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Constitutional Law - Libel - New York Times Rule Extended to Statements Made About Matters of Public Concern

Stanley J. Davidson

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In a series of articles published in December, 1961, Norma Lee Browning, a feature reporter for the Chicago Tribune daily newspaper, reported the findings of an investigation which she conducted concerning the practice of medical quackery in Chicago. She described Mrs. Myrtle S. Farnsworth, an osteopathic physician, as being one of these quacks and attempted to expose her to the public as a person totally lacking in medical skill and dangerous to the public health. In order to reveal Dr. Farnsworth's ineptitude, Miss Browning pointed out that Dr. Farnsworth professionally associated herself with only the most unethical persons, used a fraudulent machine which allegedly could be "plugged" into a person and diagnose his ailments, and was possessed of "a long and colorful record of hocus pocus activities." Dr. Farnsworth brought a libel action in the Circuit Court of Cook County against Miss Browning and the Tribune Company alleging that she had been defamed. The plaintiff requested one million dollars for the loss of her successful practice and one million dollars exemplary and punitive damages.

The plaintiff maintained that the defendants had maliciously published false statements, or alternatively, that even if the statements were true, the case was controlled by section 4 of Article II of the Illinois constitution which makes truth a defense in a libel action only when published with good motives and for justifiable ends. Conversely, the

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1. The articles were entitled: Cruel Racket Bared: Quacks Gyp Thousands; Network of Fakery: Quacks Get Together to Cheat The Ailing; Quacks and Phony Cures: Loop Crawling With Them. A quack is defined as a fraudulent or ignorant pretender to medical skill; a person who pretends professionally or publicly to skill, knowledge or qualifications which he does not possess; presented falsely as having curative powers. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966).

2. Osteopathic physicians are professionally trained and licensed to practice medicine and are capable of rendering complete health care for their patients. In this respect they are no different than medical doctors. Interview with Albert F. Kelso, Professor, Chicago College of Osteopathy, March 30, 1970. However, osteopathic treatment places chief emphasis on body manipulation, although it sometimes also includes generally accepted medical and surgical methods of diagnosis and treatment. In many states osteopaths are limited by law to treating patients only by manipulative methods, but in some states they may also undertake surgical procedures and prescribe medicine. M. FISHEIN, THE MODERN FAMILY HEALTH GUIDE, p. 804 (1959).

3. Dr. Farnsworth held a limited license in Illinois and consequently was not authorized to practice surgery, prescribe drugs, give injections or read X-rays. Appellees Additional Abstract of Record at 13-15.

defendants contended that the articles were a privileged exercise of the right to publish the truth recognized at common law as well as under the free speech and press guarantees of both the Federal and Illinois Constitutions.\footnote{5}{U.S. CONST. amend. I; ILL. CONST. art. II § 4.}

The trial judge instructed the jury that if it found that the articles dealt with a matter of public interest, the plaintiff could recover only upon showing that the articles were false and were published with actual malice.\footnote{6}{The instructions stated: \par If you find that the defendants' articles are about a subject of public interest and concern, then the plaintiff has the burden of proving that the statements about her in the defendants' news articles were in fact false, and that the statements were written and published by the defendants with actual malice towards the plaintiff. Appellant's Abstract of Record at 45.} The tendered instruction made truth an absolute defense, and shifted the burden of proof formerly on the defendants to prove that the articles were true and well motivated, and required the plaintiff to prove that the articles were false. This instruction was, therefore, in direct conflict with section 4 of Article II of the Illinois constitution. The trial court held for the defendants and a direct appeal was taken to the Illinois Supreme Court because of the presence of constitutional questions. The petitioner sought reversal on the grounds that the instructions given to the jury were erroneous since they were incompatible with the Illinois constitution.

The Illinois Supreme Court affirmed the circuit court's decision,\footnote{7}{Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969).} holding that the jury instructions given were an accurate statement of what the law of libel must be in order to comply with the United States Supreme Court's interpretation of the scope of the First Amendment of the United States Constitution. That Court had stated that the freedoms of speech and press guaranteed to citizens of the states by the First Amendment through the Fourteenth Amendment impose restrictions upon each state's ability to afford remedies for defamatory statements. The Farnsworth court interpreted these restrictions to include a requirement that alleged libelous statements which have been published concerning public issues or matters of public concern be protected by the First Amendment. This protection is afforded by making truth an absolute defense, and by placing the burden of proof upon the plaintiff to show that the matters published were false and were published with actual malice. Consequently, section 4 of Article II of the Illinois constitution is federally unconstitutional to the extent that it would require a defendant who has published statements about public

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affairs to prove that they were true and were published with good motives and for justifiable ends.

The court further stated that because the public has an important and justified interest in the field of public health, articles concerning the field are matters of public concern and entitled to constitutional protection. Thus burdened with proving the falsity of the publication and actual malice on the part of the publisher, Dr. Farnsworth was unable to recover.

The decision in *Farnsworth* is significant for two reasons. First, it is a clear adoption of the position that all published statements concerning matters of public interest are constitutionally protected. The Illinois Supreme Court decided that the constitutional protection of certain statements no longer depends on a public official or public figure nomenclature. Rather the controlling question now is whether the publication concerns a matter of public interest. Secondly, the "truth plus motives" defense in the Illinois constitution has been ruled federally unconstitutional where a public issue is involved. This is particularly significant since at the present time Illinois has convened a Constitutional Convention which is in the process of rewriting the 1870 constitution. The Convention must now decide what changes, if any, in the free speech and press section of the Illinois Bill of Rights are necessitated by *Farnsworth*.

Although the United States Supreme Court has not yet directly adopted the public issue test, it has intimated such a standard in its recent decisions developing constitutional protection for certain false statements. Prior to 1964, false statements made by private citizens were not protected by the Federal Constitution. However, in the landmark decision of *New York Times Co. v. Sullivan*, certain libelous statements published by private individuals were afforded constitutional protection. In that case the plaintiff, who was the elected supervisor of the Montgomery, Alabama, police department, alleged that he had been defamed when a civil rights advertisement in the *New York Times* accused the department of harassment of the local civil rights movement. The Court held that the public has a right, protected by the First Amendment, to vigorously criticize a public official's discharge of his official duties. The public's right to have all of the facts neces-

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10. Although the article did not directly refer to the plaintiff he contended that the word "police" in essence referred to him since he supervised all police activities. *Id.* at 258.
sary to have such robust debate cannot be adequately safeguarded unless innocent error is protected. Under any other rule:

[W]ould-be critics of official conduct may be deterred from voic-
ing 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.11

In order to fully protect the right to criticize public officials, the Court held that a public official cannot recover in a libel action based upon statements made about his official conduct unless he shows that the statements were false and were published with actual malice. Actual malice was defined as knowledge that the statement was false or was published with reckless disregard of whether it was true or false.12

Although the New York Times decision involved a public official, the opinion contained some indication that constitutional protection was not to be limited to statements made about individuals holding some type of public position.13 Liberal reference was made to a broader protection than that which the Court afforded in its decision. "Freedom of expression upon public questions is secured by the First Amend-
ment,"14 and "debate on such public issues should be uninhibited, robust and wide open."15 (emphasis added).

In Garrison v. Louisiana,16 the Court extended the New York Times rule to cases involving criminal libel. Although public officials were involved,17 the Court again made reference to public issues:

Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned . . . . For speech concerning public affairs is more than self-expression, it is the essence of self government.18 (emphasis added).

The Garrison decision was followed by Rosenblatt v. Baer19 in which a retired supervisor of a county-owned recreational facility was found to be a public official and, thus, the New York Times rule applied. The Court stated that one of the motivations for the New York Times decision was the public's strong interest in debate on public issues.20

11. Id. at 279.
12. Id. at 280.
13. The court stated that there was no need at that time to determine the boundaries of the official conduct concept. Id. at 283 n.23.
14. Id. at 269.
15. Id. at 270.
17. District Attorney Jim Garrison was criminally charged for accusing certain state court judges of his parish of laziness, inefficiency, and of hampering his efforts to enforce the vice laws. Id. at 65, 66.
18. Id. at 74, 75.
20. Id. at 85.
Indeed the very thrust of *New York Times* is that when interests in public discussion are particularly strong, the Federal Constitution limits the protections afforded by the law of defamation.\(^{21}\) Justice Douglas, in a concurring opinion, expressed the core of the matter in his suggestion that the sole question should be whether a public issue, not a public official is involved.\(^{22}\)

In 1967, the *New York Times* rule was extended to invasion of privacy cases in *Time, Inc. v. Hill*.\(^{23}\) In that case the Court indicated that when a plaintiff whose activities have become a matter of public concern sues for invasion of privacy, he can recover only by showing falsity coupled with actual malice. It must be emphasized, however, that there were no public officials involved in that case, only a private family which had been involuntarily thrust into the public limelight when escaped convicts broke into their home and held them hostage. The Court stated that their private character did not preclude an adoption of the *New York Times* actual malice test and, in fact, was necessary in order to protect the public’s right to information concerning newsworthy matters and matters of public interest.\(^{24}\)

In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,\(^{25}\) the Court ruled that criticism of “public figures” should also be given constitutional protection. The public figure classification includes persons whose position in the community creates public interest and those who thrust themselves voluntarily into an area of public controversy. Once again, while extending constitutional protection to statements made about public figures as well as public officials, some of the Court’s language was phrased in a public issue context:

> The dissemination of the individual’s opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an ‘inalienable right’ that governments are instituted among men to secure.\(^{26}\) (emphasis added).

Finally, in *Pickering v. Board of Education*,\(^{27}\) the Court again fo-
cused upon the importance of discussing public issues. It held that a public school teacher could not be removed from his teaching position for making erroneous statements about issues which are the subject of public attention. He could only be expelled consistent with the First Amendment upon the adducement of evidence that he had made a false statement with actual malice.

One dominant rationale emerges from the foregoing cases. The First Amendment guarantees to the public the right to fully discuss and criticize the important issues of the day. The Court has continually cited one statement which capsulizes this theme:

"Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."  

In order for these issues to be vigorously debated it is essential that innocent error be protected. Any other rule would restrain discussion of public matters, since the only information which would be ultimately published would be that which had first been determined to be completely true. Even if the statements were true there would be reluctance to publish them for fear that proving their veracity in court would either be too difficult or too expensive. Consequently, the "breathing space" which is essential in order to protect free speech would be eliminated, and a system of self censorship would be imposed.

The public official and public figure tests are not sufficient to protect vigorous discussions concerning all public matters. First, there are some public officials who should not have the burden of proving falsity coupled with actual malice because of limited public interest in their official activities. However, of greater consequence is the fact that there are private individuals who are neither public officials nor public figures but whose activities are of great public concern. Statements concerning such persons should also be given constitutional protection. An excellent example is provided in the Farnsworth case. Criticism of an alleged incompetent medical practitioner should be afforded constitutional protection because of the danger that that person poses to the public. Certainly society can be injured as severely by such a person as it could by a public official who is guilty of nonfeasance or misfeasance. The better test is one in which the primary consideration is whether a public issue is involved.

29. In New York Times Co. v. Sullivan, supra note 9, at 271 the Court stated: That erroneous statement is inevitable in free debate and that it must be protected if freedoms of expression are to have the breathing space that they need to survive has been established.
30. There has been much written about a public issue test and the majority of
Despite these advantages of a public issue test, some critics see it as obliterating protection of the individual's reputation.\(^{31}\) One of the motivating reasons for adopting the public official and public figure tests is because these persons have ready access to communications media. Therefore, they can more effectively counter criticism directed at their activities. The rationale that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies,"\(^{32}\) thus prevails. However, opponents of the public issue rationale argue that where a private individual is involved, he does not have access to the communications media, and thus is precluded from answering the charges made against him. This argument has been substantially weakened because of the vast efforts made by the media to provide "equal time" to persons who wish to rebut statements made on radio and television.\(^{33}\)

Another criticism made against a public issue test is that the communications media becomes its own judge as to when a plaintiff suing for defamation has to prove falsity and actual malice. Mere publication may automatically make the subject discussed a matter of public interest.\(^{34}\) It indeed appears that anytime newspapers, magazines, radio or television publish a story, a presumption arises that the subject matter dealt with is a matter of public concern.


33. The Federal Communications Commission has promulgated regulations which require broadcasters who make personal attacks on any person while in the presentation of their views on controversial issues of public importance to offer the persons attacked the opportunity to respond. For a thorough discussion of these regulations see Red Lion Broadcasting Co. v. F.C.C. and United States v. Radio Television News Directors Ass'n, 395 U.S. 367 (1969).


35. In All Diet Food Distributors, Inc. v. Time, Inc., 56 Misc. 2d 821, 290 N.Y.S.2d
federal decisions which have resolved this issue. The first post-*New York Times* case to discuss the issue at length and hold that First Amendment guarantees could best be protected with a public issue test was *United Medical Laboratories v. Columbia Broadcasting System, Inc.*,\(^{36}\) decided by the United States Court of Appeals for the Ninth Circuit. There, United Laboratories, a mail order clinical testing company, sued CBS because of the network's publication of various statements which exposed the inaccuracies of the findings of some mail order laboratories. The court held that statements concerning matters of public concern are constitutionally protected. Since the case involved a plaintiff whose business was in the field of public health, it could not recover unless there was a showing that the statements were false and were published with actual malice.\(^{37}\)

After *United Medical Laboratories*, the acceptance of the public issue test occurred frequently. The Third Circuit adopted it in a case where statements had been made concerning the distribution of nudist magazines.\(^{38}\) Obscenity in the community was determined to be an important public issue. The Fifth Circuit used the test in a case which involved the migration of a gambler to a foreign country where he became involved in an election campaign.\(^{39}\) The matter of public interest in that case was the political election in the foreign country. The Court of Appeals for the District of Columbia very recently adopted the public issue test in a case where a national crime syndicate was the topic of discussion.\(^{40}\)

The federal district courts have also overwhelmingly applied the public issue rationale. In *Arizona Biochemical Co. v. Hearst*,\(^{41}\) an action in libel was brought against the defendant newspaper publisher which

445 (Sup. Ct. 1967), the court indicated that public interest will trigger constitutional protection. In 1964 the Second Circuit in dictum stated that the crucial question as to whether or not a statement is constitutionally protected is if a matter of grave public concern is involved. Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964), *cert. denied*, 379 U.S. 968 (1965).


37. As the Tribune readily pointed out, *United Medical Laboratories* is on "all fours" with the *Farnsworth* decision. Brief for Appellees at 44.

38. Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3rd Cir. 1969), *cert. granted* 38 U.S.L.W. 3319 (1970). The adoption of the public issue test in this case was somewhat diluted by the fact that an additional factor was present. This factor was that the news broadcasts involved were of the "hot news" variety, *i.e.*, summaries of the latest news on the hour. The court stated:

It is not realistic to require thorough research or verification of each individual item under these conditions. The need for constitutional protection in the circumstances is much more apparent than in the cases of the so-called documentaries or feature stories. *Id.* at 895-896.


had published articles charging the plaintiff garbage disposal company with crime syndicate links, using physical threats and force against competitors, paying kickbacks to obtain its contracts and employing general tactics of deceit and bad faith. Applying the public issue test to the plaintiff which held several contracts with local municipalities, the court articulated the present status of the law as follows:

The Supreme Court has made it clear in all of the opinions that the rationale underlying these decisions is the vital need to protect the guarantees of free expression found in the First Amendment. The pith of the matter is the concept that in our constitutional system of self-government the people have reserved to themselves the power to oversee the functioning of society...

Viewed in this light, the privilege accorded by New York Times is designed to insure the ascertainment and publication of the truth about public affairs. If this be so the privilege should be defined in broader terms than public official or public figure.42

The court then concluded that the subject matter of the articles was of sufficient public interest to trigger constitutional protection.

Other district courts have found sufficient public interest where statements have been made about exorbitant prices charged for accommodations at a hotel that catered to the followers of the Masters Golf Tournament,43 where the general focus of the article has been upon organized crime in the United States,44 and where court decisions are being discussed.45 The nationally known “Boston Strangler” was also involved in a case in which the public issue test was adopted.46 He brought suit against Twentieth Century Fox for damages for defamation and invasion of privacy arising out of a motion picture entitled “The Boston Strangler.” The court held that the exceptional interest involved precluded recovery unless the plaintiff satisfied the New York Times requirements of falsity and actual malice. There has been only one recent federal case which might be interpreted as rejecting the public issue test.47 However, the court did not discuss the merits of the

42. Id. at 414.
47. Harkaway v. Boston Herald Traveler, 418 F.2d 56 (1st Cir. 1969). In Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966), the discussion of an important public issue was not given constitutional protection. However, the case was decided only two years after New York Times and before the United States Supreme Court had held that statements made about public figures are constitutionally protected.
issue and it seems doubtful that it was even briefed or argued.\textsuperscript{48}

Although the \textit{Farnsworth} decision makes it clear that in Illinois statements published about matters of public concern are to receive constitutional protection, there are other issues which are raised by adoption of the public issue analysis. The first of these deals with whether there is now one constitutionally protected category, \textit{i.e.}, public issues, or whether a public issue category coexists with the public official and public figure classifications. The case strongly indicates that the public official and public figure categories have now been abolished and are superceded by one broad public issue category:

The cases have seemed to establish that the question is whether a public issue, not a public official (or public figure) is involved.\textsuperscript{49}

The coexistence of three categories would serve no logical purpose. A public official whose conduct is of public concern would be involved in a public issue.\textsuperscript{50} The public issue test would also encompass public figures, \textit{i.e.}, famous persons or those who have thrust themselves into the vortex of an existing public controversy.\textsuperscript{51} Thus, it is likely that any statements which deserve protection under the public official or public figure tests would also be protected by a public issue test. Indeed, the proponents of the public issue test advocate it as not only the most effective test for protecting First Amendment rights, but, in addition, advocate it as the sole test.\textsuperscript{52}

The Illinois Supreme Court in \textit{Farnsworth} refined the definition of public issue to a greater extent than any of the other courts which have considered the question.\textsuperscript{53} When the resolution of a given issue will "enable members of society to cope with the exigencies of their period," then that issue is clearly a public one.\textsuperscript{64} The classification is "not limited to utterances that might enhance the resolution of political or governmental questions."\textsuperscript{55} However, it is evident from the facts in \textit{Time},

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\begin{enumerate}
\item The court merely stated that an attorney is a private citizen and thus the \textit{New York Times} rule does not apply.
\item \textit{Farnsworth} v. Tribune Co., 43 Ill. 2d at 290, 253 N.E.2d at 410, citing Rosenblatt v. Baer, \textit{supra} note 19, at 91 (concurring opinion).
\item See, \textit{e.g.}, Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968) (political party workers); Liberty Lobby, Inc. v. Pearson, 390 F.2d 489 (D.C. Cir. 1967) (lobbyists).
\item See note 30, \textit{supra}.
\item None of the cases which have adopted the public issue test have had any meaningful discussion as to what constitutes a public issue. \textit{See} notes 36, 38-41, 43-46, \textit{supra}.
\item 43 Ill. 2d at 291, 253 N.E.2d at 411.
\item Id.
\end{enumerate}
\end{footnotesize}
Inc. v. Hill\textsuperscript{56} that this definition is not all inclusive.\textsuperscript{57}

The court also stated that when deciding whether a matter of public concern is involved, the number of persons affected by a given issue and the "severity of its impact upon those so affected" must be taken into consideration.\textsuperscript{58} Because such a definition is very flexible, it is subject to the criticism that any issue which is being discussed in the media is a public issue. However, the definition must be flexible enough to accommodate the vast variety of subject matters which become public issues. It is not an unlimited definition for unless the finder of fact makes such a finding, a publisher presumably may not make a matter public by simply publishing it. Presumably, the matter must be of some independent public interest to be a public issue.\textsuperscript{59}

Assuming that a libel case arises which involves a public issue, the opinion in Farnsworth is not entirely clear as to whether a plaintiff must prove actual malice in addition to falsity of the statements published. On a reading of the case as a whole, the court will apparently require that a plaintiff who is involved in the public issue area prove falsity of the statement and actual malice on the part of the publisher in order to recover. This would be in accord with the New York Times rule which the court indicated served as the basis for the instruction which was actually given, and was here approved.\textsuperscript{60}

\textsuperscript{56} See note 23, supra.

\textsuperscript{57} References to certain actors and athletes who are well-known to the public are protected and yet are difficult to fit within the court's definition of a public issue. See, e.g., Cepeda v. Cowles Magazine and Broadcasting Inc., 392 F.2d 417 (9th Cir.), cert. denied, 393 U.S. 84 (1968).

\textsuperscript{58} 43 Ill. 2d at 292, 253 N.E.2d at 411. In Farnsworth the severity of impact was the controlling factor.

\textsuperscript{59} In Curtis Publishing Co. v. Butts and Associated Press v. Walker, supra note 25 at 154, the Court stated that "both Butts and Walker commanded a substantial amount of independent public interest." Thus the Court would not classify a person as a public figure solely because the newspapers had made him famous. The inference can be drawn that the Court also would not find that a public issue exists merely because the communications media has published articles concerning a certain subject. An independent public interest would have to be shown.

\textsuperscript{60} The trial court misinformed the jury as to what constitutes actual malice. The jury instructions stated:

You are instructed that actual malice means more than spite, ill will and intent to harm the plaintiff. In order to meet the burden of proving actual malice the plaintiff must prove that the defendants had actual knowledge that the statements about the plaintiff were false, or that the defendants were guilty of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. Brief for Appellees at 37.

The United States Supreme Court has expressly held that actual malice is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. St. Amant v. Thompson, supra note 50. In fact, the trial court's instruction took the actual malice test and Justice Harlan's "highly unreasonable conduct" test proposed in Curtis Publishing v. Butts and Associated Press v. Walker, supra note 25, and mistakenly equated them. Since this error was in favor of the plaintiff the court did not have to rule on it.
Assuming that the Illinois Supreme Court has created a single category of constitutionally protected statements, i.e., those which involve a public issue, and assuming that it did adopt the actual malice test, Farnsworth clears up an area of ambiguity. Prior to Farnsworth it was clear that a public official had to prove actual malice in order to recover in libel for false statements published about him. However, a public figure was previously uncertain of the burden of proof that would be required of him; was it actual malice or something else? The Butts decision which extended constitutional protection to statements made about public figures, led to this confusion because of the absence of a majority opinion. Four Justices proposed in a plurality opinion written by Justice Harlan a test less strict than the actual malice requirement. Under their test a public figure may recover, "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Three Justices would apply the actual malice test, while Justices Black and Douglas maintained that criticism of either a public official or public figure deserved absolute protection. Because of the variance of opinion in Butts, there has been much debate as to which test applies in cases involving public figures, with the majority advocating the actual malice test. The Illinois Supreme Court never decided which test applied to public figure cases, and there was conflict among the Illinois appellate courts. This question may now be resolved if the court has correctly substituted the broad public interest test for the public official and public figure tests and adopted the requirement as to proof of falsity and actual malice.

The United States Supreme Court has recently granted certiorari in cases from other jurisdictions in order to determine whether the New York Times rule applies to private individuals who are not public offi-
The Court will have several options open to it: 1) Adopt a single test, *i.e.*, the public issue test, in which the plaintiff has the burden of proving falsity coupled with actual malice (the apparent Illinois position); 2) Adopt the public issue test and have it coexist with the public figure and public official categories. In this case the Court would then have to decide whether to adopt the actual malice test or Justice Harlan's "highly unreasonable conduct" test; 3) Refuse to apply the public figure and public official tests to other public issues.

Because *Farnsworth* has held that section 4 of Article II of the Illinois Constitution is federally unconstitutional to the extent that it would require a defendant who has published matters of public interest and concern to prove their truth and their publication with good motives and for justifiable ends, the Illinois Constitutional Convention is squarely faced with the problem of revision. Section 4 states:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.

This defense, characterized as "truth plus motives" originated in the nineteenth century. The United States early adopted the English rule that truth was an absolute defense in civil libel actions; however, truth was not recognized as a defense in criminal actions. In the case of *People v. Croswell,* tried in 1804, Alexander Hamilton represented a defendant who had been charged with criminal libel after he had allegedly defamed Thomas Jefferson. Hamilton desired to use truth as a defense but was well aware that it was not available in criminal cases. In order for his position to appear more acceptable, Hamilton urged that truth be a defense if the words were uttered with good motives and for justifiable ends. This defense of truth plus motives was ultimately rejected by the Court of Appeals of New York; however,

66. The Court will consider two cases, one of which held that statements made about private individuals who are involved with a public issue are constitutionally protected. Rosenbloom v. Metromedia, Inc., *supra* note 38. In that case the matter of public concern was obscenity in the community.

In the other case, *Roy v. Monitor-Patriot Co.,* 254 A.2d 832 (1969), *cert. granted, 38 U.S.L.W. 3319 (1970)*, the plaintiff who was a candidate for public office had been accused of having been a bootlegger some twenty-six years before he announced his candidacy. The court held that this defamation was purely private since the public had no justifiable interest in conduct which occurred so long ago. Therefore, the statements were not constitutionally protected.


68. 3 Johns Cas 337 (N.Y. 1804).

69. *Id.* at 359.
many states later adopted it in their constitutions or by statute.\textsuperscript{70} Illinois adopted it in section 4 of Article II when the present constitution was drafted in 1870. Although the truth plus motives defense originated in order to gain recognition of the defense of truth in criminal actions, Illinois ultimately applied it in civil cases as well. In \textit{Ogren v. Rockford Star Printing Co.},\textsuperscript{71} the Illinois Supreme Court stated:

\begin{quote}
There is no mistaking the meaning of that section, which is, that the truth is a defense in both civil and criminal suits only when published with good motives and for justifiable ends.\textsuperscript{72}
\end{quote}

The Illinois Constitutional Convention is, at the present time, rewriting the 1870 Illinois Constitution. In view of the \textit{Farnsworth} decision, it must carefully scrutinize the defense of truth plus motives. Since the Illinois Supreme Court has held that truth plus motives cannot be constitutionally applied to cases where public issues are involved, the first issue which the Convention must resolve is whether it is desirable to preserve the defense in cases of purely private libel. The proponents of such a restricted defense argue that it is necessary to prevent the publication of certain matters solely for the purpose of embarrassing a person with his former misconduct. This is especially true in cases where the accused individual has since reformed his ways.\textsuperscript{73} On the other hand, the critics of the defense have argued that it has an inhibitory effect on free speech, since the publisher realizes that he may have the difficult task of proving his good motives to a jury.\textsuperscript{74} Another criticism of the truth plus motives defense raised in \textit{Farnsworth}\textsuperscript{75} was that it originated as a defense in criminal actions at a time when truth alone was an absolute defense in civil actions. This distinction was obscured, and the defense was held to apply in both civil and criminal cases. “If, as \textit{Garrison v. State of Louisiana} held, the good motives and ends test is invalid in the criminal law of libel where it had its origin, it is plainly so now in civil libel actions where it was never applied.”\textsuperscript{76}

Criticism of the truth plus motives defense, that it causes reluctance to publish, has been restricted by \textit{Farnsworth} to the area of purely private libel. The decision substantially allays the threat of self-censorship to a person contemplating the publication of matters

\textsuperscript{70} For a list of the statutes and their statutory or constitutional provisions see \textit{Garrison v. Louisiana}, \textit{ supra} note 16, n.7.
\textsuperscript{71} \textit{288 Ill. 405, 123 N.E. 587} (1919).
\textsuperscript{72} \textit{288 Ill. at 416, 123 N.E. at 591}.
\textsuperscript{74} See \textit{Franklin, supra} note 67.
\textsuperscript{75} Brief for Appellees at 48-54.
\textsuperscript{76} Brief for Appellees at 52. This interpretation of \textit{Garrison} is questionable.
dealing with a matter of public concern. With actual malice as an absolute defense, even though an innocent error has been made and a false statement published, a plaintiff will not recover through the defendant's mere inadvertence. If the truth plus motives defense is retained in the area of private libel, the publisher may indeed be reluctant to publish in certain instances. However, allowing for this reluctance in cases of purely private libel is sound public policy. An equitable balancing of the public's right to have all information pertinent to the resolution of public issues and the protection of the individual's reputation from needless attacks is thereby achieved.

Although some Illinois attorneys have advocated complete abolition of the truth plus motives defense, Illinois will apparently preserve the present language of section 4. The Bill of Rights Committee of the Constitutional Convention voted to preserve the present language. Thus the intent is clearly to preserve truth plus motives in the area of private libel. The most effective manner in which to achieve this would be to adopt restrictive language in the constitution which would indicate that the defense applies only in the private area. Since Farnsworth has held that the present language is unconstitutional as applied to public issue cases, the fact that the Convention would consider preserving the identical language appears to be inviting a challenge that it is unconstitutional as overbroad. The United States Supreme Court has stated that where a statute or constitutional provision sweeps within its broad scope, activities that are constitutionally protected free speech, the provision is overbroad and therefore violative of the First Amendment. In fact, a provision may be attacked as being overbroad regardless of whether the plaintiff challenging it has engaged in constitutionally protected conduct. In such a situation, "possible applications of the rule in other factual contexts" may be taken into account when examining the provision's effect upon the First Amendment. Thus, section 4 could be attacked since on its face it provides that a person who has written statements about a public issue can only use truth as a defense when he has published with good motives and for justifiable ends. Nevertheless, such an at-

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77. Members of the Chicago Bar Association's Constitutional Revision Committee advocated abolishment of the defense in their Report of Chicago Bar Association Constitutional Revision Committee, Proposed Changes to Bill of Rights.
81. NAACP v. Button, supra note 80, at 432.
tack would be unsuccessful. When the validity of a statute is in
question the Court examines the manner in which the provision has
been applied by the courts. The question then becomes whether the
provision, as applied, violates the First Amendment. Since the Illinois
Supreme Court has stated that section 4 does not apply in situations
where a public issue is involved, it would not be overbroad.

If, as it strongly appears, the Illinois Supreme Court has interpreted
the scope of the First Amendment guarantees under the Federal Con-
stitution to be encompassed under the penumbra of "public issues,"
then statements involving a matter of public concern which are alleged
to be libelous are protected unless the plaintiff is able to sustain his
very difficult burden of proof. This burden will not be satisfied unless
the plaintiff can clearly establish not only that the statements published
were false, but additionally, it appears that he must establish actual
malice in order to recover. Thus, the effect of the decision in Farns-
worth is to relieve publishers of the difficult and perilous task of prov-
ing the complete veracity of their statements or that they were pub-
lished with good motives and for justifiable ends. At the same time,
the knowing lie or the statement made with utter disregard as to its
truth will remain subject to suit.

STANLEY J. DAVIDSON

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82. Cox v. New Hampshire, 312 U.S. 569 (1941); Cf. Shuttlesworth v. Birming-