Times Marches On: The Courts' Continuing Expansion of the Application of the Actual Malice Standard

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TIMES MARCHES ON: THE COURTS' CONTINUING EXPANSION OF THE APPLICATION OF THE "ACTUAL MALICE" STANDARD

I. Introduction

The area of defamation has proved itself to be a fertile area for constitutional jurisprudential thought. Within seven short years, beginning with the New York Times Co. v. Sullivan decision, the Supreme Court of the United States has developed a federal constitutional law of libel which has strictly limited the rights of a public official, public figure, or a private citizen who is involved in an incident of "public interest" to sue for defamation, while expanding the First Amendment right of fair comment on matters of public concern. The standard enunciated by the Court in the Times case requires the showing of "actual malice" in order for a public official to recover for defamatory falsehoods relating to his official conduct.

The Court began with the constitutional rule requiring actual malice clearly limited to "public officials" and involving their "public duties," extended it through various "intermediate" decisions, and has now applied it to candidates for public office, cases of mistaken identity involving public officials, ambiguous statements in governmental commission reports attributing certain reprehensible conduct to a public official, and finally, to private individuals involved in matters of public concern.

It is the purpose of this note to examine the history and development (progression, if you will) of the scope of the First Amendment-qualified privilege in the law of defamation, together with an analysis of the current limits of the Times doctrine, and an examination of lower court applications of the "actual malice" standard.

II. Pre New York Times

Traditionally, there are two defenses to the law of defamation: truth and privilege. It was the generally accepted rule prior to 1964 that a newspaper had at least a qualified or conditional privilege to make fair comment on matters of public concern. The majority of courts, however, allowed recovery to...
a public official without the requirement of showing that the statements were motivated by actual malice, that is, feelings of spite or ill will, if the statements made about him went beyond the bounds of fair comment. To state a cause of action it was sufficient to show that the statement was false and defamatory, and that the plaintiff's reputation among a respectable segment of the community had been impaired.

There was a substantial minority view, however, that even false statements of fact were qualifiedly privileged, in the absence of malice, at least as far as they related to public officers and candidates, if made with an honest belief in their veracity, and with the public interest in mind. The rationale behind this approach was that the public information media should not be shackled by the fear of suit (with the resulting necessity to prove the truth of the statements) simply because they published statements detrimental to the reputation of certain public officials, if the statements concern matters of public interest. It is quite clearly this rationale that provided the framework for the Supreme Court's landmark decision in 1964.

III. The Constitutional Law of Libel


"Liberty to know, to utter and argue freely according to conscience is above all liberties."

"The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

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

The Times case involved allegedly defamatory statements made about an elected Commissioner of Public Affairs of the City of Montgomery, Alabama, which appeared in an editorial advertisement in the New York Times entitled,
"Heed Their Rising Voices." The editorial was published on behalf of the Negro right-to-vote movement and the Negro student movement. Contained within it were charges of incidents of police brutality, bigotry and outright intimidation of various black activist groups, along with a general protestation of such abuses and a call for financial support in aid of these movements. Contained within the editorial were various and sundry misstatements of fact, in kind and degree, as to the actual incidents involved. In his suit against four individuals who were Negroes and Alabama clergymen, and the publisher of the editorial, the New York Times Company, the plaintiff, L. B. Sullivan, claimed that the facts alleged in the editorial were, first of all, grossly misstated; and secondly, that they so intimated him in their "charges" as to cause a deleterious effect upon his reputation as a Commissioner of Montgomery. A jury in the Circuit Court of Montgomery found the defendants liable and rendered judgment for $500,000. Defendants appealed. The Supreme Court of Alabama affirmed.

The precise question which the Supreme Court of the United States was to decide was: Do the "constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct" even where the statements are false or clearly erroneous? The Supreme Court answered with a qualified "yes." The Court held that the public has a constitutionally protected right to criticize a public official's discharge of his official duties, and the Alabama rule of law which states that words published are libelous per se if they tend to injure a person (who may be a public official) in his reputation or injure him in his public office or impute misconduct to him in his office is inconsistent with the guarantees of the First and Fourteenth Amendments. A conditional or qualified privilege immunizing honest mistakes of fact in a publication concerning official conduct is required by the First and Fourteenth Amendments. Liability is founded only upon a showing of "actual malice," i.e., knowledge that the facts represented are false or acting with reckless disregard as to the truth or falsity of the statements made.

A majority of the Court held that the defense of fair comment on matters of public concern must be afforded for honest expression of opinion based on

22 Id. at 305, appendix.
23 Id. at 258-59.
24 Id.
25 Id. at 256.
28 The Court reasoned that the public's right to have all the facts necessary for "uninhibited, robust, and wide-open" debate cannot be safeguarded unless innocent error is protected. At 279, the Court said:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable "self-censorship." ... would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

29 The Court at 273 said:

Criticism of their official conduct (of government officials) does not lose its constitutional protections for speech and press merely because it is effective criticism and hence diminishes their official reputations.

30 Id. at 279-83.
31 Id. at 279-80.
privileged (though incorrect) statements of fact.32 "A constitutional guaranty of freedom of speech and press precludes an otherwise impersonal attack on governmental operations from being treated as a libel of an official responsible for those operations.33 The qualified privilege of criticism of a public official is analogous to the protection accorded a public official when he is sued for libel by a private citizen and the allegedly defamatory statements were published within the defendant public official's duties.34

The Times case dealt with civil liability for libel, not with criminal liability.35 The decision involved itself with the official conduct of a public official, not his private life.36 The opinion involved a public official, but the court clearly indicated that the constitutional protection was not limited to public officials or to their official conduct or to cases of civil libel.37 The Court made reference to a broader application of its newly reasoned decision: "[F]reedom of expression upon public questions is secured by the First Amendment. . . ."38 Though clearly limiting the "actual malice" rule to public officials performing their official duties, in the Times case, the Court implied that the constitutional privilege should not be limited to public officials, but that the proper criterion for application of the rule might be whether a "public question" was involved.

At this point in time, the newly evolved rule could be stated as follows: a publication defaming a private person is actionable if he merely shows damage to his reputation in the community;39 the same publication defaming a public official, however, is not actionable without a showing that the statements published were false, and that the defendant knew them to be false or published the statements with reckless disregard as to their truth or falsity.

B. The Development of the Times Principle in Subsequent Supreme Court Decisions (Pre 1971)

In the Times case, the Court clearly determined that an elected city commissioner was a "public official" within the purview of the newly formulated rule. The Court did not clearly establish, however, what criteria would be determinative as to whether a person is a "public official." It left the door open for further applications, but it relegated those applications to an ad hoc basis.

Subsequent to the Times decision, the Supreme Court determined that the public official designation included (besides a city commissioner): a group of Louisiana parish judges,40 a county attorney and chief of police,41 private com-

32 Id. at 256-92.
35 This point was decided in Garrison v. Louisiana, 379 U.S. 64 (1964). The Court found that the Times standard also applies to criminal libel.
36 The Court concerned itself with extending the standard where a purely private libel is involved, but concerning a public official, in Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971). See section IV, infra, for a more complete analysis.
37 376 U.S. 254, at 263, n.23.
38 Id. at 269 (emphasis added).
39 See 1 Harper and James, supra note 12, at 350.
pany officials, a deputy sheriff, members of a local school board, an elected court clerk, and, most recently, a mayor, and a deputy chief of detectives.

Finally, in *Rosenblatt v. Baer,* the Supreme Court gave some meaning to the "public official" category. The *Rosenblatt* case concerned an action brought by a retired county supervisor of a recreational area. The Court held that criticism of official conduct, made after the official has left his position, will not preclude the application of the *Times* principle where the question originally involved concerned a matter of still lively public interest. The Court held that the "public official" designation applies to all elected or appointed government employees who have, or appear to the public to have, substantial responsibility for, or control over, the conduct of government affairs. In other words, anyone who holds a position of sufficient importance that the public-at-large would be especially interested in the discharge of his duties, is included in the "public official" category.

Accompanying the increase in the scope of the "public official" category was an extension of the application of the "actual malice" standard to persons other than public officials. It would have been totally inconsistent with the Court's stated purpose in the *Times* case to limit the "actual malice" rule solely to public officials, and the subsequent extensions of the *Times* principle were, according to some authorities, logical ones. In 1967, in *Curtis Publishing Co. v. Butts,* the

49 Id. at 88, n.15.
50 Id. at 86-87, n.13.
51 Supra, note 38.
53 Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); and see its companion case, Associated Press v. Walker. The Court did not agree upon an opinion. The plaintiff, Butts, was the athletic director for the University of Georgia. He brought suit against the defendant for libel based on charges that the plaintiff had "fixed" a football game between the universities of Georgia and Alabama.

The jury verdict resulted in a judgment for plaintiff in the amount of $60,000 compensatory damages and $400,000 punitive damages. The District Court denied the defendant's motion for a new trial. On appeal, the Fifth Circuit Court of Appeals affirmed, 351 F.2d 702 (1965). Five members of the Court voted for affirmance on the grounds that the constitutional standards had been met.

The plaintiff Walker, a retired Army general, had been involved in various political activities, including taking personal command of federal troops during a school desegregation confrontation at Little Rock, Arkansas, in 1957. He was extremely interested in the issue of physical federal intervention. He instituted a libel action in a Texas court against the Associated Press for statements made in a dispatch in which the dispatch stated that the plaintiff had taken command of a violent crowd, had personally led a charge against federal marshals, and had encouraged and advised the rioters.

A verdict of $500,000 compensatory damages and $300,000 punitive damages was awarded. The trial court entered the compensatory award only. The Texas Court of Civil Appeals affirmed the trial court's decision, 393 S.W.2d 671 (1965).

All members of the Court voted for reversal of the decision. Chief Justice Warren, and Justices Brennan and White, expressed the view that the New York *Times* principle had not been met. Justices Harlan, Clark, Stewart and Fortas rested their opinion on the grounds that their standards — based on highly unreasonable conduct and phrased in terms of extreme departure from standards of investigation and reporting ordinarily adhered to by reasonable publishers — had not been met. Justices Black and Douglas concurred simply to have a majority opinion.
the Supreme Court officially applied *Times'* qualified privilege to defamatory statements concerning public figures. In the *Times* case, the Court failed to define the term "public official" and left that to be determined later. In the *Butts* case, the Court affectively broadened the application of the *Times* principle, but vaguely defined a public figure as one who, either by position alone or through some activity "amounting to a thrusting of his personality into the vortex of an important public controversy," commands sufficient continuing public interest and has sufficient access to the means of counterargument to be able to expose through discussion any falsehoods. Left without adequate guidance from the Supreme Court, the lower courts formulated their own definitions of "public figure." In *Greenbelt Cooperative Publishing v. Bresler,* the Supreme Court ruled that an individual who voluntarily and actively involved himself in matters of significant public concern is a public figure, and as such, must meet the burden of the *Times* rule in order to recover damages. This latter definition of "public figure" is the most precise definition the Supreme Court has yet deduced.

In *Time, Inc. v. Hill,* the Supreme Court extended the *Times* rule to invasion-of-privacy cases. The case involved a magazine article concerning a play depicting events surrounding a family that had been held captive for several hours by a group of escaped convicts. The Court held that, though the suit was brought by a private family who had been involuntarily thrust into the public eye, their private character did not preclude the application of the "actual malice" test, and such application was necessary to protect the public's right to information concerning newsworthy matters. The Court intimates in the *Hill* decision that a different result might be reached if the case involved a libel action brought by a private person involuntarily thrust into the limelight.

Throughout its decisions the Supreme Court has been concerned with the broader question of whether an individual case involves a "public question," rather than whether a public figure or public official has been involved. Lower court decisions have extended the *Times* principle to "public interest" situations. Where the public has a legitimate interest and personal concern in the matter, it has a right to know and be informed about the matter. The focus is on the context in which the plaintiff has been defamed, rather than his influence in the community or his activities. The Supreme Court has recently placed its seal of approval on this rationale and has extended the *Times* rule to libel suits involving private citizens who are involved in issues of public scrutiny. The individ-

56 1 HANSON, supra note 52, at 108.
57 See section III, infra, generally for a discussion of this point.
59 Id. at 8-9.
60 385 U.S. 374 (1967).
61 Id.
62 Id. at 390-91. But see Rosenbloom v. Metromedia, Inc., 39 U.S.L.W. 4694 (U.S. June 7, 1971), which essentially rejects this view, however. The Court has also applied the *Times* rule to public officials even where the defamatory remarks involve private libel. See Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).
63 Supra, note 38.
64 For a discussion of this application see section III (C), infra.
ual's status in relation to the public controversy no longer controls *Times*’ applicability.

In any suit for defamation, a plaintiff needs to prove the defamatory remarks actually damaged his reputation. A plaintiff who finds himself within the purview of the *Times* privilege must additionally prove that the statements were made with actual malice. The problem here is what does actual malice really mean. Prior to 1964 “actual malice” meant ill will, spite or intent to injure.\(^6\) \(^8\) *New York Times Co. v. Sullivan*\(^6\) held that the common law definition was constitutionally inadequate, and defined “actual malice” as being a knowing falsehood or a reckless disregard for the truth or falsity of the statement.\(^6\) The first part of this definition is self-explanatory; i.e., that the defendant knew the material to be false or entertained a high degree of awareness of its falsity.\(^6\) The second half, “reckless disregard,” has been the subject of much examination and re-definition. The failure to check the accuracy of the information published with material in the defendant’s possession,\(^7\) the lack of ordinary care in making charges against the plaintiff,\(^7\) the failure to make a prior investigation of the facts,\(^7\) or mere negligence\(^7\) is not sufficient evidence of “reckless disregard for the truth or falsity of the statements” made. “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication.”\(^7\) If the statements are “so inherently improbable that only a reckless man would have put them in circulation,” failure to check beyond the source of the story will constitute reckless disregard for truth.\(^7\) The Court, in *St. Amant v. Thompson*,\(^7\) by way of dictum, suggested that a verdict would be upheld if the defamatory statements were based on information from a source that the publisher knew or should have known to be unreliable—as, for example, information based solely on an anonymous unverified phone call. But this notion may not hold much water in light of *Monitor Patriot Co. v. Roy*.\(^7\) The Court held in that case that it was not necessary for a publisher or author to check out a story phoned in to him by an unverified informer.\(^7\) To require an investigation of every controversial matter, the Court reasoned, would unduly hinder the publication of newsworthy items.

There is a general flaw in this area of defamation (the actual malice test included) in that there are no real guidelines by which lower courts can determine if a certain course of action constitutes actionable libel on the defendant’s part. The problem is unresolved until the Supreme Court, as the final arbiter or “jury,”

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\(^6\) See Prosser, *supra* note 5, at 814.
\(^7\) 376 U.S. 254 (1964).
\(^8\) Id. at 279-80.
\(^12\) St. Amant v. Thompson, 390 U.S. 727 (1968).
\(^15\) Id. at 732.
\(^16\) 390 U.S. 727 (1968).
\(^17\) 401 U.S. 265 (1971), and see the discussion of this case in section IV, *infra*.
\(^18\) Id.
determines whether there is "sufficient evidence" of reckless disregard for truth.79 Even within the Court there is a discrepancy as to what specific circumstances constitute "actual malice."80

Despite the clear language of the Supreme Court opinions this area of law remains in what seems like a perpetual state of flux. The jury may examine the specifics of a particular case, and through application of a "reasonableness" test, determine whether there was intent to injure through falsehood.81 But whether the jury has decided "correctly" cannot be determined until the Supreme Court has decided if the facts of the case indicate an intent to injure through falsehood. There is a notion implicit in all of the Court's decisions that an absolute standard cannot be formulated, and that determinations must continue to be made on an ad hoc basis. Therein lies the Times principle's greatest weakness.

C. The Lower Courts' Application of the Times Principle

The Supreme Court has determined that specific types of individuals are "public officials" and must overcome the constitutional privilege accorded by the First Amendment,82 but the Court has only vaguely enunciated any criteria upon which to determine if an individual is a public official. The lower courts, in turn, have exercised a great deal of imagination in their determinations of the applicability of the Times principle.

The public official category now includes all individuals who are associated in any way with any level of government.83 And, as was the case in Rosenblatt v. Baer,84 the lower courts have also found the Times standard applicable even

79 See 1 HANSON, supra note 52, at 117. See also Mr. Justice Black's opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, at 171-72 (1967).
80 See, e.g., Justice Harlan's "highly unreasonable conduct" test, and Chief Justice Warren's "reckless disregard" test — the failure to investigate a story adequately with full knowledge of the resulting harm — in Curtis Publishing Co. v. Butts, 388 U.S. 130, at 133 and 162, respectively.
82 See notes 40 through 47.

though the plaintiff was no longer a public official at the time the defamatory statements were made. 85 They have applied the *Times* principle to appointed, as well as elected, public officials. 86 Prior to the Supreme Court's adoption of the "actual malice" standard to candidates for public office, 87 the lower courts firmly included candidates as being within the purview of the public official category. 88 The courts have generally looked at the duties entrusted to an individual with a government related job to determine if he is a "public official," and in so doing, have applied the *Times* rule even to minor government officials.89

Along with the increase in the scope of the public official category came an extension of the actual malice standard to public figures. A "public figure" was defined as a person who publicly, conspicuously, actively, and as a leader, thrust himself into a public discussion of public and/or controversial matters. 90 The courts have held that sports personalities, underworld figures involved in political campaigns, 92 a professor who made statements on a nuclear test ban treaty, 93 political party workers, 94 the law partner of a mayor of a city, 95 and a head football coach at the University of Washington 96 are all included, among others, within the "public figure" designation. In *Afro-American Publishing Co. v. Jaffe,* 97 however, the *Times* principle was held not to extend to a pharmacist operating a local drugstore, which was a retail outlet for publications. The *Times* rule, it was held, does not preclude recovery in a libel suit by a man who was not voluntarily thrust into the vortex of controversy. A man who has not mounted a public rostrum, sought public assistance, or organized any type of group activity, 98 is a private person, and the *Times* standard is, therefore, inapplicable.

Prior to *Rosenbloom v. Metromedia, Inc.,* 99 the lower courts had recognized a greater application of the *Times* standard than simply the public official or public figure categories. One of the leading cases on the public interest standard

87 See the discussion of *Monitor Patriot Co. v. Roy* and *Ocala Star-Banner Co. v. Damron* in section IV, infra.
91 *Cepeda v. Cowles Magazines and Broadcasting, Inc.,* 392 F.2d 417 (9th Cir. 1968), cert. denied, 393 U.S. 840 (1968). Public figures included "anyone who is famous or infamous because of who he is or what he has done." *Id.* at 418.
97 See authority collected in Annot., 19 A.L.R. 3d 1361 (1968) and Annot., 20 A.L.R. 3d 988 (1968) for an excellent synopsis of cases in the area.
99 *Id.*
is United Medical Laboratories, Inc. v. Columbia Broadcasting System.101 In this case, the plaintiff sued for libel arising out of allegedly defamatory statements made in defendant's documentary film, which insinuated that the plaintiff's laboratory testing was inaccurate and incompetent. The court held that the plaintiff's activities—since they concerned a question of public health—were clearly within the realm of the "public interest" standard, that the Times rule applied to public questions, and that plaintiff must overcome the obstacle of the Times privilege in order to recover damages.102 The decision marked a clear expansion beyond the public figure and public official categories.

In Arizona Biochemical Co. v. Hearst Corp.,103 the court there reached a similar result. Plaintiff, who was involved in the garbage collection business, was implicated as a Mafia figure in an article in the "Albany Times Union." The court held the Times privilege applicable and found the plaintiff's activities to be within the "public interest" category. Noting that garbage collection constitutes "essential services for the welfare and health of the inhabitants,"104 rather than the public's obvious interest in curtailing underworld activities, the court found the plaintiff was involved in the quasi-governmental activity of garbage collection.105

To fall within the public figure category an individual must "thrust himself into the vortex of an important public controversy."106 An individual, not necessarily in the vortex of a public controversy, may be deemed subject to the Times rule, however, if, in some manner, he involved himself in the controversy.107 Under the public interest category, the true test is whether the controversy is of sufficient public interest to warrant constitutional protection, regardless of the individual's position in the community.108

The development and application of the actual malice standard has been largely commensurate with the Supreme Court's redefinitions and applications. The "actual malice" standard requires that, in order to find liability, the publisher must be aware of the falseness of his statements, or at least have questioned the credibility of his sources, and have nevertheless acted irresponsibly in the publication of the defamatory statements.109 The plaintiff must demonstrate this actual malice by "clear and convincing proof."110 The Supreme Court has ruled that, in order to find liability, the false and defamatory statements must apply to specific circumstances. Where a District Attorney levelled blanket indictments of incompetence and mediocrity against a group of Louisiana parish judges the

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101 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969).
102 Id. at 711-12.
104 Id. at 415.
107 See Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 862 (5th Cir. 1970).
Court determined that though a select group of individuals was involved, the charges themselves were not specific enough to meet the "actual malice" test. 111

Though the burden in civil cases is proof by a preponderance of the evidence, it would appear that the Supreme Court—through the narrowly construed but liberally applied "actual malice" standard—might well require the plaintiff to prove his cause beyond a "mere" preponderance of the evidence. This is borne out by the rarity of decisions which have found sufficient evidence of actual malice. 112

IV. The Recent Expansive Trilogy

On February 24, 1971, the Supreme Court handed down a trilogy of decisions 113 expounding upon the Times principle, while necessarily expanding the proposition that Times has come to represent.

The first case, Monitor Patriot Co. v. Roy, 114 arose from events surrounding the 1960 New Hampshire Democratic primary election. On September 10, 1960, just three days prior to the primary election of candidates for the United States Senate, the "Concord Monitor," a daily newspaper in Concord, New Hampshire, published a syndicated column, written by Drew Pearson, entitled "D.C. Merry-Go-Round," which discussed the upcoming election. The column spoke of the criminal records of what it called the "motley assortment of candidates." 115 Alphonse Roy, a former U.S. Marshal, was characterized as a "former small-time bootlegger." 116 Mr. Roy, who subsequently lost his bid in the primary, sued the Monitor Patriot Company and the North American Newspaper Alliance (NANA), the distributor of the column, for libel. The circumstances surrounding this particular report are quite interesting. Pearson received information of Roy's purported criminal record from an unverified source sometime between August 24-26. The charge of being a former bootlegger was not publicly made until September 10. Obviously, this was not a "hot news" item where the columnist or the newspaper had not the time to check out the story. The alleged activities occurred 37 years before the publication. In actuality, it was the plaintiff's brother who had been involved in "bootlegging" during the Prohibition era. 117 The story, as it related to the plaintiff, was completely false. A simple investigation would have borne this out, but no such investigation was ever conducted.

The lower court's instructions to the jury are also quite interesting in that they illustrate the extent of inventiveness the courts have shown in attempting to establish concrete criteria to find liability, or to absolve defendants from

115 See id. at 266-68, n.1, for the text of the portion of the column concerning the New Hampshire primary.
116 Id.
117 The above facts were taken from throughout the plaintiff's and defendant's briefs to the Supreme Court.
liability. First, the trial judge instructed the jury that the plaintiff's status as a political candidate included him in the "public official" category, and that, as long as the false statements related to his "official" conduct as opposed to his "private" conduct, Roy must meet the "actual malice" test before he could recover damages. If the libel was in the "public sector," the jury should find for the defendant-distributor since plaintiff failed to prove by clear and convincing proof that the distributor acted with actual malice. But, as to the newspaper, they had to decide on the preponderance of the evidence whether it was liable. If the libel was in the "private sector," there were two defenses: (1) truth; and (2) "conditional privilege" if the article was false but published with a reasonable belief in its veracity.\footnote{118 See generally 401 U.S. 265, at 268-70.} The jury returned a verdict of $20,000, of which $10,000 was against the newspaper and $10,000 against the defendant-distributor—thus finding the libel to be within the "private sector." An appeal was taken. The New Hampshire Supreme Court affirmed the judgment, finding that the jury was properly guided by the trial judge's instructions.\footnote{119 Roy v. Monitor Patriot Co., 109 N.H. 441, 254 A.2d 832 (1969).} The Supreme Court (the majority spoke through Mr. Justice Stewart in all three decisions) held that "publications concerning candidates [seeking public office] must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office."\footnote{120 Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971).} Further, it was held:

as a matter of constitutional law that 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 or reckless disregard" rule of New York Times Co. v. Sullivan.\footnote{121 Id. at 277.}

But in finding a criminal charge relevant to a candidate's fitness for office, the Court found itself in clear contradiction to the New Hampshire Supreme Court's finding, and therefore reversed that court's decision.

In Garrison v. Louisiana,\footnote{122 379 U.S. 64 (1964).} the Court held that "anything which might touch on an official's fitness for office" is relevant.\footnote{123 Id. at 76-77.} The Court, in that case necessarily referred to an office holder. Here, the Court simply extended this rationale to candidates for public office. The fact that plaintiff was harmed in his private reputation as well as his public reputation will not relieve his burden of proving actual malice.\footnote{124 This attitude permeates throughout the Court's decisions, and has existed from the time of the Times ruling.}

The Supreme Court never wished to relegate the application of the Times principle solely to cases involving public officials, or "official conduct," or to conventional civil libel suits.\footnote{125 See Garrison v. Louisiana, 379 U.S. 64 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970).} In this case, while effectively extending the constitutional protection of the Times principle to candidates for public office, the Court officially sanctioned what lower courts had, on their own volition, recog-
nized for years.\textsuperscript{2} If failed, however, to more clearly define the criteria for actual malice. By implication, it held that the failure to check a story called in to a reporter by an unverified source did not constitute actual malice. Remoteness in time of an allegedly criminal activity has no bearing on its relevance. The fact that there was a substantial span of time between receipt of the defamatory information and its actual publication, and that at least a cursory check of the information is standard operating procedure in the newspaper industry where the matter involved is not an extraordinarily "hot news" item,\textsuperscript{1} carried little weight in the Court's final determination. The Court, in reversing the earlier judgment, found the jury instructions inherently deficient, and ruled that the jury was incorrectly allowed to make its own unguided determinations as to the "relevance" of the purported prior criminal activity.

The second case, \textit{Ocala Star-Banner Co. v. Damron},\textsuperscript{2} involved a matter of mistaken identity. On April 18, 1966, the defendant published an article in its local daily newspaper, the "Star-Banner," in which it related details of plaintiff's involvement in, and indictment for, perjury in a federal civil rights suit.\textsuperscript{3} The plaintiff was, at the time of the publication, the major of Crystal City, Florida, and also a candidate for the office of county tax assessor. The story, in actuality, involved the plaintiff's brother. The plaintiff was subsequently defeated in his bid for county tax assessor. He sued the Star-Banner Company for libel asking for $50,000 as compensatory damages and $500,000 as punitive damages in the Circuit Court of Marion County, Florida, alleging that the article was "libelous per se," and that it caused him "irreparable damages to his reputation, as an individual, public officer, candidate for public office and as a businessman."\textsuperscript{4} At the close of the evidence, Damron moved for a directed verdict on the issue of liability, and the trial judge granted the motion. The case then went to the jury on the issue of damages. The judge instructed the jury that the charge was libelous per se and that the plaintiff (respondent here) could recover damages without showing malice, thus implicitly finding the publication to constitute private libel. The jury awarded compensatory damages of $22,000. The Star-Banner Company moved for a new trial on the grounds that the \textit{Times} "actual malice" test applied to the facts of this case. The trial judge denied the motion on the ground that the article did not refer to respondent's official conduct. The Florida District Court of Appeals affirmed, holding the \textit{Times} rule inapplicable.\textsuperscript{5} The Supreme Court of Florida refused to review the judgment.\textsuperscript{6}

The Court was urged to accept the contention that the \textit{Times} rule applied only to "official conduct,"\textsuperscript{7} and that an indictment for perjury arising out of testimony given during a civil rights suit, not related in any manner to plaintiff's administrative duties, nor to his status as a candidate for political office, was

\textsuperscript{126} See supra, note 88.
\textsuperscript{127} These facts were derived from the parties' briefs and the general facts of the case.
\textsuperscript{128} 401 U.S. 295 (1971).
\textsuperscript{129} See id. at 296, n.1 for the text of the publication.
\textsuperscript{130} Id. at 297.
\textsuperscript{131} Ocala Star-Banner Co. v. Damron, 221 So. 2d 459, 461 (Fla. App. 1969).
\textsuperscript{132} Ocala Star-Banner Co. v. Damron, 231 So. 2d 822 (Fla. 1970).
\textsuperscript{133} See New York Times v. Sullivan, 376 U.S. 254, at 283, n.23; see 401 U.S. at 300.
private libel; the court first determined that the respondent was a "public official" since he was the mayor of Crystal City, and as such, must meet the "actual malice" test to recover damages. The Court reinforced its determination by stating that the Times principle would also apply to the respondent since he was also a candidate for political office. The Court then held, citing Monitor Patriot Co. v. Roy:

that a charge of criminal conduct against an official or candidate, no matter how remote in time or place, is always "relevant to his fitness for office" for purposes of applying the New York Times rule of knowing falsehood or reckless disregard for the truth.

Lastly, the Court found that a specific charge of perjury is relevant to an official's, or a candidate's, fitness for office and that a plaintiff who finds himself under public scrutiny must meet the Times test before recovery of damages can be awarded—even where the false publication concerns an essentially private libel.

The case now appears to have been finally disposed of by summary judgment proceedings in Florida, where the plaintiff, Damron, failed to controvert affidavits which purported to demonstrate that there was no material issue of fact as to the Supreme Court's standard of constitutional malice.

The fact that a check of the facts to determine the truth of the statements is usually made; and the fact that the editor who printed the story had close to 40 years experience in the newspaper business, and therefore, was clearly aware of standard operating procedures; and lastly, the failure to make such an investigation, examined collectively, still failed to constitute "recklessness." The Court implicitly re-affirmed its conviction that actual malice must be of "convincingly clear clarity," and that mere negligence in operation is insufficient to constitute "reckless disregard" for truth.

magazine carried an article on this latest Commission report shortly thereafter. What had previously been allegations made in a plaintiff's pleadings now appeared as empirical facts.

Pape later sued the defendant (petitioner here) for libel. The district court granted "Time's" motion for summary judgment on the ground that the article was fair comment on a government report, and therefore, constitutionally privileged. The Court of Appeals for the Seventh Circuit reversed. The Supreme Court then decided New York Times Co. v. Sullivan. The district court, armed with the newly formulated Times rule, granted "Time's motion for summary judgment again. The Court of Appeals reversed, ruling that the issue of whether the slanting of the contents of the Commission report constituted "actual malice" still needed to be decided. At trial, the author of the article and the Time's researcher admitted they had substantially altered the wording of the report, but insisted that the report's real meaning had not been changed. At the close of the evidence, the trial judge directed a verdict for "Time." The Court of Appeals reversed again, ruling that a jury trial was needed to decide the precise question of whether the omission of the word "alleged" constituted "actual malice." The respective courts found Pape to be a "public official," and his actions involved his "official conduct," but they differed as to the application of the Times principle.

The case presented the issue of whether the Court of Appeals had correctly determined, upon the facts of the case, whether "Time's" activities, taken as a whole, constituted knowing falsehood or reckless disregard for truth. Where there is a situation of "indirect" reporting, the Court recognized the possibility of having various interpretations of the same underlying facts. The Court stated:

where the source of the news engages in qualifying the information released, complexities ramify. Any departure from full direct quotation of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices.

The Court found the Commission report "bristling with ambiguities." While the report attempted to portray the facts it reported as objectively as possible, the Court found the Commission interjected its own beliefs and attitudes throughout the report. The Court reasoned that "since the series of incidents described in the report were the only evidence the Commission presented in support of its findings and recommendations, there was a logically inevitable implication that the Commission must have believed that the incidents described actually oc-

sacked the house; held him on "open" charges for ten hours; exhibited him in lineups; did not bring him before a magistrate; did not advise him of his constitutional rights; nor was he permitted to call his family or an attorney.

147 See 401 U.S. 279, at 281, for pertinent parts of the "Time" article.
148 Pape v. Time, Inc., 318 F.2d 652 (7th Cir. 1963).
150 Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965).
152 Pape v. Time, Inc., 419 F.2d 980 (7th Cir. 1969).
154 Id.
155 Id. at 290.
156 Id. at 288.
"Time" might be justified, therefore, in interpreting and reporting the Commission's report as if it was stating historical facts.

The Court then focused its attention on the need for the constitutional protection afforded by the *Times* case to negligent falsification of fact. "This protection, however, would not exist for errors of interpretation should the analysis of the Court of Appeals be adopted," cautioned the Court, "for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." Finally, the Court concluded that upon the facts of this case, plaintiff has the burden of showing that the defendant "entertained serious doubts as to the truth of the publication" before liability could be imposed. While the choice of this particular interpretation might reflect a misconception, the Court conceded, it was not enough to create a jury question of actual malice under the *Times* rule. Such a creation would impose a "much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact." In deciding that the *Times* rule had not been properly applied, and reversing the Court of Appeals decision, the Court ruled that the plaintiff had failed to provide sufficient evidence of "actual malice." "Time's" conduct reflected at most an error of judgment. If "the freedoms of expression are to have the breathing space that they need to survive," misstatements of this kind must have the protection of the First and Fourteenth Amendments. In order to insure the ascertainment and publication of the truth about public affairs, it is "essential that the First Amendment protect some erroneous publications as well as true ones."

While the Court specifically stated that the ruling in this case is confined to the specific facts of this case, one cannot wonder whether this latter case may have opened the door to constitutional protection of deliberately reported falsification. The simple excuse that the defendant thought the comments made to be a rational interpretation and conclusion of the report, without further investigation, appears to be sufficient in itself to condone any falsifications. *Roy, Damron, and Pape* have marked a significant step in the further expansion of the *Times* rule, and in so doing, have won three more skirmishes for the side of the First and Fourteenth Amendments in their one-sided legal battle against what the Supreme Court reasons are constitutionally deficient state libel and slander laws.

V. Rosenbloom v. Metromedia, Inc.: The Public Interest Standard

Where do we go from here? This question was quickly answered by the Supreme Court on June 7, 1971. Until that point the Court had basically

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157 Id. at 289.
162 Id. at 292.
163 Id.
relegated its decisions, where it applied the *Times* standard, to cases involving “public figures” or “public officials” or “candidates for public office.” The *Rosenbloom* case presented the precise question of whether the *Times* “actual malice” standard applies to a *private* individual involved in an incident of public interest.167

Plaintiff, a distributor of nudist magazines, had been arrested by the Philadelphia police on an obscenity charge. He brought suit seeking injunctive relief prohibiting further police interference with his business, claiming that his publications were not in fact obscene. The defendant radio station had broadcast various news reports concerning the plaintiff’s implication (among others) in the city-wide crackdown on distributors of allegedly obscene literature168 and had also made several broadcasts concerning the suit, and had falsely implied that the suit was to stop all future prosecutions of “smut dealers,” whereas the actual purpose was to enjoin further harassment of the plaintiff.169 The respondent, throughout its broadcasts, implicitly characterized the plaintiff as one of several “girlie book peddlers” and a distributor of “smut” and “obscene literature.” Following plaintiff’s acquittal of criminal obscenity charges, he filed suit for libel against the defendant. The district court held the *Times* standard inapplicable and applied Pennsylvania law in arriving at the defendant’s liability. Plaintiff recovered $25,000 compensatory damages and $250,000 punitive damages for the allegedly defamatory broadcasts.170 The Court of Appeals for the Third District held the *Times* standard applicable and reversed the judgment for damages.171 In a 5 to 3 decision (Mr. Justice Douglas taking no part in the decision), the Court held the *Times* principle clearly applicable to state civil libel actions brought by private individuals for defamatory falsehoods related to their involvement in events of public interest or concern.172 The Court, speaking through Mr. Justice Brennan, could see no logical basis for limiting the constitutional privilege solely to public officials or figures. The Court stated:

> Whether the person involved is a famous large scale magazine distributor or a “private” businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.173

Once establishing the applicability of the *Times* principle, the Court determined whether—from the facts of the case—the defendant acted with knowledge of the falsity of the statements or with reckless disregard for truth. Nowhere was it shown, the Court concluded, that the defendant entertained serious doubts as

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168 *Id.* at 4695.
171 415 F.2d 892 (3d Cir. 1969).
173 *Id.* at 4699. The Court formally recognized what lower courts and certain authorities had already recognized as being a logical extension of the *Times* principle. See T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 531-32, 540 (1970).
to the truth of the reports they published, and in the absence of any such proof, the decision of the Court of Appeals must be affirmed. But the Court, while extending the privilege to false statements defaming private individuals who are involved in newsworthy events, failed to set any guidelines as to what might be considered an issue of general concern. In the future, it would appear, judicial determinations as to what is a public question will continue to be made on an ad hoc basis. Thus the Court continues to operate as a final arbiter or jury in all constitutional libel cases.

Mr. Justice White, in a concurring opinion, felt that the constitutional protections afforded by the First Amendment applied to comments made “upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view.” Since the defendant acted within the limits of propriety as sanctioned by the First Amendment, there could be no liability. Mr. Justice Harlan, in a dissenting opinion, while still supporting the principle of law established in the *Time*’s case, felt that private libel could and should be properly dealt with by state libel laws, that the states should define the limits of responsible activity, so long as liability is not imposed without fault, and that a showing of damage is requisite to recovery in libel suits. Mr. Justice Marshall (joined by Mr. Justice Stewart), in a dissenting opinion, recognized the basic conflict between a “free and unfettered press,” and the rights of an individual citizen to be free from unlawful invasion of his privacy and wrongful derogation of his reputation. Marshall stated that the majority’s attempt to reconcile these diverse worlds “by creating a conditional constitutional privilege for defamation published in connection” with a matter of public interest was substantially inadequate where a private individual was concerned. Part of the problem is that nearly anyone can arguably be considered a “public person,” and the failure of the court to provide any adequate guidelines by which the lower courts can determine the scope of a public question does nothing to clarify the issue. The inadequacies of the majority’s decision, Marshall concluded, far outweigh any worthwhile adjudication the Court might have hoped to achieve.

At this point in time, it appears that the Supreme Court has included the maximum number of classes of individuals whom the *Times* decision may have alluded to. By any standards, it is quite evident that in the last year alone the *Times* rule has enjoyed a far wider application than could ever have been imagined from a simple investigation of the original decision.

174 *Id.* at 4703.
175 *Id.* at 4699. And see Mr. Justice Marshall’s dissenting opinion beginning at 4710.
176 *Id.* at 4705.
177 *Id.*
178 *Id.* At 4706, he states: “(W)here the purpose and effect of the law is to redress actual and measurable injury to private individuals . . . there is no necessary conflict with the values of freedom of speech.”
179 *Id.* at 4710.
180 *Id.*
181 *Id.*
VI. Conclusion

The question can now truly be asked: "Where do we go from here?" There appear to be two avenues through which the *Times* decision can progress: (1) a blanket application of the "actual malice" standard throughout the area of defamation (regardless of any public issue); or (2) the adoption of an absolute privilege.

The more recent decisions have extended the *Times* rule to its furthest applications, and yet kept it still within the "public sector." Within its present context, the courts will probably concern themselves with a case by case examination of individual circumstances to determine if public questions are involved. A significant move now would be to bring actions brought by individuals not engaged in public issues within the purview of the "actual malice" standard.

The other logical approach would be that which has been espoused by Mr. Justices Douglas and Black since the *Times* case,\(^{182}\) and recently reiterated in the *Rosenbloom* case.\(^{183}\) That is, to convey an absolute constitutional privilege of fair comment on matters of public concern to the news media. In other words, the press would be allowed to make any comments it wished on any public issue, and the threat of suit would be alleviated. This may be too extreme a move, however, for the relatively conservative Court. But if the Court were to expand *Times*’ constitutional protections—beyond mere adjudications as to whether particular fact patterns involved matters of public interest—the adoption of an absolute privilege might well be its next step.

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