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Libel: Times Rule Held Applicable to Plaintiff Who Was Both Public Official and Public Figure at Different Times during the Libel

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little hope of recovery, its profits will not be increased. If the creditor does not want the debtor to be sued, this can be arranged when the initial agreement is made.

The courts erred when they relied upon the age-old cliche that what you may not do directly, you may not do indirectly.[44] In the context of the lay intermediary, the practice of hiring an attorney eliminates the objections underlying the direct practice of law.[45] When an attorney is hired to do the legal work, regardless of who hires him, he is subject to the same restrictions as other attorneys and has met the qualifications to entitle him to practice law.

The court's objections to collection agencies acting as intermediaries in hiring attorneys and controlling legal proceedings seem somewhat superficial in view of the demand for such services and the relatively minor dangers involved. Where there is a conflict of interest between the creditor and the collection agency, it should be treated as such, and barring such activities as the unauthorized practice of law should be done only after consideration of the desires and interests of the creditors who are presumably the ones being protected.

Libel: *Times* Rule Held Applicable to Plaintiff Who Was Both Public Official and Public Figure at Different Times During the Libel

Plaintiff was awarded general and punitive damages in a libel action which arose out of published statements to the effect that he was a collaborator or sympathizer with Communists. These libelous statements were published and distributed over several years.[1] During the initial libels the plaintiff was either

Commercial Law Leagues, *supra* note 14, at 208. Actually, less than 5% are ever sent to attorneys. *Brief Sur Draft* 156. Given the small percentage of accounts sent to attorneys, and the fee based on recovery, it is unlikely there will be substantial conflict of interests.

44. *See* Comment, 24 U. CHI. L. REV. 572, 576 (1957).

45. See note 6 *supra*. The dangers specified for the direct practice of law by laymen are obviated if an attorney is doing the legal work.

1. The plaintiff, Dr. Arnold Rose, had participated in the writing of the monumental book discussing the problems of Negroes in this country entitled *An American Dilemma* (1944). The defendant alleged that the book had been written in large part by Communists and Communist fronters, and concluded that Rose's participation in the writing of the book marked him as a Communist collaborator. These libelous

a candidate for election or an elected state representative;[2] subsequent to his legislative term, he was a prominent, although nonofficial, public figure.[3] The trial court correctly instructed the jury that the libelous statements published while the plaintiff was a candidate or elected representative were actionable only if made with actual malice. However, the court further instructed that the plaintiff need not prove actual malice in order to recover damages for the statements published or distributed during the period that he was a nonofficial public figure. On appeal, the Minnesota Supreme Court reversed and remanded for a new trial, *holding* that since the plaintiff was either a public official or a public figure at all times, he could not recover damages in libel for any period absent a constitutionally sufficient showing of actual malice. *Rose v. Koch*, 154 N.W.2d 409 (Minn. 1967).

In order to encourage uninhibited discussion of public issues and public figures, the United States Supreme Court has recently expanded the conditional privilege of comment on public officials and public figures.[4] The landmark case of *New York Times Company v. Sullivan*,[5] decided in 1964, established the rule that a *public official* could not recover damages for a defamatory falsehood

statements were published during the fall of 1962 and spring of 1963 in the defendant's right wing newspaper, *Facts for Action*. The defendant distributed these newspapers before, during, and after the plaintiff's legislative term.

2. The plaintiff was a representative in the state legislature from January, 1963, to December 31, 1964, and a candidate for election for some months prior to his legislative term. *Rose v. Koch*, 154 N.W.2d 409, 413 (Minn. 1967).

3. The Minnesota court characterized Dr. Rose as a "person of prominence and public importance in this state and, indeed, nationally and even internationally." 154 N.W.2d at 413. Dr. Rose was a professor of Sociology at the University of Minnesota. He had lectured widely on the subject of public attitudes toward Communism, and had served on the President's National Advisory Committee on Housing for Senior Citizens. *See generally* A. ROSE, LIBEL AND ACADEMIC FREEDOM (1968) (this book was written by the plaintiff in the instant case and describes his law suit in detail).

4. These changes in the law of libel have evoked a great deal of commentary. *See, e.g.*, A. ROSE, *supra* note 3, at 118-21; Kalven, *The New York Times Case: A Note on "The Central Meaning" of the First Amendment*, 1964 SUP. CT. REV. 191; Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267; Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964); Note, *Defamation of the Public Official*, 61 NW. U.L. REV. 614 (1966); Comment, *Libel of the Public Figure: An Unsettled Controversy*, 12 ST. LOUIS U.L. REV. 103 (1967); Comment, 32 ALBANY L. REV. 207 (1967).

5. 376 U.S. 254 (1964).

concerning 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."[6] The plaintiff in the *Times* case was the elected police commissioner of Montgomery, Alabama; the falsehood related to his handling of a student civil rights demonstration and his treatment of Dr. Martin Luther King. Since the plaintiff was clearly a public official and the libel clearly concerned his official conduct, the *Times* Court was able to reserve judgment as to the ultimate scope of the terms "public official" and "official conduct."[7]

Definition of these terms became necessary in *Rosenblatt v. Baer*[8] and *Garrison v. Louisiana*.[9] In *Rosenblatt*, where a former nonelected supervisor of a county recreation area was held to be a public official, the Court defined public officials to include at least those "government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[10] In *Garrison*, the Court broadly defined the official conduct concept by including therein "anything which might touch on an official's fitness for office."[11]

A frequently raised question at this time was whether the similarities between public officials and public figures made necessary the application of the *Times* rule to the latter.[12] This question was finally reached by the Court in two cases, decided together in June of 1967. In *Associated Press v. Walker*,[13] the plaintiff was a politically prominent person and a well-known former Army general, and in *Curtis Publishing Company v. Butts*,[14] the plaintiff was the athletic director and former foot-

6. *Id.* at 279-80.
7. *Id.* at 283 n.23.
8. 383 U.S. 75 (1966).
9. 379 U.S. 64 (1964).
10. 383 U.S. at 85.
11. 379 U.S. at 77. The defendant in *Garrison* had accused several state court judges of laziness and inefficiency and had implied that they were under racketeer influences.
12. Lower federal and state courts often faced this question after *Times* and resolved it both ways. *See, e.g.*, Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964), *cert. denied*, 379 U.S. 968 (1965) (*Times* rule held applicable to a famous scientist); Faulk v. Aware, Inc., 14 N.Y.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964), *cert. denied*, 380 U.S. 916 (1965) (*Times* rule held not applicable to a radio and television performer).
13. 388 U.S. 130 (1967).
14. *Id.*

ball coach at the University of Georgia. Although the seven members of the Court that reached the question agreed that both men were public figures,[15] there was a three-way split as to the applicable standard. Chief Justice Warren, joined by Justices Brennan and White, would hold the *Times* standard of actual malice applicable equally to public officials and public figures.[16] Justice Harlan, joined by Justices Clark, Stewart, and Fortas, would apply a less strict standard to public figures and permit recovery on a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to be responsible publishers."[17] Justice Black, joined by Justice Douglas, would hold any libel judgment an infringement of the first amendment and therefore unconstitutional.[18] Chief Justice Warren prevailed in *Walker*[19] and the plaintiff's judgment in that case was reversed.[20] In *Butts*, however, the plaintiff's judgment was affirmed with Justice Harlan's new public figure standard pre-

15. *Id.* at 162.

16. In reaching this conclusion, the Chief Justice noted that the consolidation and blending of powers in both the governmental and private spheres had given nonofficial public figures great control over the resolution of important public questions. Furthermore, he thought it clear that such men have as ready access to the means of publicity as do public officials, and can as well use this publicity to influence policy or rebut criticism. *Id.* at 162.

17. *Id.* at 155.

18. *Id.* at 172. Justice Black has consistently maintained this absolutist position. *See* Rosenblatt v. Baer, 383 U.S. 75, 94 (1966) (concurring and dissenting opinion); New York Times v. Sullivan, 376 U.S. 254, 293 (1964) (concurring opinion). *See generally* Cohn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962).

19. Justices Black and Douglas joined in the Chief Justice's opinion in *Walker*, but only to enable the Court to reach a majority ground of decision in that case. In *Butts*, they dissented on the ground that any libel judgment is unconstitutional. *See* note 18 *supra*.

20. The libel in *Walker* arose out of the Associated Press' misstatement of Walker's participation in the 1962 race riots at the University of Mississippi. The news dispatch stated that Walker had led a charge against the federal marshals and had encouraged the use of violence. Walker contended that he had only advocated peaceful protest and had at no time taken control of the crowd.

The Chief Justice held without elaboration that the judgment for Walker was in clear conflict with the *Times* case. Justice Harlan, after a lengthy analysis of the evidence, agreed that Walker's judgment must be reversed on the basis of his new standard for public figures. In finding a lack of "highly unreasonable conduct" on the part of Associated Press, Justice Harlan noted that the news dispatch required immediate dissemination, and that the AP had received its information from an on-the-scene correspondent and had no reason to doubt its trustworthiness.

vailing as the plurality opinion.[21]

The Minnesota court in *Rose* resolved two threshold questions by finding that the defendant's statements were libelous,[22] and by finding that the plaintiff was a public figure subsequent to his legislative term.[23] The complexity of the *Rose* case arises from the fact that the plaintiff was a public official at the time of the initial libels, and a nonofficial public figure at the time of the subsequent libels.[24] The Minnesota court held that only the *Times* standard was applicable in this situation on the ground that the application of two standards of liability to the same case "would tax the ingenuity of the trial court and hopelessly confuse the jury."[25] The court then found that the district court's jury instructions were inadequate in light of the *Times* standard,[26] and consequently remanded for a new trial.

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21. The libel in *Butts* arose out of an article in *The Saturday Evening Post* which accused Butts, who was then the athletic director at the University of Georgia, of "fixing" a football game between the University of Georgia and the University of Alabama. The *Post* had received its information from one George Burnett, who had accidentally overheard a telephone conversation between Butts and the Alabama coach. Butts contended that the conversation concerned only general football talk which would be of no value to an opposing coach. In finding that the evidence was sufficient to satisfy his standard of "highly unreasonable conduct," Harlan noted that the *Butts* story, unlike the news dispatch in *Walker*, did not require immediate dissemination and the publishers consequently had time to make an adequate investigation. However, the *Post* apparently did not take even elementary investigatory precautions. For example, the *Post* knew that informer Burnett was on probation for bad check charges, and yet accepted his affidavit without independent verification. Moreover, the *Post* writer assigned to the article was not a football expert and no attempt was made to get expert advice on the story. Finally, Harlan noted that the *Post* was attempting to increase circulation by a policy of "sophisticated muckraking" and was therefore under pressure to print an expose.

Justice Harlan's victory in *Butts* was made possible by Chief Justice Warren's concurrence in his result. The Chief Justice, however, concurred only on the ground that the evidence satisfied the actual malice requirements of the *Times* rule and, consequently, a majority of the Court did not join in Harlan's new public figure standard. However, since Harlan did write the plurality opinion, his public figure standard is entitled to consideration.

22. 154 N.W.2d at 419.

23. *Id.* at 426.

24. *See* notes 1-3 *supra.*

25. 154 N.W.2d at 430.

26. The lower court's jury instructions were in error in two respects. First, the court limited the defendant's conditional privilege of comment to those times that the plaintiff was either a candidate for election or an elected member of the legislature. Next, although the lower court correctly instructed that the plaintiff must prove actual malice to recover punitive damages or to recover damages for the

It is clear that the *Times* rule must be applied to the plaintiff for the period that he was a state representative.[27] In choosing the standard applicable to the plaintiff for the period that he was a nonofficial public figure, the Minnesota court was faced with three alternatives. It could have applied Harlan's public figure standard and required a separate trial for the libels occurring during this period. However, this would seem to be an unreasonable choice in view of the expense and length of a typical libel suit.[28] Thus the court was limited to either a blanket application of the *Times* rule or to the application of two sets of jury instructions covering the two periods of time. The court chose the former alternative[29] on the basis that the latter would be impractical. Unfortunately, the court did not attempt to further justify its choice and it is therefore suggested that the basic question still remains: Is the difficulty of applying two standards of liability to the same case sufficient to justify the rejection of Harlan's public figure standard? In order to answer this question, it will be helpful to examine the con-

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period that he was a public official, it incorrectly instructed that evidence of personal ill will, the exaggerated nature of the publication, and other such factors could be considered by the jury in passing on the question of malice. 154 N.W.2d at 421-22. As the court noted, such instructions do not comply with the *Times* standard of actual malice. *Id.* at 427-28. *See also* St. Amant v. Thompson, 36 U.S.L.W. 4333 (U.S. April 29, 1968), for the Supreme Court's most recent elaboration on the *Times* standard of actual malice. Since the court refused to apply Harlan's public figure standard, it made no attempt to decide to what degree "highly unreasonable conduct" is less than "reckless disregard of the truth," or to decide whether the evidence in the *Rose* case would satisfy Harlan's standard for public figures. 154 N.W.2d at 430 n.70.

27. There is also an excellent argument for the extension of the *Times* rule into the period that the plaintiff was a *candidate* for public office, since uninhibited discussion on the fitness of one for public office is obviously essential to the proper functioning of the democratic process. *See* Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); *see generally* Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949). Pre-*Times* law in Minnesota did, in fact, extend the defense of conditional privilege of comment into the periods that one was either a candidate for election or a public official. *See, e.g.*, Hammerstein v. Reiling, 262 Minn. 200, 207, 115 N.W.2d 259, 264, *cert. denied*, 371 U.S. 862 (1962); Clancy v. Daily News Corp., 202 Minn. 1, 9, 277 N.W. 264, 268 (1938). Thus the trial court in *Rose* correctly instructed that the plaintiff must prove actual malice to recover damages for the libels occurring during the periods that he was a candidate for election or an elected state representative. This instruction was erroneous only in that it failed to comply with the *Times* definition of actual malice. *See* note 26 *supra*.

28. *Cf.* Curtis Publishing Co. v. Butts, 388 U.S. 130, 167 (1967) (Warren, C.J., concurring); Time, Inc. v. Hill, 385 U.S. 374, 411 (1967) (Fortas, J., dissenting).

29. *See* note 25 *supra* and accompanying text.

siderations which prompted Harlan to derive a new standard for public figures, and to determine whether those considerations are applicable to a public figure who was also a public official at a different time during the course of the libel.

Harlan distinguished the libel of a public official from the libel of a public figure on several grounds.[30] First, he noted that a libel suit brought by a public official could be analogized to a prosecution for seditious libel. Clearly the repression of *political* dissent brought about by seditious libel actions is contrary to the basic principles of a democratic society,[31] and consequently this analogy provides a valid justification for the limited scope of actionable libel when the libel is directed against public officials.[32] On the other hand, the absence of the evils of seditious libel actions in a suit brought by a public figure was one of the factors which prompted Harlan to derive a less strict standard for those actions. Harlan did not reach the question of which standard should be applied to a person who was both a public official and a nonofficial public figure at different times during the libel. However, it would seem that such a person would usually evoke comments of a *political* nature even while only a nonofficial public figure, and consequently should be accorded only that protection against libelous statements granted to public officials.[33] Certainly this

30. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967).

31. *See, e.g.*, Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U.L. REV. 1 (1964); Kalven, *The New York Times Case: A Note on "The Central Meaning" of the First Amendment*, 1964 SUP. CT. REV. 191, 205.

32. This analogy was drawn in the *Times* case as one basis for the *Times* rule. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 273-78 (1964).

33. Another possible means of eliminating the evils of seditious libel actions would be to focus on the content of the speech rather than on the status of the plaintiff. Under this approach, politically oriented speech would be accorded the higher protection of the *Times* rule, while nonpolitical speech would be granted only that protection afforded by Harlan's "highly unreasonable" standard. *Cf.* Note, *Defamation of the Public Official*, 61 NW. U.L. REV. 614, 629 n.80 (1966).

However, such an approach would seem to be precluded by the case of Time, Inc. v. Hill, 385 U.S. 374 (1966), where the Court, in extending the *Times* rule into right to privacy actions, expressly stated that "[t]he guarantees for speech and press are not the pressure of political expression or comment on public affairs . . . ." *Id.* at 388.

Moreover, a set of standards based entirely on the rather tenuous distinction between political and nonpolitical speech would probably fail to provide the press with workable guidelines and, consequently, such an approach could very well defeat the purposes of the *Times* rule by inhibiting rather than encouraging vigorous comment on public issues and public men. *Cf.* Comment, 32 ALBANY L. REV. 207, 212 (1967).

distinction is applicable to the *Rose* case. The accusation that one is a Communist collaborator is political in nature and clearly distinguishable from the accusation in the *Butts*[34] case that one has fixed a football game, or the accusation in the *Walker*[35] case that one was an active participant in a race riot. Thus the libel action brought by Rose more closely resembles a prosecution for seditious libel than the actions brought by either Butts or Walker, and the application of the *Times* rule to this case is therefore justifiable.

Harlan also noted that a public official and a public figure are distinguishable when the former is accorded a special privilege of comment protecting his speech against libel actions, such as the privilege of comment enjoyed by federal and state legislators while on the floors of their respective legislatures.[36] The *Times* rule has been justified as giving to the public a privilege of comment commensurate with that accorded these public officials.[37] On the other hand, the absence of any special privileges of comment for public figures was one of the factors which led Harlan to his conclusion that a less strict standard should be applied to libel actions brought by public figures. In order to decide which standard should be applied to a plaintiff who was both a public official and a nonofficial public figure, it is necessary to consider the overall effects of the special privilege of comment enjoyed by the plaintiff while a public official. If the plaintiff were a nonofficial public figure during the initial parts of the libel, he could use his later obtained privilege as a public official to rebut the accusations without fear of a libel suit. If he were a public official during the initial parts of the libel, he could immediately defend himself against both present and anticipated accusations. Thus, the special privilege of comment accorded the plaintiff while a public official will probably

34. *See* note 21 *supra.*

35. *See* note 20 *supra.*

36. *See, e.g.*, U.S. CONST. art. I, § 6; MINN. CONST. art. 4, § 8. Similar privileges of comment are accorded to certain federal officers in the executive branch. Barr v. Matteo, 360 U.S. 564 (1959). State law also provides immunity to certain state officers. *See generally* W. PROSSER, THE LAW OF TORTS § 109 (3d ed. 1964).

37. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 282-83 (1963); Garrison v. Louisiana, 379 U.S. 64, 74 (1964). This consideration is only one of several justifications for the *Times* rule, *see, e.g.*, note 32 *supra* and accompanying text, and consequently the *Times* rule is not necessarily limited to those public officials who do enjoy such a privilege of comment. Rosenblatt v. Baer, 383 U.S. 75, 85 n.10 (1966). Nor does a public figure's lack of a special privilege of comment necessarily preclude application of the *Times* rule to him. Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188, 196 (8th Cir. 1966).

have effects beyond the period that he actually was a public official; consequently such a plaintiff more closely resembles a public official than a public figure. This distinction is clearly applicable to the *Rose* case since Dr. Rose enjoyed a legislative immunity from libel suits while a state representative.[38] Although he did not take full advantage of this immunity,[39] it was nevertheless available to him, and it is therefore suggested that the application of the *Times* rule to his libel suit is justifiable.

The *Rose* situation will undoubtedly develop frequently since those who hold public office will often have been public figures previously, and those who have completed their term in office will often be public figures thereafter. Because of the inherent difficulty of applying two different standards of liability in the same case, the United States Supreme Court should decide what standard is applicable to a plaintiff who has been both a public official and a public figure during the course of the libel. In the meantime, lower federal and state courts will have to carefully examine the *Walker* and *Butts* cases in order to determine whether such a plaintiff more closely resembles a public official or a public figure. In the *Rose* situation, this examination indicates that the status of a public official should be accorded to plaintiff *Rose*. It is therefore submitted that the Minnesota court was correct in applying the *Times* standard in the *Rose* decision.

38. *See* MINN. CONST. art. 4, § 8.

39. While a state representative, Dr. Rose did make a speech on the House floor denying the charges that had been leveled against him. Although he did warn in general terms against "dangerous revolutionaries" who "parade falsely under the name of 'Conservatives,'" he apparently made no reference to Miss Koch or to her publishing company. 154 N.W.2d at 418 n.15.