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By William O. Bertelsman*

I. INTRODUCTION

Jim Garrison, the District Attorney of New Orleans, Louisiana, accused eight local criminal court judges of inefficiency, laziness and other assorted acts of misfeasance and nonfeasance, including being subject to “racketeering influences.” Garrison was prosecuted and convicted for criminal defamation.

In 1952, James Hill and his family were held captive for 19 hours by a group of escaped convicts. Subsequently, Life published an article stating that a new Broadway play, “Desperate Hours,” was based on the Hills’ experience. Mr. Hill, claiming that the article caused him much embarrassment, sued the publisher of the magazine for invasion of his right of privacy since the fictional family had undergone several experiences in their misadventures with the convicts, including a verbal sexual insult to the daughter of the family. None of these had actually occurred during the Hills’ unfortunate experience.

On September 30, 1962, Major General Edwin A. Walker, United States Army, retired, appeared on the campus of the University of Mississippi during the course of a violent riot which had ensued while United States marshals were attempting to enforce a court order calling for the University’s integration. The Associated Press reported in a dispatch, which was re-printed in newspapers all over the country, that the general had taken

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command of the rioters and had led a charge against the embattled marshals. Walker sued the wire service for libel.

In 1963, the Saturday Evening Post published an article entitled "The Story of a College Football Fix." In it, Wally Butts, the athletic director and former head football coach of the University of Georgia, was accused of deliberately rigging a football game with the University of Alabama by giving the head coach of the other team Georgia's plays and signals. Butts sued the publisher of the magazine for libel.

All of the above events, though widely separated in time and place share a common element. They have provided the occasions whereby the Supreme Court of the United States has hammered out a new set of rules governing freedom of the press under the first amendment. An intense conflict has arisen between freedom of expression and those areas of the law whose function is the protection of the personality, namely, defamation and privacy. At this writing, the Court's resolution of this conflict, as illustrated by its decisions in the specific situations just mentioned, is as follows:

1. Inasmuch as the judges Garrison had allegedly libelled were public officials, the statute under which he had been convicted was unconstitutional, since it permitted him to be punished for false statements made without a reasonable belief in their truth. Rather, the Court held in Garrison v. Louisiana that there had to be proof of actual malice, i.e., knowledge that the statements were false or made with reckless disregard of their truth.2

2. Mr. Hill was encumbered in his right of privacy action with the same burden imposed in cases involving public officials, namely, the onerous burden of proving actual knowledge of

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1 For the purposes of this article, the premise will be accepted that the significant social interest protected by the law of defamation and privacy is the psychic integrity, personality, or inherent human dignity of the individual. See Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion); Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va. L. Rev. 1, 40-41 (1965); Bloustein, Privacy as an Aspect of Human Dignity; An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 1000-03 (1964); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 922 (1963); Spiegel, Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy, 30 So. Cal. L. Rev. 280, 288 (1957).

2 379 U.S. 64 (1964). The criminal defamation statute was further objectionable in that it permitted punishment for truthful statements and for false statements made with a reasonable belief in their truth, if such statements arose from ill-will toward their object. Id. at 78-79.
ments were false or made with reckless disregard of their truth.  

3. Although the Court was divided concerning the retired general and the athletic director, since they were not "public officials" but merely "public figures," a plurality held that they could recover from their detractors only if they could prove that the alleged libel was "a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 

The above cases constitute, temporarily at least, the culmination of the expansion of the doctrine of the Supreme Court's landmark 1964 decision, New York Times Co. v. Sullivan, in which the Court determined that "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" required that the first amendment be extended into an area which had formerly been reserved to state tort law. This was a striking development, and required a new evaluation of traditional categories to which most lawyers and scholars dealing with the law of defamation had long been accustomed. For the torts teacher, New York Times had, as one eminent commentator facetiously put it, "the dizzying consequence of transmuting a part of his domain—one that he traditionally does not reach until the last day of the semester—into constitutional law, the Valhalla of the law school curriculum." 

As the reader can see from the brief outline of the above rules, this "dizzying consequence" has been intensified by the Court's development of the New York Times doctrine over the past four years. It is the purpose of this article to discuss in some detail the

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4 Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130, 155 (1967). The above rule was enunciated in an opinion by a plurality, but not a majority of the justices, and therefore is not the opinion of the Court. The exact nature of its authority and weight is discussed in greater detail at notes 90 and 132 infra, and accompanying text.
6 Id. at 270.
7 Until New York Times, defamation had been considered a type of expression not protected by the first amendment. See, e.g., Beauharnais v. Illinois, 343 U.S. 250 (1952). This was accepted even by advocates of the "absolutist" interpretation of the amendment. See, e.g., Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Cr. Rev. 245, 258.
development of the *New York Times* doctrine, its logic and policy, its place in first amendment theory, its shortcomings, and finally some possibilities for channels of future growth. The first step is to consider the case itself, the changes it wrought upon prior law, and the history of its teachings prior to the 1967 cases.

II. HISTORY OF THE NEW YORK TIMES DOCTRINE
PRIOR TO THE 1967 SUPREME COURT DECISIONS.

A. The Facts of New York Times

*New York Times Co. v. Sullivan,*[a] a libel suit by the Commissioner of Public Affairs of Montgomery, Alabama, against a New York newspaper, arose out of a paid advertisement placed in the newspaper by a civil rights group. Some of the individuals allegedly responsible for inserting the advertisement were also included as defendants. The plaintiff had been responsible for supervising the fire and police departments of Montgomery. Although the advertisement did not mention him by name, it did state that the Montgomery police, "armed with shotguns and tear-gas, [had] ringed the Alabama State College Campus" in retaliation for peaceful student demonstrations. The Commissioner contended that the advertisement could be read as an accusation that the police had used "intimidation and violence" in answer to the peaceful protests and had caused numerous frivolous charges to be brought against civil rights leader, Martin Luther King. Because of his relationship with the police Sullivan claimed that the

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10 The exact words of the paragraphs the Commissioner charged to be libelous were:

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from the 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.

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. . . .

The entire advertisement appears in the appendix to the opinion, 376 U.S. at 292.
unlawful acts allegedly committed by the police force were attributed by the advertisement to him.\(^{11}\)

It was uncontroverted that many of the facts stated in the advertisement were not accurate descriptions of the events, that the New York Times had in its news files stories which showed that the advertisement was inaccurate,\(^{12}\) and that no effort had been made by the advertising department to check their accuracy.\(^{13}\) The jury was instructed that the statements in the advertisement were libelous per se and could be the basis for a substantial award, even though the plaintiff had proved no actual damage, provided only that the jury believed that the statements in the advertisement had been made "of and concerning" the plaintiff.\(^{14}\) The verdict awarded the Commissioner compensatory and punitive damages totaling $500,000 against the Times and the individual defendants. The Supreme Court of Alabama affirmed.

On certiorari, the Supreme Court of the United States reversed. Relying on the first and fourteenth amendments, the Court announced the following principle:

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.\(^{15}\)


To appreciate the full significance of the New York Times doctrine, it must be considered in light of the law concerning defamation of public officials that preceded it. The fact that, prior to New York Times, defamation was considered to be outside the scope of the first amendment\(^{16}\) did not mean that comment on public affairs and public officials which could be considered libelous was totally unprotected. Such comment enjoyed a "quali-

\(^{11}\) 376 U.S. at 258.
\(^{12}\) Id.
\(^{13}\) Id. at 261.
\(^{14}\) Id. at 262.
\(^{15}\) Id. at 279-80. Of course, implicit in this statement is the additional principle that constitutionally, truth must always be a complete defense. See Garrison v. Louisiana, 379 U.S. at 73.
\(^{16}\) See note 7 supra.
fied privilege" or right of "fair comment" under the general law of libel as developed by traditional common law methods and legislation in practically all state jurisdictions. The precise nature of the privilege and the circumstances giving rise to it varied from jurisdiction to jurisdiction. It would be beyond the scope of this article to discuss in detail the myriad facets of the rules applying in the various jurisdictions—nor is this necessary since it has been thoroughly done elsewhere. For our purposes here, a few generalizations will suffice.

Under the general law of libel, if one publishes a libelous statement of another in a non-privileged situation, good faith is not a defense, although it may be proved in mitigation of damages. Further, if the libel falls into that category of publications denominated "libelous per se," i.e., gravely defamatory on their face, substantial recovery is permitted even though the plaintiff sustained no actual damage. This was one of the prime considerations in the New York Times decision. In the face of contrary precedents, the Supreme Court held that first amendment freedoms were indeed at stake. The essence of the libel law's qualified privilege for publications on matters of public concern is to relieve the publisher from the strict liability which applies to non-privileged publications. However, as the term implies, this "qualified" privilege can be abused, and thereby for-

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17 As distinguished from the absolute privilege applying to statements made, for example, in the course of judicial or legislative proceedings. No action lies as to such statements, regardless of the existence of malice. See W. Prosser, Torts § 109 (3d ed. 1964) [hereinafter cited as Prosser].
18 Berney, supra note 1, at 4-17.
19 Prosser 791-93.
20 Id. at 828.
21 The classic examples of publications defamatory per se were those which imputed to the plaintiff the commission of a crime or affliction with a loathsome disease, damaged him in his business or profession, or imputed unchastity to a woman. But where libel is concerned a fifth category has been added by modern courts, namely anything which tends to lower the plaintiff in the estimation of the community. See Prosser 772-82; Afro-American Pub. Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966).
22 This concept was used by the Alabama courts to inflict damages of half a million dollars on a locally unpopular northern newspaper.
23 See note 7 supra.
24 376 U.S. at 277-78.
25 The qualified privilege to speak on matters of public concern is but one facet of a much broader category of qualified privilege, which includes any publication "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." Prosser 805. E.g., the report of a school official to a parent regarding the conduct of his son would enjoy such privilege. See Baskett v. Crossfield, 190 Ky. 751, 228 S.W. 673 (1921).
feited, and under the general law this forfeiture may readily occur.  

Here the Supreme Court's *New York Times* rule, based on the first amendment, differs significantly from preexisting state law. While the law of many states stated that the qualified privilege was forfeited if the defamatory statement was one of fact rather than opinion, *New York Times* ruled that false statements of fact are protected, subject to the actual malice limitation. Under state law the existence of ill-will or "malice" could defeat the privilege, but under the constitutional rule the significant factor is knowledge of the falsity of the statement made rather than animosity toward the person about whom it is made. Also, under the constitutional doctrine, the burden of establishing actual malice is placed squarely on the plaintiff, and is apparently one requiring clear and convincing evidence. The plaintiff cannot be aided by presumptions in meeting this burden.

The policy behind such a doctrine as applied to politicians is, of course, apparent. While political rhetoric is not always as vivid as that used by the partisan who described the opposition's candidate as a "whore-hopper, a drunkard, and a grasper," vehement language is the rule rather than the exception. Or, as the Court put it in *New York Times*:

>[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

In the realm of religious faith, and in that of political belief,

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26 *Prosser* 819-23.
28 376 U.S. at 271-75.
29 *Prosser* 816.
32 *Id.* at 283-84. Under the law of many states, a presumption of malice arose upon the plaintiff's proving the publication of a statement that was libelous per se. *Prosser* 790-91.
33 *See* Weinstein v. Rhorer, 240 Ky. 679, 42 S.W.2d 892 (1931).
sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification... and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

... erroneous statement is inevitable in free debate, and... must be protected, if the freedoms of expression are to have the 'breathing space' they need to survive....\textsuperscript{84}

While all can appreciate the Court's concern for free speech in the political arena, and most will agree that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount" is equivalent to a form of censorship,\textsuperscript{85} one cannot deny that the \textit{New York Times} doctrine has given birth to many new problems as it has evolved over the four years of existence.

C. Problems With the \textit{New York Times} Doctrine

Hardly had the rule of \textit{New York Times} been handed down, before it became apparent that it was going to prove extremely difficult to determine to whom the doctrine applied. Who was a public official in the \textit{Times} sense? Obviously, most, if not all, elected officials were, even though the elected office might be a minor one, such as that of a school board member\textsuperscript{38} or a local tax assessor,\textsuperscript{37} or a police court clerk.\textsuperscript{38} But what about a policeman or deputy sheriff,\textsuperscript{39} a local election official or political committee-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{34}] 376 U.S. at 270.
\item[\textsuperscript{35}] Id. at 279.
\item[\textsuperscript{37}] See Eadie v. Pole, 91 N.J. Sup. 504, 221 A.2d 547 (1966).
\item[\textsuperscript{38}] See Beckley Newspapers Corp. v. Hanks, 36 U.S.L.W. 3188 (U.S. Nov. 7, 1967).
\end{enumerate}
\end{footnotesize}
man, a deputy town clerk, the supervisor of a branch post-office, or an attorney or accountant retained by a local administrative body. In *New York Times* the Court implied that not everyone on the public payroll would be subject to the public official designation and specifically left the matter open for future case-by-case determination.

The Supreme Court was itself confronted with the problem in *Rosenblatt v. Baer*, a case that had been tried initially prior to the *Times* decision but which was delayed in reaching the Court. In *Rosenblatt*, the manager of a county-owned ski resort, who had been directly responsible to the county commissioners, left his position after a public controversy concerning the efficiency of the resort's operation. A local newspaper columnist who had been an avid proponent of the managerial change, in commenting on its beneficial effects and the increase in income since it had occurred, pointedly speculated in print: "What happened to all the money last year? and every other year?" Claiming that the column accused him of embezzlement, the ex-manager recovered damages in a libel action which ultimately reached the Court on certiorari. Judgment was reversed in favor of the manager and the case was remanded to the state court for a new trial on the issue of whether the column could constitutionally be taken to refer to the plaintiff, as opposed to being so general as to constitute only a libel of government. The state court was instructed to hear new evidence as to whether the plaintiff was a "public official" in the *New York Times* sense. Guidelines were prescribed for the lower courts to follow in making this crucial determination:

Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance

44 In a footnote the Court said, "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend . . . or otherwise to specify categories of persons who would or would not be included." 376 U.S. at 283n.23.
of all government employees, . . . the *New York Times* malice standards apply.\(^46\)

But the question of defining who is a public official did not begin to exhaust the problems arising under the *New York Times* rule. The question of whether the doctrine applied to non-officials in the public eye became even more crucial. It is easily seen that if an officeholder who is running for re-election is to be burdened with the "actual malice" rule of *Times* in defending himself against political vituperation, his opponent, who is not yet an officeholder however much he might like to become one, must be saddled with the same burden if the "spirited public debate" sought to be insured by *Times* is to take place on an equal basis.\(^47\)

One decision has even held that an officeholder's law partner is subject to the rule when a discussion of the official's legal ethics inevitably involves those of the partner.\(^48\)

Only three months after the *Times* decision it was suggested that the policy of the rule required that it be applied to one who was not in political life at all, but was a "participant in public debate on an issue of grave public concern."\(^49\) Nor was it long before this defense was being invoked by defendants in every sort of case in which there was any possible claim that the circumstances involved matters of public interest.\(^50\) For the most part, the lower courts refused to extend the doctrine very far beyond public officials. The great majority of decisions occurring during this

\(^{46}\) Id. at 86.

\(^{47}\) See McFadden v. Detroit Bar Ass'n, 145 N.W.2d 285 (Mich. 1965); Dyer v. Davis, 189 So.2d 678 (La. 1966).


\(^{49}\) Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964) (dicta), suggested that the *Times* rule should be applied to one who voluntarily issued public statements on controversial issues and, as a result thereof, had been accused by a newspaper editorial of being a Communist sympathizer with un-American overtones. See also, Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966) and Pauling v. National Rev., Inc., 269 N.Y.S. 2d 11 (1966), where the courts enforced the full rigor of the *Times* rule against the same individual in square holdings.

\(^{50}\) E.g., labor union disputes. In Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966), a labor union, which had been sued for libel arising out of charges and countercharges occurring in the heat of an organization campaign claimed the protection of *New York Times*. The Supreme Court applied the *Times* doctrine "by analogy, rather than under constitutional compulsion." 383 U.S. at 65. Cf. R. H. Bouligny, Inc. v. United Steelworkers of America, 154 S.E.2d 344 (N.C. 1967). See also Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966) (prisoner found to be public figure in suit by him for damages for invasion of privacy resulting from a television documentary).
The courts were divided over whether the doctrine should be applied to those who had thrust themselves "into the vortex of the discussion of a question of pressing public concern." This was a question that the Supreme Court had specifically left unanswered.

Law review comment was virtually unanimous in agreement that the public official categorization was too rigid and inflexible to be the sole criterion for the application of the Times doctrine. On the one hand, there were some very minor officials to whom the doctrine probably should not apply; however, there were persons who were not officials but in whose activities the public had a legitimate interest. Commentators differed as to just where the line should be drawn. Most, however, seemed to feel that some sort of "legitimate public concern" test should constitute the criterion, i.e., if the matters discussed in the publication out of which the defamation arose were of legitimate public concern, the New York Times doctrine should apply.

Some such test would seem to be not only the most workable and intelligible criterion, but also the one which most fairly resolves the conflict between freedom of expression and individual

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57 See Berney, supra note 56 at 45-46; Bertelsman, supra note 56 at 681; Pedrick, supra note 56 at 592-93; Note, 75 Yale L.J., supra note 56 at 645; Note, Cornell L.Q., supra note 56 at 425; Rosenblatt v. Baer, 383 U.S. at 91 (concurring opinion).
personality explicitly recognized by the Supreme Court. The extent to which it has been adopted by the Court is the next topic to be discussed.

III. THE 1967 SUPREME COURT CASES

During its 1966 term, the Supreme Court continued to stake out the boundaries of the New York Times doctrine. Although already having briefly mentioned that term's cases by way of introduction, at this point a rather detailed analysis of each is required if the complexities of the Court's exegesis of the text of New York Times are to be fully understood.

A. Time, Inc. v. Hill

As was pointed out above, Time, Inc. v. Hill involved, not a libel suit, but a suit for the invasion of right of privacy. The action was founded on New York's right of privacy statutes. Although the writer of the article concerning the new play, "Desperate Hours", (which had been based on a novel by the play's author Joseph Hayes), had stated that the novel and play were based on the experiences of the Hill family while being held captive by escaped convicts, the truth was that the story had not been shaped by any single incident. Rather, it was an amalgamation of several actual instances about which the author had gathered information for many years. The author of the article had conferred with the playwright, but had not asked specifically whether the play was based entirely on the Hills' experience. However, the writer of the article did have on file several news clippings which revealed that the Hills' experience was of an entirely different character than that depicted in the play. Although the first draft of the article had not mentioned the Hills specifically, and had stated merely that the play was a "somewhat fictionalized" account

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68 See note 180 infra, and accompanying text.
69 385 U.S. 374 (1967).
60 These statutes, as pointed out by the Supreme Court began as a prohibition of the use of a person's name or picture for purposes of commercial advertising without his consent. 385 U.S. at 380. Over the years, the New York courts had engrafted onto the statute an exception where matters of public interest were concerned. As interpreted by the courts, the application of the New York privacy statutes was not significantly different than right of privacy rules evolved by other states through common law methods. Prosser 830, 840.
61 385 U.S. at 393.
of an incident which had occurred in suburban Philadelphia, the
copy editor rewrote the article so that the text emphasized the
derivation of the play from the Hill incident. The New York
courts awarded Mr. Hill $30,000 compensatory damages for the
article's invasion of his right of privacy. On appeal, the Supreme
Court reversed, holding that the New York Times doctrine of
actual malice was applicable under the circumstances.

Several significant points should be emphasized about the
case. First, Mr. Hill was certainly not a public official like the
police commissioner in New York Times or the judges in Garrison.
Nor was he even a borderline public official like the ski resort
manager in Rosenblatt or a public figure in the sense that General
Walker. Linus Pauling, and Warren Spahn have been so
categorized. Indeed, Mr. Hill had done all that he could to avoid
publicity, including moving himself and his family away from the
scene of their harrowing experiences. He made no attempt to in-
sert himself, or his family, before the public eye, as the persons
mentioned above had done. Secondly, although this was a violation
of privacy action, not a libel suit, it nonetheless turned on mis-
statements of facts in the publication out of which it arose.

This apparent anomaly is explained by the long-standing con-
flict between enforcement of the right of privacy and freedom of
the press. In recognition of this conflict, the privacy cases had
long held that even those persons having nothing to do with
political affairs have, to some extent at least, lost their right of
privacy if they have caught the public attention either voluntarily,
such as by becoming a celebrity in some field of endeavor, or in-
voluntarily, such as being the victim of crime. The New York
courts had so held in a privacy case involving Warren Spahn, the
noted baseball pitcher, shortly before the Supreme Court decided
the Hill case. But in an effort to strike a balance between the

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62 See note 82 infra, and accompanying text.
63 See note 49 supra, and accompanying text.
64 The Spahn litigation is particularly important in evaluating the Hill case.
See note 67 infra, and accompanying text.
65 See Fossor 844 passim; Siegel, Public Celebrity v. Scandal Magazine—
66 Fossor 847.
Spahn had recovered damages and had obtained an injunction restraining violation
of his right of privacy by the publication of an unauthorized biography in which
many details of his personal life were erroneously described. However, the details,
(Continued on next page)
protection of individual personality and the public's right to know, they held that the element of substantial fictionalization for commercial purposes had infringed upon Hill's and Spahn's privacy rights despite the public's interest in them.69

This effort was regarded sympathetically by the Court when the cases of Hill and Spahn came before it, but the majority felt that more was required if the press was to be unhampered in reporting public events. Thus, the Court in Hill responded to the New York Court of Appeals' statement in Spahn that "no public interest is served" by the "fictitious biography" of Warren Spahn and that it perceived "no constitutional infirmities" in enjoining its publications:70

If this is meant to imply that proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree. . . .

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. . . . Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. . . . No suggestion can be found in the constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. . . .71 Errorous statement is no less inevitable in such case than in the case of comment upon public affairs, and in both, if innocent of merely negligent, 'it must be protected if the freedoms of expression are to have the 'breath-in space' that they 'need to survive.'72

(Footnote continued from preceding page)

though embarrassing, were apparently not libelous, because not derogatory. The Supreme Court quoted extensively from the Spahn decision in the Hill opinion, relying on the interpretation the right of privacy statutes had received by the New York Court of Appeals. See 385 U.S. at 383. Spahn was also before the Supreme Court on certiorari and subsequently was remanded for reconsideration in the light of the Hill decision. 387 U.S. 239 (1967) (per curiam). If the Court considered Spahn in any way a different type of public figure than Mr. Hill, the opinion in Hill gives no evidence of it.

68 Id. See also Note, Privacy, Defamation and the First Amendment: The Implications of Time, Inc., v. Hill, 67 Colum. L. Rev. 926, 931, 932 (1967).

69 Prosser places this type of privacy case in the category "False Light in the Public Eye," and points out that it is very closely related to certain types of libel actions. Prosser 837-39.

70 385 U.S. at 387.

71 Quoting Bridges v. California, 314 U.S. 252 (1941).

Justices Black and Douglas joined the majority opinion "in order for the Court to be able at this time to agree on an opinion in this important case."

but filed concurring opinions reiterating their belief that the first amendment requires that the press be immune from libel and privacy suits arising out of the reporting of public affairs. Mr. Justice Harlan concurred in part and dissented in part. He agreed that the case should be remanded, because he felt that there had not been "binding jury interpretation of the degree of fault involved in the fictionalization" by the Life article. But he dissented in the majority's finding that saddling Mr. Hill with the onerous burden of the New York Times actual malice test, with its requirement of proving "calculated falsehood", was necessary to preserve freedom of the press. He felt that the primary policy underlying the New York Times rule was to insure free competition in the marketplace of ideas and that there was a "vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official." He therefore advanced the proposition that requiring the press to adhere to a duty of reasonable care, such as that imposed on other professions, would sufficiently safeguard first amendment guarantees in cases like Mr. Hill's. Justice Harlan's opinion is of great importance because it was he who wrote the plurality opinion, adopting a somewhat similar negligence test, in the Butts-Walker cases which are presently the last word concerning the effect of New York Times on persons who are not public officials.

B. The Butts-Walker Cases

On the last day of the 1966 term, the Supreme Court handed down one opinion deciding two consolidated cases which are of extreme importance. These are the cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker.

A jury in federal district court in Georgia had awarded Butts
$60,000 general damages and $3,000,000 punitive damages in a libel action arising out of an article published in The Saturday Evening Post. Entitled "The Story of a College Football Fix," the article was written in a style that strongly suggested deliberate sensationalism. It purported to describe how Butts, the athletic director and head football coach of the University of Georgia, had conspired with Paul "Bear" Bryant to rig a football game between Georgia and the University of Alabama. According to the article, one George Burnett, as the result of an electronic mixup, had accidentally overheard a telephone conversation between Butts and Bryant, Alabama's coach, which took place approximately one week prior to the game. Burnett allegedly heard Butts give Bryant a detailed description of Georgia's plays and strategy. The article concluded with the prediction that "careers would be ruined" as a result of the disclosures.

The evidence presented at trial concerning both the content of the telephone conversation overheard by Burnett and the events of the football game itself was conflicting. Burnett was revealed to be an extremely unreliable source, having previously been placed on probation in connection with bad check charges. Yet, the Post had published his version of the story without making an independent investigation. Further, Butts had gotten wind of the impending publication of the article, and his daughter had literally pleaded with the editors of the Post to cancel its publication. The editors turned a deaf ear. One of them testified at the trial that the Post had deliberately instituted a policy of "sophisticated muck-racking" and was looking for an opportunity to publish a sensational expose of some sort.

The case had been brought in the federal district court prior to the decision in New York Times. On a motion for a new trial after the New York Times decision, the trial court determined that Times was inapplicable, since Butts was not a public official. The United States Court of Appeals for the Fifth Circuit affirmed, one judge dissenting.

The Walker case presented a somewhat different situation. Amid the turmoil and confusion of the riot which ensued during

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80 388 U.S. at 161 n. 23.
82 Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965).
the enforced enrollment of a Negro, James Meridith, as a student at the University of Mississippi, a young Associated Press correspondent reported an eye-witness account of events. The correspondent's dispatch stated that retired General Walker, a well known personage who had once commanded federal troops during a similar forced integration of schools in Little Rock, Arkansas, had "led a charge of students against federal marshals on the Old Miss campus," and "had assumed ... complete command" over the crowd. The dispatch further reported that Walker had "advised" the rioters "on several tactics," including methods of combating tear gas.8

Needless to say, at the trial, Walker vehemently disputed the accuracy of the Associated Press report. According to his version of the facts, he had advised the crowd to show moderation and nonviolence, but they had rejected his counsel. Walker stated that he had never come closer than the length of a football field to the marshals against whom he had allegedly "led a charge." He also disputed many other facts contained in the dispatch, contending that he had been on the campus solely as an observer.84

The Associated Press dispatch had been widely reprinted throughout the country, and the case that came before the Supreme Court in June, 1967, was only one of many that Walker had instituted against newspapers which had carried the Associated Press release.88 In the case decided by the Supreme Court, a Texas jury had awarded Walker $500,000 general damages and $300,000 exemplary damages, but the trial court found that there was no evidence of malice to support the award for exemplary damages and set that portion aside. The Court of Civil Appeals of Texas affirmed, dismissing the Associated Press' constitutional arguments in two sentences.88

The significance of the Supreme Court's decision in Butts-Walker is extremely difficult to interpret, because there was no opinion of the Court. Four justices joined in a plurality opinion.
which enunciated what is perhaps best described as a "gross negligence test" for libel actions by "public figures" who are not public officials. Applying this test to the Butts-Walker situations, the plurality felt that on their respective facts Butts should be affirmed and Walker reversed. 88

The Chief Justice concurred in the result reached by the plurality in both cases, but filed a separate opinion stating his view that "public figures" as well as "public officials," should be subject to the actual malice test of New York Times. Justices Brennan and White agreed that the New York Times test should be applied to "public figures," but expressed the view that Butts should be reversed as well as Walker inasmuch as the Butts instructions in the court below were not sufficient under New York Times standards, even though the evidence would have supported a finding of actual malice. Justices Black and Douglas reaffirmed their position that the press should enjoy complete immunity from libel and invasion of privacy actions, at least insofar as matters of public interest are concerned. They concurred in Walker with Chief Justice Warren, so that the Court might arrive at an opinion. They dissented in Butts. 89

When the various opinions in Butts-Walker are carefully analyzed, one finds that although only four justices support the application of the "gross negligence test" to libel actions by "public figures" who are not "public officials," five of the justices favor the application of the New York Times actual malice test or a stricter view to such persons. The opinion of Justices Black and Douglas indicates that, if their view of absolute immunity cannot prevail, they prefer the application of the New York Times test to public figures, as advocated by the Chief Justice. Thus, it appears that the leading opinion in these cases, even though it expressed the views of more justices than joined in any one of the other opinions filed, does not set forth the authoritative

87 For the exact wording of the rule of the plurality opinion see text at note 4, supra. The test seems substantially identical to the usual definition for "gross negligence," i.e., "an extreme departure from the ordinary standard of care." PROSSER 187. In an article appearing after this one had been submitted for publication, Professor Kalven also stated his view that the term "gross negligence" was properly descriptive of the standard applied by the plurality. Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267, 298.

88 388 U.S. at 156.

89 Id. at 170.
test. Rather, lower courts, unless and until the Supreme Court speaks again, should follow the views of a majority of the justices and should apply the *New York Times* test to libel actions by public figures, as well as those by public officials. For the reasons hereafter stated, it is hoped that when the Court does speak again, it will reaffirm that the actual malice test of *New York Times* applies to public figures, as well as to public officials.

IV. **The New York Times Doctrine and the First Amendment**

A. **The Basic Approach of New York Times—A Qualified Privilege For a Borderline Area.**

Most of those who have commented on this subject have expressly or implicitly approved the approach of *New York Times*, i.e., offering a qualified, rather than an absolute, privilege for defamatory publications concerning public officials. At least one commentator, however, has asserted a dissenting view, stating that inasmuch as the Supreme Court has no common law powers to fabricate tort law for the states, any interference with such tort rules must be based on a constitutionally relevant standard. Therefore, he reasons, the Court had no power to promulgate a doctrine of qualified privilege in this area. But once it decided

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82 Berney, *Supra* note 56 at 49-50.
that the first amendment required that defamatory speech about public officials be protected, the Court was precluded from qualifying that protection and had to make it absolute.

This criticism merits consideration. If the first amendment protects one's right to advocate the election of a political candidate, few would contend that the government should have the power to determine whether one truly believed in that candidate's superior qualifications and could prohibit all political advocacy that was insincere. How, then, can the New York Times rule be justified, for it looks to the speaker's state of mind to determine whether the factually erroneous statements he has made concerning public affairs were made with knowledge that they were false or with reckless disregard of the truth? It is believed that such justification is indeed found in the history of libel vis-à-vis the first amendment. As pointed out above, libel, together with obscenity, was for a long time regarded as outside the ambit of the first amendment's protective pale. Professor Kalven has called this concept the two-level theory, i.e., the technique of "dividing speech into categories: that which is worthy enough to require the application of first amendment protection and that which is beneath first amendment concerns." It has been said that the New York Times line of decisions is an implementation of the theories Alexander Meiklejohn advocated for many years. Certainly, he had long been in the forefront of those who, eschewing any "balancing" or "clear and present danger" test, asserted that the first amendment was an absolute. Yet, in his writings, the "qualified privilege" approach of New York Times finds theoretical justification.

First of all, Meiklejohn sharply distinguished between public constitutional rights, such as freedom of speech and religion, which he held to be absolute, and private constitutional rights, such as the right to own property, which were subject to abridgement with due process of law. As applied to the regulation of libelous ex-

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93 See note 7 supra, and accompanying text.
94 Kalven, supra note 91 at 217. This is to be distinguished from Kalven's "two-tier theory," i.e., the first amendment is less restrictive on the states than it is on the federal government. Id. at 218.
96 A. MEIKLEJOHN, POLITICAL FREEDOM, THE CONSTITUTIONAL POWERS OF (Continued on next page)
pression, this basic principle yielded the corollary that "[t]hough private libel is subject to legislative control, political or seditious libel is not." In a very effective analogy, Meiklejohn once compared the rationale which at that time excluded libel from first amendment protection, to the rules of order which prevail at a town meeting. There, he pointed out, while the basic principle of the meeting is "that the freedom of speech shall be unabridged," the meeting cannot proceed "unless, by common consent, speech is abridged." That is, there must be rules governing who shall be permitted to speak and when, and requiring that only the subject on the floor may be discussed at a given time. Further, if a speaker "is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared 'out of order.'" If the speaker then persists in objectionable conduct, sanctions may be imposed by denying him the floor or having him "thrown out" of the meeting. Such regulation may be compared to the government's right, with respect to freedom of assembly, to require that the assembly be "peaceable." Although "no one may be 'denied the floor' on the ground of disapproval of what he is saying or would say," vituperation directed at individuals destroys the peaceable nature of the assembly and one who persists in such conduct is rightfully expelled by force, if necessary.

To apply this analogy to the New York Times situation, it might be said that the Supreme Court has found it necessary under

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99 Id. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12; "[W]hat is required is in effect a set of Roberts Rules of Order for the new uses of the public forum. . . ." Cf. Brant's suggestion that the theoretical justification for permitting the suppression of obscenity is to treat it "as disorderly action akin to nakedness in a public street." I. BRANT, THE BILL OF RIGHTS 492 (1965). An analogy may also be drawn to the reasoning of the Court in Cox v. Louisiana, 379 U.S. 536 (1965) upholding a conviction of a civil rights leader for blocking a public sidewalk during a demonstration. Stressing the interest of the municipality in insuring the free flow of traffic, the Court pointed out that no one could "insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly." Id. at 554.

100 Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, 259.

101 Id. at 260.
modern conditions to amend the rules of order controlling the procedure in that tremendous town meeting by which our nation is governed. The Court has found that, in the face of the exigencies of modern life, if "debate on public issues" which are brought up at that meeting is to be "uninhibited, robust, and wide open," then the rules of order must be somewhat relaxed. But this does not change the principle that rules of order are not in themselves an abridgment of free speech. In times when events and communications moved more slowly it was possible for a speaker to check the accuracy of what he said in public debate. However, in modern times of instant communication, where life is more complex in general, complete checking to insure absolute accuracy is impossible. Today when social advocacy for one position or the other takes place to a significant degree in what has been called "the public forum," the competition of ideas in the marketplace of which Holmes spoke long ago occurs, not only, or even primarily, in lecture halls, but in the streets, at lunch counters, on courthouse lawns, or, through the miracles of modern electronics, in our very living rooms. And this is a salutary development. What could be more beneficial to a free society, dependent for its survival upon adequately educating and informing the electorate, than to have reports of public events continuously communicated to the electorate? When significant events throughout this world, and indeed on other worlds, are flashed to us every hour on the hour, the primary need is for information now. In such a climate, there must be room for good faith factual errors, and, even more, "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" must be permitted, if political freedom is to be achieved. But, deliberate misrepresentation or "calculated falsehood" does not promote the ends of free competition of ideas in the vast town meeting of the electorate. It leads to disorder and confusion, and the exigencies of the public forum do not yet require the modification of the old


103 "But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That, at any rate, is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).

rules of order to the extent of allowing speech or writings of this kind.\footnote{106} The rules of order presently in effect, as expounded by \textit{New York Times} and its progeny, involve a borderline area. They are, after all, concerned with an individual’s attempts to seek redress for expression concerning himself, not with official punitive attempts by government to suppress political dissension. It is just these distinctions, it is submitted, that provide the key to the understanding and theoretical justification of \textit{New York Times}. The concept of seditious libel provides the touchstone.\footnote{107} One scholar has advanced the thesis that the first amendment permits “a line to be drawn between the spurious common law of seditious libel and the genuine common law of civil liability for defamation of private character.”\footnote{107} This thesis is borne out by the \textit{New York Times} line of cases. In fact, there are really two doctrines of \textit{New York Times}, one of which is the qualified privilege doctrine of “actual malice” which we have spent most of our time discussing here. The other is that where adverse comment is in such general terms as to amount to criticism of government rather than of an individual, it amounts to seditious libel, and the privilege is not merely qualified, but is absolute.\footnote{108} Where

\footnote{106 After the above was written, the Court re-emphasized this basic approach to the delicate problems of free speech involved in this area: But \textit{New York Times} and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not. \textit{St. Amant v. Thompson}, 38 U.S.L.W. 4334 (U.S. Apr. 30, 1968).}

\footnote{107 Brant, \textit{supra} note 99 at 502-03. \textit{Compare} the comments of Mr. Justice Stewart approving this approach in \textit{Rosenblatt v. Baer}, 383 U.S. at 93n.4.}

\footnote{108 In \textit{New York Times} itself this was an independent ground for reversal. 376 U.S. at 283-92. \textit{Accord}: \textit{Rosenblatt v. Baer}, 383 U.S. at 81-83. According to (Continued on next page)
the qualified privilege doctrine comes into play, we are not concerned with government itself, but individuals in government. A fine line indeed must be drawn between accusations against individuals and "impersonal discussion of governmental activity." Suppose, for example that Garrison v. Louisiana had been a civil, instead of a criminal case, and one of the eight allegedly maligned judges had sued Garrison for damages. Would his accusations, not having mentioned any of the judges by name, have been so general as to have amounted to an attack on the judicial branch of government itself and thus been immune as seditious libel, even if made with actual malice? Or suppose, as is often the case, someone charges that a city government is composed of grafters and cheats. Is this seditious libel, or a libel of a small group, the city commissioners, any one of whom can collect damages if he can prove actual malice?

The New York Times doctrine lies not only somewhere between seditious libel and individual libel but also between regulation of the incidents surrounding the exercise of free speech, which the first amendment does not prohibit, and regulation of its content, which is strictly forbidden. The principal thesis of this article is that the qualified immunity afforded by New York Times is appropriate for this borderline area.

To provide for the twilight zone, where factually erroneous speech does not amount to seditious libel, but is not solely concerned with private reputation, because the subject under discussion concerns governmental affairs or one of the items for sale in the "marketplace of ideas," the Court has fashioned a borderline rule between uninhibited regulation and absolute im-

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100 Rosenblatt v. Baer, 383 U.S. at 82.
101 See Id. at 81-83.
102 E.g., excluding sound trucks blaring propaganda from residential streets. See Kovacs v. Cooper, 336 U.S. 77 (1949).
112 See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 23, where the author states that "No one has ever argued that speech should be free of the restraints of reasonable parliamentary rules, and any concessions on this front should not be taken as relevant to the questions most central to speech theory—questions of control of content."
munity—the qualified privilege rule of *New York Times.* The wisdom of qualifying the privilege afforded by *New York Times* is supported by a consideration of the policy underlying the tort law of defamation which its constitutional rule supersedes. One must remember that the *New York Times* family of decisions are products of an unavoidable conflict which is becoming more and more intense in our modern society. This is the conflict between free speech and the need to protect the personal dignity of the individual from destruction by false attacks upon his reputation, and from invasion of his right of privacy. The public has an all but insatiable desire to be informed, not only on political and governmental issues, but also on a number of things which are really none of its business. Society has a strong interest in shielding a football coach, or anyone else, from a false accusation of corruption which will ruin his career. And the more advanced a society is, the more alert it should be to protect its citizens, as far as possible, from mental suffering inflicted upon them due to unnecessary invasions of their right of privacy.

The Supreme Court has pointed out that "whatever is added to the field of libel is taken from the field of free debate." But the converse is also true—whatever is added to the public domain, is subtracted from the law's salutary protection of an individual's reputation or right of privacy, and thus from his inherent human dignity. This was no doubt why the Court refrained from adopting privilege for defamation of public officials. The reasoning underlying this resolution of conflicting interests could hardly be

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113 Commenting on the statement of the Court in *Hill,* quoted at note 70 supra, that "guaranties for speech and press are not the preserve of political expression or comment on public affairs," Professor Kalven has said: "The point left implicit, presumably, is that while the avoidance of seditious libel may be the central purpose of the First amendment, it is not its only purpose. *New York Times v. Sullivan* gave an invaluable perspective to free speech analysis; it did not, however, attempt to set the outermost boundaries of First Amendment protection." *Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker,* 1967 Sup. Cr. Rev. 287, 292.


115 See generally authorities cited in note 1 supra.

better expressed than it was by the Court itself in *Rosenblatt v. Baer*:

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.\(^{117}\)

We have attempted to show here that this approach is both valid under the first amendment and necessary to a civilized society. Some of its specific applications remain to be considered.


In *Time, Inc. v. Hill* and *Butts-Walker* the Supreme Court conceded, as many had predicted it would have to do,\(^{118}\) that the doctrine of *New York Times* could not be confined to public officials.

Few would quarrel with subjecting General Walker to the burdens of *New York Times*. He had, after all, deliberately engaged in the public affray where he had little right to ask for quarter or special consideration. The very violence of the public event into which he had thrust himself prevented meticulous accuracy in reporting, and its urgent nature and national importance required that the public be immediately informed of all developments. The General was no doubt aware of this, and his efforts to capitalize on the alleged errors in the Associated Press's dispatch smacked of a deliberate vendetta against the northern press. It was very clear in his case that to have held the wire service to absolute accuracy of fact would have constituted a gross interference of the press's freedom, which is in the last analysis the freedom of everyone.

As for the *Butts* decision, if the gross negligence test of the plurality opinion ultimately becomes the prevailing rule there are several indications that it may be one of those hard cases which make bad law. There was at least one difficult issue in the case

\(^{117}\) 383 U.S. at 86.

\(^{118}\) See authorities cited at note 56, *supra*. 
which the plurality tiptoed past with scarce a glance. Butts was
the athletic director of a large state university. Although his salary
did not come directly from public funds, his authority was of a
public nature.\textsuperscript{119} Able judges in the lower courts have disagreed
on whether or not he was a "public official" in the \textit{New York Times}
sense.\textsuperscript{120} Yet the plurality evinced a surprising willingness
to be bound by those same "mere labels of state law" which it had
vehemently rejected in the \textit{Times} opinion,\textsuperscript{121} blandly accepting
the rulings of the Georgia courts and one of its own rulings in an
entirely different context, to the effect that the office of Athletic
Director at the University of Georgia was not that of a public
official.\textsuperscript{122}

Prior to the announcement of the \textit{Butts-Walker} opinion, it
had been suggested that the \textit{New York Times} doctrine be applied
to cases arising out of "public issues" or "events"\textsuperscript{123} or even that
the controlling principle should be whether the publications
in issue were relevant to issues up for decision by the voting
public.\textsuperscript{124} Whether one or both of these approaches is used,
or an unadorned public official test, it is submitted that the con-
siderations for applying the \textit{New York Times} doctrine to \textit{Butts}
were much more compelling than for applying it to the ski-resort
director in \textit{Rosenblatt v. Baer}. Yet, we are told that the seven
members of the Court who found it necessary to pass upon the
question,\textsuperscript{125} agreed that Butts was a "public figure" in no way
different from General Walker.\textsuperscript{126} No analysis was advanced to
support this proposition, nor was it explained why the position
Butts held was not "one which would invite public scrutiny and
discussion of the person holding it, entirely apart from the

\textsuperscript{119} 388 U.S. at 135.
\textsuperscript{120} Compare the opinion of the court in \textit{Butts v. Curtis Publishing Co.}, 242 F.
\textsuperscript{121} 376 U.S. at 269. See also \textit{Rosenblatt v. Baer}, 383 U.S. at 84.
\textsuperscript{122} 388 U.S. at 144. Curtis had also argued in its brief that, besides Butts' possible public officialdom, the very subject matter of the \textit{Post} article, higher education and big-time college sports, entitled it to the protection of the \textit{New York Times} doctrine.
\textsuperscript{123} See note 56 supra.
\textsuperscript{124} Note, \textit{Free Speech and Defamation of Public Persons; The Expanding
\textsuperscript{125} Presumably, Justices Black and Douglas did not find it necessary to pass
on the question, since they would afford absolute immunity from libel suits in all
matters concerning public affairs.
\textsuperscript{126} 388 U.S. at 162 (concurring opinion).
scrutiny and discussion occasioned by the particular charges in controversy,” the test for public officialdom enunciated in *Rosenblatt*, and a test which would certainly seem to apply to the office of athletic director of a large state university. Even more significantly, the reasoning underlying the implicit but necessary finding that the private citizen-plaintiff in *Time, Inc. v. Hill*, to whom the full rigor of the *New York Times* actual malice test has been applied, was more of a “public man” than the prominent Coach Butts was not disclosed. Further suspicion is aroused by the unexpected appearance on the *New York Times* stage of the gross negligence test of the plurality opinion. We cannot, of course, know exactly to what degree the difficulty of the *Butts* decision was responsible for this intrusion, but the vehicle of “gross negligence” enabled the Court to finally decide *Butts* instead of remanding, as had been done in *Rosenblatt* and *Hill*, for a re-trial under *New York Times* standards.

It is easy to sympathize with the obvious reluctance of several members of the Court to subject Butts, who had been victimized by an inexcusable kind of yellow journalism, to the ordeals of a second trial, which would have been necessary if the *Rosenblatt* approach had been adopted. As it was, only the Chief Justice was willing to find that the actual instructions in the trial court had adequately covered the requirements for *New York Times* “actual malice.” And, although only one Justice voted for a negligence test in *Time, Inc. v. Hill*, four were willing to adopt such a test, albeit a somewhat more stringent one, in *Butts-Walker*. All of these factors make one suspect the result desired in the *Butts* case was the real parent of the gross negligence test. This test is objectionable not so much for itself, but for its inconsistency with *New York Times* and the cases which followed it. In the first instance, it would seem to have afforded almost as much protection to good-faith factual error in publications imbued with the public interest as the “actual malice” test actually laid down there. Indeed, perhaps it is only a useless exercise in semantics to attempt to distinguish “highly unreasonable conduct constituting an extreme

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127 383 U.S. at 86n.13.
128 The plurality opinion’s apparent distinction of *Time, Inc. v. Hill* on the ground that it is a privacy action does not seem adequate to explain this anomaly. For in *Hill* the Court itself pointed out that such privacy cases are very similar to actions sounding in libel *per quod*.
departure from the standards of investigation and reporting usually adhered to by responsible publishers" 129 from the "reckless disregard of the truth" which constitutes the second half of the "actual malice" definition. 130 But, it is submitted, it is inconsistent to impose a greater burden on a private citizen thrown into the public eye only for a brief moment, and then purely involuntarily or a big-league pitcher in no way connected with governmental affairs, than upon a policy-making official of a state university or a person deliberately engaging in heated debate on issues of national importance.

One justifiable criticism of the New York Times doctrine is that the qualified nature of the privilege it affords will tend to give rise to extensive litigation as plaintiffs in varying circumstances argue that it does not apply to them or that they can meet the difficult burden of proving actual malice. 131 In this writer's view the public interest in preserving the integrity of the personality outweighs this criticism, but if the gross negligence test is to be applied, even finer distinctions will have to be drawn. 132 The courts will not only have to distinguish between the public and private spheres and define what considerations make a man a public figure as opposed to a public official, but also where violation of privacy based on "substantial fictionalization" ends and libel begins. 133 If the Court is sincerely concerned with the "self-censorship" effect of the very possibility of libel suits on the freedom of the press, even though they may not result in a judgment, 134 and if it is going to devise common-law type rules to attempt to resolve the ineluctable conflict between the interest of

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129 *I.e.*, the gross negligence formula. See notes 4 and 87, *supra.*

130 See note 15 *supra.*


133 The *Spahn* case had sounded in privacy rather than libel because, although substantial fictionalization was involved, there was apparently nothing derogatory in the spurious biography published about Spahn. But as the *Time,* Inc. v. *Hill* opinion pointed out, such an action is very close to one sounding in libel *per quod.* See note 125, *supra.* Nevertheless, under the rule of the Butts-Walker plurality opinion, different tests would apply in libel and privacy actions.

134 See quotation at note 105 *supra.*
character protection and the exigencies of the public forum, should it not devise as simple a test as possible which constitutes an equitable resolution of the conflict? Anyone who has put forth the effort to follow this article to this late point must realize that such a test is not the result if the gross negligence test of the Butts-Walker plurality opinion is to be considered authoritative. Happily, as has already been pointed out, it need not be considered authoritative, since it did not command the support of a majority of the Court.135


If one assumes, then, that the gross negligence test will prove to have been stillborn and that subsequent decisions will follow the views of a majority of the Court that New York Times' original actual malice test should be used in all cases where freedom of the press requires the shield of New York Times for its protection, an insuperable obstacle to meaningful analysis of the present state of the New York Times doctrine is overcome. For one is then relieved of the task of attempting to rationalize how it is that a free press has a more compelling interest in discussing the affairs of a completely non-public man like Mr. Hill than in the alleged rigging of a sporting event of national interest by a person who is at least arguably a public official. Both these men can now, together with advocates on various aspects of public issues and major sports and entertainment personalities, be considered "public figures"136 and subject to the full rigor of New York Times. However laudable the consistency of such an approach may be, some may feel that, at least in Mr. Hill's case, the public right to be informed has infringed too far upon the individual's right to be protected. To a lesser degree, such an argument may also be made for Spahn.137

135 See note 90 supra, and accompanying text.
136 "A public figure has been defined as a person who by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.'" Prosser 844-45.
137 "It is very well settled that the constitutional guaranty of freedom of speech and of the press does not confer upon a newspaper, anyone else, the privilege of publishing defamation merely because it has 'news' value, and the

(Continued on next page)
To attempt to sum up the present status of the *New York Times* doctrine, it would seem accurate to say that if the gross negligence test of the *Butts-Walker* plurality opinion can be considered non-authoritative, the Court has evolved a legitimate public concern or public event criterion for the application of the actual malice test. A reconciliation and analysis of the opinions, but more especially the facts, of the *New York Times* family of cases decided by the Supreme Court to date would seem to yield the following rule, which applies to both libel and privacy actions: No publisher of material the subject matter of which is a "public event" that is, of legitimate public concern, may be required to respond in damages because of factual misstatement therein, unless such misstatement was made with knowledge of its falsity, or with reckless disregard for the truth.

The concept of the public event is to be given a broad and comprehensive scope. *Time, Inc. v. Hill* and *Butts-Walker* indicate that the Court has pretty much adopted Meiklejohn's delineation of the public and private spheres. The public sphere includes not only political issues, that is, those on which the people vote directly, such as the relative merits of officials or candidates for office, but also those collateral matters concerning which the citizens must be informed if they are to be "educated for self-government."

In Meiklejohn's own words:

[T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values; the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgment of their freedom. I list four of them below:

1. Education, in all its phases, is the attempt to so inform

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(Footnote continued from preceding page)


and cultivate the mind and will of a citizen that he shall have
the wisdom, the independence, and, therefore, the dignity
of a governing citizen. Freedom of education is, thus, as
we all recognize, a basic postulate in the planning of a free
society.

2. The achievements of philosophy and the sciences in
creating knowledge and understanding of men and their
world must be made available, without abridgment, to every
citizen.

3. Literature and the arts must be protected by the First
Amendment. They lead the way toward sensitive and in-
formed appreciation and response to the values out of which
the riches of the general welfare are created.

4. Public discussions of public issues, together with the
spreading of information and opinion bearing on those issues,
must have a freedom unabridged by our agents. Though they
govern us, we, in a deeper sense, govern them. Over our
governing, they have no power. Over their governing we have
sovereign power."

From the above, it would seem doubtful that Meiklejohn would
have included sports personalities in the public area as the
Court has done, although he would probably have included Mr.
Hill, in view of his connection with the release of a major
play.

If the Times doctrine is to be applied to sports, the legitimacy
of the public concern would seem much stronger in the Butts
situation than in Spahn. In Butts, not only was a quasi-public
official involved, but also the alleged rigging of a sporting event
of national interest, which would have constituted a gigantic
fraud on the public itself, whereas in Spahn the fictionalized
biography was concerned primarily with the pitcher's private
life.

Nevertheless, the majority of the Court would apparently
apply New York Times to Messrs. Hill, Walker, Butts and Spahn

139 Id. at 256.

140 Butts and Spahn seem to put sports and sports figures squarely in the
public sphere and to subject persons prominent in that field—and by analogy those
prominent in entertainment—to all the burdens of New York Times. The writer
has no quarrel with this where, as in Butts, aspects of sports, such as the integrity
of the results, in which the public has a legitimate interest, are involved. The
same is true of cases like Grayson v. Curtis Pub. Co., 436 P.2d 756 (Wash.
1967), where the ability or sportsmanship of a prominent sports figure are under
discussion. It is only in cases like Spahn, where the private life of the sports
figure is in the spotlight that we express any reservations as to the wisdom of
extending first amendment protections so far.
without distinction or differentiation. Spahn's case, which can be considered typical of that of all sporting and entertainment personalities, represents the fringe area of a borderline situation, and perhaps the Court felt if there was a doubt it was better to resolve it in favor of the public sphere.\textsuperscript{141} Nevertheless, a powerful argument can be made that even a celebrity has a right of privacy with respect to the non-public aspects of his life.\textsuperscript{142} But the Court may have also been influenced by the consideration that sports and entertainment are more and more engaging the public interest as developments in electronics make them more readily available to all.

At any rate, despite the difficulties of borderline applications, the "public event" approach seems the most flexible and felicitous rule to follow, for it avoids attempting to apply a sterile, mechanical public official test and looks to all the facts and circumstances surrounding the events under discussion to determine whether they are the subject of a legitimate public concern. The Court has never directly passed on whether the requirement that the public concern be legitimate, as distinct from mere public curiosity, is consistent with the first amendment. It has intimated, however, that it is.\textsuperscript{143} Indeed, the concern with reputation and privacy demonstrated by the entire \textit{New York Times} family of cases seems to contradict the idea that it must be left to the unreviewable discretion of the press to establish the criteria for "newsworthiness."\textsuperscript{144}

It is true that the legitimate public concern test suggested here will involve drawing a great many nice distinctions, such as determining whether the activities of a candidate's law partner are within the public arena,\textsuperscript{145} or whether the public has a legitimate interest in the doings of an ex-governor,\textsuperscript{146} a Russian

\textsuperscript{141} This would be in accord with the traditional tort approach. \textit{See} Prosser \textit{\textsuperscript{847}.}
\textsuperscript{143} \textit{See} note 137, supra.
\textsuperscript{144} This writer respectfully disagrees with the proposition "that the courts will not, and indeed cannot, be arbiters of what is newsworthy. . . . In brief, the press will be the arbiters of it and the Court will be forced to yield to the argument that whatever the press prints is by virtue of that fact newsworthy." \textit{Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker,} 1967 Sup. Cr. Rev. 267, 284.
czarist prince,\textsuperscript{147} or the sexual aberrations of a public employee.\textsuperscript{148} But the alternative is to abandon to the tender mercies of the press and political partisans\textsuperscript{149} all protection of reputation and character of those who may be, however indirectly or involuntarily, drawn into public affairs. And if Mr. Hill can be placed into this category, who of us cannot? In this writer's view whatever effort it takes to preserve the delicate balance between free speech and protection of private personality is well worth it.\textsuperscript{150}

V. THE PRACTICAL ASPECTS: PROVING ACTUAL MALICE

The thesis has been adduced above that, despite the four-justice plurality opinion of Butts-Walker, the actual malice test of \textit{New York Times} should be employed in all future cases concerning factual misstatements arising out of the discussion of public events. The cases since \textit{New York Times} was decided in 1964 have illustrated that the burden of proving actual malice is indeed onerous, but not impossible, to meet.

Actual malice is, of course, more easily alleged than proved, and many of the reported decisions have simply held that, if it has been alleged, the plaintiff has a right to try to prove it and cannot be foreclosed from recovery at the pleading stage.\textsuperscript{151} When it comes to proof, however, one must remember that the term "actual malice" is really a misnomer, since its existence has nothing to do with the presence or absence of ill-will by the speaker.\textsuperscript{152} "Calculated falsehood," which the Supreme Court has used from time to time to describe the state of mind constituting actual malice,\textsuperscript{153} is a far more accurate term since it is the actual knowledge of falsity or a high degree of awareness of probable falsity that is the key. An intent to inflict harm does not constitute "malice" in the

\textsuperscript{148} See Note, 75 Yale L.J., supra note 56, at 656 for various examples of the types of factual analysis likely to be involved.
\textsuperscript{149} Indeed, it has been suggested that affording too broad a privilege in this area would discourage able people from participating in public affairs, because they would be deprived of all character protection. See Note, 35 U. Cin. L. Rev. 685, 89-90 (1966).
\textsuperscript{150} Accord, authorities cited in notes 131 and 137 supra.
\textsuperscript{152} See note 30 supra, and accompanying text.
\textsuperscript{153} See, e.g., Garrison v. Louisiana, 379 U.S. at 75.
times sense. Rather, there must exist "an intent to inflict harm through falsehood." 154

Quite recently, the Supreme Court had occasion to emphasize the crucial nature of the falsehood factor once again. In the recent case of St. Amant v. Thompson, 155 state courts had found that the defendant, a candidate for public office, had falsely stated that a union official had passed bribes to the plaintiff, a deputy sheriff, with complete indifference to the statement's effect on the reputation and career of the plaintiff and without checking beyond the original source. The state courts had held that this constituted reckless disregard of the truth, and thus, actual malice under New York Times. The Supreme Court disagreed, holding that a mere lack of conviction by the defendant of the truth of his statements, that is, a more or less neutral state of mind in that regard, is insufficient to constitute actual malice. Rather, said the Court, the plaintiff must adduce "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." 156

Although, as the Court acknowledged, this approach might seem to put "a premium on ignorance" 157 in the sense that it implies that what the attacker of a public official or public personage doesn't know can't hurt him, it is submitted that such an approach is necessary if the first amendment values previously discussed in this article are to be adequately protected under modern conditions. Further, this latest interpretation of New York Times malice standards confirms the interpretations given them by the lower courts during the development of the Times doctrine. Even under the standards prescribed in St. Amant, the defamed public official or public figure should still be able to prove actual malice, if in fact such a state of mind existed. This is not to say that the burden he must meet is not a heavy one, but several approaches still remain open to him.

The heart of St. Amant is that there must be evidence that demonstrates that the defendant knew what he said was false or was aware of some factor which actually and in fact raised "serious doubts" in his mind that what he said was true. In other

154 Id. at 73.
156 Id. at 4334.
words, the defendant’s actual state of mind is the key; it is not what he should—in the exercise of due care or otherwise—have believed about the truth of his statements, but what he in fact did believe about them, that counts. Therefore, in the unlikely event that the defendant admits he knew what he said was false, the burden of proof is met. However, few cases have been, or are likely to be that simple. The cases cited in this article show that few actions involve knowing falsehood. It is the reckless disregard of the truth half of the actual malice definition that comes into play most often.

As of this writing, the considerations in determining proof of actual malice are as follows: It is quite clear that failure to make an investigation does not in itself constitute sufficient recklessness to satisfy the standard, though it may be relevant if other factors are present. One such factor is the nature of the publication itself. As the Court points out in *St. Amant, Butts* illustrates that if, because of their obvious scurrility or some other reason, the publisher’s allegations are “so inherently improbable that only a reckless man would have put them in circulation,” checking beyond the first source of the story is required.

A look at the facts of some of the Supreme Court decisions illustrates how the kind of the publication affects the type of checking necessary. In *New York Times* itself, where it was not even apparent that the publication had anything to do with the plaintiff at all, no checking whatever was required. At the other extreme, in *Butts*, where the charges were extremely serious and the source unreliable, an independent verification was required. Occupying a middle ground is *St. Amant*, where the charges, although serious, were not inherently improbable. Here, the Court held, the sworn statement of one previously reliable source, with-

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158 Therefore, an assertion of opinion, if based upon a view of the facts arrived at by methods not constituting actual malice under the standards herein discussed, should always be constitutionally protected. See Oswalt v. State Record Co., 158 S.E.2d 204 (S. C. 1967).


out further checking was sufficient, but it indicated that making a similar charge on the basis of a grossly unreliable source, such as an anonymous phone call, or fabricating such a charge out of whole cloth would have constituted reckless disregard of the truth.163

If checking is required, how far must it go? If the publisher has actually obtained information, to ignore competent evidence contrary to the defamatory statements made, while giving undue weight to questionable evidence supporting such statements, are indications that the publisher in fact entertains serious doubts as to the truth of what he is saying and that calumny was the underlying motive for the publication.164 On the other hand, if there was some reliable source for the erroneous statements made, actual malice probably does not exist, even though not all possible sources were checked, or those that were checked had biased views.165 As pointed out above, if the matter is not inherently improbable on its face, no checking at all is required. And, if checking is necessary, the effort required bears an inverse ratio to the "hot news" value of the subject matter of the publication.166

But, above all, it must be remembered that the burden of proving actual malice by evidence of "convincing clarity" is on the plaintiff unassisted by presumptions based on falsity.167 More must be shown than that the defendant spoke on the basis of sketchy evidence of the truth of his statements. Plaintiff must prove that the defendant in fact seriously doubted the truth of what he said.168 Therefore, more should be required than mere proof that incorrect statements were made by the defendant, that he did not know the plaintiff, had no personal knowledge of the subject matter of the statements, opposed the plaintiff politically,169 or had been

163 Id.
engaged in a long standing dispute with him.\textsuperscript{170}

The series of cases culminating with \textit{St. Amant} have pretty well filled in the details of actual malice first sketched in outline by \textit{New York Times} and \textit{Garrison}. Guided by the considerations found in these cases, and by the standards of the publishing industry itself, courts should have no great difficulty in filling in the remaining details of the portrait on a case by case basis.

VI. \textsc{New York Times} Tomorrow: Beyond Defamation

Professor Kalven has suggested that \textit{New York Times} may be "a seminal case in that it gave a reading to the first amendment that can properly guide the Court in cases not involving libel of public officials."\textsuperscript{171} A significant step in that direction was taken in \textit{Pickering v. Board of Education},\textsuperscript{172} in which the Court held that a teacher could not, under ordinary circumstances not involving a confidential relationship with his superiors, be discharged for untrue statements which were critical of the administration of the school district on matters of public interest, unless such statements constituted actual malice in the \textit{New York Times} sense.

The case is significant as a culmination of a series of cases developing the rule that teachers and other public employees may not "be compelled to relinquish the first amendment rights they would otherwise enjoy as citizens"\textsuperscript{173} as a condition to public employment.\textsuperscript{174} But for our purposes it is more significant in that it seems to extend the \textit{Times} doctrine to all cases where truth or falsity of speech concerning matters of public interest is at issue, not just those involving claims for damages to reputation or violation for the right of privacy. It would also seem to be a reaffirmation of the proposition that seditious libel is the key to the central meaning of the first amendment.\textsuperscript{175}

In the four years between \textit{New York Times v. Sullivan} and

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\textsuperscript{172} 36 U.S.L.W. 4495 (U.S. June 3, 1968).
\textsuperscript{173} Id. at 4496.
\end{flushright}
St. Amant v. Thompson and Pickering v. Board of Education, the Supreme Court has designed a viable approach to the problem of resolving the conflict between first amendment freedoms and the protection of individual interests of reputation and privacy. The actual malice test of New York Times, as expounded in St. Amant, is both consistent with first amendment theory and understandable and workable on a practical level in the nation's trial courtrooms. The only problem remaining in adding the final touches to the text of the New York Times doctrine is the treatment to be afforded public figures. This problem may already have been solved, since a close analysis of Butts-Walker reveals that a majority of the justices favor the salutary approach of applying the actual malice test of New York Times, rather than the gross negligence test adduced by four of the justices in that case, to public figures as well as public officials. It is hoped that when the Supreme Court has occasion to speak again on the status of public figures, it will unequivocally adopt the actual malice test for public figures once and for all. If and when this has been done, a new chapter in the history of the development of our Constitution will be all but completed, and a subsequent chapter, introduced by Pickering, will have begun.