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Notes


I. INTRODUCTION

Recent years have been boom times for the law of defamation. The Supreme Court of the United States, not to mention lower federal and state courts, has entertained many and various actions for words, both on classical theories of defamation, and on invasion of privacy theories. It might be expected, as people crowd themselves closer and closer together by their habits of breeding and migration, that law cases related to personal umbrage and offense would thrive. But in view of the constitutional jurisprudence of the last few years, the continuing vitality of actions of libel is surprising. In 1964 the decision of New York Times v. Sullivan\(^1\) erected stringent new constitutional obstacles which greatly diminished a defamation plaintiff's prospects for success if he is a public official. In addition, the Supreme Court's Times opinion offered a justification for narrowing the range of libel actions which produced far-reaching ramifications. The cases following Times have progressively widened the orbit of first amendment protection on the one hand, and have refined and qualified the conduct which may not be entitled to protection on the other. This Note will critically examine the post-Times cases in the state and federal courts and will suggest the directions in which this constitutional tort rule seems to be developing. The cases will be considered with especial reference to the two thorniest problems posed by Times: first, who is disabled by the constitutional immunity; second, what kind of conduct defeats this immunity. While this juristic lode has felt many a jurisprudent's mattock, it is hoped that the more recent cases, by giving content and direction to the ambiguous words of the enunciated constitutional standards, may amply justify the enterprise.

II. THE CONSTITUTIONAL PRINCIPLES

A. The Times Case

In New York Times v. Sullivan\(^2\) the Supreme Court ruled that the first amendment immunized from liability untrue state-

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2. Id.
ments which were defamatory of a "public official" unless that official could prove, with convincing clarity,\(^3\) that the defendant was animated by "actual malice."\(^4\) Actual malice was defined as a knowingly false statement, or a false statement made with reckless disregard for whether it was true or false.\(^5\) This changed the common law majority rule which had extended the privilege of fair comment to criticism of public officials.\(^6\) The fair comment privilege was "designed to permit freedom of criticism and opinion rather than misstatements of fact."\(^7\) Thus untrue statements of fact, even if made in good faith, were not protected. Furthermore, the fair comment defense had to be established by a preponderance of the evidence.\(^8\)

The facts of the Times case are sufficiently well-known to permit abbreviated summary. The civil rights activities of Martin Luther King had brought him into opposition with the public authorities in Montgomery, Alabama. King had been charged with several "demonstration" offenses. His supporters placed an appeal, captioned "Heed Their Rising Voices," in the New York Times to raise money for King's legal defense and to generate support for civil rights activities in the South. The text of the advertisement contained a catalogue of outrages against the Negro demonstrators which had supposedly been committed by the Montgomery authorities. Some of the specifics in that catalogue, it turned out, had been somewhat misstated. Sullivan, one of Montgomery's city commissioners, brought an action for libel against the New York Times and the sponsors of the advertisement, alleging the falsity of the text and damage by innuendo. The jury returned a half-million dollar judgment for plaintiff and the Supreme Court of Alabama affirmed. When the case arrived in the United States Supreme Court, its problem was, as Professor Paul Freund states, not whether to reverse, but how to reverse.\(^9\) The rule the Court framed took the high ground,\(^10\) going considerably beyond what was necessary to set aside the Alabama judgment.\(^11\)

\(^3\) Id. at 285-86.
\(^4\) Id. at 279-80.
\(^5\) Id. at 280.
\(^6\) See Noel, Defamation of Public Officers and Candidates, 49 Colum. L. Rev. 875 (1949) for a careful review of the pre-Times rules followed in the various states.
\(^7\) Id. at 877.
\(^8\) See Goldwater v. Ginzberg, 414 F.2d 324, 341 (2d Cir. 1969).
\(^11\) Id. See also Freund, supra note 9, at 493-94.
Two theories may be said to underpin the *Times* result: one, a theory of reciprocal fairness, the other, a theory of democratic self-government. In 1959, the Court had stated in *Barr v. Mateo* that public officials must have immunity from prosecutions for defamations committed in the course of their duties. On a theory of reciprocal fairness, a similar immunity would be extended to the private citizen on the ground that it would be unfair to extend a sweeping immunity to public officials without simultaneously protecting the private citizen from excessive vulnerability. Considering the post-*Times* enlargement of who qualifies as a public official, it would appear that reciprocal fairness was a consideration of no great weight. "The real basis—the sound basis" for the *Times* decision is on quite another ground.

Inherent in the notion of self-government is the requirement that the people must have maximum feasible access to information concerning public affairs. It is particularly vital that the public receive as much information as possible concerning the characters and activities of public officials. Therefore, all but a small area of statements purveying such information should be immunized from liability for defamation. The Court adopted this position "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."  

A third, unarticulated consideration was obviously also present, a consideration which was probably the prime determinant in convincing the Court to decide the case in such sweeping terms. This can be called—perhaps unfairly—the southern jury problem. In this giddy epoch of social change and concomitant unrest, certain regions of the nation—notably the Deep South—are unexpectedly separated from the rest of the nation in moral and psychological terms. Southern juries can be expected to demonstrate hostility toward Yankees, their journals, opinions and sympathies. If the state court judgment in the *Times* case had been permitted to stand, it might have opened a broad avenue

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15. 376 U.S. at 270.
to making repression the routine manner of handling offensive political ideas in the South—and undoubtedly elsewhere—thus provoking an endless cycle of estrangement and isolation. The Court thus had to establish a rule which would provide acceptable standards not only for the Alabama courts but also for every other court throughout the nation.\(^16\) The Court could not allow regional interpretations, primarily based on racial or regional animosities, to proliferate in the area of first amendment rights.\(^17\)

**B. Expansion and Contraction: The Times Progeny in the Supreme Court**

While the first major post-*Times* case in the Supreme Court resulted in the unsurprising application of the *Times* rules to include cases of criminal libel,\(^18\) most of the succeeding modifications were both more subtle and more suggestive. In *Linn v. United Plant Guard Workers*,\(^19\) the Court adumbrated a future enlargement of the public official category. It held that a company official must show actual malice to recover for defamatory falsehoods published about him by a union with which he was negotiating a dispute. While *Linn*, strictly speaking, is chiefly a determination of the scope of section 8(b) of the National Labor Relations Act, its portent of an expanded *Times* conception of who qualifies as a public official was promptly fulfilled. In *Rosenblatt v. Baer*,\(^20\) the Court faced a defamation action by the ex-supervisor of a New Hampshire recreation area against a reporter who had questioned his professional integrity in a newspaper column. The Court held, in spite of the fact that plaintiff might not be a “public official” under New Hampshire law, that he was a public official within the meaning of the constitutional standard. “[T]he ‘public official’ designation applies at the very least,” said the Court, “to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.”\(^21\)

In 1967 the “public official” limitation in the *Times* rule was construed even more broadly. In *Time, Inc. v. Hill*,\(^22\) the Court

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16. Pending at the time the Court decided the *Times* case were more than $2 million worth of defamation cases growing out of the same advertisement. Kalven, supra note 10, at 200.
17. *Id.*
21. *Id.* at 85.
extended the *Times* immunity in the privacy area to a publisher who had fictionalized an incident in plaintiff's life. The Court opined, "The guarantees for speech or press are not the preserve of political expression or comment upon public affairs. . . . We have no doubt that the subject of the *Life* article . . . is a matter of public interest. . . . Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, ' . . . it must be protected. . . .'"

Since *Times* immunity would disable a plaintiff who had not volunteered to become an object of legitimate public interest, it is obvious that it must disable a plaintiff who had voluntarily thrust himself into the vortex of public debate: so the Court held in *Associated Press v. Walker.* Edwin Walker, retired major-general and political amateur, had involved himself in ensuring the continued racial segregation of the University of Mississippi. A green reporter for the Associated Press wrote that General Walker had been implicated in some of the violence which resulted from the integration of that University. The Mississippi jury found the facts to be otherwise and awarded damages to the general. The Supreme Court reversed unanimously, agreeing that without a showing of actual malice, General Walker must be denied a recovery. "Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest."

While the class of plaintiffs disabled by the *Times* rule was thus expanded, the content of the "actual malice" requirement was more narrowly defined. In the 1965 case of *Henry v. Collins,* the Court elaborated on the actual malice requirement, stating that the plaintiff must show an intent to harm him through the use of falsehood. The mere presence of ill-will and falsehood was not enough. In *St. Amant v. Thompson,* defendant, while a candidate for public office, published a defama-

23. *Id.* at 388.
27. *Id.* at 357.
tory article about plaintiff accusing him of criminal conduct. Plaintiff brought his action on the reckless disregard theory presented in *Times*. Speaking for the majority, Mr. Justice White stated that for first amendment purposes,

> 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.\(^29\)

In short, the Court in *St. Amant* seems to be emphasizing that “knowing falsity” and “reckless disregard” are, rather than alternative theories of actual malice, actually close kindred. In *Greenbelt Co-op Pub. Co. v. Bresler*,\(^30\) the Court reemphasized that actual malice, as a constitutional norm, is distinct from vindictiveness, or personal animus in its common-sense acceptance.

In summary, the subsequent Supreme Court cases have made two principal modifications in the *Times* rule. They have expanded from “public official” to “public person” or “newsworthy person” the class of plaintiffs who will be disabled in most cases from recovery. They have also restrictively qualified—although perhaps ambiguously—the definition of actual malice. But, of course, the real measure of the *Times* rule as an effective or well-intentioned constitutional doctrine cannot be discerned in the Supreme Court of the United States alone. Since the Supreme Court’s decisions must be implemented by the lower federal and state courts, it is to them that one must turn to learn in what manner the *Times* rule is functioning.

III. THE APPLICATION OF THE PRINCIPLES

A. WHICH PLAINTIFFS ARE UNDER THE *TIMES* DISABILITY?

1. The developing cases.\(^31\)

The *Times* case limited the application of the constitutional principle therein announced to “public officials.” But the dis-

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29. *Id.* at 731.
31. A number of post-*Times* cases sought to limit the application of the rule to particularly public persons. Thus, in *Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1966), a druggist who was called a racist for cancelling his subscriptions to the defendant newspaper was held to be outside the *Times* disability. In *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.
distinction between public officials and other people about whom public scrutiny is appropriate is only laboriously maintained. Professor Harry Kalven predicted that the distinction would fall, and fall it did. In the past two years the courts have repeatedly encountered difficulty in rationalizing the limitation. While they have recited the Hill formula of "substantial public interest" in place of the conclusory public official designation, the courts have been hard-put to remain plausible in their attempts to reflect the evident sense of the Supreme Court that the Times doctrine should not utterly swamp state rules of defamation.

In All-Diet Food Distributors, Inc. v. Time, Inc., defendant published a photograph of plaintiff's health-food store, labelling it "Food Fads and Frauds." The New York Supreme Court ruled that the Times rule should apply to the imputation of fraud because the subject was a "highly important matter affecting the public interest." The important case of United Medical Laboratories, Inc. v. CBS dealt with the same legal problem in a somewhat more interesting factual setting. CBS broadcast a documentary film about abuses in the mail-order laboratory business. Plaintiff was not mentioned in the film, but, because it was a very large mail-order laboratory, it alleged damage and sought to recover for defamation. The district court dismissed the action and held that state law forbade a recovery to a member of a defamed group unless the particular plaintiff was singled out in some way. The Ninth Circuit Court of Appeals in affirming took a different ground, concluding that the Times rule was applicable. The court noted that the Times case should not be regarded as having proscribed any extensions of that immunity which the decision announced. The court continued:

The crucial question here... is whether First Amendment immunity can properly be regarded as extending to disclosure and discussion of professional practices and conditions in the health area involved, so that those engaged in the particular field who may claim to have been stained by such a publication will be subject, in any seeking of redress, to application of the federal standard . . . instead of to the standards of state

916 (1965), a show business personality was not within the Times disability. See also Krutech v. Schimmel, 26 A.D.2d 1052, 50 Misc.2d 1052, 272 N.Y.S.2d 261 (1966); Youssouppoff v. CBS, 48 Misc. 2d 700, 265 N.Y.S.2d 754 (1965). All of these cases may be safely regarded as passé, in light of the subsequent cases.

32. Kalven, supra note 10, at 221.
33. 50 Misc. 2d 821, 290 N.Y.S.2d 445 (1967).
34. Id. at 824, 290 N.Y.S.2d at 448.
35. 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969).
libel law. . . . We have no difficulty in so concluding.36

The plaintiff argued that it was an inappropriate subject for the \textit{Times} disability because it was not a "famous" institution, regularly in the public eye. The court rejected this argument. It said that although "limelight" (the court's euphemism for public notice) may be a factor in stimulating a legitimate public interest, it could not be considered a condition precedent to the existence of a public interest.37

In \textit{Time, Inc. v. McLaney},38 the Fifth Circuit held that there could be protected domestic public interest in a person whose notoriety was derived from activities in another country. Plaintiff was, according to \textit{Time}, a racketeer who was trying corruptly to influence the outcome of elections in a certain foreign country. Plaintiff's conduct, held the court, was such as to make him a fit object of public scrutiny: that being the case, the \textit{Times} immunity arises and actual malice must be proved.39

While cogent arguments can be made for the great public interest in food, health and politics, even foreign politics, some of the cases finding a public interest sufficient to demand the application of the \textit{Times} rule seem strained. In \textit{Bon Air Hotel, Inc. v. Time, Inc.},40 the district court applied the \textit{Times} immunity on facts which, from a common-sense perspective, do not easily suggest "public interest." \textit{Sports Illustrated}, in its coverage of the Masters golf tournament, said certain unflattering things about Augusta's Bon Air Hotel. It was once a great inn, it was said, but had now fallen into dilapidation and hard times. Furthermore, according to the magazine, like other facilities in Augusta at Masters time, the Bon Air charged exhorbitant prices. In finding a public interest in these statements, the court apparently relied on a common law curiosity, the fact that inn-keepers are of a common calling, and thus live lives with a sort of quasi-public aspect. But the court stopped short of holding that all persons in common callings are \textit{ipso facto} under a \textit{Times} disability in defamation actions, preferring to state its result in more cryptic terms, \textit{i.e.}, as a conclusion based on particular facts.

36. \textit{Id.} at 711.
37. \textit{Id.} at 712. There are indications that the public interest criterion is not limited to the "health" area. \textit{Fotochrome, Inc. v. New York Herald Tribune, Inc.}, 61 Misc. 2d 226, 305 N.Y.S.2d 168 (1969).
38. 406 F.2d 565 (5th Cir. 1969).
In *Arizona Biochemical Co. v. Hearst Corp.*, a similar result was reached. Defendant was the publisher of the *Albany (N.Y.) Times Union*. It charged in print that plaintiff was mixed up with the Mafia. Plaintiff was in the garbage collection business. Interestingly, the district court found the public interest in the plaintiff originated with his quasi-governmental activity of garbage collection, rather than pegging the interest upon the prophylactic importance of public discussion of an influential crime syndicate. The court duly noted that, by plaintiff's own averment, garbage collection constitutes "essential services for the welfare and health of the inhabitants" of the areas served.

Other cases have taken the public interest doctrine still further. In *Farnsworth v. Tribune Co.*, the Illinois Supreme Court faced a libel action which arose from a *Chicago Tribune* exposé of medical quackery in Illinois. Plaintiff, an osteopathic physician, was identified by the exposé as a quack-in-point, one who used strange machines, unknown to medical science, for therapeutic and diagnostic purposes. The Illinois Constitution states: "Truth is a defense in a libel action only when published with good motives and for justifiable ends." The trial judge took the position that the *Times* rule supervened the mandate of the state constitution and refused to give a jury instruction respecting the purity of defendant's motives. Judgment was entered on a verdict for defendant and plaintiff appealed. In the Illinois Supreme Court plaintiff argued that she was an inappropriate subject for *Times* disability because she was not known to the general public prior to the publication of the exposé. The court rejected this argument. Looking to the underlying rationale of the *Times* decision and its successors, the disability was said to apply. "In determining a subject's importance to the public," said the court,

we must consider not only the number of persons affected by

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43. 302 F. Supp. at 415.
44. 43 Ill. 2d 286, 253 N.E.2d 408 (1969).
45. Ill. Const. art. 2, § 4. The Illinois Supreme Court went on to hold this section unconstitutional insofar as it would require the publisher of a statement of public interest or concern to demonstrate good motives or justifiable ends. The Supreme Court of the United States has never held directly on this point, but if they do, no doubt they would reach the same result that the Illinois high court did. See Frankfurt, *The Origins and Constitutionality of Limitation on Truth as a Defense in Tort Law*, 16 Stan. L. Rev. 789, 806 (1964).
the subject, but also the severity of its impact upon those so affected. Thus, the fact that 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 practices of one who represents herself as qualified to treat human ills.\textsuperscript{46}

But, for that matter, what occupation is not "vitally important?" Consider \textit{Rosenbloom v. Metromedia, Inc.},\textsuperscript{47} where the Philadelphia police raided plaintiff's home and warehouse, intercepting and confiscating a large quantity of what was termed "smut." Defendant included the item in a news broadcast, referring to plaintiff as a "smut peddler" and to the allegedly obscene literature as "girly magazines." With its tongue presumably in its judicial cheek, the Third Circuit Court of Appeals held that the plaintiff was under a \textit{Times} disability because of "the established public interest in the subject matter."\textsuperscript{48} Because of the importance of first amendment guarantees, the court went on, "we conclude that the fact that plaintiff was not a public figure cannot be accorded decisive importance."\textsuperscript{49}

2. \textit{Does the Times Rule Exclude Any Plaintiff?}

If health food peddlers, hostlers, garbage collectors, pornographers and quacks are all such plaintiffs as will trigger \textit{Times} immunity, it must follow that the public interest qualification is no real qualification at all. It explains cases only by a synthetic contrivance. The class of public figures, as Judge Madden has pointed out, contains "anyone who is famous or infamous because of what he is or what he has done."\textsuperscript{50} This raises an important question. Assuming that "anyone" can be under the \textit{Times} disability, have the state laws of libel been wholly superseded? One need not so conclude in order to rationalize the cases: rather, what the cases do suggest is that it is impossible to tell, merely by looking at the plaintiff, whether or not he is "public" in a constitutional sense. The constitutional status of the plaintiff is determined by examining the defendant's role and conduct. In other words, instead of there being \textit{Times}-disabled plaintiffs, from which defendant's immunity to liability is deduced, there are rather \textit{Times}-immune defendants, from which plaintiff's pub-

\begin{itemize}
\item \textsuperscript{46} 43 Ill. 2d 286, 253 N.E.2d 408 (1969).
\item \textsuperscript{47} 415 F.2d 892 (3d Cir. 1969), \textit{cert. granted}, 397 U.S. 904 (1970).
\item \textsuperscript{48} \textit{Id.} at 896.
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Cepeda v. Cowles Magazines and Broadcasting, Inc.}, 392 F.2d 417, 419 (9th Cir. 1968).
\end{itemize}
lic status is deduced. The *New York Times* doctrine has found in the lower courts a special appropriateness for its name, for it seems to have become a special constitutional rule for newspapers and other purveyors of information to the public.

If this proposition is true, then two collateral propositions may very well also obtain. First, by extrapolation, it may be said that if a private person may for certain constitutional purposes be "public," then even a public official may, for certain purposes of the law of defamation, be considered "private." Second, it would appear to follow that freedom of the press and freedom of speech may not be co-extensive, and that of the two, freedom of the press may have the wider scope.

For what purposes could a public official be considered a "private" individual for purposes of constitutional adjudication? Suppose a United States Senator has, by his official conduct, led one of his neighbors to believe that he is taking bribes. Suppose further that it is not a reasonable belief, and that, although sincerely believed, it is not true. It is quite clear that if the neighbor wrote a letter to the editor of the *New York Times*, accusing the Senator of taking bribes, the *Times* rule would apply to immunize him from liability. But what if the neighbor embodied the accusation in anonymous phone calls to the Senator's personal friends and family? Nothing in the rationale of the *Times* cases suggests that the constitutional im-

51. In *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967), a renowned trial attorney, suing for libel, was asserted by defendant to be a public figure within the meaning of the *Times* rule as expounded. The court ruled that it was not enough for the trial court to determine merely that plaintiff was a public figure. [A] court confronted with a defamation suit in which the defendant asserts the *New York Times* privilege is compelled to make the dual inquiry (1) whether the plaintiff is a public figure and (2) whether the alleged defamatory publication is addressed toward his public conduct. *Id.* at 587-88. The court goes on to suggest that a public *official* case would be easier to decide than a public *figure* case because "in the case of a public *figure* there is substantially more room for the interplay of facts concerning his entry into the public arena and the nature of the issue in which he has become embroiled." *Id.* at 588.

If the constitutional interest sought to be protected is public discussion of public issues, the distinction between public officials and public figures would seem to be of dubious utility: the focus should be on the public or non-public character of the debate itself, the identity of the participants supplying mainly corroborative data. If this analysis is correct, then the conclusion of the Fifth Circuit, that public figures and public officials present more or less difficult cases in determining whether a defamation is within the *Times* rule, is somewhat doubtful. The rule for determining the public or non-public character of the debate, regardless of who is defamed, should be the same.
community would apply. If the defamer had wanted a robust, uninhibited and wide-open debate on the matter of the Senator's ethics, he might have had it for the asking. Instead, he chose to skulk in the chimney-shadows of impropriety, inflicting private damage on the Senator as an individual, rather than as a public official. In such a situation, if it is accepted that the Times rule is a "media" rule, there should be no constitutional impediment under Times or successor cases to applying state libel laws against the defamer. As suggested previously, this result would suggest that freedom of speech is less broad than freedom of the press. If this is so, there is no justification for it in the first amendment's language. The words "freedom of speech" and "freedom of the press" stand in parallel grammatic positions in the amendment, and, by the copulatio verborum maxim, should be accorded the same priority. Furthermore, and more to the point, there are no ideological grounds for differentiating the scope of the one freedom from that of the other. There are, however, practical grounds of differentiation which go to the justiciability of certain issues in the context of the defamation problem. As Judge Madden says: a public figure, in the constitutional sense, is somebody who is famous. He becomes famous because a newspaper or a broadcaster has elected to make him so. A court cannot assume to gainsay editorial judgment of

52. One case at least, has been found explicitly to state that the constitutional protections of New York Times v. Sullivan and later cases do not extend to all statements about public officials or candidates for office, but only those which relate to their official conduct or fitness for office, and that there may be purely private libels against such persons which will be governed by state law, unrestricted by the Federal Constitution. Roy v. Monitor-Patriot Co., 254 A.2d 832, 834 (N.H. 1969). Roy surely states the principle correctly, but its authority is compromised by the fact that, on its particular facts, it is clearly a bad decision. The case arose when defendant published a column of muckraker Jack Anderson which asserted that plaintiff, a candidate for United States Senator, was a small-time bootlegger. The court stated that small-time bootlegging which had occurred "26 to 37 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate." Id. Under the facts thus presented, Roy must be written off as an aberration. The United States Supreme Court has granted certiorari, 397 U.S. 904 (1970), and presumably will reverse. See also Arber v. Stahlin, 382 Mich. 300, 170 N.W.2d 45 (1969), cert. denied, 397 U.S. 924 (1970), another aberration.


54. 392 F.2d 417, 419 (9th Cir. 1968).

55. But see Arber v. Stahlin, 382 Mich. 300, 170 N.W.2d 45 (1969), cert. denied, 397 U.S. 924 (1970), where the court states: "Of course, the public figure stature must exist prior to the alleged libel and not by
newsworthiness; according to the Madden formula, all it can look to is whether the newspaper has printed a story about a man "because of who he is or what he has done." That mightily inclusive ground would seem to cover practically every excuse a newspaper could have for writing about a man. Thus it appears that newspapers are free to print whatever they will about anyone, so long as they do so without actual malice. But as to one who seeks to injure another with words in secret, the court should have more freedom to pass judgment. Because the general public has been scrupulously excluded from the defamation, the court may be less concerned with ensuring the vitality of public debate, the factor which was determinative in the Times case.

Perhaps the most recent post-Times cases could be most succinctly summarized by analogizing them to the common law doctrine of privilege. The common law recognized certain "privileged occasions" when one could publish untrue and defamatory statements about another without incurring liability. Such an occasion would arise from the duty of a publisher, whether legal or moral, to publish the statements. If the publisher exceeded the bounds suggested by the duty, or if he were guilty of actual malice, the common law privilege would be held lost through abuse. Similarly, publication of a story in a newspaper could be viewed as conclusive evidence of a privilege. Therefore, the plaintiff would automatically have to assume the burden of proving actual malice. No court has yet been found to go so far; still, there is a certain judicial reluctance to include any "public" (as distinguished from "secret") publication under the Times immunity. Nevertheless, it is difficult to see how a disability which comprehends smut peddlers and garbage men can be kept from comprehending everyone.

virtue of the notoriety created by it." 382 Mich. at 302 n.4, 170 N.W.2d at 47 n.4.

56. See, e.g., Watt v. Longsdon, 1 K.B. 130 (1930), which sets forth this area of the common law with uncommon succinctness. See also W. ProssER, LAw or TOrts § 110 (3d ed. 1964).

57. Actual malice in the common law sense of the term is to be sharply distinguished from New York Times actual malice. At common law, the term actual malice labeled the conclusion that a privilege to defame had been exceeded. See W. ProssER, LAw or TOrts § 110 (3d ed. 1964):

[T]he statement which best fits the decided cases is that the court will look to the primary motive or purpose by which the defendant is apparently inspired . . . . [T]he privilege is lost if the publication is not made primarily for the purpose of furthering the interest which is entitled to protection.

B. Actual Malice

1. A Choice, Not an Echo.

If the successive expansion of the "public persons" category has been almost irresistible, the development of the actual malice standard has been far less even and far less clear. This fact is understandable in that, as defined in the Supreme Court cases, the standard of actual malice is exceedingly slippery. As refined by the Henry and St. Amant cases, the Times actual malice rule would impose liability upon a defendant if and only if he defamed another with a statement intended to injure, and which he knew to be false or which he published recklessly while entertaining serious reservations as to its truth.

This rule, as stated, is entirely adequate for the consideration of a limited category of cases—those which deal with what may be called "simple" facts. A simple fact is one which may be meaningfully analyzed in terms of truth or falsity. While truth is generally a defense to libel, not all libels are statements of fact to which the ascription of truth or falsity has a constant meaning. When columnist Jack Anderson writes in his column that Senator Thomas Dodd accepted money from a businessman and then recommended his benefactor's appointment to an important post in government, it is a statement of simple fact and the Times rule can meaningfully be applied. But there are other kinds

Altoona Clay Products, Inc. v. Dunn & Bradstreet, Inc., 286 F. Supp. 899 (W.D. Pa. 1968) and in Grove v. Dunn & Bradstreet, Inc., 308 F. Supp. 1068 (W.D. Pa. 1970), important public policy considerations were seen as negating liability for negligent misstatement in credit reports. The latter two cases explicitly took New York Times rationales, suggesting more clearly than any other cases have that public interest, rather than the status of the plaintiff, is the focus of the constitutional rule. These cases can be distinguished from the run of libel cases generally, however, on the ground that they involve confidential, rather than generally published statements. Nothing in the rationale of the Times doctrine suggests cloaking credit reporters in the garb of newspaper reporters—the functions of these two disseminators of information are quite different. Probably the best understanding of the credit cases is as a branch of commercial law, rather than as a broad and general extension of the Times doctrine.

59. In Burton v. Crowell Pub. Co., 82 F.2d 154 (2d Cir. 1936), defendant's camera played a trick with perspective; the resulting photograph made plaintiff appear ludicrously malformed, lewd and fantastic. "Nobody could be fatuous enough," wrote Judge Learned Hand, to believe that plaintiff was as the photograph had represented him. Nevertheless, held: photograph was libelous.

of facts which in form are non-public and in nature not subject to verification. A statement that a senator is mentally unbalanced, or that a hotel is dilapidated and overpriced, or that a doctor is a quack, is a statement which, although factual in form, is so intermixed with sentiment that an adjudication of the issue "truth vel non" would be fatuous. The common law managed this problem by attempting to distinguish between fact and opinion, according privilege to an opinion whose basis was underlying facts which could be said to be true or false. This is not a satisfying resolution to the problem because the causal link between the underlying facts and the resulting opinion is generally subjective and obscure.\(^{61}\) To say: "Dr. Farnsworth uses unproved equipment: therefore she is a quack" has no greater legitimacy than to say, for example, "Dr. Einstein spins unproved theories: therefore he is a quack." The few cases which have primarily dealt with the actual malice standard have illuminated the difficulty.

A leading case in the area is Goldwater v. Ginzburg,\(^ {62}\) the first of the major post-Times cases where a conceded public official has prevailed in an action for defamation. Ralph Ginzburg, the New York publisher, watched the 1964 Republican National Convention on his television set and in the process formed or confirmed a low opinion of Barry Goldwater, the Party's nominee for President. Ginzburg indulged his pique by planning and producing an "all-Goldwater" issue of his now-defunct magazine Fact. The October, 1964 edition of Fact, which appeared the month before the election, was wholly devoted to the Senator. On the journal's cover appeared the punning legend "Barry Goldwater: the Unconscious of a Conservative." Within were two articles, both virulent attacks on Goldwater, his personality and his politics. Although one of the articles appeared under the by-line of Warren Boroson, Ginzburg's helper, both articles apparently were written by Ginzburg himself.

The first article stated that Goldwater suffered from "paralyzing, deep-seated, irrational fear," and showed "unmistakable symptoms of paranoia." The term "paranoid" or its adjectival variants was used at least five times in this article in connection with the Senator, together with a number of allied passages which adverted to such things as Goldwater's hostility and his delusional systems. The second article set forth the results of a

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62. 414 F.2d 324 (2d Cir. 1969).
Ginzburg-conceived questionnaire and contained information with much the same thrust as that in the first article. The questionnaire had been mailed to 12,356 psychiatrists, whose names Ginzburg had procured off a commercial mailing list. It requested the solicitants to comment on Goldwater's psychological fitness to be President. Only 2417 of the solicitants responded, and of that number, 1749 declined to sign their responses. 1189 of the respondents stated that Goldwater was psychologically unfit to be President; 571 replied that they had insufficient information to warrant venturing an opinion; 657 said they believed that Goldwater was sufficiently sound for the Presidency.

The district court refused defendant's motion for summary judgment, and listed some of the lurid alleged details of the Ginzburg production which, taken as true, would permit a jury to infer the existence of actual malice. First, the cover letter which Ginzburg had sent with the questionnaire alluded to "two nervous breakdowns" which Mrs. Goldwater was supposed to have attributed to her husband. Ginzburg had made no discoverable attempt to verify the sense in which the term "nervous breakdown" was used. Second, in showing how the psychiatrists' letters were signed, Ginzburg used the notation "name withheld" interchangeably with "anonymous," giving rise to the possible inference that he may have wanted his readers to believe that some of the unsigned responses had in fact been signed. Third, Ginzburg had received a letter from the Medical Director of the American Psychiatric Association which warned in no uncertain terms of the methodological invalidity of the Ginzburg "survey." Fourth, the Ginzburg article was based on certain treatises on abnormal psychology. Ginzburg, it appeared, had never read the treatises himself, but quoted certain passages which had been underscored for him by others. He also omitted to print such qualifying language as the treatises contained. Fifth, in the second article Ginzburg adopted the practice of "distilling" and "melding" the responses. He engrafted the words of one response to the words of another, making two letters seem as if one. Some replies Ginzburg printed without including qualifying material. As to one letter, he "didn't even consider" whether the material was true or false, but cared only to print what the man had written.

Upon trial, Goldwater obtained the jury verdict. Ginzburg appealed relying heavily on the secondary nature of the sup-

posedly defamatory material. He was merely quoting others, he argued, and thus he ought to be immune from liability. The Second Circuit Court of Appeals insisted, however, that citing sources does not insulate a publisher who knows he is repeating statements which are inherently improbable or false. Having quoted statements out of context, having melded and distilled his primary materials, Ginzburg could not claim the exaggerations and distortions were other than his own handiwork.

At the trial, Goldwater's attorneys obtained the expert testimony of Burns W. Roper, the pollster, who testified on the particulars of the invalidity of the Ginzburg survey. Ginzburg argued on appeal that such testimony was irrelevant because at most it would tend to establish only "negligence" rather than "reckless disregard." The court rejected this contention also. Recklessness, said the court, is a constitutionally sufficient basis for proving actual malice, and may be shown by evidence which suggests a want of due care. Recklessness is "only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness." 64

Ginzburg was, no doubt, reckless. But the constitutional standard relates only to recklessness with respect to the truth. The statement "Goldwater is paranoid" is not, except in form, a factual statement. It cannot be true or false except in the roughest, most unsystematic way. The statement "Goldwater is a paranoid" is a conclusion, freighted with opprobrious overtones and based upon a foundation, not of fact, but of opinion. The statement "Goldwater is paranoid" is no more susceptible of factual verification than the statement "he would have been a bad President." Perhaps it is to say no more than "I dislike him." The difficulty of applying the constitutional standard is not facilitated by relying on questionnaire data, whether trumped-up or not, since when a psychiatrist states that someone is paranoid, he is also expressing an opinionative conclusion, formally similar to the opinion of the layman, with perhaps an added filip: the sentiment "I think he ought to behave differently from the way he does." The ultimate conclusory opinion still lacks a distinctly factual basis.

A similar sort of problem was presented in Rose v. Koch. 65 Defendant Gerda Koch published a right-wing political newslet-

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64. 414 F.2d at 343.
65. 278 Minn. 235, 154 N.W.2d 409 (1967).
Facts for Action. In the course of one of her issues, she stated that Arnold Rose, a professor of sociology at the University of Minnesota and retired state legislator, was a communist. This charge was apparently based on the fact that Rose had been, many years earlier, an associate of the Swedish political economist Gunnar Myrdal in the writing of *An American Dilemma*. Myrdal is a socialist. Rose was a member of the DFL, Minnesota's regular Democratic party. Rose brought an action for libel in the state district court and obtained a jury verdict for general and punitive damages. The Supreme Court of Minnesota reversed and remanded on the principal ground that the jury had been erroneously instructed. The trial judge, said the Supreme Court, although he correctly defined actual malice,

incorrectly instructed, in addition, that the jury could consider evidence of personal ill will, the exaggerated language of the libelous document, the extent of its publication, or any other factors that the jury might regard as equally relevant. The latter instruction is neither, on the one hand, a substitute for the constitutional standard of calculated falsehood or reckless disregard of truth, nor, on the other hand, an appropriate instruction on the meaning of that standard.\(^66\)

Upon remand, Rose discontinued the action. The awkwardness of the truth/falsity formulation of the *Times* standard is as evident in *Rose* as in *Goldwater*. To say of a man that he is a "communist," in this day and age, is hardly to assert a fact. "Communist" has become an epithet, connoting revulsion and condemnation: in the sense that Gerda Koch used the term, it is sentimental, rather than scientific; it cannot be "false" or "true." Thus when the court barred the jury from considering the content of the libelous document itself to determine actual malice, it foreclosed the possibility of finding actual malice at all. Aside from the language of the document and evidence about the motives of its publisher, there was no relevant data in existence—and there could be none.

In *Mahnke v. Northwestern Publications, Inc.*,\(^67\) the Minnesota high court faced the actual malice problem in a context where truth or falsity may have some meaning. A re-write man on the city desk of the *St. Paul Dispatch* sloppily rewrote a story which had been telephoned in from a reporter in the field. The plaintiff, a Minneapolis policeman until his recent death, brought his action on the reckless disregard theory and won a jury verdict. The Minnesota Supreme Court affirmed the judg-

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\(^66\). *Id.* at 251-52, 154 N.W.2d at 421-22.
\(^67\). 280 Minn. 328, 160 N.W.2d 1 (1968).
ment below, suggesting in its opinion that negligence, which the
conduct of the newspaper's employee certainly was, and reck-
less disregard lay in adjoining juridical territories. It did not,
however, in its opinion suggest what to look for as the distin-
guishing factor between the two.

2. The Problems with Actual Malice: In Your Heart You Know
He's Right.

The actual malice problem contains two principal points of
obscenity. First, how can actual malice be found in a statement
which, because it is sentimental rather than factual, can be nei-
ther true nor false? Second, assuming a statement which can be
either true or false, how does one distinguish between a negligent
misstatement on the one hand and reckless disregard on the
other?

Prescriptively, it might be thought that Goldwater was
wrongly decided. As has been argued, the statement "Goldwater
is paranoid," buttressed with however much paraphernalia and
psychiatric gew-gaws, is never more than a contumelious senti-
ment. That being true, it cannot fit into the Times definition
of actual malice. But in another sense, it might be said that
Goldwater expresses a modification of the Times doctrine relating
to the outrageousness of defendant's conduct. This modification
would state that, the Times rule notwithstanding, atrocious ac-
tivity on the part of defendant is apt to affix liability. Roughly
equivalent to this supposed modification is the rule relating to
the tortious infliction of emotional distress propounded by the
Second Restatement of Torts. The Restatement says:

Liability has been found only where the conduct has been so
outrageous in character, and so extreme in degree, as to go
beyond all possible bounds of decency, and to be regarded as
atrocious, and utterly intolerable in a civilized community.
Generally, the case is one in which the recitation of the facts
to an average member of the community would arouse his re-
sentment against the actor, and lead him to exclaim, "Out-
rageous!"

The Restatement adds that such conduct includes not merely in-
tentional conduct, but also reckless conduct "in deliberate disre-
gard of a high degree of probability that the emotional distress
will follow."

While the "outrageous" test might be a humane qualification

68. Id. at 343, 160 N.W.2d at 10–11.
69. RESTATEMENT (SECOND) OF TORTS § 46, comment d (1965).
70. Id. at comment 1.
to the *Times* rule, there are several reasons which militate against its overt adoption, if not its covert acceptance. First, insofar as the “outrageous” formula is subjective, it depends upon the caprice of a judge or jury, and thus may exercise a chilling effect on important first amendment rights. This factor would not be determinative without reference to the interest sought to be protected. If people subject to the courts of the United States can stand any words, they can stand those which are merely expressive of opinion. The second consideration which would inhibit the adoption of this qualification to the *Times* rule is the previously-mentioned “southern jury problem,” and the need for transnational consistency in the application of constitutional principles. The *Times* rule itself, after all, was originally a response to the “outrage” of the Alabama jury which tried the case.

The second problem in the actual malice area relates to the difficulty of drawing a line between reckless disregard and negligent misstatement. While the true/false language of the *Times* standard is at least meaningful in this area, the problem of how to draw the negligence/recklessness distinction remains. This problem assumes a statement of simple fact—a statement which can be true or false. Further, it assumes that it is false. Unless libel suits are to be eliminated altogether, the matter of line-drawing must be faced. Both *Goldwater* and *Mahnke* suggest that negligence and recklessness are principally to be distinguished on quantitative grounds—that is, that recklessness is just a great deal of negligence. The *St. Amant* case hints that there may be a *qualitative* distinction as well, going to the state of mind of the defendant, that is, his reservations, or lack thereof, about the truth of the defamations he published.

The difficulty of line-drawing could possibly be simplified by the application of the “outrageous” formula to the question of whether a negligent misstatement amounted to a reckless disregard as well. If, in light of all the circumstances in the case—the conduct of the defendant and the contents of the libel—the jury concluded that the false statement of the defendant was beyond the bounds of what can be tolerated in a civilized community, and was atrocious, then liability could be imposed. This test would be vulnerable to substantially the same attack that was expounded against the use of the outrageous formula in connection with the possible *sotto voce* modification of the *Times* rule. But a distinction between the two problems exists. There seems to be no compelling reason to suppose that sentimental words need to be actionable. But unless one adopts the
extreme position that no language is actionable and that the laws of defamation are unconstitutional,\footnote{Not even Mr. Justice Black would go so far. See, for example, his opinion concurring and dissenting in Rosenblatt v. Baer: "[T]he only sure way to protect speech and press . . . is to recognize that libel laws are abridgments of speech and press and therefore are barred in both federal and state courts by the First and Fourteenth Amendments." 383 U.S. at 95. He indicated, however, that he would hold out for the minimum limitation that the wholly-protected speech relate to "public affairs." Id.} distinction between reckless disregard and negligent misstatement must be made, on one or another ground. The "outrageous" formula focuses precisely on those defamations which are the most despicable, interdicting precisely that behavior which should be deterred.\footnote{Cf. Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), where columnist Drew Pearson had accused Congressman Eugene Keogh of New York of substantial misconduct. The district court refused the Post's motion for summary judgment and certified the case because of a doubt about the proper application of the law to the D.C. Circuit Court of Appeals for an interlocutory appeal. The court reversed the trial court and ordered the entry of a summary judgment for defendant. The court argued that there is no basis, in experience or in the Times case, for asserting that the more serious the accusation, the higher the duty of the publisher to ensure that it is true before it is published. On the contrary, argued the court, it is the accusations of greatest gravity which we have most warrant for not discouraging. Id. at 972.}

IV. CONCLUSION

The New York Times rule in certain respects has outgrown itself; but in other respects, it is embroiled in confusion. The limitation of the Times rule to publicly interesting plaintiffs may confidently be said to be nearing total elimination, barring a drastic change in the rule. Thus it is probable that at some time in the near future proving actual malice will be a requirement for every plaintiff who seeks a recovery for defamatory words. But the definition of actual malice itself has presented problems, if only semantic ones, which seem nearly insoluble. The use of the truth/falsity distinction for epithets like "communist" or "paranoid" has produced an uncomfortable murkiness in this area. Nor is it clear how negligence and reckless disregard are to be distinguished. The use of the "outrageous" formula suggested in this Note may offer some aid; yet the formula may be more suitable to curbstone punditry than to constitutional jurisprudence. Since the "public interest" limitation is nearly a moribund problem, it is the definition and operation of the standards for actual malice which should occupy courts as they face defamation cases in the future.