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The Riot

General Walker and Louis Leman arrived on the campus about 8:45 that evening (S.F. 446), at which time a loud, violent riot was in progress in an area of the campus that is known as the Circle (S.F. 162, 169, 192, 206, 294, 295, 297, 420, 477), sometimes inaccurately referred to in the testimony as the Grove (Actually, the Grove is another area that lies to the northeast of the Circle). To assist the Court in following the evidence, we have attached a plot plan of the area to this Application. It is a reduced partial reproduction of Plaintiff's Exhibit 11.

As may be seen from the plot plan, University Avenue enters the campus from the east and then divides to form encircling drives around the Circle. At the east end of the Circle is a Confederate Monument referred to throughout the testimony as the Monument or the Statue. At the west end of the Circle and across the drive is the Lyceum Building. It is the center or the headquarters of the University (S.F. 1391). Slightly west of the center of the Circle is the flagpole, and it forms the intersection of crosswalks that traverse the Circle in North-South and East-West directions. The distance from the monument to the Lyceum Building is approximately 525 feet. The flagpole is approximately 275 feet west of the monument on a direct line between it and the Lyceum Building. Proceeding clockwise from the Lyceum Building, and to the north of the Circle, are Peabody Hall, the Fine Arts Building, and the Y. M. C. A. Building. Moving counter-clockwise from the Lyceum Building, and to the south of the Circle, are the

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Chemistry Building, Carrier Hall (the Engineering Building), and Hume Hall (the Science Building), which was under construction at the time of the riot.

By approximately 4 o'clock that afternoon a ring of federal marshals had encircled the Lyceum Building (S.F. 151), where Justice Department officials and for a time the head of the Mississippi Highway Patrol, a Colonel Birdsong, were located (S.F. 1368). A crowd had assembled in the Circle area and began taunting and jeering the marshals. Mississippi Highway Patrolmen stood between the marshals and the crowd in the Circle until the riot started. By approximately 8 o'clock that evening a full scale riot had erupted which was to continue all night, destroy 16 automobiles, kill two people, injure 50, and result in the arrest of 160 persons, including the plaintiff (S.F. 228, 296, 1349, 1350, 714).

By all accounts, including General Walker's, the riot was serious and violent by the time he arrived, and it got worse as the night wore on. The rioters would form into groups and charge toward the marshals, throwing bricks, bottles, rocks, sticks, and other missiles before being repulsed by the tear gas (S.F. 158, 201, 488, 555, 1291). As described by plaintiff's witness Kuettner, it was a full scale riot and a dangerous situation. (S.F. 1278); the movement of the crowd was an ebb and flow kind of surging, accompanied by loud cursing and yelling (S.F. 1290). Newsmen were also a target of the crowd's wrath (S.F. 193). Later in the evening, the rioters attempted to charge the marshals with a fire truck and then with a bulldozer (S.F. 1283-1285), both of which attacks were without

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success. At one point, according to General Walker's own testimony, someone queried him as to how to combat the tear gas, and he advised to use sand (S.F. 919), but stated "Where would you get sand?" (S.F. 920). The rioters would hurl "Molotov cocktails" at the marshals (S.F. 1294). These were soft drink bottles filled with gasoline and equipped with burning fuses (S.F. 1294). Walker was in the vicinity of the Molotov cocktails (S.F. 363). The bricks, stones, and other missiles were, for the most part, obtained from construction materials at the site of the new Science Building southeast of the Circle (S.F. 1215). The charges toward the marshals would originate near the monument, close to the supply of ammunition, and would proceed west toward the marshals.

Finally, rifle fire erupted, and by the following morning there were some 7 to 10 bullet holes in the front of the Lyceum Building (S.F. 1352-1353). The next morning the campus looked like a battle field (S.F. 1296, 261, Def. Ex. 20, 21, 23, 24, 25, 28). Concrete benches in the Circle along the sidewalks had been broken and used as missiles (S.F. 295).

General Walker and Leman had left the car several blocks east of the Circle (S.F. 875) and walked down University Avenue in a westerly direction toward the monument (S.F. 876), arriving, as hereinabove stated, about 8:45 P.M. According to General Walker's own testimony, as he approached the Circle from the east, people were moving along the sidewalks and he said to them "Come on", and waved across the street to a group that recognized him (S.F. 878). By the time he reached the monument he began

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hearing students saying "We have a leader" (S.F. 882), and asking him "Will you lead us up to the steps; will you get us organized; will you lead us?"; and that was the predominant question on the campus at that time, according to General Walker (S.F. 883). About that same time he met a deputy sheriff named Talmage Witt and requested the sheriff to deputize him, but the sheriff refused (S.F. 885, 886). Witt, who appeared at the trial as a plaintiff's witness, is 5'-11" tall and weighs 275 pounds (S.F. 314), and fits the description of the "portly" man described in the story by defendant's reporter, Savell.

Other evidence which occupies literally hundreds of pages of the Statement of Facts, and which will be discussed under subsequent points of error, conclusively establishes as a matter of law that, applying correct principles of Texas law, both the "command" and "charge" statements were substantially true and were fair comment. Generally, such evidence shows without dispute that upon his arrival at the scene of the riot General Walker was hailed by the rioters as their leader, that he delivered at least one speech to the rioters in which he told them that they had a right to continue protesting, and that he moved toward the federal marshals on one or more occasions surrounded by rioters. However, for the purpose of argument under this point of error, the truth or falsity of the statements is immaterial because the First and Fourteenth Amendment protection under the rule laid down in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412, and *Garrison* v. *Louisiana*, 379 U. S. 64, 13 L. Ed. 2d 125, 85 S. Ct. ...., does not depend upon truth or falsity.

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Argument and Authorities

To be sure, the actual holding of the *Times* and *Garrison* cases applied to public officials, since the persons alleged to have been libeled in those cases *were* public officials. It is manifest, however, from the reasoning underlying the decisions that they cannot be so limited. Moreover, to so restrict the *Times* and *Garrison* rule would create constitutional anomalies of the most serious kind and would, indeed, engender the very dangers that the rule was intended to avoid.

The plaintiff's declared purpose on the night of the riot —September 30, 1962—was to stand shoulder to shoulder with Governor Barnett in opposing the orders of the courts. He was in Oxford to support the Governor's position, and he occupied the same position from the standpoint of the law of libel as Governor Barnett, whose cause he was publicly supporting.

It would be a constitutional anomaly having neither substance nor shadow of basis in reason to hold on the one hand that Governor Barnett is within the *Times* rule, which he clearly is, and yet to hold on the other hand that those who publicly rise to stand beside him, seeking with equal vigor and effect to rally public support for his cause, are not. Logically, the Constitutional protection, if it is to exist at all and have any fairness about it, must extend to the area of public debate and to those who participate in it.

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The question before this Court, then, is whether the *Times* and *Garrison* cases laid down a narrow, technical rule, strictly limited to public officials, as held by the trial court and apparently by the Court of Civil Appeals, or whether they announced a broad constitutional policy of real substance which applies to matters of serious public concern and to public men of political prominence who inject themselves into political controversies seeking to sway public opinion and gain public support for their cause, as held by the Federal Court in the *Courier-Journal* case.

A question of equal significance is whether the severe limitations upon the defenses of substantial truth and fair comment, as enunciated and applied by the court below, afford the safeguards for freedom of speech and press required by the *Times* and *Garrison* decisions.

In this argument we will show that the philosophy and reasoning underlying the *Times* and *Garrison* opinions, the holdings and statements by other courts that have considered the question subsequent to those decisions, and the great weight of comment by legal writers, clearly support the holding of the Federal Court in the *Courier-Journal* case; and that the restrictive interpretation of the defenses of substantial truth and fair comment as applied by the court below would, if permitted to stand, effectively inhibit and preclude the various news media from reporting, in good faith, events of profound national significance, thus creating a form of censorship through fear of libel actions that is the direct antithesis of the spirit and holding of the *Times* and *Garrison* cases.

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The touchstone of the *Times* and *Garrison* decisions was the Supreme Court's recognition of the existence and wisdom of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .", and the premise that it is the purpose and philosophy of the First Amendment to insure free and uninhibited exchange of ideas on issues of public importance, even though such a freedom, like others, will result in some abuses.

Quoting from Judge Learned Hand, the court in the *Times* case said that the First Amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " The court then quoted the "classic formulation" of the principle:

> " 'Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels

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> is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.' "

Recognizing that "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press," the court then quoted from an earlier opinion as follows:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of democracy."

In short, the holding of *Times* and *Garrison* is that, in the long run, freedom of expression on public matters is of overriding public importance regardless of the excesses and abuses that may occasionally result; and that the indi-

vidual's claim for libel is pre-empted by the paramount public need for information on public issues.

Moreover, the court's heavy emphasis in the *Times* case on the opinion of the Kansas Supreme Court in *Coleman* v. *MacLennan,* 98 P. 281, leaves no doubt that the decision extends to all matters of great public concern. The court quoted with approval the following from the Supreme Court of Kansas:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes *matters of public concern, public men,* and candidates for office." 78 Kan. at 723. (Emphasis added)

In *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659 (2 Cir. 1964), an action for libel, the court said, as an alternative ground for its holding:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made,

> the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy . . . the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line." (671)

In *Gilberg* v. *Goffi,* 251 NYS 2d 823, an action for libel, the rule of the *Times* case was applied to a mayor's law partner, who was neither an officeholder nor a candidate for office, but who had entered a public controversy as to whether a municipal code of ethics was needed to bar the mayor and his law firm from practicing law in the city court.

In *Pearson* v. *Fairbanks Publishing Co., Inc.* (Superior Court of Alaska, Fourth District, No. 10,209), the action was to recover damages for libel. The alleged libel was the charge that the plaintiff, a newspaper and radio columnist, was the "Garbage Man of the Fourth Estate." The court, in taking note of the *Times* decision and holding that the publication complained of was not actionable, said, in an

opinion not yet published, that "Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting."

In the case at bar, there can be no doubt that the question of school integration that came to a head in the Mississippi crisis was a matter of grave national controversy and concern. It was one of the most dominant and widely debated issues of this century. In the *Times* case, the Supreme Court referred to the integration question as "one of the major public issues of our time . . .", (at 701). This is also conclusively established in the record. The plaintiff was a national public political figure (S.F. 331, 486, 516) and a recent candidate for high public office. He knew that the question of integration was a matter of national controversy and interest (S.F. 759); he knew that his going to Mississippi would create considerable publicity (S.F. 922); he sought that publicity; he knew that there was an explosive situation on the campus and that feelings were high in Mississippi (S.F. 922); and that the Chief Executive of the State was openly obstructing the mandate of the Fifth Circuit Court. His repeated television and radio addresses called attention to himself and solicited support for the cause that he championed. That he deliberately and publicly became part and parcel of the controversy is not open to question.

If the *Times* decision applies at all to matters of public concern and participants in debate on public issues, it clearly applies to plaintiff and his conduct in Mississippi. The

publications complained of in the case at bar were not mere gossip about the plaintiff in some private capacity. The defendant was reporting the crucial events at Oxford, and plaintiff's voluntary presence brought him within the area of national controversy.

If the *Times* rule were to be limited to public officials, a national press columnist or TV commentator could state falsely, but without malice, that a public official was a thief and clearly come within the ambit of the rule, but anyone who dared to enter the debate by publicly suggesting that the columnist or commentator was a liar in so stating, would be denied the same protection. This is scarcely wide-open debate. A defeated presidential candidate could spend the ensuing four years rallying public support by defamatory statements about the incumbent and enjoy the protection of the rule, but those who would criticize the challenger would have to do so without it.

The Court can well imagine other examples, such as labor leaders, political party leaders, campaign managers, national magazines, and countless others who wield broad public power and have wide public support for themselves and those that they champion, but who hold no public office. Surely it would be unthinkable to hold that utterances made *about* them are to enjoy less protection than the clamor that *they* are free to utter about public officials under the *Times rule.* If the people are to be free to criticize the Government and those who comprise it, they must be free to criticize the critics within the same latitude and under the same rule of law. To hold otherwise would create an imbalance of the freedom of expression and could con-

ceivably result in an atmosphere in which an administration could be toppled by a rising Castro who, by virtue of holding no office, enjoyed freedoms of expression about the Government that were denied to those who would criticize him.

The repressing effect of a half million dollar award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument so plain, and the punishment for such presentation so burdensome and oppressive that this Court may not, consistent with the First Amendment, permit its imposition. As the court said in the *Times* case:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

Cf. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961); *Shelton* v. *Tucker,* 364 U. S. 470 (1960); *Speiser* v. *Randall,* 357 U. S. 513 (1958).

In a comment at 19 *Southwestern Law Journal* 399, concerning the *Times* and *Garrison* cases, the author, discussing the scope of the protection afforded by those cases, concluded as follows:

> "Frequently, protection of statements made against controversial public figures is more important than protection of those made against public

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> officials. Discussion concerning particular minor officials is much less significant than discussion concerning important public figures, such as corporation executives. Thus, protection of statements against all public officials, whatever the echelon, seems unnecessary, while protection of statements against some controversial public figures seems highly desirable. Thus, a rule strictly applicable only to defamation against public officials seems unwise. A more appropriate solution would be to apply the rule when the public interest in the dissemination of truth requires it, whether the individual is a public official or a private citizen. The public interest is the correct test, not the popularity or notoriety of the individual involved. The social utility in protecting statements made against popular entertainers would be very slight. On the other hand, there would seem to be a great utility in protecting statements made against labor leaders, who, though not so well known, are closely connected with governmental affairs." (407)

It would be difficult, if not impossible, to conceive of a matter in which the public would have a greater interest than in reports on the activities of a person, already politically prominent, who has taken to the airwaves and called for tens of thousands of persons to leave their homes and join him at a scene of civil disorder and crisis in a distant State, there to stand beside and assist another political leader who is openly defying the orders of the Federal

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Courts. There could be no possible reason or consistency whatever in holding that Governor Barnett is within the *Times* rule, but that one who rises to stand beside him is not. The object in either case is the same, the solicitation of public support is the same, the impact upon public opinion is the same, the potential influence and effect on the outcome of the controversy are the same, and consequently the interest of the public is the same. A distinction based merely upon the fact that the one holds office and the other does not would have no reason and would serve no purpose that can be imagined.

Similar comment by legal writers can be found in 9 *Villanova Law Review* 534, 537; 48 *Marquette Law Review* 128, 133; 10 *New York Law Forum* 249; 42 *Texas Law Review* 1080, 1084; 16 *Syracuse Law Review* 132, 135; 26 *Montana Law Review* 110, 115; 39 *Tulane Law Review* 355, 362; and 49 *Cornell Law Quarterly* 581.*

It is beyond dispute that General Walker publicly summoned his followers to journey to Oxford, with their flags, tents and skillets, to record their opposition to and demonstrate against federal authority; that in the very shadow of the Mississippi State capitol, he announced, at a nationally televised press conference, that he was in Mississippi to stand "beside Governor Ross Barnett" in his defiance of the President and the Federal Courts; that he thereafter arrived at the "Ole Miss" campus at a time when violent rioting was already in progress;

*We suggest that legal commentary written *after* the *Times* and *Garrison* decisions is more profitable reading in considering the question at hand than the article relied on by the Court of Civil Appeals, which pre-dated those decisions by over a third of a century.

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that, upon his arrival, General Walker was hailed by the rioters as their "leader"; that he condemned an Episcopal minister for trying to persuade the rioters to disperse; that he gave advice to the rioters on how to combat the tear gas which the federal marshals had used to defend themselves; that he delivered a speech to the rioters in which he told them, by his own admission, that they had a right to protest and that they should continue to protest —this at a time when he had personally observed scores of rioters throwing rocks and bricks at the federal marshals; that he had approached the Lyceum Building—where federal marshals were defending themselves—surrounded by rioters (See pp. 50-77, infra).

If, upon these facts and the hysteria and confusion surrounding the event, a news medium cannot, without risk of a $500,000 libel judgment, report that General Walker "assumed command" of the crowd and "led a charge" on the Lyceum Building, then the Constitutional freedoms contained in the First and Fourteenth Amendments are rendered virtually meaningless; for, if such reporting, in good faith, is not to be protected by the defenses of substantial truth or fair comment, or both, then a news medium's only prudent recourse is to refrain altogether from reporting significant, news-worthy events, even those which arrest the attention of the entire nation.

Plainly, the holding below constitutes a substantial encroachment upon freedom of speech and consequent freedom of debate on the many issues posed by events such as those which occurred at Oxford.

It is no answer to any of the foregoing to assert, as does the plaintiff (and, apparently, the court below), that

a reporter need have no fears if he reports only the "facts". In the pressure of events and the time limitations inherent in the transmission of news, it would manifestly be impractical—even if possible—to report a myriad of "facts", as contrasted with conclusions of fact based on the rapidly unfolding panorama of events and sensations.

Even assuming that a reporter, in the heat and confusion of the moment, could comprehend and apply a distinction difficult of application even for trained lawyers and judges in an atmosphere far removed from the events themselves, imposition of such restrictions and limitations would virtually prohibit the reporting of the event itself. It is like saying that the A.P. can report the detailed events of a battle—so long as it makes no errors—but if it transmits the conclusion of fact that the battle was lost, it does so only at the risk of suits by the Commanding General.

It is of great national interest and significance—for many reasons—that a former General Officer in the United States Army, the Commander of the troops at Little Rock, and one who had but recently campaigned for high public office, had publicly called upon his fellow citizens to register their defiance of Federal authority and had thereafter, at least apparently, participated in and encouraged violent acts of defiance themselves. If the ostensible activities of General Walker in this situation can be "blacked out" or censored through application of the law of libel, coupled with a restrictive interpretation of the defenses of substantial truth and fair comment, then the unconstitutionally inhibiting effects of the libel laws upon news media, and upon freedom of speech and press generally, are self-evi-

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dent. It would be impossible, in reporting a riot, to distinguish with precision those persons who were moving toward the objective in a charge from those who were moving toward the objective just to "watch what happened," particularly where, as in this case, both movements appeared identical and charges of that very kind were occurring all night and were the rule, not the exception.

It is significant that, outlining the scope of the "fair comment" defense in Texas, the starting point of the Fort Worth Court's analysis was the proposition that a charge, made in good faith and without malice, that a public official is guilty of a crime is actionable under the libel laws. (Opin. pp. 13-14). Thus, the very keystone of that court's opinion is in direct and irreconcilable conflict with the holding in *Times* and *Garrison.*

Nor is it wholly without significance that the defense of "fair comment" which was raised in the *Times* case appears to have been substantially identical to that enunciated by the Court of Civil Appeals here. See *New York Times Co.* v. *Sullivan, supra.,* p. 267.

Where, as here, the defense of "fair comment" is so truncated as to make it, in the adopted words of the court below, a "weak defense" . . . "subject to so many limitations that it is seldom completely applicable," and where, as here, such limitations are invoked to impose a liability of half a million dollars for reporting in good faith the facts as they appeared to be, it becomes obvious that the libel laws are here being used to achieve a result which the Federal Constitution prohibits.

Under the rule of the *Times* and *Garrison* cases, the constitutional protection can be denied only upon a show-

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ing of actual malice, i.e., a showing that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. As correctly held by both courts below, there is no evidence of malice in the case at bar. Indeed, the trial court, by written opinion, expressly recognized that since there was no actual malice the rule of the *Times* case, if applicable, would require that judgment be rendered for the defendant (Supp. Tr.) The trial court's error was in holding that the rule of the *Times* case was limited to public officials. Since the *Times* case cannot be so limited, and since there was no evidence of actual malice, judgment should now be rendered for defendant.

APPENDIX C

Motion of Petitioner The Associated Press for Rehearing in the Supreme Court of Texas, pp. 1-2

No. A-11069

IN THE

SUPREME COURT OF TEXAS

THE ASSOCIATED PRESS,
Petitioner

vs.

EDWIN A. WALKER,
Respondent

PETITIONER'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, The Associated Press, respectfully submits this Motion for rehearing and reconsideration of its Application for Writ of Error heretofore filed herein, and which was refused, no reversible error, by this Court on February 9, 1966, and as grounds therefor respectfully shows as follows:

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Motion of Petitioner The Associated Press for Rehearing in the Supreme Court of Texas, pp. 1-2

1.

This Court erred in overruling Petitioner's First Point of Error, which reads as follows:

> "The news reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary."

because the publications here in question are privileged and protected under the First and Fourteenth Amendments to the Constitution of the United States as interpreted in the cases of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412, and *Garrison* v *Louisiana,* 379 U. S. 64, 13 L. Ed. 2d 125, 85 S. Ct.

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APPENDIX D

Judgment of the Texas Court of Civil Appeals

THE ASSOCIATED PRESS
16624
vs.
EDWIN A. WALKER

(No. 31,741-C)
July 30, 1965

From the District Court of Tarrant County.

Opinion Per Curiam.

This cause came on to be heard on the transcript of the record and the same having been reviewed, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellee, Edwin A. Walker, do have and recover of and from appellant, The Associated Press, and its surety on its supersedeas bond, Houston Fire and Casualty Insurance Company, the amount adjudged below, with interest thereon at the rate of six per cent per annum from August 3, 1965, together with all costs in this behalf expended, both in this Court and in the trial court, for which let execution issue, and that this decision be certified below for observance.

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Appendix D

Judgment of the Texas Court of Civil Appeals

THE ASSOCIATED PRESS
17887-16624
vs.
EDWIN A. WALKER

September 17, 1965

This day came on to be heard the motion by appellant for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

THE ASSOCIATED PRESS
17888-16624
vs.
EDWIN A. WALKER

September 17, 1965

This day came on to be heard the motion by appellees (*sic*) for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

Appendix D

Judgment of the Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

No. A-11,069
THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

February 9, 1966

From Tarrant County, Second District.

Application of The Associated Press, as well as the conditional application of Edwin A. Walker, for writs of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that same present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicant, The Associated Press, and its surety, Houston Fire & Casualty Insurance Company, and applicant, Edwin A. Walker, each pay all costs incurred on their respective applications for writs of error.

Appendix D

Judgment of the Supreme Court of Texas

No. A-11,069
THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

March 23, 1966

From Tarrant County, Second District.

Motion of The Associated Press for rehearing of its application for writ of error having been duly considered, it is ordered that such motion be, and hereby is, overruled.

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APPENDIX E

Conflicting Opinions

1. *Walker* v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W. D. Ky., 1965)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, KENTUCKY

EDWIN A. WALKER *Plaintiff* *vs.* COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, INC. WHAS, INC. *Defendants*	Civil Action No. 4639

OPINION

This cause comes on before the Court on the Defendants' Motion to Dismiss the Plaintiff's Complaint, as amended.

On September 30, 1963, the Plaintiff, Edwin A. Walker, a former Army Major General, filed this action for actual and punitive damages for libel in the sum of Two Million Dollars, against the Defendants, Courier-Journal and Louisville Times Company and WHAS, Inc., Kentucky corporations, with their principal places of business in Louisville, Kentucky. Jurisdiction of the Court over this action is fixed by USC Title 28, Paragraph 1332.

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Appendix E
Walker v. *Courier-Journal and Louisville Times Co.*

The Defendant corporations, on October 1, 1962, October 2, 1962 and October 3, 1962, published in their newspapers and/or broadcast over their radio and television facilities, various news items or stories concerning the rioting on the campus of the University of Mississippi, in the City of Oxford, Mississippi, which said published matter had been received by Defendants from national news gathering agencies to which Defendants were subscribers.

The news items or stories so published and complained of by the Plaintiff stated in substance, that the Plaintiff, Walker, had led a charge of rioters against United States Marshals who were present on the University of Mississippi campus carrying out the orders of the United States Courts requiring integration of enrollment of whites and negroes at said University. Plaintiff, Walker, alleged that such items imputed to him that he was a "trouble maker", that he was "participating" in the occurrences taking place in Oxford, all in the context used of inciting of the students to riot, and that the publication reflected libelously on the honor, character and reputation of the Plaintiff.

This Court has considered the briefs and memoranda submitted by counsel for the parties and taking judicial notice of the public events relating thereto which were widely reported throughout the Nation and are matters of common knowledge, and further treating as true (for the purpose of passing upon this Motion to Dismiss) the factual allegations of the Complaint, as amended, arrives at the following conclusions which are the basis of its final Order entered herein.

Following the filing of this action the Supreme Court of the United States handed down its Opinion in New York Times Company v. Sullivan, 376 U. S. 254 (October Term,

1963) wherein said Court in legal effect federally preempted the law of libel in matters of "grave national concern" involving "public officials" with the announced doctrine that

> ". . . . Constitutional guarantees require, we think, 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 or not."

There can be no question but that the serious occurrences at the University of Mississippi wherein the State of Mississippi and the Federal Govenment were locked in conflict as to the educational integration of the races was a matter of "grave national concern." The Supreme Court of the United States has classified the integration struggle as "one of the major political issues of our time."

Thus, it can be seen that had the Plaintiff, Walker, been a "public official" at the time of this occurrence, this Court's task would have been automatically relegated to a decision *only* of the *one issue* of whether or not the Defendants herein had published the statements attributed to them with "actual malice", that is, with knowledge that the statements were false or with reckless disregard of whether or not they were false.

However, the matter is not so simple, for this Court notes with significance that in laying down the doctrine of "actual malice" in the Times case, the Supreme Court quoted with approval from the case of Coleman v. McLennan, 78 Kans. 711, 98 P. 281 (1908) as follows:

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> "This privilege extends to a great variety of subjects and includes matters of public concern, *public men* and candidates for office." (Emphasis added)

and in conclusion the Court stated:

> "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable." (Page 283)

In connection with the last above quoted language, the Supreme Court included a footnote to its Opinion (Footnote 23) in part, as follows:

> "We have no occasion here . . . to specify categories of persons who would or would not be included."

From this language I believe the Supreme Court of the United States has served clear notice that the broad Constitutional protections afforded by the First and Fourteenth Amendments will not be limited to "public officials" only, for to have any meaning the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to "public officials" only, *then why Footnote 23?* I subscribe that Footnote 23 is of vast importance in understanding the intended scope of the Supreme Court's Opinion, for it is a departure from the Court's traditional rule of basing its decision on the narrowest Constitutional grounds and is interpreted by this

Court as giving special significance to the broad language adopted in arriving at its decision.

The Plaintiff, Walker, is of course not a "public official" within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of "political prominence." This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon others to join with him there in support of his publicly stated position on the matters of public concern there in issue.

Had not Plaintiff thereby become a "public man"? Could he not have reasonably foreseen that his being a person of "political prominence" his presence in Oxford would be taken cognizance of by the press? Had not Walker interwoven his personal status into that of a public one whereby he would become the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be "erroneously" reported? This Court so believes.

I therefore reach the inescapable conclusion that the protective "public official" doctrine of "actual malice" announced in Sullivan v. New York Times is in common reason and should be applicable to a "public man" as well, and

that the Plaintiff, Walker, was such a "public man" under the circumstances involved here. "Public men are, as it were, public property."

My application of the doctrine of New York Times v. Sullivan to the facts herein issue finds authority not only in the logical dictates of Footnote 23 discussed above, but in the reasoning and philosophy underlying the Times Opinion and in the critical discussion in legal commentaries and recent decisions of other courts. The decision of Judge Friendly in Pauling v. News Syndicate Company, 335 F. 2d 659 at 671 (2d Cir. 1964), favorably presages the result here. See also Gilberg v. Goff, 251 N. Y. S. 2d 823 (1964); Pearson v. Fairbanks Publishing Co. (Unreported, Superior Ct. of Alaska, 4th District, Nov. 25, 1964); and Pedrick, Freedom of the Press and the Law of Libel, 49 Cornell L. Q. 581, at 592 (1964); 9 Vill. L. Rev. 534 (1964).

I adopt this position with full understanding of the fact that by such extension of the scope of word meaning I am perhaps "plowing new ground" in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the Times Opinion which I believe to be a ". . . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. . . ." Public debate cannot be "uninhibited, robust and wide open" if the news media are compelled to stand legally in awe of error in reporting the words, and actions of persons of national prominence and influence (not "public officials") who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of

thinking. If any person seeks the "spotlight" of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.

This is particularly so here where open riot and turmoil with accompanyiig destruction of property, injuries and death turned portions of the University of Mississippi campus into a strife beset no man's land through the dark hours of the night.

Therefore, having applied the doctrine of the Times case to this action, this Court moves on to a consideration of this record, upon the sole remaining question: whether or not these defendants have been guilty of "actual malice" in their publications of data furnished them by national news gathering agencies.

Plaintiff, Walker, is bound to show that the defamatory falsehoods relied upon were not just that "erroneous statement. . . . inevitable in free debate" noted by Justice Brennan, New York Times v. Sullivan, supra at 271-272) but that they were made with knowledge that they were false or with a reckless disregard of their falsity. The question of the existence of actual malice from the facts taken as true is a matter of law to be determined by the Court.

An examination of the record reflects that the information published by Defendants was furnished to them by national news gathering agencies to which they subscribed and was furnished in the ordinary course of news dis-

semination and published routinely by defendants in the ordinary course of their business endeavors—the dissemination of news to the general public.

Everyone knows that news of any matter of public concern possesses a limited lifetime for to be news it must be published with promptness and dispatch in order that the public be kept informed as to the actions of "public men" and their activities in connection with "matters of public concern." There is just no such thing as interesting and saleable *old* news.

This Court is of the opinion that the Defendants had the right to rely upon the reputable national news sources which furnished them the news items in issue here, and further that the republication of those items by the Defendants, with the errors therein, within the time limits and under the circumstances (ordinary course of dissemination) was not unreasonable. Defendants, in their newspaper and radio and television publications, could not be deemed in reasonableness by the Plaintiff or the public to be warranting the authenticity of the republication of events transpiring from places *far distant,* nor to be assuming the burden of verifying in advance the items reported to them from an *atmosphere of violence and turmoil* by established news gathering agencies, while at the same time meeting the public need and demand for prompt publication and dissemination of news on matters of "public concern."

We must have an informed society. The reliance upon or republications by defendants of the reports of national news gathering agencies as here occurred is, in this Court's opinion, insufficient to establish a "reckless" disregard of the facts, or knowledge of falsity, now *Constitutionally*

necessary to support an action for libel of the kind stated herein.

Indeed, the Plaintiff's very actions have established the facts negativing that "actual malice" which is required to sustain his action. This Court cannot be deemed not to know that which is known widely and generally to the public at large.

This Plaintiff has filed actions, seeking recovery for libels substantially similar to those alleged here, against the Associated Press in Texas, Colorado, Louisiana and Mississippi; against newspapers in Texas, Louisiana, Georgia, Florida, Missouri, Colorado and Wisconsin; and against Newsweek Magazine in Oklahoma.

Furthermore, the news stories complained of were furnished by national news gathering agencies to, and republished by, the principal newspapers, news magazines and radio and television stations throughout the United States.

In addition to the Court's judicial notice, the geographical scope and number of Plaintiff's suits and the virtual universality of the publication of the stories complained of, is proof positive of the extensive republication by news sources throughout the Country of the releases challenged here.

These facts clearly negative the possible attribution of "actual malice" to any single publisher.

If, possession of contrary information in the New York Times' own files would support "at most a finding of negligence in failing to discover the misstatements, and is Constitutionally insufficient to show the recklessness that is required for a finding of actual malice", I can conceive of no basis for a finding of actual malice in the reliance upon and

republication of news reports supplied here by reputable news gathering agencies. At most, such reliance could only be that "Constitutionally insufficient" negligence referred to by the Court. New York Times v. Sullivan, 376 US 254, at 287-288, 84 S. Ct. 710. Consistent with the later statement of the Supreme Court in Garrison v. State of Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed.2d 125 at 133 (1964), I find that under the facts alleged here the statements in issue cannot have been "made with the high degree of awareness of their probable falsity demanded by New York Times."

Accordingly, it is this Court's opinion that the doctrine proclaimed by the New York Times case is dispositive of all the issues here presented and, therefore, Defendants' Motion to Dismiss is sustained and the Plaintiff's Complaint is dismissed with prejudice, by separate Order contemporaneously issued herewith.

September 23, 1965.

JAMES F. GORDON
James F. Gordon, Judge
United States District Court

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APPENDIX E

2. *Pauling* v. *National Review, Inc.*
(Not yet reported)

SUPREME COURT
NEW YORK COUNTY
SPECIAL AND TRIAL TERM—PART X
(Feb. Term, Cont'd.)

LINUS C. PAULING,

Plaintiff,

—against—

NATIONAL REVIEW, INC., WILLIAM A. RUSHER, and WILLIAM F. BUCKLEY, JR.,

Defendants.

SILVERMAN, J.:

This is a motion to dismiss the complaint at the close of the plaintiff's case in the trial of an action for libel.

Plaintiff, Dr. Linus C. Pauling, is a world famous scientist, winner of a Nobel Prize for chemistry and of a Nobel Peace Prize. Defendants are the corporate owner, and the individual publisher and editor of a fortnightly magazine called National Review.

There are two causes of action based on two articles, one in the National Review of July 17, 1962 and one in the issue of September 25, 1962.

The first article says, among other things:

> *"The Collaborators*
>
> What are we going to do about those of our fellow citizens who persist in a course of collaboration with the enemy who has sworn to bury us?
>
> * * *

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"Take, second, Professor Linus Pauling of the California Institute of Technology, once more acting as megaphone for Soviet policy by touting the World Peace Conference that the Communists have called for this summer in Moscow, just as year after year since time immemorial he has given his name, energy, voice and pen to one after another Soviet-serving enterprise. Or * * * Or * * * who a couple of months ago, along with Linus Pauling and a dozen others, attached their signatures to one more in a decades-long series of Communist-aiding fronts: this time, an Open Letter not only calling for the liquidation of South Vietnam's President Ngo Dinh Diem but condemning the presence of American personnel in that country as imperialist aggression (hence, by implication, more than justifying the Vietcong for killing Americans).

"Are such persons Communists? Some such undoubtedly are, but there is not publicly at hand the full proof, of the kind demanded by the courts, that they are Communists in the total, deliberate, disciplined organizational sense. But whether they are Communists are not in the legal sense, the objective fact is that these persons we have named, and many others like them, have given aid and comfort to the enemies of this country. They have done so not once or twice, by what might have been a special impulse, quirk or personal attachment, but time and again, over a period of years and decades; and some of these acts are saved from falling under the constitutional definition of treason only by the historical chance that our government has not yet

decided to give direct legal recognition to the fact that our present enemies are our enemies, and that we are at war.

"So we repeat: what are we going to do about these people? If it is proper that for the time being they should be immune from legal sanction, does it also follow that they should continue to receive public respect, honor and rewards?

* * *

"This soft and complacent public attitude toward the collaborators amounts, at bottom, to a general collusion in the sabotage of the nation's will, and in the moral nihilism that their actions express. If our standards have so far dissolved that there is no longer *anyone* on whom we will turn our backs, then we as a people are ready for suicide."

The second article sued on reads, in part, as follows:

"Are You Being Sued
By Linus Pauling?

We are (or so his lawyer tells us). And so are other well-behaved papers and people throughout the country.

* * *

"Dr. Pauling is chasing after all kinds of people, even the formidable Sam Newhouse, owner of twenty-odd daily newspapers. His victory signal is the check or two he has wrested from publishers—who may indeed have libeled him, in which case they should pay up; but who may simply have been too pusillanimous to fight back against what some will view as brazen attempts at intimidation of the free press by one of the nation's leading fellow-travelers."

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Approximately a year and a half after this suit was instituted, the United States Supreme Court in New York Times v. Sullivan, 376 U. S. 254 (1964) enunciated a new doctrine in the law of libel, as affected by the First Amendment. And the critical question on the present motion is whether that doctrine should be extended to apply to the present case, and, if so, whether plaintiff has proved a prima facie case under that doctrine.

In New York Times v. Sullivan, supra, the Supreme Court held that:

> "The constitutional guarantees [of the First and Fourteenth Amendments] require, we think, 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." (376 U. S. at p. 279.)

Plaintiff is not a public official, and so the first question is whether New York Times v. Sullivan has any applicability to his case at all. The Supreme Court has certainly not excluded that possibility. In the New York Times case it said (376 U. S. at 283, Fn. 23):

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, *or otherwise to specify categories of persons who would or would not be included*" (Italics added).

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In its last pronouncement on the point, the Supreme Court said:

> "We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern. *Cf. Salinger* v. *Cowles,* 195 Iowa 873, 889, 191 N. W. 167, 173-174 (1922); *Peck* v. *Coos Bay Times Publishing Co.,* 122 Ore. 408, 420-421, 259 P. 307, 311-312 (1927); *Coleman* v. *MacLennan,* 78 Kan. 711, 723-724, 98 P. 281, 285-286 (1908); *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659, 671 (C. A. 2d Cir. 1965)." Rosenblatt v. Baer, decided February 21, 1966, Fn. 12 to Opinion of Brennan, J., 86 S. Ct. 669, 676.

The underlying policy adopted by the Supreme Court in the New York Times case would seem to favor extending the doctrine of that case at least to a private person who "has thrust himself into the vortex of the discussion of a question of pressing public concern".

In Rosenblatt v. Baer (supra), Mr. Justice Brennan, speaking for the court, said:

> "The motivating force for the decision in *New York Times* was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

> open *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U. S., at 270. (Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. * * * (86 S.Ct. at 675)
>
> * * *
>
> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. * * *" (86 S.Ct. at 676)

In determining the relative importance and protection to be given to the interest in public discussion, on the one hand, and the safeguarding of individual reputation on the other, the Supreme Court, in the New York Times case, has shifted the balance sharply in favor of the freedom of public discussion. Logically, of course, limitations on the law of libel as a protection of public persons may discourage private persons (viewed as possible libel plaintiffs) from speaking out on issues when to do so may expose them to attacks on their own reputation. But, conversely, viewing these speakers as possible defendants in libel suits, such limitations may encourage them to speak out. And

the Supreme Court apparently believes that the latter consideration outweighs the former. In New York Times v. Sullivan, 376 U. S. at 271, the Court quoted with approval the following from Cantwell v. Connecticut, 310 U. S. 296, 310:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

In Gilberg v. Goffi, 21 A D 2d 517, 527 (1964), affirmed 15 N Y 2d 1023 (1965), the Appellate Division, Second Department, applying New York Times v. Sullivan, said:

> "Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic government is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern, even if thereby some individual be wrongly calumniated * * * ."

The Supreme Court, in the New York Times case, quoted Beauharnais v. Illinois, 343 U. S. 250, 263, that

"public men, are, as it were, public property" (376 U. S. 268).

Again, referring to the risk of successive libel judgments against a newspaper, the Court said, at 376 U. S. 278:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

These considerations, stated by the Court with reference to public officials, would seem to be equally applicable to a private person who publicly, prominently, actively, and as a leader, thrusts himself (however properly) into a public discussion of public and exceedingly controversial questions.

In Gilberg v. Goffi, 21 A D 2d 517 (1964), affirmed 15 N Y 2d 1023 (1965), the New York State courts applied the New York Times doctrine to a law partner of the mayor of a city, who sued a rival candidate for mayor, for libel, when the latter said that the mayor's law firm (of which plaintiff was, of course, a partner) was practicing law under conditions which showed a conflict of interest. The Court said that, although plaintiff was not a public official, "plaintiff's action is so closely related to criticism of a public official that the *Times* case is determinative" (21 A D 2d at 520). Cases in other jurisdictions have applied the New York Times doctrine to private persons who actively engage in a public controversy. (See, e.g., Walker v. Courier-Journal, 246 F. Supp. 231 [W. D. Ky. 1965].)

Finally, the United States Court of Appeals for the Second Circuit has indicated very strongly its view that Dr. Pauling is a person to whom the rule of New York Times

v. Sullivan should apply. In Pauling v. News Syndicate Company, 335 F. 2d 659, 671 (C. A. 2, 1964), the Court said, with reference to the doctrine of the New York Times case:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; * * * . Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy * * * the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line."

In the case at bar, Dr. Pauling testified that after he read the Smythe Report on atomic energy, about 1946, he became greatly concerned about the destructive effects on our civilization of a possible nuclear war. He began to accept invitations as a speaker on this subject; he became interested in educating his fellow Americans as to this danger; he further testified that this has been a dominating interest with him for over twenty years and, during that

period, he has given some 750 addresses, lectures, talks, etc., with respect to atomic weapons, the need to control them, the need to prevent war, and the need for settling disputes by international law. He has traveled about the world and spoken on these subjects. He has pressed his views on heads of state, ambassadors, and other public officials. His efforts have gained him such prominence in this field that he was awarded the Nobel Peace Prize. By the same token, however, he has from time to time found himself—as was his right as a citizen—in public and active opposition to persons and policies that he deemed inconsistent with his views; and quite frequently his publicly-expressed views on many questions—not merely those relating to his efforts for world peace—have been contrary to those expressed by the more conservative or right-wing elements in this country. On June 8, 1962, he had joined in a call for a World Peace Conference to be held in Moscow that summer. A few months earlier he had joined in "An Open Letter to President John F. Kennedy against U. S. military intervention in South Vietnam", which letter was published as a paid advertisement in the New York Times.

The matters he has discussed are, of course, matters of the gravest and most widespread public importance; they concern the foreign policy of the United States, the military operations now going on, and the future of civilization itself. And at each step there have been many who disagree with Dr. Pauling.

It is clear that if any private citizen has, by his conduct, made himself a public figure engaged voluntarily in public discussion of matters of grave public concern and controversy, Dr. Pauling has done so.

Finally, the criticisms made of him in the alleged libelous articles are not criticisms of his private life; they are criti-

cisms of his public conduct and of the motives for that public conduct. This applies even to the intimation in the second article that by his libel suits he is attempting to intimidate the press; for the freedom of public discussion is itself a public issue and one that is properly a subject of public discussion.

Accordingly, I hold that, in order for Dr. Pauling to recover, it would be necessary for him to meet the standards of New York Times v. Sullivan.

The basic principle of New York Times v. Sullivan is that, in the cases to which it applies, there can be no recovery for even a defamatory falsehood unless the plaintiff proves that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not". (376 U. S. at 280.)

This kind of "actual malice" " 'is not presumed but is a matter for proof by the plaintiff' " (376 U. S. at 284; and see 376 U. S. at 279, quoted supra).

In the case at bar, there is no real evidence that defendants knew that the statements they made were false. A four-year-old conversation with an editor, who did not himself have anything to do with the writing of the allegedly libelous articles, is no more sufficient to show knowledge of falsity than were the new stories in the Times files in New York Times v. Sullivan. As the Court there said, "the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication" of the alleged libel (New York Times v. Sullivan, 376 U. S. at 287).

Plaintiff argues that he has shown "reckless disregard" by the defendants of whether the article "was false or not".

But all the plaintiff's evidence on this phase of the case amounts to, giving it the most favorable inferences, is that defendants relied on unreliable sources, and that if they had checked in a reasonable manner, they would have ascertained that their statements were false. Assuming these facts to be true, that is still not a showing of "reckless disregard of whether it was false or not", in the New York Times v. Sullivan sense. As the Supreme Court pointed out in Garrison v. Louisiana, 379 U. S. 64, 79 (1964):

> "The reasonable-belief standard * * * is not the same as the reckless-disregard-of-truth standard. * * * The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth."

Reckless disregard of whether a statement is false or not, in the New York Times sense, is to be contrasted with the "utterances honestly believed" (Garrison v. Louisiana, 379 U. S. at 73) which are to be protected. Such reckless disregard must be the equivalent of the "calculated falsehood" (ibid. at 75), which is not protected.

The evidence presented by plaintiff does not meet this standard.

In this aspect of the case, perhaps the most vulnerable passage in the libelous articles is this:

> "Are such persons Communists? Some such undoubtedly are, but there is not publicly at hand the full proof, of the kind demanded by the courts, that they are Communists in the total, deliberate, disciplined organizational sense."

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Assuming that this could be read as referring to plaintiff, it could be argued that this is a charge that plaintiff is a Communist, with an admission that the writer has no evidence of it; and therefore that the charge is made with reckless disregard of whether it is false or not.

But of course the admission in the article that there is no legal evidence to support the charge—assuming it to apply to plaintiff—itself limits the charge. To hold that this statement is not protected under New York Times v. Sullivan would risk the very danger that the Supreme Court gave us a ground for rejecting a rule that defendants be required to prove truth:

> "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'. * * * The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." N. Y. Times v. Sullivan, 376 U. S. at 279.

Neither knowledge of falsity nor reckless disregard of whether the statements were false or not has been shown with the "convincing clarity which the constitutional standard demands", and thus a judgment based on such evidence would not be permitted to stand (New York Times v. Sullivan, 376 U. S. at 285-286). And it is for the Judge in the first instance to decide whether that standard has been met (Ibid., and compare Rosenblatt v. Baer, 86 S. Ct. at 677, Feb 21, 1966, slip opinion, page 12).

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The record of this trial is extremely voluminous. So I should make clear that on the basis of pre-N. Y. Times v. Sullivan law, plaintiff would have proved a prima facie case. The articles on their face are libelous, i.e., defamatory if untrue; the defenses of truth, fair comment without malice, etc., to the extent thus far gone into, all present questions of fact for the jury. Publication of the article by the corporate defendant, with the active participation and approval of the individual defendant editor, are (*sic*) conceded. While the participation by the individual defendant-publisher, Mr. Rusher, is perhaps marginal, enough has been shown of his participation to present a question for the jury as to his responsibility. The suggestion that damage has been conclusively disproved by plaintiff's own reputation witnesses is unfounded; to begin with, that issue was not fully explored with those witnesses and properly so under Linehan v. Nelson, 197 N. Y. 482 (1910); and in any event the testimony of the reputation witnesses was limited to plaintiff's reputation in the academic and scientific communities and was not conclusive.

But, applying New York Times v. Sullivan, I hold that plaintiff has failed to prove a prima facie case, and the complaint must be dismissed.

Lest there be any misunderstanding, I do not hold that the charges against Dr. Pauling, made in the articles, are true or justified. It is clear that in all his actions Dr. Pauling acted well within his legal rights. And if his conscience required him to take the actions and pursue the course of conduct that he has pursued for the last twenty years, then he has acted in accordance with his moral duty. Accepting plaintiff's testimony, presumably his work for

public education and world peace has imposed certain sacrifices on Dr. Pauling. Dr. Pauling has added the prestige of his reputation to aid the causes in which he believes. I merely hold that by so doing he also limited his legal remedies for any claimed libel of his reputation. And perhaps this can be deemed another sacrifice that he is making for the things he believes in.

I should finally mention one matter of judicial economy. When plaintiff rested late Friday afternoon, and defendants moved to dismiss the complaint, I reserved decision and indicated that I was going to send the case to the jury ultimately. We were then in the sixth week of trial. (Actually, because of intervening religious holidays, etc., there had been about five weeks of testimony.) If I were to grant the motion to dismiss now, and an appellate court disagreed with me, the appellate court would have no choice but to order a new trial, and the weeks of trial that we have thus far had would have to be done over again. On the other hand, if I reserved decision on the motion to dismiss and let the case go to a jury verdict, then, even if I should thereafter dismiss the complaint, and the appellate court were to disagree with me, the appellate court would not have to order a new trial, but could merely enter the appropriate final judgment. Recognizing that the law in this area is still evolving and that the appellate courts might hold the New York Times case inapplicable, I thought it wiser to reserve decision and thus minimize the risk of retrial. But over the weekend I reconsidered this question, and, accordingly, I inquired of counsel as to how much longer the case would take, and I required them, as officers of the court, to make representations to me as to what additional evidence they expected to produce and by

what witnesses. Counsel's estimate as to the future length of the trial varied, but both sides agreed that there are still a number of weeks to go. My own guess is that probably the remainder of the case would take about as long to try as plaintiff's case has taken thus far. Thus, if I were now not to grant the motion to dismiss, but were to reserve decision, and the appellate courts should agree with me that the doctrine of *New York Times* v. *Sullivan* applies, I would have subjected the parties, the court, and the jurors to about as much additional unnecessary trial as I would if I were to grant the motion to dismiss, now, and the appellate courts disagreed with me. This seems to me too high a premium to pay as insurance against the ever-present risk of error on my part. It is for these reasons that I am not reserving decision.

The motion to dismiss the complaint is granted.

Dated, April 19, 1966.

S. J. SILVERMAN
J. S. C.

APPENDIX E

3. *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2d Dept. 1964) *aff'd* 15 N. Y. 2d 1023, 207 N. E. 2d 620 (1965)

DAVID C. GILBERG, Respondent, *v.*

FERRER F. GOFFI, Appellant.

Second Department, July 9, 1964.

APPEAL from an order of the Supreme Court at Special Term (JOHN J. DILLON, J.), entered January 29, 1964 in Westchester County, which (1) denied plaintiff's motion for summary judgment and defendant's cross application for summary judgment, (2) struck the third defense and portions of the second defense, and otherwise denied the motion to strike defenses, and (3) limited the disclosure and discovery required of plantiff by defendant, and directed that such disclosure and discovery proceed. The appeal, as limited by defendant's brief, is from so much of said order as struck the third defense, and as denied defendant's cross application for summary judgment of dismissal of the complaint.

Harry Krauss for appellant.

David C. Gilberg, respondent in person.

SAMUEL RABIN, J. This appeal turns upon the extent of immunity to be accorded to the campaign utterances, oral and written, of a candidate for public office.

The learned Special Term held that the complaint stated a case for recovery in defamation, and that questions of fact were raised incident to the defenses of privilege and justification. In our opinion, the evidentiary showing made by each party establishes facts which are sufficient, under two landmark decisions rendered after the Special Term's decision, to warrant the granting of summary judgment in defendant's favor.

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By reason of these recent pronouncements, the issues at bar may no longer be evaluated solely by the prior controlling precedents in the law of defamation. Now, all utterances addressed to public officials, when challenged in a civil libel action, must be accorded the constitutional safeguards for freedom of speech inherent in the First and Fourteenth Amendments of the Federal Constitution (*New York Time Co.* v. *Sullivan,* 376 U. S. 254, 264-265). The privilege of a citizen to criticize official conduct is part of the evolving body of the law of libel which now recognizes that public officials, in the performance of their duties, enjoy a concomitant immunity when they speak out on matters of public concern, even if a particular citizen be defamed in the process (*Sheridan* v. *Crisona,* 14 N Y 2d 108). The threat of a damage suit should not be permitted to inhibit or curtail the freedom of expression of either the citizen or the public servant (*New York Times Co.* v. *Sullivan, supra,* pp. 282-283).

In the *New York Times* case, the following principles were authoritively declared:

(1) The ancient doctrine that the Constitution does not protect libelous publications may no longer be utilized where its application would serve to impose sanctions upon criticism of the official conduct of public officers (pp. 268-269);

(2) Expressions of grievance and protest on a public issue do not lose their constitutional protection by reason of a combination of falsity of factual statement and of defamatory content (p. 273);

(3) Public officials, like Judges, are expected to be "'men of fortitude'" when assailed by half-truth, misinformation, charges of gross incompetence, disregard of

public interest, communist sympathies, hints of bribery, embezzlement and the like, especially when such charges are hurled in the heat of a political campaign (pp. 272-273);

(4) In cases involving criticism of public officials, a new principle of qualified privilege in the law of libel is to be applied, namely (pp. 279-280): "The constitutional guarantees require, we think, 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."

(5) This new principle is to be tested by the facts of each particular case in order to ascertain whether the alleged libelous statements were prompted by actual malice (pp. 284-286);

(6) On weighing the evidence, the court is to avoid such result as might suggest " 'that prosecutions for libel on government have any place in the American system of jurisprudence' "(p. 291); and

(7) The court is likewise to avoid the thwarting of the free expression of impersonal attack on government by investing the remarks with a personal significance (p. 292).

In the *New York Times* case the plaintiff was a Police Commissioner who sought damages in libel by attributing to himself certain false statements which had been published in an advertisement in the *Times* newspaper with respect to the Montgomery (Alabama) local police force which he headed. Plaintiff's money judgment was reversed for lack of demonstration of direct reference to him in the publication and for lack of proof of defendants' actual malice.

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In our opinion, the same deficiencies rendered insufficient the present plaintiff's cause of action. While the plaintiff claims that he was not a public official, it is our opinion, based upon the proof adduced on the defendant's cross motion for summary judgment, that plaintiff's action is so closely related to criticism of a public official that the *Times* case is determinative and that the plaintiff has no justiciable claim.

The pertinent facts here may be briefly stated:

The Mayor of the City of Mount Vernon was a reputable lawyer who assumed and functioned in his office of Mayor during the period 1960 to 1963. Since June 1, 1960, plaintiff, likewise a lawyer of good reputation and standing, has been a partner in the Mayor's law firm.

Before the Mayor assumed his office, and during his tenure, the *Daily Argus,* a newspaper published in the City of Mount Vernon, reported in various news articles that the question of the adoption and enforcement of municipal conflicts- of-interest rule had been locally advanced. In March and April, 1958, the *Argus* reported that Alderman Kendall had advocated passage of a local law dealing with conflicts of interest. In September, 1962, additional articles with reference to such a local law appeared in the *Argus.* In November, 1962, the *Argus* published a news article to the effect that one Bornstein, who had been feuding with the Mayor on municipal and political matters, had filed a "complaint" with this court in which he challenged the right of plaintiff Gilberg to represent clients in the local City Court while his law partner was Mayor of the City. In the same month, the *Argus* further reported that one Zimmerman had sent a letter to the local Common Council urging that a local law be adopted so as to bar a Mayor or his law firm

from practicing law in the City Court or before municipal agencies and that the Common Council had referred the letter to the local bar association.

In the Fall of 1963, the defendant, a faithful reader of the *Argus,* became an independent candidate for the office of alderman, election to which position would make him a member of the local Common Council. His rival candidates were two incumbent Republican Aldermen (one of whom was Alderman Kendall) and two Democratic candidates. In the ensuing election campaign the defendant was associated with Bornstein and other opponents of the Mayor who was seeking re-election to that office.

On the night of October 22, 1963, defendant together with Bornstein appeared on the public platform, and both made speeches before an audience. The defendant read his speech from a prepared typewritten manuscript, copies of which had been signed by him and distributed earlier to the press for publication. In his address, in the part now relevant, the defendant made the following remarks:

"One of my opponents claimed credit for being the sponsor of a Conflicts of Interests code. We read in the papers of the charges that the mayor's law firm was practicing in the City Court of Mount Vernon, under conditions which show a clear conflict of interests. Yet, neither of them called for any investigation. Is it that they did not care or that they did not dare?

"They have failed to show any courage as aldermen. There has not been a dissenting vote among them in so long a time that it is difficult to remember when any such thing happened. No group can think so much alike for so long a time on so many subjects.

"It would seem as though someone else is doing the thinking for them and that they are merely the 'Yes' men

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for this individual. By being 'Yes' men, they have allowed our city to become disgraced among all of the cities of our nation.

"Of my Democratic opponents, both are lackeys of the Democratic mayoralty candidate * * *

"Our mayoralty candidate * * * is a man of recognized decency and integrity. He is our one hope to bring back our city to the sphere of respectability. To do this, he needs aldermen who are prepared to act for him when action is necessary. As members of his team, my running mate and I will see to it that he gets the legislation he needs to carry out his purpose."

The defendant's address was reported in the *Daily Argus* in its issue of October 23, 1963. Orally on the following day, and by copy of a letter sent to such newspaper on October 25, 1963, the plaintiff informed defendant that his (defendant's) statements about the Mayor's law firm were false and defamatory; and plaintiff called upon defendant either to justify publicly his remarks or to avow his error. Plaintiff's written communication stated that he was not a "politician"; that he sought no public office; that no law, rule or regulation prohibited his law firm from practicing in the City Court; and that his firm had appeared in no case "where a conflict of interests may or might arise."

Defendant proffered no formal retraction. In lieu thereof, on October 28, 1963 he sent a letter to the *Argus,* the substance of which it printed in a news article. In such letter defendant referred to the publication in the *Argus* on November 19, 1962 of an article reciting the filing of the Bornstein "complaint" to this court, and then went on to state:

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"This fully supports my statement. I have no interest in Mr. Gilberg's method of practicing law, except insofar as it concerns the conduct of the Common Council. I have said and still argue that it was the duty of the Common Council, who on previous occasions, had voiced itself as in favor of a strong conflict of interests law, to have instituted an investigation of the matter. * * * If Mr. Bornstein's charges are sustained in an investigation by the Common Council, it would fall upon that body to adopt appropriate rules for correcting the situation.

"As a candidate for the office of Alderman, it is my privilege and duty to present the issues to the people, and in that sense, I have brought this forth as such an issue."

The instant action was thereafter commenced on the theory that the oral address of October 22 which had been reduced to writing, and the writing of October 28, constituted both a slander and a libel of the plaintiff. In his complaint, plaintiff charges in substance that defendant uttered false statements to the effect that the law firm, of which plaintiff is a partner, had practiced law in the local City Court under conditions which showed a conflict of interests; and that, by innuendo, the defendant had suggested that the law firm had thereby violated some precept which precluded its practice in that court. The complaint neither pleads special damages, nor avers that the defendant's impugning remarks were uttered with malice.

In his answer, the defendant pleaded a general denial, and, *inter alia,* defenses of lack of malice, qualified privilege, and justification. He also set out the various mentioned publications of the *Daily Argus* relating to a municipal conflicts-of-interest law and the presentations made thereon to this court and to the Common Council; and pleaded that his

campaign remarks were not aimed at plaintiff but at his incumbent aldermanic adversaries for the purpose of drawing to the attention of the voters their failure to proceed "with relation to the charge publicly made by the said Bornstein."

In support of his second defense of justification, defendant pleaded that the Mayor's official status as a Magistrate empowered him to act in the City Court and to appoint an acting City Court Judge. Defendant also referred to the Mayor's power of appointment of the Corporation Counsel and various other municipal functionaries, including the local Police Commissioner, and pleaded that these latter appointees appeared in the City Court in the prosecution or defense of divers actions involving the municipality and local law enforcement.

Upon the motions of the respective parties* for summary judgment, the Special Term held that the evidentiary showing as to the defenses of qualified privilege and justification (as corrected) entitled defendant to a trial. The Special Term further held that the issue was not whether defendant had read something in a newspaper, but whether his charge of conflict of interests was objectively true.

On the present appeal, only the defendant seeks review of the denial of summary judgment in his favor. If defendant is correct in his contention that he was entitled to summary judgment on the evidentiary showings, his appeal from so much of the order under review as struck out the defense of truth is moot.

Under the current practice, a motion for summary judgment should be granted where, on the papers and proof

*Defendant did not by cross notice formally move for summary judgment in his favor. He requested such judgment, however, in his affidavit in opposition to plaintiff's motion for summary judgment.

submitted, a cause of action or defense "shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party;" and the motion should be denied where any party shows the existence of any issue of fact, other than an issue as to the amount or extent of damages, sufficient to require a trial (CPLR 3212, subds. [b], [c]). In effect, defendant's cross motion for summary judgment was a motion to dismiss the complaint for failing, on an evidentiary showing, to *state* a cause of action (CPLR 3211, subd. [a], par. 7). The plaintiff's motion for summary judgment, in effect, was an application to dismiss the pleaded defenses for want of substance (CPLR 3211, subd. [b]).

Applying the principles of the *New York Times* case (376 U. S. 254, *supra*) to the facts and pleadings at bar, it is patent first and foremost that the alleged defamatory words of defendant's October 22, 1963 address, set out in paragraph 12 of the complaint, contain no direct reference to plaintiff Gilberg either by name or association with the Mayor's law firm. Construed in the context of indulging in "a clear conflict of interests," defendant's said speech and his press release thereon were limited to practice in the City Court by "The Mayor's law firm." The only proof in this record that such words were susceptible of reference to the plaintiff personally lies in plaintiff's subjective interpretation of the words and in the alleged coincidence that, on October 23, 1963, plaintiff received a number of unidentified telephone messages calling attention to the newspaper article published that day "and the implication of the statement, as the same affected the ethics and legality of law practice in the City Court on my part, [and] my being a member of the 'Mayor's law firm'." Plaintiff's proof on this issue is

therefore precisely the same as the complaint's evidence in the *New York Times* case (*supra*). As there stated, the alleged defamatory words "did not on their face make even an oblique reference" to the complainant "as an individual"; and any proof "that he had in fact been so involved" rested "solely on the unsupported assumption that, because of his official position, he must have been" (*New York Times Co.* v. *Sullivan, supra,* p. 289).

In the *Times* case, the position of the complainant was even stronger, since presumably everybody in the City of Montgomery knew or should have known that he was the Commissioner in charge of the police department; and yet the innuendo that the alleged defamatory matter assailing the police applied to him individually was rejected as unavailing on the "assumption" that he was personally involved in any generic criticism of police action. At bar, although plaintiff stated that his position as the active partner of the Mayor's law firm in charge of City Court cases, was known to Bench and Bar and to most litigants, proof is lacking that defendant knew of this situation or that he even knew the plaintiff. In fact, the proof is that plaintiff and the defendant had never met, and that defendant was attacking the Common Council and his incumbent rivals for membership in that body.

Plaintiff's proof utterly fails to connect the defendant with knowledge, actual or constructive, that plaintiff was a member of the "Mayor's law firm." In the absence of proof of such knowledge and in the absence of specific reference in the alleged defamatory statements to the actual name of such law firm or to the particular individuals who comprised it, it is our opinion that plaintiff has failed at the outset to establish that he was personally included in the

law firm claimed to have been defamed by defendant. Paraphrasing the language of Mr. Justice BRENNAN in the *New York Times* case (*supra*), the proof adduced as to defendant's utterances of October 22 may be taken as referring to "the Mayor's law firm," but they did not on their face "make even an oblique reference" to plaintiff as an individual; and support for such conclusion rests only on plaintiff's "assumption" and those of his unidentified telephone informants—assumptions that cannot properly be drawn directly from the specific words used in the defendant's text.

Nor is plaintiff's case for personal calumny in any way aided by defendant's writing issued on October 28, 1963 to the *Daily Argus* in lieu of a personal retraction to plaintiff and in justification of his October 22 speech and press release. This later writing mentions plaintiff specifically by name for the first time; but, in our opinion, it does not, by reason of such identification, serve to strengthen the plaintiff's case, as urged by plaintiff. That later writing of October 28 made no charge of any unprofessional activity against the plaintiff personally. It merely emphasized defendant's reliance: (a) upon the *Daily Argus'* publication concerning Bornstein's complaint to this court which "had challenged the right of Mr. Gilberg to represent clients in City Court while his law partner is Mayor of the City;" and (b) upon the fact that such complaint constituted a proper reason why the Common Council should have inquired into the necessity for a code of ethics.

Accordingly, on the proof adduced, we are of the opinion that plaintiff has failed to establish that he had been personally vilified for a lack of professional propriety by any utterance, oral or written, ascribable to the defendant. Plaintiff has established only that the "Mayor's law firm"

had been impugned by defendant on a pre-existing claim of conflict of interests which had already appeared in the public press.

In view of the fact that defendant was a candidate for public office; that he was talking about another office-holder's law firm; and that he was calling upon the Common Council to investigate Bornstein's and Zimmerman's pre-existing charges, as already published, with respect to such law firm, it is our opinion that defendant's utterances can fairly be construed only as part and parcel of a debate on the public issue as to whether Mount Vernon required a code of ethics to govern the practice of law in the City Court by a firm, or a member thereof, in which a partner occupied the office of Mayor. The statement by the defendant that Bornstein's and Zimmerman's presentations of that issue had been published in the papers and that he (the defendant) had read the published article was not false, but in fact true.

Nor is it of any avail to plaintiff to claim that he was not a candidate for any public office and that he was outside the political arena. Obviously the law firm, of which he was a member, had generated the public issue on which the the defendant made comment. In our opinion, having entered the fray as champion of that law firm, plaintiff made himself as much a part of the local political campaign as did his law partner, the Mayor. It would be anomalous to hold that the Mayor, as a public office holder, was precluded by the *New York Times* case from suing in libel on a conflict of interest issue affecting his law firm, but that his law partner was individually free to do so on the same subject matter.

Upon the basis of all the proof adduced, it is our opinion that the doctrine proclaimed in the *New York Times* case is

dispositive of all the legal issues, actual or potential, here presented. Accordingly, invoking such doctrine, we may summarily dispose of those issues.

On the issue of malice, the plaintiff was bound to show that the defamatory falsehood relied upon, growing out of the Mayor's conduct as a public official, was made with "actual malice." Plaintiff was required to show that the defendant's utterances were made with knowledge that they were false or with a reckless disregard as to their falsity. Examining the proof tendered on this issue, it is our view that plaintiff produced no evidence that defendant was aware of any erroneous statements or that he was in any way reckless in that regard. At best, it might be said that defendant was negligent in failing to ascertain the truth or accuracy of the details supporting the prior claims of Bornstein and Zimmerman to the effect that the Mayor's law firm had indulged in the practice of law in circumstances involving a conflict of interests. However, as noted in the *Times* case, a finding of negligence in failing to discover misstatements is "constitutionally insufficient to show the recklessness that is required for a finding of actual malice" (376 U. S. 254, 288).

On the issue of privilege, as previously indicated it is plaintiff's contention that defendant could derive no immunity for his utterances, since plaintiff was neither a public officer nor a political candidate. But that contention, as already noted, is untenable. It is our opinion: (a) that in submitting "the Mayor's law firm" as an actionable issue, plaintiff has inextricably interwoven his personal and individual status with that of the firm; (b) that the firm was a proper subject for comment in the public domain; and (c) that in the context of the utterances made, plaintiff and the firm necessarily constituted one and the same juridical person.

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Accordingly, and solely because the plaintiff's papers fail to make out an actionable wrong, it is our conclusion that the defendant's cross motion for summary judgment should be granted. We see no need, therefore, to discuss defendant's alternative point that his third defense of truth was erroneously dismissed.

In reaching this conclusion, we express no opinion on the underlying controversy which plaintiff has sought to bring to the surface, i.e., the charge that the Mayor's law firm had offended any professional standards of conduct. In our opinion, the propriety of the firm's conduct, or of plaintiff's individual conduct, is not a question for judicial determination in the instant action. The only justiciable questions properly here are: (a) whether such conduct had become a public question; and (b) whether, within the limitations laid down in the *Times* case, the defendant as a candidate had the right to comment thereon as he did. It appears to us that the defendant had such right, and that plaintiff and his law firm must find solace in the philosophy that men in public life must be "men of fortitude" who must endure exposure to the vicissitudes of argument in the public forum, where half-truths, misinformation, and worse, are not uncommon in the furor and in the tempo of a political campaign. In sum, it is our view that discussion of a need for a municipal code of ethics to bar certain activities on the part of a public official and his associates is not tantamount to saying that the activities sought to be prohibited are, prior to the adoption of such code, wrongful per se. In that light, plaintiff's failure to prove his individual defamation and defendant's actual malice are omissions which are fatal to plaintiff's case.

Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic govern-

ment is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern, even if thereby some individual be wrongly calumniated (*Sheridan* v. *Crisona,* 14 N Y 2d 108, *supra; Spalding* v *Vilas,* 161 U.S. 483, 498; *Matson* v. *Margiotti,* 371 Pa. 188; *Manceri* v. *City of New York,* 12 A D 2d 895). If by reason of such utterances a defendant is immune from liability, he does not lose his immunity when the utterances are passed on to the press for publication in the same text as previously delivered (*Barr* v. *Matteo,* 360 U.S. 564, 574-575; *Mellon* v. *Brewer,* 18 F. 2d 168; *Glass* v. *Ickes,* 117 F. 2d 273).

Accordingly, the order under review, insofar as appealed from and insofar as it denied defendant's cross motion for summary judgment, should be reversed, without costs; such cross motion should be granted, dismissing the complaint; and the appeal, insofar as it relates to the plaintiff's motion to strike out the third defense should be dismissed as moot.

CHRIST, BRENNAN and HOPKINS, JJ., concur with RABIN, J.; BELDOCK, P. J., dissents and votes to affirm the order, with the following memorandum: In my opinion, the decision in *New York Times Co.* v. *Sullivan* (376 U. S. 254) is distinguishable from the case at bar. That case concerned the alleged criticism of the official conduct of a public official. The instant case concerns criticism of a public official's private practice of the law. That the plaintiff here was known by the defendant to be a law partner of the public official, clearly appears from the fact that plaintiff's name was included in the name of the law firm and from the fact that the November 19, 1962 article which appeared in the

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Daily Argus, and which was defendant's basis for his October 22, 1963 speech, specifically mentioned plaintiff by name. In my opinion, defendant's speech accuses the Mayor and his law partners of unethical conduct in their practice of law. Therefore, it was sufficient to defeat defendant's cross motion for summary judgment dismissing the complaint.

Order, insofar as appealed from and insofar as it denied defendant's cross motion for summary judgment, reversed, without costs; such cross motion granted and the complaint dismissed, without costs. Appeal, insofar as it relates to the plaintiff's motion to strike out the third defense, dismissed as moot.

APPENDIX E

4. *Pearson* v. *Fairbanks Publishing Co.* (unreported), *aff'd on other grounds* Alaska (1966)

IN THE
SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

DREW PEARSON,
Plaintiff,
—*vs*—
FAIRBANKS PUBLISHING CO., INC. and C. W. SNEDDEN,
Defendants.

No. 10,209

MEMORANDUM OPINION

Warren A. Taylor and Robert A. Parrish, Fairbanks, Alaska, for plaintiff.

Robert J. McNealy, Fairbanks, Alaska, and Henry J. Camarot, Springfield, Oregon, for defendants.

Plaintiff Drew Pearson is and has been at all times pertinent herein the author of an internationally published column entitled the Washington-Merry-Go-Round. Defendants Fairbanks Publishing Co., Inc. and C. W. Snedden are and have been at all times pertinent herein a newspaper printing company and publisher respectively of a Fairbanks newspaper entitled The Daily News Miner. Plaintiff complains in this action that defendants libeled him in two editorials, published July 8 and August 15, 1958, wherein plaintiff was called the "Garbage Man of the Fourth

Estate." The defendants defend principally upon true fact and fair comment. The pertinent Pearson column and the News Miner editorials are set out in the appendix to this opinion.

At the outset of this opinion the Court desires to point up a difference in the respective parties (*sic*) theory as to the controlling factors of the suit. Plaintiff contends that the four corners of the alleged libelous publication alone constitute the yardstick for fact finding; that the words "Garbage Man of the Fourth Estate" are defamatory and libelous per se (supporting presumed substantial damages). Plaintiff then proceeded to adduce proofs that he is a man of good international reputation, that he routed crooks and misfits out of government, sponsored charity projects of large proportion, and generally bent his efforts to effect good will of mankind; that his few errors bore insignificant relation to the thirty odd thousand columns that he had authored, and that generally the designation of "The Garbage Man of the Fourth Estate" could not truthfully or fairly characterize one of such standing, asserting in this regard that such label has grave personal connotation over and above any technical application by the working press.

Defendants on the other hand offer a very broad base for fact finding, asserting and endeavoring to prove that plaintiff is a public figure of international proportion, is a controversial figure, has a reputation among the working press of publishing leftovers and inaccurate material, that he injects himself, however subtly, into local political arenas and did so in the matter at bar, that the word garbage is generally understood as a literary designation of trash and has no personal connotation; and besides, defendants sum

up— "how many garbage pails must a person empty to be called a garbage man".

The foregoing summary is necessarily an over simplification of the extensive matters actually presented during the eight day trial, in which, incidentally, the orderly processing of each side was hopelessly overwhelmed by the accommodation to out of town and out of state witnesses (the plaintiff himself left the Court and the State before the trial was half finished) all of which made evidence relevancy a meaningless phrase and materiality an indefinable term. However shaded in grays most of the propositions appear, certain significant facts can be considered as established:

(1.) There was a political atmosphere in the Territory of Alaska at the times of the plaintiff's column and the defendant's editorial comment. (July-August 1958)

(2.) That plaintiff's column contained political implications of supporting Democrat Ernest Gruening for political office. (See Appendix A)

(3.) That defendant's editorials contained political implications of supporting Republican Mike Stepovich for political office. (See Appendix B)

From the foregoing alone it would be accurate to conclude that at least eventually these two members of the working press, Mr. Pearson and Mr. Snedden, would come to contest. And literary weapons usually include name calling. Apparently the Court is asked to decide not only under rule of privilege who is entitled to the first hurl but also the delicacy (or extravagance) the rule of fair comment dictates. These are not easy decisions.

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I am further disheartened with a growing acceptance of incredulity that once proud and fierce free press advocates should succumb to judicial determination of controversies between themselves. The fact of this lawsuit seems to be the most difficult fact of all to reconcile. It precipitates speculation as to what the plaintiff contended the law was or should be in those many suits wherein he was defendant, (see Defendant Exhibit I, entitled "Confessions of an S.O.B."); interesting however scandulous (*sic*) herein.

What is the law of libel as applied herein? Plaintiff urges *Reynolds* v. *Pegler* 223 F2d 429. Defendant urges *Pauling* v. *News Syndicate Co., Inc.* (No. 301 Sept. term 1963, U. S. Court of Appeals 2nd Circuit). This Court is most strongly attracted to *New York Times* v. *Sullivan* 376 U S 254, 84 S. Ct. 710, 11 L. ed (*sic*) 2d 686 (1963) which contains an amazing collection of authoritative statements concerning libel and the freedom of the press on matters of public concern. A study of this material could scarely leave doubt as to the historical and contemporary attitudes on this subject, as for example in 1794 (pg. 703).

> "In every State, probably in the Union, the press has exerted a freedom of canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of common law. On this footing the freedom of the press has stood; on this foundation it yet stands".

and again later,

> "In the realm of religious faith and in that of political belief, sharp differences arise. In both fields

> the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in the church or state, and even to false statement. But the people of this nation have ordained in the light of history, that in spite of the probability of excesses and abuses these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. (310 U. S. 296)"

While the above historical references had application primarily to public officials, this category has been extended to candidates for public office[1] and this Court finds no reasonable basis to exempt those who presume to speak for such candidates, particularly those public figures of international stature. Restated with facts at bar the plaintiff Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting[2]. There can be little question that candidate Gruening could have been so assailed with impunity.

The foregoing is an application of State and Federal constitutional protection of free speech and press given to the publication. I also hold that the case law, developed

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[1]See *Bingham* v. *Buckley*—NY 2d—(Sup. Ct. July 30, 1964)

[2]For example as to a candidate see *Phoenix* v. *Choisser,* 82 Ariz. 271, 276, 277, 312 P. 2d 150, 154 (1957), *Coleman* v. *MacLannen* 78 Kans. 711 98 P. 281 (1908).

prior to the Times case, leads with persuasive logic to the same result.

Turning to the evidence I find that the innuendoes of fact in the editorial are false.[8] However these statements are privileged.

The restatement of torts provides in section 598 that:

> An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that,
>
> (a) facts exist which affect a sufficiently important public interest, and
>
> (b) the public interest requires the comunication of the defamatory matter to a public officer or private citizen and that such person is authorized or privileged to act if the defamatory matter is true.

The evidence indicates that Mr. Snedden, who caused the offending editorials to be published, honestly believed that Mr. Pearson was inaccurate. The occasion for the first publication has been explained. If Senator Gruening could be attacked, so could one of his outspoken supporters.

As previously mentioned, Mr. Pearson interjected himself into Alaskan politics; his reputation for accurate analysis was accordingly a matter of public concern. The July 8th editorial was related to this area of public con-

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[8]July 8, 1958. Statements of fact include "almost everything he has said about Alaska has been inaccurate either in whole or in detail". August 15, 1958. "He is careless with the facts". The Court cannot separate these facts from the editorial expression of opinion. The entire editorial suggests that the publisher is presenting his opinion rather than objective findings.

cern as was the August 15th editorial, the latter also citing the reason for dropping the column.

Restatement of torts § 606 (1) applies to public figures:

> (1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
>
> (a) is upon,
>
> (i) a true or privileged statement of fact, or
>
> (ii) upon facts otherwise known or available to the recipient as a member of the public and
>
> (b) represents the actual opinion of the critic, and
>
> (c) is not made solely for purpose of causing harm to the other.

If the phrase "Garbage Man of the Fourth Estate" disparages the private character of the author in the mind of the reader then the rule provides:

> (2) Criticism of the private conduct or character of another who is engaged in the activities of public concern, in so far as his private conduct or character affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b) and (c) of sub-section (1) and, in addition, is one which a man of reasonable intelligence and judgment might make.

Another relevant Restatement of torts right in point is Sect. 610 (3) and comments f and g:

(3) The privilege of criticism stated in § 606 includes criticism of another's participation in public activities.

(f) One who as a citizen or as a representative of some voluntary group or association participates in matters of public concern and importance is subject to criticism and comment which is privileged under the rule stated in § 606. So too, one who by his activities and by written or spoken language attempts to influence public opinion in any way is subject to the free and honest criticism of his efforts by members of the public. Thus, lobbyists and other persons attempting to influence prospective legislation, propagandists seeking public support for their causes, and various persons who participate in civic and state activities, not as office holders or candidates therefor, but merely as private citizens, are subject to the free expression of the opinion of those comentators who honestly but disparagingly pass judgment upon their activities.

(g) A man may, by writing letters or articles for newspapers or magazines, appeal to the public either to expose what he regards as abuses on the part of governmental officials or others or to direct attention to real or supposed grievances of himself, a third person or a class. Under such circumstances, his conduct in making such an appeal is exposed to the judgment of the public, and, having started a newspaper war, he cannot complain if he gets

> the worst of it, so long as the expression of opinion, however disparaging, is honestly given. So too, a critic who attacks a book, play or public institution must expect that his criticism will in turn become the object of counter attacks.

The following are some of the cases that the Court relied on to illustrate the Restatement policy. *Fetens* v. *Sokolsky* 51 N. Y. S. 2d 240 (1944) which held that when a writers (*sic*) work is submitted to the public, caustic criticism is privileged. Such attacks may be fantastic and still privileged. *Berg* v. *Printers Ink,* 54 F Supp 795 (1943). An opinion must however be published in good faith and not for the sole purpose of harming the author. *Parmalee* v. *Hearst Publishing Co.,* 93 N E 2d 512, 515 (1950). To say plaintiff wrote disgusting and depraved books is fair comment; *Reynolds* v. *Pegler* 223 F 2d 429, 433 (1955) (good faith test applied).

Fair comment exists here since there was a legitimate interest in a reporters (*sic*) accuracy and the publication was in part:

> "for the bona fide purpose of giving the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff". Prosser on Torts (2nd Ed) pg. 623.

In conclusion, while reasonable men may find this editorial to be false and in bad style, this does not mean it is unfair. It has been held to be no libel to call a newspaper "the most vulgar, ignorant and scurrilous journal ever pub-

lished" *Great Britain Hariot* v. *Stewart,* cited in *Cherry* v. *Des Moines Leader,* 86 N W 323, 325 (Iowa 1901). (A drama critic in describing a performance wrote "Effie is an old jade, Addie a capering monster. . . . Strange creatures with painted faces and hideous mien.["] This was fair comment.)

The defendant's editorial was privileged, and as held by our Supreme Court and the Supreme Court of the United States, the privilege aforementioned is lost only by a showing of actual malice. Plaintiff contends evil motives, ill will and emnity are the only reasonable motivations that could attend the publishing of such otherwise purposeless name calling, not calculable under any stretch of the imagination to correct believed misstatement of fact concerning Gruening and Stepovich; that the use of the term "Garbage Man of the Fourth Estate", imputing as it is contended the lowest form of human endeavors, inherently establishes malice, all, a priori, indelibly impressed by a repeated publication in the same language.

In connection with purposelessness this Court believes it reasonable to infer that to strike down ones lauder is to strike down the lauded and this defeats the conclusiveness of plaintiff's first contention, i.e., there could have been constructive purpose. In connection with the imputation of "Garbage Man of the Fourth Estate" this Court accepts the defendant's definition of garbage as literary trash which definition is both reasonable and accruate, however inappropriate for the purposes sought to be achieved by its use. Such definition hardly supports the contention of inherent malice. The fact of repeating the use of this phrase a month later, while outraging all sense of propriety and pur-

pose, must necessarily be accepted and judged by the same standard and test as the first publication; it also falls short of stripping the privilege the Constitution and common law affords. As a parting comment on this last subject the Court finds, when coupled with the matter of the telegrams, sufficient reason and basis to refuse defendant's request for attorney fees and costs. It may well be that this "one for good measure" constituted such "salt in the wound" as to have precipitated this lawsuit. Accordingly, each party shall bear its own costs and attorney fees.

Let findings of fact and conclusions of law and judgment be drawn by defendant not inconsistent with this opinion.

DATED at Fairbanks, Alaska this 25th day of November, 1964.

EVERETT W. HAPP
Superior Court Judge

Appendix E
"Appendix A" to Opinion in *Pearson* v.
Fairbanks Publishing Co.

Pearson v. Fairbanks Publishing Co.

Civil Case No. 10,209

The following column appeared in the Fairbanks Daily News Miner—Monday, July 7, 1958

Drew Pearson's WASHINGTON
Merry-go round. . . . .

WASHINGTON—A lot of Johnny-come-latelies such as Gov. Mike Stepovich are now claiming credit for making Alaska the 49th state in the Union. But the man who unobtrusively, but consistently, badgered senators, buttonholed congressmen, maneuvered in the smoke-filled rooms to bring statehood to Alaska is an ex-newspaperman named Ernest Gruening. He more than anyone else is the father of the 49th state.

Gruening first came to Washington in 1933 as chief of insular affairs division of the Interior Department organized under the late great Harold Ickes. As such, he guided the destinies of such American stepchildren as the Virgin Islands, Puerto Rico, Hawaii and Alaska.

Gruening had taken a degree at Harvard Medical School, but spent much of his time as a newspaperman, and was editing the Portland, Maine, Evening Express when he came to Washington to nurse American territories. After battling their causes before Congress, he was made governor of Alaska in 1939, and as such did a revolutionary thing.

He went all over that far flung territory, visiting every Eskimo village, every island in the Aleutians, every backwoods settlement, getting to know the people and their

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problems. By a rickety plane, and even by canoe, he toured the northwest territory.

Back in Washington when Congress was in session, he called on congressmen to plead for Alaskan problems. For 14 years, longer than any other man in history, he remained the governor of Alaska. Then when Eisenhower failed to reappoint him in 1953, the people of Alaska elected him unofficial senator and he moved to Washington to undertake a 24-hour-a-day lobbying campaign for the territorys (*sic*) statehood.

Shortly before this, however, a great tragedy struck Ernest Gruening's family which, though it brought grief to him, probably hastened the day when Alaska became the 49th state.

His son, Peter, a correspondent for the United Press, was killed in Australia, and his grief-stricken father more than ever threw all his heart and soul into the battle for Alaskan statehood. In effect he made Alaska his child.

That is the real story of the No. 1 lobbyist for Alaska and how statehoood was achieved.

In some respects the state of Texas probably had most to lose by admission of Alaska as the 49th state. But Sen. Lyndon Johnson put national interest ahead of state interest and worked quietly behind the scenes for Alaska. Without his potent support the bill would have been delayed.

Alaska, with 587,000 square miles against Texas' 267,000, now becomes the biggest state in the Union. California can no longer boast the highest peak in the U. S. A., for Mt. McKinley in Alaska is 6000 feet higher than Mt. Whitney in California. And Yellowstone is no longer the biggest national park. McKinley National Park is the biggest.

Finally, a new crop of Texas jokes will have to be told.

Appendix E
"Appendix B" to Opinion in *Pearson* v. *Fairbanks Publishing Co.*

Pearson v. Fairbanks Publishing Co.

Civil Case No. 10,209

The following editorial appeared in the Fairbanks Daily News Miner—Tuesday, July 8, 1958

GARBAGE MAN OF THE FOURTH ESTATE

Drew Pearson irritates us often. On days like yesterday he infuriates us. It isn't so much because of his opinions, which frequently are so biased they almost tilt out of the page, as it is because his facts are so cockeyed.

In yesterday's Washington-Merry-Go-Round column printed on the News Miner's editorial page, Mr. Pearson credited Ernest Gruening with being "more than any one else the father of the 49th state." This is a matter of opinion. We think Drew Pearson is not in the best of all possible positions to draw such a conclusion. Without wishing in the least to deprecate the fine contribution of former governor Gruening, we feel that the columnist is somewhat off the beam there. That, of course is our opinion.

But in describing the statehood efforts of our former governor—real and imaginary—we think it was wholly unnecessary for Mr. Pearson to start his piece by describing our present governor as a "Johnny-come-lately" and stating that Governor Stepovich is "now claiming credit for making Alaska the 49th state".

Mike Stepovich, born in Fairbanks, can hardly be described accurately as a Johnny-come-lately. He has too much of an understanding of the cooperative endeavor which the gaining of statehood was, and too much to do, to be claiming credit for that accomplishment. To the best of

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our knowledge, Mike Stepovich hasn't been claiming a thing.

No one can dispute that Ernest Gruening, over a long period of years, was dedicated to the statehood cause. It is true he threw himself heart and soul into the battle. In fact, he threw himself in on many occasions when it would have served the cause of statehood vastly better for him to have kept himself out.

We are reminded here of a description given by one who is familiar with the Washington scene as Drew Pearson—and immensely more familiar with the details of the Alaska statehood struggle there. This man said, "It's a good thing the people of Alaska sent down two other Tennessee Plan representatives, and had Bob Bartlett on the job, because it has taken practically the full time efforts of three men for the past two years patching up the damage Gruening did."

One word in Mr. Pearson's column about Ernest Gruening sticks out like a sore thumb. The word says he worked "unobtrusively" in Washington. It sticks out because it is so devastatingly inappropriate. If you ever see anybody being unobtrusive, you won't have to ask his name to be sure it is not Ernest Gruening.

It is too bad that Drew Pearson was stimulated to write the things he did about our former governor and our present one, because they are going to hurt Mr. Gruening in Washington and in Alaska, where he is all too well known.

Yesterday's column deepens a doubt we already had in our mind about the usefulness of Drew Pearson on the national scene. Almost every single thing he ever said about

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Alaska has been inaccurate either in whole or in detail. Long before yesterday this raised for us the question of whether he is as irresponsible in all fields and on all subjects as he is in respect to Alaska. If he is, he is doing a distinct dis-service to the American republic, which being a democracy can only function wisely to the extent its citizens are well and fairly informed by the press.

Does Mr. Pearson so inform his readers? Not on matters Alaskan, of our certain knowledge; and not on much of anything else, in the opinion of his Washington colleagues, one of whom the other day described him as "the garbage man of the fourth estate."

This would seem to raise the point—which frankly has bothered us from time to time in the past—of why we should give space in our newspaper to the printing of garbage. We have worried about that. Even though the Washington Merry-Go-Round is the most popular and widely read column sent out from Washington, the question worries us right now.

For the time being we'll get a clothespin for our editorial nose while we decide what to do about this free-wheeling garbage man of the fourth estate.

The following editorial appeared in the Fairbanks Daily News Miner—Friday, August 15, 1965

EXIT DREW PEARSON

For some years the News-Miner has carried the Washington column by Drew Pearson called "Washington Merry-Go-Round". Since Aug. 1 it has not appeared in our paper and several subscribers have telephoned or written to ask what happened to Pearson.

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The Pearson column has been discontinued. This was not an action which we took lightly or without a good deal of thought, as the "Washington Merry-Go-Round["] is undeniably a popular feature in many newspapers.

We have known for a long time that on subjects having to do with Alaska Mr. Pearson has been so inaccurate as to be very disturbing to us. It was not until the publisher of the News-Miner recently spent several months in Washington, however, that the general reputation of this columnist was fully appreciated.

That reputation is summed up in the comment of a member of the working press in the nation's capital that Pearson is "the garbage man of the fourth estate."

Not wishing to distribute garbage with our newspaper, we have dropped Pearson. We will not be parties to publishing what we know to be inaccurate and misleading.

Since the early part of this year, while our publisher and other Alaskans have been in Washington in connection with the statehood bill, they have observed at first hand some of the happenings on which Drew Pearson commented in his column. We do not mean things connected with statehood, but other events in Washington. We are sorry to have to say that, in our opinion, Pearson's accounts were not very closely related to the real events.

It is not because Mr. Pearson is allegedly "liberal" or "anti-Republican" that we are dropping him. It is just because he is so everlastingly careless with the facts.

Another Washington column, whose writer deals accurately with the great problems of the day in our nation, will soon start in the News-Miner.

APPENDIX E

5. *Brennan* v. *Associated Press (not yet reported)*

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

E. GAYNOR BRENNAN,
Plaintiff,
—against—
THE ASSOCIATED PRESS,
Defendant.

Civil Action
No. 7728

Before: HON. LEONARD P. MOORE, *U. S. C. J.**

Appearances:

Philip R. Shiff, New Haven, Connecticut, for the Plaintiff.

Curtiss K. Thompson of Thompson, Weir & Barclay, New Haven, Connecticut (William M. Mack of New Haven, Connecticut, and Arthur Moynihan and Nicholas Vazzana, both of New York, New York, of counsel on the brief), for the Defendant.

MOORE, *Circuit Judge*

This is a libel action arising out of an allegedly defamatory account in a news dispatch of what took place at a public hearing before the liquor control committee of the Connecticut legislature on March 14, 1957.

*Of the Second Circuit, sitting by designation.

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The plaintiff, E. Gaynor Brennan, was and is a successful lawyer living in Stamford. He had served in both houses of the Connecticut legislature, having been elected to the House in 1933 and to the Senate in 1935 and 1937. In 1939 he had been appointed Chairman of the Liquor Control Commission, in which capacity he served until 1941 or 1942. He had been prominent in the Republican Party of Connecticut, having been chairman of its platform committee in 1938. He had held numerous other positions in the state and municipal governments, including the offices of prosecutor of the City Court of Stamford from 1933 to 1937 and Judge of the same court from 1937 to 1939.

Brennan appeared at the hearing on March 14, 1957 as a representative of the Connecticut Wholesale Liquor Dealers Association. Before appearing, he fully complied with the laws of Connecticut pertaining to such appearances by filing with the Secretary of State the name of his principal and a brief description of the legislation in connection with which he was to appear.

During the course of the Committee hearing, William H. Veale, secretary of the United Temperance Society, addressed the Committee in part as follows:

> "Our program is one of education. We don't try to pull any political pressure upon you. We condemned in 1955 the fact that two members of the law firm of the State Democratic Chairman registered as liquor lobbyists and we're condemning in this assembly that a brother of a Republican county leader in Fairfield is registered as a liquor lobbist."

Veale's remarks were apparently directed towards the plaintiff Brennan, whose brother at the time was County Chairman of the Republican Party in Fairfield County.

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Brennan spoke next. After identifying the capacity in which he appeared, he said:

> ". . . I could assure the previous speaker that as a counsel and member of the bar, I am certainly aware of the ethics of my profession and know that I would not appear here if any member of my family were a member of the General Assembly. I would feel disqualified. My position with the Connecticut Wholesale Liquor Dealers Association is on a contract to see that they obey the law. I resent the remarks of the last speaker and I condemn his ignorance."

A representative of the defendant, The Associated Press (AP), a New York corporation with its principal place of business in New York, was present at the hearing. He subsequently prepared a news dispatch describing the hearing, for publication in defendant's member papers on the morning of March 15, 1957. Plaintiff does not claim that this dispatch, which is set forth as Appendix A to this opinion, is libelous of him.

On the night of March 14-15, 1957, the original dispatch was rewritten in defendant's New Haven office for publication in defendant's member papers in Connecticut on the afternoon of March 15. Defendant's rewrite editor did not know Brennan personally, though he may have read about him in Connecticut newspapers in the brief period since the rewrite editor moved to defendant's New Haven office from defendant's New York office in January 1957. The purpose of the rewrite editor was to give the original

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dispatch a new freshness, so that the afternoon papers would not be running word for word the same story that had appeared in the morning papers. The rewritten story is reproduced as Appendix B to this opinion.

The principal change made by the rewrite editor was in the lead paragraph. Instead of describing the interchange between Veale and Brennan as a clash "on the issue of whether there is a tie-up between political leaders and the liquor industry," as the original dispatch had done, the rewrite began:

> "A charge of illicit lobbying was hurled at a lawyer for the Connecticut Wholesale Liquor Dealers Assn. at a state capitol public hearing yesterday."

It is this lead paragraph, published in the afternoon editions of five Connecticut newspapers with an aggregate circulation of approximately 103,000, which underlies the present suit.

Brennan never asked AP to retract or correct the rewrite. Instead, he brought suit against AP in the Fairfield County Superior Court on February 25, 1959, nearly two years after the publication of the rewrite. The action was subsequently removed to this court upon petition by the defendant.

The essence of the complaint is that the rewrite was false and malicious, in that no one ever accused Brennan of "illicit lobbying" at the hearing. In his original complaint, Brennan alleged that "his practice of law has diminished, whereby he has sustained heavy pecuniary loss," and that "he has been irreparably injured in his profession as a practising attorney." Both allegations were withdrawn

by subsequent amendments. No actual damages were alleged in the complaint as amended for trial, and none were proven at trial.

Plaintiff maintains that he can recover without proof of actual damages, on the grounds that the rewritten story was libelous per se, both because it indicated falsely that he had been accused of a crime involving moral turpitude and because it tended to injure him in the practice of his profession as a lawyer. Brennan relies for the first proposition on two Connecticut criminal statutes which make certain kinds of lobbying illegal, and which provide for fines and imprisonment (up to one year under one statute; up to five years, under the other), in case of violation. Conn. Gen. Stat. § 2-45 (1958); § 53-150 (1958). See also Conn. Gen. Stat. § 53-152 (1958). For his second proposition, Brennan relies on Canon 26 of the Connecticut Canons of Professional Ethics, which indicates that certain kinds of lobbying by an attorney are "unprofessional" and would be grounds for disbarment.

Had AP made the charge that Brennan was an "illicit lobbyist", without qualification, the various dictionary synonyms probably would not have saved the words from being libelous per se. The reading public would more than likely attribute the connotation of "illegal" to "illicit" rather than "unauthorized" or "improper". However, these two words cannot be taken out of the entire article, divorced from it and made the sole foundation of a liability claim. Although Veale did not at any time call Brennan an "illicit lobbyist", the article in its entirety makes it abundantly clear what Veale was condemning in Brennan's appearance before the Committee, namely, the fact that Brennan and a political leader were brothers.

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There was nothing in Veale's remarks, as quoted at length in the AP story, from which it could be inferred that Brennan had failed to register as a lobbyist, had violated any provision of the lobbying laws or had offended against any canon of professional ethics. Veale's sole criticism as revealed by the article was limited to the brotherly relationship. Brennan, as an experienced and skillful lawyer, could hardly have thought that "as a result thereof that plaintiff [he] was subject to criminal prosecution and disbarment proceedings." There was no suggestion of any such consequence in the article and no proof of even such a possibility produced upon the trial.

Whether a given statement is defamatory or not often turns on the context of the statement. To call a merchant a "crook", without qualification, might well be slanderous per se, because the imputation of dishonesty would tend to injure him in the practice of his livelihood. But to say that a merchant is a crook, because he owes money, is not slanderous per se, since "the appellation is explained away by a specification which does not support the charge." *Herman* v. *Post,* 98 Conn. 792, 793-94, 120 Atl. 606 (1923). See *Yakavicze* v. *Valentukevicious,* 84 Conn. 350, 353-54, 80 Atl. 94, 95-96 (1911). The same principle applies equally to libel:

> "The whole of the reported article must be considered in determining whether it is actionable and whether it transcends a substantially true statement of the facts."

Rose v. *Indianapolis Newspapers, Inc.,* 213 F. 2d 227, 229 (7th Cir. 1954). See also *Schy* v. *Hearst Publ. Co.,* 205 F. 2d 750, 752 (7th Cir. 1953); *Dorney* v. *Dairymen's League*

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Co-op Ass'n., 149 F. Supp. 615, 619 (D. N. J. 1957); *Paris* v. *New York Times Co.,* 170 Misc. 215, 9 N. Y. S. 2d 689 (Sup. Ct. 1939), *affirmed without opinion,* 259 App. Div. 1007, 21 N. Y. S. 2d 512 (1940); *Restatement,* Torts § 563, comment *d* (1938).

Here, as in *Herman* v. *Post* and *Paris* v. *New York Times Co., supra,* the context clarifies and removes any misapprehension which might have been caused by the initial statement, so that there is no defamation per se. This being so, the absence of any allegation or proof of actual damages is fatal to the plaintiff's case under general principles of the law of defamation. See *Proto* v. *Bridgeport Herald Corp.,* 136 Conn. 557, 72 A. 2d 820 (1950).

Even if Brennan had been able to demonstrate the existence of libel per se, Conn. Gen. Stat. 52-237 (1958) permits the plaintiff in a libel action to recover only "such actual damage as he may have specially alleged and proved" unless the plaintiff proves either "malice in fact" on the part of the defendant, or failure by the defendant to withdraw the libelous charge upon plaintiff's timely request. Since the plaintiff here did not request a retraction of the statement complained of, and since he neither pleaded nor proved special damages, he can recover only upon proof of malice in fact. *Sandora* v. *Times Co., supra; Wynne* v. *Parsons,* 57 Conn. 73, 17 Atl. 362 (1888).

> "This expression 'malice in fact,' however, does not necessarily mean hatred, spite or ill-will against the plaintiffs, but that there must have been some improper or unjustifiable motive in publishing the article. The defendant must have been actuated from some other motive than a bona fide intention

> of printing an article merely as news in which it believed the public was interested. It is not for the defendant to establish any want of such improper motive on his part. The burden is upon the plaintiffs to establish by a fair preponderance of the evidence such improper or unjustifiable motive on the part of the defendant, ..."

Sandora v. *Times Co.,* 113 Conn. 574, 580, 155 Atl. 819, 822; see *Proto* v. *Bridgeport Herald Corp., supra.*

Upon all the facts and appropriate inferences therefrom, I find that the plaintiff has not sustained his burden of proving that the defendant acted for "some improper or unjustifiable motive." The purpose of defendant's rewrite editor was to give the story a new freshness for the afternoon papers. This purpose may be contrasted with the purpose of the defendants in *Hogan* v. *New York Times Co.,* 313 F. 2d 354 (2d Cir. 1963) (purpose to ridicule plaintiffs for the entertainment of the public); *Proto* v. *Bridgeport Herald Corp.,* 136 Conn. 557, 72 A. 2d 820 (1950) (apparent intent to ridicule plaintiff); and *Wynne* v. *Parsons,* 57 Conn. 73, 17 Atl. 362 (1888) (purpose "to incite the plaintiff to pay [a] claim, and to amuse the public").

The rewrite editor may well have been careless in his choice of words in rewriting the story. "Improper lobbying" would have been a fair characterization of Veale's charges against the plaintiff; "illicit lobbying" was not. But this carelessness did not rise to the level of a reckless indifference to truth or falsity, sufficient to show malice or abuse of privilege. See *Charles Parker Co.* v. *Silver City Crystal Co.,* 142 Conn. 605, 116 A. 2d 440 (1955). This is

not a case in which a newspaper printed a story without making adequate inquiry of eye-witnesses, as was true in *Hogan* v. *New York Times Co., supra,* and *Corsello* v. *Emerson Bros.,* 106 Conn. 127, 137 Atl. 390 (1927). The rewrite was based on an eyewitness account: that of the writer of the original dispatch. As a result, there would have been little or no point in checking the story out with Veale or with the plaintiff. The only negligence on the part of the defendant was in Bender's choice of the word "illicit", and this choice was not so inaccurate as to be reckless.

Similarly, the plaintiff has not proven actual malice within the meaning of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), which held that the Constitution:

> 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.

376 U. S. at 279-80.

A preliminary problem under the *Times* case is whether the plaintiff is sufficiently akin to a "public official" so that he cannot recover without proof of actual malice. This question may be definitively answered when the Supreme Court decides *Rosenblatt* v. *Baer,* 106 N. H. 26, 203 A. 2d 723 (1964), *cert. granted,* 380 U. S. 941 (1965). However, such cases as have now been decided under *Times* suggest that the defendant may invoke the protection of the *Times* rule. Judge Friendly in *Pauling* v. *News Syndicate Co.,* 335

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F. 2d 659, 671 (2d Cir. 1964), *cert. denied,* 379 U. S. 968 (1965), indicated that it would be easy to extend the *Times* privilege from attacks on public officials to attacks on candidates for public office and thence to participants in public debate on issues of grave public concern. In *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2d Dep't 1964), *aff'd without opinion,* 15 N. Y. 2d 1023, 260 N. Y. S. 2d 29 (1965), a New York court held within the scope of the *Times* rule a lawyer in practice with a town mayor, where the allegedly defamatory statement charged that the mayor's law firm was practising in the town under circumstances showing a conflict of interest. Another New York court has held that a police lieutenant charged with needlessly killing a colored boy in a case which attracted widespread public attention was a "public official," and therefore had to prove actual malice before he could recover for libel. *Gilligan* v. *King,* 34 U. S. L. Week 2243 (N. Y. Sup. Ct. Oct. 29, 1965). In *Walker* v. *Courier-Journal,* 34 U. S. L. Week 2176 (Sep. 23, 1965), the District Court for the Western District of Kentucky held that General Edwin A. Walker, who had gone to the University of Mississippi during racial disorders there after making public appeals for support, became sufficiently a public figure so that he could recover for inaccurate reporting of his activities there only upon proof of actual malice. See also *Nusbaum* v. *Newark Morning Ledger Co.,* 86 N. J. Super. 132, 206 A. 2d 185 (1965) (raising but not deciding the issue whether a private witness who had voluntarily appeared before a congressional subcommittee investigating a matter of public concern could recover for inaccurate reporting of events related to that investigation without proof of actual malice). But see *Fignole* v.

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Curtis Publishing Co., 34 U. S. Law Week 2297 (S. D. N. Y. Nov. 23, 1965) (*Times* rule does not apply to Haitian politician); *Clark* v. *Pearson,* 34 U. S. L. Week 2338 (D. D. C. Dec. 20, 1965) (lobbyist need not prove malice in libel action against columnist).

The Supreme Court in the *Times* case stressed "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." 376 U. S. at 270. The public interest in full and free reporting of the activities of lobbyists need not be belabored. The plaintiff had gone before the state legislature as a paid representative of a group who would be affected by proposed legislation in order to voice the opinion of that group as to the proposed legislation. There is no question as to the legality of the plaintiff's conduct. Enlightened law-making can result only from a full presentation of the views of all interested parties. But there is a strong public interest which requires that this presentation of views be freely reported, to minimize the danger of clandestine influence, and to inform the public of this important stage of the legislative process. To paraphrase the *Times* opinion, a rule compelling the reporter of legislative hearings to guarantee the truth of all his assertions upon pain of libel judgments would deter the making of honest characterizations of lobbying activity which the public had a right to hear. A description of the behavior of lobbyists at a legislative hearing, in short, is qualitatively different from descriptions of activities not closely related to government, which classification, if inaccurate, may serve as the basis for damage recovery without proof of actual malice. See *Butts v. Curtis Publishing Co.,* 242 F. Supp. 390 (N. D.

Ga. 1964) (football coach at state university held not a public officer); *Faulk v. AWARE, Inc.,* 14 N. Y. 2d 954, 253 N. Y. S. 2d 990 (1964), *cert. denied,* 380 U. S. 916 (1965) (radio and television performer held not a public officer under the *Times* case).

As we have seen, the rewrite editor's choice of words may well have been careless. But as the Supreme Court said in *Garrison v. Louisiana,* 379 U. S. 64, 79 (1964), "the test . . . laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." The *Times* case itself tells us that proof of malice must be made "with convincing clarity." 376 U. S. at 285-86 (1964). Such proof is lacking here. Defendant's rewriter intended to freshen the original story for the afternoon papers; and if he erred in his nocturnal zeal, and unjustly cast aspersions on the plaintiff, his error was not of the magnitude to serve as the basis for the recovery of damages.

Judgment for the defendant. The findings of fact and conclusions of law appearing herein shall constitute the findings and conclusions as required by Rule 52(a) of the Rules of Civil Procedure.