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Constitutional Law -- Torts -- Defamation and the First Amendment: The Elements and Application of the Reckless-Disregard Test

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disturbance. In reversing the conviction, the Court reiterated that " 'an undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression.' "[39]

What then distinguishes "fighting words" from ordinary words? Fighting words "inflict injury" and "tend to create a breach of the peace." Clearly, the Court in *Chaplinsky* had reference to terms so strongly abusive as to be analogous to a physical assault. In *Cohen* no epithets were employed, and the message was not directed at any particular individual. Thus the message lacked the highly personal nature which characterized the insult in *Chaplinsky*. The highly personal nature of the insult, the degree of abusiveness in the insult, and the immediacy of the probable retaliation distinguish fighting words from other words. It is impossible to list the words which might constitute fighting words when hurled as an insult; they vary with the times and with the local customs of people. In the 1940's "Fascist" was a highly abusive term, and in the 1950's and 1960's "Communist" was often used in name-calling. The determinative factor is the manner in which the words are used. When highly abusive words are used in a manner so provocative as to virtually assure retaliation, the "fighting words" doctrine operates to exclude such expression from first amendment protection. As *Cox*, *Street*, and *Cohen* indicate, the societal interest in order must clearly outweigh the individual interest in expression to justify application of the narrow doctrine of "fighting words."

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Constitutional Law—Torts—Defamation and the First Amendment: The Elements and Application of the Reckless-Disregard Test

On June 7, 1971, the United States Supreme Court handed down its latest decision concerning the conflicting interests of state libel law and the first amendment. *Rosenbloom v. Metromedia*[1] was a libel action brought by a distributor of a nudist magazine against a radio station for broadcasting defamatory news bulletins concerning his arrest for

[39]403 U.S. at 23, *quoting* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).

[1]403 U.S. 29 (1971).

selling obscene literature and his lawsuit against the city and police officials and several local news media. The eight justices who considered the case filed five separate opinions. A brief consideration of two cases leading up to this decision will help determine why the Court was so bitterly divided.

In 1964 the Supreme Court held in *New York Times v. Sullivan*[2] that the first amendment precludes recovery by a public official for a defamatory falsehood concerning his official conduct in the absence of a showing that the falsehood was made with knowledge of its falsity or with reckless disregard of whether or not it was false. Finding the case to be a proper one for review of the evidence,[3] the Court held that there was insufficient evidence to support a finding of intentional or reckless falsehood and remanded.

In *Curtis Publishing Co. v. Butts*,[4] a 1967 case, the Court considered the effect of the first amendment upon the right to recover for defamation of one who, although not a public official, is before the public eye by voluntary conduct. Mr. Justice Harlan for the plurality opined that "public figures" can recover upon a showing of highly unreasonable conduct,[5] on which point he felt the evidence sufficient. Chief Justice Warren, whose separate opinion was the lowest common denominator and thus the holding of the Court,[6] thought a finding of intentional or reckless falsehood to be required for public figures as well as public officials. However, he agreed that the evidence was sufficient to support such a finding.

Rosenbloom could have been decided on the ground that plaintiff was a public figure required under *Butts* to prove intentional or reckless falsehood. George Rosenbloom had, after all, voluntarily undertaken to become a distributor of nudist magazines. No doubt he recognized the controversial nature of the magazines. The defendant radio station indeed argued that by so doing the plaintiff had assumed the risk of public exposure and furthermore that his arrest and institution of a novel law-

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[2]376 U.S. 254 (1964).

[3]For a discussion of appellate review of constitutional fact see Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223 (1968).

[4]388 U.S. 130 (1967).

[5]By "highly unreasonable conduct" Justice Harlan apparently meant gross negligence.

[6]388 U.S. at 162. Three justices held that reckless disregard is required for public figures. Justices Black and Douglas held that there can be no recovery for even intentional falsehoods. Therefore, at least five justices would not allow recovery without a showing of reckless disregard.

suit added to his status as a public figure.[7] However, the Court assumed without discussion that the plaintiff was not a public figure and thus reached the issue of the effect of the first amendment on libel actions brought by private individuals. Mr. Justice Brennan's plurality opinion stated that a private citizen cannot recover for a defamatory falsehood concerning a matter of legitimate public interest in the absence of a showing of intentional or reckless falsehood. Mr. Justice White concurred in the result but limited his opinion to cases involving the conduct of public officials, such as the action by police in arresting Mr. Rosenbloom.[8] Add Mr. Justice Black's absolutist opinion—that the first amendment bars recovery even for intentional falsehoods[9]—and the White opinion as lowest common denomenator becomes the holding of the Court.[10] Justices Harlan, Stewart, and Marshall[11] opined that a private plaintiff can recover for libel upon a showing of ordinary negligence, whether or not a matter of legitimate public interest is involved.

Mr. Justice Brennan took the position that the basis for the *New York Times* rule was protection of first amendment interests, which include not only self-governance but also all matters of legitimate public concern. "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[12] Thus, if *New York Times* is right, the argument continues, so is the position taken by the plurality. Justice Brennan further held that the reckless-disregard standard is required because self-censorship induced by the threat of a libel judgment offends the first amendment, and any standard of protection less than reckless disregard will result in self-censorship.[13] He concluded that there is a constitutional privilege to report on matters of general or public interest, and that the

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[7]Brief for Respondent at 18 n.5.

[8]403 U.S. at 57.

[9]*Id.* at 57.

[10]The White opinion is the lowest common denominator in that at least five justices extend this much protection to *defendants*. With respect to plaintiffs, the Brennan plurality opinion represents the minimum protection that at least five justices are willing to extend.

[11]Mr. Justice Harlan dissented in a separate opinion. *Id.* at 62. Mr. Justice Marshall authored a dissent in which Mr. Justice Stewart concurred. *Id.* at 78.

[12]*Id.* at 43.

[13]Whether self-censorship or exercise of ordinary care is what would result if the negligence standard urged by Justice Harlan were adopted is, of course, unknown. One might feel that there is a substantial risk of self-censorship and that it is better to err in favor of free debate.

privilege may be defeated only by a showing that the publisher acted with reckless disregard of the truth, evidence thereof being reviewable on appeal.

Justices Harlan and Marshall, contrary to Mr. Justice Brennan, held that *New York Times* was based in part upon our history of seditious libel and upon the proposition that when public officials are involved the state interest does not fully apply. In support of this latter proposition, Harlan argued that a public official has access to the media to correct false statements and that he assumes the risk of defamatory publications.[14] Thus, while public officials must prove reckless disregard to recover for libel, public figures (who also have access to the media and assume the risk) need only prove gross negligence because as to them there is no seditious libel consideration. As to private plaintiffs, the state interest fully applies, and ordinary negligence is adequate protection of the constitutional interests involved. Justices Harlan and Marshall both expressed concern that the plurality's ill-defined reckless-disregard standard and insistance upon appellate review of evidence would result in "ad hoc balancing" of the federal and state interests;[15] they forecast as consequences a lack of predictability and undue involvement of the Court in the fact-finding process. Justice Harlan's concern therefore was to discern "generally applicable rules that should balance with fair precision the competing interests at stake."[16] Justices Marshall and Harlan were also offended by the necessity under the plurality view for a judicial determination of what constitutes a matter of legitimate public interest, a determination which they felt to be beyond judicial competency.

Assuming that the plurality view does become law, a plaintiff involved in a public event may nevertheless recover for libel if: (1) the defaming statement is false, and (2) it is knowingly or recklessly uttered. The first element, falsity, is traditionally presumed.[17] There is dictum in another Supreme Court case, *Rosenblatt v. Baer*,[18] however, to support

[14]For a discussion questioning the validity of the access-to-the-media argument, see Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267. As for assumed risk, this is but a legal conclusion that a public figure cannot recover for non-reckless libel, and can in no wise be considered a reason for withholding recovery.

[15]For a discussion of "ad hoc" and "definitional balancing" with respect to the first amendment, see Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 58-80.

[16]403 U.S. at 63 (Harlan, J., dissenting).

[17]Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971).

[18]383 U.S. 75, 84 (1966).

the contention that *New York Times* has shifted the burden to the plaintiff to prove falsity. At least two federal cases have placed the burden on the plaintiff without discussion.[19] The Pennsylvania Supreme Court, on the other hand, recently held that the burden is still on the defendant.[20] The language in *Rosenblatt* was read to mean that if the defendant offers proof of truth, then the plaintiff must overcome that proof. The court reasoned that the presumption of innocence applies to the plaintiff in an action for defamation, thus raising a presumption that a defamatory statement is false, and that placing the burden on the plaintiff would put him in the difficult position of having to prove a negative.

The second essential element required to defeat the defendant's constitutional privilege is that the statement be made with knowledge that it is false or reckless disregard as to whether the statement is false. If falsity is presumed, what happens when it is shown that prior to publication the defendant was in a position to know whether his statements were true or false? For example, if the plaintiff shows that the defendant's correspondent was present when he allegedly led a crowd of people against national guardsmen in order to block integration,[21] would a presumption of falsity create a presumption of intentional falsity?[22] Apparently the answer of the Pennsylvania court is "yes." Thus when the defendant had enough personal knowledge of the plaintiff to know whether his statements about her were true or false, and when falsity was presumed without proof, the defendant was found to have acted with knowledge of falsity.[23] Such a result clearly seems contrary to *New York Times:* "Such a presumption is inconsistent with the federal rule."[24]

When the plaintiff shows that the defendant knew a statement was false, there is no constitutional problem since the first amendment does not protect intentional falsehoods.[25] However, the defendant's knowledge of falsity must exist with respect to the false impression created in the mind of his audience. If he knows that the plaintiff is being sued in civil court, but his publication creates the impression that the plaintiff

[19]Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969); Sellers v. Time Inc., 299 F. Supp. 582 (E.D. Pa. 1969).

[20]Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971).

[21]Associated Press v. Walker, 388 U.S. 130 (1967).

[22]Similarly, presumed falsity would be projected into presumed reckless-disregard.

[23]Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971).

[24]376 U.S. at 283-84.

[25]Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

is subject to criminal charges, his falsehood is intentional only if he knows that he is creating this false impression.[26] Also, knowledge must exist at the time of publication, and failure to retract after notice of falsity will not suffice.[27] Finally, the kind of knowledge required is actual and subjective; the mere fact that there is information in the defendant's files which is contrary to his publication does not constitute such knowledge.[28]

When knowing falsehood is not shown, and the plaintiff relies on reckless disregard, the problem of balancing state and federal interests arises. While the Supreme Court has formulated no comprehensive test of reckless disregard, it has provided some meaningful guidelines. It must be found that the defendant "in fact entertained serious doubts as to the truth of his publication,"[29] that is, that he acted with a "high degree of awareness" of probable falsity.[30] However, in Curtis Publishing Co. v. Butts[31] a nationally famous college football coach was falsely charged with having fixed a football game, and the finding of the requisite degree of awareness was based upon the following criteria: (1) defendant knew that the informant relied upon was on probation in connection with check violations, (2) only a football expert could competently have inferred from the notes taken by the informant upon overhearing the conversation alleged to be a fix that the game was in fact fixed, and (3) Wally Butts and his daughter protested to the defendant prior to publication that the charges were false. The Court emphasized that the defendant had embarked upon a policy of "sophisticated muckraking" to increase circulation and was not reporting "hot news."[32] If *Butts* can be reconciled with the "high degree of awareness" requirement, it can be only by consideration of the two major interests involved, the factors which affect each, and the manner in which they are balanced under the reckless-disregard standard.

The state's interest is in "compensating individuals for actual, measurable harm caused by the [wrongful] conduct of others"[33] and in deterring future wrongful conduct. The greater the harm, the greater the

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[26]Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 459 P.2d 8 (1969).
[27]New York Times v. Sullivan, 376 U.S. 254, 286-87 (1964).
[28]*Id.* at 287.
[29]St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
[30]Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
[31]388 U.S. 130 (1967).
[32]*Id.* at 157-58.
[33]403 U.S. at 66 (Harlan, J., dissenting).

state's interest. In the area of libel, the amount of harm done is generally proportional to the severity of the charges made. The constitutional interest is in promoting "a citizenry informed by a free and unfettered press"[34] with special sensitivity to seditious libel. The three factors which most strongly affect this interest are the proximity to seditious libel, the public need to be informed about a matter, and the possibility of self-censorship resulting from the threat of liability. The reckless-disregard standard should be expected to deal with each of these factors in one way or another.

Since reckless disregard is a subjective standard,[35] the relevant inquiry is what evidence is required to show it, evidence being reviewable on appeal. The plaintiff will generally try to show that facts were known to the defendant which would cause an average man to perceive that there was a substantial risk of falsity. From this the jury may infer that defendant did in fact so perceive. The greater the risk of falsity actually appreciated by the defendant, and the more severe the charges, the more likely a finding of reckless disregard. Also, as the *appreciated risk*[36] increases, the minimum required level of severity decreases until at the point where the appreciated risk approaches one hundred percent—that is, when the defendant has actual knowledge of falsity—the charges need only be severe enough to create some state interest in compensation or deterrence. Conversely, as the severity of the charges increases, the requisite *appreciated risk* decreases.[37] Thus in *Butts*, notwithstanding that

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[34]*Id.* at 78 (Marshall, J., dissenting).

[35]St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968).

[36]The *appreciated risk* is the *actual risk* to the extent that it is perceived by the defendant. The actual risk, on the other hand, is the probability of falsity given the facts known or readily knowable to the defendant. When the risk of falsity is 85% but the evidence does not warrant an inference that this risk was fully perceived by the defendant, then the appreciated risk is somewhat less than 85% (perhaps 65%, for example). But a 25% risk fully perceived constitutes a 25% appreciated risk.

[37]The approximate relationship between appreciated risk and severity (which might range from zero to one, for example) can be expressed symbolically:

$$\text{(appreciated risk) (severity of the charges} + K_1\text{) is greater than } K_1$$

The constant K_1 has a magnitude determined by our concept of how much fault is required to constitute recklessness. When the inequality holds, defendant is reckless (as distinguished from reckless disregard which, as will be shown, is cognizant of other variables.) The above expression was used rather than the simpler formulation

$$\text{(appreciated risk) (severity) is greater than } K_1$$

because it was necessary to show that when appreciated risk approaches 100%, the severity need only be large enough to create some state interest but need not be of the magnitude of K_1 . In other words, the product of appreciated risk and severity simply expresses the amount of harm likely to occur through falsity, which need not be large when we are dealing with intentional falsehood.

the evidence does not seem to support a finding of "a high degree of awareness of probable falsity"—that is, of high *appreciated risk*—the defendant was said to be *reckless*[38] owing to the fact that the charges were severe. Thus the Court was arguably correct in finding that the defendant acted with *reckless disregard*, unless factors which represent the constitutional interest were present in such a magnitude as to make the defendant's conduct *justifiable* in some sense.

Whether a defendant's conduct can be said to be *justifiable*[39] will necessarily depend upon two factors: the magnitude of the constitutional interest in his communication,[40] and the *burden* of verifying his information. Even if there is a very strong public interest in given subject matter,[41] if the defendant's information might easily and quickly be verified, then his *reckless* conduct can hardly be said to be justifiable. On the other hand, when verification would be difficult and expensive, requiring it would have the general effect of depriving the public of communication. When the public need for the information is great, then even conduct of a marginally *reckless* magnitude may be protected as *justifiable*; hence *reckless disregard* is said not to exist. Even when the public interest and burden are great, however, conduct that is of an extremely reckless nature will not be protected. As previously noted,[42] there is some doubt as to the competency of courts to determine the public interest in given subject matter. Apparently, however, the courts do weigh public interest,

[38]For the purposes of this note, "recklessness" and "reckless disregard" are treated as technical terms having different meanings. "Recklessness" considers only appreciated risk and severity, while "reckless disregard" considers these factors plus public or constitutional interest and burden of verification.

[39]"Justifiability" as used in this note is analogous to but distinct from justification concepts in negligence. In negligence, a risk created by the defendant may be justified by the social utility of his conduct if the only alternative to the risk would impose a prohibitive burden on the conduct and hence deprive the public of a valuable social utility. In such a case the defendant is not at fault. Justifiability is analogous in that when the public interest in defendant's publication is great, and the burden of verification is prohibitive, the defendant's conduct may be justifiable (resulting in no liability) notwithstanding the fact that he has acted recklessly. Justifiability is distinct from justification in that with respect to justifiability the defendant is still at fault.

[40]Where seditious libel considerations are present, the constitutional interest in protecting the defendant's communication is greatest for two reasons. Firstly, the public interest in effective self-governance is present. Secondly, there may be an additional constitutional interest involved because of the special sensitivty to seditious libel. And this latter, if present, would not be mitigated by the lack of a substantial burden of verification.

[41]Of course there is no public interest in the dissemination of false statements. When the public interest in a defendant's communication is referred to herein, what is meant is the public interest in dissemination of the statements assuming them to be true.

[42]*See* text following note 16 *supra*.

covertly or overtly, though they tend to be less influenced by it than the other factors already discussed.[43]

Thus in *Butts*, the Court emphasized that the *Saturday Evening Post* had embarked upon a policy of "sophisticated muckraking."[44] The Minnesota Supreme Court read this portion of *Butts* to mean that defendant's publication was serving its own commercial interests (to bolster circulation) rather than the public interest.[45] The Minnesota court also concluded that while *Butts* extended the reckless-disregard standard to public figures, less evidence is required to establish reckless disregard in an action by a public figure than in an action by a public official.[46] Presumably this is because the constitutional interest is greater when an action is brought by a public official because of the proximity to seditious libel. The Court in *Butts* also emphasized that the defendant's

[43]The burden of verification may have a value anywhere from zero (no burden) to infinity (verification impossible). When verification is impossible, the public interest fully applies. When there is no burden (verification might be accomplished quickly and easily), then the public interest does not apply at all because imposition of the burden will not tend to deprive the public of communication. Thus, as the burden increases from zero to infinity, the facor by which the public interest must be multiplied increases from zero to one.

$$\frac{\text{(burden)}}{\text{(burden} + K_2)} \times \text{(public interest)}$$

Since public interest is a means of finding reckless conduct justifiable by increasing the magnitude of recklessness required to establish reckless disregard, it should be added to K_1 on the right-hand side of the inequality set out in note 37 *supra*:

$$\text{(appreciated risk) (severity} + K_1) > K_1 + \left[\frac{\text{(public interest)}}{K_3} \times \frac{\text{(burden)}}{\text{(burden} + K_2)}\right]$$

Public interest is divided by K_3, a constant greater than one, to indicate that courts, feeling incompetent to determine the weight to accord the public interest in a given communication, will not consider public interest to the extent they consider other factors.

Since proximity to seditious libel is a constitutional interest not affected by burden of verification, a variable denoting the value of this interest should be added to the right-hand side of the inequality:

$$\text{(appreciated risk) (severity} + K_1) > K_1 + \left[\frac{\text{(public interest)}}{K_3} \times \frac{\text{(burden)}}{\text{(burden} + K_2)}\right] + \text{(seditious libel)}$$

[44] 388 U.S. at 158.

[45]Rose v. Koch, 278 Minn. 235, 239, 154 N.W.2d 409, 413 (1967).

[46]*Id.* at 262; 154 N.W.2d at 427-28.

publication was not "hot news."[47] The defendant in *Rosenbloom* contended in his brief that the relevance of "hot news" is that requiring verification of each item would deprive the public of the valuable service provided by publishing news as it happens.[48] Finally, the Court in *Butts* noted that elementary and easily taken precautions were open to the defendant but were ignored.[49] All this implies that there was no overwhelming constitutional or public interest which the defendant was serving, and even if there was, it was not fully applicable because the burden of verification was only slight.

Analysis to determine whether the first amendment bars a recovery for libel should determine first whether a matter of public interest (or a public official or figure) was involved and, if so, whether the statement was false (this may depend on who has the burden of proof).[50] If both of these inquires are answered affirmatively, it should then be determined whether the falsehood was intentional. If so, the first amendment privilege is defeated; if not, it must finally be determined whether defendant acted recklessly and, if so, whether his conduct was justifiable. If *unjustifiable recklessness* does appear, the first amendment will not bar recovery.

Certain general conclusions can be drawn from a reading of the cases on reckless disregard—that is, *unjustifiable recklessness*—and explained in terms of the variables discussed above. Whether or not the public interest in the defendant's communication is great. he cannot be considered *reckless* in relying on a third party in the absence of obvious reasons to doubt that person's veracity. He may rely on a news service,[51] or individuals known to have good character,[52] or one whose veracity is unknown,[53] or even on a single source representing only one side of a controversy.[54] In all such cases, it cannot be said that the defendant is taking a meaningful appreciated risk.

On the other hand, where there are obvious reasons for disbelieving statementsof a third party, then a substantial appreciated risk arises and

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[47]388 U.S. at 157.

[48]Brief for Respondent at 31-32.

[49]388 U.S. at 157.

[50]See text at note 19 *supra*.

[51]Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231 (W.D. Ky. 1965).

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

[53]St. Amant v. Thompson, 390 U.S. 727 (1968).

[54]New York Times v. Connor, 365 F.2d 567 (5th Cir. 1966).

the defendant may be found to have been reckless, and justifiability again will depend on the magnitude of the constitutional interests. Thus when the defendant relies on a layman of doubtful veracity to draw inferences of serious misconduct and when it is obvious that those inferences may be competently drawn only by an expert, he has been held reckless.[55] Nor may the defendant rely on an anonymous phone call,[56] since one who will not disclose his identity is inherently unreliable. Nor may he rely on one of good reputation known to be relating hearsay from an unreliable source, when the charges made are improbable and severe.[57] Finally, when the defendant relies solely upon statements made by a prison inmate who with obvious reason to lie (his own freedom) makes severe charges (murder, witness tampering, malicious prosecution), he may be considered reckless. And even when strong constitutional interests exist (self-governance, seditious libel) and means of verification do not, if the defendant also knows that the informant's statements are completely inconsistent with known material facts, the conduct is too reckless to be justifiable.[58]

If the defendant bases an inference on facts known or believed to be true, he will be protected unless the severity and improbability of that inference are of reckless magnitude.[59] Thus the defendant is not reckless in drawing a conclusion of improper conduct from the fact that county paving equipment was seen in use in paving a county official's driveway, and he will not be liable even though he might easily have learned whether the plaintiff official had paid for the service.[60] The defendant may infer from a thorough knowledge of the plaintiff's political philosophy that the plaintiff is a fascist; from the fact that plaintiff's newspaper printed articles which the defendant believes increased the risk of race riots that the plaintiff is a race riot promoter; and from the fact that a

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[55]Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[56]St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (dictum).

[57]Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 160 N.W.2d 1 (1968).

[58]Indianapolis Newspapers, Inc. v. Fields, ___ Ind. ___, 259 N.E.2d 651 (1970), *cert. denied*, 400 U.S. 930 (1970).

[59]Since the manner in which people draw inferences is not always logical, especially if the one inferring is not sophisticated or is influenced by emotion or prejudice, it must appear not only that the inference is illogical but also that the defendant probably did not believe it himself before a meaningful appreciated risk arises on which a finding of reckless disregard can be predicated. Furthermore, there is generally a privilege under state law to express *opinion*, at least when the factual basis for the opinion also appears. Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).

[60]Tagawa v. Maui Publishing Co., 448 P.2d 337 (Hawaii 1968).

cartoon in plaintiff's newspaper depicted a judge and made reference to his Jewish ancestory that the plaintiff is a Jew-baiter.[61] Even when the drawing of the defendant's inference borders on recklessness, when he concludes from a tenuous past relationship that the plaintiff is a colleague of two United States fugitives, if the public interest is great (organized crime), and the burden of verification is difficult, if not prohibitive, the defendant will not be held to have acted with unjustifiable recklessness.[62]

However, if the facts tend to negate rather than support an inference, as when defendant concludes that a murder-suicide was the act of the "happiest mother in town," the inference can be said to be a fabrication which the defendant must have strongly suspected, if not known, to be untrue.[63] And when the defendant's lay opinion is obviously incapable of accurately inferring serious misconduct from a few facts believed to be true and expert opinion is available, the defendant's drawing of those inferences over the plaintiff's protest of falsity will not receive first amendment protection, at least in the absence of strong constitutional interests.[64]

Two lawsuits resulting from the same set of facts and the same publication yielded one United States district court[65] and two circuit court of appeals[66] opinions which are seemingly unreconcilable with the formulation discussed above. The defendant had put together an article concerning the arrest of several "Cosa Nostra big wigs." The article pictured a group of these men at a dinner with two lawyers, Ragano and Wasserman, who had been hired to defend them. Originally the two attorneys were referred to as "mouthpieces," but this reference was deleted or lost in the editing process. The result was that a reader of the article would have the impression that defendant's reference to the pictured group as "hoodlums" included the two attorneys. Ragano brought suit in the Federal District Court for the Middle District of Florida.[67] the trial judge denied the defendant's motion for summary

[61]Tait v. King Broadcasting Co., 1 Wash. App. 250, 460 P.2d 307 (1969). A possible factor in this case is that the plaintiff as a newspaper editor clearly had access to the media.

[62]Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969).

[63]Varnish v. Best Medium Publishing Co., 405 F.2d 609, 610 n.1 (2d Cir. 1968).

[64]Curis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[65]Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969).

[66]Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970).

[67]Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969).

judgment but permitted an interlocutory appeal. The Fifth Circuit affirmed.[68] Both the district and the court of appeals held that there was a genuine issue of fact as to reckless disregard. The D.C. Circuit was in accord and reversed the district court's entry of summary judgment in an action by the other attorney, Wasserman.[69] The basis for the holding was that defendant knew plaintiffs to be lawyers but nevertheless referred to them as "hoodlums." The plaintiffs appear to have little chance of showing that the article was defamatory as a result of anything more than bureaucratic negligence in editing. Perhaps the denial of summary judgment indicated nothing more than that plaintiffs should be given the chance to prove at trial that defendant's reporters realized the defamatory nature of its article. On the other hand, in light of the reviewability of constitutional fact as recognized by Judge Skelly Wright, concurring in *Wasserman*,[70] this seems unlikely. Two other possible justifications present very interesting problems in this area of the law.

One justification for *Ragano* and *Wasserman* is implicit in the statement of District Judge Krentzman:

> [f]ailure to delineate fact from opinion in such characterizations would have a *deterrent effect upon the availability of attorneys to represent persons accused of crime* and could foreseeably result in frustrating the *constitutional rights of an accused to secure services of counsel of his choice*.[71]

Hence, there is a conflict between the first amendment and the sixth amendment. If this is indeed the explanation of *Ragano*, then the implications are highly significant. The courts have not dealt so far with the conflict between fair trial and the *New York Times* doctrine, but it is a problem they will almost certainly have to face.

The second possible explanation for *Ragano* is that there is going to be some erosion of the reckless-disregard standard in certain instances in order to shift the "cost of doing business" to the news industry. Such an inroad on *New York Times* would almost certainly be concerned primarily with situations in which the harm results from faults in the operaton of bureaucracies rather than expressions of points of view. The

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[68]Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970).

[69]Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970).

[70]*Id.* at 922-23.

[71]Ragano v. Time, Inc., 302 F. Supp. 1005, 1009 (M.D. Fla. 1969) (emphasis added).

extent and limits of such a doctrine can only be matters of speculation at this time.

The reckless-disregard standard is very complex and may be difficult to apply.[72] If the Supreme Court decides many of these cases, the complexity of the application of the standard combined with the necessity for constitutional fact-finding may prove to be an unhappy burden on an already greatly overworked Court. Some commentators have suggested that the quality of the Court's work has already begun to suffer.[73] In light of these considerations, perhaps Mr. Justice Harlan's desire to formulate simple rules which can be easily and quickly applied without pulling the Court so far into the fact-finding process can be appreciated.

KENNETH S. CANNADAY

Military Law—Retroactivity of the Service-Connection Test of the Jurisdiction of Courts-Martial

Throughout the history of the United States, the relationship of the nation's military establishment to the civilian government has been a recurring problem. One facet of this relationship that has resulted in significant tension concerns the proper division of jurisdiction between the military and civilian courts. The determination of when a particular defendant is subject to military jurisdiction is difficult because of the inherent stress between constitutional guarantees in the application of military justice.[1] Several constitutional provisions[2] and a myriad of federal statutes[3] deal with the military's jurisdiction over its members. The problem is complicated because these provisions are not always consistent.[4]

The difference between the civilian and military systems of justice lies in the denial to military personnel of some of the protections of the

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[72]*See* note 43 *supra.*

[73]*See* Strong, *The Time Has Come To Talk of a Major Curtailment in the Supreme Cort's Jurisdiction*, 48 N.C.L. REV. 1 (1969), and commentators cited therein.

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[1]Relford v. Commandant, 401 U.S. 355, 362 (1971).

[2]*See, e.g.*, U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2; U.S. CONST. amend. V; U.S. CONST. amend. VI.

[3]The Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ], sets out the general scheme of military justice.

[4]For example, until 1957 precisely how the Bill of Rights applies to servicemen was uncertain. Reid v. Covert, 354 U.S. 1, 37 (1957).