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Defamation of Public Figures: Is New York Times Outdated?

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DEFAMATION OF PUBLIC FIGURES: IS *NEW YORK TIMES* OUTDATED?

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I. INTRODUCTION

The balancing of freedom of speech and the protection of personal reputation has been the subject of litigation for many years. The law of defamation of public figures was finally settled by the United States Supreme Court in 1964 with its landmark holding in *New York Times v. Sullivan*.[1] In *New York Times*, Justice Brennan held that public officials could recover for defamation only upon showing that their defamers knew or should have known that their statements were false.[2] This standard has been upheld for over thirty years. Recently, however, the ruling in *New York Times* has been questioned and rejected abroad, by courts in both Australia[3] and South Africa.[4]

Part II of this note begins by discussing the current status of public figure defamation law in the United States. Part III discusses Australian defamation law with respect to the Australian case, *Theophanous v. The Herald & Weekly Times Ltd.*[5] Part IV discusses the 1996 South African case *Holomisa v. Argus Newspapers Ltd.*[6] Part V of this note examines the logic of the foreign cases and the possible impact these cases may have on United States public official defamation law. The note concludes by suggesting that because of the unreasonable assumptions made in the foreign cases and the

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* *Editor's note:* This note was selected as the best note for Fall 1996.
** This note is dedicated to my mother, father, sister, and brother.
1. New York Times v. Sullivan, 376 U.S. 254 (1964) [hereinafter *New York Times I*].
2. *Id.* at 279-80.
3. Theophanous v. The Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104 (Austl.).
4. Holomisa v. Argus Newspapers Ltd. 1996 (2) SALR 588 (Sup. Ct., WLD) (S. Afr.).
5. (1994) 182 C.L.R. at 104.
6. 1996 (2) SALR at 588.

inadequate protection of free speech provided under the decisions of the foreign cases, these recent rulings will have little if any impact on U.S. defamation law.

II. UNITED STATES DEFAMATION LAW

Under common law in the United States, defamation was a tort of strict liability.[7] Courts held publishers liable even when they had acted reasonably or innocently in publishing the defamatory material.[8] This standard was changed by the 1964 U.S. Supreme Court ruling in the landmark case, *New York Times*.[9] In *New York Times*, Justice Brennan put forth what is now the standard applied to defamation of public figures.[10] L.B. Sullivan, an elected Commissioner of Montgomery, Alabama,[11] brought a civil libel suit against the New York Times Company, a New York corporation that publishes the *New York Times* (*Times*), a daily newspaper.[12] Sullivan alleged that certain statements contained in a full-page advertisement in the *Times* on March 29, 1960 were libelous against him.[13] The purpose of the advertisement was to solicit funds for the "support of the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment."[14] The advertisement stated: " 'As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.' "[15] It further alleged that the students " '[we]re being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom.' "[16]

Sullivan based his libel claims specifically on the contents of two of the ten paragraphs of the advertisement.[17] Paragraph three stated:

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7. Ortiz v. Valdescastilla, 478 N.Y.S.2d 895, 895 (N.Y. App. Div. 1984).

8. Triangle Publications, Inc. v. Chumley, 317 S.E.2d 534, 536 (Ga. 1984) (holding that "[t]he standard of care under which [a] publisher who defames private figure may constitutionally be held liable in tort is one of ordinary care").

9. *New York Times I*, 376 U.S. at 267.

10. *Id.* at 254.

11. *Id.* at 256.

12. *Id.* Sullivan also brought suit against four African American clergyman from Alabama. *Id.*

13. *Id.*

14. *Id.* at 257.

15. *Id.* at 256 (quoting *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at L23).

16. *Id.* (quoting *Heed Their Rising Voices*, *supra* note 15).

17. *Id.* at 257.

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."[18]

The sixth paragraph stated:

> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times — for 'speeding,' 'loitering,' and similar 'offenses.' And now they have charged him with 'perjury' — a *felony* under which they could imprison him for *ten years*. . . ."[19]

Sullivan alleged that because he was the Montgomery Commissioner who supervised the Police Department, readers would interpret the word "police" in the advertisement to mean that he had been responsible for "ringing" the campus with police.[20] Sullivan further contended that readers would impute responsibility to him for padlocking the dining hall in an attempt "to starve the students into submission."[21] Sullivan also claimed that the sixth paragraph would be read as accusing the Montgomery police, and therefore him, of intimidation and violence against Dr. King, and of bombing Dr. King's home, assaulting Dr. King, and charging Dr. King with perjury.[22]

The *Times*, including the advertisement, was circulated in Alabama.[23] The *Times* Advertising Acceptability Department took the order for the advertisement from a New York advertising agency, which was acting for the signatory Committee.[24] The order was accompanied by a letter[25] certifying

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18. *Id.* (quoting *Heed Their Rising Voices*, *supra* note 15, at L23).
19. *Id.* at 257-58 (quoting *Heed Their Rising Voices*, *supra* note 15, at L23).
20. *Id.* at 258.
21. *Id.*
22. *Id.* ("Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.").
23. Total circulation for the *Times* that day was approximately 650,000 copies — 394 copies were circulated in Alabama with approximately 35 of these copies circulated in Montgomery County. *Id.* at 260 n. 3.
24. *Id.* at 260.
25. *Id.* The letter was from A. Philip Randolph, Chairman of the Committee, who "was known to the Times' Advertising Acceptability Department as a responsible person." *Id.*

that the individuals listed in the advertisement had given their permission.[26] The manager of the Advertising Acceptability Department testified at trial that it was the established practice of the Department to accept such letters as proof of authorization.[27] No one at the *Times* made any attempt to check the accuracy of the statements that were contained in the advertisement.[28]

Under Alabama law as it existed at the time of trial, a public officer could not recover punitive damages in a libel suit based upon a publication concerning his official conduct unless he first made a written demand for a public retraction, and the defendant failed or refused to comply.[29] Sullivan made such a written demand of the *Times*, the *Times* wrote to Sullivan concerning his demand, but it did not print a retraction.[30] Sullivan filed suit a few days after receiving the letter from the *Times*.[31]

At the trial level, Sullivan was awarded $500,000 in damages for the libel.[32] The case was appealed, and the Alabama Supreme Court, relying on Alabama case law, held that "[w]here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt[,] . . . [they are] libelous per se."[33] The court further held:

> Where words are libelous per se and as heretofore stated we think the published words in the present case were libelous per se, the right to damages results as a consequence, because there is a tendency of such libel to injure the person libeled in his reputation, profession, trade, or business, and *proof of such pecuniary injury is not required*, such injury being implied.[34]

In reply to the *Times*' argument that the advertisement was protected by the First Amendment of the U.S. Constitution,[35] the court merely stated:

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26. *New York Times I*, 376 U.S. at 260.

27. *Id.*

28. *Id.* at 261.

29. *Id.*

30. *Id.* The *Times* sent Sullivan a letter stating, " '[W]e . . . are somewhat puzzled as to how you think the statements in any way reflect on you. . . . [I]f you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.' " *Id.*

31. *Id.*

32. New York Times v. Sullivan, 144 So. 2d 25, 28 (Ala. 1962) [hereinafter *New York Times II*].

33. *Id.* at 37 (citing White v. Birmingham Post Co., 172 So. 649 (1937); Iron Age Pub'g Co. v. Crudup, 5 So. 332 (1889)).

34. *Id.* at 49 (citing Webb v. Gray, 62 So. 194 (Ala. 1913); Advertiser Co. v. Jones, 53 So. 759 (Ala. 1910)) (emphasis added).

35. The First Amendment states: "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

"The First Amendment of the U.S. Constitution does not protect libelous publications."[36] Additionally, the court reasoned that "the Fourteenth Amendment is directed against State action and not private action."[37]

On appeal to the U.S. Supreme Court, Justice Brennan quickly disposed of the lower court's ruling on the Fourteenth Amendment. Justice Brennan reasoned that even though this was a civil action between two private parties, the U.S. Constitution applies because "the Alabama courts have applied a state rule of law which . . . [the *Times*] claim[s] to impose invalid restrictions on their constitutional freedoms of speech and press."[38] Brennan further stated that the form in which the state power had been applied was inconsequential.[39] Brennan's sole concern was that the power had been exercised.[40]

Once the Court decided that the U.S. Constitution applied to Sullivan's action, it proceeded to determine whether the Alabama common law of libel,[41] "as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments."[42] In making this

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Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

36. *New York Times II*, 144 So. 2d at 40 (citing Konigsberg v. State Bar of Cal., 366 U.S. 36, 36 (1961) (holding that a state bar applicant's refusal to answer any question having substantial relevance to his qualifications could be grounds for a denial of a license); Times Film Corp. v. City of Chicago, 365 U.S. 43, 43 (1961) (holding that those who wish to exhibit films do not have an absolute privilege against prior restraint); Beauharnais v. Illinois, 343 U.S. 250, 250 (1952) (holding that libelous statements that defame groups are not protected); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that " 'fighting words' — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" — were among the classes of speech that were not protected by the First Amendment); Near v. Minnesota, 283 U.S. 697, 698 (1931) (holding that the proper remedy for false accusations against public officials was by postpublication libel action, not by prepublication procedures).

37. *New York Times II*, 144 So. 2d at 40 (citing Collins v. Hardyman, 341 U.S. 651 (1951)). The Fourteenth Amendment states, in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

38. *New York Times I*, 376 U.S. at 265. Furthermore, the First Amendment protection of free speech applies to the states through the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

39. *New York Times I*, 376 U.S. at 265 (stating that "[i]t matters not that . . . [the] law has been applied in a civil action and that it is common law only").

40. *Id.* (citing *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879); American Fed'n of Labor v. Swing, 312 U.S. 321 (1941)).

41. *See* Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 457-58 (Ala. 1960) (holding publisher libel for statements regarding a teacher); Alabama Ride Co. v. Vance, 178 So. 438, 438 (Ala. 1938) (holding city commission not libel for publication of petition that was "substantially true"); Parsons v. Age-Herald Publ'g Co., 61 So. 345, 350 (Ala. 1913) (holding newspaper not libel for "fair and accurate" report, "published in good faith to inform the public . . . though the report [may] contain matter that is false, defamatory, and injurious").

42. *New York Times I*, 376 U.S. at 268.

determination, the Court began by noting that previous decisions of the Court had settled the question of whether the First Amendment protected freedom of expression upon public questions.[43] Justice Brennan pointed to several prior decisions of the Court that upheld the importance of free, unrestrained, open debate on public issues.[44] The Court also recognized that the founders of our nation enacted the First Amendment because they were concerned with the tyrannies of a governing majority. The Court noted that the founders believed that the best way to protect the governed was to allow the " 'opportunity to discuss freely supposed grievances and proposed remedies.' "[45] Against this backdrop, the Court concluded that the *Times* advertisement was entitled to First Amendment protection.[46] This, the Court said, was because "the present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection."[47]

Having determined that the advertisement was protected by the Constitution, the Court then turned to the question of whether the advertisement forfeited such protection because it was defamatory and contained false factual statements.[48] In deciding whether the advertisement was excluded from First Amendment protection because of the false factual statements it contained, the Court once again turned to some of its prior decisions.[49] The Court noted that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries, or administrative officials — and especially one that puts the burden of proof on the speaker."[50] As policy underlying these past decisions, the Court stated that "erroneous statement[s] [are] . . . inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[51] However, it further stated that the allowance of such

43. *New York Times I*, 376 U.S. at 269.

44. *Id.* at 269-70 (citing on N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963); Roth v. United States, 354 U.S. 476, 484 (1957) (stating "[the First Amendment] was fashioned to assure unfettered interchange of ideas"); Bridges v. California., 314 U.S. 252, 270 (1941) (stating "it is a prized American privilege to speak one's mind . . . on all public institutions"); Stromberg v. California, 283 U.S. 359, 369 (1931); Whitney v. California, 274 U.S. 357, 375-76 (1927); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

45. *New York Times I*, 376 U.S. at 270 (quoting Justice Brandeis' concurring opinion in *Whitney*, 274 U.S. at 375-76).

46. *Id.* at 270-71.

47. *Id.* at 271.

48. *Id.*

49. *Id.* at 271-72.

50. *Id.* at 271.

51. *Id.* at 271-72 (quoting *N.A.A.C.P.*, 371 U.S. at 433).

statements was a small price to pay for democracy.[52]

Turning to the issue of whether the defamatory nature of the advertisement warranted its repression, the Court looked to cases involving judges who had allegedly been defamed.[53] Justice Brennan noted that these cases held that criticism of judges and their decisions could not be restricted, even if the criticism contained false information.[54] He reasoned that if such protection is afforded to critics of judges, it surely must also extend to critics, like the *Times*, of elected city commissioners.[55]

Having examined the case law of defamation and the policies underlying the adoption of the First Amendment, the Court enunciated the standard on defamation of public officials in the United States as it stands today.[56] The Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[57]

This standard is commonly referred to as the "actual malice" standard. The Court further held that the Alabama law that "presumed" malice as to general

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52. *Id.* at 271-72 (citing N.A.A.C.P. v. Button, 371 U.S. 415, 445 (1963); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)). The Court gave particular deference to the opinion of Judge Edgerton in *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942), *cert. denied* 317 U.S. 678 (D.C. Cir. 1942). Judge Edgerton stated:

> Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate.

Id.

53. *New York Times I*, 376 U.S. at 272-73 (citing Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331, 342, 343 n.5, 345 (1946); Bridges v. California, 314 U.S. 252 (1941)).

54. *Id.* (citing *Bridges*, 314 U.S. at 252).

55. *Id.* at 273 (stating that "[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations").

56. *Id.* at 279-80.

57. *Id.*

damages was also violative of and inconsistent with the Constitution.[58] Concluding that the Alabama law was unconstitutional as written, the Court reversed and remanded the case.[59] Although the "actual malice" standard, and the decision as a whole, has been criticized and examined for many years, it has stood as good law until the present with very little refinement.[60]

III. AUSTRALIAN DEFAMATION LAW

Courts in other jurisdictions recently have criticized Justice Brennan's standard in *New York Times*. In the Australian case *Theophanous v. The Herald & Weekly Times Ltd.*,[61] three of the five Justices explicitly rejected the holding in *New York Times*.

In *Theophanous*, the defendant published a letter that allegedly defamed Dr. Andrew Theophanous.[62] Dr. Theophanous had been a member of the House of Representatives since 1980.[63] At the time of the alleged defamation, he was the chairperson of the Joint Parliamentary Standing Committee on Migration Regulations as well as the Chairperson of the Australian Labor Party's Federal Caucus Immigration Committee.[64] On November 8, 1992, defendant, The Herald & Weekly Times Ltd. published a letter to the editor in its newspaper *The Sunday Herald Sun* (*Herald*) entitled, "Give Theophanous the Shove."[65] The letter contained the following allegedly defamatory statements:

> If reports coming out of Canberra are true about the alleged behavior of Dr. Andrew Theophanous, then it is high time he was

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58. *New York Times I*, 376 U.S. at 283-84. The Court stated that " '[t]he power to create presumptions is not a means of escape from constitutional restrictions.' " *Id.* at 284 (quoting Bailey v. Alabama, 219 U.S. 219, 239 (1944)).

59. *Id.* at 292. The Court went on to find that "the evidence against the Times support[ed] at most a finding of negligence in failing to discover the misstatements, and [wa]s constitutionally insufficient to show the recklessness that [wa]s required for a finding of actual malice." *Id.* at 287-88. The Court also found that the jury's finding that the statements were made " 'of and concerning' " Sullivan was not supported by the evidence. *Id.* at 288.

60. Commentators have said that one of the problems in applying the *New York Times* standard is that it is difficult for courts to determine just who is a "public figure." For an interesting and thorough discussion of subsequent cases that have addressed the "public figure" aspect of the *New York Times* decision, see Erik Walker, Comment, *Defamation Law: Public Figures — Who Are They?*, 45 BAYLOR L. REV. 955 (1993).

61. (1994) 182 C.L.R. at 104.

62. *Id.* at 117-18.

63. *Id.* at 117.

64. *Id.*

65. *Id.* at 117-18. The letter had been written by a second defendant, Mr. Bruce Ruxton, who at the time of publication was the President of the Victorian branch of the Returned and Services League. *Id.*

thrown off Parliament's immigration committee.

I have read reports that he stands for most things Australians are against.

He appears to want a bias shown towards Greeks as immigrants.

Let me say at the outset that the Greeks who have come to this country have been a splendid example to everyone. They are hard working, honest, delightful people, and they would agree with me, I'm sure, that right now too many immigrants are being allowed in.

There are just no jobs for newcomers — or those who already live here.

It has been reported that Dr. Theophanous wants the British base of Australian society diluted so that English would cease to be the major language.

What is this man on about? And what language would he suggest we use to replace English?

I'm grateful there's an election in the wind. I hope the people of Calwell give Dr. Theophanous the heave.

Poor old Arthur Calwell must be spinning in his grave at the idiotic antics of the man in the seat named after him.

Calwell was a great Australian and the architect of this country's post-war immigration policy.[66]

Dr. Theophanous brought an action for defamation against the defendants in the County Court of Victoria.[67] He alleged that the letter implied that he "showed a bias towards Greeks as migrants; . . . stood for things that most Australians were against; . . . [and] was an idiot and his actions were the antics of an idiotic man."[68] As a defense, the *Herald* asserted that under the Commonwealth Constitution, there was a freedom to publish material

> (i) in the course of discussion of government and political matters; (ii) of and concerning members of the Parliament of the Commonwealth of Australia which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees; [and] (iii) in relation to the suitability of persons for office as members of Parliament.[69]

The *Herald* further asserted that the publication was not actionable because it was made

66. *Id.* at 118.
67. *Id.*
68. *Id.*
69. *Id.* at 119.

> without malice; . . . [was] reasonable in the circumstances; . . . [was] not made without an honest belief in the truth of the words or made with reckless disregard for the truth or untruth of the words; made at a time when it was publicly anticipated that a federal election was about to be called.[70]

In deciding whether the Commonwealth Constitution provided an implied freedom of discussion of government and political matters, the *Theophanous* Court concluded that to guarantee the efficacy of representative democracy, an implied freedom of discussion must extend to the protection of political discussion.[71] Having decided that an implied freedom of discussion did indeed exist under the Commonwealth Constitution, the High Court proceeded to determine the criteria under which an action for defamation was not actionable.[72]

In examining the "actual malice" standard of the *New York Times,*[73] the court held that a publication is not actionable unless it is made with knowledge of falsity or with reckless disregard for the truth or falsity,[74] the High Court noted that the standard afforded some protection to the reputation of the public official and a large amount of protection to the publisher.[75] The High Court also examined several criticisms of the *New York Times* standard. Chief Justice Mason pointed out that the *New York Times* standard does not place enough emphasis on the reputation of the person defamed.[76] He also noted the criticism that the rule places too much emphasis on free speech at the expense of individual reputation.[77] Chief Justice Mason stated that this emphasis would be more misplaced if the court were to adopt the *New York Times* standard because of the difference between cost rules and procedures of the United States and Australia.[78] Referring to points made by the New South Wales Law Reform Commission, Chief Justice Mason recognized several problems defendants have experienced under the *New York Times* standard.[79] Defendants have suffered intrusive discovery procedures as a result of the plaintiff's attempts to prove malice; the protracted litigation has inflated costs and damages; and the protection of

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70. *Id.* at 119.
71. *Id.* at 130.
72. *Id.* at 133.
73. *New York Times I*, 376 U.S. at 254.
74. *Id.* at 280.
75. *Theophanous*, (1994) 182 C.L.R. at 134.
76. *Id.*
77. *Id.*
78. *Id.* at 134-35.
79. *Id.* at 135.

sources has been threatened.[80]

Deciding not to adopt the *New York Times* standard in Australia, the High Court held that *New York Times* did not provide adequate protection to reputation.[81] It reasoned that the standard placed too heavy a burden of proof on the public official because the official would have to prove that the statement was made with actual malice,[82] and that the protection of free communication did not require a "subordination of the protection of individual reputation as appears to have occurred in the United States."[83] As a better rule, Chief Justice Mason held that "if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly, . . . and that the publication was reasonable."[84] Chief Justice Mason stated that here "reasonable" means that the publisher either took "some steps to check the accuracy of the impugned material or . . . establish[ed] that it was otherwise justified in publishing without taking such steps or steps which were adequate."[85]

The appropriateness of the *New York Times* standard to defamation of Australian public officials also was addressed by Justice Brennan of the *Theophanous* court.[86] In response to the *Herald's* argument that *New York Times* supported the position that there was a freedom to publish founded on the Commonwealth Constitution, Brennan stated that cases decided based on constitutions of foreign countries provided extremely limited assistance.[87] Furthermore, this was due to the fact that they frequently contained provisions that are not present in Australia's Commonwealth Constitution.[88] Brennan specifically pointed to the First Amendment of the U.S. Constitution, which he viewed as expressly creating or being construed as expressly creating, a provision for freedom of communication, which has no counterpart in the Commonwealth Constitution.[89]

Justice Brennan further noted a difference between the history of the United States preceding its adoption of the First and Fourteenth amendments

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80. *Id.*
81. *Id.*
82. *Id.* at 135-36.
83. *Id.* at 136.
84. *Id.* at 137.
85. *Id.*
86. *Id.* at 141. In *Theophanous*, the High Court of Australia was comprised of seven Justices: Mason, C.J.; Brennan, J.; Deane, J.; Dawson, J.; Toohey, J.; Gaudron, J.; and McHugh, J. *Id.* at 104.
87. *Id.* at 157.
88. *Id.*
89. *Id.* at 157-58 & n.68 (noting that section 2 of the Canadian Charter of Rights and Freedoms provides for freedom of expression, and that Article 10, clause 1.1 of the European Convention on Human Rights expressly grants a similar right).

to the U.S. Constitution and that of Australia preceding the adoption of the Commonwealth Constitution.[90] Brennan noted that Australia's Constitution has neither a Bill of Rights nor a First Amendment,[91] and that in fact, the Melbourne Convention, held in 1898 to draft the Australian Constitution, rejected the adoption of a provision similar to section one of the Fourteenth Amendment of the U.S. Constitution.[92]

Brennan stated that the *New York Times* standard, which places the burden on the plaintiff, demonstrated the major difference between the legal cultures of the two countries.[93] According to Brennan, the purpose behind *New York Times* standard is to define the conditions under which the protection of the constitutional privilege is lost.[94] Whereas, the purpose of Australian defamation law is to "protect personal reputation to an extent appropriate in a society which also values free speech."[95] Brennan thus concluded that the ruling in *New York Times* has no persuasive influence on the interpretation of the Commonwealth Constitution.[96]

Justice Deane of the *Theophanous* court also considered the issue of whether the *New York Times* standard should be adopted in Australia.[97] He initially noted the benefit of adopting a standard such as that enunciated in *New York Times* because it would protect the citizens from being punished for expressing "honest and well founded criticism."[98] However, citizens still would be protected if a different standard were adopted because of the difficulties of "proof and the inherent uncertainty of all litigation."[99] Deane stated that a major shortcoming of the *New York Times* standard was that it required the plaintiff to prove truth or malice in defamation actions would probably do little to eliminate any "chilling" effect on speech.[100] This was because the decreased likelihood of defamation proceedings under a standard like *New York Times* would be counterbalanced to a significant extent by the increased costs and mental probing the defendant would suffer as result of the plaintiff's attempts to prove falsity and malice.[101] Because the defendant could be subject to financial ruin even if he or she spoke the truth,

90. *Id.* at 159.
91. *Theopanous*, (1994) 182 C.L.R. at 159.
92. *Id.* at 160 n.86.
93. *Id.* at 160.
94. *Id.* at 160-61.
95. *Id.* at 161.
96. *Id.*
97. *Id.* at 185-87.
98. *Id.* at 185.
99. *Id.*
100. *Id.*
101. *Id.*

Deane concluded that freedom of speech seemed to be no real freedom at all.[102]

IV. SOUTH AFRICAN DEFAMATION LAW

A recent case outside of the United States that considered the adoption of the *New York Times* standard was decided in South Africa in February 1996. Before examining the South African case, however, it is important to comment on the recent history of that county's constitution. The final draft of the South African Constitution was adopted on May 8, 1996.[103] The new Constitution is unique in South African history in that it explicitly provides for the protection and enforcement of fundamental rights.[104] Against this background, the recent South African rejection of the *New York Times* standard becomes very interesting.

In *Holomisa v. Argus Newspapers Ltd.*,[105] the plaintiff was allegedly defamed by an article published in the defendant's newspaper. At the time of the alleged defamation, the plaintiff was the military ruler of Transkei, a so-called homeland created by the pretransition government in furtherance of its ideology of apartheid.[106] On May 27, 1993, defendant's newspaper, the Johannesburg *Star* printed an article titled "Holomisa Is Linked to Infiltration of Apla Hit Squad."[107]

The article contained several statements that Holomisa considered to be defamatory.[108] It claimed that Holomisa had been "directly involved" in an infiltration into South Africa by the Azanian People's Liberation Army (Apla) and the Transkei Defense Force squad.[109] The article further stated that the purpose of the infiltration was to kill whites in the northern Natal region and to assassinate a top South African official in Transkei.[110] The

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102. *Id.* In conclusion, Justice Deane agreed with Chief Justice Mason and Justices Toohey and Gaudron that "an unqualified application of the defamation laws of Victoria to impose liability in damages in respect of political communications and discussion is precluded by the constitutional implication of political communication and discussion." *Id.* at 187. Justice Deane disagreed with the three Justices about the condition upon the defendant to prove an absence of recklessness or reasonableness. *Id.* at 188. However, he agreed that the implied freedom of communication implicit in the Commonwealth Constitution precluded liability for defamation based upon the facts of this case and thus, lent his support to the decision of the others. *Id.*

103. Jefri Jay Ruchti, *Republic of South Africa, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD at ix (Gisbert H. Flanz ed., Supp. 1996). The new Constitution will come fully into operation at the time of the next scheduled national elections on April 30, 1999. *Id.*

104. S. AFR. CONST. ch. 2, §§ 7-39 (Bill of Rights) (1996).

105. 1996 (2) SALR 588 (Sup. Ct. WLD) (S. Afr.).

106. *Id.* at 593.

107. *Id.*

108. *Id.* at 593-94.

109. *Id.* at 593.

110. *Id.*

Star contended that the article was based on military intelligence sources.[111]

Plaintiff filed suit in August 1994, alleging damages for defamation.[112] Plaintiff claimed that the article would be understood to mean that he had participated in acts aimed at the killing of white people and had been involved in a conspiracy to murder a South African official.[113] The plaintiff's claim pleaded that the article was " 'false and defamatory of the plaintiff' and that the defendant published it 'wrongfully and unlawfully and with the intention to defame the plaintiff and damage him in his reputation.' "[114]

The defendant excepted to plaintiff's pleadings, alleging a failure of legal competency.[115] The *Star* alleged that criticism of public officials was protected under section 15(1) of the 1993 Interim Constitution.[116] Apparently attempting to incorporate the rule enunciated in *New York Times* into South African common law under the new Constitution, the *Star* asserted that a public official who attempts to recover damages for defamation must first prove that the defendant had " '(1) [a]ctual knowledge that the matter published was in fact false; *alternatively,* (2) [had] publi[shed] . . . the matter with reckless disregard as to whether it was false or not.' "[117] "According to the exception, the plaintiff's failure to make these averments rendered his particulars of claim fatally defective."[118] The *Star's* exception placed the propriety of the *New York Times* standard squarely before the court.

In addressing the *Star's* exceptions, the *Holomisa* court first had to decide the issue of whether the Constitution applied to the dispute between the two parties.[119] The *Holomisa* court concluded that the Interim Constitution's Chapter on Fundamental Rights was "intended to apply *in some manner* to all disputes between litigating parties."[120] The court specifically noted that section 35(3), "which obliges a court to 'have due regard' in interpreting any law and in applying and developing the common-

111. *Id.*
112. *Id.*
113. *Id.* at 594.
114. *Id.*
115. *Id.*
116. *Id.* (citing Republic of South Africa Act 200 of 1993, Interim Constitution, § 15(1)); *see* Jefri Jay Ruchti, *Republic of South Africa, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD at 12 (Gisbert H. Flanz ed., Supp. 1995). The new Constitution states: "Everyone has the right to freedom of expressions, which includes — (a) freedom of the press and other media; (b) freedom to receive and impart information and ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research." S. AFR. CONST. § 16(1) (1996); *see* Ruchti, *supra* note 103, at 12.
117. *Holomisa*, 1996 (2) SALR at 594.
118. *Id.*
119. *Id.* at 596.
120. *Id.* at 597.

law, 'to the spirit, purport and objects' of the fundamental rights chapter, becomes not merely an interpretative directive, but a force that informs all legal institutions and decisions with the new power of constitutional values."[121] Based upon this section, the court concluded that "it would be improper to consider the defences available to the defendant in a defamation action [before them] without taking into account, as between defendant and plaintiff, the fact that s[ection] 15(1) guarantees *every person* 'the right to freedom of speech and expression.' "[122]

Having concluded that the Constitution applied in the instant case, the *Holomisa* court turned its attention to the *Star's* constitutional arguments.[123] After a survey of the common law of South Africa, the court concluded that in order to escape liability for a defamatory publication under the current state of the defamation law, the defendant had to prove the truth of the statements contained therein.[124] The court stated that if the court were bound only by the common law, the decision in *Neethling* would be binding.[125] However, the court held the decision in *Neethling* predated the Constitution, and current South African courts were bound to take into account the Constitution's fundamental rights provisions.[126]

In determining what standard was called for by the Constitution in defamation cases, the *Holomisa* court considered the *New York Times* standard.[127] It put forth several reasons for its decision not to follow *New York Times*.[128] First was the difference between the United States and South Africa in the size of defamation awards.[129] The *Holomisa* court stated that the reason the *New York Times* court imposed such a heavy burden on the plaintiff was because the State was using defamation actions to " 'transform the traditional libel action, designed to repair the reputation

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121. *Id.* at 598 (quoting Republic of South Africa Act 200 of 1993, Interim Constitution, § 35(3)); *see* Ruchti, *supra* note 115, at 22.

122. *Holomisa*, 1996 (2) SALR at 598 (quoting Republic of South Africa Act 200 of 1993, Interim Constitution, § 15(1)); *see* Ruchti, *supra* note 115, at 12.

123. *Holomisa*, 1996 (2) SALR at 598.

124. *Id.* at 603 (relying on Neethling v. Du Preez, 1994 (1) SALR 708 (A) (S. Afr.)).

> "The matter stands rather differently in regard to the defence of truth in the public benefit. Here no form of compulsion operates on the mind of the defendant whose decision put the character of the plaintiff in jeopardy proceeds entirely from his own volition.
>
> . . . .
>
> Since it is entirely of his own accord that the defendant elects to vilify the plaintiff, justice demands that he should do so at his own peril . . . ."

Id. (quoting *Neethling*, 1994 (1) SALR at 770).

125. *Id.* at 603.

126. *Id.*

127. *Id.* at 613.

128. *Id.* at 613-16.

129. *Id.* at 613-14.

of a private party, into a State political weapon to intimidate the press.' "[130] Because defamation awards were much smaller in South Africa than in New York, the danger that the State in South Africa would use such an action to stifle the press was much smaller.[131]

The *Holomisa* court stated that another reason *New York Times* should not be followed was the difference between the United States and South Africa in the protections that are afforded public officials.[132] *New York Times* had justified curtailing a public official's right to sue for libel on the ground that public officials are granted immunity for defamatory statements made in the course of their conduct while performing official duties.[133] However, public officials enjoy no such immunity in South Africa.[134]

The *Holomisa* court, quoting S.W. Kentridge for its most significant reservation about the *New York Times* standard, stated that it " 'gives wholly insufficient weight to an individual's right of reputation.' "[135] The *Holomisa* court continued, quoting Kentridge:

> "A person who goes into public life must expect robust and often unfair criticism. That is part of the price of going into public life. But it does not follow that it is necessary to deprive him or her of any right to reputation. There are surely some libels so gross and offensive that they should be publishable only on condition that they are proved to be true."[136]

In conclusion, the *Holomisa* court held that the express granting of free speech by the South African Constitution dictated that a plaintiff who seeks to restrict political speech should bear the burden of proving that the defendant has forfeited constitutional protection.[137] If a publisher acts "unreasonably" in publishing statements, the publisher would then forfeit constitutional protection.[138] This "reasonableness" standard would serve to protect reputation, while affording constitutional protection for free speech

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130. *Id.* at 613 (quoting ANTHONY LEWIS, MAKE NO LAW — The *Sullivan* CASE AND THE FIRST AMENDMENT 35 (1991). As justification for this rationale, the *Holomisa* court noted that by the time of the *New York Times* action, Southern officials had brought nearly US$300 million in libel actions against the press. *Id.*

131. *Holomisa*, 1996 (2) SALR at 614.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 615 (quoting S.W. Kentridge, Freedom of Speech: Is It the Primary Right?, Lecture at the Nineteenth F.A. Mann Lecture (Oct. 18, 1995)).

136. *Id.* (quoting Kentridge, *supra* note 135).

137. *Id.* at 617.

138. *Id.*

and expression.[139] Finally, summarizing the new defamation law in South Africa, the *Holomisa* court held that "a defamatory statement which relates to 'free and fair political activity is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made.' "[140]

V. THE EFFECT OF THE AUSTRALIAN AND SOUTH AFRICAN DECISIONS ON UNITED STATES DEFAMATION LAW

On their faces, the *Theophanous* and *Holomisa* decisions appear to make sense. They both address concerns that have been raised about the *New York Times* decision.[141] However, the Australian and South African decisions lose most of their persuasiveness under close scrutiny.

In *Theophanous*,[142] the High Court of Australia relied on several criticisms of the *New York Times*[143] decision as support for its rejection of that standard. The High Court stated that one reason for rejecting the standard was that the defamation defendant would suffer intrusive and expensive discovery procedures as a result of the plaintiff's burden to prove actual malice.[144] However, this criticism fails to consider the potential harm to defendants without such a standard. Arguably, if the burden is placed on defendants to prove the truth of their statements, plaintiffs will inevitably win more cases. This is because of the inherent difficulty in proving the truth of some statements. If plaintiffs win more cases, defendants necessarily will have to pay more damages, probably in excess of any discovery costs they might incur under the *New York Times* standard.

The High Court attempted to address this argument by suggesting a cap on damages in such cases,[145] but this argument is flawed as well. While

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139. *Id.*

> The reasonableness standard offers a powerful tool for resolving the difficulties inherent in protecting reputation while . . . giving recognition to the role the Constitution accords free speech . . . . Only due inquiry and the application of reasonable care will mark such conduct out for protection.

Id.

140. *Id.* at 618.

141. For an interesting critique of the *New York Times* decision, *see* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986). Epstein concludes that "on balance, the common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of individual reputation than does the New York Times rule that has replaced it. . . . [T]he sensible constitutional conclusion is to abandon the actual malice rule in New York Times." *Id.* at 817.

142. *Theophanous*, (1994) 182 C.L.R. at 104.

143. *New York Times I*, 376 U.S. at 254.

144. *Theophanous*, (1994) 182 C.L.R. at 135.

145. *Id.*

a cap on damages would certainly reduce the damages in an individual case, a lower burden for plaintiffs would increase the number of actions brought against defendants. An increase in the volume of actions would result in an increase in discovery and other litigation costs. Under a more plaintiff-friendly standard, these increased costs could well surpass any costs defendants might suffer under the *New York Times* standard. If so, the chilling effect on free speech would not be eradicated. In fact, publishers would be as hesitant, if not more hesitant, to publish controversial material.

Justice Brennan of the High Court also stated reasons for not adopting the *New York Times* standard in Australia.[146] Brennan pointed out that there is no express provision for freedom of speech in the Australian Constitution.[147] While this is true, a lack of constitutional protections has not prevented courts from creating or inferring such protections. One example is the implied right to privacy announced by the U.S. Supreme Court. Framers of constitutions should not be held to have provided for every possible conflict or contingency that might arise in the future. As every lawyer knows, some events or circumstances are impossible to foresee. Furthermore, over a period of nearly one hundred years, attitudes, mores, and social values change. A document expressing the views of its framers should not be held to accurately reflect the views of individuals to whom it applies nearly one hundred years later. Even if one were to concede that the Australian Constitution contains no freedom of speech provision, this should not have any bearing on U.S. defamation law because of the First Amendment of the U.S. Constitution.[148]

Of the two decisions rejecting the *New York Times* standard, *Holomisa* is more likely to have an influence on U.S. defamation law. There are two reasons for this. First, *Holomisa* was decided more recently than *Theophanous*.[149] Second, the political and social circumstances immediately preceding the decisions in both *New York Times* and *Holomisa* were arguably similar. In the early 1960s in the southern United States, there was great racial tension. Many states in the South were attempting to prevent or stall desegregation attempts. Similarly, in South Africa in the early 1990s, there also was great racial tension. Apartheid was not long in the past, a new Constitution had been adopted, and many people resented the equality now given to Blacks. These similarities would appear to support an adoption of the *New York Times* standard.

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146. *Id.* at 159-60.

147. *Id.*

148. *See* U.S. CONST. AMEND. I. The First Amendment states, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

149. *Holomisa* was decided in February 1996, and *Theophanous* was decided in October 1994.

However, the *Holomisa* court enunciated several reasons for their rejection of *New York Times* standard.[150] These reasons, like those cited in *Theophanous*, do not survive close scrutiny. The *Holomisa* court stated that one reason for rejecting *New York Times* was the smaller defamation awards typically awarded by South African courts.[151] Because of these smaller awards, the South African government would be less likely to use a defamation action to stifle the press.[152] This justification fails to take into account the many other costs associated with litigation. Even though the awards in South African defamation actions are smaller, defendants still would incur discovery costs, lawyer fees, and loss of work time in preparing for the case. Furthermore, in most cases, there will be the cost associated with the damage to the reputation of the defendant as a result of having been charged with the publication of false material. Because of these other costs associated with a defamation action, South African officials still could use such actions as a very effective weapon against contrary views.

Another reason given by the *Holomisa* court for refusing to grant protection to speech concerning public officials was that South African public officials enjoy no corresponding protection themselves.[153] Although true, this is not an acceptable justification for the rejection of the *New York Times* standard. Public officials are in a position to exert power and influence over those they govern. One inherent danger of this power is the abuse and oppression of the governed. A protection such as that granted in *New York Times* serves as a check, which can be used by the governed against potential abuse. Public officials do not need a rule to protect against potential abuses because the governed are not in a position to exert power or influence over them. Thus, this is not a valid justification for rejection of the *New York Times* standard.

The final reason enunciated by the *Holomisa* court for rejecting *New York Times* was that " 'some libels [are surely] so gross and offensive that they should be publishable only on condition that they are proved to be true.' "[154] Arguably, the *New York Times* standard still would offer protection against such publications. If the libels are indeed gross, offensive, and untrue, plaintiffs under *New York Times* still have a good chance of winning their cases. The more gross or offensive the published statements, the easier it is for plaintiffs to argue that the defendant knew or should have known of their falsity. If, however, the gross and offensive statements are true, the public has a right to be informed. Simply to say that because

150. *See supra* text accompanying notes 127-33.
151. *Holomisa*, 1996 (2) SALR at 614.
152. *Id.*
153. *Id.*
154. *Id.* at 615 (quoting Kentridge, *supra* note 135).

statements are gross or offensive they should be proven true before being published is not a valid reason to reject the *New York Times* standard.

The reasons for the rejection of the *New York Times* standard that were enunciated in the *Holomisa* court do not withstand scrutiny. Granted, the political systems and histories of the United States and South Africa do contain some common elements; therefore, the *Holomisa* decision should be considered closely in light of current defamation law in the United States. However, because the *Holomisa* decision is based on inaccurate assumptions and faulty reasoning, it should have no bearing on defamation law in the United States.

Notwithstanding *Theophanous* and *Holomisa*, the recent emergence of the internet may provide support for critics of the *New York Times* standard. Because of the proliferation of web sites throughout the world, vast amounts of information may be disseminated to millions of sites within a matter of seconds. Proponents of a more plaintiff-friendly rule might argue that today a plaintiff can be defamed on a greater scale than in 1964 when *New York Times* was decided. Furthermore, due to the potential for greater harm, plaintiffs today should have a lower burden of proof in defamation actions.

This argument, however, proves too much. Arguably, as more people are exposed to this type of damaging information, they will become more accustomed to it. After continued exposure, an audience tends to become desensitized to the information. As more and more claims are proven to be untrue, the audience becomes skeptical of the information, and thus, the damage to plaintiffs is decreased or becomes nonexistent. Additionally, new electronic mediums, such as the internet, are relatively inexpensive and available to anyone, thus allowing plaintiffs to respond immediately, worldwide to defamatory remarks.

VI. CONCLUSION

The two recent decisions out of Australia and South Africa that rejected the actual malice standard set forth in *New York Times* should be examined closely. Because *New York Times* has been widely criticized and is more than thirty years old, it should be examined as well to insure that it is still appropriate today. Upon examination of all three decisions, I conclude that *New York Times* was a valid decision, that it is an appropriate standard today, and that the decisions out of Australia and South Africa leave publishers subject to many of the evils that the actual malice standard of *New York Times* was designed to protect against.

As has been discussed in this note, the *Theophanous* standard does not provide adequate protections to publishers. By requiring the publisher to prove that it acted reasonably, that is, it took some measures to check the accuracy of the impugned material or was justified in publishing the material

without taking such steps, the *Theophanous* standard allows the opportunity for abuse of defamation actions by public officials. Juries are free to assess huge damage awards against the press, publishers are subject to intrusive and expensive discovery costs, and political discussion necessarily can be curtailed. Because of the unique history of the United States, including past abuses of the system in an attempt to curtail the free speech of the press, it is doubtful that the *Theophanous* court's rejection of the actual malice standard of *New York Times* will have any impact on U.S. defamation law.

The decision of the *Holomisa* court deserves more attention because of the similarity between South Africa's racial unrest and that of pre-*New York Times* United States. One could postulate that in light of the history of South Africa, the *Holomisa* court should be concerned with the possibility of abuse that a more plaintiff-friendly standard than the actual malice standard would create. Instead, *Holomisa* merely requires a plaintiff to show that the defamatory statements were "unreasonably" published. While this standard makes it slightly harder for a plaintiff to prevail in a defamation action than does the *Theophanous* standard, it still does not go far enough. Under *Holomisa*, juries are still able to easily decide that a defamation has occurred and award large damages. Furthermore, publishers still are subject to extensive discovery procedures. Given the history of oppression and discrimination in South Africa, one would think the *Holomisa* court would embrace *New York Times*. But for wholly inadequate reasons, the actual malice standard was rejected. Because of the unsoundness of the *Holomisa* decision, it will have a negligible impact on U.S. defamation law and most likely will be viewed as an aberration.

The actual malice standard set forth in *New York Times* was a sound decision. It was good law then and remains the standard today, more than thirty years later. The decision will continue to stand for many more years into the future, *Theophanous* and *Holomisa* notwithstanding.