vigoda v. Barton, 204 N.E.2d 441 (Mass. 1965).

38. New York Times Co. v. Sullivan, *supra* note 1, at 282-83. "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." *Ibid.*

39. LA. REV. STAT. ANN. § 14:47-49 (1950). For a reprinting of these applicable sections, see Garrison v. Louisiana, *supra* note 2, at 65.

40. LA. REV. STAT. ANN. § 14:48 (1950). "Where such a publication or expression is true, actual malice must be proved in order to convict the offender."

41. State v. Cox, 246 La. 748, 756, 167 So. 2d 352, 355 (1964); Bennett, *The Louisiana Criminal Code*, 5 LA. L. REV. 6, 34 (1942).

42. LA. REV. STAT. ANN. § 14:49(2) (1950).

43. The most stringent of the accusations was: "This raises interesting questions about the racketeer influences on our eight vacation-minded judges." Garrison v. Louisiana, *supra* note 2, at 66.

44. *Id.* at 78. "The Louisiana Supreme Court affirmed the conviction solely on the ground that the evidence sufficed to support the trial court's finding of ill-will, emnity, or a wanton desire to injure. But the trial court also rested the conviction

2. *Opinion.*—Defendant petitioned the Supreme Court of the United States for a writ of *certiorari* on grounds that he had been deprived of his constitutional rights of freedom of speech which had been established in *Sullivan.* The Supreme Court reversed the Louisiana conviction holding that the Louisiana Criminal Libel Statute is unconstitutional for two reasons: first, it punishes true statements made with malice in violation of the first amendment protection of freedom of speech which makes truth an absolute defense to an action for libel brought by a public official; second, it punishes false statements made with ill will in derogation of the rules laid down in *Sullivan.*[45]

3. *Rationale.*—The Court relied upon the same basic rationale as that used in *Sullivan,* giving a more far-reaching effect to the concept that "debate on public issues should be uninhibited, robust and wide-open. . . ."[46] and that any restrictions on this debate should be struck down. Plaintiff only has protection from and a remedy against the calculated falsehood or deliberate lie.[47]

III. The Law Prior to *Sullivan* and *Garrison*

The significance of these two cases becomes much clearer after an examination of prior state law in this area. Both the courts and text-writers have seemed unable to cope with the problems of the qualified privilege. They have insisted on making narrow distinctions in cases where no reason for the distinctions has existed. Very little, if any, uniformity has been achieved among the states and confusion has existed. Defamation of public officials has been treated much the same as defamation of public figures by some courts while other courts have attempted by different methods to broaden the privilege enjoyed by the critic of government and the public official. Yet, other courts have restricted the privilege, while seeming to ignore the first amendment. This discussion will try to point out the distinctions and problems with which the courts have become entangled, so as to illustrate the ultimate importance of *Sullivan* and *Garrison.*

A. *Fair Comment and the Conditional Privilege*

Courts have persisted in making distinctions between the defense

on additional findings that the statement was false and not made in the reasonable belief of its truth." *Ibid.*

45. Garrison v. Louisiana, *supra* note 2.

46. See note 30 *supra.*

47. Garrison v. Louisiana, *supra* note 2, at 75. "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . .' Chaplinsky v. New Hampshire, 315 U.S. 568, 572." *Ibid.*

of fair comment and the defense of the conditional privilege to assert good faith misstatements of fact. Fair comment has been generally defined as a qualified privilege extended to all members of society[48] to offer any comment or opinion about any public figure or subject of public concern,[49] provided that the comment be the honest expression of the writer's opinion—and that it be made with proper motives and for justifiable ends.[50]

The conditional privilege to assert good faith misstatements of fact can generally be defined as a qualified privilege which is restricted to criticism of government or public officials.[51] This privilege has been held to be defeasible if the defendant did not have a reasonable belief in the truth of the erroneous statements, or if the statements were made with an improper motive.[52]

The basic difference between the two is that the fair comment privilege has not been restricted to statements about government and public officials or candidates as is the conditional privilege for misstatements of fact;[53] rather the fair comment privilege has been extended to any criticism directed at a subject of public concern, *i.e.*, educational, charitable, and religious institutions or artistic, literary, and athletic activities.[54] Dean Prosser contends that the two privileges are one in the same: the privilege to assert misstatements of fact is merely an extension of the fair comment privilege.[55] No matter what label is used to describe the privilege, "actual malice" will defeat either the fair comment privilege or the conditional privilege to assert misstatements of fact.[56] The problem here is: what definition

48. See note 10 *supra.*

49. See note 8 *supra.*

50. "It [the comment] must, furthermore, represent the commentator's honest opinion, and be published, in part at least, for the bona fide purpose of giving the public the benefit of comment which it is entitled to have, rather than any ulterior motive of causing harm to the plaintiff." PROSSER § 110, at 816. See also Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N.W. 974 (1925).

51. See notes 10-11 *supra.*

52. See *Defamation of Public Officers,* at 890. See also Ranson v. West, 125 Ky. 457, 101 S.W. 885 (1907), for a case holding that the privilege will not be allowed unless defendant had reasonable grounds to believe that the statements were true. Other courts have required only that the defendant have a good faith belief in the truth of the statements no matter how unreasonable the belief might have been. Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation,* 25 ILL. L. REV. 865, 871 (1931). Professor Noel would contend that defendant must have acted as a reasonable man under the same circumstances. *Defamation of Public Officers,* at 890. "Conditional privilege is defeated by the presence of an improper purpose, and any purpose is regarded as improper except that of promoting the interest for the protection of which the privilege is given." *Id.* at 889. See also PROSSER § 110, at 816.

53. See notes 8-11 *supra.*

54. *See* note 8 *supra.*

55. See PROSSER § 110, at 814-16. See note 9 *supra.*

56. Note, 12 MIAMI L. REV. 89, 94 (1958).

of actual malice will be applied in determining whether the privilege is defeated?

All jurisdictions have recognized the fair comment privilege in one form or another, while only a minority have recognized the conditional privilege for misstatements of fact as defined above.[57] The *Sullivan* decision vindicates this minority view, accepting some of its qualifications while rejecting others.

B. *Misstatements of Fact—Decisions and Policy*

There has been a sharp conflict among the courts as to whether defamatory misstatements of fact, made in good faith with a reasonable belief in the truth of the statements concerning a public official or candidate for public office, will be privileged. The large majority of courts have held that any misstatement of fact, notwithstanding that it was made with a good faith belief in its truth, will not be protected; and the defense extends only to comment or opinion on true facts.[58]

In those jurisdictions which followed the majority view, the distinction between fact and comment attained its ultimate importance. In most cases, the determination of whether a statement is "fact" or "comment" is not difficult; however, in some cases it can be very confusing, especially when the speaker's inference is so completely unrelated to true facts actually stated that the reader must imply that other facts existed which were not true. The best determinative test appears to be what the ordinary reader would understand the statement to be: either "an expression of the . . . writer's opinions or a directed statement of existing facts."[59] The determination of this issue, which could quite often have been the decisive factor in the trial, was generally regarded as a question of law for the judge to decide as long as the essential facts were uncontroverted. But the jury should make the determination when the alleged comment implied the existence of other untrue facts[60] or where the facts were

57. See *Defamation of Public Officers,* at 896 n.102, for a list of states which have refused to recognize the conditional privilege to assert misstatements of fact. See also New York Times Co. v. Sullivan, 396 U.S. 254, 280 n.20 (1964), for a list of states which *have* recognized the conditional privilege.

58. See note 57 *supra.* Post Publishing Co. v. Hallam, 59 Fed. 530 (6th Cir. 1893), appears to be the leading case which followed the majority view.

59. *Defamation of Public Officers,* at 879. " 'If one states that a candidate is a thief, without qualifications, he communicates a fact,' and the statement is actionable if untrue; but if he had 'stated the exact facts and expressed the opinion that they amounted to stealing, though they did not technically constitute the offense of larceny, the comment might be privileged.' " Eikhoff v. Gilbert, 124 Mich. 353, 360, 83 N.W. 110, 113 (1900).

60. The jury should determine if what appears to be comment actually implies the existence of facts which might be untrue. Van Arsdale v. Time, Inc., 35 N.Y.S.2d 951

controverted.[61] In most of those majority jurisdictions which refused to recognize the conditional privilege to assert good faith misstatements of fact, the defendant has carried the burden of proving that his statements were comment rather than fact. In carrying this burden, the defendant was required to affirmatively establish all the elements of the fair comment privilege.[62] If the statements were held to be facts rather than comment—either by the judge or jury[63]—defendant was usually given the burden of establishing the truth of his charge.[64] But often this burden was not as strenuous as it appeared. In one case where the plaintiff was accused of wasting 80,000 dollars on a worthless project, although, in reality, only 17,500 dollars were expended, the court held that the accusations were "substantially true"; thus, the defendant was not held liable.[65]

The policy favored by the majority view has been protection for the reputation of the individual, premised on the theory that erroneous statements of fact would be much more harmful than mere harsh comment which reasonable men would reject if the facts were insufficient to support the inference.[66] It was feared that the grave risk of this potential threat to one's reputation would deter good men from running for public office, leaving only those people with no character to discredit as our public officials. It has also been contended that this rule of strict liability for libelous falsehoods is needed to protect the public from a "wayward press," to improve the standards of our newspapers, and to provide society with a better informed public.[67] Another basis for the more rigid requirements of accuracy on the part of the publisher is that newspapers can obtain liability in-

(Sup. Ct. 1942), *aff'd mem.*, 265 App. Div. 919, 39 N.Y.S.2d 413 (1st Dep't 1942); RESTATEMENT, TORTS § 618, comment *b* (1934).

61. Bodine v. Times-Journal Publishing Co., 26 Okla. 135, 110 Pac. 1096 (1910)); Switzer v. American Ry. Exp. Co., 119 S.C. 237, 112 S.E. 110 (1922). See note 63 *infra.*

62. PROSSER § 111, at 823. One requirement of the fair comment privilege being that no misstatements of fact were made.

63. There was a great amount of confusion on this issue with some commentators contending that is a question for the jury even though the facts are uncontroverted. RESTATEMENT, TORTS § 618(2) (1938), takes the view that "the jury determines whether criticism was merely the expression of an opinion upon known facts or upon a true or privileged statement of fact or whether it carried with it a false implication of defamatory facts and whether it represented the honest opinion of its author and whether it was expressed for a proper purpose."

64. RESTATEMENT, TORTS § 613(2)(a) (1938). However, in Missouri, in cases involving defamation of public officials or candidates, the plaintiff has the burden of proving that the statements were false. Kleinschmidt v. Johnson, 183 S.W.2d 82 (Mo. 1944).

65. Fort Worth Press Co. v. Davis, 96 S.W.2d 416 (Tex. Civ. App. 1936).

66. Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 412, 419 (1910).

67. Note, 12 MIAMI L. REV. 89, 102 (1958). This theory proposed that a more responsible press would lead to a more accurate reporting of the news.

surance for defamation and pass this added cost on to the advertiser or subscriber, therefore leaving the press with no financial burden and still providing the public official with the protection he justly deserves.[68]

A minority of the courts and most of the commentators have agreed that defamatory misstatements of fact, made with a reasonable belief in their truth, should be privileged[69] on the condition that defendant's accusations were not made with "actual malice."[70] There has been a divergence of opinion as to who has the burden of proving "actual malice," but the better view would place the burden on the plaintiff.[71] Yet, the defendant must affirmatively establish his privilege by showing a public interest sufficient to justify the privilege.[72]

The basic rationale supporting this minority view is that our society and government will suffer if the discussion and debate on public officials and candidates is restrained by the potential threat of a large libel judgment. It is also urged that the limited protection from libel suits offered by the majority view fails to balance adequately the competing interests of the *public* to be fully informed and of the *individual* to have his reputation protected from asserted falsehoods because it fails to give sufficient weight to the interest of the public to be fully informed.[73] It has been contended that the interests can best be balanced by holding the publisher to a higher standard of care in ascertaining the truth of the defamatory publication, and by relieving him of liability for good faith misstatements of fact made after a thorough investigation.[74] If the defendant must make all statements of fact at his peril, there is a grave risk that "many dark spots in the lives of public officers and candidates will remain unilluminated," and the popular politician, even though dishonest and corrupt, will be protected.[75] Advocates of the minority view have also argued that there appears to be *no* decline in the

68. *Developments in the Law of Defamation,* 69 HARV. L. REV. 875, 906 (1956). See *id.* at 914, for a discussion of defamation insurance.

69. A list of the states and commentators who adhere to the minority view is found in New York Times Co. v. Sullivan, 376 U.S. 254, 280 n.20 (1964).

70. For a discussion of the numerous definitions of actual malice and the problems created thereby, see text accompanying notes 84-97 *infra.*

71. "In an action for defamation the plaintiff has the burden of proving . . . (g) abuse of a conditional privileged occasion." RESTATEMENT, TORTS § 613(1)(g) (1938). See comment *f* of this section for reasons sufficient to hold that the privilege has been abused. For all practical purposes actual malice must be given the same meaning as the abuse of privilege "because the defamatory matter was published for some purpose other than that for which the particular privilege is given." RESTATEMENTS, TORTS § 613, comment *f* (1938). See note 90 *infra.*

72. RESTATEMENT, TORTS § 613(2)(B) & (C) (1938).

73. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908).

74. 24 MINN. L. REV. 620 (1940).

75. *Defamation of Public Officers,* at 892.

quality of public officials and candidates in those states which have adopted the minority's view limiting libel actions brought by public officials.[76] Criticism has also been directed toward the belief that factual misstatements are more injurious to the plaintiff than mere comment, the theory being that the average reader will not stop to determine whether the statement is fact or comment and then base his belief in the statement on this determination.[77]

Moreover, the minority view which grants a qualified privilege for good-faith misstatements of fact has taken various forms. One court has held that the conditional privilege applies only to misstatements made about the public acts of *public officials* and not mere *candidates* for public office, relying on the theory that an official should be held to a higher standard of care and his duty to the public is increased once he assumes his office.[78] Two older decisions have taken the contrary view, allowing the conditional privilege only for falsehoods about candidates, relying on the belief that elected officials need greater protection than the candidate.[79]

Three other theories which have provided the defendant with protection greater than that granted by the strict majority view have been advanced. The first of these was the "libel per se" rule: if extrinsic facts must be shown to make the words appear defamatory, then the statements are not libelous "on their face" and plaintiff must plead and prove "special damages" as a condition to recovery.[80] "Special damages," which refer to a pecuniary loss such as loss of customers or employment, are often difficult, if not impossible, to prove.[81] It appears that this "libel per se" theory, which was adopted in only one state, has now been abandoned.[82]

A second theory advanced was the "public official rule" which provided for no liability for a defamatory misstatement unless the assertion was of such a nature that it would require plaintiff's removal from office if it were true.[83] This rule also has received very limited

76. *Id.* at 895.

77. "Statement[s] of fact, inferences therefrom, comments, criticism and the opinion of a writer are frequently so blended in a writing that a demarcation between them is difficult to draw." Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 300, 27 S.E.2d 837, 841-42 (1943).

78. *Id.* at 303, 27 S.E.2d at 842-43.

79. State v. Fish, 91 N.J.L. 228, 102 Atl. 378 (1917); Commonwealth v. Wardwell, 136 Mass. 164, 169 (1883).

80. See Carpenter, *Libel Per Se in California and Some Other States*, 17 So. CAL. L. REV. 347, 356-67 (1944); 26 IOWA L. REV. 893, 895 (1941).

81. *Defamation of Public Officers*, at 901.

82. Sydney v. MacFadden Newspaper Publishing Corp., 242 N.Y. 208, 151 N.E. 209 (1926).

83. Sweeney v. Caller-Times Publishing Co., 41 F. Supp. 163 (S.D. Tex. 1941); Tanzer v. Crawley Publishing Corp., 240 App. Div. 203, 205, 268 N.Y. Supp. 620, 622 (4th Dep't 1934); Cotulla v. Kerr, 74 Tex. 89, 94, 11 S.W. 1058, 1059 (1889).

application and support because of its unjustness in condoning the publication of malicious misstatements of fact which were very detrimental to the official's reputation, though falling short of a sufficient justification for removal from office.

A third theory was adopted by the Missouri courts which, although not allowing a privilege for misstatements of fact, placed the burden of proving the falsity of the statements on the plaintiff once defendant had established the presence of the public interest requisite for the defense.[84] This theory has some merit in avoiding the worst of both the strict majority and minority views in that defendant is not forced to prove the truth of his statements, and plaintiff is not forced to prove the defendant's bad faith or negligence.[85]

The relevance of these variations from the strict majority or minority view is to point out the obvious dissatisfaction with both, and the different compromising theories which have been employed to remedy the conflict.

C. *Definitions of Actual Malice*

The numerous definitions of actual malice and their application have been responsible for much of the confusion which has prevailed in the law of defamation. To illustrate one of the significant areas of the *Sullivan* decision, these older definitions must be examined.

The distinction between "actual malice" and "legal malice" must first be established in order to avoid confusion.[86] Legal malice is the fictional term[87] which is implied by law when defendant makes an unprivileged defamatory statement about plaintiff even though the defendant harbored no ill will toward the plaintiff and also had an honest belief that the statements were true.[88] Legal malice is "implied as a disguise for strict liability in any case of unprivileged defamation."[89] Defendant has the burden of rebutting this fiction by proving that the words were not defamatory on their face.

"Actual malice" becomes important when the defendant sufficiently establishes a privileged occasion for making the statement. It is similar to the allegation of "abuse of privilege"[90] which plaintiff must

84. Kleinschmidt v. Johnson, *supra* note 64.

85. *Developments in the Law of Defamation, supra* note 68, at 928 n.357.

86. Cases illustrating the distinction are: Iverson v. Frandsen, 237 F.2d 898 (10th Cir. 1956); Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).

87. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908).

88. Hoffman v. Trenton Times, 17 N.J. Misc. 339, 8 A.2d 837 (Sup. Ct. 1939); PROSSER § 108, at 790-91.

89. PROSSER § 110, at 821.

90. "Abuse of privilege" is the term generally referred to as meaning excessive publication, use of the privilege for an improper purpose, or a failure of defendant to believe in the truth of the statements made. See RESTATEMENT, TORTS § 613, comment *f* (1938); PROSSER § 110, at 823.

prove to defeat the qualified privilege.[91] Put in simpler terms, when the occasion is privileged, plaintiff has the burden of proving actual malice to defeat the privilege; while in unprivileged occasion, defendant must rebut the presumption of "legal malice."

It can be assumed that proof of "actual malice" will defeat both the fair comment privilege and the qualified privilege to assert good faith misstatements of fact.[92] The real difficulty and confusion results from the definition to be applied to the term. As related to the fair comment privilege, Dean Prosser would discard the term "malice" as meaningless and unsatisfactory, and apply the test of the *Restatement of Torts*: "the privilege of fair comment is lost if the publication is not made primarily for the purpose of furthering the interest which is entitled to protection."[93] Other courts have stated that the privilege is lost if the defendant acts from motives of "hatred, ill will or enmity or a wanton desire to injure."[94] It has also been said that the defamatory statement must be an *honest* expression of the writer's own opinion.[95]

As related to the qualified privilege to assert misstatements of fact, the privilege has been held to be lost if the defendant does not believe in the truth of his statements,[96] or if defendant does not have reasonable grounds or "probable cause" to believe that the statements are true.[97] Yet, some courts have held that statements made in good faith will be privileged notwithstanding the unreasonableness of the basis for believing the truth of the statements.[98] Dean Prosser contends that the defendant should be held to the standard of the reasonable man under the same circumstances, giving heavy consideration to the "strength of his belief, the grounds that he has to support it, and the importance of conveying the information."[99]

The courts and commentators have persisted in making distinctions as to what abuses will defeat the fair comment or qualified privilege to assert misstatements of fact. Both the *Sullivan* and *Garrison* deci-

91. Cook v. Pulitzer Publishing Co., 241 Mo. 326, 145 S.W. 480 (1912); RESTATEMENT, TORTS § 613(1)(9) (1938); PROSSER § 110, at 819.

92. 12 MIAMI L. REV. 89, 94 (1958). For this purpose "actual" malice is given the same meaning as the phrase "abuse of privilege" as used by the RESTATEMENT, TORTS §§ 605, 613 (1938).

93. PROSSER § 110, at 822.

94. Brewer v. Second Baptist Church, 32 Cal. 2d 791, 197 P.2d 713 (1948); Mullen v. Lewiston Evening Journal, 147 Mc. 286, 86 A.2d 164 (1952).

95. Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N.W. 974 (1925); 1 HARPER & JAMES, TORTS § 457 (1956).

96. Caldwell v. Personal Fin. Co., 46 So. 2d 726 (Fla. 1950); Froslee v. Lund's State Bank, 131 Minn. 435, 155 N.W. 619 (1915).

97. Baskett v. Crossfield, 190 Ky. 751, 228 S.W. 673 (1920). *Cf.* Hogan v. New York Times Co., 313 F.2d 354 (2d Cir. 1963).

98. A.B.C. Needlecraft Co. v. Dun & Bradstreet, 245 F.2d 775 (2d Cir. 1957).

99. PROSSER § 111, at 822.

sions have helped to abolish these distinctions and problem areas, but they have the potential of creating new "gray areas" which will undoubtedly lead to difficulties of interpretation by the state courts.

IV. Predictions on the Future Effect of *Sullivan* and *Garrison* on Prior State Law

It can be assumed that the constitutional limitations announced in *Sullivan* and *Garrison* supersede state law, both statutory and decisional, and that state libel judgments must conform to these rules and restrictions in order to achieve validity.[100] The basic standards and rules are set out in the decisions, but certain collateral issues are susceptible of conflicting interpretations. It is the purpose of the discussion in the remaining portion of this article to point out these problem areas, to predict the ultimate effect of *Sullivan* and *Garrison* on state law, and to formulate guidelines which may prove suggestive to the judges and attorneys who must try defamation cases.

A. *Who is a Public Official?*

The qualified privilege of fair comment has generally been extended to any matter of public concern which affects the interests of the community as a whole, such as the administration of government,[101] the qualifications of officials or candidates,[102] the management of institutions, such as schools[103] and churches,[104] the conduct of a private enterprise which affects the public interest,[105] the work of an individual which is submitted to the public,[106] and exhibitions of art,[107] athletic[108] or acting[109] abilities. The question remains: Do the extensions of the

100. The first amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The restraints imposed upon Congress by this amendment have been applied to the states through the due process clause of the fourteenth amendment. See Bridges v. California, 314 U.S. 252, 268 (1941); Gitlow v. New York, 268 U.S. 652 (1925); Bartholomew, *The Gitlow Doctrine Down to Date,* 50 A.B.A.J. 139 (1964).

101. Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E.2d 209 (1943) (audit of city's books).

102. Catalfo v. Shenton, 102 N.H. 47, 149 A.2d 871 (1959) (Democratic State Committee chairman).

103. Clark v. McBaine, 299 Mo. 77, 252 S.W. 428 (1923).

104. Klos v. Zahorik, 113 Iowa 161, 84 N.W. 1046 (1901).

105. Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955).

106. McCarthy v. Cincinnati Enquirer, 101 Ohio App. 297, 136 N.E.2d 393 (1956) (submission of radio and T.V. programs).

107. Outcault v. New York Herald Co., 117 App. Div. 534, 102 N.Y.S. 685 (1907).

108. Cohen v. Cowles Publishing Co., 45 Wash. 2d 262, 273 P.2d 893 (1954) (jockey's handling of a horse).

109. Cherry v. Des Moines Leader, *supra* note 86. See Prosser § 110, at 812-14, for other subjects of public interest sufficient to justify the fair comment privilege.

privilege to misstatements of fact made by *Sullivan* apply only to elected public officers, or do they also apply to these other areas of legitimate public concern? Strictly construed, the decision is limited to elected public officials, but the Court's language and the policy which it promotes give the impression that *Sullivan's* misstatement of fact doctrine should likewise be applied to candidates for public office.[110] If the *Sullivan* rules are not applicable to candidates, the rule would have the potential effect of discriminating against the incumbent seeking re-election.

The *Sullivan* rule which allows a conditional privilege for misstatements of fact about public officials made without actual malice is certainly not extended to public figures outside the sphere of government. It has been held *not* to apply to a former heavy-weight boxing champion[111] or to a major league baseball pitcher.[112] Since the primary purpose espoused by *Sullivan* was the promotion of a sound government and better officials as the end result of a better educated public, it can be plausibly contended that only those persons closely connected with government will fall within the rule for only a valid public interest should outweigh the interest of the individual's reputation. But the Alaska Superior Court has extended the *Sullivan* rule to include attacks on critics of government as distinguished from public officials because the critic (here a news columnist) became so infected with the best interests of government that his protection from defamation should be no greater than that of the public official.[113] It has also been suggested by Judge Friendly of the Second Circuit that the constitutional privilege announced in *Sullivan* could be properly extended to participants in any public debate on issues which are of "grave public concern."[114]

110. "Although the public official is the strongest case for constitutional compulsion of such a privilege, it is questionable whether in principle the decision [New York Times Co. v. Sullivan] can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent." Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964) (dictum). To support this theory that the constitutional privilege of *Sullivan* is extended to candidates as well as elected public officials, it should be noted that the Court cited with approval cases which had previously granted the privilege for misstatements of fact about candidates. New York Times Co. v. Sullivan, 376 U.S. 254, 280 n.20 (1964).

111. Dempsey v. Time, Inc., 43 Misc. 2d 759, 252 N.Y.S.2d 186 (Sup. Ct. 1964).

112. Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S. 2d 529 (Sup. Ct. 1964).

113. Pearson v. Fairbanks Publishing Co., Civil No. 10,209, Super. Ct. of Alaska, 4th Dist., Nov. 25, 1964 *appeal docketed,* Civil No. 585, Sup. Ct. of Alaska.

114. Pauling v. News Syndicate Co., *supra* note 110, at 671. This view has been criticized in Note, 51 VA. L. REV. 106, 113 (1965), as "an unjustified interpretation of the *Sullivan* rationale."

Any discussion as to how far down into the ranks of governmental employees or officers the *Sullivan* rule extends would be purely speculative, for the Court specifically refrained from determining this issue.[115] However, an employee of a government body will be restricted in bringing his libel action by the *Sullivan* rule no matter how minor the governmental position he holds if the defamatory attack is directed at the governmental body in which he holds a position.[116] If the attack is definitely personal, as opposed to an attack on the governmental body, the best guideline or rule which can be formulated in deciding if plaintiff is a "public official"[117] is a balancing of interests test. The interests of the individual's reputation must be weighed against the individual's relationship to government and the value to sound government which is achieved by the free discussion of the individual's qualifications for his governmental duties.[118] This issue becomes very difficult in cases where the defamed plaintiff is a "minor" official such as a member of the school board or other municipal commission, a school principal, or a "white collar" employee of the federal, state, or local government.[119] It is assumed that state courts will give a liberal construction to the language of *Sullivan* in cases where the plaintiff's importance in government reaches a high level, and the damage to his reputation is relatively small. The defendant has the burden of proving that the plaintiff is a legitimate subject for his commentary, since this is one of the elements necessary to establish the privileged occasion.[120]

115. "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule [qualified privilege to assert good faith misstatements of fact], or otherwise to specify categories of persons who would or would not be included." New York Times Co. v. Sullivan, *supra* note 110, at 283 n.23.

116. "The present proposition [the Alabama Supreme Court's contention that an attack on a government body is an attack on the employees in charge of that agency] would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed," and it "strikes at the very center of the constitutionally protected area of free expression." *Id.* at 292.

117. This refers to the determinative issue of whether the *Sullivan* rule, which allows the conditional privilege for misstatements not made with actual malice, will apply.

118. "Here the rule by which privilege is to be measured is correctly stated, as . . . the balance of public good against private hurt." Coleman v. MacLennan, 78 Kan. 711, 731, 98 Pac. 281, 288 (1908). The Court in *Sullivan* might have subconsciously applied this balancing test for it is certainly questionable whether plaintiff suffered any appreciable amonnt of damage. See text accompanying note 162 *infra*.

119. See Sheridan v. Crisona, 14 N.Y.2d 108, 198 N.E.2d 359 (1964), for a recent case enumerating a limited class of officials who would fall within *Sullivan's* constitutional privilege.

120. If plaintiff was not a public official within the meaning of the *Sullivan* decision, then the *Sullivan* rule on misstatements of fact will not apply, thereby leaving the state courts unrestrained from following their previous defamation law on the issue of liability.

B. *Criticism of Official Conduct*

The *Sullivan* decision is restricted to criticism of the *official conduct* of the public official, but the benefit of the *Sullivan* privilege is not destroyed if the criticism also affects the private character of the official.[121] "Anything which might touch on an official's fitness for office . . ." will be privileged, and this would include any attacks on the official's alleged "dishonesty, malfeasance, or improper motivation . . . ."[122] This language indicates that defendant should have little difficulty in proving that the criticism was directed at plaintiff's official conduct.

C. *Defendants Who Can Rely on the Sullivan Privilege*

It appears that the *Sullivan* privilege is not limited to the press or any other particular category, but is extended to anyone who is in the position to furnish information to the public concerning its officials.[123] In a majority of jurisdictions the fair comment privilege has been extended to the public and not limited to a certain group who have a duty to inform the public,[124] and at least one court which had previously adhered to the minority view—allowing a privilege for good faith misstatements of fact—also did not limit the privilege to the press, but seemed to extend the privilege to all members of society.[125] The constitutional guaranties announced in *Sullivan* are derived from *either* the "freedom of speech" or "freedom of the press" provisions of the first amendment, and it is quite obvious that the Supreme Court did not intend to limit the privilege to the press since an *individual* successfully relied on the privilege in *Garrison.*[126]

D. *Comment or Opinion*

The effect of *Sullivan* and *Garrison* on state defamation laws dealing specifically with comment or opinion is especially important, for if *Sullivan* applies only to defamatory statements of fact, a state court might

121. "The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed." Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

122. *Ibid.*

123. The *Sullivan* opinion gave no indication that the privilege is restricted to the press. The defendant can successfully rely on either the freedom of press or the freedom of speech provision of the first amendment. See note 100 *supra*, for a reprinting of the applicable phrases of the first amendment.

124. PROSSER § 110, at 812.

125. Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962). Dean Prosser contends that the conditional privilege to assert good faith misstatements of fact should be extended to anyone "in a position to furnish information about public servants." PROSSER § 110, at 815.

126. Garrison v. Louisiana, *supra* note 121.

label the defamatory remarks as comment or opinion and erroneously disregard the constitutional standards announced in *Sullivan*. Although the decision in *Sullivan* did not turn on this fair comment issue, the Court did express its view on this matter by stating in a footnote to the opinion that the first and fourteenth amendments allow the defense of fair comment for an *honest* expression of opinion which is based on "*privileged*, as well as *true*, statements of fact" to be defeated only by a showing of actual malice.[127] Although the Court in *Garrison* specifically refrained from reaching a decision on this issue of a state's power to award damages for harsh defamatory comment alone,[128] the Court did give a good indication of its view on this issue by adopting the language of *State v. Burnham*:[129]

> If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice . . . . 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.[130]

This language furnishes a strong indication that the statutes of a majority of the states which make truth a defense only if the statements are made "with good motives and for justifiable ends" are invalid.[131] If truth constitutes an absolute privilege or defense,[132] it is easily implied that *no* remedy will be allowed for honest comment based upon true facts no matter how vituperative the comment may be.[133] Although this decision is directed at a state's punishment for criminal libel, it is inferred that the rules announced here will apply equally well to actions for civil libel.[134]

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127. Since the fourteenth amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here." New York Times Co. v. Sullivan, *supra* note 110, at 292 n.30 (emphasis added).

128. "In view of our result, we do not decide . . . whether a State may provide any remedy, civil or criminal, if defamatory comment alone, however vituperative, is directed at public officials." Garrison v. Louisiana, *supra* note 128, at 76 n.10.

129. State v. Burnham, 9 N.H. 34, 43-44, 31 Am. Dec. 217 (1837).

130. *Id.* at 42-43, 31 Am. Dec. at 221; quoted in Garrison v. Louisiana, *supra* note 121, at 73.

131. *Id.* at 70. For a list of such state statutes which negate the truth defense if the statements are not published "with good motives and for justifiable ends," see Garrison v. Louisiana, *supra* note 121, at 70 n.7.

132. "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Id.* at 74.

133. This implication appears to be valid, but it must be noted that the Court in *Garrison* specifically reserved judgment on this issue. See note 128 *supra*.

134. "What a State may not constitutionally bring about by means of a criminal

The granting of a qualified privilege for harsh comment based on good faith misstatements of fact as opposed to comment based on true facts is a more radical position. However, the Court in *Sullivan* indicated that this position would be taken.[135] Since the Court failed to explain the method of determining whether the misstatement of fact is privileged, it must be assumed that the Court intended that the misstatement would be privileged unless it was made with actual malice, as defined in the *Sullivan* decision: "with knowledge that it [the misstatement of fact on which the comment was based] was false or with reckless disregard of whether it was false or not."[136] The defense of fair comment would therefore not be defeated if the plaintiff merely proved that the defendant was motivated by ill will, hatred, a desire to injure, or an improper purpose as many state courts have frequently held.[137] If this proposed theory of fair comment is carried to its ultimate conclusion, evidence of ill will or a desire to injure would be admissible only for the purpose of determining punitive damages, if, in fact, the privilege were disallowed because of defendant's reckless disregard for the truth, since evidence of malice would have no probative value in determining the reasonableness of defendant's belief in the truth of his statements. The *Garrison* opinion strengthens this evidence argument by stating that there must be an intent to injure the plaintiff by falsehood in order to hold the defendant liable rather than merely "an intent to inflict harm."[138] This is unquestionably a revolutionary idea which provides protection for the plaintiff only against defendant's "calculated falsehood" or the

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statute is likewise beyond the reach of its civil law of libel." New York Times Co. v. Sullivan, *supra* note 110, at 277. *Cf.*, Farmers Union v. WDAY, 360 U.S. 525, 535 (1958).

135. See note 127 *supra*.

136. See note 21 *supra*.

137. PROSSER § 110, at 819-21.

138. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded .... Moreover, [i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives.'" Garrison v. Louisiana, *supra* note 121, at 73-74. The Supreme Court has supported this language in the *Garrison* decision by reversing two state court decisions in which the jury had been instructed that they could "infer malice . . . from the falsity and libelous nature of the statement, although malice as a legal presumption does not arise from the fact that the statement in question is false or libelous." The basis for the reversal was the fact that the "jury might well have understood these instructions to allow recovery on a showing of an intent to inflict harm, rather than an intent to inflict harm through falsehood." Henry v. Collins, 380 U.S. 356 (1965).

known or deliberate lie.[139] It may be contended that the Court did not intend its language to be interpreted in such a revolutionary manner, but the two decisions read together certainly seem to lean toward this result.

It is proposed that comment on *true* or *privileged* statements of fact is privileged, but it must be noted that this extended privilege must still meet the requirement that the comment be an *honest* good-faith expression of the publisher's opinion.[140] Until the Supreme Court provides some new standard or criterion to determine what is an "honest expression" of the defendant's opinion, it can be assumed that state courts can rely on their definitions of this term, as most states have previously held that the opinion must be, in substance or practicality, the honest opinion of the writer.[141] The majority of these courts, in defining honest opinion, have required that the defendant have a good faith, reasonable belief in the correctness of his opinion, with the immunity not being forfeited merely because the inference was incorrect, if the facts from which the opinion were drawn are stated with the opinion.[142] This theory that honest comment based on true or privileged facts will be immune from libel appears contrary to the previous weight of authority since it has been formerly held that the fair comment privilege is lost if the statements are not made primarily to further the "interest which is entitled to protection,"[143] or if defendant's primary motivation is ill will for the plaintiff.[144] Yet, some courts have held that if the publication was made primarily for a proper purpose, the additional fact that defendant desired to injure the plaintiff or had enmity for him will not defeat the privilege.[145] It must be pointed out, however, that the *Sullivan* and *Garrison* liberalization of the fair comment rule applies only to the restricted area of defamatory comment on the official acts of public officials, and it has no relevance to public figures outside this narrow perimeter.

This new concept would appear to abolish, for the purpose of attacks on public officials, the previous important distinctions between

139. "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity." Garrison v. Louisiana, *supra* note 121, at 75.

140. "[I]t follows that a defense of fair comment must be afforded for honest expression of opinion . . . ." New York Times Co. v. Sullivan, *supra* note 110, at 292 n.30 (emphasis added.)

141. 12 MIAMI L. REV. 89, 98 (1958).

142. GATLEY, LIBEL AND SLANDER 354 (4th ed. 1953).

143. PROSSER § 111, at 822.

144. Brewer v. Second Baptist Church, 32 Cal. 2d 791, 197 P.2d 713 (1948); Mullen v. Lewiston Evening Journal, 147 Me. 286 A.2d 164 (1952).

145. Craig v. Wright, 182 Okla. 68, 76 P.2d 248 (1938); Evans, *Legal Immunity for Defamation*, 24 MINN. L. REV. 607, 610 (1940).

fact and opinion. This distinction was especially important in the majority of jurisdictions which had restricted the qualified privilege to comment or opinion and had not extended it to good faith misstatements of fact which were generally held libelous per se.[146] No longer will the determination of whether the statement is an opinion or a fact have any real importance in the outcome of the case. For if plaintiff alleges that falsehoods were stated, he must prove with "convincing clarity" that the falsehoods were made with a "reckless disregard" for their truth or falsity, and if plaintiff fails to carry his burden of proof, the statements are privileged. Further, any comment inferred from these facts should likewise be privileged if the comment is the "honest expression" of the writer's opinion.[147] This theory is entirely contrary to the standard or rule to which the courts and textwriters have steadfastly adhered in the past: that in order for comment or opinion to be privileged, it must be based on true facts actually stated,[148] but here again, it must be emphasized that this new theory of liability would apply only to comment directed at the official acts of public officials, for *Sullivan* and *Garrison* explicitly restrict the application of their rules to this area.

If our examination of the Supreme Court's position on the concepts mentioned above has been correct, then a judge's duty in instructing the jury will be greatly simplified in cases where the defamatory remarks consist of both misstatements of fact and harsh comment based on either true facts or misstatements of fact, and most of the defamation cases will probably consist of inter-connected comment and misstatements of fact. It will not be necessary for the judge to instruct the jury to apply one definition of "actual malice" to determine the liability for the misstatement of fact,[149] and apply another definition of "actual malice" to determine if the fair comment privilege is defeated.[150] The judge may simply charge the jury to determine the fact issue of whether the defendant made the statements in reckless disregard of their truth, if he feels that plaintiff has presented

146. See note 57 *supra.*

147. See text accompanying notes 140-42 *supra.*

148. RESTATEMENT, TORTS § 606(1)(a)(i) & (ii) (1938). "Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon (i) a true or privileged statement of fact, or (ii) upon facts otherwise known or available to the recipient as a member of the public . . . ." The *Sullivan* rule of actual malice would make it much easier for the court to hold the statement of fact, on which the opinion was based, as a *privileged* statement of fact.

149. This refers to the *Sullivan* definition: "with knowledge that it was false or with reckless disregard of whether it was false or not." See note 22 *supra.*

150. This refers to the definitions which state courts had previously applied to determine if the fair comment privilege had been abused or defeated. See text accompanying notes 86-99 *supra.*

a fact issue sufficient to send to the jury.[151] If the jury finds for the defendant, then the misstatements of fact become privileged, and the only question remaining is whether the comment was an honest expression of the writer's opinion. If the jury finds for the defendant on the issue of recklessness, it can be assumed that they would also find that the comment was defendant's honest opinion, since it is generally not required that the inference or opinion be reasonable, only that it be honest.[152]

E. *Plaintiff's Burden of Proving Actual Malice*

Both *Sullivan* and *Garrison* seem to imply that plaintiff's burden of proving defendant's actual malice is not satisfied merely by proving this issue by a preponderance of the evidence. This inference is drawn from the statement in *Garrison* that "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."[153] This statement added to the phrase used in *Sullivan,* "convincing clarity which the constitutional standard demands"[154] provides a strong argument that plaintiff must prove defendant's actual malice by "clear and convincing proof." This heavier burden should increase the number of directed verdicts for defendants at the trial level.[155] The appellate court which has the power to review the evidence de novo on the actual malice issue can

151. It is contended that numerous motions by defendant for directed verdicts will be granted at this stage of the trial, since plaintiff will find it very difficult to prove defendants' recklessness with "convincing clarity." See note 155 *infra.*

152. *Developments in the Law of Defamation,* 69 HARV. L. REV. 875, 926 (1956). "The courts agree that most statements of opinion based on inferences made in good faith from true facts and concerning matters in the public interest are protected as 'fair comment' even though the inferences are unreasonable . . . ." See also RESTATEMENT, TORTS § 606(1) (1938).

153. Garrison v. Louisiana, *supra* note 121, at 74.

154. New York Times Co. v. Sullivan, *supra* note 110, at 285-86. "[W]e consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent [plaintiff] under the proper rule of law."

155. To point out the relevance of this increase in the burden of proof, the following analogy might be helpful. If plaintiff's burden of proof is a "preponderance of the evidence," the trial judge must submit the issue to the jury if only a small minority of a certain number of people would believe the proposed fact to be true (20 out of a possible 100). If plaintiff's burden is that of proving the truth of his proposition by "clear and convincing evidence," then the judge should direct the verdict for the defendant unless more than a majority of a certain number of people would believe the proposed fact to be true (55 out of a possible 100). This standard is increased greatly where the criminal standard, "beyond a reasonable doubt," is used. In making his decision whether to direct the verdict or not, the judge must consider the standard to be applied, the evidence introduced, and what a reasonable prudent man as a juror would decide.

also reverse if plaintiff fails to carry his burden of proving his case by "clear and convincing proof."[156]

F. *Standard for Determining the Existence of a "Reckless Disregard" for the Truth*

The Court in *Garrison* expressly struck down the reasonable belief test which the Louisiana court used to determine if the defendant had made his statements with a reckless disregard of the truth.[157] The Court expressly denied the test of "ordinary care" or that of the "reasonable prudent man" and held that the defendant's privilege is defeated only if he made the statement with a reckless disregard for the truth.[158] It seems that this term "reckless disregard" is closely analogous to the concept of "gross negligence."[159] In ascertaining the standard for determining if there has been a reckless disregard for the truth, previous definitions of the phrase "recklessness" must be examined. Dean Prosser uses the term as meaning that the "actor has intentionally done an act of unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that

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156. The appellate court may do as the Supreme Court did in *Sullivan* (review the evidence de novo) and reverse the case ordering the lower court to direct the verdict for defendant. See Kalven, *The New York Times Case: A Note on The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 220.

157. Garrison v. Louisiana, *supra* note 121, at 79. See Baer v. Rosenblatt, 203 A.2d 773 (N.H. 1964) for a case which, even though acknowledging *Sullivan*, applied the reasonable belief or reasonable grounds test and found defendant guilty, stating that he [defendant] "gave no support for what he wrote." The Supreme Court of the United States expressly rejected this reasonable belief test in *Garrison*, so it now becomes necessary for state courts to abandon this test and formulate a new standard to determine recklessness which will attain the Supreme Court's sanction. 379 U.S. at 79.

158. "The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." Garrison v. Louisiana, *supra* note 121, at 79. It can be assumed that a reckless disregard for the truth cannot be found merely because of a failure to check readily available files, for in *Sullivan*, the Court held that the evidence was not sufficient to support a finding of actual malice even though the defendant could have ascertained the inaccuracies in the advertisement by checking its files. If a failure to check readily available files is not a reckless disregard for the truth, it appears that plaintiff's burden of proving actual malice could almost be insurmountable absent a showing that defendant knew that the statement was false. New York Times Co. v. Sullivan, *supra* note 110, at 287.

159. "There is no clear distinction at all between such conduct [reckless conduct] and gross negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care." See PROSSER § 34, at 189. Gross negligence is sometimes described as a lack of any care whatsoever or a failure to exercise that amount of care which even a careless person would use. Growley v. Barto, 59 Wash. 2d 280, 367 P.2d 838 (1962).

harm would follow . . . with a conscious indifference to the consequences."[160]

The use of the recklessness or "gross negligence" standard rather than the ordinary negligence standard has its significance in the inherent distinctions between the two standards which courts have built up in the past, and the explicit use of the new standard of recklessness will tend to make the plaintiff's case much more difficult.

V. Direction of the Supreme Court

In attempting to anticipate the direction in which the Court is moving in this area, two important considerations must be examined carefully. The first of these is the setting in which the *Sullivan* case was decided. The turbulent situation giving rise to the litigation was so strongly connected with the negro civil rights movement, which is "making significant constitutional law not only in the area of the fourteenth amendment's equal protection clause but in unexpected sectors of first amendment theory,"[161] that one can contend that the *Sullivan* decision was only a sensitive reaction to the Negro's protest against the denial of his civil rights. The second consideration which should be noted is that the alleged defamatory statements were critical of plaintiff's segregation-minded conduct which probably would have been approved by the majority of the constituents within the plaintiff's locality. The Court could hardly provide plaintiff with a remedy for defamation where the language used would actually benefit the plaintiff in future elections, although it would not be beneficial if made to "right-thinking people"; however, no court has denied plaintiff's recovery specifically because the group of "right-thinking people" was too small.[162] So in a case such as *Sullivan*, justice dictated that the Court find some ground for denying recovery other than that only a probable minority of Alabamians would find the statements defamatory.[163] The Court was also confronted with the fact that eleven additional libel suits were pending as a result of the same advertisement involved in *Sullivan*, with the plaintiffs seeking a total of 5,600,000 dollars in damages.[164] These considerations offer

160. Prosser § 34, at 188-89.

161. Kalven, *supra* note 156, at 192.

162. Peck v. Tribune, 214 U.S. 185, 190 (1909); *Developments in the Law of Defamation, supra* note 152, at 886.

163. It is this writer's opinion that only a few Alabamians' would consider an attack, which alleged that an official was a segregationist, as derogatory of the official's character or reputation. "Montgomery [Alabama] is one of the localities in which widespread hostility to desegregation has been manifested." New York Times Co. v. Sullivan, 376 U.S. 254, 294 (1964) (Black, J., concurring).

164. *Id.* at 295.

some indication that the Court was only responding "to the pressures of the day created by the negro protest movement."[165]

One has to look no further than the two concurring opinions to find that this was not merely a response to the negro movement, for Justices Black, Goldberg, and Douglas, concurring, argued that the "actual malice" limitation on the privilege to criticize public officials is far too restrictive. Mr. Justice Black summed up his theory very adequately, stating: "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the first amendment."[166] Under this view, plaintiff would have no remedy for the deliberate or calculated lie. The concurring opinions coupled with the later *Garrison* decision, which extended the *Sullivan* decision to criminal libel and indicated further extensions within the area of comment, refute any speculation that the Court has taken a position in *Sullivan* which it will narrowly construe or from which it will retreat. It should also be noted that the Court could have decided the controversy in *Sullivan* strictly on the basis that the evidence was inadequate to connect the plaintiff with the statements asserted in the publication, for the Court found that the evidence was insufficient to connect the plaintiff with the advertisement.[167] By refusing to reach the result on this issue alone, it becomes clear that the Court was primarily concerned with abolishing seditious libel and creating greater protection for "free speech on public issues."[168] One commentator has reached this conclusion by analyzing the opinion in the form of a syllogism which goes to the heart of the first amendment.

> The central meaning of the [First] Amendment is that seditious libel cannot be made the subject of government sanction. The Alabama rule on fair comment is closely akin to making seditious libel an offense. The Alabama rule therefore violated the central meaning of the Amendment.[169]

It is highly doubtful that the Court will follow the direction of the concurring opinions; as the majority most likely felt that the principles set forth in these opinions would unfairly over-extend the qualified privilege. They fail to give any consideration to the reputation of the public official who should be provided with, at least, limited

165. Kalven, *supra* note 156, at 192.

166. New York Times Co. v. Sullivan, *supra* note 163, at 297.

167. *Id.* at 292. "[T]he evidence was constitutionally insufficient to support a finding that the statements referred to respondent [plaintiff]."

168. Kalven, *supra* note 156, at 209. See also Berney, *Libel and the First Amendment—a New Constitutional Privilege*, 51 VA. L. REV. 1 (1955).

169. Kalven, *supra* note 156, at 209. For the first time the Sedition Act of 1798, 1 Stat. 596, was impliedly declared unconstitutional. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." New York Times Co. v. Sullivan, *supra* note 163, at 276 (footnote omitted). The act expired in 1801.

protection. That he assumes the cloak of office should not forfeit his right to some recourse against the malicious lie. The value of a good reputation is certainly of greater importance than the concurring justices would allot to it. Freedom of expression concerning government is the keystone to our democratic system, but the protection of the individual should not be totally sacrificed in providing this privilege to the critics of government and the public official.

The majority in *Sullivan* arrive at a much more equitable solution by extending the privilege to the critic of public officials and government, while still providing an official with a remedy for the calculated or deliberate lie. The Court wisely refrained from extending to the citizen-critic the absolute privilege which had previously been granted to the public official in *Barr v. Matteo*.[170] It might be argued that the citizen should be granted the same immunity as the public official, but this view fails to consider the unique position of the official in that he could quite commonly find himself in the situation where it would become necessary to make defamatory remarks in fulfilling his obligations to his office. The public official has a much greater need for the absolute privilege than the citizen, for the citizen is not obligated to make his statements. Even the newspaper publisher would never find himself in a position where he is obligated to make a defamatory statement as might be the case with the public official. One who finds the defeasance of the privilege by proof of "actual malice" a too restricted interpretation of the first amendment should note that the plaintiff carries the burden of proving both the falsity of the statements and the "actual malice" of defendant. The Court also held that "actual malice" is a constitutional fact which is subject to a de novo review.[171] This de novo review minimizes the hazard of an erroneous finding of malice in a state court.[172]

The majority opinion in *Sullivan* gives a new and strong meaning to the first amendment by reversing the "long-standing . . . rule of common law that prevailed in a large majority of the states."[173] Like so many cases which establish a novel or revolutionary principle, *Sullivan* and *Garrison* leave several sub-issues in a state of flux,[174] and only time and further litigation will provide the answers.

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170. 360 U.S. 564, 575 (1958). See text accompanying 35-36 *supra*.

171. See note 156 *supra*.

172. The de novo review is a valuable safeguard to the defendant who has been convicted by a hostile judge and jury.

173. Kalven, *supra* note 156, at 220. See PROSSER § 110, at 814; RESTATEMENT, TORTS § 598, comment *a*, at 261 (1938).

174. These unsettled areas of the law regarding defamation of public officials are listed in the introduction of this article. See text following note 2 *supra*.