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Since that time, in the entire United States only one case, decided in Wyoming in 1947, has been concerned with motives and ends as distinct from truth and from malice.[18] The fact that the question arises so infrequently suggests that the requirement of proper motives and ends is becoming a purely formal one and that in those states where it exists the courts will go a long way to protect statements which they believe to be true.

The requirement that motives and ends, as well as truth, are required to make out a defense to civil libel, has had some effect on the formalities of pleading the truth, but apparently none on the results. An analysis of Illinois cases since *Ogren* uncovers none which permitted recovery against a defendant who told the exact truth and could prove it; and none to a newspaper defendant that could prove that it told the essential truth and acted without malice. So far as can be determined, there has never been a case—*except Ogren*—which went beyond requiring the absence of malice to demand a showing of some kind of positive good motives.

What motives would be "good," what ends would be "justifiable," are unanswered questions. The answers may ultimately be those suggested in the *LaMonte* case—to want the truth to be known is in itself a good motive; to speak so that the truth may be known is in itself a justifiable end. This approach was used many years ago by the New Hampshire Supreme Court[19] in a decision quoted with approval last year by the United States Supreme Court in *Garrison v. Louisiana*:[20]

> It has been said 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.[21]

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DEFAMATION OF PUBLIC OFFICIALS

In Illinois and in other states as well, citizens and newspapers who have criticized public officials and candidates for public office have had to pay both damages for civil defamation and fines for criminal libel. If they were unable to prove the truth of their charges, and in Illinois if they were unable to prove good motives and justifiable ends as well, their speech was not protected. The free exchange of views and information on matters of public concern which the First Amendment was enacted to protect could be and often was severely inhibited by the sanctions of a civil suit or a criminal prosecution.

18 Spriggs v. Cheyenne Newspapers, 63 Wyo. 416, 182 P.2d 801 (1947).
19 State v. Burnham, 9 N.H. 34, 31 Am. Dec. 217 (1837).
20 379 U.S. 64, 85 Sup. Ct. 209 (1964).
21 *Id.* at 73, 85 Sup. Ct. at 215.

The conflict between the rights of free speech and freedom of the press under the First Amendment to the United States Constitution and the right to be secure from injury to reputation resulting from the publication of defamatory material is particularly acute in the field of political controversy, in which statements are likely to be made in the heat of campaign battle, with passion, and often without too much care for the exact truth. However, such statements, false and even malicious though they may be, often do deal with issues about which the public has a right to be informed.

The traditional Illinois position with respect to the conflict between free speech and the right to be protected from defamatory statements was simply to define the area of protected free speech in such a way as to exclude defamatory statements. For example, in *Cook v. East Shore Newspapers,*[1] the court said:

> While the right of free speech and free press is recognized, which includes the right to publish matters in the interest of the public and to criticize and condemn public officials, it does not include the right to libel them.[2]

There are four possible types of statements one might make about a public official and be subject to an action for defamation. They are: (1) statements which are false and made with (actual) malice; (2) statements which are false and made without (actual) malice; (3) statements which are true but made with malice (or without proper motives and justifiable ends); and (4) statements which are true and made without malice (or for proper motives). In addition, a statement may be "comment"—fair or unfair—reflecting opinion or viewpoint but having no verifiable factual content (neither true nor false).

Theoretically, any statement of the first three types, if it would tend to degrade the memory of the dead, or to impeach the reputation or expose the natural defects of one who is alive, thereby subjecting him to public contempt or financial injury, would be actionable.[3] As a matter of fact, almost all cases in which a public official plaintiff has recovered have been of the first type.[4] Although there is rarely a finding that the statement in question was false, the defendant was unable to prove that it was true, and the presumption that a defamatory statement is false went unrebutted.

The Illinois attitude toward libelous statements about public officials has from the beginning been one of protection of the plaintiff politician at the expense of the freedom of expression of the defendant newspaper and at the expense of the right of the public to be fully informed. False state-

1 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1946).
2 *Id.* at 596, 64 N.E.2d at 767.
3 Ill. Rev. Stat. ch. 38, § 402 (1874).
4 Some may be in the second group; the presence or absence of actual malice is often difficult to determine.

ments, or statements which the defendant could not prove to be true, were actionable, and the necessary "malice" was presumed.

Although this symposium is not specifically concerned with criminal defamation, it is interesting to note that in Illinois a criminal libel prosecution for criticism of public officials is far from unheard-of. There is a long series of Illinois cases, usually involving state's attorneys, sheriffs, or other law enforcement officials, whose conduct in office was criticized by newspapers and who secured convictions for criminal libel.

One such case, *People v. Fuller*,[5] has frequently been cited as authority in civil libel cases for the proposition that false defamatory statements about public officials are not protected by privilege and that the burden of proving their truth rests with the defendant. In *Fuller*, the complainant was a county treasurer, and the local newspaper accused him of filching county funds. In upholding a $200 fine, the Illinois Supreme Court said that although the public conduct of all public officers is a matter of public concern and may be made the subject of fair and reasonable criticism, the privilege does not extend to false and defamatory statements imputing a criminal offense or moral delinquency to the officer in discharge of his official duties.[6] The court analyzed the public record of the expenditures in question and found as a matter of law that they were proper and that therefore the defendant's statements were false. In addition, it found evidence in the record that the defendant's motives were malicious.

A very similar case, *People v. Stroud*,[7] involved allegations that a state's attorney played poker until 3 a.m., drank whiskey with a beer chaser, and engaged in other improper conduct. A fine of $300 was upheld.

The most recent such case in Illinois was *People v. Doss*[8] in which a judgment finding the defendant guilty of criminal libel was affirmed. The defamatory statements concerned a state's attorney and were to the effect that he was not an impartial prosecutor and was "a lying and deceitful man."

The use of criminal libel by public officials to inhibit criticism of their conduct received a severe setback from the United States Supreme Court in the case of *Garrison v. Louisiana*.[9] In that case the defendant, district attorney of Orleans Parish, criticized the eight judges of the Criminal District Court of the Parish, accusing them of being inefficient, lazy, and taking excessive vacations, thus causing a large backlog of untried cases to accumulate. In addition, he stated that they refused to authorize disbursements to cover the expenses of his undercover agents, thereby hampering his efforts to enforce the vice laws. He further indicated that their performance

5 238 Ill. 116, 87 N.E. 336 (1909).
6 *Id.* at 125, 87 N.E. at 338.
7 247 Ill. 220, 93 N.E. 126 (1910).
8 384 Ill. 400, 51 N.E.2d 517 (1944), *cert. denied*, 321 U.S. 789, 64 Sup. Ct. 788 (1944).
9 379 U.S. 64, 85 Sup. Ct. 209 (1964).

and attitude raised interesting questions about racketeer influences on the judges.

In reversing the conviction for criminal libel, the Supreme Court held that it was an unconstitutional infringement on First Amendment rights to impose criminal sanctions on criticism of public officials unless the statement is false and made either with knowledge of its falsity or with reckless disregard of whether it was true or false.[10] Under no circumstances, according to *Garrison,* can a true statement about a public official be the subject of an action for criminal libel.

It is of course perfectly possible for an officeholder or group in office to attempt to use a civil libel action as a means of inhibiting criticism. The imposition of substantial damages can be just as effective a deterrent to free expression as the exaction of a fine.[11]

Bearing in mind the inhibiting effects of a policy which protects the public official by requiring that statements concerning his conduct be provably true and made without malice, let us look at some of the more important Illinois cases in which newspapers have attacked public officials and lost.

The leading Illinois case on libel by newspaper—*Ogren v. Rockford Star Printing Co.*[12]—was discussed in the preceding section on Motives and Ends. However, in addition to being the first case to adopt the restrictive interpretation of the "truth plus motives" provision of the 1870 Illinois Constitution, the *Ogren* case also held that:

> To a malicious publication against a candidate for public office there is no defense on the ground of privilege, and it is not a defense that it is honestly and mistakenly made.[13]

Obviously, if a statement is "honestly and mistakenly made," the malice to which the court referred is malice implied in law, not actual malice.

In *Cook v. East Shore Newspapers,*[14] the plaintiff was an East St. Louis judge. The defendant newspapers published a story to the effect that, in the plaintiff's court, the court reporter had been forced to pay a kickback to the judge to secure her job. The trial court found that the defendant had been unable to prove the charges true and that they were in fact not true. In affirming a judgment for the plaintiff, the appellate court said:

> It is the law in Illinois that a publication by a newspaper of a statement of fact, which is not true, against an individual and which is libelous per se, is actionable and not privileged.[15]

10 This is the *New York Times* test. See New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 Sup. Ct. 710, 726 (1964).

11 Garrison v. Louisiana, 379 U.S. 64, 67, 85 Sup. Ct. 209, 215 (1964).

12 288 Ill. 405, 123 N.E. 587 (1919).

13 *Id.* at 417, 123 N.E. at 592.

14 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1946).

15 *Id.* at 578, 64 N.E.2d at 760.

In its opinion, the court specifically disapproved the doctrine of *Coleman v. MacLennon*,[16] which is the leading case for what, at the time, was the minority view—"that the right of fair comment on matters of public interest extends, in the absence of malice, to misstatements of fact."[17]

The *Cook* case relied on a long line of prior Illinois cases involving politicians and newspapers, including some of the criminal libel cases discussed above, to the effect that qualifiedly privileged statements "lose their character as such on proof of actual malice."[18] However, no actual malice was proven in this case; the existence of malice must have been assumed from the nature of the material published because there was no extrinsic evidence of malice.

Belt v. Tribune Co.[19] is another example of the lack of protection which Illinois courts extend to political reporting. In this case the plaintiff, a civil engineer, charged the Tribune with publishing an article which contained allegedly false and malicious statements to the effect that Army engineers, on the advice of the plaintiff, had destroyed a sewage system, an underground water supply system, and a mile of roadway, and that the plaintiff's firm was collecting a percentage of the cost of replacing the facilities. The appellate court found that the complaint stated a cause of action for libel and dismissed the "fair comment" defense on the ground that "fair comment was not justified in view of the denial of the truth of the comment; and fair comment and criticism cannot be predicated upon unfair or false statements of facts."[20]

The most recent Illinois case along these lines was *Van Norman v. Peoria Journal-Star*,[21] decided in 1961. In that case, the defendant newspaper published a story that had been reported to it by the incumbent mayor of Peoria. The part of the report that was the basis of the complaint read as follows:

> Morgan [mayor of Peoria] also characterized Van Norman as a man who came to City Hall in a drunken condition carrying a gun that had to be taken away from him before he hurt somebody.[22]

The defendant claimed that it had published a true report of the remarks of Mayor Morgan, and that such matters were fair comment and criticism and privileged, having arisen out of an incident which occurred on February 7, 1951 wherein plaintiff pointed a gun at Z. O. Monroe in the city hall lobby and threatened to take his life.

The evidence was conflicting as to just what happened on the occasion

16 78 Kan. 711, 98 Pac. 281 (1908).
17 *Id.* at 726, 98 Pac. at 290.
18 327 Ill. App. 559, 578; 64 N.E.2d 751, 760 (4th Dist. 1946).
19 6 Ill. App. 2d 489, 128 N.E.2d 638 (1st Dist. 1955).
20 *Id.* at 494, 128 N.E.2d at 640.
21 31 Ill. App. 2d 314, 175 N.E.2d 805 (2d Dist. 1961).
22 *Id.* at 320, 175 N.E.2d at 807.

to which the mayor referred. There was some question about the accuracy of the date, and it appeared that whatever it was that happened, the plaintiff was not drunk. In other words, the story was inaccurate.

The defendant newspaper argued that the imposition of punitive damages in this case would impede rather than promote the public welfare and could not help but have an inhibiting and stultifying effect upon the rigorous exercise of the freedom of the press. It argued further that if a newspaper may report a campaign of this nature only at the peril of having a jury assess substantial penalties upon the publisher, then the people will not obtain information of a controversial nature, but only pious platitudes.

In making this argument, the defendant anticipated the position of the U.S. Supreme Court in *New York Times v. Sullivan*,[23] but it was unsuccessful, and a verdict of $20,000, including $15,000 punitive damages, was upheld.

One final illustration may be given of the traditional Illinois view of these cases. In the case of *Proesel v. Myers Pub. Co.*,[24] the defendant newspaper had published a story accusing the plaintiff, mayor of Lincolnwood, of misusing village funds by diverting money from the waterworks program to reroute a sewer. The newspaper quoted another defendant as the source of the story, a village trustee named Ream.

The defendant moved to strike the complaint for failing to state a cause of action. The trial court granted the motion to strike but was reversed on appeal. The appellate court held that the effect of the defendant's motion to strike was to admit for purposes of the pleadings that the libelous statements were false. If they were false, said the court, then the defense of fair comment or criticism would not be available to the defendant. The court characterized the statements as libelous *per se*, not because they charged the plaintiff with a crime, but because they charged him with incapacity in office. The court quoted with approval from *Ogren:* "An intention to serve the public good cannot authorize or justify a defamation of private character."[25] The court did not explain how misuse of the waterworks funds could be considered a private act.

Following the trial, a second appeal by the newspaper resulted in a sharp reversal of position. Although the reversal was technically on the basis of the "innocent construction rule," the court expressed its awareness of the intervening U.S. Supreme Court decision in *New York Times* in the following words:

> If . . . there were left any room for argument, the memorable decision of the United States Supreme Court in *New York Times v. Sullivan* would have effectively disposed of this case beyond dispute. It was there held on constitutional grounds that the publica-

23 376 U.S. 254, 84 Sup. Ct. 710 (1964).
24 24 Ill. App. 2d 501, 165 N.E.2d 352 (1st Dist. 1960).
25 288 Ill. 405, 417, 123 N.E. 587, 592 (1919).

> tion of false and defamatory statements criticizing a public official's conduct was not actionable in the absence of proof of actual malice. Subjected to this test, the allegations of the complaint before us are markedly deficient.[26]

That the use of civil libel as a weapon to inhibit the freedom of the press to report material which reflects on the conduct of public officials is perhaps more apparent from two cases arising out of civil rights disputes than it is from the Illinois cases discussed above, all of which arose out of relatively minor disputes involving local politics and local government.

In *Henry v. Collins*,[27] the county attorney and the chief of police of Clarksdale, Mississippi, filed an action for libel against an officer of the Mississippi chapter of the National Association for the Advancement of Colored People. The alleged defamatory statement was one made to the press to the effect that his arrest was "the result of a diabolical plot" in which the plaintiffs were participants, to convict him on trumped-up charges of sexual misconduct. The verdict was for the plaintiffs, and was upheld by the Mississippi appellate court and supreme court. The jury instructions said in part:

> If you believe from the evidence that defendant published a false statement charging that his arrest was the result of a diabolical plot . . . , you may 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 and libelous. It is for you to determine as a fact . . . whether or not the statement in question was actually made with malice.[28]

In reversing the Mississippi Supreme Court, the United States Supreme Court, in a per curiam decision, said simply:

> The constitutional guarantees . . . [prohibit] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not.[29]

It is perhaps fortunate that cases such as those mentioned above have caused courts and judges to look again at the traditional attitude that defamation is not protected speech. For too long, in Illinois as elsewhere, newspapers and other critics of public officials have been forced to be extremely wary of revenge by libel action whenever they might want to embark on a campaign of criticism of public officials. Perhaps now citizens and newspaper readers will be able to read the news as reporters write it and not as it is filtered through the cautious fingers of conservative counsel.

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26 48 Ill. App. 2d 402, 405, 199 N.E.2d 73, 74 (1st Dist. 1964).
27 380 U.S. 356, 85 Sup. Ct. 992 (1965).
28 *Id.* at 357, 85 Sup. Ct. at 993.
29 *Ibid.*