Florida Law Review

Volume 26 | Issue 2 Article 14

January 1974

Freedom of the Press: The Constitutionality of Florida's Right of Reply Statue

Barbara Alden Ropes

"two factor formula of creditor entry and debtor response"[48] provides merely a guideline for judicial inquiry, and lower courts will ultimately have to decide each breach of peace question on its own facts.

RICHARD CANDELORA

FREEDOM OF THE PRESS: THE CONSTITUTIONALITY OF FLORIDA'S RIGHT OF REPLY STATUTE

Tornillo v. Miami Herald Publishing Co., 287 So. 2d 78 (Fla. 1973)

Plaintiff, a candidate for nomination to the Florida House of Representatives, was criticized in two editorials appearing in a newspaper published by defendant.[1] Plaintiff claimed a right of reply under Florida Statutes, section 104.38,[2] and submitted a response to be published verbatim, at defendant's expense. Upon defendant's refusal to comply with the statute, plaintiff filed an action for declaratory and injunctive relief and punitive damages in civil

---

48. *Id.* at 624; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 967 (1972). The instant court approved the statement that judicial inquiry should focus upon whether the creditor entered the debtor's premises, the type of premises entered, the presence or absence of debtor consent, the possibility of creditor deceit in procuring consent, and third-party response.

1. The first editorial referred to the alleged illegal activities of the Classroom Teachers' Association (CTA), which plaintiff had led in the Dade County strike in 1972. Miami (Fla.) Herald, Sept. 20, 1972, §A at 6, col. 1. The second editorial stated that the plaintiff had been "kicking the public shin" for years, and had been trying unduly to use or obtain public funds for the benefit of the CTA. Miami (Fla.) Herald, Sept. 29, 1972, §A at 6, col. 3.

2. FLA. STAT. §104.38 (1971) provides in part: "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree . . . ."

court.[3] The Dade County Circuit Court held the statute violative of the first and fourteenth amendments.[4] On direct appeal,[5] the Florida supreme court reversed and remanded and HELD, Florida's right of reply statute was not in conflict with the principles underlying the first amendment to the United States Constitution or to article I, section 4, of the Florida constitution.[6]

Under the first amendment the United States Supreme Court has consistently upheld the right of the press to publish free from governmental interference.[7] In only a few instances has intervention been allowed, principally in the area of libelous publications.[8] Even this restriction is a narrow one,[9] having been applied by the courts with increasing reluctance.[10] Except in unusual circumstances,[11] it is well settled that any prior restraint on publication[12] or any attempt to compel publication of commercial[13] or editorial[14] advertising will be struck down. Thus, the press has been traditionally re-

---

3. The attorney general was notified of the suit pursuant to FLA. STAT. §86.091 (1971), and was represented at the emergency hearing held by Judge Francis J. Christie on Oct. 2, 1972. His representative advised the judge that the attorney general had refused to appeal State v. News-Journal Corp., 36 Fla. Supp. 164 (County J. Ct. Volusia County 1972), which held FLA. STAT. §104.38 (1971) unconstitutional. The attorney general had doubts as to the validity of the right of reply statute, and therefore would not defend the statute in the instant case. Tornillo v. Miami Herald Publishing Co., 38 Fla. Supp. 80, 82 (Cir. Ct. Dade County 1972).

4. 38 Fla. Supp. at 80.

5. FLA. CONST. art. V, §3(b)(1). Jurisdiction is directly vested in the Florida supreme court upon a finding by a lower court that a statute is unconstitutional.

6. 287 So. 2d 78 (Fla. 1973) (Roberts, J., concurring; Boyd, J., dissenting).

7. *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

8. For a history of libel law, see Verder, *The History and Theory of the Law of Defamation*, pt. 1, 3 COLUM. L. REV. 546 (1903); Verder, *The History and Theory of the Law of Defamation*, pt. 2, 4 COLUM. L. REV. 33 (1904). Other areas of speech not protected in publication or discourse are obscenity, Miller v. California, 413 U.S. 15 (1973); fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); and certain aspects of commercial speech, Breard v. Alexandria, 341 U.S. 622 (1951). In addition, it has been argued that restrictions upon the media, which can be generally categorized under the right of privacy, should be allowed. *See* Nimmer, *The Right To Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 958-67 (1968).

9. *See* Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970) (word "blackmail" not defamatory); Ashton v. Kentucky, 384 U.S. 195 (1966) (trial court's instruction to the jury in a criminal libel case too indefinite and uncertain); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (a statment is defamatory only if published with a knowing or reckless disregard for the truth).

10. *See* Comment, *The Expanding Constitutional Protection for News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547 (1972).

11. Basically, prior restraint is allowed only where the publication itself would be so harmful that other remedies would be inadequate. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (injunction of publication after civil court determination that it was obscene). *But cf.* New York Times Co. v. United States, 403 U.S. 713 (1971) (injunction denied because Government failed to show that documents were top secret).

12. Grosjean v. American Press Co., Inc., 297 U.S. 233, 249 (1936); Near v. Minnesota, 283 U.S. 697 (1931).

13. Associates & Aldrich Co., Inc. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971).

14. Chicago Joint Bd. ACW v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970).

garded as a sanctuary for free expression,[15] and its existence, unhampered by governmental intervention, has been considered the best assurance of "uninhibited, robust, and wide open debate."[16]

While few restrictions have been imposed upon the press, the Government has regulated the broadcasting media to ensure that monopolistic control does not inhibit the flow of information to the public.[17] The United States Supreme Court has approved this concept by recognizing the fairness doctrine, under which broadcasters must give adequate coverage to public issues and fairly mention opposing viewpoints.[18] Consequently, the Federal Communications Commission maintains direct supervisory powers over the broadcast media, compelling coverage at the broadcaster's expense if sponsorship is unavailable.[19] This doctrine has been applied exclusively to the broadcasting media, since it is based upon the premise that regulation of publication is permissible only in a governmentally created and controlled area.[20]

Right of reply legislation, therefore, is unusual in that it imposes a restraint comparable to the fairness doctrine upon the press.[21] Florida's statute is not unique, however, for several foreign countries enforce the right of reply[22] and four states have specifically embodied its principles in their statutory law.[23] In addition, approximately thirty states condition either the award or amount of damages in a libel suit upon a newspaper's retraction of any allegedly defamatory statements.[24] While such statutes encourage the immediate presentation of an individual's views, as do the right of reply statutes, few courts have ever considered their constitutionality.[25]

---

15. "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). "[O]ur liberty depends on the freedom of the press and that cannot be limited without being lost." Thomas Jefferson, *quoted in* State *ex rel.* Singleton v. Woodruff, 153 Fla. 84, 86, 13 So. 2d 704, 706 (1943).

16. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

17. 47 U.S.C. §315 (1970). Because of the limited nature of broadcasting frequencies, the "fairness doctrine" was enacted to prevent a station owner from presenting only his views to the public. 13 F.C.C. REP. 1246, 1247 (1949).

18. Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969).

19. *Id.* at 377.

20. *Id.* at 390. *See also* Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

21. Right of reply legislation generally compels a newspaper to give an individual or candidate an amount of copy equal to the amount of space in which he was criticized. Donnelly, *The Right of Reply: An Alternative to an Action for Libel,* 34 VA. L. REV. 867, 887 (1948). The fairness doctrine compels a broadcaster to allow an individual air space equal to the amount of time in which he was criticized. 13 F.C.C. REP. 1246, 1251-52 (1949).

22. *E.g.,* Austria, France, Germany, Greece. Donnelly, *supra* note 21, at 884-85.

23. In addition to Florida, they are: Mississippi, MISS. CODE ANN. §23-3-35 (1972) (limited to candidate); Ohio, OHIO REV. CODE ANN. §§2739.13-.16 (Page 1954) (comprehensive statute); and Wisconsin, WIS. STAT. §895.05(2) (1966) (emphasizing retraction, reply being of secondary importance).

24. *See, e.g.,* ORE. REV. STAT. §30.160 (1972) (absent an intentional defamation, damages recoverable only if request for retraction or correction has been denied); TENN. CODE ANN. §23-2605 (Supp. 1972).

25. Concerning retraction statutes, *see, e.g.,* New York Times Co. v. Sullivan, 376 U.S.

In a case of first impression, the instant court relied upon the underlying policy of the first amendment to uphold Florida's right of reply statute.[26] Within the context of the electoral process, the court balanced the right of the newspaper to publish without restraint against the right of the individual to effectively defend his reputation and express his views.[27] Determining that the first amendment was intended to ensure the dissemination of information to the public, especially in an electoral situation, the court stated that the public's "need to know" could best be promoted by allowing a candidate the right of reply.[28]

As authority for its interpretation of the first amendment, the court discussed both the history of Florida's right of reply statute and the specific language of the first amendment.[29] Citing to the Florida constitution[30] for the proposition that the state must punish electoral abuses, the court stated that the corrupt practice act of 1909 had been enacted to maintain "conditions conducive to free and fair elections."[31] Because the legislature had become fearful that the power of the press, when turned to criticism of a candidate, might annihilate the candidate's ability to exercise free speech in self-defense, the right of reply was incorporated into the 1913 corrupt practice act.[32] Thus, the court reasoned, the right of reply does not abridge freedom of the press, but rather expands it: it ensures that a candidate will be allowed to communicate his views and thereby broadens the scope of information available to the public in the electoral process.[33] The court's analysis of the legislative history of

---

254 (1964), where the United States Supreme Court decided a libel action without attaching significance to the Alabama retraction statute under which the suit was instituted. This silence could be construed as evidence of its constitutionality. As to right of reply legislation, there are no high court decisions on point. Of the four jurisdictions that have such statutes, only those of Florida and Mississippi have been considered. The Mississippi statute was considered in Manasco v. Walley, 216 Miss. 614, 63 So. 2d 91 (1953), where the court held that the statute applied only to defamatory statements. The Florida statute was struck down as unconstitutional in State v. News-Journal Corp., 36 Fla. Supp. 164 (County J. Ct. Volusia County 1972).

26. 287 So. 2d 78, 87 (Fla. 1973).

27. *Id.* at 80.

28. *Id.* The court also considered three other issues, which were basically peripheral to the holding of the case. The other issues were (1) whether a court of equity could intervene in a criminal prosecution, (2) whether the statute was vague and overbroad, and (3) whether compelling a newspaper to afford a candidate copy space was a deprivation of property rights. *Id.* at 85, 86. A petition for rehearing centered on a determination of this last issue but the court maintained its original position. The court held that (1) equity could enjoin criminal prosecutions in exceptional circumstances, (2) the court should resolve any vagueness issue of a constitutional statute in favor of its specificity, and (3) the statute was not an unconstitutional deprivation of property rights because it was a valid exercise of the state police power. *Id.*

29. *Id.* at 80, 81.

30. FLA. CONST. art. III, §26, art. IV, §4 (1885).

31. 287 So. 2d at 81.

32. *Id.*

33. *Id.*

Florida's right of reply statute was sound,[34] and several commentators have agreed that such legislation does not abridge the first amendment.[35] Generally, however, state restrictions upon the freedom of the press, although designed to ensure fair elections, have been struck down where there has been no showing of a clear and present danger to the general welfare.[36] Furthermore, despite the scarcity of case law on point,[37] the mere fact that "no specific newspaper content is excluded"[38] is perhaps questionable justification for weakening historical safeguards and infringing upon the freedom of the press.

Consequently, the instant court bolstered its holding by emphasizing the press's responsibility to present divergent opinions.[39] Traditionally, the judiciary has asserted that the very existence of a free press ensures a flow of information to the public in the absence of governmental supervision.[40] This assertion has been strengthened by recent statements of prominent newspaper publishers, affirming that the press is cognizant of its duty to inform the people.[41] The principal court, however, reasoned that a responsible press could not be guaranteed without some statutory safeguards, since the modern trend toward monopolization has resulted in "the voice of the press [becoming more] exclusive in its observation and its wisdom, which in turn deprives the public of their [*sic*] right to know both sides of controversial matters."[42] While the Miami Herald, defendant in the instant case, is perhaps a monopoly in southern Florida,[43] and the national press is becoming increasingly monopolistic in both size and dissemination of information,[44] the instant court made

---

34. *See generally* Keen, *Brief History of the Corrupt Practice Acts of Florida,* 9 FLA. L.J. 297 (1935).

35. Horning, *The First Amendment Right of a Public Forum,* 1969 DUKE L.J. 931, 937-41; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 CORNELL L.Q. 581, 605 (1964); Pierce, *The Anatomy of an Historical Decision:* New York Times Co. v. Sullivan, 43 N.C.L. REV. 315, 346-47 (1965); Note, *Vindication of the Reputation of a Public Official,* 80 HARV. L. REV. 1730, 1746-47 (1967).

36. *E.g.,* Mills v. Alabama, 384 U.S. 214 (1966) (newspaper prohibited from publishing editorials on election day). *See also* Terminiello v. Chicago, 337 U.S. 1 (1949) (ordinance prohibiting publications creating breach of peace); Winters v. New York, 333 U.S. 507 (1948) (statute forbidding publications concerning "deeds of bloodshed and lust"); Musser v. Utah, 333 U.S. 95 (1948) (statute prohibiting publication advocating polygamy).

37. *See* note 25 *supra.*

38. 287 So. 2d at 82.

39. *Id.*

40. *See* note 15 *supra* and text accompanying note 16 *supra.*

41. The American Newspapers Publishers' Association President, Stanford Smith, has advised the Congress: "[O]nly legislation which grants an unqualified privilege from subpoena will achieve the fundamental purpose of assuring a free flow of information to the public." Miami (Fla.) Herald, Jan. 5, 1973, §A at 12, col. 1. Davis Taylor, publisher of the Boston Globe, said in an accompanying statment: "[U]nder our concept of a free press, newspaper publishers bear the ultimate responsibility to the public to preserve a free flow of information." *Id.*

42. 287 So. 2d at 83.

43. The Miami Herald, owned by Knight Newspapers, Inc., is the largest newspaper in Florida, its size being greater than the next two largest Florida newspapers combined. TREND MAGAZINE, March 1973, at 34.

44. *See* B. BAGDIKIAN, THE EFFETE CONSPIRACY AND OTHER CRIMES BY THE PRESS 10, 11

no allowance for small newspapers[45] or the editorial freedom that allows expression of opinions reflecting the convictions of the writers rather than of the "monopolistic" owners.[46]

In addition to the foregoing policy considerations, the instant court compared the fairness doctrine with the right of reply,[47] relying principally upon *Red Lion Broadcasting Co. v. F.C.C.*,[48] despite the fact that *Red Lion* has never been judicially extended beyond the broadcast media.[49] Furthermore, the recent case of *Columbia Broadcasting System, Inc. v. Democratic National Committee*[50] narrowed the fairness doctrine and affirmed that a broad reading of *Red Lion*, such as that in the instant case, is inappropriate. In *C.B.S.* the Supreme Court held that the fairness doctrine does not compel broadcasters to accept paid editorial advertisements, although the admitted purpose of the first amendment is to facilitate the flow of information to the public.[51] The Court stated that *Red Lion* should not be interpreted as standing for the principle that "everyone should speak"[52] and implied that in no instance should the fairness doctrine be extended to the press.[53]

In the instant decision the majority of the court made no mention of *C.B.S.*[54] and extended *Red Lion* and the fairness doctrine to the right of reply on two grounds. First, the court stated that the right of reply tends to prevent monopolization of expression, a purpose of the first amendment expounded in *Red Lion*.[55] Second, the court cited to dicta in the recent decision of *Rosenbloom v. Metromedia*:[56]

(1972); Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. FLA. L. REV. 295-99 (1969).

45. "Where, as is often the case, there are many candidates competing for several offices, it becomes a practical impossibility, even for large newspapers, to comply by providing each with equal space. In the case of a small newspaper, because of inherent space and budget limitations, it would be forced to abandon all efforts at comprehensive, intelligent and analytical coverage of electoral news events, upon pain of jail sentence. Faced with an apparent dilemma of this sort, a newspaper will choose not to publish anything at all, rather than face financial ruin or prison." Brief for Sebring News, Inc. as Amicus Curiae at 2, Tornillo v. Miami Herald Publishing Co., 287 So. 2d 78.

46. For example, one Gannett newspaper endorsed Governor Askew, while another supported Jack Matthews, and Gannett newspapers endorsed both Nixon and McGovern in editorials. Brief for Today as Amicus Curiae at 2, Tornillo v. Miami Herald Publishing Co., 287 So. 2d 78 (Fla. 1973).

47. 287 So. 2d at 83-84.

48. 395 U.S. 367 (1969).

49. *See* text accompanying note 20 *supra*.

50. 412 U.S. 94 (1973).

51. *Id.*

52. *Id.* at 101.

53. *Id.* at 117-18.

54. The court stated only that it had "carefully considered appellee's argument that *Red Lion Broadcasting Co. v .F.C.C.* . . . is inapplicable." 287 So. 2d at 84.

55. *Id.*

56. 403 U.S. 29, 47 (1971).

> If the states fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of insuring their ability to respond rather than in stifling public discussion of matters of public concern.

The *Rosenbloom* court supplemented this statement by a footnote stating that "some states have adopted retraction statutes or right of reply statutes."[57] While this may be support for the holding in the instant case, *Rosenbloom* can be distinguished as a defamation suit against a radio station by a magazine distributor.[58] Its application is tenuous in the instant factual situation, which involves governmental regulation of the press in an area not previously sanctioned by the United States Supreme Court.[59]

Although the majority in the instant decision did not distinguish *C.B.S.*, Justice Roberts' concurrence centered on this issue. He emphasized the reluctance in *C.B.S.* to give monied interests the power to force broadcasters to accept their advertisements.[60] Under Florida's right of reply statute, a candidate does not pay for the space and may demand his right of reply only after the newspaper has initiated an attack against him. Therefore, the fear of a candidate monopolizing press copy by reason of financial advantage is groundless. Justice Roberts concluded that "our opinion in the instant case in no way conflicts with . . . *C.B.S.*,"[61] but it is doubtful that this assertion is valid in light of the dicta in *C.B.S.* implying that the fairness doctrine should not be extended to the news media.[62]

While the fairness doctrine per se should not be extended to right of reply legislation, other aspects of the instant decision find greater support in case law. The court correctly declared that policies underlying the first amendment made the people's right to be informed of paramount importance. The first amendment does not protect the press from *all* forms of restraint, nor does it ensure an individual free expression of *all* views.[63] Therefore, insofar as the right of reply reasonably expands the scope of information available to the people, it supports first amendment policy and does not "abridge" freedom of the press. However, the instant court's departure from the well-established principle of governmental abstention is much too sweeping. The most satisfactory result for all parties could probably have been achieved by limiting, or strictly construing, the right of reply. If a candidate or individual could demand free press copy upon publication of only defamatory or libelous state-

---

57. *Id.* n.15.

58. *Rosenbloom* suggested right of reply legislation as a possible alternative to damage suits that operate as repressive burdens on the press. Dealing with libel, *Rosenbloom* recognized the established principle that restraints on the press are to be narrowly construed and held for the radio station, and not for the individual. *Id.* at . Therefore, *Rosenbloom* is at best questionable authority for expanding the scope of restraints on the press.

59. *See* notes 7, 8 *supra.*

60. 287 So. 2d at 88 (Roberts, J., concurring).

61. *Id.*

62. *See* note 52 *supra* and accompanying text.

63. *See* note 8 *supra* and accompanying text.

ments,[64] many of the problems inherent in the instant decision could be alleviated. There is, for example, precedent for restricting the publication of libel,[65] and the possibility of a vague statute[66] is lessened, as the scope of libelous material has been frequently defined by the United States Supreme Court.[67] Furthermore, the right of the individual to protect his reputation by immediate expression in self-defense would be upheld and, in the majority of jurisdictions, the printing of such a reply would mitigate the press's apprehension of damage judgments collectible in a libel suit.[68] Thus, a compromise would be achieved between individual expression and freedom of the press. More importantly, the scope of information available to the people would be enlarged in accord with the fundamental principle of the first amendment.

BARBARA ALDEN ROPES

64. *See* Manasco v. Walley, 216 Miss. 614, 63 So. 2d 91 (1953).

65. *See* notes 8, 9, 10 *supra* and accompanying text.

66. One of the issues before the court in the instant case was vagueness and overbreadth. *See* note 27 *supra.*

67. *See* note 9 *supra.*

68. *See* Chafee, *Possible New Remedies for Errors in the Press,* 60 HARV. L. REV. 1 (1964); Donnelly, *The Right of Reply: An Alternative to an Action for Libel,* 34 VA. L. REV. 867 (1948); Lefar, *Legal Remedies for Defamation,* 6 ARK. L. REV. 423 (1952).