

Constitutional Law of Defamation and Privacy Butts and Walker

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NOTES

THE CONSTITUTIONAL LAW OF DEFAMATION AND PRIVACY: *BUTTS* AND *WALKER*

The clash between the first amendment freedoms of speech and press, and the common law protections of privacy, name, and reputation, has resulted in a federal law of defamation and privacy. In *New York Times Co. v. Sullivan*,¹ the Supreme Court declared that the Constitution demands the formulation of federal guidelines limiting the permissible scope of defamation and privacy actions. Thus, the Court announced

a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.²

Unfortunately, the creation or expansion of one right necessarily tolls the demise or confinement of another. The *New York Times* rule was formulated "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ."³ In theory, protection of the listener is more vital than protection of the speaker.⁴ Though some abuse is inherent in the protection itself, even false statements must be protected if the freedom of expression is to be given the breathing space it requires for survival. Where malice is present, however, the shield may be lifted, because democracy has no interest in defending the calculated misstatement.⁵

I

THE EVOLUTION OF *New York Times*

Even when *New York Times* was decided, it was clear that the Court had barely begun to plow inroads into the personal protections previously afforded by defamation and privacy actions.⁶ In the mean-

1 376 U.S. 254 (1964).

2 *Id.* at 279-80.

3 *Id.* at 270.

4 A. MEIKLEJOHN, *POLITICAL FREEDOM* 57 (1960).

5 See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

6 Justice Douglas has said, "[T]he right of privacy, greatly cherished in the

time, uncertain of the dimensions of the new rule, lower federal courts and state courts were left to wade through the resultant judicial quagmire.

Foreseeing the future growth of the rule the Court had laid down, a majority of post-*New York Times* lower court decisions adopted an expansionistic interpretation. The rule was immediately extended to include appointed officials, such as a police lieutenant who served as deputy chief of detectives⁷ and the chairman of a county Democratic primary board.⁸ It was also applied to candidates for public office.⁹ One case went so far as to find a partner in the mayor's law firm within the purview of the rule when he was allegedly defamed by an opposition candidate.¹⁰ An internationally renowned columnist who had commented on matters of public concern was required to prove "actual malice" in his attempt to recover for alleged defamation.¹¹

*Pauling v. Globe-Democrat Publishing Co.*¹² is the most significant post-*New York Times* lower court decision. Linus Pauling, a Nobel Prize winning chemist of international repute, made efforts to promote a nuclear test ban treaty. Defendant newspaper published allegedly defamatory material about Pauling. The Eighth Circuit conceded that Pauling clearly was not a public official. Nevertheless, "by his public statements and actions, [he projected] . . . himself into the arena of public controversy and into the very 'vortex of the discussion of a question of pressing public concern.'" ¹³ It was apparent that Pauling was better equipped to influence public policy than a minor public official. The court reasoned that since the *New York Times* rule was applicable to a minor public official, it must also be applied to a public figure like Pauling.

While many lower courts have taken the initiative in holding public persons and public issues within the scope of *New York Times*, others have been more hesitant and have refused to extend the decision beyond its facts pending a further pronouncement from the Supreme

American tradition, is fast disappearing." Douglas, *The Attack on the Right to Privacy*, PLAYBOY, Dec. 1967, at 189.

⁷ *Pape v. Time, Inc.*, 354 F.2d 558, 559 (7th Cir. 1965).

⁸ *McNabb v. Tennessean Newspapers, Inc.*, 400 S.W.2d 871, 872 (Tenn. Ct. App. 1965).

⁹ *State v. Browne*, 86 N.J. Super. 217, 220, 206 A.2d 591, 592 (App. Div. 1965).

¹⁰ *Gilberg v. Goffi*, 21 App. Div. 2d 517, 520, 251 N.Y.S.2d 823, 826 (2d Dep't 1964).

¹¹ *Pearson v. Fairbanks Publishing Co.*, 413 P.2d 711 (Alas. 1966).

¹² 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967).

¹³ *Id.* at 195. Pauling testified before congressional committees, circulated a petition to the United Nations among the world's most eminent scientists, and sued to enjoin the Secretary of Defense and the Atomic Energy Commission from detonating nuclear weapons. *Id.* at 190-91.

Court.¹⁴ New York courts refused to apply *New York Times* to a well known ex-prizefighter accused of using "loaded gloves" to win the heavyweight championship,¹⁵ and to a renowned baseball pitcher whose purported biography was "fictionalized" for a juvenile readership.¹⁶ Both courts held that even though a legitimate public interest was present, plaintiffs should not be required to prove "actual malice" merely because they were public individuals. A celebrated New York case, *Youssouf v. C.B.S., Inc.*,¹⁷ decided that a Russian Prince, suing under the New York right-of-privacy statute,¹⁸ did not come within the scope of *New York Times*. The *Youssouf* case received support when a federal district court decided that *New York Times* does not apply to public figures, public officials, or political candidates in foreign countries.¹⁹

II

DR. MEIKLEJOHN AND THE SUPREME COURT

The post-*New York Times* Supreme Court cases cannot fully be understood without first considering the philosophy of Dr. Alexander Meiklejohn,²⁰ since his works have had a profound influence on the first amendment decisions of the current Supreme Court bench.²¹ Professor Meiklejohn's views are premised upon the observation that the citizens of the United States are not only "the governed," but also "the governors." The people delegate a portion of their sovereign power to their government; voting is primary among those powers retained by the people. The function of the first amendment is to prevent the

¹⁴ [A] considerable number of state and lower federal courts [have] . . . produced a sharp division of opinion as to whether the *New York Times* rule should apply only in actions brought by public officials or whether it has a longer reach.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 134 (1967).

¹⁵ *Dempsey v. Time, Inc.*, 43 Misc. 2d 754, 755, 252 N.Y.S.2d 186, 187 (Sup. Ct.), *aff'd mem.*, 22 App. Div. 2d 854, 254 N.Y.S.2d 80 (1st Dep't 1964).

¹⁶ *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 220, 250 N.Y.S.2d 529, 531 (Sup. Ct. 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1st Dep't 1965), *aff'd*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded per curiam*, 387 U.S. 239 (1967).

¹⁷ 48 Misc. 2d 700, 265 N.Y.S.2d 754 (Sup. Ct. 1965).

¹⁸ N. Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1948).

¹⁹ *Figrole v. Curtis Publishing Co.*, 247 F. Supp. 595, 597 (S.D.N.Y. 1965).

²⁰ This discussion of Dr. Meiklejohn's philosophy is derived from A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960), and Meiklejohn, *The First Amendment Is an Absolute*, in 1961 SUP. CT. REV. 245.

²¹ See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

abridgment of the freedom of the electoral power of the people, Freedom of expression must be encouraged in all areas of thought, since only in an atmosphere characterized by the free exchange of ideas and feelings can the individual members of society become knowledgeable, intelligent, sensitive "governors." Democracy requires unrestricted public discussion of public issues. The range of uninhibited communication must include education, in all its phases, as well as the achievements of philosophy, literature, and the arts and sciences.

Dr. Meiklejohn's concept of the first amendment freedoms of speech and press is plainly "issue" rather than "person" oriented. The paramount consideration is neither the speaker's nor the subject's role in society, but rather whether the statement in any way makes the hearer a more effective "governor." There are very few statements that do not contribute in some way toward this goal. Assuming the Court's thinking was significantly shaped by Professor Meiklejohn's philosophy, the "public official" and "official conduct" limitations of the *New York Times* rule were never intended to canalize the future development of defamation and invasion of privacy cases. Although *New York Times* involved a statement regarding the official conduct of an elected public official, the early commentators confidently predicted that the announced standard was merely a starting point for a much more pervasive rule.²²

In *Garrison v. Louisiana*,²³ decided several months after the promulgation of the *New York Times* decision, the Supreme Court extended *New York Times* into the area of criminal libel. "[W]e see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations."²⁴ *Rosenblatt v. Baer*²⁵ was the next of the first amendment defamation cases to reach the Court. Baer, a former supervisor of a county recreation area, recovered damages from the defendant columnist for an alleged civil libel, the New Hampshire

²² See, e.g., Notes, *Constitutional Law—Defamation—Actual Malice*, 44 BOSTON U.L. REV. 563, 568 (1964), *Free Speech and Defamation of Public Persons: The Expanding Doctrine of New York Times Co. v. Sullivan*, 52 CORNELL L.Q. 419 (1967), *Torts: Trial Court Difficulties in Applying the New Rule of Fair Mistake to Civil Libel*, 48 MARQ. L. REV. 128 (1964), *Privilege To Defame: The United States Supreme Court Has Established a New and Important Area of Constitutional Law*, 26 MONT. L. REV. 110, 117 (1964), *Privilege To Criticize Public Officials: A Constitutional Extension*, 38 S. CAL. L. REV. 349, 354 (1965), *First Amendment Requires Qualified Privilege To Publish Defamatory Misstatements About Public Officials*, 113 U. PA. L. REV. 284, 287 (1964).

²³ 379 U.S. 64 (1964).

²⁴ *Id.* at 67 (footnote omitted). The district attorney of New Orleans accused the eight judges of the Criminal District Court of the Parish of New Orleans of being ineffective, lazy, and sympathetic to violators of the vice laws. *Id.* at 66.

²⁵ 383 U.S. 75 (1966).

Supreme Court expressly holding *New York Times* inapplicable.²⁶ The Supreme Court reversed.²⁷ Faced with the need for further definition of "public official," the Court stated:

[T]he "public official" designation applies at the very least 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 governmental affairs.²⁸

In three 1967 decisions,²⁹ the Court explicitly abandoned the "public official" and "official conduct" rubric of *New York Times*. In *Time, Inc. v. Hill*,³⁰ the Court all but adopted the Meiklejohn philosophy by holding that the constitution requires the New York right of privacy statute to be tempered by the "actual malice" restriction of *New York Times* where the allegedly libelous material concerned "matters of public interest."³¹ *Hill*, however, does not necessarily mark a complete abdication of the Court's person-oriented view of the freedom of expression. Lurking in the background of the opinion is the fact that the members of the Hill family had "involuntarily [become] the subjects of a front-page news story."³² Hence, the issue of public personage may remain a significant ingredient in the first amendment defamation cases. An important question, unanswered at present, is whether the Court would apply *New York Times* in the *Hill* context absent the public personage catalyst. It is unlikely that the Court would do so, especially in light of two post-*Hill* cases, *Curtis Publishing Co. v. Butts*³³ and *Associated Press v. Walker*,³⁴ in which the Court clearly reverted to its person orientation by deciding the cases on a "public figures" rather than "public issues" rationale.

A. *The Effect of Time, Inc. v. Hill*

In September, 1952, the James Hill family was involuntarily thrust into the public limelight. For nineteen hours, three escaped convicts held the Hills hostage in their suburban Whitmarsh, Pennsylvania,

²⁶ Baer v. Rosenblatt, 106 N.H. 26, 34, 203 A.2d 773, 780 (1964).

²⁷ Rosenblatt v. Baer, 383 U.S. 75 (1966). The case was remanded for consideration of three issues unanswered by the record: whether the column specifically concerned the plaintiff; whether plaintiff might be able to establish that he was not a "public official" and, therefore, outside the *New York Times* rule; and whether there was "actual malice." *Id.* at 87.

²⁸ 383 U.S. at 85 (footnote omitted).

²⁹ *Curtis Publishing Co. v. Butts*, decided with *Associated Press v. Walker*, 388 U.S. 130, 155 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967).

³⁰ 385 U.S. 374 (1967).

³¹ *Id.* at 387-88.

³² *Id.* at 378.

³³ 388 U.S. 130 (1967).

³⁴ 388 U.S. 130 (1967).

home. When the convicts departed, the press arrived. While recounting the experience, Hill emphasized that no member of his family had been harmed during the incident and that, in fact, they had been treated courteously by the convicts. In order to avoid unwanted publicity, the family abandoned the Whitemarsh area and moved to Connecticut.

Three years after the Hill incident, "The Desperate Hours" opened on the Philadelphia stage. The play portrayed a harrowing encounter suffered by the Hilliards while being held captive in their suburban home by three escaped convicts. Unlike the Hills, the Hilliards were brutally maltreated. After the play's opening, *Life* published an article, "True Crime Inspires Tense Play," which referred to the play as a "re-enactment" of the Hill experience. Hill brought suit against the publisher under the New York right-of-privacy statute,³⁵ and the New York Court of Appeals affirmed a judgment in his favor.³⁶ Relying on *New York Times*, the Supreme Court reversed on the ground that the opening of a new play is a matter of public interest.³⁷

We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of *matters of public interest* in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government We have no doubt that the subject of the *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest.³⁸

Thus, the Court rid the *New York Times* rule of the "public official" and "official conduct" shackles. Under *Hill*, the test hinges on whether the actionable statement concerns a matter of public interest. The case thus represents a giant step toward the adoption of the Meiklejohn theory of the first amendment. The Court protected not only the right of *Life* to publish, even carelessly, material about a theatrical event, but also the right of the reading public, the "voter-governors," to read the expressed views. Also, the Court, for the first time,

³⁵ N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1948).

³⁶ *Hill v. Hayes*, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965), *aff'g mem.* 14 Misc. 2d 249, 155 N.Y.S.2d 234 (Sup. Ct. 1956).

³⁷ *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The case was remanded for further jury consideration on the issue of actual malice. The Court found that the evidence presented was sufficient to support a jury finding of either actual malice, negligence, or innocent misstatement. Since the jury had not been properly instructed on the question of actual malice, a new trial was necessary. *Id.* at 391.

³⁸ *Id.* at 387-88 (emphasis added).

applied the constitutional standards previously employed in defamation cases to an invasion of privacy action.³⁹

B. *Butts and Walker*

Declaring that they provided an opportunity to delineate the sweep of the *New York Times* rule, the Supreme Court considered *Butts*⁴⁰ and *Walker*⁴¹ together. *Butts* grew out of "The Story of College Football Fix," an article published in defendant's *Saturday Evening Post*.⁴² The article accused plaintiff, athletic director and former football coach at the University of Georgia, of conspiring to fix the 1962 Georgia-Alabama football game. The story was based on an alleged telephone conversation in which Butts outlined Georgia's game plan to "Bear" Bryant, head football coach of the University of Alabama. After the publication of the article, Butts resigned his post at the University of Georgia and commenced a libel suit in the federal district court in Georgia, seeking ten million dollars compensatory and punitive damages.⁴³ The jury returned a verdict for the plaintiff in excess of three million dollars. The judge reduced the recovery to \$460,000 by remittitur. The Fifth Circuit affirmed,⁴⁴ and the Supreme Court granted certiorari.⁴⁵

The *Walker* case arose out of the racial tempest that swept the University of Mississippi campus on the night of September 30, 1962, when federal troops sought to secure the enrollment of James Meredith, a Negro. Associated Press dispatched a report asserting that retired General Edwin A. Walker, who was in fact present throughout the tumult, "had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court's decree and to assist in preserving order."⁴⁶ Walker was also described as "encouraging rioters to use violence and giving them technical advice on combating the effects of tear gas."⁴⁷ Walker brought an action for libel in the Texas state courts seeking two million dollars compensatory and punitive damages. The jury awarded him \$500,000 compensatory and \$300,000 punitive damages. The judge, finding no evidence of

³⁹ Justice Douglas has said that "[f]reedom of speech has an aura of privacy." Douglas, *supra* note 6, at 189.

⁴⁰ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

⁴¹ *Associated Press v. Walker*, 388 U.S. 130 (1967).

⁴² *SATURDAY EVENING POST*, Mar. 23, 1963, at 80.

⁴³ *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916 (N.D. Ga. 1964).

⁴⁴ *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965).

⁴⁵ *Curtis Publishing Co. v. Butts*, 385 U.S. 811 (1966).

⁴⁶ 388 U.S. at 140.

⁴⁷ *Id.*

actual malice, limited the recovery to the amount of the compensatory award.⁴⁸ The Texas Court of Civil Appeals affirmed.⁴⁹ After the Supreme Court of Texas denied a writ of error, the United States Supreme Court granted certiorari.⁵⁰

In four separate opinions *Butts* was affirmed by a five-to-four decision, while *Walker* was reversed unanimously.⁵¹ Since no more than four justices concurred in any opinion, it is difficult to glean a "majority rationale" for the decisions.⁵² Five justices, in three separate opinions, decided that *New York Times* applies to public figures. Four others favored a modified *New York Times* rule applicable to "public figures" who are not "public officials."

Justice Harlan, announcing the *judgments* of the court, but actually espousing a minority rationale, favored a new test designed for "public figures" who are not "public officials."

[A] "public figure" who is not a public official may . . . recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of *highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.*⁵³

⁴⁸ *Id.* at 141-42.

⁴⁹ *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1965).

⁵⁰ *Associated Press v. Walker*, 385 U.S. 812 (1966).

⁵¹ The Court distinguished the cases, in part, on the evidence of "actual malice." Whereas the reporter in *Walker* was a reliable correspondent of the defendant, the informer in *Butts* was an unknown who "had been placed on probation in connection with bad check charges." 388 U.S. at 157. In addition, Curtis failed to investigate the suspicious report. Though the *Walker* story was "hot news," of value only if dispatched instantly, the *Butts* report, not received until after the game, was of a different character. Curtis could have afforded the time to investigate the story, whereas *Associated Press* could not. *Id.* Finally, it was shown that "[t]he Saturday Evening Post was anxious to change its image by instituting a policy of 'sophisticated muckraking,' and the pressure to produce a successful exposé might have induced a stretching of standards." *Id.* at 158.

⁵² Justice Harlan announced the judgments of the Court in what was actually the minority opinion. Justices Clark, Stewart, and Fortas concurred with Justice Harlan. The opinion applied a somewhat modified *New York Times* rule to "public figures" who are not "public officials." The remainder of the bench agreed that the *New York Times* standard should be applied to "public figures" in toto. On the basis of this rationale, the Chief Justice was able to concur in the results reached by Justice Harlan. Justice Black, joined by Justice Douglas, concurred in the reversal of *Walker* but would have likewise reversed *Butts*. He reiterated his belief that the *New York Times* decision is an inadequate statement of first amendment freedoms. Justice Brennan, the author of the *New York Times* rule, agreed to reverse *Walker*, but would also have reversed and remanded *Butts* in order that the jury might be properly instructed in accordance with *New York Times*. He did not think the jury was adequately charged, and therefore believed the Court was invading the province of the jury by holding that *Butts* had met the test of *New York Times*. Justice White concurred in this opinion.

⁵³ 388 U.S. at 155 (emphasis added).

It is difficult to perceive what Harlan's test adds to the *New York Times* standard. One would be hard pressed to find a case in which a publisher demonstrated "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" and yet did not act "with reckless disregard of whether [the statement] was false or not."

In a separate opinion, the Chief Justice announced the rule actually adhered to by a majority of the Court—i.e., that the *New York Times* standard should be applied to "public figures." He refused to accept Justice Harlan's "public figure" standard.

I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment.⁵⁴

In 1964 the Supreme Court announced a rule imposing constitutional restrictions on the right of an individual to maintain a defamation action. The rule as then articulated was narrowly confined to include only an action commenced by a "public official" with regard to a statement made about his "official conduct." In each of the four cases heard since *New York Times*, the court has expanded the rule far enough to envelop the facts involved. By including "public figures" within the purview of *New York Times*, the Court has established precedent capable of including virtually any set of facts. If James Hill, held captive in his home by escaped convicts, was "involuntarily thrust into the public limelight,"⁵⁵ and if General Walker, by his presence on a university campus during a racial disturbance, "thrust himself into the 'vortex' of the controversy,"⁵⁶ then any person who makes a significant comment about an issue of public concern, or invites such comment, may be held to have "thrust" himself into the public view and to have become a "public figure."

Despite the potential scope of the enlarged *New York Times* rule, at least two types of defamation are presently untouched: the statement made or invited by the totally non-public individual on a subject of public concern, and all private defamations and invasions of privacy. Even a complete acceptance of the Meiklejohn theory need never reach the latter type of statement, which neither aids our American democratic system nor enlightens its voter-governors. It is the treatment of

⁵⁴ *Id.* at 163.

⁵⁵ *Time, Inc. v. Hill*, 385 U.S. 374, 391 (1966).

⁵⁶ *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 146 (1966). With respect to distinguishing this case from *Walker*, see note 51 *supra*.

the former type of statement, made or invited by the non-public individual concerning a public issue, that will determine where the Court draws the line. If such statements were protected, the press would be veiled with an unconditional license, except where the plaintiff can prove actual malice. Such a result might endanger rather than promote free speech. If the press is given free rein to comment on anyone who enters the public arena, however unobtrusively, as by writing a letter to the editor of the *New York Times*,⁵⁷ fewer people will be moved to so enter the arena. The Court's apparent assumption that the first amendment freedoms of the press and of speech are one is unrealistic, especially today when the publishing industry is to a large extent controlled by a few multibillion dollar organizations. An individual defamed by today's press is defamed before an audience of millions. Perhaps two centuries ago he could resurrect his good name by proving his rectitude to his fellow parishioners, but today his voice will not carry far enough. The Court must recognize that too free a press will only serve to stifle free speech.

III

DEFAMATION AND PRIVACY—A JUDICIAL QUAGMIRE

The *Hill* case, read concurrently with *Butts* and *Walker*, manifests the Court's design to equate privacy and defamation actions within the realm of first amendment guarantees. Whereas defamation had a long history under the jurisdiction of the seignorial and ecclesiastical tribunals prior to its assimilation by the common law courts in the sixteenth century, privacy, as a cause of action, is essentially a creation of the twentieth century.⁵⁸ The celebrated 1890 law review article by Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy,"⁵⁹ is generally credited with originating the right.⁶⁰ Whereas the defamation action primarily protects one's reputation, the right to privacy secures peace of mind and protects "an inviolate personality."⁶¹ The right to be free from invasions of privacy, or, in the famous words of

⁵⁷ The possibility that a letterwriter "invites public judgment" was suggested by the Court of Appeals for the District of Columbia in *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 657 (D.C. Cir. 1960). "[Plaintiff] in no sense mounted a public rostrum, not even by a letter expressly or implicitly intended for publication." *Id.* at 657.

⁵⁸ See W. PROSSER, *TORTS* §§ 106-12 (3d ed. 1964).

⁵⁹ 4 HARV. L. REV. 193 (1890).

⁶⁰ See Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

⁶¹ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

Judge Cooley, the right "to be let alone,"⁶² is today one of the least understood areas of the law. It has been likened to a "haystack in a hurricane."⁶³

In an effort to clear the muddy waters, Dean Prosser has defined the right to privacy in terms of four distinct torts:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁶⁴

Prosser, among others,⁶⁵ has suggested the possibility that the third element of privacy, false light in the public eye, may be capable of "swallowing up and engulfing the whole law of public defamation."⁶⁶ But probably this is merely a function of Prosser's definition. *Afro-American Publishing Co. v. Jaffe*⁶⁷ should serve to placate Prosser's fears. Plaintiff commenced an action for libel and for invasion of privacy arising out of a single publication. The district court awarded plaintiff both compensatory and punitive damages. The award was based on both the libel and the invasion of privacy counts. The court of appeals reversed the lower court's judgment on the privacy issue, but upheld the compensatory award on the ground that the plaintiff had a valid defamation action.⁶⁸ The court concluded that Jaffe had not "mounted a public rostrum" and was, therefore, not required by *New York Times* to prove "actual malice."

It would appear that privacy and defamation, at least for the

⁶² T. COOLEY, TORTS 29 (2d ed. 1888).

⁶³ *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir. 1956).

⁶⁴ Prosser, *supra* note 60, at 389. See also W. PROSSER, *supra* note 58, § 112, at 832-44.

⁶⁵ E.g., Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1121 (1962).

⁶⁶ Prosser, *supra* note 60, at 401.

⁶⁷ 366 F.2d 649 (D.C. Cir. 1966). Plaintiff, a Washington, D.C., pharmacist, maintained a newsstand for publications of interest to Negro readers. Though white himself, all of Jaffe's employees and about 80% of his customers were Negro. Believing that defendant's newspaper, *Afro*, was spreading racial hatred, plaintiff cancelled his handling of the *Afro*. Thereafter, defendant's manager and editor published an editorial about Jaffe's refusal to handle *Afro*. The column attributed racial bigotry to the plaintiff. *Id.* at 652-53.

⁶⁸ Although his interest in privacy for his actions and racial sentiments did not give plaintiff an immunity from public discussion, he had, we think, a right to responsible newspaper discussion, which does not descend to the level of false, defamatory statements.

Id. at 654.

present time, are to continue as distinct, though related, torts. Nevertheless, the Supreme Court has equated them for constitutional purposes. This approach is not only logical, but imperative. The cases must be considered not from the defendant speaker's or the plaintiff subject's point of view, but rather in terms of society's need to hear the statement, since this is what the first amendment was designed to protect. From this perspective, it makes no difference whether an action is stated in terms of defamation or invasion of privacy.

IV

THE "MORES TEST"

It is difficult to reconcile the different results reached in *Hill* and *Butts*. To distinguish the cases on the ground that the former was a privacy action while the latter was a defamation suit would add nothing to our understanding of the law. The cases can be differentiated on their facts only by accepting the Court's position that the quantum of proof of "actual malice" was greater in *Butts* than in *Hill*. An examination of the record in each of these cases, however, renders such explanation unsatisfactory.

Perhaps what the Court really had in mind when it chose to affirm *Butts* and to remand *Hill* was a "mores test."⁶⁹ The "mores test" makes recovery for public defamation and invasion of privacy easier as the publicity complained of becomes increasingly objectionable to the public ethic. Standing alone, the test provides an insufficient basis for either granting or denying recovery to a defamed plaintiff. It is, however, an element of some magnitude that cannot be overlooked in the Court's delicate balance between reputation and the first amendment. On the basis of the "mores" formula, *Butts* could recover more easily than *Hill*, because the publicity of which he complained accused him of conduct cutting across the very fibre of the American ethic. The publicity objected to by *Hill*, on the other hand, was in no sense defamatory or degrading by the socially accepted standards of propriety.

Several cases can be juxtaposed to demonstrate the foundation and application of the "mores test." *Melvin v. Reid*⁷⁰ was an invasion of privacy action stemming out of a motion picture, "The Red Kimono," based on the true story of the life of Gabrielle Darley Melvin, who had

⁶⁹ The "mores test" was suggested by the lower court in *Sidis v. F-R Publishing Corp.*, 34 F. Supp. 19 (S.D.N.Y. 1938), *aff'd*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940), and is discussed by Dean Prosser in his article, *supra* note 60, at 396-97.

⁷⁰ 112 Cal. App. 285, 297 P. 91 (1931).

gained considerable notoriety as a prostitute and as the defendant in a spectacular murder trial. Six years prior to the production of the movie, plaintiff married and abandoned her previous way of life. As a married woman, Mrs. Melvin led a virtuous life and became a respected member of her community. When "The Red Kimono" was released, plaintiff's unsavory past was, for the first time, revealed to her friends and acquaintances. Though the court refused to recognize an actionable invasion of privacy under these facts, it reversed a judgment for the defendant on the basis of plaintiff's fundamental "right to pursue and obtain safety and happiness without improper infringements thereon by others."⁷¹

Compare *Sidis v. F-R Publishing Corp.*⁷² In 1910, William James Sidis was recognized as a child prodigy. At the age of sixteen he graduated from Harvard amid considerable public attention. Five years earlier, he had lectured to a group of distinguished mathematicians on the fourth dimension. Immediately after his graduation, he abandoned all pursuit of academics and sought to lead a secluded life. He succeeded in avoiding the public limelight for more than a decade until the *New Yorker* magazine printed the article that gave rise to the privacy action. The article traced Sidis's past and examined his present mode of living in great detail. Even though the article was "merciless in its dissection of intimate details of its subject's personal life,"⁷³ the court refused to find an actionable invasion of privacy. *Melvin* and *Sidis* can be legitimately distinguished only on the basis of the "mores test."

Perhaps the clearest illustration of the "mores test" in action can be derived from consideration of the two famous *Gill* cases.⁷⁴ Plaintiffs, Mr. and Mrs. Gill, owned and operated a concession in the Farmers' Market in Los Angeles, where they enjoyed an excellent reputation. Defendant photographed plaintiffs embracing in the market place. This photograph was published in the *Ladies Home Journal* in connection with an article entitled "Love," which implied that the persons depicted in the picture were exhibiting the "wrong kind of love." In *Gill v. Hearst Publishing Co.*,⁷⁵ a privacy suit, plaintiffs alleged all the above facts except that concerning the "wrong kind of love." The court held that because the picture depicted a pose voluntarily assumed by the Gills in a public place, and because the photograph was not taken sur-

⁷¹ *Id.* at 291, 297 P. at 93.

⁷² 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940).

⁷³ *Id.* at 807.

⁷⁴ *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953); *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952).

⁷⁵ 40 Cal. 2d 224, 253 P.2d 441 (1953).

reptitiously, the complaint failed to state a cause of action. In *Gill v. Curtis Publishing Co.*,⁷⁶ another privacy action stemming out of the same publication of the same photograph, plaintiff alleged the innuendo concerning the "wrong kind of love" and the same court held that the complaint stated a valid cause of action. Without resort to the "mores test," the *Gill* cases are difficult to reconcile.

The "mores test" performs a legitimate function in the constitutional law of defamation and privacy. The decisions in this area are the product of a balancing process performed by the Court, by which the interests of society in the freedom of expression have been determined to outweigh those of the individual in the preservation of his reputation and his "inviolable personality." Nevertheless, in those rare instances in which the individual prevails, the degree to which the publicity offends the public morality must play an important role in tipping the scales in his favor. There is little purpose in depriving society of the right to hear a statement when that same society does not consider the plaintiff damaged by it.

CONCLUSION

The rule announced four years ago in *New York Times*, protecting those who defame without "actual malice," has been freed from the narrow confines of statements concerning the "official conduct" of "public officials" to include comments about "public figures." Furthermore, the Court, quite properly, has decided to apply the same constitutional standards to invasion of privacy actions as were previously employed in defamation cases. Thus, the Court has given the first amendment an interpretation that allows the "voter-governors" to hear more than ever before. They are, however, in danger of being stifled by the tyranny of a licentious press. If the "public figure" label is expanded beyond *Hill*, *Butts*, and *Walker*, the press will be the recipient of a nearly unrestricted license against which the "mores test" and the "actual malice" doctrine will afford little protection. Just as the former is nebulous and undependable, the latter, created by a bench seeking to protect the press, will probably prove inadequate. The Court will soon be forced to define the limits of "public figure." There is only one way properly to strike a balance between the first amendment freedoms of speech and press, and the common law protections of privacy, name, and reputation—very carefully.

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