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## Constitutional Law - Privileges from Libel - New York Times Co. v. Sullivan: Defined or Shackled

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## CONSTITUTIONAL LAW—PRIVILEGES FROM LIBEL—NEW YORK TIMES CO. v. SULLIVAN: DEFINED OR SHACKLED?

Prior to the 1960 New Hampshire Democratic primary election, the Concord Monitor, a daily newspaper in the state, published a column characterizing Roselle Roy, a senatorial candidate, as being a "former small-time bootlegger." Roy sued for libel. The state trial judge instructed the jury that, as a candidate, Roy is a public official and within the *New York Times Co. v. Sullivan*<sup>1</sup> rule of "actual malice." But the judge further stated that this rule applied only to statements directed at Roy's "public sector," and it was for the jury to decide whether the article was directed at his "public sector" or his "private sector" by a probability of the evidence. No evidence was introduced showing known falsehood or recklessness of the truth on the part of the newspaper. The jury returned a verdict for the plaintiff, and the state supreme court affirmed on the ground that it was proper for the jury to decide the relevancy of the charge to the plaintiff's fitness for office. The United States Supreme Court reversed and remanded the case to the trial court. It held, as a matter of constitutional law, that a charge of criminal conduct, no matter how remote in time and place, can never be irrelevant to an official's or a candidate's fitness for office for the purpose of applying the *New York Times Co. v. Sullivan* rule of "actual malice." *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

On April 18, 1966 the Ocala Star-Banner, a rural Florida newspaper, published an article stating that Leonard Damron, a local mayor and candidate for county office, had recently been indicted in a federal court for perjury. Damron sued for libel. At the trial, the newspaper entered evidence showing the charge was true as to a relative of the plaintiff, but that a new editor had inadvertently mixed up their names. Damron entered contrary evidence as to this allegation of mistake by the newspaper. The trial court awarded Damron a directed verdict on the issue of liability. The trial court held, and the appellate court affirmed, that the perjury charge is a private libel, and as such is not within the *New York Times Co. v. Sullivan* rule. The United States Supreme Court reversed and remanded the case to the trial court. The Court held that a perjury charge against a local mayor and candidate for county office is relevant to his fitness for office for the purpose of applying the *New York Times Co. v. Sullivan* rule of "actual malice." *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971).

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1. 376 U.S. 254 (1964).

The immediate significance of these companion decisions lies in that they represent the broadest interpretation which the United States Supreme Court has yet given to the concept of "official conduct" within the *New York Times* rule. Of underlying and greater significance is that, through these decisions, the Supreme Court appears to have again refused to extend the *New York Times* protections to the ambit of legitimate public interest alone. The purposes of this case note will be to examine these decisions in terms of the development of the doctrine of constitutional privileges of fair comment, and to assess their impact in light of post *New York Times* trends.

At common law, slander was first treated as a sin, and one's remedy was found in the ecclesiastical courts.<sup>2</sup> Libel developed originally as a crime of inciting a breach of the peace rather than as a tortious injury to an individual's reputation.<sup>3</sup> Both eventually formed the concept of defamation, which reflects the interest society has in protecting the reputation of its members.<sup>4</sup> This interest, while strong, can be subordinated to other interests which society deems to be of equal or greater importance than the injury done to one's standing within it.<sup>5</sup> These other interests, or privileges, are formulated on the premise that, before the defamer will be allowed to use them, he must show that the reason for the injury he has done to another is of greater importance than the injury inflicted for which compensation is sought.<sup>6</sup> Traditionally, these privileges have been grouped into two basic areas: absolute privilege and conditional or qualified privilege<sup>7</sup>—absolute being indefeasible, and conditional being defeasible on its abuse by the defamer.<sup>8</sup> Conditional privilege can be divested from the defamer who extends his comments either to one not sharing his interest in them or to areas beyond his interest, or who comments for an improper purpose.<sup>9</sup> The defamer's interest may be his own, a third party's, a common interest, or a public interest; and, if not abused, it affords a defense to liability.<sup>10</sup> A public interest may be divided into two categories. One is the right and duty of each member of the public to communicate a wide scope of information to proper authorities when necessary. An example is the duty to report suspected misconduct of a public employee to his su-

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2. PROSSER, *TORTS* 755 (3rd ed. 1964).

3. *Id.* at 823.

4. *Id.* at 754.

5. *Id.* at 805.

6. Veeder, *Freedom of Public Discussion*, 23 *HARV. L. REV.* 413, 427 (1910).

7. PROSSER, *supra* note 2, at 796 and 805.

8. *Id.* at 823.

9. *Id.* at 819.

10. *Id.* at 821.

perior. The other area of public interest is the right of each person, individually and collectively, to discuss matters which have presented themselves before the public and which affect the public. This latter qualified privilege has come to be known as the right of fair comment.<sup>11</sup> Having by its nature a broadness in range of publication, it conversely had a limited scope of subject matter.<sup>12</sup>

For fair comment to constitute a valid defense to defamatory liability it had to be exercised within its prescribed bounds. Since it extended only to that which was the legitimate concern of the public, any comment outside the bounds of that concern was not protected.<sup>13</sup> Policies of government, acts of public officials and candidates, persons or things offered for public acceptance, and noteworthy events and those involved in them were proper subjects of comment and opinion.<sup>14</sup> However, comment had to be restricted to the public nature of these individuals; and, opinion, while limited to the same public scope, also had to be drawn from inferences based on facts truly stated. Hence, an opinion concerning an area of legitimate public concern was not protected if its factual basis was in error,<sup>15</sup> while an opinion drawn on an unreasonable inference from facts truly stated was within the privilege of fair comment.<sup>16</sup> Thus, it may be seen that the common law placed more emphasis on preventing untrue facts from entering public discussion than on preventing poorly founded opinion. In common law England, misstatements of fact were never privileged<sup>17</sup> and invariably they undermined any defense pertaining to them. On the other hand, since truth was deemed an absolute defense, there was no loss of privilege for publishing truthful material which was subsequently misconstrued.<sup>18</sup>

American courts paralleled their English counterparts in their application of libel and slander, and even attempted a brief imitation of the Star Chamber<sup>19</sup> activities with the passage of the Alien and Sedition Act of 1798.<sup>20</sup>

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11. *Id.* at 812.

12. *Id.* at 811.

13. *Id.* at 812.

14. *Id.* at 813.

15. *Wason v. Walter*, L.R. 4 Q.B. 73, 96 (1868).

16. *Id.*

17. *See Walker v. Hodgson*, [1909] 1 K.B. 239; *Wisdom v. Brown*, 1 T.L.R. 412 (Q.B. 1885); *George v. Goddard*, 175 Eng. Rep. 1242 (Q.B. 1861).

18. *Supra* note 7, at 825. *See also* RESTATEMENT (FIRST) OF TORTS, §§ 593-612 (1934).

19. Originally treated exclusively as a crime, libel was tried in the English Star Chamber. This institution used it as a convenient means to suppress sedition. PROSSER, *supra* note 2.

20. Act of July 14, 1798, ch. 74, 1 Stat. 596. Expired by its own terms in 1801.

On the question of whether privilege should be extended to misstatements of fact, the courts were divided; a majority held that they were not protected,<sup>21</sup> while the minority allowed such protection if they were published in good faith.<sup>22</sup> In 1845 the United States Supreme Court specifically decided, in *White v. Nicholls*,<sup>23</sup> that misstatements of fact are not within the privilege of fair comment. The plaintiff, a federal official, was accused, in a series of letters, of having used his position for personal gain. The Court said a public official or candidate puts his character in issue, and any honest intent to inform the public of his fitness for office was privileged.<sup>24</sup> However, the court stated:

[T]he publication of falsehood and calumny against public officers, or candidates for public offices, is an offense dangerous to the people, and deserves punishment, because the people may be deceived, and reject their best citizens, to their great injury, and, it may be to the loss of their liberties.<sup>25</sup>

Justice Holmes gave the majority view its definitive state court arguments

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21. See *Alabama*: *Starks v. Comer*, 190 Ala. 245, 67 So. 440 (1914); *Arizona*: *Arizona Publishing Co. v. Harris*, 20 Ariz. 446, 181 P. 373 (1919); *Delaware*: *Star Publishing Co. v. Danahoe*, 58 A. 513 (Del. 1904); *Illinois*: *Proesel v. Myers Publishing Co.*, 24 Ill. App. 2d 501, 165 N.E.2d 352 (1960); *Kentucky*: *Tipton v. Rains*, 228 Ky. 677, 15 S.W.2d 496 (1929); *Maine*: *Patangall v. Mooers*, 113 Me. 412, 94 A. 561 (1915); *Maryland*: *Negley v. Farrow*, 60 Md. 158, 45 Am. Dec. 715 (1882); *Massachusetts*: *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891); *Michigan*: *Moore v. Booth Publishing Co.*, 216 Mich. 653, 185 N.W. 780 (1921); *Missouri*: *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (1934); *New Jersey*: *Lindsey v. Evening Journal Ass'n*, 10 N.J. Misc. 1275, 163 A. 245 (1932); *New York*: *Hamilton v. Eno*, 81 N.Y. 116 (1880); *Ohio*: *Post Publishing Co. v. Moloney*, 50 Ohio St. 71, 33 N.E. 921 (1893); *Oklahoma*: *Lindley v. Delman*, 166 Okla. 165, 26 P.2d 751 (1933); *Oregon*: *Peck v. Coos Bay Times Publishing Co.*, 122 Ore. 408, 259 P. 307 (1927); *South Carolina*: *Jackson v. Record Publishing Co.*, 178 S.E. 833 (1935); *Texas*: *Fort Worth Press Co. v. Davis*, 96 S.W.2d 416 (Tex. Civ. App. 1936); *Virginia*: *Williams Printing Co. v. Saunders*, 113 Va. 156, 73 S.E. 472 (1912); *Washington*: *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P.2d 847 (1933); *Wisconsin*: *Finnegan v. Eagle Printing Co.*, 173 Wis. 5, 179 N.W. 788 (1920).

22. See *California*: *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1921); *Iowa*: *Salinger v. Cowles*, 195 Iowa 873, 191 N.W. 167 (1922); *Kansas*: *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908); *Minnesota*: *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925); *New Hampshire*: *Lafferty v. Houlihan*, 81 N.H. 67, 121 A. 92 (1923); *North Carolina*: *Lewis v. Carr*, 178 N.C. 578, 101 S.E. 97 (1919); *Pennsylvania*: *Mulderig v. Wilkes-Barre Times*, 215 Pa. 470, 64 A. 636 (1906); *South Dakota*: *McLean v. Merriman*, 42 S.D. 394, 175 N.W. 878 (1920); *Utah*: *Williams v. Standard-Examiner Publishing Co.*, 83 Utah 31, 27 P.2d 1 (1933); *Vermont*: *Posnett v. Marble*, 62 Vt. 481, 20 A. 813 (1890); *West Virginia*: *Swearingen v. Parkersburg Sentinel Co.*, 125 W. Va. 731, 26 S.E.2d 209 (1943).

23. 44 U.S. 266 (1845).

24. *Id.* at 289.

25. *Id.* at 289.

in *Burt v. Advertiser Newspaper Co.*<sup>26</sup> in 1891. A series of four newspaper articles had accused an official with the New York Customs House of engaging in fraud and bribery to reduce the tariff on imported sugar. Holmes held that so far as the articles contained false statements of fact, they were not privileged.<sup>27</sup> Expounding on the issue, he added:

[W]hat is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libellous, he will not be privileged if those facts are not true, . . .<sup>28</sup>

and

it is not a justification that the defendant had reasonable cause to believe its charges to be true. A person publishes libellous matter at his peril.<sup>29</sup>

The definitive federal argument for the majority view was set out in *Post Publishing Co. v. Hallam*<sup>30</sup> in 1893. An article had accused a candidate for Congress of selling out his delegate support at a state convention in return for his opponent paying his campaign expenses. The court rejected the minority doctrine as doing the public more harm than good. Here the court stated what became the major criticism of the minority view:

[T]he danger that honorable and worthy men may be driven from . . . public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof.<sup>31</sup>

An Ohio court echoed this argument in *Post Publishing Co. v. Maloney*,<sup>32</sup> involving articles accusing a city policeman of having a criminal record. In a 1936 case, *Washington Times Co. v. Bonner*,<sup>33</sup> involving charges of

26. 154 Mass. 238, 28 N.E. 1 (1891).

27. *Id.* at 244, 28 N.E. at 5.

28. *Id.* at 242, 28 N.E. at 4.

29. *Id.* at 245, 28 N.E. at 5.

30. 59 F. 530 (6th Cir. 1893).

31. *Id.* at 541.

32. 50 Ohio St. 71, 89, 33 N.E. 921, 926 (1893): "To hold otherwise, would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation; and thus defeat the object of the rule contended for, and overturn the reason upon which it is sought to sustain it."

33. 86 F.2d 836 (1936), where the court stated: "[T]he great weight of authority in the state courts, and the rule in the Federal courts, is to the contrary—that the right of fair comment does not extend to misstatements of fact." *Id.* at 842. *But see* *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), wherein the circuit court in dismissing plaintiff's libel complaint for alleging only libel per quod, and failing to indicate special damages stated misstatements of fact are not actionable: "so long as no charge of crime, corruption, gross immorality or gross incompetency is made and no special damage results." *Id.* at 458.

influence peddling by an officer of the Federal Power Commission, the circuit court of appeals, after liberally quoting from the *Burt* and *Hallam* cases, emphasized that the predominant view on the question of privilege for false statements of fact had not changed.

The minority view of state court decisions following the "liberal doctrine" is best exemplified by *Coleman v. MacLennan*.<sup>34</sup> A charge by a newspaper that the incumbent attorney general had been involved in misappropriation of school funds resulted in a libel suit. It was ruled that where misstatements of fact are published in good faith, with an honest belief in their truth and the necessity for the protection of the public, they are privileged, even though injury is caused.<sup>35</sup> The court's rationale is that the importance and advantage of public discussion is so "vast" that it "more than counterbalanced" the injury to the individual which may be great.<sup>36</sup> The court reviewed and rejected the arguments for the more narrow doctrine found in the *Hallam* case and reiterated in others. It stated that in Kansas no one has been driven from public office by the "liberal" rule, and qualified men continue to apply for office.<sup>37</sup> The court added:

Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles.<sup>38</sup>

The court further stated:

It must apply to all officers and agents of government—municipal, state and national; to the management of all public institutions—educational, charitable and penal; to the conduct of all corporate enterprises affected with a public interest—transportation, banking, insurance, and to innumerable other subjects involving the public welfare.<sup>39</sup>

This statement foreshadowed things to come.

California adopted the "liberal" doctrine as a result of *Snively v. Record Publishing Co.*,<sup>40</sup> a case which overruled the state's prior cases applying the majority rule. The facts involved the publication of an editorial car-

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34. 78 Kan. 711, 98 P. 281 (1908).

35. *Id.* at 722, 98 P. at 285. See *Kansas v. Balch*, 31 Kan. 465, 2 P. 609 (1884), where it was held that charging an official with vote fraud was privileged if published in good faith with an honest belief in its truth.

36. *Coleman v. MacLennan*, *supra* note 34, at 724, 98 P. at 286.

37. *Supra* note 34, at 733, 98 P. at 288.

38. *Supra* note 34, at 739, 98 P. at 291.

39. *Supra* note 34, at 734, 98 P. at 289.

40. 185 Cal. 565, 198 P. 1 (1921).

toon representing the Los Angeles police chief as a graft-taking public thief. The court held that the rights of newspapers are no different from the rights of any other citizen,<sup>41</sup> adding:

When under these conditions he honestly believes that the person of whom he speaks or writes is guilty of a crime of a nature that makes the fact material to the interests of those whom he addresses, it is as much his right and duty to declare to them that fact as it would be to tell them any other fact pertinent to the occasion and material to their interests.<sup>42</sup>

All of the minority states removed the privilege of the "liberal" doctrine upon a showing that the publication was the result of express malice. This was not the implied or fictional malice that the common law attributed to an unprivileged defamatory publication, but was the evil mind, spite, or ill will that motivated the publication,<sup>43</sup> as shown by convincing evidence. Hence, on the issue of liability for false statements of fact, American courts held either that there was no defense, or there was a qualified defense, given good faith and honest belief.

Prior to 1964, defamation was held to be outside the sphere of protection afforded by the first amendment. While broad in their protection, guarantees of free speech and press are not absolutes.<sup>44</sup> In 1941, the United States Supreme Court, in *Chaplinsky v. New Hampshire*,<sup>45</sup> a case turning on the constitutionality of a state law prohibiting the offensive addressing of another in public, enumerated types of speech outside constitutional protection:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>46</sup>

The value of a strong and uninhibited press was not lost on the Supreme Court. In *Stromberg v. California*<sup>47</sup> the Court stated that free political

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41. *Id.* at 571, 198 P. at 3.

42. *Id.* at 576, 198 P. at 5.

43. PROSSER, *supra* note 2, at 821.

44. FORKOSCH, CONSTITUTIONAL LAW 436 (2d ed. 1963). See generally Roth v. United States, 354 U.S. 476 (1957); Near v. Minnesota, 283 U.S. 697 (1931); Robertson v. Baldwin, 165 U.S. 275 (1897).

45. 315 U.S. 568 (1942).

46. *Id.* at 571-72. *Accord* Beauharnais v. Illinois, 343 U.S. 250 (1952). The Court, in upholding a state law prohibiting race or ethnic libel, stated: "Libelous utterances [are] not . . . within the area of constitutionally protected speech . . . ." *Id.* at 266.

47. 283 U.S. 359 (1931).



speech, in order to make government responsive to the will of the people, is fundamental to our system of government.<sup>48</sup> Again in *Grosjean v. American Press Co.*,<sup>49</sup> where a state law attempted to tax newspapers over a certain circulation size, the Court stated that to "fetter" the press is to "fetter" ourselves.<sup>50</sup>

[I]nformed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.<sup>51</sup>

Thus the Supreme Court, while stating that an unbridled press constituted one of the most important elements in the efficient workings of our society, held that libel and slander were outside the guaranteed free speech protections. Coupled with the fact that the Court adhered to the majority's narrow view that misstatements of fact are privileged,<sup>52</sup> it can be surmised that the Court felt the latter was in no way inhibitive of the free exercise of constitutional guarantees. A change of perspective would come with the advent of *New York Times Co. v. Sullivan*.<sup>53</sup>

The New York Times published a paid advertisement which accused the police of an Alabama city of harassment tactics and arrests in reprisal for a civil rights demonstration held there. Some of these charges were untrue, as a review of the newspaper's own files had shown. One of the commissioners of the city sued the New York Times, alleging that there was enough of a colloquium in the advertisement to defame him. The Supreme Court of the United States reversed the plaintiff's verdict holding: 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.<sup>54</sup>

The Court concluded that the prior majority rule as to privilege and false statements was an infringement on first amendment rights,<sup>55</sup> and, to the extent that a public official is criticized in his official conduct, adopted the minority "liberal" doctrine as a matter of constitutional law, explaining that "a rule compelling the critic of official conduct to guarantee the truth of all

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48. *Id.* at 369.

49. 297 U.S. 233 (1936).

50. *Id.* at 250.

51. *Id.*

52. *Supra* note 25.

53. 376 U.S. 254 (1964).

54. *Id.* at 279-80.

55. *Id.* at 279.

his factual assertions—and to do so on pain of libel judgments . . . —leads to a comparable ‘self-censorship.’”<sup>56</sup>

Writers have commented that the *Times* case has established a middle ground between the absolute right of seditious libel and the protection of individual reputation.<sup>57</sup> They also have pointed to the fact that the *Times* case did not define its terms “official conduct,” “public official,” and “reckless disregard.” Federal and state court case law soon began narrowing the concept of “public official” to include a presidential candidate,<sup>58</sup> a public assessor,<sup>59</sup> a chairman of a county political organization,<sup>60</sup> a state’s attorney general,<sup>61</sup> a city attorney,<sup>62</sup> a city policeman,<sup>63</sup> an elected member of a local school board,<sup>64</sup> and a principal of a school.<sup>65</sup> In *Garrison v. Louisiana*,<sup>66</sup> a parish prosecutor was convicted under state criminal libel law for his remarks that eight judges were lazy, inefficient, indifferent to vice, and subject to “racketeering” influence. Holding the *Times* case applicable to criminal libel<sup>67</sup> the United States Supreme Court further defined “official conduct”:

[A]nything which might touch on an official’s fitness for office is relevant. . . . [f]ew more [things are] germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these . . . may also effect [his] private character.<sup>68</sup>

“Reckless disregard” was further defined as “the high degree of awareness of their probable falsity. . . .”<sup>69</sup> Whether the *Times* case standards ap-

56. *Id.*

57. Bertelsman, *The First Amendment and Protection of Reputation and Privacy—New York Times Co. v. Sullivan and How It Grew*, 56 KY. L.J. 718, 741 (1968).

58. *Goldwater v. Ginsberg*, 261 F. Supp. 784 (S.D. N.Y. 1966).

59. *Eadie v. Pole*, 91 N.J. Super. 504, 221 A.2d 547 (1966).

60. *McNabb v. Tennessean Newspapers, Inc.*, 55 Tenn. App. 380, 400 S.W.2d 871 (1965).

61. *Phoenix Newspaper, Inc. v. Church*, 103 Ariz. 582, 447 P.2d 840 (1968).

62. *Tunnell v. Edwardsville Intelligencer, Inc.*, 99 Ill. App.2d 1, 241 N.E.2d 28 (1968).

63. *Causey v. Greater Niles Twp. Publishing Corp.*, 40 Ill.2d 257, 239 N.E.2d 837 (1968).

64. *Cabin v. Community Newspapers, Inc.*, 27 App. Div.2d 543, 275 N.Y.S.2d 396 (1966).

65. *Reaves v. Foster*, 200 So. 2d 453 (Miss. 1967).

66. 379 U.S. 64 (1964).

67. *Id.* at 67.

68. *Id.* at 77.

69. *Id.* at 74. See *Henry v. Collins*, 380 U.S. 356 (1964), where the Court reversed the plaintiff’s verdict in a libel action on the basis that the jury was instructed on intent to do harm rather than intent to do harm through falsehood;

plied to a former county resort manager was the issue in *Rosenblatt v. Baer*.<sup>70</sup> The Supreme Court again refined its *Times* case terms, holding:

[T]he "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.<sup>71</sup>

The case was remanded to the trial court for a hearing in accordance with this refinement. With *Garrison* and *Rosenblatt*, the Court began a gradual expansion of the application of the *Times* rule, and a further delineation of its terms.

In 1966 and 1967 the Supreme Court decided two cases which have proved difficult to reconcile with past and recent cases of a similar nature. *Linn v. Plant Guard Workers*<sup>72</sup> concerned statements made about the plaintiff, a union member, in the midst of a union dispute. Though the plaintiff was nothing more than a private individual involved in a noteworthy labor dispute, the Court ruled he was subject to the *Times* standards of "actual malice."<sup>73</sup> *Time, Inc. v. Hill*<sup>74</sup> was an invasion of privacy suit. The plaintiff and his family had been involved in a famous incident concerning escaped convicts. The true facts were fictionalized into a stage play, which the defendant's article represented to be the true facts. Again the Court held this individual subject to the *Times* case standard:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs. . . . [e]xposure of self to others in varying degrees is a concomitant of life. . . . The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press.<sup>75</sup>

These two cases appear to replace the *Times* case ambit and turn only on the question of public issue.<sup>76</sup> However, neither have been followed by the Court in subsequent decisions.

*Curtis Publishing Co. v. Butts*<sup>77</sup> was also decided in 1967. Two separate cases were consolidated by the Court and decided together. The *Butts* case arose out of an accusation that the plaintiff, a university football

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St. Amant v. Thompson, 390 U.S. 727 (1968), where the Court, in reversing a libel judgment for a police chief, defined reckless disregard as the entertainment of "serious doubts" as to the truth of a statement.

70. 383 U.S. 75 (1965).

71. *Id.* at 85.

72. 383 U.S. 53 (1966).

73. *Id.* at 62-3.

74. 385 U.S. 374 (1967).

75. *Id.* at 388.

76. Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 402 (1969).

77. 388 U.S. 130 (1967).

coach, had conspired with a rival coach to "fix" a game. The *Walker* case involved a press dispatch stating that the plaintiff, a prominent former army officer, had incited and led rioters against federal marshals at the integration of a Southern university. Four justices reached a plurality decision holding both Butts and Walker to be "public figures," as opposed to "public officials," and as such could recover upon a showing of "highly unreasonable conduct constituting an extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers."<sup>78</sup> This was something less than the "actual malice" test and amounts to recovery based on gross negligence. Three justices ruled that the "actual malice" test should apply to "public figures" as well as "public officials." And two justices ruled that, where questions of public concern are involved, the privilege from liability should be absolute.<sup>79</sup> Hence five of nine justices stated the test for "public figures" should be "actual malice" or greater. Consequently, the plurality decision cannot be considered as controlling.<sup>80</sup> As in the *Times* case, the Court here again left undecided who is a "public figure." Upon the premise that a public figure is one who has "thrust" himself into the "vortex of the discussion of a pressing public concern,"<sup>81</sup> lower federal and state courts have held an outspoken scientist,<sup>82</sup> a vociferous critic of urban renewal,<sup>83</sup> an author,<sup>84</sup> and the chairman of a conservative political party<sup>85</sup> to be "public figures."

The 1968 decision of *Pickering v. Bd. of Education*,<sup>86</sup> like the *Linn* and the *Hill* cases, appears to be a departure from precedent. Plaintiff, a teacher, through a letter to a newspaper, criticized the local school board for mismanagement of tax revenue. The charges were in error and he

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78. *Id.* at 155.

79. *Id.* at 172.

80. Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 S. Ct. Rev. 267, 307.

81. Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 195 (8th Cir. 1966). See Pauling v. News Syndicate Co., 335 F.2d 659 (2nd Cir. 1964).

82. Pauling v. Globe-Democrat, *supra* note 81, at 188.

83. Beatty v. Ellings, 285 Minn. 293, 173 N.W.2d 12 (1969).

84. Dacey v. Florida Bar, Inc., 427 F.2d 1292 (4th Cir. 1970).

85. Tait v. King Broadcasting Co., 460 P.2d 307 (Wash. App. 1969). Others finding plaintiff a "public figure" have refused to apply the *Times* rule because of the plaintiff's limited access to media for rebuttal. See Dempsey v. Times, Inc., 43 Misc. 2d 754, 252 N.Y.S.2d 186 (1964) (a prizefighter); Faulk v. Aware, Inc., 14 N.Y.2d 954, 202 N.E.2d 372 (1964), *cert. denied* 380 U.S. 916 (1964) (a radio performer); Lorellard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 213 N.E.2d 1 (1965) (a socialite); Fignole v. Curtis Publishing Co., 247 F. Supp. 595 (S.D. N.Y. 1965) (a citizen prominent in foreign country only).

86. 391 U.S. 563 (1968).

was shortly thereafter fired. In his suit to regain his position the Court held:

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.<sup>87</sup>

Once again the Court appears to have lowered its level of constitutional protection to the public issue strata. If, however, the Court wished to definitively state such, an ample opportunity was presented in *Greenbelt Pub. Ass'n. v. Bresler*.<sup>88</sup> Plaintiff, a state legislator and prominent real estate developer, owned property which a local city wished to use for school facilities. The defendant's article reported events at a city council meeting in which officials negotiated with Bresler on the terms for the sale of the parcel. One official was quoted in the article as stating Bresler was "blackmailing" the city. He sued, stating that the article had accused him of a crime. By way of reference the Court said: "There can be no question that the public debates at the sessions . . . regarding Bresler's negotiations with the city were a subject of substantial concern to all who lived in the community."<sup>89</sup> But the Court then proceeded to rule that, as a prominent developer, Bresler was a "public figure."<sup>90</sup> The case eventually turned on the ruling that the word "blackmail," in the context in which it was reported, could not constitutionally be deemed libel.<sup>91</sup>

While the Supreme Court showed reluctance to extend the first amendment protections to questions of public concern, regardless of the standing of the parties, the lower federal courts, and two state courts, were not. A New York court in *All Diet Food Distributors, Inc. v. Time, Inc.*,<sup>92</sup> held that the defendant's article, which mentioned plaintiff's store, was an exposé of "food fads and frauds," and therefore was privileged. The court stated that the subject matter was one of considerable public concern, and the motivation for publication was the disclosure of an important matter of public interest.<sup>93</sup>

The United States Court of Appeals for the Ninth Circuit held, in *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*,<sup>94</sup> that

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87. *Id.* at 574.

88. 398 U.S. 6 (1970).

89. *Id.* at 13.

90. *Id.* at 9.

91. *Id.* at 13.

92. 56 Misc. 2d 821, 290 N.Y.S.2d 445 (1967).

93. *Id.* at 824, 290 N.Y.S.2d at 448.

94. 404 F.2d 706 (9th Cir. 1968).

an exposé of the health menace caused by the plaintiff's inaccuracies in public testing was privileged:

[T]he area of public interest to which they relate . . . would seem to us to be one of such inherent public concern and stake that there could be no possible question as to the applicability of the *New York Times* standard. . . .<sup>95</sup>

Justifying its extension of the "actual malice" rule to questions of public issue, the court stated that the *Times* case was a guideline for further development and not an outer limit on constitutional protections.<sup>96</sup> *Bon Air Hotel, Inc. v. Time, Inc.*<sup>97</sup> reiterated this view. In this case the defendant's article characterizing a hotel as providing poor service while charging exorbitant prices was deemed within the *Times* rule. Here the court of appeals specifically affirmed the district court's ruling that the "actual malice" test applies regardless of whether a "public figure" or "official" is involved.<sup>98</sup> Again, in *Wasserman v. Time, Inc.*<sup>99</sup> a charge that an attorney who succeeded in obtaining his client's release from arrest had in fact been arrested with him was ruled to be privileged. Even though the attorney was not a public official, the court of appeals held that he was involved in a matter of public concern and therefore subject to the *Times* rule.<sup>100</sup> Other federal courts have followed this interpretation.<sup>101</sup>

Significantly, the *Monitor* and *Ocala* decisions have given the concept of "official conduct" its broadest application to date. By holding that a charge of criminal conduct is always "relevant" to an official's or candidate's fitness for office, the Court has given color to the outline of "official conduct" it drew in the *Garrison*<sup>102</sup> case. However, in its dictum, the Court has for practical purposes made the term all inclusive:

Indeed, whatever vitality the "official conduct" concept may retain with regard to occupants of public office . . . it is clearly of little applicability in the context of an election campaign . . . . [i]t is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks.<sup>103</sup>

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95. *Id.* at 711.

96. *Id.* at 710.

97. 295 F. Supp. 704 (S.D. Geo. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970).

98. *Id.* at 708.

99. 424 F.2d 920 (D.C. Cir. 1970).

100. *Id.* at 922.

101. *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969); *Arizona Biochemical Co. v. Hearst Corp.*, 302 F. Supp. 412 (S.D. N.Y. 1969); *Cerrito v. Time, Inc.*, 302 F. Supp. 1071 (N.D. Cal. 1969); *DeSalvo v. Twentieth Century-Fox Film Corp.*, 300 F. Supp. 742 (D. Mass. 1969); *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.*, 286 F. Supp. 899 (W.D. Penn. 1968); *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

102. *Supra* at note 66.

103. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274-75 (1971).

The Court continued, stating that whether there remains some area of defamation to which a candidate might have "full recourse" was not in issue.<sup>104</sup> The principal activity of a candidate consists in pressing before the electorate every conceivable aspect of his public and private life which he feels may exemplify his qualifications. Hence, a candidate who offers his spotless record and "sterling integrity" cannot object when others attempt to demonstrate the contrary.<sup>105</sup> It should be realized that the Court specifically included "public officials" within its "relevancy" standard in both the *Monitor* and *Ocala* cases.<sup>106</sup> By these decisions the Court has expanded the "official conduct" term to a greater extent than in any previous case it has decided.

As has previously been stated, many courts have replaced the person-orientated *Times* rule with one predicated on mere public concern.<sup>107</sup> It would seem that this is consistent with the Court's announced policy of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."<sup>108</sup> The anomalies of the *Linn*, *Hill*, and *Pickering* cases in contrast to the other decisions of the Court can be attributed only to the concept of public issue on which they turned: "[A]lthough the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context."<sup>109</sup> Yet, the Court has not felt bound by these decisions. This fact has resulted in comment and criticism from various writers:

The upshot . . . is that the logic of the *New York Times* and *Hill* taken together grants the press some measure of constitutional protection for anything the press thinks is a matter of public interest.<sup>110</sup>

Another writer, attributing the Court's reluctance to the lack of a proper case on which to make the full transition, predicted it would be forthcoming.<sup>111</sup> However, with the arrival and passing of the *Greenbelt* case, it appears that the Court has refused to forsake the person-orientated ambit for one centering upon legitimate public interest. As a by-product, the *Monitor* and *Ocala* decisions seem to be a re-emphasis of this refusal, if by

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104. *Id.* at 275.

105. *Id.* at 274.

106. *Id.* at 277; *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971).

107. See text accompanying *supra* notes 92-101.

108. *New York Times Co. v. Sullivan*, *supra* note 53, at 270.

109. *Time, Inc. v. Hill*, *supra* note 74, at 390-91.

110. *Kalven*, *supra* note 80, at 284.

111. Comment, *Calculated Misstatements of Fact Not Protected by First Amendment Guarantees of Free Speech and Press*, 1969 UTAH L. REV. 118, 139.

omission only. In neither opinion did the Court leave the person-orientated ambit and even discuss the question of public concern as an issue. It can be argued that the Court is under no obligation to resolve cases by formulating new rules when they can be disposed of under prior decision. Conversely, it may also be said that, in light of developing case law applying the "public interest" test, it is significant that in *Greenbelt*, and now in *Monitor* and *Ocala*, the Court chose to ignore it as an issue. Future case law from the Court will be necessary to determine whether the "public interest" test will or will not be the standard of privilege granted.

*Richard Lee*