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to continue to do so in the future to preserve the jobs and incomes of the union membership.[30]

The necessary adjustments in the present methods of international trade operation will be made to accommodate this new system. It is unfortunate that the loss of jobs and property is the price often paid for progress. But the gain in the form of cheaper, safer and faster transportation of goods more than offsets these losses, and demands the use of containers in the future.

30. "Port labor is determined not to be boxed in by the container . . . . The ILA . . . intends to see to it that, containers or no containers, the traditional work of the dock worker shall not be taken from him. And, furthermore, that he will have employment in all new work categories which substitute for his traditional functions." Address by Thomas Gleason, Baltimore Symposium on International Shipping, 1968, in CONTAINER NEWS, Dec. 1968, at 14.

United Medical Laboratories and Public Concern: A Judicial Mandate for Unlimited Extension of the Actual Malice Standard

Five years ago in *New York Times Co. v. Sullivan*[1] the Supreme Court determined the extent to which the first amendment limits a state's power to award damages in a libel action brought by a public official against critics of his official conduct. The Court held that public officials can recover only if "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[2]

The decision brought praise from civil libertarians, while skeptics cautioned that the holding would bring chaos and unpredictability to common law libel standards. One constitutional expert, Professor Harry Kalven, reasoned: "[The Court] may regard the [*New York Times*] opinion as covering simply one pocket of cases, those dealing with libel of public officials, and not destructive of the earlier notions that are inconsistent only with the larger reading of the Court's action. But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming."[3] Professor

1. 376 U.S. 254 (1964).
2. *Id.* at 279-80.
3. Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221. Even if the "invitation to follow a dialectic progression" from "public official" to related areas was not followed, the extent of the "public official" class was shown to be practically unlimited in Rosenblatt v. Baer, 383 U.S. 75 (1966). There the Court felt the status of public official would apply even to a ski lodge superintendent employed by the state.

Kalven's prediction has come true. The analogy between a public official and a public figure was drawn by the Court in *Curtis Publishing Co. v. Butts,* and its companion case *Associated Press v. Walker.*[4] Earlier the Court had inferred that a "public interest" standard based on newsworthiness may be the proper ambit for the *New York Times* standard in *Time, Inc. v. Hill*;[5] however, this inference comes only from dicta, since the *Hill* holding was specifically limited to declaring the New York right of privacy statute[6] inapplicable in the given fact situation.

Although these cases have indicated what general course the Supreme Court wishes to take in the libel field, one important question remains unanswered: at what point does the first amendment prevent state libel law from remedying harms caused by speech? In other words, what individuals are precluded from suing, without proof of actual malice, persons who publish or transmit statements damaging to their reputation? This question has been partially answered by the Supreme Court, and where the Court has been silent or ambivalent, both federal and state courts have interpreted. These new interpretations will be examined, with attention given to whether recent decisions have solved problems or further complicated them.

The United States Court of Appeals for the Ninth Circuit recently extended the *New York Times* concept in *United Medical Laboratories, Inc. v. CBS.*[7] United Medical Laboratories based its libel claim on a series of CBS television broadcasts describing the inaccuracies of 22 mail-order laboratories in testing various clinical specimens submitted by the broadcasting company. The broadcast concluded that the inaccuracies created a danger to the public health and that public regulation might be required. Although United Medical was not mentioned by name, it claimed that the report referred to all mail-order laboratories, and specifically to United Medical because of its prominence in the industry, thus bringing public scorn to the company and resulting in injury to its business and reputation.

The district court dismissed United Medical's claim under Oregon law,[8] and the court of appeals affirmed, but on constitutional grounds. The court of appeals reasoned that it is not the public figure status of the plaintiff so much as the "public interest" in the subject matter of the alleged libel that is crucial in determining when the right of free speech precludes recovery, unless there is a showing of actual malice.[9]

The Ninth Circuit cited a recent New York decision which had first used the public concern dialectic in commercial libel actions. In *All Diet Foods Distributors, Inc. v. Time, Inc.*,[10] a New York supreme court concluded that public issues and interests involved in the diet food industry precluded recovery by plaintiff unless actual malice could be proven. The Ninth Circuit felt the concern for public health was equally important in the clinical testing field. By its own statement, the *United Medical* court anticipated the Supreme Court's extending the actual malice standard: "unless all

4. 388 U.S. 130 (1967).
5. 385 U.S. 374 (1967).
6. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1948).
7. 404 F.2d 706 (9th Cir. 1968), *cert. denied,* 37 U.S.L.W. 3352 (March 24, 1969).
8. United Med. Labs., Inc. v. CBS, 258 F. Supp. 735 (D. Ore. 1966).
9. United Med. Labs., Inc. v. CBS, 404 F.2d 706, 712 (9th Cir. 1968).
10. 56 Misc. 2d 821, 290 N.Y.S.2d 445 (Sup. Ct. 1967).

other areas, not merely those of legitimate general interest but also those of affecting personal concern to the public, are to be artificially ignored, we are not able to see how the path upon which the Court has been moving can be regarded as having reached an end."[11] Apparently the Ninth Circuit considered it imperative to enter the public concern domain, but now the public concern must be defined, along with its impact and necessary limitations in affecting the libel area.

Impact of the Public Concern Test

United Medical is likely to have as much impact in extending the actual malice standard as the *Butts, Walker,* and *Pauling v. Globe-Democrat Publishing Co.* decisions.[12] At least one state court has been quick to use the principle set forth in *United Medical.* In *Doctors Convalescent Center, Inc. v. East Shore Newspapers, Inc.*,[13] the plaintiff corporation operated a nursing home for the ill and infirm. Among its patients were mentally retarded children, some of whom were wards of the state. The allegedly libelous newspaper accounts gave a detailed description of conditions at the home and its operation: these included lack of supervision and adequately trained personnel, acts of cruelty toward the patients, and lack of medical attention. The court held that the state has great interest in the institutionalization of mentally retarded children, and that while not all of the patients were wards of the state, the public interest is equally great in all persons so afflicted. Therefore, for the convalescent home to recover, the public interest involved necessitated that it prove actual malice.

The addition of the public interest concept to the *New York Times* doctrine will limit commercial enterprises from indiscriminately suing those who investigate and report on industrial conditions that may endanger the public health. Interestingly enough, although it was said that the Supreme Court in *New York Times* was responsive to pressures created by the civil rights movement,[14] the courts may now be recognizing that the public should be protected in all matters concerning its welfare.

Failure to provide a strict limitation on plaintiff's ability to recover by requiring proof of actual malice would curtail the news media from investigating matters that the public must know for its own protection. *United Medical, Doctors Convalescent Center,* and *All Diet Foods Distributors* are similar in that the plaintiff in each was a commercial institution involved in matters affecting public health. The impact of the public concern standard need not, however, be limited to commercial entities. Non-

11. United Med. Labs., Inc. v. CBS, 404 F.2d 706, 711 (9th Cir. 1968).

12. Public figure status has included: Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967) (college football coach); Associated Press v. Walker, 388 U.S. 130 (1967) (retired Army general); Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967) (prominent trial court attorney); Pauling v. Globe-Democrat Publ. Co., 362 F.2d 188 (8th Cir. 1966), *cert. denied,* 388 U.S. 909 (1967) (world renowned scientist); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *prob. juris. noted,* 37 U.S.L.W. 3133 (U.S. Oct. 15, 1968) (No. 48) (professional baseball player); Grayson v. Curtis Publ. Co., 72 Wash. 2d 985, 436 P.2d 756 (1967) (college basketball coach).

13. ....Ill. 2d...., 244 N.E. 2d 373 (1968).

14. Kalven, *supra* note 3, at 192.

commercial entities participating in matters of public concern should also be required to prove actual malice in an ensuing libel suit, for the standard merely presupposes the existence of public concern and is not conditioned on the commercial status of the plaintiff.

Rationale for the Public Concern Standard and Proper Limitations

First amendment protections should include both public concerns and the traditional political concern. *New York Times* declared that freedom to criticize government "robustly"[15] is the central freedom protected by the first amendment, so that libel claims by government officials require close scrutiny. Under the public concern test, the same restrictions would extend to any libel claim based on plaintiff's activity in an area of public concern.

If the courts are to extend the protection already afforded to news media in the libel area, it need not take on the dangerous attributes of a "newsworthiness" standard mentioned by Justice Brennan in *Hill*: "[T]he vast range of published matter . . . exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[16] Newsworthiness must be equated with public concern and should not be an all-encompassing standard that allows anything which is published to come under the "actual malice" requirement. Even though the courts have extended earlier concepts, precedents in the commercial libel field need not protect speech or writing concerning the personal life of an executive of a commercial business. The private lives of employees, unconnected with the interest owed to the public by the business, must be protected no matter how "newsworthy."[17]

For example, one area of public concern would be the automobile industry and the safety of its products. The danger inherent in producing defective automobiles compares with the danger in performing inaccurate clinical tests. However, the president of an automobile company need not prove actual malice if the libelous comment concerned only his personal life, and there existed no nexus between the statements and the production of unsafe automobiles. On the other hand, if there *is* a connection between his activity and the production of unsafe automobiles, actual malice should be the standard. Here, the public has a legitimate concern.

The Public Forum Test and Its Consequences

Recently several courts have discussed the limitations on a public concern standard. Although these decisions preceded *United Medical,* they will be examined to evaluate

15. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
16. 385 U.S. 374, 388 (1967).
17. New York Times Co. v. Sullivan, 376 U.S. 254, 293-97 (1964) (concurring opinion). Mr. Justice Black and Mr. Justice Douglas, looking at the absolute language of the first amendment, would not make such a distinction, but would consider all such speech protected under *New York Times.*

whether the public concern was sufficient to impose an actual malice standard. In *Bon Air Hotel, Inc. v. Time, Inc.*,[18] an Augusta, Georgia hotel sued Time Incorporated for its depiction of the hotel as being dirty, unkempt, and "white-washed." The article referred to the living quarters offered by the hotel during the Masters Golf Festival each April. Time argued: (1) the hotel was a public accommodation and thus should be classified as a public figure, and (2) the hotel business is of such public concern as to warrant proof of actual malice. The district court held that while the plaintiffs in *Butts* and *Walker* had public activities sufficient to give them an opportunity to rebut the allegedly libelous statements to an interested public, the hotel did not have such access nor was it of sufficient news value. (The difficulties caused by insistence that the plaintiff have access to a public forum before an actual malice standard is imposed will be discussed later.)

Perhaps extending the public figure concept to a hotel is unrealistic; however, public accommodations which service thousands of traveling and vacationing citizens each year are of public concern. In light of the importance of the Masters Tournament to the many golf enthusiasts who attend the tournament each year, a description of the accommodations would appear to be of sufficient public concern under *United Medical.*

The problem with *Bon Air* was its acceptance of the public forum argument. For the court, the issue of whether to apply the actual malice standard was determined by the fact that the hotel did not have access to a public forum to reply to its critic. This reasoning, however, is tautological: the *sine qua non* of a public figure is that he *does* have access to a public forum; conversely, a non-public figure has no such access. Therefore, all that the court really concluded was that the hotel was not a public figure, and the question of whether the hotel was a figure of public concern should have remained open. Access to a public forum, while important in public figure cases, should be irrelevant in public concern cases. Indeed, to use such a test of whether to apply the actual malice standard in a public concern case where the plaintiff has previously been anonymous is to foreclose the case against the defendant.

This error in reasoning has found its way into other cases. In *Rosenbloom v. Metromedia, Inc.*,[19] a radio station had branded a dealer in nudist magazines a "smut distributor" in news reports on police raids and subsequent judicial proceedings. The district court held that since he had no public figure status or meaningful access to news media to protect his reputation, he need only prove libel under state law and not actual malice to recover from the radio station. The court did not deny that the suppression of crime in the sale of obscene literature is a matter in which the public has a justified and important interest, but felt, as did the *Bon Air* court, that access to means of public rebuttal of libel charges is an important factor in determining whether the *New York Times* rule should be invoked.[20] *Rosenbloom* appears wrong

18. Bon Air Hotel, Inc. v. Time, Inc., Civil No. 1171 (S.D. Ga., Dec. 23, 1967), *aff'd,* Civil No. 9446 (5th Cir., Apr. 30, 1968), *cert. denied,* 393 U.S. 859 (1968) (Mr. Justice Black and Mr. Justice Douglas dissenting). The facts of the case are partially stated at 376 F.2d 118 (5th Cir. 1967).

19. 289 F. Supp. 737 (E.D. Pa. 1968).

20. *Id.* at 742.

under the public concern standard stated in *United Medical.* The public's concern with the type of literature being sold by book distributors calls for the free flow of ideas and opinions. Any standard less than actual malice would jeopardize the public debate of such an important issue.

In a later decision, the Fifth Circuit, in *Time, Inc. v. McLaney,*[21] reversed a denial of summary judgment for defendant in a situation in which the court felt that the constitutional privilege extended to publishers reporting on matters of important public concern. McLaney had actively participated in an election campaign in the Bahamas. He had supported the efforts of the reform government through substantial campaign contributions, thereby directly influencing the national election. McLaney sued Time because of its assertion that he was a professional gambler. The court equated plaintiff with General Walker because he had thrusted his personality into the "vortex" of an important public controversy.[22] The court affirmed summary judgment on the basis of plaintiff's failure to prove "actual malice." McLaney was considered a public figure because his activity in the foreign election was of public concern.

The *McLaney* court seems to have concluded that constitutional privilege extends to activities of individuals not associated with a government in an official capacity but involved in matters of important public concern. The court thereby blurred the distinction between public figure and public concern, for McLaney was not a public figure in the sense that Butts or Walker were, but rather resembled Rosenbloom in his personal anonymity prior to defendant's allegedly libelous statement. A plaintiff need not be a public figure to affect the public concern; United Medical Laboratories was not a public figure prior to the CBS broadcasts. The *United Medical* court did not have to artificially label plaintiff as a public figure to activate the actual malice standard. The *McLaney* court should not have weakened its opinion by asserting plaintiff was a public figure, but should have concluded that the actual malice standard applies because the particular facts indicated the subject matter giving rise to the suit was of public concern.

Conclusion

The *United Medical* decision appears to complete the cycle from public official to public figure to public concern. If public concern can extend the *New York Times* doctrine into matters concerning mail-order testing laboratories, convalescent homes for the aged and ill, and the diet food industry, it is hard to escape the expansion of the doctrine into public accommodations, and other matters of public concern in which a non-public figure may participate. In this highly technological and mobile age, where the public health and safety depend on factors that are often hidden or distant, these extensions are desirable.

But to allow the plaintiff to assert as a defense to the defendant's invocation of the actual malice standard the former's non-access to a public forum in cases where the alleged libel involves a matter of public concern, defeats the public concern extension.

21. 406 F.2d 565 (5th Cir. 1969).
22. Associated Press v. Walker, 388 U.S. 130, 155 (1967).