Louisiana Law Review

Volume 57 | Number 2
Winter 1997

Free Speech and Anonymity: Louisiana's Increasing Protection

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COMMENT

Free Speech and Anonymity: Louisiana's Increasing Protection

I. INTRODUCTION

Anonymous writings have been important to American society since Colonial times. In 1735, a colonial jury refused to convict John Peter Zenger for seditious libel when he refused to reveal the author of anonymous political pamphlets which he had printed.[1] The Federalist Papers, written by Alexander Hamilton, James Madison, and John Jay to convince the people of the Colonies to ratify the Constitution, were written under pseudonyms.[2] As Justice Black noted in *Talley v. California*,[3] we must remember that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[4] This comment addresses two ways in which the most protected speech, that which criticizes or concerns government or its officials, has been historically limited.

First, Part II discusses libel suits brought by public officials. If large numbers of libel suits filed by public officials were litigated, public officials could effectively suppress criticism because newspapers, fearing lawsuits against them, would be intimidated by the overwhelming legal costs involved.[5] Therefore, any criticism of a public official would require absolute certainty as to its truth before being published. The courts have limited the availability of libel suits to public officials[6] by use of the "actual malice" standard. The United States Supreme Court most recently applied this standard in *Harte-Hanks Communication, Inc. v. Connaughton*.[7] In 1995, the Louisiana Supreme Court confronted the same issue in *Tarpley v. Colfax Chronicle*[8] and found that the

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1. *See* James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger (Stanley N. Katz ed. 1972).

2. The authors used the name Publius.

3. 362 U.S. 60, 80 S. Ct. 536 (1960).

4. *Id.* at 64, 80 S. Ct. at 538.

5. *See* Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 La. L. Rev. 1153 (1993). *See also* Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335 (1959) (holding actual malice standard as applied to public official defendants being sued by private individual plaintiffs necessary, because otherwise the threat of damages would "inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* at 571, 79 S. Ct. at 1339).

6. "Public figures," private individuals who have "commanded a substantial amount of independent public interest" or whose personality has entered "the 'vortex' of an important public controversy," are also held to the actual malice standard in a libel suit. Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975 (1967).

7. 491 U.S. 657, 109 S. Ct. 2678 (1989).

8. 650 So. 2d 738 (La. 1995).

Louisiana Constitution provides greater protection for freedom of speech and the press and the freedom to openly criticize our government and its officials than does the United States Constitution. Part II focuses on the actual malice standard and the way in which Louisiana's application of the standard evidences the differing levels of protection between the First Amendment to the United States Constitution and Article 1, section 5 of the Louisiana Constituion.

Second, Part III addresses the Louisiana Legislature's attempt to limit speech within the realm of political debate with an outright ban on anonymous campaign literature. *State v. Moses*[9] held Louisiana Revised Statutes 18:1463(C)(3), which prohibited the distribution of anonymous campaign literature, unconstitutional. In *Moses*, the Louisiana Fourth Circuit Court of Appeal adopted the reasoning of the United States Supreme Court case *McIntyre v. Ohio Elections Commission*[10] and buttressed its opinion with its own interpretation of the Louisiana Constitution, which it viewed as granting greater protection for freedom of speech than the United States Constitution.

II. THE "ACTUAL MALICE" STANDARD IN PUBLIC OFFICIAL LIBEL SUITS

A. *Development of the "Actual Malice" Standard and the Use of Summary Judgment*

1. *The United States Supreme Court Standard*

In *New York Times Company v. Sullivan*,[11] the United States Supreme Court determined the "constitutional [protections for speech and press] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct,"[12] unless he proves "actual malice," i.e., that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[13] The difficult burden placed upon public officials protects open, public debate concerning our government. This protection limits the ability of public officials to recover damages in libel suits, thereby restricting the potential liability of newspapers and other media.

An important means of effectuating this policy is the media defendant's use of summary judgment.[14] The public official plaintiff must show that he can prove actual malice, a much heavier burden than other civil action plaintiffs must carry. Without this heavier burden, reporters would be forced to fully litigate libel claims, and the cost of attorney's fees alone would produce a chilling effect

9. 655 So. 2d 779 (La. App. 4th Cir. 1995).
10. 115 S. Ct. 1511 (1995).
11. 376 U.S. 254, 84 S. Ct. 710 (1964).
12. *Id.* at 279, 84 S. Ct. at 726.
13. *Id.* at 280, 84 S. Ct. at 726.
14. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986).

whereby "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[15] Therefore,

> [w]hen determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public [official], a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under [*Sullivan*]. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.[16]

2. Harte-Hanks Communication, Inc. v. Connaughton—*The Application of* Sullivan *by The United States Supreme Court*

Daniel Connaughton, a candidate for municipal judge, conducted a tape-recorded interview of Patsy Stephens during which Stephens revealed that she made cash payments to Billy Joe New, the Director of Court Services, to dispose of minor criminal charges against her former husband and other relatives and acquaintances.[17] There were eight witnesses to the conversation. One was Alice Thompson, Stephens' sister, and the other seven were Connaughton's political allies.[18] New was later arrested, indicted, and convicted of accepting bribes.

New's lawyer contacted the *Journal News* to arrange an interview with Alice Thompson concerning the "dirty tricks" Connaughton was using in his campaign.[19] Specifically, Thompson charged that Connaughton offered to pay for Thompson and Stephens' Florida vacation, to buy a restaurant for their parents, and to provide jobs for both women.[20] During the interview, Thompson indicated that another newspaper had refused to print her story, that the local police were not interested, and that she was opposed to Connaughton' selection.[21] The *Journal News* then interviewed Connaughton who candidly acknowledged the conversation and its contents to the reporters.[22] Connaughton stated that although the subjects mentioned by Thompson were discussed, her

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15. Weaver & Bennett, *supra* note 5, at 1161.
16. *Anderson*, 477 U.S. at 254, 106 S. Ct. at 2513.
17. Harte-Hanks Communication, Inc. v. Connaughton, 491 U.S. 657, 668, 109 S. Ct. 2678, 2686 (1989).
18. *Id.* at 660, 109 S. Ct. at 2687.
19. *Id.* at 670, 109 S. Ct. at 2687.
20. *Id.* at 671-72, 109 S. Ct. at 2687-88.
21. *Id.* at 673, 109 S. Ct. at 2688.
22. *Id.* at 676, 109 S. Ct. at 2690.

account was "'obviously shaded and bizarre'" and "there was 'absolutely' no 'quid pro quo for information.'"[23]

The jury, after hearing all of the evidence, decided unanimously that the allegations were false and that the *Journal News* acted with actual malice. The Supreme Court affirmed. In doing so, the Court relied on several indicia of actual malice. First, the managing editor of the *Journal News* instructed reporters to interview all witnesses to the conversation between Connaughton and Thompson except Patsy Stephens, her sister.[24] The Court stated:

> It is utterly bewildering in light of the fact that the *Journal News* committed substantial resources to investigating Thompson's claims, yet chose not to interview the one witness who was most likely to confirm Thompson's account of the events. However, if the *Journal News* had serious doubts concerning the truth of Thompson's remarks, but was committed to running the story, there was good reason not to interview Stephens—while denials coming from Connaughton's supporters might be explained as motivated by a desire to assist Connaughton, a denial coming from Stephens would quickly put an end to the story.[25]

Second, "[t]he newspaper's decision not to listen to the tapes of the Stephens interview in Connaughton's home also supports the finding of actual malice."[26] Connaughton made the tapes available, and Thompson's rendition of the conversation could have been dispelled by listening to the tapes.[27]

B. The Louisiana Approach—Tarpley v. Colfax Chronicle

On February 11, 1993, the *Colfax Chronicle* published an anonymous letter to the editor concerning the conduct of Mr. Tarpley, the district attorney:

> A few more statistics on Mr. Tarpley need examining. Mr. Tarpley knows that meetings of the school board an hour before the regular meeting to discuss business and make decisions is a violation of the law he was sworn to uphold. To make it even worse, Mr. Tarpley attended these meetings. Not only were decisions made, but they were carried out and never voted on in open meetings. To me, this hinges on malfeasance.[28]

Prior to printing this letter to the editor, the *Colfax Chronicle* had printed copies of plea agreements and accused the district attorney of "[coddling] criminals and

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23. *Id.* at 677, 109 S. Ct. at 2690.
24. *Id.* at 682, 109 S. Ct. at 2693.
25. *Id.*, 109 S. Ct. at 2693.
26. *Id.* at 683, 109 S. Ct. at 2693.
27. *Id.*
28. Tarpley v. Colfax Chronicle, 649 So. 2d 469, 470 (La. App. 3d Cir. 1994).

their attorneys" and of "wheeling and dealing" in court. The *Colfax Chronicle* also alleged that Mr. Tarpley lacked "due diligence" in his litigation of a DWI case, printed cartoons suggesting he was lax in prosecuting homicides and printed editorials criticizing his performance as the district attorney.[29] After reading the latest allegation in the newspaper, Mr. Tarpley wrote the Colfax Chronicle to request an apology and the name of his accuser. The *Chronicle* printed his request and this response:

> Dear Mr. Tarpley, For 117 years, the people of this parish have trusted this newspaper. We do not betray the trust of anyone, for any reason. You will not intimidate us with childish threats of lawsuits. For the record, we will not reveal the author of the above mentioned letter, not today, not next week, not ever.[30]

In an effort to oust the district attorney, the *Chronicle* printed a recall petition and urged its readers to circulate the petition among local citizens. The editor published ads free of charge encouraging the recall. As the Louisiana Third Circuit Court of Appeal put it, "[t]he record leaves no doubt that Mrs. Richards [the editor] and the *Colfax Chronicle* were not particularly fond of Mr. Tarpley."[31] The district court granted the *Colfax Chronicle*'s motion for summary judgment. Upon its review of this evidence, the court of appeal reversed. The Louisiana Supreme Court, however, reversed the court of appeal and reinstated the district court's summary judgment.[32]

The supreme court's opinion reiterated the standard for summary judgment in public official libel suits. The court, citing *Mashburn v. Collin*,[33] stated the evidence must show that "the alleged defamatory statements were made with knowing *and* reckless falsity."[34] The *Mashburn* court relied on the United States Supreme Court decision in *Harte-Hanks Communication, Inc. v. Connaughton*[35] as authority for the standard. However, *Harte-Hanks* actually used a different standard requiring only a showing that the statement was made "with knowledge that the statement was false *or* with reckless disregard as to whether or not it was true."[36] The Louisiana Supreme Court added the proviso that "the actual malice standard is not satisfied merely through showing ill will

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29. *Id.* at 471.
30. *Id.*
31. *Id.*
32. Tarpley v. Colfax Chronicle, 650 So. 2d 738 (La. 1995).
33. 355 So. 2d 879 (1977).
34. *Tarpley*, 650 So. 2d at 740 (emphasis added) (citing Mashburn v. Collin, 355 So. 2d 879 (1977)).
35. 491 U.S. 657, 109 S. Ct. 2678 (1989).
36. *Id.* at 667, 109 S. Ct. at 2685 (emphasis added). As discussed *infra* Part III, the Louisiana Supreme Court did not account for the difference in the language, but this difference may reflect the court's belief that the Louisiana Constitution grants greater protection of speech than the United States Constitution.

or 'malice' in the ordinary sense of the word."[37] To prove reckless disregard for the truth, the plaintiff "must show that the false publication was made with a 'high degree of awareness of probable falsity' or the defendant 'entertained serious doubt as to the truth of his publication.'"[38] Without discussing in what way the evidence failed to establish that Mr. Tarpley would be able to meet this burden, the supreme court reinstated the district court's summary judgment.

In the *Harte-Hanks* decision, the United States Supreme Court stated "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."[39] However, the Court allowed circumstantial evidence showing the defendant's state of mind and motive to be considered in the actual malice inquiry.[40] Thus, while the Court established that neither a newspaper's motive nor its failure to investigate supports a finding of actual malice, it suggested a combination of these two factors—a showing of a newspaper's motive to injure *and* a newspaper's failure to investigate a claim (particularly one easily disproved)—may suffice to find actual malice. As earlier discussed, in *Harte-Hanks*, the United States Supreme Court found the evidence sufficient to support a finding of actual malice.

C. *Differences Between* Harte-Hanks *and* Tarpley

A significant difference between *Harte-Hanks* and *Tarpley* is each defendant's knowledge of its source's credibility. In *Harte-Hanks*, the source's credibility was questionable from the start. Thompson admitted that her story had been turned down by another newspaper and that the police were not interested.[41] In *Tarpley*, however, the editor testified "she had known the author of the published letter for approximately thirty-five years and considered him to be very credible."[42] While this difference would probably not relieve the *Colfax Chronicle* from ultimate liability under federal precedent,[43] it may have made a difference in the summary judgment proceedings. Perhaps, in a fully litigated trial the jury would have found that the editor's assertion was, in fact, true and that she acted without "actual malice." However, in the motion for summary judgment, the editor's knowledge of her source's credibility, in light of all the facts, would probably be insufficient to support a motion for summary judgment under the federal standard. Under *Harte-Hanks*, the United States

37. *Tarpley*, 650 So. 2d at 740.

38. *Id.* at 740 (quoting Harte-Hanks Communication, Inc. v. Connaughton, 491 U.S. 657, 667, 109 S. Ct. 2678, 2686 (1989)).

39. *Harte-Hanks*, 491 U.S. at 688, 109 S. Ct. at 2696.

40. *Id.* at 668, 109 S. Ct. at 2686.

41. *Id.* at 673, 109 S. Ct. at 2688.

42. Tarpley v. Colfax Chronicle, 649 So. 2d 469, 471 (La. App. 3d Cir. 1994).

43. *See e.g.*, Harte-Hanks Communication, Inc. v. Cannaughton, 491 U.S. 657, 109 S. Ct. 2678 (1989), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986).

Supreme Court probably would have upheld the Louisiana Third Circuit's reversal of summary judgment in *Tarpley*.

One might differentiate between the two cases on the ground that *Tarpley* concerned the newspaper's decision to publish the sentiments of a third party, whereas in *Harte-Hanks* the newspaper published its report based upon its own investigation. This difference, however, does not seem significant considering both newspapers' published allegations of a public official's illegal conduct. In *Tarpley*, the *Colfax Chronicle* did no investigation, and in *Harte-Hanks*, the investigation the *Journal News* undertook was deemed insufficient. The intent to injure a public official motivated both media defendants.

Examining the facts of *Harte-Hanks* and *Tarpley* and comparing the reasoning of the United States Supreme Court and the Louisiana Supreme Court reveal that the summary judgment hurdle is higher under Louisiana precedent than its federal counterpart.

The next section examines the reasoning of the Louisiana Fourth Circuit Court of Appeal in *State* v. *Moses*.[44] As demonstrated by the fourth circuit's treatment of the Louisiana legislature's attempt to ban anonymous campaign literature, an explanation of the higher summary judgment standard in Louisiana may be that the Louisiana Constitution, as interpreted by the Louisiana courts, provides greater protection of free speech.

III. LEGISLATIVE BANS ON ANONYMOUS CAMPAIGN LITERATURE

The District of Columbia and all but two of the United States currently have statutes requiring disclosure of some party's identity on campaign literature.[45] Intermittently, Louisiana has been one of the states with such a statute. When the Louisiana Fourth Circuit decided *State v. Moses*,[46] it broke Louisiana away from the mainstream. Two predecessors of the statute found unconstitutional in *Moses* were also struck down in 1976 and 1989 by the Louisiana Supreme Court,[47] indicating that the Louisiana legislature has attempted to maintain such a statute in spite of its repeated defeats in the courts.

In *Moses*, Napoleon Moses was indicted for violating Louisiana Revised Statutes 18:1463(C)(3) which states, in pertinent part, "if an individual . . . is responsible for or causes the distribution or transmission of any statements relative to candidates or propositions, there shall be included thereon the name of the individual . . . and whether or not such individual . . . supports or opposes such candidate or proposition."[48] Moses violated this statute when he distributed campaign literature which did not include the name and address of the

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44. 655 So. 2d 779 (La. App. 4th Cir. 1995).

45. Erika King, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. Cent. L.J. 144 (1995).

46. 655 So. 2d 779 (La. App. 4th Cir. 1995).

47. State v. Fulton, 337 So. 2d 866 (La. 1976); State v. Burgess, 543 So. 2d 1332 (La. 1989).

48. La. R.S. 18:1463(C)(3) (Supp. 1996).

person responsible for its contents. Moses was not charged with a violation of Louisiana Revised Statutes 18:1463(C)(1) which prohibits the distribution of any literature "containing any statement which [the distributor] knows or should be reasonably expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters."[49] The constitutional controversy created by subsection (C)(3) stems from the fact that it prohibits *all* anonymous campaign literature, not simply anonymous campaign literature containing false statements.

The Fourth Circuit's opinion in *Moses* relied on the recent United States Supreme Court decision in *McIntyre v. Ohio Elections Commission*[50] and on the greater protection provided for speech and privacy through Louisiana Constitution article 1, sections 5 and 7.[51] The fourth circuit questioned why candidates and issues (or propositions) should receive protection against false statements via statutory sanctions while elected, public officials receive no statutory protection or any civil remedy for such false statements unless they meet the nearly insurmountable "actual malice" standard of the common law defamation action. The United States Supreme Court seems willing to place heightened importance upon the state's interest in preventing fraud and libel "during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large."[52] But, the Court does not offer the same level of protection to officials once they are elected, instead requiring them to overcome the actual malice standard.[53]

Why is the public at large more susceptible to adverse consequences during an election than they are at other times? Two distinctions support this different treatment. First, candidates only have a limited amount of time available before the election to refute the false statements. Second, an elected official presumably has significantly greater access to the media for an effective refutation.

A. McIntyre v. Ohio Elections Commission

In *McIntyre*,[54] the United States Supreme Court considered a challenge to Ohio's longstanding statute prohibiting the distribution of anonymous campaign literature.[55] Mrs. McIntyre distributed anonymous leaflets expressing her

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49. La. R.S. 18:1463(C)(1) (Supp. 1996).

50. 115 S. Ct. 1511 (1995) (holding unconstitutional an Ohio law prohibiting the distribution of anonymous campaign literature).

51. "We find that article 1, Section 7, Freedom of Expression, of the Louisiana Constitution when combined with article 1, Section 5, Right to Privacy, affords stronger protection for anonymity in Louisiana than can be found in the U.S. Constitution." *Moses*, 655 So. 2d at 784.

52. *McIntyre*, 115 S. Ct. at 1520.

53. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678 (1989).

54. 115 S. Ct. 1511 (1995).

55. Ohio Rev. Code Ann. § 3599.09(A) (Anderson 1988). The statute was originally enacted in 1915. Act of May 27, 1915, 1915 Ohio Leg. Acts 350, *cited in McIntyre*, 115 S. Ct. at 1532 (Scalia, J., dissenting).

opposition to a school tax levy.[56] A complaint was filed with the Ohio Elections Commission who found she had violated Section 3599.09(A) of the Ohio Code[57] which states in pertinent part:

> No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election . . . unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of . . . the person who issues, makes, or is responsible therefor.[58]

The Commision imposed a fine of $100.[59]

The Court was quick to point out, as in *Moses*, "there [was] no suggestion that the text of her message was false, misleading, or libelous."[60] The Court found that the Ohio statute could be used to punish an "offender" who distributed anonymous campaign literature that: (1) was true; (2) concerned a ballot issue rather than a candidate for political office; and (3) was printed and distributed at a very low cost, on a small scale by a private individual.[61] Justice Stevens' opinion for the Court rested its decision on the First Amendment protection of freedom of speech.

The Court first noted the historical significance of anonymity in literature: "Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[62] The court stressed the importance of anonymity in the political arena with powerful examples—reminding us of England's press licensing laws, seditious libel prosecutions, and the fact that "even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names."[63] Justice Stevens quoted Justice Black's decision in *Talley v. California*[64] noting "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[65]

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56. *McIntyre*, 115 S. Ct. at 1514.
57. *Id.* at 1514.
58. Ohio Rev. Code Ann. § 3599.09(A) (Anderson 1988).
59. *McIntyre*, 115 S. Ct. at 1514.
60. *Id.*
61. *Id.* at 1521.
62. *Id.* at 1516.
63. *Id.* at 1517 (citing Talley v. California, 362 U.S. 60, 64-65, 80 S. Ct. 536, 538-39 (1960)).
64. 362 U.S. 60, 80 S. Ct. 536 (1960).
65. *McIntyre*, 115 S. Ct. at 1516.

The Court then shifted its attention to Ohio's argument that this statute does not regulate such types of speech but only "unsigned documents designed to influence voters in an election."[66] Ohio argued the statute should be treated simply as an election code provision governing the voting process, not one governing speech.[67] The Court rejected this argument and found that the Ohio statute does not regulate the mechanics of the electoral process but regulates "pure speech."[68] The Court concluded that the statute restricted political speech based on content, and as a content-based restriction on political expression, subjected the statute to "exacting scrutiny."[69] Under the rigors of "exacting scrutiny," the Court viewed Mrs. McIntyre's leaflet as "the essence of First Amendment expression."[70]

Once the Court determined that the leaflet was protected by the First Amendment, it considered whether the statute was "narrowly tailored to serve an overriding state interest."[71] Ohio asserted an interest in preventing fraudulent and libelous statements and in providing the electorate with relevant information.[72] The Court dismissed the interest in providing the electorate with relevant information as insufficient. Justice Stevens stated:

> Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, . . . the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude.[73]

Further, the author's name and address do not aid the reader in evaluating the message.[74]

The Court recognized that Ohio did have a valid interest in preventing fraud and libel, and that the statute both aided the enforcement of the statutory prohibition against the dissemination of false information and deterred the making of false statements.[75] However, the Court held the means this statute employed, namely the prohibition of *all* anonymous literature relating to elections, was unconstitutionally overbroad. The statute applied to candidates as well as individuals. It applied to elections of public officers as well as to ballot issues "that present neither a substantial risk of libel nor any potential appearance of corrupt advantage."[76] It applied to leaflets distributed on the eve of an

66. *Id.* at 1517.
67. *Id.* at 1518.
68. *Id.*
69. *Id.* at 1518.
70. *Id.* at 1519.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1520.
75. *Id.*
76. *Id.* at 1521.

election as well as those distributed months in advance.[77] It applied regardless of the character or strength of the author's interest in anonymity and to true and accurate documents.[78] Further, the Court noted that the statute was not well tailored for its purpose since Ohio could not use it to prevent the distribution of fliers with false names and addresses printed on them.[79] Justice Stevens did specifically recognize that a more limited identification requirement may be justified by a state's enforcement interest.[80]

B. State v. Moses—*Protection Under the Louisiana Constitution*

The Louisiana Fourth Circuit Court of Appeal believed *McIntyre* controlled its decision. However, the court of appeal analyzed the Louisiana statute under the Louisiana Constitution and found that anonymity in the realm of political speech is afforded greater protection by the Louisiana Constitution than by the United States Constitution.[81] After noting the Louisiana Supreme Court's reasoning in the prior decisions striking down the predecessors of Louisiana Revised Statutes 18:1463(C)(3),[82] the fourth circuit compared the language of the First Amendment to the United States Constitution[83] and Louisiana

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77. *Id.*

78. *Id.* at 1522.

79. *Id.*

80. *Id.* (Justice Thomas' concurrence rejected the reasoning of the majority and focused on the original understanding of the phrase "freedom of speech, or of the press." 115 S. Ct. at 1524 (Thomas, J., concurring). He looked closely at the Revolutionary and Ratification periods and concluded "the historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'" 115 S. Ct. at 1526 (Thomas, J., concurring). Therefore, anonymity, in the context here involved, is protected under the First Amendment. Justice Scalia, joined by Justice Rehnquist, dissented. He rejected what he considered the majority's "hitherto unknown right-to-be-unknown while engaging in electoral politics." 115 S. Ct. at 1531 (Scalia, J., dissenting). He also rejected the findings of Justice Thomas and opined "there probably never arose even the abstract question of whether electoral openness and regularity was worth such a governmental restriction upon the normal right to anonymous speech" since "[t]he idea of close government regulation of the electoral process is a more modern phenomenon, arriving in this country in the late 1800's." 115 S. Ct. at 1532 (Scalia, J., dissenting). Justice Scalia believed that the "widespread and longstanding traditions of our people," evidenced by laws stretching back to 1890 and encompassing every state except California, afford a very strong presumption of constitutionality to the statute at issue. 115 S. Ct. at 1532-33 (Scalia, J., dissenting) (It is interesting to note that Justice Clark's dissent in *Talley* assumed the constitutional validity of the Ohio (and other states) statute at issue in this case was obvious. Talley v. California, 362 U.S. 60, 70, 80 S. Ct. 536, 542 (1960)). He concluded "[s]uch a universal and long established American legislative practice must be given precedence . . . over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech." 115 S. Ct. 1533 (Scalia, J., dissenting)).

81. State v. Moses, 655 So. 2d 779 (La. App. 4th Cir. 1995).

82. State v. Burgess, 543 So. 2d 1332 (La. 1989); State v. Fulton, 337 So. 2d 866 (La. 1976).

83. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution article 1, sections 5 and 7.[84] The fourth circuit asserted that the following language from the Louisiana Constitution provides greater protection to anonymous speech:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.[85]
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> No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.[86]

While *McIntyre* concerned the distribution of materials relating to a ballot issue, *Moses* concerned the distribution of materials relating to a candidate for public office. Justice Stevens relied on the fact that the Ohio statute applied "not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage"[87] as one reason for its overbreadth. Arguably, a statute which prohibits anonymous speech about a candidate seeking election would be less broad and perhaps Constitutional. The Louisiana Fourth Circuit rejected that possibility and used the Louisiana Constitution for support. Based on the greater protection of privacy provided by reading Louisiana Constitution article 1, sections 5 and 7 in conjunction, the fourth circuit held the statute's prohibition of anonymous speech unconstitutional under the Louisiana Constitution.

The fourth circuit analogized a defamation suit by a private citizen to the presumed protection the statute provided for candidates and elected officials. The court stated that it is contrary to the spirit of both the United States and Louisiana Constitutions to afford special defamation protections to a public official or candidate (by providing the name of the individual making the statement), while a private individual in a defamation action has the burden of proving who made the statement.[88] The court's analogy is problematic because it assumes that the purpose of the statute is to provide the candidate or elected official with the identity of the person making the statement so that he may bring a civil defamation action. However, the statute itself imposes a penalty on the

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84. State v. Moses, 655 So. 2d 779, 784 (La. App. 4th Cir. 1995).
85. La. Const. art. 1, § 5.
86. La. Const. art. 1, § 7.
87. McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1521 (1995).
88. State v. Moses, 655 So. 2d 779, 784-85 (La. App. 4th Cir. 1995).

violator. It does not provide for a civil action by the candidate, and arguably, it is the purpose of the statute to protect the election and not the candidates. This analogy also fails to account for the heightened level of importance the United States Supreme Court was willing to afford the state in the area of elections.

The underlying rationale for the fourth circuit's opinion, that the citizens of Louisiana decided to "give a 'higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution,'"[89] supports its decision that the statute is unconstitutional in violation of the Louisiana Constitution. That the Louisiana statute is also a ban on *all* anonymous speech relating to elections of candidates and ballot issues would likely prompt the United States Supreme Court to strike it down as overbroad and thus violative of the First Amendment to the United States Constitution.

In *Moses*, the fourth circuit stated "that article I, Section 7, Freedom of Expression, of the Louisiana Constitution when combined with article 1, Section 5, Right to Privacy, affords stronger protection for anonymity in Louisiana than can be found in the U.S. Constitution."[90] To support its conclusion, the court quoted its decision, *State v. Daniels*:

> Louisiana enjoys the distinction of having a specifically denominated and defined constitutional right to privacy. The Louisiana Supreme Court recognized that: "Article 1, Section 5, of the Louisiana Constitution of 1974 protects against unreasonable searches, seizures and invasions of privacy. This declaration of rights does not duplicate the Fourth Amendment [to the United States Constitution]. It represents a conscious choice by the citizens of Louisiana to give a 'higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.'"[91]

IV. AN ANALYSIS OF LOUISIANA CONSTITUTION ARTICLE 1, SECTIONS 5 AND 7

Louisiana Constitution article 1, section 7 states that "[n]o law shall curtail or restrain the freedom of speech or of the press."[92] This language tracks that of the United States Constitution Amendment I with one exception. The United States Constitution states "Congress shall make no law . . . abridging the freedom of speech, or of the press."[93] The Louisiana Constitution, however,

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89. *Id.* at 785 (quoting State v. Daniels, 631 So. 2d 1281, 1283 (La. App. 4th Cir. 1994) (quoting State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982))).

90. *Moses*, 655 So. 2d at 784.

91. 631 So. 2d at 1283 (La. App. 4th Cir. 1994) (quoting State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982) (quoting State v. Church, 538 So. 2d 993 (La. 1989))).

92. La. Const. art. 1, § 7.

93. U.S. Const. amend. I.

uses the words "curtail" and "restrain" rather than abridge. Abridge is synonymous with curtail,[94] but the choice of curtail may reflect a decision to reject the jurisprudence concerning the United States Constitution in favor of more stringent protection of speech. This is bolstered by the use of the disjunctive "or" followed by "restrain." Restrain may be defined as "to hold back from some course of action, keep in check, repress."[95]

The aggregate of many libel suits against the media may certainly repress or restrain the freedom of speech for individuals who wish to speak out but are afraid of reprisal. This restraint may be alleviated by the stringent application of the "actual malice" standard as evidenced by the Louisiana Supreme Court's opinion in *Tarpley*. Louisiana Revised Statutes 18:1463(C)(3) represented a law that directly curtailed and restrained freedom of speech. It completely eliminated one type of speech by prohibiting the distribution of campaign literature unless it contained information deemed necessary by the state (the author's name, address, and whether he supports or opposes the candidate or proposition) and was, therefore, unconstitutional.

The second sentence of Louisiana Constitution article 1, section 7 states that "[e]very person may speak, write, and publish his sentiments on any subject."[96] This language is not simply a negative restriction on the power of the state like the first sentence, but is positive language reaffirming the freedoms reserved by the people. The first and second sentences read together go further to protect the freedom of speech and of the press than does the United States Constitution Amendment I which is only a negative restriction on the government's ability to limit speech.

Louisiana Constitution article 1, section 5 states in pertinent part that "[e]very person shall be secure in his . . . communications . . . against unreasonable searches, seizures, or invasions of privacy."[97] Communications may be defined as "the imparting, conveying, or exchange of ideas, knowledge, information, etc. (whether by speech, writing, or signs)."[98] Privacy may be defined as "the state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right."[99] In *State v. Hernandez*, the Louisiana Supreme Court explained that:

> Our state constitution's declaration of the right to privacy contains an affirmative establishment of a right of privacy, explicit protections against unreasonable searches, seizures or invasions of property and communications, as well as houses, papers and effects, and gives standing to any person adversely affected by a violation of these safeguards to raise the

94. I Oxford English Dictionary 43 (2d. Ed. 1989).
95. XIII *id.* at 756-57.
96. La. Const. art. 1, § 7.
97. La. Const. art. 1, § 5.
98. III Oxford English Dictionary 578 (2d Ed. 1989).
99. XII *id.* at 515.

> illegality in the courts. This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.[100]

To protect the privacy of an individual's communications, the state must protect a newspaper's ability to print certain material without publicizing the name of the individual who wishes to remain anonymous.[101] If liability is imposed on newspapers for agreeing to such protection, then the mechanism for an individual to speak out without his communications leading to his own unwanted publicity is curtailed. Thus, the right for one's communications to be secure against unreasonable invasions of privacy strengthens the reasoning for a very stringent application of the "actual malice" standard. Louisiana Revised Stautes 18:1463(C)(3) was a direct infringement against the right of one's communication to be free from unreasonable invasions of privacy. The mechanism of printing one's beliefs, ideas or other information anonymously to avoid publicity would be eliminated by this statute. It thus directly conflicted with the Louisiana Constitution.

Combining the negative restriction on the ability of the state to limit the freedom of speech and the press and the reaffirmation of these freedoms reserved by the people contained in Article 1, section 7, and the requirement that individuals' communications be free from unreasonable invasions of privacy contained in Article 1, section 5 leads to an almost absolute protection for anonymous speech. The one limitation on that freedom is the last clause of Article 1, section 7 which makes an individual "responsible for abuse of that freedom."[102] How may one abuse the freedom of speech and the press? Abuse may be defined as "improper use, injurious speech, perversion."[103] Couched in such absolute terms, the Louisiana Constitution's protection of freedom of speech, press, and security in one's communications from invasions of privacy seems to require a misuse of those freedoms which would pervert them in order to rise to the level of abuse. Merely making false statements in a public forum does not seem to rise to the level of a perversion of these freedoms.

The "actual malice" standard for public official libel suits, in its *Tarpley* application, serves well the constitutional mandate of protection for the freedom of speech. There is room for the court to find that there has, in fact, been an abuse of that freedom, but such a finding requires a showing of "knowing and

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100. State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982).

101. For a case in which the Louisiana Supreme Court placed greater emphasis on the freedom of the press to publish even where the privacy of several individuals was ostensibly invaded by the publication, see Roshto v. Hebert, 439 So. 2d 428 (La. 1983). It would seem that the court would most fervently protect both the freedom of the press and an individual's privacy if both were jeopardized by a libel action.

102. La. Const. art. 1, § 7.

103. I Oxford English Dictionary 59 (2d Ed. 1989).

reckless falsity." The individual must know that the information he is disseminating is false and must know that the dissemination of such false information is reckless in that it perverts the exercise of the freedoms granted in the Louisiana Constitution.

An argument for the constitutionality of Louisiana Revised Statutes 18:1463(C)(3) seems to be its use in enforcing the constitutional requirement that individual's be responsible for abuse of their freedom of speech and the press. However, as discussed previously, banning entire categories of political speech is clearly not constitutionally permissible. It is not possible for there to be a misuse of the freedom of speech that rises to the level of perverting that freedom when there has not even been an exercise of that freedom.

V. CONCLUSION

The protection of the freedom of speech, press, and security in one's communications from invasions of privacy embodied in the Louisiana Constitution goes further to protect those freedoms than does the United States Constitution. This was reflected in the Louisiana Supreme Court's decision in *Tarpley* in which the United States Constitution perhaps would not have protected these freedoms. It was reflected in the Louisiana Fourth Circuit Court of Appeal decision in *Moses* by the court's choice not to rest its decision solely on the interpretation given the United States Constitution by the United States Supreme Court, but on the rigid protection of these freedoms found in the Louisiana Constitution. If these decisions reflect a trend in Louisiana courts' willingness to rely on the Louisiana Constitution for protection of the freedom of speech, the press, and the right to privacy, then Louisianians may look forward to increasingly unfettered political discussion and debate.

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