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THE *NEW YORK TIMES* RULE: JUDICIAL OVERKILL

LEWIS C. GREEN†

I. THE *New York Times* RULE

THE *New York Times*¹ case immunizes from liability one who publishes false and defamatory statements about a public official. From the *New York Times* opinion, it is possible to draw three qualifications to this rule:

1. In its original form, the rule applied only to one who holds public office.²

2. The Court further stated that the immunity was available only if the defamatory statement related to the official conduct of the plaintiff.³

3. Finally, the Court stated that the immunity would be lost if the defamatory statement was published with "actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁴

To date, all three of these qualifications appear to be ill-fated. The rule has been widely extended to a great variety of public employees, appointed as well as elected, such as police officers and deputy sheriffs,⁵ and a case pending in the Supreme Court seeks to extend it to the football coach at a state university.⁶ Moreover, the rule has even been extended to persons who are not government officials or employees. It has been applied to candidates for office as well as incumbents,⁷ the

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I have been asked to present a commentary on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), from the point of view of the plaintiff's attorney. I qualify for this assignment because I represent the plaintiff in a pending case involving this issue (*Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), *petition for cert. filed*, 35 U.S.L. WEEK 3143 (U.S. Sept. 6, 1966) (No. 522).) However, I am largely disqualified for the same reason, for it appears that considerations of ethics impose considerable restraint in commenting upon a pending case in which I am counsel of record. A similar restraint is probably in order respecting General Walker's cases, in one of which I was formerly counsel of record (on the defense side). [ed. — *Certiorari* was denied in the *Pauling* case, 87 Sup. Ct. 2097 (1967).]

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

2. *Id.* at 282-83.

3. *Id.* at 273, 279, 282-83.

4. *Id.* at 279-80, 285-86.

5. See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (*semble*); *Pape v. Time, Inc.*, 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966) (deputy chief of detectives and police lieutenant); *Thompson v. St. Amant*, 184 So. 2d 314 (La. App. 1966) (deputy sheriff); *Gilligan v. King*, 48 Misc. 2d 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965).

6. *Butts v. Curtis Publishing Co.*, 351 F.2d 702 (5th Cir. 1965), *cert. granted*, 385 U.S. 811 (1966).

7. See, e.g., *State v. Browne*, 86 N.J. Super. 217, 206 A.2d 591 (App. Div. 1965); *Block v. Benton*, 44 Misc. 2d 1053, 255 N.Y.S.2d 767 (Sup. 1964).

partner in the law firm of a public official,⁸ and persons of prominence who have spoken out on matters of public concern.⁹ The end of this extension is not yet in sight.

It is hard to imagine what kind of libel will be held by the Court not to relate to the official conduct of the public official. By hypothesis, the libelous publication will damage his reputation. Anything which damages his reputation is likely, at least in the opinion of some people, to reflect upon his fitness for an office of public trust. In short, it is to be expected that this qualification will prove illusory.¹⁰

The recent application of the *New York Times* rule to a right of privacy case from the State of New York, in *Time, Inc. v. Hill*,¹¹ appears to me to be of less significance. The privilege articulated in that case is restricted by its terms to reports of newsworthy people or events. Thus restricted, the privilege appears to afford little more protection than the law generally affords outside of New York.¹²

II. EVALUATION

To evaluate the merits of the *New York Times* rule, it is necessary to analyze what the new rule adds to and detracts from our society, and determine how well the additions and subtractions balance.

The obvious loss under the new rule is the loss of the limited protection which the libel laws have traditionally afforded to the individual human being, the protection of his own individual human dignity from the use by others of words, as Mr. Justice Fortas said, as "instruments of aggression and personal assault."¹³ The individual who falls within the target area of the *New York Times* rule is deprived of all protection from false, defamatory insults which offend his sensibilities, and damage his reputation in society. In short, if you are in the target area, the Supreme Court has declared open season on you.

As to the right of privacy, if the generous application of the new rule in *Time, Inc. v. Hill* is representative of its future, as it may well

8. *Gilberg v. Gaffi*, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (Sup. 1964), *aff'd*, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965).

9. See Brief for Appellant, petition for cert., pp. 6-9, 13-16, *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), *petition for cert. filed*, 35 U.S.L. WEEK 3143 (U.S. Sept. 6, 1966) (No. 522).

10. I feel constrained to withhold comment on the development of the third qualification, "actual malice." My views are set forth in part in the *Pauling* petition for certiorari, especially at pages 6-9, 13-16. For a thoughtful pre-*Pauling* comment, see Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 596-600 (1964).

11. 385 U.S. 374 (1967).

12. See, e.g., 1 HARPER & JAMES, TORTS § 9.7 at 688 (1956); RESTATEMENT, TORTS § 867, comment c (1939). *But cf.* PROSSER, TORTS § 112 at 848-49 (3d ed. 1964). The application of the rule to the facts of the case seems questionable, however.

13. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

be, then the individual has lost further protection from verbal assault upon the fundamental right of privacy.

What has been added to society can be simply, if argumentatively, stated: False, defamatory insults have been added to the merchandise offered to the public in the market place of ideas. Under the peculiar facts of the *Hill* case, where truth would have been a defense even under New York law, further wares have been added to the New York market place: False statements offensive to the sensibility and privacy of the individual.

What has been lost, on the other hand, seems to me to be an essential part of the personal dignity of the individual human being. This is an interest which merits high ranking on our scale of social values. In the final analysis, it is the basis of our Declaration of Independence and Bill of Rights.

When the gains and losses are thus balanced, it is easy to reach a conclusion. I respectfully submit that false statements add little that is beneficial to the market place of ideas.¹⁴ And, even more clearly, false verbal assaults upon another person, rather than comments upon issues of public importance, are of little value to society. In short, I suggest that the new rule eradicates a very valuable element in our society, and adds little in return.

Of course, I have stated the supposed values of the new rule in only a limited way. It may be argued that the justification for the *New York Times* rule is not simply the value of the false, libelous statements themselves, but the creation of a "breathing space,"¹⁵ an atmosphere in which critics will feel complete, "uninhibited . . . wide open [freedom to make] vehement, caustic, and sometimes unpleasantly sharp,"¹⁶ and libelous attacks on other persons, without undue concern for accuracy and truth, and without fear of retribution in case of error. In short, those persons who are inclined to argue by way of insult and personal attack should feel "uninhibited [and] wide open." As I understand this argument, society is supposed to benefit from personal and defamatory abuse, even though a part or all of it is false. The argument is not very persuasive, for two reasons.

14. Mr. Justice Brennan cites Mill and Milton in support of the proposition that a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964). But this proposition, to the extent that it has any validity, depends upon an effective debate; it has little relevance to the massive power of the press, arrayed against the lone voice of an individual person. And it may be doubted whether Mill and Milton would find a valuable contribution in a defamatory, personal insult.

15. *Id.* at 272.

16. *Id.* at 270.

First, the personal insult, even when it is not false, has limited value, if any, in a free social order. After all, the market place that we cherish is the market place of ideas, of discussion of public issues and events, not the market place of *ad hominem* attacks diverting attention from the issues.¹⁷

Second, I suggest that a vehement, caustic, defamatory attack upon another's person is a serious business. It is not entirely unreasonable that the attacker should feel some little restraint, that he should take the trouble to find out whether he has his facts straight, before he attacks the person who disagrees with him. That is what the law of libel is all about, and has been for generations. I submit that the public would be better informed by a smaller number of truthful libels than a larger number of false ones, and society would benefit thereby.

The "breathing space" argument does have some merit because it points up the real, fundamental danger in the *New York Times* rule, and in its extension to "public figures," in terms of the values of free speech. It seems probable that the new rule will have a more repressive effect upon free speech (and upon much more valuable speech) than did the old rule. As Mr. Justice Brandeis stated in *Whitney v. California*, "those who won our independence believed . . . public discussion is a political duty; and that this should be a fundamental principle of the American Government."¹⁸ Under the new rule, one who recognizes this responsibility and plays a responsible part in our society automatically enters the target area created by the *New York Times* rule. In effect, this new rule would limit the freedom of speech of citizens of high attainment, on matters of public concern, by exposing them to libel without redress. Those persons best qualified to add something of value to the market place of ideas will be constrained by fear of irresponsible *ad hominem* attacks. The result is an expansion of freedom to libel at the expense of freedom of speech.¹⁹

III. THE ROLE OF THE SUPREME COURT

The Supreme Court is at its best when it proceeds with caution and deliberation, shaping its rulings precisely to meet the needs clearly presented. Great constitutional pronouncements are occasionally called for. Witness, for example, the segregation cases and the reapportion-

17. Of course, a publication may make a newsworthy comment on a public issue while insulting an individual — e.g., a statement that the county treasurer has embezzled the county's funds. But a personal attack upon an individual, simply for the sake of discrediting him, merely diverts attention from the merits of the public issues which should be freely discussed.

18. 274 U.S. 357, 375 (1927) (concurring opinion).

19. See Note, 51 VA. L. REV. 106, 119 (1965). See also Barron, *Access to the Press*, 80 HARV. L. REV. 1641, 1657 (1967).

ment cases. But fundamental constitutional changes are best wrought when they are forged to meet an urgent, deeply felt, firmly established need, which can be met in no other way. The history of mis-government which brought on the segregation cases and the reapportionment cases illustrates the kind of need which justifies such changes.

By these standards, how does the ruling of *New York Times Co. v. Sullivan* measure up? Clearly the decision of the Alabama Supreme Court was properly reversed; we could not tolerate this kind of penalty for the type of publication involved. And it cannot be said that the case was entirely an isolated one. There were more or less related cases in the southern courts, and the subsequent judgment in the case of General Walker demonstrates that the need went beyond the *New York Times* case.

However, I do not think it can be said that we had suffered from a half-century of mis-government resulting from fundamental inadequacies in our libel laws. On the contrary, our libel laws had worked reasonably well for more than a century and a half. Admittedly, the law of libel is complex, but I am not aware of any extensive history of grossly excessive and repressive judgments, or of extensive restraints upon the exercise of the privilege of free speech, arising out of the libel laws. Mr. Seelman²⁰ tells us that, in recent years, there has been an epidemic of outrageous awards of punitive damages for libel, throughout the nation and particularly in New York. It is not clear that other authorities share this view, or that it would withstand analysis in the light of newspaper revenue increases and devaluation of the dollar. In any event, even Mr. Seelman admits that the appellate courts kept a firm hand on these awards, and reduced them drastically. Thus, if such a problem did exist outside of the South, it was apparently adequately controlled by the appellate courts.

The problem presented in the *New York Times* case, and in the related cases, was a recent development, an outgrowth of the bitter aftermath of the segregation cases. The judgment in the *New York Times* case was not proof of a fundamental inadequacy of the law of libel; it was simply a breakdown of the judicial process in certain southern states, similar to the breakdown in the enforcement of certain aspects of the criminal law in those same states. The acquittal of the murderer of a civil rights worker does not demonstrate that the law of murder needs drastic revision; rather it shows that the judicial process is not working properly, at the particular time and place, in that kind of case.

20. See Seelman, N.Y.L.J., Oct. 1, 1965, p. 1, col. 6.

Of course, the judgment of the Alabama Supreme Court had to be reversed, just as a pesky gnat must occasionally be swatted. But I submit that the Court failed us, in fashioning a nuclear blunderbuss with which to swat a gnat. The Court could have met the need effectively, in any of several ways, without bringing to pass the undesirable consequences noted above. For example, there would be no significant loss to society if the Supreme Court would assert for itself the power to set aside excessive damage awards in libel cases. Alternatively, the Court could, and in fact did,²¹ rule as a matter of federal constitutional law that the publication did not libel Mr. Sullivan, because it did not clearly charge him with the conduct in question. Nor would it be a shock to most of us to find that some or all of the traditional libel defenses have been cloaked with the sanctity of the first amendment. Thus, the Court would be able to, and almost did, dispose of some parts of the publication by bringing the defense of substantial truth within the protection guaranteed by the first and fourteenth amendments.²² No doubt other ways could have been found to reverse that judgment without proclaiming such a far-reaching change in our constitutional law.²³

In short, the need was for fair and adequate enforcement of our libel laws, not for a new law of libel. The remedy selected by the Court was not shaped to the need, and has already begun to produce unfortunate results.

Is our society really a better place to live because the United States Constitution protects *Life* magazine in its harassment of Mr. Hill and his family?²⁴ Or because the Constitution guarantees to a sharp-tongued columnist the privilege of falsely accusing an appointed County Park Commissioner of embezzling public funds?²⁵ Or because the Constitution guarantees to a Nashville newspaper the privilege of running a series of editorial attacks upon the Chairman of the Democratic Primary Board, falsely charging him with fraud, false certifications, and illegal manipulation of elections?²⁶

21. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288-92 (1964).

22. See *Id.* at 289. Similar traditional defenses have been invoked, with some plausibility, in the cases brought by General Walker.

23. Any of the alternatives suggested in the text would appear more effective than the Court's actual ruling, in circumventing the apparent prejudice of southern courts or juries. The *New York Times* rule (at least prior to *Pauling*) would frequently leave the question of "actual malice" to the jury. Is there any doubt how the *New York Times* or *Walker* juries would resolve that question?

24. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

25. See *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

26. See *McNabb v. Tennessean Newspapers, Inc.*, 400 S.W.2d 871 (Tenn. App. 1965).

Clearly "there are dangers in granting too much freedom to modern communications media which sometimes lack a sense of responsibility commensurate with their power."²⁷ Ultimately, the *New York Times* decision may be recognized as the unfortunate judicial by-product of the reaction to the segregation cases, and may be severely limited.

ADDENDUM

Curtis Publishing Co. v. Butts and *Associated Press v. Walker* were decided by the Supreme Court on June 12, 1967.^a The Court has indeed extended the *New York Times* rule to persons of prominence who are not public officials. Nevertheless, two aspects of these decisions suggest that the retreat from *New York Times* has already begun.

First, four members of the Court were unwilling to so extend the rule. Instead, they devised a new, and more moderate, rule: the publication is privileged if the defendant was guilty of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."^b

At first glance, the minority proposal seems eminently sensible. It gives full protection where it is needed most — in the publication of newsworthy writings, and particularly those furnished by third parties, where the need for prompt publication precludes extensive investigation, such as wire service news stories. Yet it requires a reasonable degree of care in the magazine or editorial attack. The proposal still leaves the crucial determination to a possibly prejudiced jury, but the determination of the reasonableness of the publisher's conduct is one more susceptible to judicial control on the facts than the issue of the publisher's state of mind.

The four Justices who proposed the new rule were not a majority, and one of them has since retired, but one may hope that their view will prevail in time, and will indeed replace the *Times* rule in its application to public officials.

Second, all but two members of the Court concluded that the evidence would support a verdict in favor of Butts against the *Saturday Evening Post*. Three Justices reached this conclusion by utilizing the

27. 1965 ANN. SURVEY AM. L. 422-23.

a. 87 Sup. Ct. 1975 (1967).

b. *Id.* at 1991.

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"actual malice" test of *New York Times*, and four by applying the new rule supported by the minority, but both groups emphasized the same circumstances. The *Post* story on Butts was not "hot news," as was the Walker story; there was opportunity to investigate; the investigation made was grossly inadequate. And this is true even though the story was supported by an affidavit.

This reaction of seven members of the Court suggests that, with proper instructions, the Court may be willing to uphold a verdict for the plaintiff somewhat more readily than might have been expected prior to these decisions, at least in a case without substantial racial or political overtones. It may be that the *New York Times* rule has reached its crest, and will slowly recede to a rule which gives a fair measure of recognition to the "need for vindication of honor."^e

c. *Id.* at 1987.