Further Limits on Libel Actions - Extension of the New York Times Rule to Libels Arising from Discussion of Public Issues

W. H. Flamm Jr.

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Communications Law Commons, Constitutional Law Commons, and the First Amendment Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol16/iss5/7

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
FURTHER LIMITS ON LIBEL ACTIONS — EXTENSION OF THE New York Times RULE TO LIBELS ARISING FROM DISCUSSION OF “PUBLIC ISSUES”

I. Introduction

The United States Supreme Court decision in New York Times Co. v. Sullivan,1 Curtis Publishing Co. v. Butts2 and Associated Press v. Walker,3 which limited recovery in libel actions brought by public officials and public figures to cases in which the plaintiff could prove “actual malice” placed the law of libel in a quagmire. The major problem was in determining which plaintiffs were public officials and public figures within the ambit of these decisions.4 Despite a contrariety in the resolution of this problem, decisions show an inexorable progression toward a more manageable standard for the application of the actual malice rule. The purpose of this Comment is to show the emergence of a new standard for the application of the actual malice rule to all libels which arise from the publication of material which has been termed “newsworthy,” “in the public interest,” or “concerning public issues.” The Supreme Court has attempted to clarify this issue in several recent cases,5 and the outcome

2. 388 U.S. 130 (1967).
4. It should be noted, however, that the quagmire into which the Court plunged in these three decisions was no worse than that which faced it before the New York Times decision. Professor Kalven illustrated this point in The Reasonable Man And The First Amendment: Hill, Butts, And Walker, 1967 SUPREME COURT REVIEW 267, when he stated:

   The common law of defamation, yielding slowly to the policies favoring a free press, worked out an elaborate series of accommodations for the competing interests, and as a complement thereto an elaborate gradation of privileges for false statements about individuals. There is the absolute privilege of judge, legislator, and executive when at work, a privilege whatever the state of mind of the defendant. There is the qualified privilege for the useful, private communication, such as the employee character reference. And here there is a split of authority, some states holding the privilege defeasible only by proof of malice, recklessness, or knowing falsity, other states holding that ordinary negligence is enough. To complicate matters further, there are two sets of privileges for “public” communications: fair comment and record libel. The record libel privilege covers the repeating of defamation contained in a public record and is probably not defeasible at all so long as the statement accurately reports what the public record contains. Fair comment, as the Court discovered in New York Times, is a mysterious doctrine relying heavily on distinctions between fact and opinion and the degree of disclosure of underlying fact. And there may be still further differences between comment by way of literary criticism and comment on public officials, candidates for office, or other public figures. And as to public officials or figures there have been at least two rules of fair comment. One imposes strict liability for accuracy in statements of fact but affords a privilege to the expression of opinion, as did the Alabama law in New York Times. The other broadens the privilege so as to protect error in the underlying statements of fact if made in good faith. And arguably “good faith” in this formula might mean either the absence of negligence or something more. It was into this bramble bush of distinctions that the Court jumped in New York Times.

Id. at 290–91.
of one case now awaiting decision could conceivably go a great deal farther in resolving the confusion over the application of the New York Times rule. It will also be seen that this application of the New York Times rule, in addition to being more capable of consistent application, is in keeping with the first amendment rationale which led the Court to its decisions in New York Times, Butts and Walker.

II. Emergence Of The Actual Malice Rule: An Analysis Of New York Times, Butts And Walker

In 1964, motivated in part by the exigencies of the social issue involved, the Supreme Court, in New York Times Co. v. Sullivan, employed a novel investigation of the constitutional protection afforded the press, holding that the first amendment, through the due process clause of the fourteenth amendment, applied to the area of state libel law. The defendants, who were members of a group which included prominent clergymen, statesmen and show business personalities, placed an advertisement in the March 29, 1960, New York Times entitled "Heed Their Rising Voices," designed to bring public attention to the civil rights movement in the South and to solicit funds for the legal defense of the Reverend Martin Luther King, Jr. The plaintiff, a Commissioner of Montgomery, Alabama, brought suit, alleging that the advertisement libelled him. A jury in the Circuit Court of Montgomery, Alabama, awarded him $500,000 and the Supreme Court of Alabama affirmed. The Supreme Court of the United States unanimously reversed the decision, holding that:


8. 376 U.S. 254 (1964). The application of the first amendment to the law of libel for the first time brought into direct conflict American constitutional and English common law. For a general history of the American libel action, see Merin, Libel And The Supreme Court, 11 WM. & MARY L. REV. 371 (1969), where the author suggests that the framers probably gave no thought to libel actions in drafting the first amendment. But see Time, Inc. v. Hill, 385 U.S. 374, 400 (1967) (concurring opinion). In that case, Justice Black, citing 8 T. JEFFERSON, WORKS 464-65 (Ford ed. 1904), maintains that Jefferson took the position that there should be no action for libel or defamation.

9. The portion of the New York Times advertisement which was alleged to be libellous consisted of two separate paragraphs, the first of which alleged that police had padlocked the entire student body out of the dining hall at the Alabama State College Campus. The other paragraph read:

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times — for "speeding," "loitering," and similar "offenses." And now they have charged him with "perjury" — a felony under which they could imprison him for ten years.

376 U.S. at 292. It is interesting to note that the Supreme Court did not dispose of the case on the non-constitutional grounds available, that either the statements were not libellous, or that they could not, as a matter of law, be interpreted to refer to the plaintiff as the Montgomery, Alabama, Commissioner in charge of the operations of the police department. See Kalven, supra note 7.
The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering 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.10

The Court arrived at this conclusion through a first amendment rationale, a reciprocal application of the privilege afforded to public officials, and pragmatic considerations.

The two non-constitutional predicates for the decision were founded upon the conditional privilege afforded the public official and his access to the mass media.11 The Court reasoned that since public officials have a conditional privilege to defame others in the course of their official duties,12 the democratic ideal of the competition of ideas would seem to require similar protection to those who would advocate contrary positions. In addition, it was thought that the nature of the public official’s status affords him access to the mass media to propound his views and discuss those of his opponents with little effort and cost. The reasoning thus would seem to be that unless some restrictions were placed on the ability of public officials to bring libel actions against critics, discussion of government would be hampered, and a one-sided view of the political process would obtain. Moreover, to allow public officials to recover for libel is reminiscent of the rejected concept of seditious libel.18

The Court placed its greatest reliance, however, upon the first amendment. The major premise of this argument was that the first amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.14

Since the Court emphasized the competition of ideas, it follows that a legal doctrine which erects a barrier to their circulation would have a pernicious effect upon the protection afforded by the first amendment. Especially in the area of criticism of public officials, the danger of subduing the competition of ideas is too great to offset the possibility of damage to individuals. Although the Court recognized that the circulation of falsehood is without social value in balancing the relative interests, it was concluded that exposing the publisher to liability for circulation of falsehood without fault would have the impermissible effect of suppressing both falsehood and constitutionally protected speech. The result would be a regime of self-censorship whereby the publisher would print

11. Id. at 282.
12. This privilege may be afforded by record libel, state law or by one of the other privileges alluded to in note 4 supra. In the New York Times case, the privilege of the plaintiff was a conditional one for honest misstatements of fact while acting within the scope of his duties. 376 U.S. at 282.
13. See Merin, note 8 supra. The Alien and Sedition Act was never put to a test in the Supreme Court, but stood until its repeal in 1832.
14. 376 U.S. at 270.
only that material which he was certain would not put him in jeopardy of a libel judgment.\textsuperscript{16} Allowing the publisher only the defense of truth is unsatisfactory, for the same result occurs.\textsuperscript{16} In addition to curtailing circulation of falsehoods there would be a deleterious impact upon transmission of worthwhile information which, because of limited time, resources, or the nature of the information cannot be absolutely verified.

Three Justices, concurring in the result, did not accept the actual malice rule.\textsuperscript{17} The disagreement among the concurring and majority Justices concerned the degree of danger with which first amendment rights must be threatened before a plaintiff will be placed under any infirmity in establishing his cause of action. The concurring Justices advocated an absolute, rather than a conditional privilege, maintaining that the first amendment uniformly forbids any libel action against the press.\textsuperscript{18} Moreover, although a majority of the Court agreed that the degree of danger presented to freedom of the press was sufficient to impose a disability in the case of libel of a public official of Sullivan's stature, the Court did not define the parameters of the rule's application. Furthermore, the question whether the rule would be applied to those other than public officials was not discussed. In addition, other questions were left unanswered by the New York Times decision. Despite the Court's caveat that actual malice must be proven with convincing clarity, the opinion did little to indicate what circumstances might show actual malice.\textsuperscript{19} For example, failure to retract, or retraction only under pressure, were held insufficient to sustain a finding of actual malice on the facts of the case, but the Court explicitly refused to hold that such insufficiency could never amount to a showing of actual malice.\textsuperscript{20} Similarly, mere

\textsuperscript{15} Justice Brennan said "[t]he rule thus damps the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." \textit{Id.} at 279. Not only does the rule dampen the vigor but so do the size of the judgments. The Court did not lose pass without emphasis that it would be a hardy publisher indeed who could weather more than one half-million dollar libel judgment. While the figure of one-half million dollars for a single judgment is staggering, it is overwhelming with relation to the debilitating effect that such judgments have on the press. It is worthy of note that, out of this single incident, there were suits pending against the New York Times in Alabama alone totalling over five million dollars. \textit{Id.} at 286-97 (concurring opinion).

\textsuperscript{16} Id. at 279.

\textsuperscript{17} Concurring opinions were written by Justices Black and Goldberg, both of whom Justice Douglas joined.

\textsuperscript{18} See generally Brennan, \textit{The Supreme Court And The Meiklejohn Interpretation Of The First Amendment}, 79 Harv. L. Rev. 1 (1965); Meiklejohn, \textit{The First Amendment Is An Absolute}, 1961 THE SUPREME COURT REVIEW 245. Justices Black and Douglas have republished or referred to their opinions in this case in almost every other applicable libel case that has come before the Court. The most recent are Ocala Star-Banner Co. v. Damron, 39 U.S.L.W. 4268 (U.S., Feb. 23, 1971); Monitor Patriot Co. v. Roy, 39 U.S.L.W. 4264 (U.S., Feb. 23, 1971) and Time, Inc. v. Pape, 39 U.S.L.W. 4270 (U.S., Feb. 23, 1971). Their recurring theme is that: [I]t is time for this Court to abandon New York Times Co. v. Sullivan and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.

\textsuperscript{19} 376 U.S. at 285-86. In addition, the term "convincing clarity" was left without definition. \textit{See} pp. 978-82 \textit{infra}.

\textsuperscript{20} Id. at 287. \textit{See} pp. 978-82 \textit{infra}.
negligence in failing to find discrepancies of fact did not in this case, show actual malice.\textsuperscript{21} Finally, the Court, in basing the decision on the competition of ideas and robust criticism of government, took no position with respect to the relevance of the defamation to the functioning of government or the duties of the public official involved as any criterion for the application of the rule.

Inexorably, these questions came to the fore. In 1967, the Court was faced with two libel suits brought by plaintiffs who were not public officials. The cases, \textit{Curtis Publishing Co. v. Butts}, and \textit{Associated Press v. Walker},\textsuperscript{22} were decided together, and the intricate intertwining of four separate opinions dramatically outlines the conflicting views within the Court with respect to the protection afforded the press by the first amendment. Because of the complexity of the opinions, it may be informative to establish a "box score" for the cases.\textsuperscript{23}

Although a majority of the Court agreed on the result of the cases, only four members\textsuperscript{24} adhered to the judgment of the Court delivered by

\begin{itemize}
  \item \textsuperscript{21} \textit{Id.} See pp. 978-82 \textit{infra}.
  \item \textsuperscript{22} 388 U.S. 130 (1967). Both cases were decided together. In \textit{Butts}, the Saturday Evening Post, on a muckraking campaign to raise its lagging circulation and revenues, published an article in which it "exposed" the "fact" that Bear Bryant and Wally Butts had conspired to fix the upcoming crucial Georgia State-Alabama football game. Their information had been received over the telephone from an informer whose credibility was something less than impeccable. No investigation was made into the charges, despite the fact that there was more than enough time to do so before the magazine went to print. In \textit{Walker}, the Associated Press received the report that General Walker had led the charge on the University of Mississippi from one of its own correspondents who, although rather new at the job, might be expected to be reliable. The reports were "hot news," for immediate publication, and on the surface seemed to be in character with General Walker's prior actions and declarations. In addition, the charges in \textit{Butts} were shocking, giving rise to the reasonable inference that they might be false, while the report in \textit{Walker} seemed on the surface to be entirely believable. It was this combination of factors present in \textit{Butts} and not in \textit{Walker} that enabled the Court, irrespective of their conclusions as to the level of protection afforded by the first amendment, to conclude that actual malice, as defined by \textit{New York Times}, was present in the former case and not the latter. See pp. 978-82 \textit{infra}.
  \item \textsuperscript{23} For an analysis of the decisions in these cases and the individual predispositions of each Justice, see Kalven, note \textsuperscript{4} supra.
  \item \textsuperscript{24} Justice Harlan was joined in his opinion by Justices Clark, Stewart and Fortas. In the light of Professor Kalven's article, \textit{see note \textsuperscript{4} supra}, it may be interesting for purposes of predicting what the Court will do in the future, to note that Justices Harlan and Stewart are the sole remaining members of this group on the Court today. Moreover, despite the fact that a majority of the Justices seemed unable to reach an agreement as to the level of protection afforded the publisher by the first amendment, even Justice Harlan's position, the most plaintiff-oriented, acknowledges that the first amendment requires that there be some sort of fault principle involved in libel suits. The opinion concedes that while truth is almost always an absolute defense, falsity is not always equivalent to guilt, since the requirement of truth may in itself amount to self-censorship by the press:

    [N]either the interests of the publisher nor those of society necessarily preclude a damage award based on \textit{improper conduct} which creates a false publication. It is the \textit{conduct} element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press.

    388 U.S. at 152-53 (emphasis added). At common law, libel actions were based on falsity, with strict liability if the defendant intentionally published the libel, even if he reasonably believed it to be true. Cohen, \textit{A New Niche For The Fault Principle: A Forthcoming Newsworthiness Privilege In Libel Cases}, 18 U.C.L.A. L. REV. 371, 373 n.18 (1970).
Justice Harlan, which held that public figures can vindicate their rights in a libel suit if they can show that the defendant engaged in "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting adhered to by responsible publishers." Three other Justices concurring in the result, disagreed with the test proposed, maintaining that the New York Times rule should be applied to public figures as well as public officials. Justices Black and Douglas once again stated their position that the first amendment presents an absolute bar to libel actions against the press. In addition, the two Justices attacked Justice Harlan's view reasoning that by employing variable standards based on the facts of the case, nature of the matter published, and the type of plaintiff involved, thus formulating the privilege only after the alleged libel has occurred, the Court was fostering confusion and creating a situation in which no publisher would know whether he was acting safely.

The result of this judicial discord was that no general rule was promulgated by the Court in Butts and Walker; nor could it be said that the New York Times standard was directly applied. By inference, however, it appeared that the New York Times rule had more support in the Court than the Harlan theory, since it seemed far more probable that Justices Black and Douglas would accept that rule in future cases as closer to an absolute privilege than the lesser standard advanced by the Harlan opinion.

Another consequence of the lack of consensus among the Court was the difficulty in establishing which prospective litigants would be disabled by the rule. From the outcome of Butts and Walker, it was not possible to determine the ambit of the rule. While it could be said that private

25. 388 U.S. at 155. Justice Harlan would seem to advocate a variable standard for the protection afforded by the first amendment. See Kalven, note 4 supra, at 292. Whatever intrinsic merit such a proposal has, it suffers from debilitating practical difficulties. Assuming that it is possible to separate libel suits into any number of categories, depending on the status of the plaintiff or the matter discussed or any other criteria, which appears to be difficult enough of itself, the amount of time, effort and difficulty in sorting the individual cases into separate categories is staggering compared with the amount of litigation that could arise from the possible inaccuracy of trial court determinations.

26. Chief Justice Warren, Justices White and Brennan, while disagreeing with Justice Harlan's variable standard, agreed that even if the New York Times rule had been applied, actual malice could have been shown in Butts and not in Walker. 388 U.S. at 162-74.

27. Justices Black and Douglas concurred in the result in Walker and dissented in the result in Butts, rejecting the reasoning in both cases. Their contention is that the provision in the first amendment that "Congress shall make no law . . . abridging the freedom . . . of the press" is an absolute prohibition and leaves no room for libel actions. Therefore, even if actual malice could have been shown in Butts, there should have been no recovery. Such an approach would not only limit recovery in libel actions, it would prohibit suit altogether. 388 U.S. at 172 (concurring and dissenting opinion).

28. Justice Black stated that "[n]o one, including this Court, can know what is and what is not constitutionally obscene or libellous under this Court's rulings." 388 U.S. at 171 (concurring and dissenting opinion).

29. The terminology is Professor Kalven's. Level of privilege refers to the degree of protection afforded, i.e., the Harlan rule versus the actual malice rule. The controversy dealt with here revolves about the classes of persons to whom the privilege
plaintiffs did not have to prove actual malice, an affirmative statement of who was a public figure for purposes of applying any privilege afforded by the first amendment was hard to distill from the language of the cases. Justice Harlan’s description of what constituted a public figure was of marginal assistance; Butts was a public figure by virtue of his “position alone,” and Walker was barred from recovery “by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy. . . .” Further factors to be taken into consideration in determining whether or not a plaintiff was a public figure were: (1) the importance of the defendant’s activities, which were measured by balancing the value of the defendant’s service to society against the risk of harm posed to individuals by that activity; (2) whether the plaintiff was entitled to protection in light of his past activity; and (3) whether the plaintiff had a means of self defense. These tests attempted to draw together the common characteristics of public officials and public figures. Both public figures and public officials have access to the media as a means of self defense, although the public figure’s means of retaliation do not include the common law qualified privilege for libel that the public official has. Both public officials and public figures deliberately have involved themselves in issues which place them in the public limelight, and therefore may be said to have agreed to hold themselves out to criticism. The test of the importance of the defendant’s activity, however, is more elusive. It would seem that the more social value presented by the defendant’s type of publication, the greater is the danger of harm to the individual’s reputation if the publication proves false. In addition, while the use of this test may be helpful when the defendant publishes a scandal sheet, or is simply a muckraker, any judicial determination of such status approaches the very censorship which the Court is so scrupulously trying to avoid. The final result of the New York Times, Butts and Walker cases, then, was that while the question of whether or not there would be a varying level of privilege seemed sure to be answered in the negative, the question of the ambit of the privilege, i.e., what plaintiffs would be disabled, or, conversely, what defendants would be protected by the New York Times rule, was destined to be the paramount inquiry in future litigation. Until the emergence of the public interest doctrine, the

will pose a barrier, or the ambit. Moreover, this is the sole controversy within the judiciary. While other courts have examined Justice Harlan’s proposed differing levels of privilege, variable protection for the press has never been applied. See Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969), cert. granted, 397 U.S. 904 (1970) (No. 947, 1969 Term; renumbered No. 66, 1970 Term; argued Dec. 7-8, 1970), where the Third Circuit expressly rejected any application of the “highly unreasonable conduct” rule. See also Cepeda v. Cowles Magazines & Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968); Holmes v. Curtis Publishing Co., 303 F. Supp. 522 (D.S.C. 1969); A.S. Abell Co. v. Barnes, 258 Md. 56, 265 A.2d 207 (1970).

30. 388 U.S. at 155.
31. Id.
32. Id. at 154.
33. Id.
34. Id.
35. See Kalven, note 4 supra.
vast majority of important libel cases following these three landmarks were primarily concerned with the determination of this question.

Significantly, however, although New York Times, Butts, and Walker established that the application of the actual malice rule was predicated upon the existence of a public official or public figure, underlying even those cases was a theory based on more than the mere status of the plaintiff as a public figure or a public official. The Court repeatedly emphasized that the actual malice privilege was being afforded the defendants because of the first amendment rationale requiring the free exchange of ideas on matters of public interest and concern. Moreover, each of the cases arose factually in the context of issues of public concern which were far more important than the individual plaintiffs themselves. Both New York Times and Walker were actions brought by plaintiffs who had been mentioned in accounts of the nascent civil rights movement. There were few issues more topical when Sullivan sued the New York Times than the sit-ins and protests for racial equality, and few names more frequently mentioned than the man with whom the reports were concerned—Martin Luther King. Likewise, a great deal of attention was focused on the attempted desegregation of the University of Mississippi, with which General Walker interfered. To a lesser extent, in Butts, rumor of efforts to fix the Georgia State-Alabama football contest was an issue of significant public interest, albeit of smaller consequence. In all three cases, the defa-

36. In the New York Times case, Justice Brennan, speaking for the majority, said that although the publication of which the plaintiff complained was an advertisement, it “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.” 376 U.S. at 256. Justice Black, in his concurring opinion, further stressed the importance of the issue to the decision, and the underlying first amendment rationale:

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called “outside agitators,” a term which can be made to fit papers like the Times, which is published in New York. . . . Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

Id. at 294-95 (concurring opinion).

In Butts and Walker, Justice Harlan noted that even employing a balancing of interests approach, both cases involved matters of such public interest as to outweigh society’s pervasive interest in protecting individual reputation. He thus reiterated the reasoning of Time, Inc. v. Hill, 385 U.S. 347, 389 (1967), stating that:

[Freedom of the press] is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community . . . as it is a social necessity required for the “maintenance of our political system and an open society.”

388 U.S. at 149.
mation concerned the plaintiff's activity in the particular area of public concern, thus establishing a nexus between the libel and the issue.\textsuperscript{87}

The only case in which the Court imposed the \textit{New York Times} rule to disable a plaintiff who was neither a public official nor a public figure in the years immediately following \textit{New York Times} was \textit{Time, Inc. v. Hill}.\textsuperscript{88} In that case, however, the suit was brought on a theory of invasion of privacy rather than defamation, and the statements, rather than being defamatory, could arguably have been considered laudatory.\textsuperscript{89}

With that notable exception, the courts progressed in a rather mechanical fashion, broadening the categories of public figures, generally adhering to Justice Harlan's two primary classifications — those who were public figures because of their popularity or occupation, and those who were public figures because they had thrust themselves into the vortex of public issues. In both cases, the primary justification for barring recovery seems to be that those who would hold themselves out to the public must assent to criticism, notwithstanding the falsity of some remarks. Judicial focus in these controversies was on the activity of the plaintiff; in effect he brings about his own disability through his conscious choice. It is submitted that the major fallacy in this approach lies in allowing the plaintiff to control, after a fashion, what protection will be afforded the publisher by the first amendment. This is inconsistent with the theory that the first amendment's purpose is to protect and foster the free flow of ideas. It would seem more consonant with the first amendment rationale to say that persons are important because the issues in which they are involved are important, rather than the reverse.

Nevertheless, in the aftermath of the \textit{New York Times}, \textit{Butts} and \textit{Walker} decisions, courts chose to scrutinize the plaintiff more closely than the idea which was being communicated in applying first amendment protection to libel actions. Employing this methodology, courts determined the following individuals to be public officials or public figures

\textsuperscript{37} It would seem that under both the public figure and public interest approaches to the application of the privilege, some nexus is required between the defamation and the matter discussed. This naturally follows from the rationale underlying these approaches. The public figure or official gains that status from his connection with the issue. Under the public interest approach, the same is true, although under this approach there is no need to go further and determine whether there is a public figure. Under both methods, however, it is apparent that since it is the issue which gives rise to the privilege, a libel unrelated to the issue should not be protected. The problem arises in determining how proximate or remote the nexus must be, especially in light of two recent Supreme Court decisions which have concluded that all aspects of a candidate's or official's life are relevant to his fitness for office. \textit{Monitor Patriot Co. v. Roy}, 39 U.S.L.W. 4264 (U.S., Feb. 23, 1971); \textit{Ocala Star-Banner Co. v. Damron}, 39 U.S.L.W. 4268 (U.S., Feb. 23, 1971), discussed at p. 976 \textit{infra}.

\textsuperscript{38} 385 U.S. 374 (1967).

\textsuperscript{39} The article appearing in \textit{Life} Magazine described a play based on a fictionalized account of plaintiff's experiences while he and his family were held hostages by escaped convicts in their suburban Philadelphia home. The photographers and actors went to the house and recreated some of the scenes, while the story described plaintiff's gallant conduct in the face of verbal and physical abuse at the hands of their captors.
for purposes of applying the actual malice rule: A county district attorney, a county attorney, a deputy chief of detectives, the supervisor of a county recreation area, a court clerk, a professional baseball player, an active participant in a political campaign, a candidate for public office, the operator of a state-supported nursing home, and a United States Army officer. It is difficult to see how the *New York Times*, *Butts* and *Walker* reasoning applies to this panoply of cases. Although it may be said that the result of these decisions is to extend the concept of "public official" to all persons or organizations that have any nexus with governmental operations, the outcome is that the term "public official" has been retained purposelessly. It seems clear that public officials such as a court clerk and a recreation supervisor have extremely limited access to the media to vindicate their reputations, and, even if the common law afforded such persons a qualified privilege to defame others within the scope of their functions, such a privilege would probably be so narrow as to be functionally useless. Moreover, it strains credulity to classify an active participant in a primary election campaign as a public figure having a degree of notoriety that rivals General Walker, or even Wally Butts. It is submitted that what can be distilled from these cases, however, particularly those involving public officials, is that the protection is afforded the publisher because the statements made about the plaintiffs concern government, rather than the fact that the plaintiff may be a public official. The undercurrent remains. In reality, it is the issue, and not the figure, that determines the privilege.

III. THE NEW STANDARD — PUBLIC INTEREST
IN PUBLIC ISSUES

Fundamental to the application of the first amendment to the law of libel is the concept that the first amendment was designed to protect and foster the circulation of ideas, or at least some ideas that are of social importance. An important corollary to this concept is the recognition that
the circulation of falsehood is of marginal social utility.\textsuperscript{51} Not only does the circulation of a falsehood impede the intelligent formation of judgment, but when the falsehood concerns a person it can damage that person’s reputation. It is axiomatic to principles of tort law that damage be recompensed by a tortfeasor. In the area of libel, however, a problem arises from the realization that a likely concomitant to the suppression of falsehood is the inhibition of the circulation of truth which should be protected activity under the first amendment. The proposition can also be stated in the converse — a policy devoted to the promulgation of truth inevitably results in the circulation of some falsehood.

Our libel law has its roots in English law, which was formulated to control seditious libel against the Crown.\textsuperscript{52} Therefore, viewing the situation from the standpoint of the circulation of ideas and informing the public, the basis of libel law, \textit{i.e.}, the protection of reputation through the suppression of all falsehood, emphasizes the negative, repressive side of the spectrum, while the first amendment and American constitutional legal history emphasize the positive, expansive side. In short, while English law emphasized the importance of reputation at the expense of freedom of the press, the first amendment and many American decisions would seem to take the opposite view.\textsuperscript{53} The outcome of the collision of the first amendment with the law of libel becomes more difficult to assay when it is recalled that the first amendment can be satisfied short of tolerating circulation of all falsehood. Clearly, \textit{New York Times} and its progeny indicate that the first amendment leaves little room for actionable libel where government is involved, and that some falsehood must be tolerated to avoid a “chilling effect” on first amendment rights.

First amendment freedom of the press, however, is not limited to protection of robust criticism of government. In the words of Justice Brennan:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. \textit{Freedom of discussion}, if it would fulfill its historic function in this nation, must \textit{embrace all issues about which information is needed or appropriate} to enable the members of society to cope with the exigencies of their period.\textsuperscript{54}

\footnotesize{\textsuperscript{51} Obscenity and blasphemy have also been traditionally considered as possessing no social value. Roth \textit{v.} United States, 354 U.S. 476 (1957). The term "redeeming social importance," in its broadest sense, has been the criterion for judging whether ideas merit first amendment protection in the obscenity area. For the problems involved in applying such a standard to the law of libel, see note 92 and accompanying text infra.}

\footnotesize{\textsuperscript{52} Merin, \textit{supra} note 8, at 372.}

\footnotesize{\textsuperscript{53} Cohen, note 24 \textit{supra}.}

\footnotesize{\textsuperscript{54} Time, Inc. \textit{v.} Hill, 385 U.S. 374, 388 (1967) (emphasis added), \textit{quoting} Thornhill \textit{v.} Alabama, 310 U.S. 88, 102 (1940).}
Although Justice Brennan's view of the first amendment is not expressed in absolute terms, his position is substantially similar to that of Professor Meiklejohn, who views the first amendment as an absolute:

Public discussion of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents (government). 55

Under the Meiklejohn interpretation, the first amendment protects all speech and publication concerning the public's governing power, including all speech concerned with the freedom to vote, all thought and expression by which voters form intelligent judgments in voting, and also as a necessary incident of this governing power, that speech which is concerned with education in all its aspects, philosophy, sciences, literature and the arts. 56

Under either view it seems evident that the first amendment is intended to protect the expression of ideas and the discussion of issues. With this purpose in mind, whatever protection against libel actions the first amendment is to afford publishers, it is submitted that such protection must be based upon the issue which the defendant is discussing rather than the person involved in the issue. Since the Court has determined the level of protection will be the actual malice rule advanced in New York Times, it would seem that this protection should be applied according to the issue rather than the plaintiff. This concept was an undercurrent in the decisions in New York Times and its progeny; it has more recently become of primary concern in the application of the actual malice rule.

A. The Emergence of the Public Interest Doctrine

1. Basis of the Common Law Privileges

At common law there was an absolute privilege granted to judges, legislators, legal counsel, and often grand and petit juries acting within

55. Meiklejohn, The First Amendment Is An Absolute, 1961 The Supreme Court Review 257. Professor Meiklejohn's view is that the people are the governors, and government is merely the agent of the people. To this end, the people granted some power to the government and reserved the most important power to themselves. These reserved, or governing powers are protected and embodied in the first amendment, and formal government is powerless to abridge these powers in any way. His central thesis is that "[t]he revolutionary intent of the First Amendment is . . . to deny all subordinate agencies authority to abridge the freedom of the electoral power of the people." Id. at 254. See also Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). Although Professor Meiklejohn's definition of powers of governing importance includes virtually all speech, his view of the first amendment is probably not as absolute as that of Justices Black and Douglas, who feel that the first amendment leaves no room for libel suits against the press. It should be further noted that no matter how absolute their view of the first amendment, all of these men agree that this concept applies only to pure speech; while the first amendment protects the speech itself, the government nevertheless still has the power to regulate to a certain extent the time, place, and manner of speech. See, e.g., Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

56. Brennan, supra note 55, at 13. Justice Brennan seems to take a slightly less absolute view of the first amendment than Professor Meiklejohn.
the scope of their duties. Moreover, an absolute privilege was also accorded major government officials, and a rather narrow qualified privilege was extended to others in government service. There were also the privileges of fair comment and record libel. Of these privileges, only fair comment was based entirely on a plaintiff's holding out of himself for criticism. Although not predicated upon constitutional protection, the real justification for these privileges of other kinds is remarkably similar to the first amendment freedom of speech theory — that citizens have the right to discuss ideas and the right to be informed on issues. All of these privileges cover areas described by Professor Meiklejohn as of "governing importance;" they include judicial and other governmental operations, and even entertainment. Although at common law the level of the privilege and the standard of defamement differed among states and according to the particular privilege, one element was common; the privilege attached to the issue and the defendant's status, not to the person defamed.

57. Cochran v. Couzens, 42 F.2d 783 (D.C. Cir. 1930) (legislator); Schultz v. Strauss, 127 Wis. 325, 106 N.W. 1066 (1906) (grand jury); Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938) (absolute privilege of judge, counsel, and broadcaster for record libel).
60. Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901). The fair comment privilege was based upon the rationale that anything held out to the public automatically becomes open to criticism. It was assumed that if the plaintiff held himself out to the public, he invited criticism. The basis of this privilege varied according to state law, but was generally limited to expressions of opinion rather than statements of fact. See note 4 supra.
61. Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938). Record libel privileges were not defeasible so long as the account published was accurate.
62. See note 60 supra.
63. Professor Meiklejohn, however, would extend the privilege much further; under his theory, information which was privileged would include all that is necessary to inform in the broadest sense. See Meiklejohn, supra note 55, at 256-57.
64. The common law privileges were not dependent upon the plaintiff involved in order to be invoked; on the contrary, they depended on the defendant's right to communicate the information in controversy. This is a more logical approach than the public figure doctrine if the privilege must depend on one of the parties rather than the issue. Common law privileges attached because of the defendant's status; certain classes of people such as legislators, judges and public officials were recognized to have the right to communicate even defamatory material in the interests of the public welfare because those with the privilege were assumed to have a degree of expertise and authority in that particular field. The ability of the defamed party to rebut, or shape public opinion, or his access to the media was not controlling; the privilege applied because the communicator had a degree of authority on the issue discussed. Since this was the basis for the privilege, it follows that, as an alternative to recognizing a privilege based on the issue, the privilege should be based on the communicator's authority and expertise to speak on the area. Such an approach would amount to the same ultimate result as the public interest approach. It would either have to be recognized that the press has the authority and expertise to communicate on public issues in general, or some complex licensing procedure would have to be invented, based either on subject matter, or on the quality of publication. Since any form of licensing would require judicial determination of the worth of the publication or its manner of presentation, which involves governmental control of the press, this method would prove unsatisfactory. The only alternative left then, would be to recognize the general authority of the press in communicating public issues, and extend the privilege to all matter printed on public issues, the same result as that ultimately contemplated in the public interest approach. See notes 58-61 supra.
2. Unabashed Application of the Public Issue Test —
The Corporate Plaintiff

The corporate plaintiff in a libel suit presents distinct problems to the courts. On the one hand, it may be argued that a corporation needs protection from loss of reputation even more than an individual plaintiff because damage to a corporation's reputation may have a direct and proximate effect on its financial status which can be proven with some degree of certitude. On the other hand, it may be important to a large segment of the population to discuss the practices of corporations. The problem is exacerbated because it is extremely difficult to classify a corporation as a public figure for any of the reasons set forth in the Butts and Walker cases. Few corporations would thrust their corporate personality into the vortex of important public issues deliberately; controversy is bad business. If one corporation is deemed to be a public figure because of what it does, it would seem to follow that all corporations must necessarily be public figures. The courts, therefore, were faced with the problem of either recognizing the public issue argument or running the risk of quelling the circulation of valuable information.

Thus, in United Medical Laboratories v. Columbia Broadcasting Systems,65 CBS ran a series of exposes on fraud in the medical laboratory business, pointing out with well-documented reports that some laboratories were overlooking diseases found in biological samples in some instances, and inventing diseases which their drug-producing subsidiaries could cure in other instances, and one such laboratory brought suit, the Ninth Circuit Court of Appeals was compelled to recognize that:

[T]he fundamental basis on which all of the Court's First Amendment thrusts into the various fields thus far presented has rested — the right of the public to have an interest in the matter involved and its right therefore to know or be informed about it.66

65. 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969). Cases involving commercial organizations as plaintiffs would seem to demonstrate a clear victory for the public interest rationale. The original tension was created by attempting to balance the interests of freedom of the press against harm to reputation. The damage done to the reputation of a corporation or other commercial institution by a libelous publication clearly is more profound and debilitating in its immediate effects than the injury incurred by an individual. While an individual's peace of mind and relationships with others may suffer because of an injury to reputation, these elements are relatively immeasurable and may possibly be overcome with time. In the case of a corporation, however, the loss of reputation leads to a direct and immediate calculable loss of income. A corporation's reputation, often carried on its books as that elusive element known as "good will," is often the major element responsible for the profitable existence of that corporation, and loss of it may well plunge the corporation into financial chaos. In United Medical Laboratories v. Columbia Broadcasting System, 404 F.2d 706 (9th Cir. 1968), the company established $100,000 in special damages as a result of allegedly defamatory broadcasts.

66. Id. at 710 (emphasis added). The court went on to recognize the public interest underrun in Butts and Walker:

Those cases engaged in some analogy of public figures to public officials. In outer respects, such an analogy might have more closeness than one between public officials and persons engaged in the activities here involved. Thus, such persons perhaps could claim not to have offered themselves to the limelight as
May 1971] Comments 969

Clearly, the court's primary emphasis was upon the public's interest in the things done by these companies; concern for the status of injured parties was reduced to a secondary level.

In Arizona Biochemical Co. v. Hearst Corp, the United States District Court for the Southern District of New York employed the public interest criteria for application of the New York Times rule where it might have been able to stretch that case's public official rationale. In Arizona Biochemical, the plaintiff was a garbage collection company which the defendant alleged secured its municipal contracts through illegal kickbacks and associations with organized criminal elements. The court reasoned that if the purpose of the First Amendment limitation on libel actions is to "insure the ascertainment and publication of the truth about public affairs . . . [the] privilege should be defined in broader terms than public official or public figure." Since the collection of garbage was an important service to the inhabitants of the area, "[t]he operation of the plaintiff's business is infected with the public interest."

One case cited as precedent by the court in Arizona Biochemical not only blatantly applies the public interest doctrine, but also serves to show how far that test is likely to be carried. In Bon Air Hotel v. Time, Inc., plaintiff hotel sued Time, Inc., for a publication which criticized the accommodations in the hotel and accused it of charging exorbitant prices. Almost the entire business of the hotel was derived from spectators who came once a year to watch the Masters' Golf Tournament in Augusta, Georgia. The District Court for the Southern District of Georgia held that notwithstanding the facts that the alleged defamation was published on a national scale and the segment of the public interested in the function of the hotel was limited, since a hotel is "quasi-public in character" and the circumstances surrounding the athletic event were of legitimate public

have public officials and public figures. But though limelight may be a factor in public interest occurring, it can hardly be held to constitute a condition for the right of public interest to exist. Indeed, in the case of Mr. Butts at least, the factor of limelight would seem to have been a relatively subordinate one in the national publication involved.

The primary basis of general interest in the Butts situation would have to be regarded as the public's right to be concerned over the nature and significance of the things alleged to have been done, with the persons said to have done them being secondary elements therein. Thus, if some analogy were to be looked for here, in caution against an uncertain extension of First Amendment immunity being made, this aspect would exist sufficiently in the elements of the field in which United Labs was engaged being, from the nature and extent of its capacity to affect health, as naturally entitled to public gaze and interest, and as inherently subject to right of public information and discussion, as were the field and activity in Butts — or in Walker . . . .

Id. at 712.

68. Id. at 414.
69. Id. at 416.
interest, the plaintiff had to prove actual malice. The Circuit Court for the Fifth Circuit affirmed.

3. Public Issues and the Private Plaintiff

It is not surprising that the first instance of application of the public issue test to a plaintiff who was neither a public figure, nor a public official was in a case in which the publication was libellous per se — the plaintiff was accused of committing a crime. Where the defamatory meaning does not appear on the face of the publication, there is the possibility that the difficulty of proving that it was in fact libellous and showing special damages may indirectly vindicate first amendment rights, but with a publication that is libellous per se none of these safeguards, however indirect, are present. In addition, the topic of crime is clearly a legitimate public issue of traditionally significant import. Therefore, it was within the context of this clear public issue that courts took the opportunity to apply the public interest test to private individuals.

Two of the cases, Time, Inc. v. Ragano and Wasserman v. Time, Inc., arose out of the same publication. The defendant, Time magazine,

71. 295 F. Supp. at 709, 426 F.2d at 867. The courts of the Fifth Circuit have given the most clear and unequivocal enunciation of the public interest doctrine:

The question before us is whether the first amendment protection, extended to public figures in Butts, applies to publication concerning matters of public interest. . . . We agree with these decisions . . . that publications concerning matters of public interest are protected by the first amendment absent proof of actual malice.

Id. at 861. In commenting upon the quantum of public interest necessary to make the matter one of legitimate public interest, the court said:

Although some "public interest" cases have dealt with matters of a more critical nature, e.g., public health and organized crime, we conclude that Time's article, focusing on Augusta, the Masters' Golf Tournament and the public accommodations available for the many thousands of spectators, was of a legitimate public interest.

Id. at 862.

In discussing the public interest doctrine and affirming the lower court's opinion, it was ruled that:

Adequacy of means of self-defense and ability to counter false charges is not a decisive criterion by which a defamer's right to First Amendment protection is to be judged.

295 F. Supp. 704, 708 (S.D. Ga. 1969). Such a position buttresses the contention that the privilege is invoked according to the issue, rather than the plaintiff.


73. A statement libellous per se is one that is actionable without proving damages. The Tentative Draft of the Restatement of Torts defines this form of libel as follows:

Liability Without Proof of Special Harm—

(1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is

(a) libel whose defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement, or

(b) libel or slander which imputes to another

(i) a criminal offense . . . .

(ii) a loathsome disease . . . .

(iii) matter incompatible with his business, trade, profession or office . . . .

(iv) unchastity on the part of a woman plaintiff.

ReSTaTeMeNT (SeCoNd) oF TOrTS § 569 (Tent. Draft No. 12, 1966).

74. 427 F.2d 219 (5th Cir. 1970).

75. 424 F.2d 920 (D.C. Cir. 1970) (per curiam).
identified thirteen men in a picture as “top Cosa Nostra hoodlums.” However, plaintiffs Ragano and Wasserman turned out not to be the hoodlums, but rather their attorneys. The Fifth Circuit and the District of Columbia Circuit, respectively, held that although the plaintiffs were not public figures, they were required to show actual malice on the part of the defendants because of the great public interest in the issues involved. Likewise, district courts in Massachusetts, California, and New York have reached the same result.

Crime, however, has not been the only public issue in which the courts have applied the New York Times rule to private plaintiffs. In Farnsworth v. Tribune Co., the Supreme Court of Illinois held that a

76. 427 F.2d at 221; 424 F.2d at 922. The Wasserman court indicated that the doctrine was a firmly entrenched rule in the Fifth Circuit:

Preliminarily, we note our agreement with the District Court that even if plaintiff is not a “public figure,” New York Times Co. v. Sullivan . . . which required that “actual malice” be shown is applicable because the article which is alleged to be defamatory concerned a matter of great public interest.

77. DeSalvo v. Twentieth Century-Fox Film Corp., 300 F. Supp. 742 (D. Mass. 1969). In that case, the plaintiff, committed as insane after being arrested for robbery, assault and other non-capital offenses, attempted to capitalize on the popular suspicion that he might be the Boston Strangler. He hired F. Lee Bailey to aid him in selling covenants not to sue to all persons who might be interested in writing on the Boston Strangler. Defendant purchased the rights from one of plaintiff’s buyers in order to make a motion picture. The court held that:

Due to the exceptional public interest in the so-called “Boston Strangler” incidents and the extensive publicity surrounding plaintiff as a possible “Boston Strangler,” particularly pending and during his criminal trial on criminal charges on which he was convicted and is presently confined, the public interest in the “Boston Strangler” preclude maintenance of an action by plaintiff for defamation or invasion of privacy unless plaintiff proves publication that is knowingly false or falsely made with reckless disregard for the truth.

Id. at 747. That same court also used the public interest doctrine in addition to the standard New York Times criteria in the more recent case of Medina v. Time, Inc., 319 F. Supp. 398 (D. Mass. 1970). There, plaintiff, a Captain in the United States Army, brought suit over a Time magazine report which stated that an eyewitness had seen the plaintiff shoot a small child during a raid on the hamlet of My Lai in Vietnam. The court held that:

Even before the appearance of this article the allegations of atrocious conduct by American soldiers had become a legitimate matter of public discussion and concern, and defendant’s publication clearly is entitled to the protection of the New York Times standard.

Id. at 399-400.

78. Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Cal. 1969). Life magazine identified plaintiff as head of a Cosa Nostra family in San Jose. The court held that the basis for affording the privilege to the press is the public’s right to know. Since the public has a right to know about organized crime, it follows that the privilege must attach.

79. Konigsberg v. Time, Inc., 312 F. Supp. 848 (S.D.N.Y. 1970). This case arose from the same Life magazine series on organized crime, in which the magazine called the plaintiff “the most dangerous uncaged killer on the east coast.” Id. at 849. The rationale here was much the same as that in Cerrito v. Time, Inc., note 78 supra.

80. 43 Ill. 2d 286, 253 N.E.2d 408 (1969). The newspaper alleged that the doctor used gadgetry virtually unheard of to medical science, and that she was allied with a “musical tea leaf reader.”
doctor who claimed that a newspaper labelled her a quack must prove actual malice to recover damages, reasoning that "the question is whether a public issue, not a public official (or public figure) is involved." 81 In that case the court, balancing the relevant interests, determined that the subject matter involved was of such great importance as to outweigh the fact that the plaintiff's personal contacts were with but a small portion of the community.

The Third Circuit has made perhaps the most far-reaching application of the public issue standard to a private individual. In Rosenblum v. Metromedia, Inc., 82 it was held that a private distributor of nudist magazines who had been labelled a "girlie book peddler" and a member of the "smut literature racket" by a Philadelphia radio station was under the New York Times disability. The court took the position that "the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented." 83 It was recognized that the protection afforded by the first amendment cannot be narrowly construed as limited only to public figures and public officials. With respect to the constitutional protection of freedom of speech, the court ruled that:

[T]he First Amendment guarantees must be applied broadly lest they suffocate for lack of breathing room. . . . [S]ome degree of abuse is inescapable if the press is to discharge its function adequately; that such abuse must be tolerated or the guarantee will be unduly chilled by the threat of defamation actions, with resultant damage to the general public which is the primary beneficiary of the guarantee. 84

B. Implications of the Public Issue Doctrine

Even if the Supreme Court succumbs to what Professor Kalven has called the "overwhelming invitation to follow a dialectic progression from
public official to government policy to public policy to matters in the public domain . . . ”,85 all of the problems raised by the common law of libel and New York Times and its progeny that have plagued the courts are not entirely solved. Among the problems inherent in the public interest approach are the following: Will the public figure and public official classifications propounded by earlier cases have continuing validity? Will the scope of the privilege be determined, at least in part, by the relation of the libellous remark to the discussion of the issue; i.e., will the courts still make a determination between public and purely private libel? If the courts do accept the public interest doctrine, is it possible for a plaintiff to recover on the grounds that the goals of the first amendment of the public's right to know and be informed on matters of public interest could have been adequately fulfilled without mentioning the plaintiff's name at all? These questions are all closely allied to a more fundamental inquiry: What is a public issue, and who will determine its existence?

In Rosenbloom, it was argued that the application of the public issue or public interest test will require judicial distinction between "matters of legitimate public interest" and "matters of mere public curiosity."86 The rationale for such a distinction seems to be that, while the dissemination of information relating to matters of legitimate public interest has a social value worthy of first amendment protection, promulgation of material which appeals to mere lurid curiosity has such little value in relation to its potential harm to reputation that the courts are justified in excluding it from protection.87 Federal courts have not yet begun to consider this problem,88 nor have they given any concrete indication as

85. Kalven, supra note 4, at 221.
86. Brief in the Supreme Court for Petitioner at 17; for Respondent at 20, Rosenbloom v. Metromedia, Inc., No. 66, 1970 Term, argued Dec. 7-8, 1970. Petitioner argued against the adoption of the public interest doctrine on grounds that it would be impossible for the Court to make distinctions between matters of public interest and matters of public curiosity; the adoption of the doctrine would make the press the arbiter of that issue. It is submitted that petitioner was correct in this contention. See pp. 974-76 infra. Respondent contended that such a determination would be possible, maintaining that the area of "private libels" are those that are not matters of legitimate public interest. However, the Supreme Court has recently made great inroads on the area of "private libels" to the point where such a classification no longer exists with respect to candidates and elected officials. Monitor Patriot Co. v. Roy, 39 U.S.L.W. 4264 (U.S., Feb. 23, 1971); Ocala Star-Banner Co. v. Damron, 39 U.S.L.W. 4268 (U.S., Feb. 23, 1971).
87. Such an interpretation would perhaps be consistent with the Meiklejohn view, since, under that theory, protection is limited, however slightly, to matters of governing importance. It is submitted that, just as it is exceedingly difficult to make a determination between public interest and curiosity, so would it be an onerous task to distinguish between matters of governing importance and others. Moreover, with the broad definitions that can be given both of these designations of protected speech, little would be gained in making such distinctions.
88. One case which would have presented an excellent opportunity to attempt a distinction was Sellers v. Time, Inc., 423 F.2d 887 (3d Cir. 1970). In that case, Time magazine reported in its Law section an incident under the heading "Duffer's Dilemma," dealing with plaintiff's unsuccessful motion for summary judgment in a suit against him based on assumption of risk. Plaintiff was playing golf and sliced the ball, hitting a companion seated in a golf cart behind him. The article alleged, among other things, that plaintiff, a businessman, played golf for business purposes rather than for pleasure, and made light of the plaintiff's contention that his companion had assumed the risk of being hit by sitting twenty feet behind the plaintiff.
to whether this distinction is feasible; they have simply accepted as the minor premise of their argument in cases decided on the public interest doctrine that the interest involved was legitimate.80

On the state court level, however, the Illinois Supreme Court's attempt to define the scope of legitimate public interest in Farnsworth illustrates the difficulty in formulating a basis for such a distinction:

In determining a subject's importance to the public, we must consider not only the number of persons affected by the subject, but also the severity of its impact upon those so affected. Thus, the fact that the plaintiff's personal contacts were presumably with only a small portion of the public does not militate against immunity where the publications concern a matter of such vital importance as the qualifications and practice of one who represents herself as qualified to treat human ills.80

It is submitted that any attempt to distinguish between matters of public interest and mere curiosity will not only run counter to the protection afforded by the first amendment, but will also have the deleterious result of moving the courts from the bog of public official-public figure determination into a different quagmire of equal instability. First, while admittedly the courts have been able, albeit with great difficulty, to assess the social value of certain publications, notably in the area of obscenity,81 such determinations have not met with general approval, even among the Justices of the Supreme Court.82 In addition, determinations of obscenity have been based on whether or not there was the "slightest redeeming

Rather than making any decision that the statements made about plaintiff were either irrelevant to the discussion of the legal topic, or mere matters of public curiosity, the court strained to hold that the statements were not libellous.

89. Explication of the reasons why the courts have considered the matters discussed to have been legitimate has been peremptory. See, e.g., Holmes v. Curtis Publishing Co., 303 F. Supp. 522 (D.S.C. 1969). But see DeSalvo v. Twentieth Century-Fox Film Corp., 77 Supra. This case is one of the few exceptions to this trend. However, in DeSalvo, it is also possible to argue that the matter was one of public interest because of the publicity, rather than it received publicity because it was a matter of public interest. This is an acute problem in attempting to differentiate between public interest and public curiosity, or in deciding whether to allow the press to be the arbiter of public issues. Repeated publicity may lead to genuine public interest; conversely, public demand may lead to repeated publicity. Each realization of this situation may be one reason why the courts that adhere to the public interest doctrine have not ventured to establish criteria for determining public interest, but instead have accepted the publication as a matter of legitimate public interest simply because it was printed.

90. 43 Ill. 2d 286, 289, 253 N.E.2d 408, 411 (1969).
92. In Memoirs, several English professors from Harvard, Williams and Brandeis colleges testified that the book, Fanny Hill, had some value in the history of English literature, while the headmaster of a private school maintained that the book was nothing more than hardcore pornography. This diversity of opinion prompted Justice White to remark:

If "social importance" is to be used as the prevailing opinion uses it today, obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable.

Id. at 461 (dissenting opinion).
social importance." It would seem possible to find that even matters of curiosity might have this scintilla of importance. Therefore, the test either becomes useless, or a higher standard of social importance must be used in the area of libel. Moreover, while the social importance test in the realm of obscenity is an ultimate test, i.e., it is used in the ultimate determination of whether the publication is obscene, such a test in the libel area would be a preliminary one. Its function would not be to determine whether the publication is libellous, but whether the publisher may be afforded the protection of the first amendment. This would place an additional burden on both the publisher and the defamed party. Instead of requiring the publisher to simply publish without actual malice, he would have to make a threshold determination whether he may be risking a libel suit, and then if that determination is answered in the affirmative, he would have the further problem of weighing the social value of the publication, as it bears on his opportunity to invoke the actual malice standard, against the risk of adverse judgment if the matter turns out to be one of mere public curiosity. In addition to the lack of predictability, there would be the same chilling effect caused by self-censorship condemned in New York Times.

Additional problems arise with any judicial determination of the importance of a publication. Farnsworth is an indication that the determination of importance will not be made on the universality of the public interest. Likewise, Bon Air Hotel supports the proposition that the percentage of the general public interested in the publication has relatively little bearing on whether the matter is one of public interest. These decisions severely discount the probability of the courts using any such empirical criteria in making a decision on the legitimacy of the public interest.

It appears, then, that the courts will be unable to make any workable distinction between matters of public interest and those of mere public curiosity. Since public interest is, by definition, determined by what

94. One distinction may be valid, however. It is quite settled that the courts will make no distinction between the press and radio and television for purposes of applying the first amendment and the New York Times rule to libel actions. Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 895 (3d Cir. 1969), cert. granted, 397 U.S. 904 (1970) (No. 947, 1969 Term; renumbered No. 66, 1970 Term; argued Dec. 7-8, 1970). However, a distinction has been made between the press in this broad sense, and other dispensers of information. The Court of Appeals for the Third Circuit, in Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir. 1971), held that:

[The doctrine of New York Times v. Sullivan does not extend to private subscription credit reports, and that any allegations of defamation concerning such reports are properly subject to the libel laws of the several states.]

Id. at 438. This distinction, made by the same court that decided Rosenbloom is based on the private nature of the communication rather than the amount of public interest involved, which would seem to be fairly large. See Cohen, supra note 24.

The court placed great weight on the fact that, despite any interest, the credit report is not a medium entitled to protection. It stated:

In the view we take of this case, moreover, there is a more fundamental flaw in defendant's attempt to clothe itself in the protective cloak of the Times standard. Based on a thorough review of the cases interpreting and applying the Times doctrine, we hold that the defendant's publication is not a medium entitled to that extended constitutional protection. We reaffirm our conclusion in Rosenbloom that "no rational distinction can be made between radio and television on
the public desires to know, and since the press, as a matter of business, reflects in its reporting the demands of the public, it follows that the press will determine what is of the public interest. In short, all that is printed will be in that category. 95

Assuming that the press has a privilege to print all that is of the public interest, and assuming that all that is printed will be deemed to be of legitimate public interest, the question arises whether the courts will continue to follow the Garrison v. Louisiana 96 holding that there must be some degree of relevance, or nexus between the matter discussed and the libel. The Supreme Court, in the recent cases of Monitor Patriot Co. v. Roy 97 and Ocala Star-Banner Co. v. Dowron 98 held that:

[A]s a matter of constitutional law . . . a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the "knowing falsehood of reckless disregard" rule of New York Times v. Sullivan. 99

the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment. . . . We find such a distinction patent, however, between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. To be sure, defendant's publication is not held out for public consumption. By contractual stipulation, each subscriber agrees that

[a]ll information whether printed, written or oral, submitted in answer to regular or special inquiry or voluntarily furnished to the subscriber by Dun & Bradstreet, Inc., is for the exclusive use of the subscriber. Such information shall be held in strict confidence and shall never be revealed or made accessible in any manner whatever to the persons reported upon or to any others. (Emphasis supplied by the court.)

As the court noted in denying a motion to dismiss in Packaging Industries, Inc. v. Dun & Bradstreet, . . . a case strikingly similar to this action:

[T]his defendant, for a fee, presents private clients with a confidential report. It comes before this court in a situation quite unlike that of the defendants in Sullivan and Butts. It has not assumed the role of informing the public at large; pursuant to its own requirement confidentiality must be maintained. The application of a special privilege to this case would be an extension well beyond the limits previously established.

Id. at 437 (emphasis added). Such a distinction does not limit the application of the actual malice rule, since the defendant in this type of case is not part of the press within the meaning of the first amendment.

95. This has prompted one commentator to state:

Once the privilege to report news is recognized in the clearest cases, whatever cautions are expressed in recognizing the privilege, news must eventually be defined in terms of what consumers of news want rather than, as Warren and Brandeis thought, in terms of what courts decide are the legitimate objects of public interest.

Cohen, supra note 24, at 381. Professor Kalven has noted:

Newsworthiness will almost certainly become a descriptive and not a normative term. In brief, the press will be the arbiters of it and the Court will be forced to yield to the argument that whatever the press prints is by virtue of that fact newsworthy.

Kalven, supra note 4, at 284. See also note 89 supra.

96. 379 U.S. 64 (1964).


99. Id.
Although they eschew the concept of public versus private libels\textsuperscript{100} in publications, these holdings should not be taken as an abrogation of the concept of relevance but merely as a broadening of the interpretation of that term. However, this leniency in defining relevance, and the Court’s apparent distaste for the distinctions between libels in the private and public sectors\textsuperscript{101} indicates that, although some standard of relevance will be maintained, only the most blatantly irrelevant defamatory remarks will lose first amendment protection.

Closely related to the problem of relevance of the libel to the issue discussed is the question of relevance of the plaintiff to the issue. There is a certain amount of merit to the argument that if the first amendment provides protection for the discussion of issues, it is possible that the issues may be adequately discussed and the public’s right to know fulfilled without mention of the plaintiff’s name. If this can be done, it would seem improper to leave an innocent plaintiff without remedy.\textsuperscript{102} Although this is not a frivolous contention, there is no case in which this argument has been made, and it seems unlikely that such a theory would meet with a favorable reception, because adoption of this position would embark the courts on careers as editors, and would bring back a great deal of the public figure quandary. In the first place, to make the determination whether the mention of the plaintiff’s name was relevant to the discussion of the issue, the court would first have to look to see if he was somehow embroiled or otherwise involved in the issue — much like the \textit{Butts} test of thrusting his personality into the vortex. The result is the return of the public figure problem. If the plaintiff did not fall within this category, the court would still have to determine if there were some other independent ground for mentioning the plaintiff, such as presenting a valid example of the topic discussed, or to lend credence to the point being made. Such an inquiry is not as to the legal validity, but

\textsuperscript{100} This distinction was promulgated in Garrison v. Louisiana, 379 U.S. 64 (1964). A libel concerning a public official’s fitness for office is a public libel, while one which would be irrelevant to his performance of his assigned duties would be a private libel. It is a matter of speculation whether, should the Court choose to adopt the public interest doctrine, it will apply this new all-encompassing concept of relevance and the abrogation of public versus private libels to all plaintiffs.

\textsuperscript{101} The Court did not expressly limit this expansion of relevance to public officials to the point where it showed any intention of not carrying it to other areas:


\textsuperscript{102} See Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), where, although this doctrine was not argued or applied, an excellent factual setting is provided within which this argument may be pertinent. In a Sports Illustrated article concerning Boston Celtics basketball player Bill Russell, Coach Red Auerbach said that Russell destroyed players, and that he had “destroyed” plaintiff Johnston to such an extent that he was practically “run out” of basketball. Plaintiff had in fact left professional basketball for other reasons and was employed as a college coach. Thus, a good argument could be made that plaintiff’s name need not have been mentioned to illustrate Russell’s psychological prowess. However, the case also illustrates the problems inherent in such an argument. For example, could a court determine that the article would have been just as believable or interesting if Auerbach had said that Russell almost ran “a player” out of professional basketball?
rather the artistic and editorial merit of mentioning the plaintiff, a job for which the courts are unqualified. It appears that the relevance of the plaintiff to the issues discussed must be an editorial judgment on the part of the publisher, rather than one based on the plaintiff's ability to shape public opinion, or his access to the media to vindicate himself.

IV. PROVING ACTUAL MALICE

The means of proving actual malice, while having been much less extensively litigated than the question of public figures and public officials, nevertheless has given rise to its own share of controversy. On the one hand, much argument has been made on behalf of plaintiffs that it is virtually impossible to prove that the defendant made the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” On the other hand, Justice Douglas maintains that the actual malice standard puts the constitutional rights of the defendant in the hands of a jury which is unqualified to judge those rights, and therefore the privilege should be absolute.

Perhaps the effect of the actual malice rule is closer to the former interpretation than the latter. Proof of actual knowledge on the part of the defendant that the matter published was false is extremely difficult. Recklessness, through the refinements of judicial interpretation, has come to mean almost the same thing as actual knowledge. It was held by the United States Supreme Court in St. Amant v. Thompson that:

[It is] clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

103. Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188 (8th Cir. 1966). One of the primary criteria employed in Pauling for determining that plaintiff was a public figure was his ability to exert a sizeable influence on public opinion. But see Rosenblatt v. Baer, 383 U.S. 75 (1966) and Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir. 1968). Plaintiffs in those cases, a County Recreation Supervisor, and a worker in a political campaign for a primary election, respectively were held to be public figures. The extent to which those men could significantly influence public opinion is questionable.

104. It is submitted that access to the media as a means of vindicating reputation is illusory. Once publicly proclaimed to be a devil, a man is unlikely to convince others that he is a saint simply by declaring so.


107. Due to the fact that recklessness, an easier standard to prove than actual knowledge, is also included in the definition, cases of proof of actual knowledge are rare. The closest any opinion has come to intimating that the defendant had actual knowledge of the falsity of the report was Curtis Publishing Co. v. Butts, where the inference can be drawn from the opinion that the publisher either was actually aware of the falsehood, or he was exceedingly incompetent.

The Court went on to say that:

[T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. 109

Recklessness was earlier defined as requiring a showing that the matter was published with a "high degree of awareness of . . . probable falsity." 110 Accordingly, the courts have held that the following are not alone enough to establish recklessness, and thus actual malice: Mere failure to investigate, absent other circumstances; 111 failure to pay heed to the possibly defamatory nature of the comments; 112 lack of personal knowledge of the verity of the statements; 113 omission of the word "alleged" in reporting about a crime; 114 and even rewording of the reporter's source, at least to the extent that, while a defamatory reference not present in the original has been introduced, the substantial meaning of the report remains the same. 115 While the mere presence of one of these factors alone will not support a finding of actual malice, several of them in conjunction, or even one combined with other extrinsic factors may do so. For instance, while failure to investigate alone is insufficient, this factor played an important part in the Butts case where the charges were serious, there was ample time to conduct at least a cursory investigation, and the reliability of the source of the report was known to be poor. Moreover, while the omission of the word "alleged" was held to be insufficient, the Supreme Court painstakingly emphasized that "this holding is confined to the specific facts of the case, and nothing herein is to be understood as making the word 'alleged' a superfluity in published reports of information damaging to reputation." 116 At this point, the most that can be said with respect

109. Id. at 731–32.
113. Id.
115. Id. But see Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970). In that case, plaintiff, an attorney for alleged notorious criminals, was referred to as a hoodlum. It was shown that in the first draft of the article Time had referred to the plaintiff as a "mouthpiece." Failure to make this distinction was held to be grounds for refusing summary judgment on the basis that a jury could find that Time had acted with actual malice. See note 116 infra.
116. Time, Inc. v. Pape, 39 U.S.L.W. 4270 (U.S., Feb. 23, 1971). A partial reason for the Court's decision was because it thought that:

*Time*’s omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*.

Id. at 4273.

It is here that the distinction between *Pape* and *Ragano* may lie. It is possible that the Court may sanction an inference of awareness of falsity based on the blatancy of the publisher's disregard for the less defamatory of two possible interpretations. In short, while the publisher may get away with twisting his report somewhat, the Court at some stage may determine a breaking point. Such an
to a definite judicial determination of the meaning of actual malice is that, even when there was a great deal of dissent on the Supreme Court as to whether the actual malice rule should be applied in a given case, the Justices seemed to be in agreement as to whether, on the facts of each case, actual malice could have been proven were it to be applied.117

Where the actual malice rule is theoretically supposed to have its greatest effect is in aiding a judge in making a decision whether or not to grant summary judgment. The theory is that the mere cost of defending a libel suit, regardless of its ultimate outcome, may have the effect of exerting a chilling force on the rights of the press.118 Thus, the plaintiff must show facts from which actual malice may be inferred by the jury.119 This has the salutary effects of lessening any chilling effect that may occur, and also allowing a preliminary determination of the defendant's constitutional rights by a judge rather than a jury.

The major objection to summary judgment on the issue of actual malice is that it does not adequately provide for the vindication of the plaintiff's reputation. If a judgment is returned for the defendant, it does not necessarily mean that the publication was not false; it simply means that it could not be shown that the defendant did not know it was false. In such a case, the plaintiff not only does not recover any pecuniary compensation, but he also does not have the satisfaction of having his reputation cleared of a falsehood.

The major objection arising from the difficulty of proving actual malice is the inability of the heretofore private plaintiff to be compensated in any way for his loss of reputation. While in any balancing of interests approach, one side is bound to suffer more than the other, it may seem that the potential injury to the private plaintiff here is extremely great. Admittedly, this is the inescapable outcome of the application of the actual malice rule. It is submitted that this result, while at first blush seems to be oppressive to the plaintiff, is totally justified by the first amendment and pragmatic considerations. A man's reputation may be fragile, and damage to it may have far reaching consequences. An award for damages for the unintentional circulation of falsehood, however, has not only a detrimental effect on freedom of the press, but

117. Cohen, supra note 24, at 386 n.71. This is apparent from the opinions in Butts and Walker. See pp. 958-60 supra.


also serves little practical purpose in restoring the plaintiff. An award of money to the plaintiff, however extrinsically beneficial, can do nothing to restore his good name. In one sense, at least, the purpose of an award must be seen to be punishment of the wrongdoer, rather than restoration of the injured party. It may also be justified as serving the purpose of deterring others from publishing libels. It may easily be seen from a practical standpoint that such punishment for negligent behavior is neither commensurate with the fault of the defendant, nor will it serve effectively as a deterrent. If the publisher is to be punished for his conduct, it is axiomatic that only intentional conduct should be punished. In addition, it is anomalous to allow negligence or some lesser standard as a basis of liability for constitutionally protected activity while requiring an element of intent to invoke liability for other unprotected activity in the tort area, such as infliction of mental distress, which coincidentally, might be considered one of the compensable elements resulting from a defamatory publication. The injury to the plaintiff, therefore, while serious, may carry less weight in a balancing test because of the relative impossibility of restoration.

On the other side of the scale is the serious impediment to the very existence of the press posed by libel judgments. Indicative of the chilling effect of libel judgments on first amendment rights is the fact that the New York Times, at the time of the suit by Sullivan, had over five million dollars in judgments pending from that one advertisement alone. As the weight of the abstract injury to the plaintiff was lessened by practical considerations, so is the weight of the abstract first amendment right of the press increased by those same pragmatic incidents. Therefore, the harsh result of leaving the private plaintiff remediless seems inescapable due to the constitutional interest in the circulation of all but knowing or intentional falsehood, and by the very uncompensable nature of the injury.

V. CONCLUSION

The present standards of application of the New York Times rule based on a determination of the plaintiff's status are unwieldy and unsatisfactory. If the application of the first amendment to the press is to assure the circulation of ideas, there seems to be no valid reason why constitutional protection should depend on the party discussed rather than the idea that is circulated. The justifications found by the New York Times, Butts, and Walker courts for the public official-public figure criteria are not satisfactory determinants of first amendment rights. The ability of a person to affect governmental action or to sway public opinion has no bearing on the right to discuss an issue with which he may be involved in a great or small way, voluntarily or involuntarily. The

120. See note 15 supra.
121. Justice Douglas has said in a related context that a person embroiled in an important public issue may be both unknown and unable to influence public opinion.
access of the plaintiff to the media to rebut the charges seems from the beginning to have suffered from an inherent defect; practically speaking, if a man is called a liar, people are not likely to believe that he is not a liar simply because he says so in a newspaper. The right protected by the constitution is the right of discussion and the right to be informed on issues. These issues should be determined by the public. In the interests of more accurate judicial determination and since the press is more responsive to the demands of the public in this area than the courts, it seems both logically and practically more feasible to allow the press the privilege to print all matter. This would be the result if the Supreme Court chooses to follow the public interest doctrine set forth in Rosenbloom. While it may be argued that the only obstacle to an absolute immunity of the press (or, as Justice Douglas would have it, the inability to maintain a libel action against the press) is the admitted difficulty of proving actual malice, it is submitted that the actual malice rule is adequate for safeguarding reputation. The right of society to be informed can only be adequately served if all publication is protected unless it was printed with knowledge of or reckless disregard for its falsity.

W. H. Flamm, Jr.

His statement was that "maybe the key man in a hierarchy is the night watchman responsible for thefts of state secrets." Rosenblatt v. Baer, 383 U.S. 75, 88 (1966) (concurring opinion).