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Constitutional Law—Defamation—Misstatements of Fact about Public Figure Privileged

Defendant corporations published news items received from national wire services reporting involvement of the plaintiff, former Major General Edwin A. Walker, in riots at the University of Mississippi. The stories stated that the plaintiff had led a charge of rioters against United States marshals who were present to enforce court orders requiring integration of the university. In *Walker v. Courier Journal* the United States District Court for the Western District of Kentucky dismissed the complaint with prejudice, holding that it could not be sustained constitutionally under the ruling of *New York Times Co. v. Sullivan*. The *Sullivan* case held that the first amendment guarantee of free speech prohibits a public official from recovering damages for defamatory misstatements of fact relating to his official conduct unless he can prove the statements were made with actual malice. The *Walker* court found that the Supreme Court did not intend that the rule be limited to public officials, but must be extended to “public men” as well. The court held that by injecting himself into an issue of national concern the plaintiff had brought himself into the category to which the rule should apply. Concluding that the defendants had a right to rely on the news-gathering agencies and were not obligated to check the facts contained in the reports, the court ruled that there could be no basis for a finding of actual malice in republishing the reports.

The *Walker* court found justification for the extension in what it found to be the import of the *Sullivan* decision. Two passages from *Sullivan* were especially relied upon. The court pointed to a footnote to the holding in which the Supreme Court suggested that

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3 *Ibid.* In order to show actual malice the plaintiff must prove a knowing falsehood or the reckless disregard of whether the statement was true or false. *Id.* at 279-80.
4 The widespread publication of the same statements in other newspapers as shown by the suits Walker had pending in other jurisdictions was also treated by the court as evidence of the lack of malice. See *New Orleans Times-Picayune*, Oct. 30, 1965, § 1. p. 3, col. 1.
it would leave to later decisions the question of how far the rule would be extended, implying to the *Walker* court that it would be stretched beyond public officials. The court also relied on a quotation in *Sullivan* of dictum from *Coleman v. MacLennan*, a declaration that the "privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office." "*Coleman*, which was quoted extensively in *Sullivan*, is the leading case for the rule of a minority of American jurisdictions that before *Sullivan* had adopted a qualified privilege protecting misstatements of fact about public officials and candidates for office. This rule had not received wide acceptance before being approved by *Sullivan*, and only in scattered and seemingly unrelated decisions within the minority had it been extended beyond public officials and candidates. Like *Sullivan*, the *Coleman* rule repre-

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8 "We have no occasion here to determine how far down into the lower ranks of governmental 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." 376 U.S. at 283 n.23. (Emphasis added.) It could be argued that rather than implying that the rule is to be extended beyond public officials, the Court is simply saying it did not need to determine at that time who would or would not be included in the category of public official.

9 78 Kan. 711, 98 Pac. 281 (1908).

10 Id. at 723, 98 Pac. at 285.


9 E.g., Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N.W. 974 (1925); But see Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d 837 (1943). There the court limited the rule to criticism of the official acts of public officials.

10 These cases are of little help as background for a "public man" rule because they are usually based not on any policy considerations but on a misreading of prior cases or a confusion of privileges. In *Crane v. Waters*, 10 Fed. 619 (D. Mass. 1882), the court granted the privilege to statements made about the plaintiff's attempted takeover of a railroad, but it supported its holding by citing cases involving completely distinct privileges of fair comment and the right to make an accurate report of legislative proceedings. In *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411 (1896), where the criticism was made of the plaintiff's construction of a public building, the court granted the privilege as one falling into the category of the right to communicate information to one who has an interest in the subject matter, but it was limited by *Pattangall v. Mooers*, 113 Me. 412, 94 Atl. 561 (1915). Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955), cited *Crane v. Waters*, *supra*, *Bearce v. Bass*, *supra*, and cases dealing with other privileges in denying recovery to a corporation president.

If there is a leading case for this minority within the minority, it is probably *McLean v. Merriman*, 42 S.D. 394, 175 N.W. 878 (1920), in
sented a determination by the courts that the right of the official or the candidate to a truthful report of his activities is outweighed by the right of the public to free discussion of those who govern or wish to govern it. By extending the rule, the *Walker* court has declared that this right to free discussion applies also to men who are attempting to influence the opinion of the public about a subject in which it has an interest.

An extension of the rule beyond *Sullivan* to the *Walker* situation must be justified by the first amendment. Ideally, the task that would befall the courts would be to formulate a definition of "public man" that would insure a maximum freedom of speech not only for the critic but for the public man himself. The courts must formulate standards by which it will be possible to ascertain when a plaintiff has brought himself into the class of public men. Two criteria were adopted in *Walker*. The court first found that the subject matter of the news reports was of "grave national concern" and therefore a legitimate issue for widespread public discussion. It then found that the plaintiff had injected himself into this issue and had "interwoven his personal status into that of a public one whereby he . . . [became] the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be 'erroneously' reported." In balancing private interests in reputation against first amendment guarantees, a court applying a "public man" rule may be faced with two determinations not present in *Sullivan*: the value of free public discussion of the particular issue, and the extent to which the plaintiff will be deemed

which the statements charged that the leader of a campaign against a woman-suffrage amendment was allied with the liquor interests. The court held that the plaintiff stood much in the position of a candidate for public office and that any information about the forces back of the campaign was a matter of public interest and concern and therefore was privileged.

31 Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908).

32 The status of "public man" should have no relation to the extent to which the defamation itself has created controversy or placed the plaintiff's name before the public. But see Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955). There, plaintiff was a corporation president, and in connection with a municipal election campaign defendant stated falsely that plaintiff's business was closing and 1000 jobs were to be lost. The court found that plaintiff as a corporation president was a public man and that a loss of jobs was an issue of public interest. Quaere: Should the defamation be privileged if the threatened loss of jobs was an issue of the defendant's own invention?

246 F. Supp. at 234.
to have waived protection against damaging misstatements by projecting himself into the issue.

A rule which requires the courts to determine the interest the public has in the discussion of the issue may be as difficult to standardize into a working definition as the concept of obscenity has been for the Supreme Court. As long as the first amendment is not deemed to preempt the law of libel completely, however, some such limitation will have to evolve.

An inseparable part of this requirement of a "public issue" is a determination that the individual criticized has participated in the issue. The courts may be aided by the pre-Sullivan cases applying privileges to criticism of persons in the public eye. The qualified privilege protecting misstatement of fact about officials and candidates has often been confused with the fair comment privilege by the courts. The fair comment privilege arose originally as an immunity for criticism of literary works. Later, when the value of free discussion of the government was accepted, it was extended by analogy to criticism of government officials. As such, it has protected comment and opinion only, not misstatement of fact, and the jury has had the burden of distinguishing fact from opinion. The misstatement-of-fact privilege has antecedents different from those of fair comment; its principle justification is by extension from the privilege allowing falsehoods when the person to

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15 It is unclear whether even Mr. Justice Black, applying his theory that the first amendment is an "absolute," would conclude that no defamation is ever actionable. See Leflar, The Free-ness of Free Speech, 15 Vand. L. Rev. 1073, 1079-80 (1962). For an "absolutist" approach that would exclude private libels see Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 259.
16 Whether fair comment is a privilege or whether statements subject to the fair comment rule are not defamatory at all is a question that is still debated. See 41 N.C.L. Rev. 153, 154-55 (1962).
18 Hallen, Fair Comment, 8 Texas L. Rev. 41, 53 (1929); Veeder, Freedom of Public Discussion, 23 Harv. L. Rev. 413-14 (1910).
19 In the early nineteenth century criticism of government officials was still severely inhibited by libel laws while criticism of literary works was privileged. See Holt, Libel 96, 213 (Am. ed. 1818).
20 Hallen, supra note 18, at 53; Veeder, supra note 18, at 414.
21 RESTATEMENT, TORTS § 606(1), comment b (1938).
22 Id. § 618.
whom the publication is made has a protectible interest in the facts communicated.\(^{23}\)

Fair comment, like the misstatement-of-fact privilege, is to a great extent a recognition of the public interest in free discussion,\(^{24}\) but in many cases there are other weighty considerations that move the courts to invoke fair comment. The court may conclude in a particular case that one who submits himself to public scrutiny for profit or for personal gratification should not complain when the reaction is not to his liking since he is in effect asking to be judged.\(^ {25}\) Further, the court naturally hesitates to enter the field of literary, artistic, or political criticism by attempting to set up standards by which to determine the justification of damaging opinion.\(^ {26}\) Neither of these arguments has much force in the typical case of misstatement of fact concerning a public official or candidate for office. The public official or candidate is asking to be judged in an even more literal sense than the artist, and the right to fair comment applies to his critics with equal or greater force. By inviting opinion he is risking his reputation, but it does not follow that he is courting misstatements of fact simply by taking a public stand. Misstatements may be more likely to occur, but this is because of the public interest in reporting his activities. In that sense, the simple fact that he has submitted himself to public scrutiny bears no logical relation to the misstatement privilege. Indeed, the facts of his public activities are more easily accessible because they are public.

The second argument buttressing the right to fair comment, that the court’s opinion is no more correct than the critic’s, is also largely inapplicable to the misstatement privilege. Granting the practical and theoretical difficulties of distinguishing fact from opinion,\(^ {27}\) the court still is more justified in allowing the jury to determine that a fact is true or false than that an opinion is reasonable or unreasonable.

The public figure concept that gives rise to a privilege in the

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\(^{24}\) See generally PROSSER, TORTS § 110 (3rd ed. 1964); 1 HARPER & JAMES, TORTS § 5.28 (1956); RESTATEMENT, TORTS §§ 606-07 (1938).


\(^{26}\) See, e.g., Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 137, 95 N.E. 735, 740 (1911).

\(^{27}\) See Noel, supra note 8, at 878-80.
right-to-privacy cases is similar to fair comment in that it includes not only those who abhor publicity but must suffer it because of the public interest involved (i.e., the criminal), but also those who have sought publicity and for whom a claim to a right of privacy would be therefore contradictory.  

The definition of "public man" for the purpose of extending the Sullivan rule presumably would be narrower than that applied to fair comment and the right to privacy. It would be based on public interest and only insofar as that interest is protected by the first amendment. The extent to which a plaintiff is known should be weighed only in determining the public interest in discussing his activities. The criticism engendered by his public stand must fall within the purview of the first amendment's assurance of the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."  

In a New York case, Dempsey v. Time Inc., the court refused to extend the Sullivan privilege to a magazine article containing defamatory material about one of the famous prizefighter's bouts. The court was of the opinion that public interest in discussing a sports event of forty years ago was not sufficient to be protected by a first amendment privilege. 

Another consideration that must be weighed in a judicial formulation of a "public man" rule is the possibility that a broad privilege will inhibit public discussion rather than encourage it. The classic objection to the Sullivan privilege as it existed at the common law was that such a rule would tend to discourage qualified people from

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31 Cf. Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964). There a famous baseball pitcher was granted an injunction against publication of a fictionalized biography on the grounds that it invaded his right of privacy. The court rejected any application of the Sullivan rule. But cf. Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964) (dictum). There, the statements were made about the pacifist beliefs of a renowned scientist. The court suggested that had it not held for the defendant on other grounds it would have done so by application of Sullivan. Gilberg v. Goffa, 21 App. Div. 2d 517, 251 N.Y.S.2d 186 (Sup. Ct. 1964). In this case the defendant suggested that the mayor permitted a conflict of interest in allowing members of his law firm to practice before the city court. Plaintiff, a member of the firm, was denied recovery on the alternate grounds that he was not sufficiently identified as one to whom the damaging statements referred and that his position was so closely related to that of the mayor as to make him a "public official" within the meaning of the rule in Sullivan.
If this argument seems to underestimate the mettle of American politicians, it becomes more relevant when applied to the public man or the potential public man. If the rule is limited to include only those who wield great power and influence, there would seem to be no danger, but if every writer of letters to the editor or soapbox speaker becomes subject to massive and permissively irresponsible criticism by the press for which he has no legal redress, there may be fewer such people. The first amendment may cut two ways; it should not be interpreted so as to inhibit the public man any more than his critics. In *Barr v. Matteo* the Supreme Court held that the head of a federal executive department had an absolute privilege against a libel action for a publication within his official discretion. Mr. Chief Justice Warren's dissent pointed out that this holding created an imbalance likely to limit public discussion, since there was no generally corresponding privilege accorded to critics of executive officers. In a sense the *Sullivan* case restored the balance and even extended it, since criticism of all public officials is privileged. The question arises whether a privilege protecting misstatements about public men requires some sort of re-balancing of rights that will protect the interests and free speech rights of one who may be a public man. If the rule is extended, will it provide the balance within itself, so that whoever criticizes the public man will automatically become a public man himself and subject to the rule? Granted that it will, the right to counterattack hardly seems a realistic remedy to some classes of persons who could conceivably be deemed public men.

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33 See Coleman v. MacLennan, 78 Kan. 711, 733-34, 98 Pac. 281, 289 (1908); Noel, supra note 8, at 895.
35 Id. at 578.