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FREE SPEECH AND DEFAMATION OF PUBLIC PERSONS: THE EXPANDING DOCTRINE OF *NEW YORK TIMES CO. v. SULLIVAN*

When the Supreme Court held in *New York Times Co. v. Sullivan*[1] that there is a conditional privilege attached even to false statements about a public official, most authorities recognized that the case represented both an important imposition of constitutional standards upon the law of defamation and a significaut statement of the Court's interpretation of the first amendment.[2] Some even predicted that the case signalled a whole new approach to the free-speech clause.[3] Certainly the doctrine would be applied to many more classes of persons than elected police commissioners. Yet, the Court specifically refused to delineate its proper use,[4] and commentators immediately speculated that *New York Times* would serve as relevant precedent in cases involving appointed officials, candidates for office, and even private citizens.[5]

Although *New York Times* was decided less than three years ago, it is already clear that the predictions were correct. Many courts have found the logic, if not the facts, of the case to compel application of the doctrine to words spoken about various persons before the public eye.[6] One recent case in point is that of *Pauling v. Globe-Democrat Publishing Co.*,[7] which held that Dr. Linus Pauling, a Nobel Prize winning scientist and leader of the movement to ban nuclear testing, came within the ambit of the "public official" doctrine. Thus, certain statements made about him in an editorial published by the defendant were held to be conditionally privileged even if false. Further, even though the evidence of actual malice was clearly weightier than that in *New York Times*, the court held that the proof presented was insufficient at law to show abuse of the privilege. This case seems to serve well as a bellwether of legal developments in the wake of the *Times* case. Yet, even though the expansion of the doctrine was foreseen, there is still considerable confusion as to its proper rationale. As a consequence, there are few recognized principles by which the doctrine may be circumscribed. In the hope of clearing these muddy waters, the following discussion will propose that appropriate legal principles can be formulated once the issues in the *Times* case are fully understood.

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1 376 U.S. 254 (1964).

2 See, e.g., Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'" 1964 Sup. Ct. Rev. 191; Pedrick, "Freedom of the Press and the Law of Libel: The Modern Revised Translation," 49 Cornell L.Q. 581 (1964); Pierce, "The Anatomy of an Historic Decision: New York Times Co. v. Sullivan," 43 N.C.L. Rev. 315 (1965).

3 See, e.g., Kalven, supra note 2, at 204-05; Pedrick, supra note 2, at 587.

4 New York Times Co. v. Sullivan, 376 U.S. 254, 283 n.23 (1964).

5 See, e.g., Notes, 44 B.U.L. Rev. 563 (1964), 48 Marq. L. Rev. 128 (1964), 26 Mont. L. Rev. 110 (1964), 38 So. Cal. L. Rev. 349 (1965), 113 U. Pa. L. Rev. 284 (1964).

6 E.g., Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964), cert. denied, 379 U.S. 968 (1965); Walker v. Associated Press, 417 P.2d 486 (Colo. 1966); Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (2d Dep't 1964), aff'd, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965). In Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231, 234 (W.D. Ky. 1965), Judge Gordon said:

> I adopt this position with full understanding of the fact that by such extention of the scope of word meaning I am perhaps "plowing new ground" in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the Times Opinion . . . .

7 362 F.2d 188 (8th Cir.), cert. filed, 35 U.S.L. Week 3143 (U.S. Oct. 18, 1966).

The New York Times Decision: Issues and Principles

The rule of the *Times* decision was not new to American courts. Indeed, a "minority" of state courts had been applying a comparable rule for many years.[8] These courts had derived the rule by expanding a well established privilege previously granted to private communications within a specific, common-interest group.[9] Thus one early New Hampshire case held:

> If information given in good faith to a private individual of the misconduct of his servant is "privileged," equally so must be a communication to the voters of a nation concerning the misconduct of those whom they are taxed to support and whose continuance in any service virtually depends on the national voice. To be effectual, the latter communication must be made in such form as to reach the public.[10]

The "majority" courts, which did not adopt a privilege for misstatements of fact about a public official, rejected the extension of this common-interest privilege with two arguments: (1) such a rule would encourage the development of licentious public debate, and (2) public officials should not be open to indiscriminiate attack, for, if they were, good men would be discouraged from seeking public office.[11]

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[8] Snively v. Record Pub. Co., 185 Cal. 565, 198 Pac. 1 (1921); Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908); Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N.W. 974 (1925); Palmer v. City of Concord, 48 N.H. 211 (1868). See generally Annots., 110 A.L.R. 412 (1937), 150 A.L.R. 358 (1944).

[9] A familiar statement of this common-interest privilege is found in Williams v. Standard-Examiner Pub. Co., 83 Utah 31, 60, 27 P.2d 1, 14 (1933):

> A qualifiedly privileged communication "extends to all communications made bona fide upon any subject-matter in which a party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character, of imperfect obligation."

See cases cited in note 8, supra, for the various minority court handlings of the privilege.

That the privilege was generally applied to private communications and not to outright public pronouncements is indicated by all of the examples given in Cooley, Torts 214-17 (1st ed. 1879) and Townshend, Slander and Libel §§ 241-46 (3d ed. 1877). Cooley and Townshend were often cited as substantiating the minority view. However, Cooley's discussion is under the head of "Liberty of the Press," and generally his propositions are much broader than his precedents would warrant, except for those from the minority courts. Cooley, supra at 217-20. See also Townshend, supra § 247.

[10] Palmer v. City of Concord, 48 N.H. 211, 216 (1868). The common-interest privilege may be distinguished from a privilege to speak purely in one's own interest or entirely in another's interest. See Prosser, Torts § 110, at 805-11 (3d ed. 1964). Technically, the quotation from Palmer v. City of Concord, supra, refers to the privilege to speak in another's interest. However, the distinctions among the three privileges are merely a matter of degree depending upon whether the speaker's or the other's interest is greater in any given situation. Hence, for the present purposes the three will be considered under the label of the common-interest privilege.

[11] See Sweeney v. Baker, 13 W. Va. 158, 184-90 (1878); Morris, Torts 306 (1953). In King v. Root, 4 Wend. 113, 138 (N.Y. Ct. Err. 1829) it was said:

> It is however insisted that this libel was a privileged communication. If so, . . . the party libeled had no right to recover unless he established malice in fact . . . . The effect of such a doctrine would be deplorable. Instead of protecting it would destroy the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office, without being answerable for the truth of such publications. No honest man could afford to be an editor, and no man, who had any character to lose, would be a candidate for office under such a construction of the law of libel. The only safe rule to adopt in such cases is, to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish.

When the arguments of the "majority" and "minority" courts are compared, it becomes evident that they operate on two different levels. The minority argument has the force of logical extension of a rule of law. On the other hand, the majority undercuts this argument, not by denying its logic, but by predicting dire results if it is adopted. When the Supreme Court adopted the "minority" rule under constitutional standards, it did not even broach the classical "majority" arguments. It did undercut them, however, by discussing the undesirable consequences of a system of judicial control over speech.[12] The issues surrounding the rule of *New York Times*, then, center upon three areas: (1) its theoretical justifications, (2) the results of judicial regulation of speech, and (3) the ability of the public forum to cope with freedom of speech.

Theoretical Justifications. The idea of the common-interest privilege helps to explain and fill out the system in which the free-speech guarantee operates. It may be true that in certain realms the exercise of first amendment rights conflicts with other valuable interests.[13] Nevertheless, with regard to the law of defamation and public issues, the following will suggest that the problem is not one of "balancing" conflicting interests, but of understanding complementary ones.

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . . . "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[14]

> For speech concerning public affairs is more than self-expression; it is the essence of self-government.[15]

These quotations indicate that there is, in some sense, an essential relation between free speech on public issues and the rest of our political system. The three institutionalized branches of government—legislative, executive, and judicial—are decision-making organs, and the guarantees and powers whereby they can discover the facts or seek out the truth are fundamental to their proper functioning.[16] With universal suffrage, however, the public becomes a fourth decision-making branch of government. The various statements of the Supreme Court, as suggested above, indicate that the free-speech guarantee

[12] New York Times Co. v. Sullivan, 376 U.S. 254, 277-79 (1964).

[13] See, Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1 (1965), especially at 8-11, discussing how the "clear and present danger" and "balancing" tests have been applied rather consistently to particular types of problems.

[14] New York Times Co. v. Sullivan, supra note 12, at 269, citing Roth v. United States, 354 U.S. 476, 484 (1957) and Stromberg v. California, 283 U.S. 359, 369 (1931).

[15] Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[16] Two examples are the subpoena and contempt powers of the legislative and judicial branches. Although it is doubtful whether the executive has contempt powers, nevertheless the power of the executive to seek out the facts is at least implicit in all executive powers to enforce law. Indeed, the framers of the Constitution presumed the existence of such power to such an extent that they felt obliged merely to put certain limitations on it, e.g., the fourth amendment's proscription of illegal searches and seizures.

is a grant of a fact-finding power to the public. As Alexander Meiklejohn has said:

> When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves.[17]

Reputation itself is nothing more than the state of public opinion about a given person. When a court entertains a defamation suit, it is undertaking to determine what opinion of the plaintiff the public should hold.[18] The bringing of a defamation suit is merely a shifting of the fact-finding process from one governmental body to another, *i.e.*, from the public forum to the courts. Yet, the public forum is the more natural one for the decision. When the particular reputation in question is closely intermingled with issues about which the public may make a governmental decision, a defamation suit amounts to an infringement upon the guaranteed fact-finding powers of the public. The common interest of a speaker-accuser and his listeners is that they are all members of a governmental body.[19] If the free-speech clause protects a defamatory statement, it is because that statement was a part of the decision-making processes of that body.

In *Rosenblatt v. Baer*,[20] Justice Brennan summarized the *Times* decision in the following manner:

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[17] Meiklejohn, Free Speech and Its Relation to Self-Government 88-89 (1948). The perspective of this note is generally in harmony with, and to a great extent derived from, Professor Meiklejohn's ideas.

[18] There are two primary objectives of a defamation suit: (1) to get the facts straight, and (2) to recompense plaintiff for any injury he has suffered. This note examines both the theoretical and practical problems inherent in a court's acting as a fact-finding body with regard to the defaming of public officials. In regard to the second objective, if monetary compensation is necessary, only the courts can provide it. However, if the public forum is as likely to discover the truth as the courts are, then it arguably also provides a more appropriate remedy. If a candidate or official is unjustly accused and he is able to set the record straight, then he will probably gain more public support. Further, the public forum allows an accused to set the record straight in a few hours or days rather than in a couple of years as with the courts. This suggests, too, that the presumption of damages in a defamation suit is often unwarranted.

One can say that a third objective of the law of defamation is the threat of punishment, so that speech will be kept in proper bounds. This is improper with regard to political discussion, because of the infringement which results from implementation of such a policy. Further, all of this must be set in the general context of the freewheeling nature of American politics. Noting that Americans are generally cynical about what they hear about public persons, it is unlikely that any given accusation will have any immediate effect. See Noel, "Defamation of Public Officers and Candidates," 49 Colum. L. Rev. 875 (1949); Pedrick, "Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches," 48 Nw. U.L. Rev. 135 (1953).

[19] "[The public official's absolute provilege to speak lends support for] the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer." New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964). Recognition of a duty in the citizen to criticize makes application of the common-interest privilege doctrinally more sound.

[20] 383 U.S. 75 (1966).

> Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation.[21]

This language suggests a "balancing" approach to such questions, an approach which has come under some criticism.[22] Interestingly, the *New York Times* decision itself conspicuously omitted discussions of this nature,[23] and at least two members of the Court would omit them altogether on first-amendment issues.[24] It is submitted that, regardless of the legitimacy of the balancing approach to other constitutional questions, to view the issues here as a contention of interests would be a misapprehension. There is no "interest in preventing and redressing attacks upon reputation" as such. The interest lies in the discovery and preservation of truth about persons and this is the same interest as that embodied in the first amendment.[25]

The Results of Judicial Regulation. There is considerable evidence that the judicial "cure" for licentious speech creates as many problems as it solves. *First,* the suit in defamation has been criticized as being awkward, inefficient, and unjust in achieving its stated goals.[26] Professor Kalven has suggested that *New York Times* is at least partly an expression of judicial distrust of the fact-finding processes of the courts.[27] *Second,* it is often clear that the plaintiff is not interested in the stated purpose of a libel suit but is using the suit as a weapon in a battle which is taking place outside the courts. By allowing such suits to be maintained, courts and juries sometimes become adjudicators of

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[21] Id. at 86.

[22] See Meiklejohn, supra note 17, at 65-69; Brant, "Seditious Libel: Myth and Reality," 39 N.Y.U.L. Rev. 1, 17-19 (1964).

[23] See Kalven, supra note 2, at 214-17.

[24] See the concurring opinion of Justice Douglas, with whom Justice Black joined, in Garrison v. Louisiana, 379 U.S. 64, 81-82 (1964).

[25] This is not to say that the Supreme Court should not or is not "balancing" in the sense of weighing the various arguments pro and con on a given issue. What is not present here is a conflict of two theoretically recognized interests. The problem is to determine to what extent the theory of freedom of speech can be turned into rules of law without becoming self-defeating in establishing rational self-government.

[26] See Donnelly, "The Right of Reply: An Alternative to An Action for Libel," 34 Va. L. Rev. 867, especially at 868-74 (1948); Noel, supra note 18. Speaking from the potential plaintiff's point of view, Professor Pedrick has said:

> To the unsettled legal questions encumbering such an action can be added other factors of equal or greater potency. Such a suit or suits would not come to trial for from one to three years in most jurisdictions . . . . With time the libel might fade (with benefit to the persons libeled) but with a law suit pending the charges are kept alive. In such a suit the defendant will make every effort to blacken the plaintiffs' reputations on the defense of truth and in connection with the issue of damages. The plaintiff is therefore apt to find himself spending more time defending against fresh charges absolutely privileged in connection with the suit, than in demolishing the old. This is a costly and losing game. The atmosphere of partisan politics will almost surely settle over the trial for political defamation. The trial of the law suit may thus simply provide the defendant with a new and more effective forum. . . . [The jury's] verdict may very well reflect a prejudice that political contests ought not to be fought in court, that persons with thin skins should not project themselves into political controversies. . . . . A law suit for a money award is simply not a very satisfactory answer to the problem of assaults on reputations.

Pedrick, supra note 18, at 177-78.

[27] Kalven, supra note 2, at 210-13.

matters not properly before them.[28] *Third*, with the many intricate doctrines of defamation law, a judge cannot help but have his own political and social views influence his decisions.[29] The various distinctions which arise under such doctrines as fair comment, libel per se, and slander per se all permit, even require, a judge to use his personal views as a basis of regulation.[30] *Fourth*, and by way of summation, these difficulties intrinsic to the defamation suit may cause an unwanted infringement upon public debate. Rather than risk ending up in court, persons are apt to remain silent even when they have something worthwhile to contribute to public debate. With the potential of the defamation law to be subject to judicial prejudices, the system tends to protect false reputations and particular interests in spite of its stated goals.[31]

Free Speech in the Public Forum. The old "majority" argument was premised upon the belief that the public forum would become a wild arena of licentious speech if speakers were not held responsible for the truth of their statements. Good men would be unwilling to participate in public affairs.[32] Yet, there appears to be no evidence that the tenor of public debate or the quality of public

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[28] The Times case is an example of this. It appeared that the real purpose of the suit was to strike a blow for the South against a northern newspaper which had aided the civil rights cause. See Kalven, supra note 2, at 197-200 and his description of this case as an inverse of the "wrong thinking minority" problem. Compare the majority and minority opinions in the 5-4 decision in Linn v. Plant Guard Workers, 383 U.S. 53, 67, 69 (1966) which held that the National Labor Relations Act did not completely preempt the states from entertaining libel suits arising out of labor disputes.

[29] In some cases the judge is required to use his understanding of the political atmosphere in order to make technical decisions. In Lightfoot v. Jennings, 363 Mo. 878, 882, 254 S.W.2d 596, 599 (1953) the following principle is presented:

> As a general rule the imputation of political principles or practices objectionable to the average person in the community has been recognized as defamatory and actionable per se. Annots., 51 A.L.R. 1071 (1927), 171 A.L.R. 709 (1947). "Whether language has that tendency (that is, whether it is defamatory and actionable without proof of special damages) depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place."

Citing Mencher v. Chesley, 297 N.Y. 94, 100, 75 N.E.2d 257, 259 (1947).

[30] As an example, a majority of courts have held that it is defamatory to call someone a communist. However, in Keefe v. O'Brien, 203 Misc. 113, 114, 116 N.Y.S.2d 286, 288 (Sup. Ct. Kings County 1952) this interesting argument is presented:

> To hold that calling one a communist is slander would unwittingly entrap the unwary, for nothing would please communists better than to enable them to institute suits for damages promiscuously, regardless of the ultimate outcome. It has been amply demonstrated that it is part of communist doctrine and strategy to make the courtroom its forum for propaganda purposes. . . .
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> . . . [T]he court will take judicial notice of the cold war now existing between our form of government and communism. Our safety is therefore best served by an exposure of communists and communism. It is far better, therefore, to allow free play of our emotions in dealing with persons whom we believe to be communists rather than seal the lips of people who might be frightened into silence and suppression lest use of the word "communist" should per se force upon them costly litigation.

"It is apparent that the courts have introduced into the factual question of what is defamatory both their notions as to what ought to be defamatory and their judgments as to what ought to be done in the entire situation before them." Riesman, "Democracy and Defamation: Fair Game and Fair Comment II," 42 Colum. L. Rev. 1282, 1300 (1942). See generally Hallen, "Fair Comment," 8 Texas L. Rev. 41 (1929); Pedrick, supra note 18; Titus, "Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment," 15 Vand. L. Rev. 1203 (1962).

[31] See New York Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964); Kalven, supra note 2, at 210-13.

[32] See note 11 supra.

officials differed between the majority and minority jurisdictions.[33] By insisting that defamed persons seek their redress in the public forum unless they can show actual malice, the *Times* decision implicitly assumes that the communications media today are sufficiently stable and fair in allowing all sides to have their say.[34] If one can assume that, when someone accuses another, the newsmen, microphones, and cameras will immediately seek out that other's response, then one can conclude that the public forum is basically a fair tribunal.[35] This image comports well with the constitutional doctrine outlined above that the public is a decision-making organ of government with its own fact-finding processes. Whether or not such an image is realistic, of course, is probably more a matter of faith than of fact. Nevertheless, some recent studies of public-opinion formation do indicate that the public forum is stable.[36]

"Public Decisionability": The Test for Delimiting Constitutional Protection

In essence, a plaintiff in a defamation suit alleges that the processes of the public forum have been subverted, and that in order for justice to be done the courts must step in and take action. The above analysis suggests, however, that the pre-*New York Times* law allowed suits to be brought which amounted to unjustifiable infringements upon the public decision-making processes. In theory, all information relevant to matters about which the public may make a governmental decision is protected by the first amendment. Hence, the test of whether certain accusing words are protected by the rule in the *Times* decision is one of the relevance of the matters contained therein to *some vote by the public, i.e.*, their *"public decisionability."* In other words, the context of a defamatory statement or the statement itself either explicitly or implicitly must indicate that the defamation bears some proximate relation to theoretically conceivable governmental action which may be induced or accomplished by a decision at the polls.[37]

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33 See Coleman v. MacLennan, 78 Kan. 711, 733-34, 98 Pac. 281, 289 (1908).

34 See New York Times Co. v. Sullivan, 376 U.S. 254, 304-05 (1964) (Goldberg, J., concurring).

35 One possible weakness in the public forum is that the accusation may be made just before an election, when the accused would not have time to reply before the people vote. Mills v. Alabama, 384 U.S. 214 (1966) struck down, as an abridgement of free speech, an Alabama statute prohibiting certain types of electioneering on election day. The Alabama Supreme Court bad approved the statute as preventive of last minute attacks, but Justice Black, speaking for the majority, noted that this merely allowed any attacks made the day before election to go unchallenged. Whether a statutory solution to this problem may yet be devised or whether it is still an area appropriate to the law of defamation is an open question.

36 See Key, Public Opinion and American Democracy (1961), especially at 391-95, indicating that the press has adopted the role of a "common carrier," presenting all shades of opinion and few of its own viewpoints. For an analysis of various factors which tend to diminish the impact of any given message carried in the media, see Berelson, Lazarsfeld & McPhee, Voting: A Study of Opinion Formation in a Presidential Campaign (1954).

37 A simple defamatory statement about a well-known public official or candidate probably merits protection by itself, since implicit in the statement is a suggestion that the people should "throw the bum out." See notes 46-47 infra and accompanying text for qualifications.

A defamatory statement about the president of a private university, made in the context of encouraging public takeover of all college education and used as an example of the abuses of the present system, would probably merit the protection of the Times rule because it would be relevant to the governmental action contemplated in the statement as a whole. Cf. note 41 infra.

On the other hand, a simple defamatory statement about the president of a private university on a nonpublic issue would not merit protection, because the context would neither

In the *Times* decision the Court stated that the privilege attached to statements about the "official conduct" of a "public official."[38] Hence, there are two perspectives from which defamatory words are analyzed when determining whether they qualify for the privilege: (1) whether they are about a "public official," and (2) whether they are about his "official conduct." From both perspectives, however, the test is one of public decisionability.

The Public Figure Concept. Recognizing that the term "public official" overly restricts the operation of the free-speech guarantee,[39] one must ask whether the public opinion of a given person will influence or relate to an issue about which the public may eventually get to vote. This is obvious with regard to elected and most appointed officials as well as candidates for office. The question becomes difficult with regard to private persons. Of course, the nonofficial must be a public person in that he must be well known. But that would not be enough because it would include those who make their living from their public personalities as well as merely newsworthy persons.[40] The connection must be established between the person and a governmental issue.[41] This con-

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explicitly nor implicitly relate the defamation to potential governmental action. Nor would a series of defamatory statements about various presidents of private universities merit protection, unless perhaps the issue of public control over college education had been a subject of recent public debate. In the latter case the general understanding of the issue as one of conceivable governmental action, as in the public official case, would be a part of the context and hence the public decisionability of the statement would be implicit in it.

[38] New York Times Co. v. Sullivan, supra note 34, at 279.

[39] See the materials cited in notes 2 and 5 supra.

[40] One of the problems with the Times rule is that it might be interpreted as interfering with the right of privacy. Cf. Franklin, "A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact," 16 Stan. L. Rev. 107, 141-43 (1963).

A clear distinction should be made between a public issue (i.e., something that is publicly decisionable) and something merely of interest to the public. Often a person becomes newsworthy, e.g., by committing a crime or having an odd incident befall him, under circumstances which would not call for the application of the Times rule to statements about him. "It is very well settled that the constitutional guarantee of freedom of speech and of the press does not confer upon a newspaper, or anyone else, the privilege of publishing defamation merely because it has 'news' value, and the public would like to read it." Prosser, supra note 10, at 812. [Footnote omitted.] But cf. Time, Inc. v. Hill, 87 Sup. Ct. 534 (1967) (no defamatory statements and no compensable invasion of privacy, though defendant's statements were false).

Generally, it has been held that the privilege of fair comment applies to statements made about "anyone who submits something to the public for its approval, as in the case of books, articles, . . . exhibitions of art, music, [and] acting . . . [because he] is regarded as having sought public judgment, and [is] in no position to complain if that judgment, opinion, comment or criticism is adverse." Prosser, supra note 10, at 813-14. [Footnotes omitted.] The seeking of public judgment on one's work, however, would not justify misstatements of fact about matters other than those actually submitted to the public. But see Comment, "The Scope of First Amendment Protection for Good-Faith Defamatory Error," 75 Yale L.J. 642, 651 (1966); Comment, "Defamation of the Public Official," 61 Nw. U.L. Rev. 614, 626-32 (1966). The argument contra is usually based upon the proposition that the first amendment free-speech protections have not been limited to political matters. The distinction between first amendment "absolute" political freedom and fifth amendment liberty, however, allows for more consistent theory. See Meiklejohn, supra note 17, at 37-41. Even when the Supreme Court has brought nonpolitical speech under the mantle of the first amendment, it has been willing to use tests which employ prevailing mores, e.g., the "redeeming social value" test used in obscenity cases. On the other hand, when political speech is at issue, the Court generally "balances" this against direct governmental interests in maintaining order. See Brennan, supra note 13, at 5-11.

[41] Butts v. Curtis Pub. Co., 242 F. Supp. 390 (N.D. Ga. 1964), aff'd, 351 F.2d 702 (5th Cir. 1965), cert. granted, 87 Sup. Ct. 30 (1966), held that the director of athletics and head football coach at a state university was not a public official within the Times rule. On appeal it was held that defendant had not preserved the point. A vigorous dissent, however, argued

nection had been made in the case of Linus Pauling because he had sought and achieved considerable notoriety for his stand on issues regarding the use of nuclear weapons.[42] In holding that he was within the ambit of the "public official" doctrine, the Eighth Circuit, following a few other courts, adopted the test suggested in a footnote to the *Baer* decision—that the plaintiff "has thrust himself into the vortex of the discussion of a question of pressing public concern."[43]

This test, however, leaves one group of "public figures" in an anomalous position. Should one consider as within the rule of the *Times* case those persons whose reputations really are closely related to public issues, but who have not "thrust" themselves into public debate? The president of a large steel corporation, particularly at a time when a price increase has been announced, would seem to be such a person. Certainly, important governmental decisions, which ultimately may come up for a vote, may depend upon the way such a person conducts himself and upon the nature of the interests he attempts to serve. Many such private persons are recognized as having certain public responsibilities, and, in our large corporate society, governmental control or regulation of the acts of such persons and their organizations is not a remote or inconceivable possibility. Hence, the reputation of such a person probably is of a publicly decisionable nature. Nevertheless, each given case of a "non-thruster" would involve considerable weighing of the particular facts to determine whether there is a sufficient relation between the person and a governmental issue. The question of "public figure" *vel non* would devolve upon such issues as (1) whether the verbal context of the defamatory statement was one which advocated possible governmental action, (2) whether general public debate at that time was centered upon possible governmental action related to this person, thus allowing ready implication of the relevance of the defamatory statement to the contemplated governmental action, and (3) whether the defamatory "information" conveyed about this person would be relevant to the ultimate decision.[44]

Lastly, the question of public decisionability must rest upon the potential of

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not only that the point had been preserved but also that plaintiff should come within the rule because he was a government employee entrusted with the education of youth, which is of public concern. Curtis Pub. Co. v. Butts, 351 F.2d at 722. The matter in controversy did involve plaintiff's official conduct as defined by his job, and his dismissal was the act of a higher state official. Nevertheless, the case indicates how difficult the question of public decisionability can become. Other than the fact that the school is state sponsored, there would appear to be no reason to consider the "public concern" here as being any greater than with a director of athletics in a private university. If the context of the defamatory statement had indicated that the public institution was poorly administered by the higher state officials or that they were protecting and maintaining unscrupulous men in state jobs, then the potential of the issue to come to a vote would have been manifest. On the other hand, if the accusation were likely to be merely an incident in itself, and its hearers were not likely to view it as related to any governmental action, then the matter would not be publicly decisionable. See note 40 supra on the argument that anyone of interest to the public should come under the Times rule.

42 Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188, 195-97 (8th Cir.), cert. filed, 35 U.S.L. Week 3143 (U.S. Oct. 18, 1966).

43 Rosenblatt v. Baer, 383 U.S. 75, 86 n.12 (1966). See Pauling v. Globe-Democrat Pub. Co., supra note 42, at 195-96; Walker v. Courier Journal & Louisville Times Co., 246 F. Supp. 231, 233-34 (W.D. Ky. 1965); Walker v. Associated Press, 417 P.2d 486, 490 (Colo. 1966); Pauling v. National Review, Inc., 49 Misc. 2d 975, 977-81, 269 N.Y.S.2d 11, 14-18 (Sup. Ct. New York County 1966).

44 See notes 46-47 infra and accompanying text.

the issue to come up for a vote in the *future*. Thus, statements about a person who once was an official or was otherwise related to public affairs would not be privileged unless this historical relation cast some insight upon present issues.[45]

The Official Conduct Concept. Asking whether a defamatory statement is about the official conduct of the accused person helps to distinguish between those matters about a given person which may be brought before the public and those which are rightfully private.[46] May one say that a certain public figure beats his wife? The issue here is what types of facts about a public person should be relevant to public decisions. This is not to ask what *are* the facts the public uses, since there are many ways of getting votes which are unrelated to issues, such as appeals to religious or ancestral similarities. Rather, the test must be whether the stated facts would influence a rational person as to the way he would vote in some future election.[47] This influence, of course, may be highly indirect or even speculative. Whether Dr. Pauling was cited for contempt of Congress might seem rather remote to a voter in St. Louis. Nevertheless, if it were presented in a context suggesting that all those who advocate the end of nuclear testing are contemptuous of the American system of government and have little interest in preserving it, the "fact" would not be irrelevant to a rational St. Louis voter, who might some day face a choice between candidates one of whom advocated abolition of nuclear testing.

On this question, however, a distinction between officials or candidates and mere public persons is required. Whether or not the chief of police beats his wife may give some indication as to what forms of enforcement he is inclined to use. But such a fact about Linus Pauling would probably be irrelevant to his advocacy of cessation of nuclear testing. General character may be highly relevant as a qualification for office, but it is generally irrelevant to questions concerning what programs the government should embark upon. So long as a person merely participates in discussion of public issues, matters relating to his character would seem to be relevant only to the extent that they cast fuller meaning upon his particular public stand.

On the other hand, a person who has not "thrust" himself into debate, but about whom public debate rightfully centers, would seem to be in a more precarious position because he has no control over whether his reputation, or any aspect of his life, is related to public issues. One can argue, however, that such a liability is intrinsic to the "public" nature of certain private, but influential,

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45 Rosenblatt v. Baer, supra note 43 suggests this problem. Plaintiff was a former official in charge of a publicly run ski resort. In commenting on how well the resort was presently running, the defendant had publicly asked, "What happened to all the money last year? and every other year?" The Court remanded for a determination of whether plaintiff was a public official. It has been suggested, however, that it would have been better to remand upon the question of whether there was a public issue. Comment, "The Scope of First Amendment Protection for Good-Faith Defamatory Error." 75 Yale L.J. 642, 647 (1966). See Ott v. Murphy, 160 Iowa 730, 141 N.W. 463 (1913) where a "minority" court was faced with this problem.

46 It is generally agreed that the literal meaning of "official conduct" is too narrow. See the materials cited in notes 2 and 5 supra. Garrison v. Louisiana, 379 U.S. 64, 76-77 (1964) held that the fact that a statement reflected also upon an official's private character is irrelevant.

47 Comment, "The Scope of First Amendment Protection for Good-Faith Defamatory Error," 75 Yale L.J. 642, 648 (1966) suggests that the test should be whether there is a "reasonable relationship between what is discussed and how the individual affects the public." This formulation may extend the protection too far. See note 40 supra.

positions and that, after all, the person did seek that position. Moreover, a person who "thrusts" himself into public debate may have to purchase an advertisement or otherwise exert himself in order to be heard by the public,[48] whereas a "non-thruster" will likely be sought out by the news media for the very reason that he is the center of public, governmental debate. Thus, a means of public reply is more readily at hand for the "non-thruster." Even in view of these mitigating factors, however, exactly what "facts" about a non-thruster are publicly descisionable is a question involving considerable weighing of the circumstances in each case. Interestingly, whereas the rule in *New York Times* is at least partly justified as preventing judicial determination of what the public should be free to discuss, the foregoing indicates that this object has not been wholly achieved.[49]

Actual Malice: The Limit of the Privilege

At least two members of the Supreme Court believe that the actual malice condition on the privilege will still permit overt judicial infringement upon the right of free speech.[50] As a practical matter, David Riesman indicated that, given identical cases, the old "majority" and "minority" courts probably would have reached the same results, the majority courts merely having to manipulate such doctrines as fair comment to a greater extent.[51] Further, the majority-minority distinction was blurred because there was considerable variance among the "minority" courts as to what would constitute abuse of the privilege.[52] Only

[48] Other ways of "thrusting" are suggested by the case of Linus Pauling. He had collected names for a petition which was sent to the United Nations and had also brought suits in the federal courts attempting to enjoin nuclear testing. Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188, 190 (8th Cir.), cert. filed, 35 U.S.L. Week 3143 (U.S. Oct. 18, 1966).

Associated Press v. Walker, 393 S.W.2d 671 (Texas Civ. App. 1965), cert. granted, 87 Sup. Ct. 40 (1966) presents difficulties with the idea of thrusting oneself into public debate. Plaintiff had voluntarily participated in the activities surrounding the enrollment of James Meredith in the University of Mississippi. If plaintiff had not been a famous person, his acts would have been merely newsworthy. He would not have been thrusting himself into the public debate so much as participating in the events about which public debate were centered. However, given his considerable reputation, his acts were calculated to convince others to support one side. Hence, at least to some extent, the substance of his acts was to thrust himself into the public debate as a debater. When the Supreme Court decides the case, it will have to determine: (1) whether this is sufficient to make plaintiff a "thruster," (2) whether, if not a "thruster," plaintiff was a person about whom public debate had centered to such an extent that defendant's statements implicitly came within a context of contemplated governmental action, or (3) whether, in the aggregate, the two factors are sufficient to warrant protection of the statement.

[49] The rule of the Times case has required the courts to stay away from the thick of political debate and to interfere, if at all, only on the fringe areas. Whereas, previously, every campaign or outright political discussion was potentially the subject of a lawsuit, now absent actual malice the courts will handle only those cases where public decisionability is a negligible factor.

[50] See the concurring opinion of Justice Black, joined by Justice Douglas, in New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964). Justice Goldberg also expressed some concern for the difficulties of the condition. Id. at 298 n.2 (concurring opinion).

[51] Reisman, "Democracy and Defamation: Fair Game and Fair Comment II," 42 Colum. L. Rev. 1282, 1288 n.28 and accompanying text (1942).

[52] Snively v. Record Pub. Co., 185 Cal. 565, 576, 198 Pac. 1, 5 (1921) (requiring "actual malice," but not as defined in the Times case); Bays v. Hunt, 60 Iowa 251, 255, 14 N.W. 785, 787 (1882) (requiring "honest belief" in order to bring a statement within the scope of the privilege); Coleman v. MacLennan, 78 Kan. 711, 743, 98 Pac. 281, 292 (1908) (requiring "good faith"); Palmer v. City of Concord, 48 N.H. 211, 217 (1868) (requring "justifiable motive"). This variation among the courts had an analogue in variations among cases within each jurisdiction concerning the proper formulation of the condition. Often the formulation

a few courts adopted a standard similar to actual malice as defined by the Supreme Court.[53] If the *Times* decision actually does bring about a distinct change in the law, much will depend upon the specific content given to the idea of actual malice.

In a recent case, Justice Brennan made the following comment about the condition:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Colum. L. Rev. 1085, 1088-1111 (1942) . . . . Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."[54]

The particular citation to the Riesman article in this context is a good indication of the Court's goal in imposing the actual malice condition. That article describes how the fascists used the "big lie" technique of propaganda to destroy their political opponents. The free-speech protection should not go so far as to allow such outright smear campaigns. Making plaintiff allege and prove such conduct on the part of defendant causes a distinct change in the nature of a defamation suit. Prior to *New York Times* plaintiff had merely to claim that defendant had injected false statements into public debate. Now, however, plaintiff must show that the defendant had the wrong state of mind when he participated. The court does not infringe upon the truth-seeking processes of the public forum unless plaintiff can show that the defendant was deliberately attempting to *inhibit* the discovery of truth. This, of course, is consistent with the basic justification of the privilege—that the public, as a governmental body, has a protected fact-finding function.

Several cases, including *New York Times* itself, have involved the question of whether the plaintiff proved actual malice.[55] Significantly, all have declared that it was not shown. The leading Supreme Court case on the question is

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used depended upon the facts of the case being adjudicated. Nevertheless, there was general confusion in the area concerning both the extent and the applicability of the privilege. Compare McIntosh v. Williams, 160 Ga. 461, 128 S.E. 672 (1925), with Kirkland v. Constitution Pub. Co., 38 Ga. App. 632, 144 S.E. 821 (1928), aff'd by a divided court, 169 Ga. 264, 149 S.E. 869 (1929). See generally Hallen, "Character of Belief Necessary for the Conditional Privilege in Defamation," 25 Ill. L. Rev. 865 (1931); Hallen, "Fair Comment," 8 Texas L. Rev. 41 (1929); Annots., 110 A.L.R. 412 (1937), 150 A.L.R. 358 (1944).

[53] See Coleman v. MacLennan, supra note 52, at 726-28, 98 Pac. at 286-87.

[54] Garrison v. Louisiana, 379 U.S. 64, 75 (1964), citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[55] New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188 (8th Cir.), cert. filed, 35 U.S.L. Week, 3143 (U.S. Oct. 18, 1966); Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. New York County 1966).

Henry v. Collins,[56] which declared that the combination of ill will and falsehood was not enough. Plaintiff must show an "intent to inflict harm through falsehood."[57] The distinction became a very fine one in the *Pauling* case. There the defendant admitted that "we felt he was about to be cited, he wasn't;"[58] whereas defendant's editorial stated, that Pauling "was cited for contempt of Congress."[59] The case held that defendant's admission together with proof of "defendant's publication in its newspaper of letters to the editor, a cartoon, and a series of adverse editorial comments on Dr. Pauling both before and after the editorial . . . and the fact the accused material was an editorial rather than a paid advertisement" were not sufficient to show actual malice.[60] This case, and others, indicate that the courts really are requiring a "convincing clarity" of proof of actual malice.[61] In view of the justifications for the privilege, this would appear to be proper, so that judicial infringement upon speech may occur only when the speaker is attempting to inhibit the fact-finding processes of the public forum.

The *New York Times* decision implied that the conditional privilege established was a necessary counterpart to the "absolute" privilege granted to statements made by public officials.[62] Justices Black and Douglas suggested that the conditional privilege is not a sufficient counterpart.[63] Others have argued that the existence of the absolute privilege for officials does not justify even the conditional one for non-officials.[64] Both positions, however, misconstrue the issues. In order to qualify for the absolute privilege, statements by an official must be within the outer scope of his official duties.[65] In the *Times* decision the Court spoke of the duty of the citizen to criticize.[66] The actual malice condition, then, can be viewed as the outer limit of the scope of this duty. When the public forum is viewed as a fourth branch of government, the two privileges become exactly comparable.

The actual malice condition, however, has been criticized as being too indefinite because it involves primarily the state of mind of the defendant.[67] Such a problem is not unusual to the law, but the accusation does raise the problem of what considerations might be relevant to a determination of actual malice.

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56 380 U.S. 356 (1965).

57 Id. at 357.

58 Pauling v. Globe-Democrat Pub. Co., supra note 55, at 198.

59 Id. at 200.

60 Id. at 198.

61 The "convincing clarity" test is given in the Times case itself. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

62 Id. at 282-83. The court in Fignole v. Curtis Pub. Co., 247 F. Supp. 595, 597-98 (S.D.N.Y. 1965) reasoned that the Times case was based solely on the need to give citizens a comparable privilege. See also Clark v. Pearson, 248 F. Supp. 188, 195 (D.D.C. 1965). This position has not been generally accepted. See the cases cited in note 43 supra.

63 "The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment." New York Times Co. v. Sullivan, supra note 61, at 293 (Black, J., concurring, joined by Douglas, J.). See also the concurring opinion of Justice Douglas, joined by Justice Black, in Garrison v. Louisiana 379 U.S. 64, 81-83 (1964).

64 Pedrick, "Freedom of the Press and the Law of Libel: The Modern Revised Translation," 49 Cornell L.Q. 581, 590-91 (1964).

65 Barr v. Matteo, 360 U.S. 564, 575 (1959).

66 See note 19 supra.

67 See New York Times Co. v. Sullivan 376 U.S. 254, 298 and n.2 (1964). (Goldberg, J., concurring). See also note 50 supra.

One relevant principle is that a statement should be taken for what it actually is. Thus, a fair report of what others said, a paid advertisement, or an editorial should be treated according to the extent to which the newspaper identifies itself as the source of the published matter. Newspapers often act as "common carriers" of statements,[68] and the Supreme Court has suggested that this role should be protected.[69] So long as the public media correctly identifies the source of a given statement, there would seem to be no reason to hold the newspaper liable for its defamatory nature unless the matter is obviously false on its face or unless the newspaper is its source.

CONCLUSION

The doctrine of *New York Times Co. v. Sullivan* is best viewed as a declaration that the free-speech clause of the first amendment guarantees a fact-finding power to the people. This power is necessary for the proper functioning of self-government. The conditional privilege attached even to misstatements of fact about the official conduct of public officials prevents the courts from infringing upon this power. The "official conduct" and "public official" labels, however, are too narrow. The categories they represent should be delimited by a principle which asks whether the public statements in question may be relevant to decisions yet to be made by the voting public. This principle, invoked by the test of "public decisionability," would make cases like *Pauling v. Globe-Democrat Pub. Co.* consistent with the *Times* case without altering that case's basic meaning. Lastly, the actual malice condition on the privilege is justified so long as it is interpreted to include only deliberate attempts to subvert the fact-finding processes of the public.

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[68] Pedrick, supra note 64, at 598-99. Most courts have long recognized that showing the publication was merely a republication of someone else's defamatory statement tends to show want of actual malice. See Annot., 74 A.L.R. 732, 738 (1931). Legislation has often been advocated for right-of-reply statutes, which would institutionalize this "common carrier" role. Donnelly, "The Right of Reply: An Alternative to an Action for Libel," 34 Va. L. Rev. 867 (1948). That the outcry for such statutes has dwindled somewhat in the past decade suggests that perhaps the various news media have developed such practices without legislation. See also Key, supra note 36, at 391-95.

In Farmers Educ. & Co-op. Union of America v. WDAY, Inc., 360 U.S. 525 (1959) the Supreme Court held that broadcasters were absolutely privileged from suit for statements made by candidates under the equal time provisions of the Federal Communications Act.

[69] Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.
New York Times Co. v. Sullivan, supra note 67, at 266.

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