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NEWSMEN AND THE *TIMES* DOCTRINE

HAROLD L. NELSON†

THE FAMOUS DECISION in *New York Times Co. v. Sullivan*¹ was almost eighteen months old in August, 1965 when Justice Byron R. White told a convention of lawyers that the American public had not grasped the extent to which the decision permitted criticism of public officials. The case had held that city officials of Birmingham, Alabama, could not recover damages for statements made about them in a *New York Times* advertisement sponsored by a civil rights group, unless they could show, that the statement was made with “‘actual malice’¹ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”²

Justice White found this to be a major development in the law of libel, with implications for all who would write about their public servants. For, while the liar who spread a damaging falsehood about a public official was still liable for damages, “the honest mistake is protected by the first amendment whether the reputation of the public official is damaged or not,”³ he said. In addition, he expressed the hope that, “cases like this are noticed by more than the public official and the mass media,” including “all others who ought to know.”⁴

Based solely on the many newsmen’s answers to my frequently-posed questions about the *New York Times* case, I will hazard the guess that Justice White credited “the mass media” with too much knowledge of the decision, and the same is true today, three years after the decision was handed down.⁵

There has been little, if any, change in the attitude of the vast majority of reporters toward writing about public officials, or in the way that they perform this work. There has likewise been little, if any, change in the way editors instruct their reporters about covering public officials. By and large, newsmen know vaguely that the *New York Times* decision gives them added protection against liability for libel, but they do not understand why and how.

There are, of course, reasons why this situation may change somewhat. For one thing, schools of journalism are teaching the new

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

2. *Id.* at 279-80.

3. *New York Times*, Aug. 8, 1965, p. 29, col. 1.

4. *Ibid.*

5. A scientific sampling of newsmen would assuredly increase the credibility of this assertion, but perhaps sixty or seventy reporters and editors from all sizes of newspapers form the basis of my “horseback” guesses.

doctrine to the students who will become reporters, and are perhaps making the relatively greater protection in the new malice rule clear to them. Secondly, as the sequel here will show, the *New York Times* rule is far less complex than the old rule of "fair comment" — rendered largely or perhaps entirely obsolete by *New York Times* — and more susceptible of understanding by non-lawyer newsmen. Finally, those who write about the law applicable to the press in some professional publications of the journalism field are gradually explaining the new rule and publicizing the fact of the new protection.⁶ However, in other journals of the news world, one may search in vain for any indication that the *New York Times* case has smashing implications for the present and future protection of the press.

While this does not mean that the press is ignoring the business of understanding a kind of "new dispensation" in the handling of defamation, there is nothing like the outpouring of print and talk about this change that there is in certain other spheres of press law. Using volume as a measure, the glut of print concerning the controversy over free press and fair trial during the last three years, for example, puts the discussion over the *New York Times* rule to shame.⁷ And to date, there is little question that many editors and most reporters have no more than a foggy notion of the implications of the *New York Times* decision.

There are at least two basic reasons why the field in general seems little aware of this landmark case and is little involved in its implications. First, no organized, powerful group — such as the bar and the bench in the case of the present free press-fair trial confrontation⁸ — is seeking and publicizing new rules and practices which im-

6. Sylvan Meyer of the Gainesville, Georgia, Daily Times has written in *Nieman Reports*, "As a result of this decision, an almost unlimited right to criticize public officials now obtains." Meyer, *We Call It Privilege, They Call It Freedom to Smear*, *Nieman Reports*, Dec. 1965, pp. 9-10. Editor & Publisher articles and reports of new decisions hint or imply the breadth of the new protection. See Editor & Publisher, July 11, 1964, p. 12; Nov. 2, 1965, p. 12; April 30, 1966, p. 106; Sept. 24, 1966, p. 28; Jan. 14, 1967, p. 11. See Yoakam & Farrar, *The Times Libel Case and Communication Law*, 1965 *JOURNALISM Q.* 661-64. A new book of some 400 pages on libel alone makes the point crystal clear. PHELPS & HAMILTON, *LIBEL* (1966).

7. Major statements since the *Report of the President's Commission on the Assassination of President John F. Kennedy* (1964) include: Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pts. I & II (1965); AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS (1966); GILLMOR, *FREE PRESS AND FAIR TRIAL* (1966). See generally *A Free Press And A Fair Trial — A Symposium*, 11 *VILL. L. REV.* 677 (1966).

8. See ABA, *op. cit. supra* note 6; ABA, Report by Special Committee on Proposed Revision of Canon 35, adopted by the House of Delegates, Feb. 5, 1963; Bar Association of City of New York, Report of Fair Trial Committee, reported in *New York Times*, Jan. 5, 1967, p. 1, col. 7.

pinge upon news coverage of public officials. The press, as a result, is under little pressure to examine its practices, air its viewpoint, or defend itself from attack in the area of libel. Second, where is the journalism management, owner or editor, that is ready to tell reporters that they no longer have to worry as much as formerly about getting their facts straight? That with the *New York Times* doctrine in effect, they can ease up on the verification of facts, because only "reckless disregard" of falsity will get them in trouble when reporting public officials or figures?

Nor has the Supreme Court seemed anxious, in the *New York Times* case, or in subsequent decisions that use or extend the doctrine, to criticize the press or rap its knuckles for its actions,⁹ as it has done in reversing convictions in cases involving pre-trial publicity.¹⁰ Thus no major source of authority has been holding the press up to censure for libeling public officials, as has been done for interfering with justice through prejudicial publicity.

What newspaper editor, publisher or lawyer knows what the courts mean by "reckless disregard" of truth and falsity? This requisite for recovery has been found in only one reported case under the *New York Times* rule,¹¹ and there is as yet no easily ascertained rule of thumb or guideline for reasonable speculation as to where permissible "negligence" ends and punishable "recklessness" begins.

It is true that one view of malice, among the numerous definitions during the pre-*New York Times* decades, has encompassed the idea of "reckless disregard for the rights" of others.¹² However, no satisfactory guidelines were developed for the determination of the content of "recklessness" at that time, and as a result no reasonably clear precedent is available to us from the past as a guide under the new Supreme Court rule.

Since the *New York Times* case, however, a few highly varied fact situations have become available to us as preliminary indications of the type of falsity or error that the court might view as less than "reckless disregard." The newsman can see that an advertising man's failure to take an elevator up a flight to the morgue to verify the facts of an advertisement full of personal charges was not "reckless disregard."¹³

9. *But see* note 17 *infra* and accompanying text.

10. Major decisions overturning convictions on the basis of an interference with a fair trial, caused by publicity, include: *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Ridean v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

11. *Curtis Publishing Co. v. Butts*, 87 Sup. Ct. 1975 (1967).

12. See THAYER, *LEGAL CONTROL OF THE PRESS* 275, 307, 308 (4th ed. 1963).

13. 376 U.S. 254 (1964). The basis for this suit was several errors in the famous advertisement, "Heed Their Rising Voices," which detailed the plight of Negroes in

Similarly, it can be seen that a federal circuit court had a wealth of reasons for refusing to find "recklessness" in a newspaper's failure to check damaging personal charges made by a syndicated columnist against a public official in *Washington Post Co. v. Keogh*.¹⁴ But on the other hand, he sees from *Time, Inc. v. Hill*¹⁵ that a jury might find

Birmingham, Alabama. Police did not "ring" the college campus; Martin Luther King had been arrested only four times, not seven as asserted in the advertisement; students had sung the national anthem, not "My Country Tis of Thee." Though the files of the *Times'* morgue contained clippings that would have indicated to any staff member that there were several errors in the ad, such a check was not made. According to the Supreme Court, this did not constitute "recklessness," but was at most negligence. *Id.* at 288.

14. See *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966). Keogh, a New York Congressman, sued the *Post* and columnist Drew Pearson for an alleged libel in two of Pearson's columns printed in the *Post*. The United States Court of Appeals held that the charge against Keogh of bribe-splitting, aired by Pearson and the *Post*, did not demonstrate the malice of the *New York Times* rule. The *Post* showed no reckless disregard in not verifying Pearson's charge, regardless of Pearson's reputation for accuracy. To require such checking by the *Post* would be to burden it with greater responsibilities of verification than the Supreme Court required of the *New York Times* where information available from public articles in the *Times'* own files demonstrated the falsity of the allegations. *Id.* at 972.

Other language in the case seems important for an understanding of the degree of liberality envisioned by this court as a proper attitude toward the newspaper's duty to verify syndicated news reports:

Verification of syndicated news reports and columns is a time-consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly become irrelevant and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible. Thus the newspaper is confronted with the choice of publication without verification or suppression. Verification is also a costly process, and the newspaper business is one in which economic survival has become a major problem. . . . We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid risks of publishing controversial material. The costliness of this process would especially deter less established publishers from taking chances and, since columns such as Pearson's are highly popular attractions, competition with publishers who can afford to verify or to litigate, would become even more difficult. It is highly unlikely, moreover, that the form of journalism engaged in by Pearson and other columnists could survive in the face of a rule requiring verification to negate recklessness. Pearson and his fellow columnists seek and often uncover the sensational, relying upon educated instinct, wide knowledge and confidential tips. Verification would be certain to dry up much of the stream of information that finds its way into their hands. Whether or not this would please a number of us is irrelevant. What matters is that a rule requiring certification in the absence of evidence that the publisher had good reason to suspect falsity would curtail substantially a protected form of speech. *Id.* at 972-73.

15. 385 U.S. 374 (1967). This was the first privacy case in which the *New York Times* rule was used. This suit was based on a magazine story about a new play depicting a family held hostage by escaped convicts. The magazine, *Life*, stated that the play re-enacted the true experience of the Hill family, and was inspired by it. Hill charged the magazine with representing in words and pictures that he and his family were mistreated and suffered violence, when, in fact, they were not harmed or molested, and that *Life* falsely reported that the play portrayed the Hills' experience. The lower court awarded damages, relying on precedents other than the *New York Times* decision.

But the Supreme Court reversed and remanded the case, saying that it must be decided in the light of the *New York Times* rule. However, the Court did hold that it was possible for a jury to find that *Life* knew the truth or was reckless of the truth on facts such as these: The *Life* editor's story file contained news clippings revealing the nonviolent character of the Hills' experience, and a clipping in which the author of the play said that it was based on various incidents in several cities. Also the editor admitted that he knew that the play was somewhat fictionalized. *Id.* at 393.

“recklessness” in an editor’s failure to alter an incorrect statement on the basis of facts in a “story file” within his possession.

Finally, two new Supreme Court decisions add some light. In one, a unanimous Court reversed a libel judgment of \$500,000 granted to former Major General Edwin A. Walker who had sued the Associated Press for statements in a story relating to his part in a riot at the University of Mississippi in 1962.¹⁶ The story said that Walker had “led a charge” of students against federal marshals as the students protested the admission of James H. Meredith, a Negro, to the University, and that Walker “assumed command” of rioters. This Texas case was one of fifteen that Walker brought as a result of the Associated Press dispatch, asking a total of more than \$30 million in damages.

The other decision upheld a judgment of \$460,000 awarded to Wallace Butts, former athletic director of the University of Georgia, against Curtis Publishing Company.¹⁷ The Curtis magazine, *Saturday Evening Post*, had accused Butts of giving his school’s football secrets to Paul Bryant, coach of the University of Alabama, before a game between the schools in 1962. The story was based on the statement of one George Burnett, who told the *Post* that he had overheard, by accident, a telephone conversation in which the secrets were passed. The decision to affirm was by a five to four vote.

Justice Harlan said in the majority opinion in *Curtis Publishing Co. v. Butts* that the *Post* engaged in “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers”¹⁸ in its handling of the story. Such recklessness, the Court apparently felt, emerged in this fashion: “[Even though] the Butts story was in no sense hot news,” said Justice Harlan, “Elementary precautions were . . . ignored”¹⁹ by the magazine in preparing the story. The *Post* knew that Burnett had been convicted and placed on probation for writing two bad checks, but,

[the *Post*] proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett’s notes were not even viewed by any of the magazine’s personnel prior to publication. [Furthermore] no attempt was made to screen the films of the game to see if Burnett’s information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.²⁰

16. *Associated Press v. Walker*, 87 Sup. Ct. 1975 (1967).

17. *Curtis Publishing Co. v. Butts*, 87 Sup. Ct. 1975 (1967).

18. 87 Sup. Ct. 1975, 1993 (1967).

19. *Id.* at 1992.

20. *Id.* at 1993.

In a separate opinion, Chief Justice Warren said that the magazine used "slipshod and sketchy investigatory techniques"²¹ in preparing the article.

A summary of the operative facts leading to the finding of "reckless disregard" in the *Butts* case would include:

- a) Elementary precautions in news handling were ignored, and the investigation by the magazine was slipshod;
- b) A witness of questionable character was relied upon by the *Post* as its chief source of information;
- c) Corroboration of the witness's statements did not extend even to the *Post's* examining his written notes, or to a reasonable effort to check other sources or subsequent events that might have shed light on the matter.

The Court contrasted the "recklessness" in the *Butts* case with the Associated Press's wire story in *Associated Press v. Walker*.²² In *Walker*, the campus rioting was "hot news" that had to be written quickly, and there was not "the slightest hint of a severe departure from accepted publishing standards."²³

Does any line of analysis emerge from the above five cases that might help newsmen more rationally estimate the measurement of a "reckless disregard of falsity" in performing their work? Two facets or dimensions of the news stories involved seem to promise a start: the credibility of the news source, and the extent of investigation by the news medium.

1. *Source credibility.* In *Butts* the Court found "recklessness" based in part on the fact that Burnett, the *Post's* source of information, had once been convicted of writing bad checks. Yet in *Keogh*, the court of appeals said that whatever the reputation of columnist Drew Pearson, printing his charges without verification by the newspaper would not indicate reckless disregard. This ostensible contradiction is considerably modified by the latter court's elaboration of the circumstances of the Pearson publication, for "hot news" which arrives from afar by wire is very hard for a newspaper to check if it is to print before staleness sets in.

2. *Verification of the offensive statement.* In three cases the courts have called attention to the demands of timeliness in getting news into print. Where breaking stories ("hot news") are involved,

21. *Id.* at 1999 (concurring opinion).

22. 87 Sup. Ct. 1975 (1967).

23. *Id.* at 1993.

verification by the news medium seems to be less demanded by the courts than where less urgent information (sometimes called "time copy") is involved. This point was made in connection with the syndicated wire copy of Drew Pearson ("considerations of time and distance make verification impossible"); the Associated Press reporter's story of rioting ("hot news" that had to be reported quickly); and the *Post's* story of Butt's conversation (by no means "hot news," and thus news that should have been checked out).

As timeliness modifies the verification requirements, the courts also seem to say that convenience or proximity to corroborating or refuting evidence also can have some bearing. In *New York Times*, the failure of an advertising man to go up one story to check the morgue on the facts of an advertisement containing personal charges — charges that would have been refuted in part, at least, by clippings in the morgue — was not reckless disregard. And in *Keogh*, the syndicated columnist's remoteness from the newspaper that printed the column, and his inaccessibility to the newspaper, made verification impossible if the column was to be fresh when it reached readers. There was no reckless disregard here. In *Hill*, however, the Supreme Court ruled that an editor's failure to discover an incorrect statement by the use of facts in a story file within his possession presented a question for the jury.

One fairly clear point does emerge from an analysis of the decisions. The *Walker* and *Keogh* cases indicate that reporters and editors are apparently justified in going into print with breaking, "hot news," or news that will lose its value if delayed a few hours, even though thorough verification is not undertaken. However, the *Butts* and *New York Times* cases tell us that where there seems to be little need for immediate publication, failure to verify may (*Butts*) or may not (*New York Times*) constitute reckless disregard for falsity. On the whole, the newsman must sense from these cases that the decisions are strengthening his position, even if the specifics of "reckless disregard" must await development.

MALICE, OLD AND NEW

The reporter can hope that as more fact situations emerge in future decisions, rules of thumb can be fashioned which will help him to understand the meaning of "reckless disregard." That may take a good deal of time, and the guidelines that are worked out may be only very vague indications to the newsman about what is "safe." Nevertheless, his problem of understanding what "reckless disregard" means in the definition of malice, is apparently a mild one compared to the

problem presented by the pre-*New York Times* rules on actual malice, which included perhaps a dozen definitions. Compare his present problem of comprehending "reckless disregard" — he should have little difficulty in understanding the "knowledge" element of the *New York Times* rule — with that of many decades before *New York Times*.

Before 1964, the best rule for the newsman to live by in avoiding accusations of malice was perhaps this: "Don't write out of spite or ill-will." These were common synonyms for malice, and told the reporter or editor something about a frame of mind or approach to his work that would serve him well. But it was only a beginning in an area that was never clarified for the reporter in the standard texts on the subject.²⁴

To list the many definitions of malice, or sometimes merely hints, which the courts developed, would take several pages. A wide-sweeping definition in British law was that malice meant "a wrong feeling in a man's mind."²⁵ Synonyms for malice in the cases involving defamation and privilege included ill-will, indirect and wicked motive, hatred, spite, personal animosity, and intent to injure.²⁶ Sometimes "good faith" seemed to be equated with lack of malice.²⁷ Lack of malice was also sometimes inferred where the court decided that there was an honest belief in the offending words, or "probable cause" for publishing them.²⁸ In a predecessor of the *New York Times* rule, from the realm of trade libel, came the holding that malice did not need to be anything like ill-will, but might be "reckless disregard for the rights of others."²⁹ One court found it in "fabrication" of details for a story.³⁰ Sometimes, violence or extreme terms in a comment were held to support an inference of malice and thereby to defeat the defense of fair comment,³¹ one court even saying that "matters of public interest must be discussed temperately."³² Malice has even been invoked without defining it.³³

Under such an opaque and elastic concept, liberal provisions for defenses against libel charges might mean little. California in 1921

24. See, e.g., ARTHUR & CROSMAN, *THE LAW OF NEWSPAPERS* (2d ed. 1940); SIEBERT, *THE RIGHTS AND PRIVILEGES OF THE PRESS* (1934); THAYER, *op. cit. supra* note 12.

25. *Clark v. Molyneux*, [1877] 3 Q.B.D. 237, 247.

26. See 26 *WORDS & PHRASES* 230-37 (1953).

27. See *Snively v. Record Publishing Co.*, 185 Cal. 565, 571, 198 Pac. 1, 3 (1921); *Jarman v. Rea*, 137 Cal. 339, 350, 70 Pac. 216, 220 (1902).

28. See *Taylor v. Lewis*, 132 Cal. App. 381, 384, 22 P.2d 569, 571 (Dist. Ct. App. 1933).

29. See *Gott v. Pulsifer*, 122 Mass. 235 (1877).

30. See *United Press Int'l v. Mohs*, 381 S.W.2d 104, 110 (Tex. Ct. Civ. App. 1964).

31. See *Bausewine v. Norristown Herald, Inc.*, 351 Pa. 634, 41 A.2d 736 (1945).

32. *England v. Daily Gazette Co.*, 104 S.E.2d 306, 316 (W.Va. 1958).

33. See *Snively v. Record Publishing Co.*, 185 Cal. 565, 575-77, 198 Pac. 1, 5 (1921).

liberalized its law, adopting the minority position that statements about public officials in their official capacity did not have to be accurate in all respects to be immune from successful libel suit. (This, of course, was roughly the position that the United States Supreme Court was to take in the *New York Times* case forty-three years later.) The California Supreme Court's reasoning was that the official conduct of a public official is "a matter of public concern of which every citizen may speak in good faith without malice."³⁴ However, with a great diversity of definitions available, malice was subsequently found³⁵ about as often as it was not found.³⁶ Whether California's adoption of the liberal rule affording immunity to "false facts" has contributed much protection to newsmen when the immunity has had to run in tandem with a protean malice is at least doubtful.

Since the *New York Times* decision, the liberal rule, which says that erroneous statements about public officials are within the protection of the first amendment, has been running in harness with a single, authoritative definition of malice that may provide stability and comparative clarity: The statement about the public acts of the public official must have been made with actual malice — "that is, with knowledge that it was false or with reckless disregard of whether it was false or not."³⁷

Justices Black and Douglas have both asserted that this definition means little or nothing in the way of added rigor, and that "reckless disregard" may be found easily.³⁸ They may be proven correct, but there is no question that newsmen will find some relief in confronting the single horn of "reckless disregard" rather than the Medusa of the old malice.

THE *New York Times* RULE AND THE FAIR COMMENT DOCTRINE

The alleviation of the newsman's difficulties with malice has not been the only result of the *New York Times* decision. The new rule also has apparently delivered the death blow to the old doctrine of "fair com-

34. *Id.* at 571, 198 Pac. at 3.

35. See *Larrick v. Gilloon*, 176 Cal. App. 2d 408, 1 Cal. Rptr. 360 (Dist. Ct. App. 1959); *MacLeod v. Tribune Publishing Co.*, 332 P.2d 829 (Cal. Dist. Ct. App. 1959); *Farr v. Bramblett*, 132 Cal. App. 2d 36, 281 P.2d 372 (Dist. Ct. App. 1955); *Morcom v. San Francisco Shopping News Co.*, 4 Cal. App. 2d 284, 40 P.2d 940 (Dist. Ct. App. 1935).

36. See *Maher v. Devlin*, 203 Cal. 270, 263 Pac. 812 (1928); *Babcock v. McClatchy Newspapers*, 82 Cal. App. 2d 528, 186 P.2d 737 (Dist. Ct. App. 1948); *Taylor v. Lewis*, 132 Cal. App. 381, 22 P.2d 569 (Dist. Ct. App. 1933); *Jones v. Express Publishing Co.*, 87 Cal. App. 246, 262 Pac. 78 (Dist. Ct. App. 1927).

37. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

38. See *Time, Inc. v. Hill*, 385 U.S. 374, 398-99 (1967) (concurring opinion); *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (concurring opinion).

ment" in libel. That doctrine provided immunity from successful libel suit for words commenting on or criticizing the public acts and words of public officials and candidates, and indeed, of all who offer their skills and talents for public approval. While the doctrine served as an important protection, it nevertheless had serious shortcomings from the viewpoint of the press.

One of its shortcomings lay in its confounding specifics, which almost defied understanding for many newsmen — who, after all, might be presumed to need to understand. They could find in "fair comment" much confirmation for Dean Prosser's statement that ". . . there is a great deal of the law of defamation which makes no sense."³⁹ The second difficulty in "fair comment" as a protection, from the newsman's viewpoint, was that in most states it required a degree of accuracy in the news that working journalists sometimes found difficult to maintain. Finally, in the states following the minority rule, which gave protection in spite of factual inaccuracies about public persons, as well as in the majority states, there were still difficulties in the slippery treatment of malice, as indicated above.

The newsman's bewilderment about "fair comment" may be suggested — although by no means delineated or exhausted — by the part played in the doctrine by the word "fact." Prior to *New York Times*, three-fourths of the states that took a position on "fair comment" began with the restriction that this immunity from liability for libel existed only with respect to "opinion" and provided no protection for "misstatement of facts."⁴⁰ If fact rather than opinion offended, the defense would have to be truth. And so at the outset, a determination had to be made about what is fact and what is opinion. Trying to separate the elements of this philosophical omelette never brought reliable results, although in individual cases there was often no problem. In fact, the courts and legal writers made little attempt to unravel the complex distinctions between fact and opinion as they wove their way through the fabric of discussion. More characteristic was a simple declaration, unaccompanied by explanation.

With fact distinguished from opinion, the former had to be identified as accurate or as misstatement. If it was a damaging misstatement, it was unprotected and libel could be found without resorting to an analysis of any opinion contained in the statement and the subsequent "fair comment" test that might protect such opinion. But if

39. PROSSER, *TORTS* 754 (3d ed. 1964).

40. See generally PHELPS & HAMILTON, *op. cit. supra* note 6, at 189-205; PROSSER, *op. cit. supra* note 38, at 814-16; THAYER, *op. cit. supra* note 9, at 453-64; Titus, *Statement of Fact versus Statement of Opinion — A Spurious Debate in Fair Comment*, 15 *VAND. L. REV.* 1203-06 (1962).

the factual errors were not libelous, the opinion could nevertheless be "unfair" and as a result unprotected. A factual basis, moreover, was a necessary element for the comment-opinion if it were to be classified as "fair," and this factual basis had to be set forth in the article if it were not generally known by, or readily available to, the reader. Finally, most courts held that an imputation of a corrupt or dishonorable motive by a party from established facts was to be classified as fact, and not privileged as comment.

As the reader might surmise, neither courts nor legal writers were always lucid in describing all these threads in the fact and opinion pattern, in distinguishing them from each other, or in keeping them in their proper relationships. Text books and reference materials generally used by newsmen were not in accord in their handling of this matter or others in "fair comment,"⁴¹ and the reporter or editor whose psychological security needed the support of understanding where the libel law affected him, was somewhat out of luck.

The *New York Times* rule that arrived in 1964 simply eliminated the relevancy of the "fair comment" doctrine where public officials were the targets of criticism. For all states — those which had given, and those which had denied, protection for factual error in statements about public officials — the federal rule now said that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive'. . . ."⁴² The only unprotected expression under the new doctrine is that which is malicious and that which is not related to public life and duties.

Furthermore, this rule apparently is to be applied broadly to private individuals who willingly take part in public affairs, under the decisions of June, 1967. The *Walker* case was a unanimous decision to the effect that the freedom of the press guarantee extends to derogatory and false statements against *public figures* who are not *public officials*. Chief Justice Warren wrote: "Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'"⁴³

Meanwhile, the *New York Times* rule has been extended to another realm of the law of libel: privacy. In two cases that have been before the United States Supreme Court, the Court held the parties to

41. Cf. ASHLEY, SAY IT SAFELY ch. 8 (3d ed. 1966); SIEBERT, *op. cit. supra* note 23, at chs. 13, 14; SWINDLER, PROBLEMS OF LAW IN JOURNALISM ch. 7 (1955); THAYER, *op. cit. supra* note 12, at ch. 11.

42. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

43. 87 Sup. Ct. 1975, 1996 (1967).

be "public figures" and subject to the malice requirements of the *New York Times* decision. One was James Hill, who was thrust into the public eye when escaped convicts held him and his family captive in their home.⁴⁴ The other was Warren Spahn, the famous baseball pitcher, who sued for invasion of privacy after a biography allegedly full of errors was written and published about him.⁴⁵ Each must in the trial on remand show knowledge of falsity or reckless disregard of truth on the part of the writers of the offending works if he is to recover damages.

With this growing safety for news media, is there likely to be a growing carelessness among reporters, editors, and other "gatekeepers" past whom the news of public affairs moves? Is there likely to be a cool and calculated employment of untruth by the media, whose increasingly "savvy" employees may be in a position to take advantage of the new doctrine and push "reckless disregard" to its furthest discoverable limits?

There are some developments in the newspaper world which suggest that the *New York Times* rule should not be viewed with alarm as a key that will unlock the flood gates of untruth in commentary about public men. For one thing, competition among newspapers has declined drastically, and the old need to hit the streets first with half-documented pieces of sensation in order to boost circulation is far smaller than it was in 1940 or 1920 or 1900. It is true, however, that investigative reporting aimed at uncovering public graft or corruption may find it convenient to have the *New York Times* rule in effect as support for a speculative story whose evidence is tentative and whose aim is a fishing excursion with bait that will tease out informers.

It may be that if an increasing recklessness in the press did tend to develop, the courts would label it as such and find malice. However, this is not a safe guess, for formulas for finding contempt of court in press reports, and for finding obscenity in books and magazines, have in recent decades been closely scrutinized in decisions expanding freedom of expression. Direct government control of speech and press through court process, has generally diminished since the post-World War I period in the United States,⁴⁶ and an expansion of freedom granted in the 1960's is not likely to be soon retracted.

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

45. *Spahn v. Julian Messner, Inc.*, 87 Sup. Ct. 1706 (1967). The Supreme Court vacated the judgment of the lower court for Spahn and remanded the case "for further consideration in light of *Time, Inc. v. Hill*, 385 U.S. 374." See also *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (6th Cir. 1966), *cert. denied*, 87 Sup. Ct. 2097 (1967).

46. NELSON, *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT* xxxv-xlviii (1967).

Finally, it can hardly be doubted that there is a growing sense of professionalism among the workers in the news world, an attitude of devotion to an important function and a commitment to performing it well and in the public interest. Taught in schools and departments of journalism, and developed on the job, it has been sensed by such observers as Walter Lippmann, and found in careful studies of news rooms and of Capitol Hill reporters.⁴⁷ It will not make angels of newsmen, and we may be thankful for that, but it may help to keep the *New York Times* doctrine on the track of furthering essential democratic debate rather than shunting it into a path of protecting scurrility.

47. See Lippmann, *Free Press a Necessity, Not a Privilege*, Milwaukee Journal, June 5, 1967, p. 12, col. 3; McLeod & Hawley, *Professionalization Among Newsmen*, 1964 JOURNALISM Q. 529-38; Rivers, *The Correspondents after 25 Years*, 1962 COLUMBIA JOURNALISM REV. 4-10.