

Constitutional Law: Libel and Slander: Extent of Comment About Public Official Under the First Amendment: *Rosenblatt v. Baer*

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death of Elsie Hoepfner. It is this last mutually agreeable will that binds the hand of Emil Hoepfner and determines the disposition of the estate of Emil Hoepfner in a court of equity.²⁷

The two cases discussed have shown the problems that arise when a will or wills are made pursuant to a contract. When, and if, such contracts are held effective during the lives of the respective testators, additional problems will be created.

THOMAS A. ERDMANN

Constitutional Law: Libel and Slander: Extent of Comment About Public Official Under the First Amendment: *Rosenblatt v. Baer*: On March 9, 1964, the United States Supreme Court decided *New York Times Co. v. Sullivan*,¹ holding that under the First Amendment a public official may not recover damages for false and defamatory statements about his public conduct unless he shows that the statement was motivated by actual malice. The *Times* case thus ended a division among American courts on the question of whether the immunity protecting fair comment on the conduct of public officials and the qualification of candidates for public office should be supplemented by a qualified privilege to make false and defamatory statements about them.²

The question of how far beyond candidates for public office the designation "public official" went was then left for later decision. The Court in the *Times* case stated it would not at that time "determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule or otherwise to specify categories of persons who would or would not be included."³ The *Times* case therefore is said only to apply to debate on "public issues" designed to bring about "political and social changes desired by the people."⁴

The Court made its first attempt to further define the term "public official" in *Rosenblatt v. Baer*,⁵ in which a former supervisor of a county-owned ski resort had recovered a \$31,500 judgment from an unpaid columnist for the *Laconia (N. H.) Evening Citizen*. The columnist had made statements about the relatively low profits realized by the ski area when the plaintiff was the supervisor. The main question in the article, which could be understood to imply speculation, was, "What happened to all the money last year and every other year?"

²⁷ 32 Wis.2d 339, 347, 145 N.W.2d 754, 759 (1966).

¹ 376 U.S. 254 (1964).

² Note, 113 U. PA. L. REV. 284 (1964). Also see Noel, *Defamation of Public Officers and Candidates* 49 COL. L. REV. 875 (1949) and Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413 (1910). For the development of the law of defamation generally, see Lewis, *The Individual Members Right to Recover for Defamation*, 17 U. MIAMI L. REV. 519-525 (1963).

³ 376 U.S. 254, 283 (1964).

⁴ Note, 113 U. PA. L. REV. 284, 288 (1964).

⁵ *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

At the outset of the *Rosenblatt* decision, the Court rejected any possibility that a state court's definition of "public official" would be used in the case. It added that it was not necessary to set down a precise definition for the purpose of this case. It indicated, rather, that the definition would be expanded on a decision-by-decision basis. However, the Court indicated the necessity of free criticism of those responsible for government operations, lest criticism of government itself be criticized.

"It is clear therefore that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have or appear to the public to have, substantial responsibility for or control over conduct of governmental affairs."⁷

This, when coupled with the facts in the *Times* case where the one claiming libel was Commissioner of Public Affairs, whose duties were to supervise the Police Department, Fire Department, Department of Cemetery and Department of Scales, gives little indication of how far the Court will ultimately go in extending the "public official" definition.⁸

In *Rosenblatt*, the Court again discussed the *Times* definition of "malice." It split on the question of whether to extend the areas in which defamatory falsehoods are protected absolutely. Douglas and Black reiterated their absolute privilege theory of the *Times* case, in which they thought there was an absolute right to print anything without sanction by the state regardless of malice.⁹ Professor Pedrick points out the problem of this approach:

The concurring Justices, Black, Douglas, and Goldberg, would extend an absolute privilege to anyone who chooses to attack a public official. In their view a completely open season on public officials would best serve the public interest. Fabricated charges of embezzlement of public funds, of bribery, of espionage for a foreign power, could be made freely and without accountability under this view. We have had figures on the American political scene who behaved as though they thought that might be the law of libel. The test run afforded by their careers ought to be enough now to condemn the hunting license approach to political debate. Fortunately for the country, the concurring Justices numbered only three and it is hoped this number will represent the high water mark for support of this "absolutist" approach.¹⁰

⁶ *Baer v. Rosenblatt*, 106 N.H. 26, 203 A.2d 773 (1964).

⁷ *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

⁸ The significance of *New York Times v. Sullivan* to the civil rights movement is brought out by Professor Kalven: Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191.

⁹ See *Pennekamp v. Florida*, 328 U.S. 331 (1946) and also Pedrick, *Freedom of the Press and The Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581 (1964). Also see Note, 113 U. PA. L. REV. 284 (1964).

¹⁰ This is the same position taken by *Garrison v. Louisiana*, 379 U.S. 64 (1964)

In the *Rosenblatt* decision, Douglas recognized the problem brought out by Professor Pedrick but felt that the risk of abusing free speech as in the late forties and early fifties was worth taking when juxtaposed with any kind of limitation on speech.¹¹ It is possible, however, that the majority decision, requiring that there be a public official and actual malice, will eliminate to some extent the dire consequences of absolute freedom on one extreme and of no freedom on the other.

Douglas's concurring opinion seemed to present the basic problem of the *Baer* decision. He pointed out that there is no way of drawing lines to exclude anyone on the public payroll, such as the typist or night watchman. He saw no way to protect anyone who is a member of an agency in the public domain. There seems to be little doubt that this is the major difficulty of the majority opinion. Did *Baer*, by his contract of employment, assume the risk of verbal attack of the kind upheld in this case? If so, would the typist, or night watchman of the ski hill also be vulnerable? If they are, it seems that the Court has extended the *Times* decision too far.

The solution offered by Douglas may be the best answer and the one the Court will ultimately arrive at. He said the question should be whether a "public issue," not a "public official" was involved. This would allow a demarcation between the spurious common law of seditious libel and the genuine common law of civil liability for defamation of private character. The definition by Douglas would eliminate a problem which arose from the *Times* case. That case stated that the privilege applied only to official conduct of public officials. A private matter of a public official, however can become of utmost public significance.¹² Douglas states that this problem would be solved by using the term, "public issue" instead of "public official." Although the Court will probably not surrender its "public official" term, it may adopt "public issue" as part of the definition or else find another way to include it in the definition.

When applying Douglas's standard to the facts in *Rosenblatt v. Baer*, the Court could find (and did) that a public official is involved in the case. However, if "public issue" were added to the "public official" criterion, it would be necessary for the defendant to show not only that

and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Blacks' concurring opinion in the latter case shows the dire consequences of allowing such suits to companies such as Columbia Broadcasting System.

¹¹See Pedrick, *Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches*, 48 N.W. U. L. REV. 135 (1953). Prof. Pedrick disagrees with Black's and Douglas' position: Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 596 (1964). Also see Green, *The Right to Communicate*, 35 N.Y.U.L. REV. 903 (1960).

¹²The incident was graphically brought out in Tappel, *Thunder on the Thames, The British Press and the Profumo Case*, Saturday Review, July 13, 1963, p. 44, and *Letter from London: Profumo Case*, New Yorker, June 29, 1963, p. 66, which may help to recall the case.

the defamed person was a public official but also that a significant public issue was present. Whether or not the Court would think the profits at a public ski hill was a public issue significant enough to allow the inferential remarks made by the defendant is doubtful. The definition would also prevent the random selection of people employed in a beauracracy from being as freely attacked.

CONCLUSION

With the *Times* case, the Supreme Court federalized the libel laws pertaining to public officials and ruled that a head of a police department was a public official, and therefore any remarks made about him, regardless of the truthfulness or falsity, were privileged provided they were not motivated by actual malice. The three concurring Justices wanted the "public official" designation abolished completely.¹³

The *Rosenblatt* case reaffirmed the *Times* decision and began the refinement of the term "public official" by finding the superintendent of the ski area a public official and by saying that at the very least, the definition covers those who have or appear to the public to have control over conduct of governmental affairs.¹⁴

The future may find the majority linking the term "public issue" to the definition. Decisions will also pinpoint more exactly how far down the line of governmental officials the Court will go. Finally, cases involving sports figures,¹⁵ entertainers, etc., where the problem becomes whether "public men," "public institutions," and "public issues" are to be included in the "public official" definition will have to be decided. The *Rosenblatt* case indicates the need for a more precise and limited definition of who falls under the *Times* rule of a public official.

JAMES P. LONSDORF

Executors and Trustees: Improper Exercise of Discretionary Power to Sell Real Estate: In *Estate of Scheibe*¹ the will declared a residuary trust and gave the "executors and trustees full power of sale of any interest which I may have in any real estate without special court authority."² The testator died on March 11, 1958, and among

¹³ See Green, *The Right to Communicate*, 35 N.Y.U.L. REV. 903 (1960). The concurring Justices for absolute privilege were Black, Douglas and Goldberg. Green develops their theory.

¹⁴ See Note, 113 U. PA. L. REV. 284, 287 (1964), where it was suggested that it was already virtually certain that the immunity will include statements about politically appointed as well as elected officials like a justice of the peace or a village clerk, whose exercise of power is restricted to very small communities.

¹⁵ E.g., *Spahn v. Julian Messner, Inc.*, 43 Misc.2d 219, 250 N.Y.S.2d 259, 534, 535 (1964).

¹ 30 Wis.2d 116, 140 N.W.2d 196 (1966).

² Brief for Respondent, p. 3, *Estate of Scheibe*, 30 Wis.2d 116, 140 N.W.2d 196 (1966). In situations where there is no express power of sale in the governing instrument, no statutory authorization and no inherent power to sell, the fiduciary must seek court permission to sell and will obtain this only if there