NOTES

LIBEL PER SE AND EPITHETS IMPUTING DISLOYALTY

Courts have long recognized that reputations can be injured by words impugning patriotism or falsely ascribing beliefs in an ideology incompatible with the American form of government.[1] Such an injury may be redressed by a libel action brought to vindicate the plaintiff's name and to recover damages. This note will examine the kinds of epithets that are actionable on their face—libelous per se—with no requirement that the plaintiff plead or prove special damages.

I. Libel Per Se and Libel Per Quod

The rules of libel accepted by the *Restatement*[2] and stated by commentators appear simple.[3] A defamatory publication will subject one to liability if it is false and the defendant was not privileged to make it.[4] A defamation consists of matter that tends to harm the reputation of a person so as to diminish the community's respect for him and cause others not to associate or deal with him.[5] Libel is the publication of defamatory matter by written or printed words, pictures, signs, or other physical forms.[6] Damage is pre-

1. 13 Mo. L. Rev. 113, 115 (1948); 22 Tul. L. Rev. 335, 336 (1947); *see, e.g.*, Press Publishing Co. v. Gillette, 229 F. 108 (2d Cir. 1915); Farr v. Bramblett, 132 Cal. App. 2d 36, 281 P.2d 372 (1955); Stow v. Converse, 3 Conn. 325 (1820); Giles v. State, 6 Ga. 276 (1848); Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N.E. 692 (1891); Briggs v. Harrison, 152 La. 724, 94 So. 369 (1922); Seested v. Post Printing & Publishing Co., 31 S.W.2d 1045 (Mo. 1930); Burrell v. Moran, 38 Ohio Op. 2d 185, 82 N.E.2d 334 (C.P. Cuyahoga County 1948); O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 51 A.2d 775, *cert. denied*, 332 U.S. 766 (1947).

2. Restatement of Torts (1938).

3. *See* Samore, *New York Libel Per Quod: Enigma Still?*, 31 Albany L. Rev. 250 (1967).

4. *Id.* For a general discussion of privilege see W. Prosser, Torts §§ 109, 110 (3d ed. 1964). The privilege of fair comment will be treated at notes 87-93 *infra* and accompanying text. There is no defamation when the jury reasonably finds the published matter to be true. Lovejoy v. Mutual Broadcasting Co., 220 S.W.2d 308 (Tex. Civ. App. 1948).

5. W. Prosser, *supra* note 4, § 106; Restatement of Torts § 559 (1938).

6. Restatement of Torts § 568(1) (1938).

A number of states have statutes defining libel. "A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule." Ga. Code Ann. § 105-701 (1956); *accord*, Calif. Civ. Code § 45 (West 1954); Idaho Code Ann. § 18-4801 (1948).

sumed;[7] the plaintiff is not required to plead or prove specific pecuniary loss (special damages).[8]

Slander is the publication of defamatory matter by oral or other transitory means, *e.g.*, in sign language or by the nod of the head.[9] Damage from slander is not presumed, but must be proven, except in four special categories: those imputing major crimes; those imputing loathsome diseases; those effecting the plaintiff in his business, trade, profession or office; and those imputing unchastity to a woman.[10]

The distinction between libel and slander is blurred by the American rule of libel per quod. When facts extrinsic to a publication are needed to make it defamatory, the publication is libelous per quod. When a libel is per quod, the plaintiff must plead special damages as in slander.[11] The origin of the libel per quod rule is beyond the scope of this note,[12] and it is not here intended to argue its merits.[13] However, it should be noted that special damages can be difficult to establish. Thus, to require the plaintiff

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7. Prosser, *Libel Per Quod,* 46 VA. L. REV. 839, 842-43 (1960).

8. "One who falsely, and without privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom." RESTATEMENT OF TORTS § 560 (1938); *see* Samore, *supra* note 3. The possibility of wide distribution is the distinguishing feature of a publication that will support a libel action. RESTATEMENT OF TORTS § 568, comment d (1938). Dean Prosser has challenged the validity of this and other reasons for making libel actionable without special damages. Prosser, *supra* note 7, at 842-43. It is not libelous per se to publish defamatory matter about a relative or associate of a plaintiff. Skrochi v. Stahl, 14 Cal. App. 1, 110 P. 957 (1910); Powers v. Bressler, 210 N.Y.S.2d 442 (Sup. Ct. 1960); Pogany v. Chambers, 206 Misc. 933, 134 N.Y.S.2d 691 (Sup. Ct.), *aff'd,* 285 App. Div. 866, 137 N.Y.S.2d 228 (1954).

9. RESTATEMENT OF TORTS § 568(2), comment d (1938).

10. RESTATEMENT OF TORTS §§ 570, 574 (1938); Prosser, *supra* note 7, at 441; Note *Libel Per Se and Special Damages,* 13 VAND. L. REV. 730, 731 n.9 (1960).

11. Prosser, *supra* note 7, at 840. It is generally accepted that libels that would be actionable per se as slanders would be libelous per se. *Id.* at 844 n.20; *see* Levy v. Gelber, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup. Ct. 1941) (injury to profession). Dean Prosser has suggested that the *Restatement* be changed to limit general damages in libel to those defamatory on their face and the special slander categories. RESTATEMENT (SECOND) OF TORTS § 569 (Tent. Draft No. 12, 1966). This position was rejected by the American Law Institute. 43 A.L.I. PROCEEDINGS 460-62 (1966). A compromise submitted to the Institute made the publisher liable for general damages if "he knew or should have known of the extrinsic facts which were necessary to make the statement defamatory. . . ." 43 A.L.I. PROCEEDINGS 448 (1966). This proposition is still under study. 1967 A.L.I. ANNUAL REPORT 11.

12. *See* Henn, *Libel-by-Extrinsic-Fact,* 47 CORN. L.Q. 14, 16-18 (1961); Prosser, *supra* note 7; Note, *supra* note 10.

13. Arguments in favor of the rule are found in Prosser, *supra* note 7; Prosser, *More Libel Per Quod,* 79 HARV. L. REV. 1629 (1966); 43 A.L.I. PROCEEDINGS 443 (1966). Arguments against the rule are found in Eldredge, *The Spurious Rule of Libel Per Quod,* 79 HARV. L. REV. 733 (1966); 43 A.L.I. PROCEEDINGS 444 (1966).

to prove special damages may preclude an injured party not only from monetary compensation, but also from vindicating his reputation, which may be the real purpose of the litigation.[14] Since these problems are avoided when plaintiff can allege libel per se, it is useful to know what epithets courts have included in that category.

II. Direct Imputations

The basic politically defamatory assertion is that a person has beliefs or belongs to a group antagonistic to the American form of government. Such assertions may cause many to believe that the person so labeled participates in unlawful activity, advocates the violent overthrow of the American political and economic system, or sympathizes with an enemy of the United States.[15]

A. *The Time of the Publication*

Because the public attitude toward a political belief or group may change, words harmless at one time may damage a reputation at another time.[16] The importance of the time factor can best be illustrated by examining certain epithets which have been held libelous per se, based upon the time of the publication.[17]

In the 1890's, falsely stating that one was an anarchist was libelous per se. One court so holding noted that the dictionary defined anarchist as "one

14. Eldredge, *supra* note 13, at 755-56.

15. 11 Ohio St. L.J. 577 (1950).

16. Chaplin v. National Broadcasting Co., 15 F.R.D. 134 (S.D.N.Y. 1953) (N.Y. law applied); Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash. 1943) (Wash. law applied), *appeal dismissed,* 144 F.2d 249 (9th Cir. 1944); Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947); Lunn v. Littauer, 187 App. Div. 808, 175 N.Y.S. 657 (1919); Luotto v. Field, 49 N.Y.S.2d 785 (Sup. Ct.), *modified,* 268 App. Div. 277, 50 N.Y.S.2d 849, *rev'd on other grounds,* 294 N.Y. 460, 63 N.E.2d 58 (1944); Burrell v. Moran, 38 Ohio Op. 185, 82 N.E.2d 334 (C.P. Cuyahoga County 1948); 26 Iowa L. Rev. 893 (1941); 45 Mich. L. Rev. 518 (1947).

17. At least one court has confused the time of the publication with the time of the acts alleged in the publication. In Luotto v. Field, 49 N.Y.S.2d 785 (Sup. Ct.), *modified,* 268 App. Div. 277, 50 N.Y.S.2d 849, *rev'd on other grounds,* 294 N.Y. 460, 63 N.E.2d 58 (1944), the defendant published in 1942, during World War II, that the plaintiff was a one-time Fascist in the years prior to Pearl Harbor and the American entry into the War. The court stated that, prior to the War, Fascist was descriptive of a form of government and did not acquire an evil meaning until the United States was fighting Fascist forces. Therefore, the court reasoned, while it was libelous per se falsely to charge that one was a Fascist during the War, it was not libelous per se if the charge was that one was a Fascist before the War. The reasoning of the court overlooks the strong possibility that the statement may have the same adverse effect on the plaintiff's reputation whether the publication says he is a Fascist before or a Fascist during the War. If a plaintiff's reputation is damaged he should be allowed to recover no matter when the offensive association is alleged to have existed.

who incites revolt, or promotes disorder in the state," and found that anarchists were commonly understood to advocate the destruction of government. It concluded that citizens must regard with hatred or contempt those who advocate the destruction of government.[18] Similar results were reached in other pre-World War I cases involving charges that the plaintiff was a "dangerous, able, and seditious agitator,"[19] and that plaintiff had called the United States flag a "dirty rag."[20]

Before World War I, a false imputation of being a German would not have been libelous on its face because the epithet did not imply disloyalty.[21] Such statements were considered libelous per se with the advent of the War because they essentially labeled the plaintiff an enemy.[22] A similar analysis appears in World War II cases involving alleged libels concerning Hitler and the Nazis in Germany,[23] the Fascists in Italy, and the Japanese.[24] Being called an enemy or one who favors an enemy during a war impugns one's loyalty to the community in which he lives. Since disloyalty offends the community, it is presumed that the plaintiff's reputation is seriously injured, producing a cause of action based on the face of the publication, without any need to plead extrinsic facts about the war.[25]

Communism has been viewed as a threat to the United States for a longer period of time than any of the other enemies or political groups previously discussed. The holdings on epithets imputing Communist beliefs, activities or affiliations have not been entirely consistent because the Soviet Union was an ally of the United States during the Second World War. Prior to World War II courts held that "Communist" or "red" was capable of meaning one who believes in violence, sabotage, and the seizure of private

18. Cerveny v. Chicago Daily News, 139 Ill. 345, 353-54, 28 N.E. 692, 692-93 (1891).

19. Wilkes v. Shields, 62 Minn. 426, 64 N.W. 921 (1895).

20. Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922); *see* Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919), in which plaintiff, a candidate for mayor on the Socialist ticket, was stated to advocate Socialism of a violent kind. The court held this to be libelous per se. Although at this time the Socialist Party offered to be the true Marxist party, the court in the case did not indicate whether a false accusation of Socialist standing alone would be sufficient to constitute libel per se. 2 BAYLOR L. REV. 358 (1950).

21. Briggs v. Harrison, 152 La. 724, 94 So. 369 (1922).

22. *Id.;* Seested v. Post Printing & Publishing Co., 326 Mo. 559, 31 S.W.2d 1045 (1930).

23. O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 51 A.2d 775, *cert. denied,* 332 U.S. 766 (1947); Goodrich v. Reporter Publishing Co., 199 S.W.2d 228 (Tex. Civ. App. 1946).

24. Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash. 1943), *appeal dismissed,* 144 F.2d 249 (9th Cir. 1944).

25. O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 51 A.2d 775, *cert. denied,* 332 U.S. 766 (1947).

property.[26] In recognizing that the Communist movement opposed the American system, the courts equated the label "Communist" with disloyalty to the United States.[27]

Since the Soviet Union and the United States were allies during the Second World War, it might be expected that the public disdain for Communism would have lessened so that the imputation would not be defamatory. This was the position taken by the Supreme Court of Pennsylvania in *McAndrew v. Scranton Republican Publishing Co.*[28] In 1946 defendant falsely attributed to the plaintiff the statement, "We all have to have a little Communism today." Though the court could reasonably have held this statement incapable of meaning that the plaintiff advocated Communism,[29] it decided that to say a man was a Communist was not to defame him.[30] The court reasoned that Russia and the United States had become friendly during the war, and the public no longer identified Communism with Russian terrorism. However, during World War II other courts held such imputations libelous per se,[31] arguing that there was a general belief that Communism condones violence against the established government, and that it is the public belief that is the test for determining the epithet's defamatory character.[32] The time factor therefore did not affect "Communist"

26. Toomey v. Jones, 124 Okla. 167, 254 P. 736 (1926); *see* Wells v. Times Printing Co., 77 Wash. 329, 137 P. 457 (1913) which held that a publication charging plaintiff in 1912 with being a "red-tinted agitator" was libelous per se. The alleged libel also consisted of charges that plaintiff "reviled the U.S. Flag" and "denounced Old Glory as a dirty rag." The court did not discuss "red-tinted agitator" apart from the other statements.

27. In Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S.2d 544 (Sup. Ct. 1940), the court found that the false statement "Communist" was not libelous per se in 1939. This view was rejected one year later in Levy v. Gelber, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup. Ct. 1941) (plaintiff called a "Nazi" and a "Communist") and Gallagher v. Chavalas, 48 Cal. App. 2d 52, 119 P.2d 408 (1941). A possible reason for this rejection was that the Soviet Union had become more aggressive in Europe since the decision in *Garriga*. 45 MICH. L. REV. 518, 519 (1947); *see* 26 IOWA L. REV. 893 (1941); 32 MINN. L. REV. 412, 413 n.8 (1948).

In Hays v. American Defense Soc'y, 252 N.Y. 266, 169 N.E. 380 (1929), the court indicated that a false accusation of Communism would be libelous, although the plaintiff was not actually labeled a Communist in the case. In Washington Times Co. v. Murray, 299 F. 903 (D.C. Cir. 1924), it was held that to be falsely accused of being a secret agent of Russia in 1922 was libelous. *Cf.* Branch v. Cahill, 88 F.2d 545 (9th Cir. 1937).

28. 364 Pa. 504, 72 A.2d 780 (1950).

29. *Cf.* 98 U. PA. L. REV. 931 (1950).

30. McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 72 A.2d 784 (1950).

31. *See id.* at 519, 72 A.2d at 787 (dissenting opinion).

32. *See, e.g.*, Spanel v. Pegler, 160 F.2d 619, 622 (7th Cir. 1947); Burrell v. Moran, 38 Ohio Op. 185, 82 N.E.2d 334 (C.P. Cuyahoga County 1948); 98 U. PA. L. REV. 931 (1950).

to the degree it did other epithets, *e.g.*, "German." The public view of Communism remained largely adverse,[33] and this view has prevailed to the present.[34]

B. *Public Opinion*

The major test for per se political libel is contemporary community opinion. Courts rely upon a number of factors to determine what epithets will alienate community opinion. When the epithet is connected with a foreign government, the relations between the United States and that foreign government will be an important factor. Courts have also sought a reflection of public attitude in legislative acts and executive orders.[35] Examples of relevant governmental actions include laws excluding aliens who advocate the violent overthrow of the government[36] and laws denying governmental employment to such persons.[37] Courts have taken such enactments as evidence of the public aversion toward such persons, and have found that Communists in particular subscribe to the disapproved beliefs.[38] The government's failure to declare a particular group illegal has led some courts to hold that there is no public hatred for that group. In *Garriga v. Rich-*

33. For examples of cases contemporary to *McAndrew* which viewed the epithet "Communist" differently, *see* Spanel v. Pegler, 166 F.2d 298 (2d Cir. 1948); Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); Wright v. Farm Journal, 158 F.2d 976 (2d Cir. 1947); Spanel v. Pegler, 70 F. Supp. 926 (D. Conn. 1946); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947); Burrell v. Moran, 38 Ohio Op. 185, 82 N.E.2d 334 (C.P. Cuyahoga County 1948); Americans for Democratic Action v. Meade, 72 Pa. D. & C. 306 (C.P. Philadelphia County 1950); 2 BAYLOR L. REV. 358 (1950); 45 MICH. L. REV. 518 (1947).

34. *See, e.g.*, Utah State Farm Bureau Fed'n v. National Farmers Union Serv. Corp., 198 F.2d 20 (10th Cir. 1952); Foltz v. News Syndicate Co., 114 F. Supp. 599 (S.D.N.Y. 1953), *continued by executor,* Palmisano v. News Syndicate Co., 130 F. Supp. 17 (S.D.N.Y. 1955); Chaplin v. National Broadcasting Co., 15 F.R.D. 134 (S.D.N.Y. 1953); Macleod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959); Farr v. Bramblett, 132 Cal. App. 2d 36, 281 P.2d 372 (1955); Weisberger v. Condon, 6 Misc. 2d 176, 161 N.Y.S.2d 448 (Sup. Ct. 1957). *See also* Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964), *cert. denied,* 379 U.S. 968 (1965); Steinman v. DiRoberts, 23 App. Div. 693, 257 N.Y.S.2d 695 (1965), *aff'd,* 17 N.Y.2d 514, 214 N.E.2d 89, 267 N.Y.S.2d 512 (1966); Pauling v. National Review Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966); Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964); W. PROSSER, *supra* note 4, § 106, at 761.

35. *See* Mencher v. Chesley, 297 N.Y. 94, 100-01, 75 N.E.2d 257, 259-60 (1947); Burrell v. Moran, 38 Ohio Op. 185, 82 N.E.2d 344 (C.P. Cuyahoga County 1948).

36. *See* Gallagher v. Chavallas, 48 Cal. App. 2d 52, 58, 119 P.2d 408, 412 (1941); *cf.* Branch v. Cahill, 88 F.2d 545 (9th Cir. 1937).

37. *See* Mencher v. Chesley, 297 N.Y. 94, 101, 75 N.E.2d 257, 260 (1947); Note, *Recent Legislative Attempts to Curb Subversive Activities in the United States,* 10 GEO. WASH. L. REV. 104 (1941); 32 MINN. L. REV. 412 (1948).

38. *See* cases cited notes 33 & 34 *supra.*

field,[39] for example, the court held that, even if the Communist Party did believe in the overthrow of the government by force, the Party was not illegal; therefore, a false accusation of Communism could not be libelous per se. However, to hold the legality of the Party an absolute bar to plaintiff's claim overlooks the fact that adverse public opinion may exist without finding expression in legislative or executive action. It is improper to infer public opinion from a legislature's failure to act.

Some courts turn to the dictionary definition of a term in order to ascertain what the public believes the term to mean.[40] This may produce unsatisfactory results, for the dictionary is not a reliable guide to public opinion.[41] For example, one court found the definition of "Communism" to be a system of common ownership of production and equal distribution, with no mention of violence.[42] While this definition makes no mention of violence, the association of Communism with violence, regardless of a dictionary definition, may be crucial in creating adverse public opinion.

It is difficult for a court to discover public opinion by using such indicators as the dictionary or the legislature, and it is undesirable to base a decision on any one of such bits of evidence standing alone. There are no conclusive determinants, and all that the courts can hope for is a rough approximation—a feeling—of the public mood as determined by a variety of sources. These sources can include public opinion polls, party platforms,[43] or psychological studies on human reaction to particular terms.[44] It is probably dangerous for judges to rely on their own feelings as evidence of public opinion, for any judge is but a sample of one. Inadequate as available tools are for assessing public opinion, they will at least lay a groundwork for the courts.

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39. 174 Misc. 315, 20 N.Y.S.2d 544 (Sup. Ct. 1940). The legality of the Communist Party was also noted in McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 72 A.2d 780 (1950).

40. Cerveny v. Chicago Daily News, 139 Ill. 345, 28 N.E. 692 (1891); McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 72 A.2d 780 (1950).

41. 98 U. PA. L. REV. 931, 932 (1950); *see* Peck v. Tribune Co., 214 U.S. 185 (1909); Americans for Democratic Action v. Meade, 72 Pa. D. & C. 306 (C.P. Philadelphia County 1950); W. PROSSER, *supra* note 4, § 106, at 761. The recipient does not have to correctly understand the publication. "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." RESTATEMENT OF TORTS § 563 (1938).

42. McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 72 A.2d 780 (1950).

43. *Id.* at 514, 72 A.2d at 784.

44. Mencher v. Chesley, 297 N.Y. 94, 100, 75 N.E.2d 257, 259 (1947); 32 MINN. L. REV. 412, 413 (1948); *see* Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1304-05 (1942).

III. Indirect Imputations

The previous section dealt with direct statements that a plaintiff was disloyal or a member of a disloyal group. Many courts have held libelous per se false imputations of actions, beliefs, or associations from which the community could infer disloyalty. When the imputation is indirect, the courts have the added burden of determining whether the inference alleged is one which the community could reasonably have made.

A. *Standard of Reasonable Inferences*

When a statement is claimed to be libelous per se, the court must determine whether that statement is capable of a defamatory meaning.[45] The usual test is whether the epithet is *reasonably* susceptible to the meaning alleged by the plaintiff. If that test is met, the statement is sent to the jury to determine if those to whom it was published read into it the defamatory meaning.[46]

A court will not ordinarily place one meaning on the words to the exclusion of all other possible meanings.[47] The Superior Court of New Jersey, in *Herrmann v. Newark Morning Ledger Company*,[48] has deviated from this general rule by holding that the judge has discretion to make a conclusive determination on whether the meaning is defamatory. The defendant had falsely published that plaintiff, a labor leader, opposed a resolution that commended the policy of a mayor in dismissing teachers and other city employees who pleaded the Fifth Amendment in a Communist investigation. The court found that as a matter of law the community would believe this false publication was tantamount to portraying plaintiff as a Communist or Communist sympathizer. The court held the statement defamatory and refused to send the issue to the jury, reasoning that, if a court knows that a substantial number of people will hold the plaintiff in low esteem, there is no need for a jury determination that might reverse the court's decision.[49] The court did not reveal the source of its knowledge of the public reaction to the publication.

45. Restatement of Torts § 614 (1938); *cf.* Bates v. Campbell, 213 Cal. 438, 442, 2 P.2d 383, 385 (1931).

46. Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); Grant v. Reader's Digest Ass'n, 151 F.2d 733 (2d Cir. 1945), *cert. denied*, 326 U.S. 797 (1946); Chaplin v. National Broadcasting Co., 15 F.R.D. 134 (S.D.N.Y. 1953); MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959); Mosler v. Whelan, 28 N.J. 397, 147 A.2d 7 (1958); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947).

47. Mencher v. Chesley, 297 N.Y. 94, 99, 75 N.E.2d 257, 259 (1947); W. Prosser, *supra* note 4, § 106, at 765.

48. 48 N.J. Super. 420, 138 A.2d 61 (1958).

49. *Id.* at 440-41, 138 A.2d at 72. This decision was sustained on rehearing. Herrmann v. Newark Morning Ledger Co., 49 N.J. Super. 551, 140 A.2d 529 (1958).

In cases of indirect imputation, there is greater opportunity for reasonable disagreement because the epithet is ambiguous. Since the epithet's meaning may be questioned, it would seem wiser for a court to send the issue to the jury. In the *Herrmann* case,[50] an alternative meaning could be that plaintiff favored the right against self incrimination provided in the Fifth Amendment, an interpretation that should not injure the plaintiff's reputation in the community. The members of the jury actually act as the ordinary readers, and it is the effect on them that determines whether there is a defamation. With a jury determination a court has at least a larger sampling on which to determine what ordinary readers of the publication would think about the plaintiff.

The innocent construction rule is another deviation from the general rule that words go to the jury if they are reasonably susceptible to a defamatory meaning. The innocent construction rule, followed only in Illinois,[51] requires the court to read the article as a whole, and give the words their natural and obvious meaning. If the epithet can be read innocently, it is non-actionable as a matter of law.[52] The rule has been criticized because it ignores the actual effect of a publication on the average reader, and substitutes the court's ability to find a possible innocent meaning.[53] Since some publications which might convey a defamatory meaning may also have an innocent meaning, it is likely that a plaintiff, in fact defamed, will be denied recovery.[54]

B. *The Degree of Association and the Strength of the Inference*

When an imputation is indirect, there is less certainty that the reader knows what the publication means. Faced with such a publication, a court must determine whether the degree of association is sufficient that a reader could reasonably infer disloyalty.

The intense patriotism that exists during a war can cause defamatory inferences to be drawn from words that would not support such inferences

50. Herrmann v. Newark Morning Ledger Co., 48 N.J. Super 420, 138 A.2d 61 (1958), discussed in notes 48 & 49 *supra* and accompanying text.

51. Note, *The Illinois Doctrine of Innocent Construction: A Minority of One,* 30 U. CHI. L. REV. 524 (1963); *see* Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962); John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105, *cert. denied,* 371 U.S. 877 (1962).

52. John v. Tribune Co., 24 Ill. 2d 437, 443, 181 N.E.2d 105, 108, *cert denied,* 371 U.S. 877 (1962).

53. MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 547, 343 P.2d 36, 44 (1959).

54. An excellent example of this undesirable result is found in Dilling v. Illinois Publishing & Printing Co., 340 Ill. App. 303, 91 N.E.2d 635 (1950); *see* Parmelee v. Hearst Publishing Co., 341 Ill. App. 339, 93 N.E.2d 512 (1950).

in peacetime. It was libelous during World War I to call one a "profiteer" or "tool" of profiteers because of the natural inference that the libelee was damaging the war effort for private benefit.[55] During World War II, a person's reputation would be injured if the public believed that he maintained ties with "pro-Nazis,"[56] or was a "pal of the Japanese," or was friendly with a follower of fascism.[57]

Cases in which the plaintiff alleges he has been labeled a Communist are particularly illustrative of these problems because such imputations are often indirect. Defendant frequently sets up a relation between the plaintiff and Communism or Communist activities that does not necessarily imply disloyalty, as for example, that the plaintiff is the legislative representative of the Communist Party.[58] In the latter instance it was held that the difference between calling one a Communist and calling him an agent, sympathizer, or "fellow traveler" was one only of degree. Any imputation connecting plaintiff with Communism indicates a threat to American institutions. The fact that it was indirect may make the plaintiff's case stronger because many people are more fearful of those who operate in secret.[59] These observations have been generally accepted by courts; most false allegations of relationships to Communism or Communist activities have been found libelous on their face.[60] An example is found in

55. Lunn v. Littauer, 187 App. Div. 808, 175 N.Y.S. 657 (1919).

56. Hryhorijiv v. Winchell, 180 Misc. 575, 45 N.Y.S.2d 31 (Sup. Ct. 1943), *aff'd*, 267 App. Div. 817, 47 N.Y.S.2d 102 (1944); *see* Christopher v. American News Co., 171 F.2d 275 (7th Cir. 1948).

57. Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash. 1943), *appeal dismissed*, 144 F.2d 249 (9th Cir. 1944); Hartmann v. Winchell, 187 Misc. 54, 63 N.Y.S.2d 225 (Sup. Ct. 1946). Even in peacetime a charge of treason is likely to be held libelous on its face, not on the basis of imputing a crime, but on that of general injury to reputation. *See* Press Club v. Gillette, 229 F. 108 (2d Cir. 1915). *But cf.* Kellems v. California CIO Council, 68 F. Supp. 277 (N.D. Cal. 1946).

58. Grant v. Reader's Digest Ass'n, 151 F.2d 733 (2d Cir. 1945), *cert. denied*, 326 U.S. 797 (1946).

59. *Id.* at 735.

60. Utah State Farm Bureau Fed'n v. National Farmers Union Serv. Corp., 198 F.2d 20 (10th Cir. 1952) (Communist dominated organization); Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 546, 343 P.2d 36, 42 (1959); Farr v. Bramblett, 132 Cal. App. 2d 36, 281 P.2d 372 (1955) (part of Communist front organization); Jeffers v. Screen Extras Guild, 107 Cal. App. 2d 253, 237 P.2d 51 (1951) (part of Communist influenced Conference of Unions); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947) (former *Daily Worker* employee and campaign manager for a Communist political candidate); Lasky v. Kempton, 134 N.Y.S.2d 730 (Sup. Ct. 1954), *rev'd on other grounds*, 285 App. Div. 1121, 140 N.Y.S.2d 526 (1955); Yankwich, *Certainty in the Law of Defamation*, 1 U.C.L.A.L. REV. 163, 168 (1954); *see* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 139 (1951); Faulk v. Aware, Inc., 3 Misc. 2d 833, 155 N.Y.S.2d 726 (Sup. Ct. 1956), *aff'd*, 3 App. Div. 2d 703, 160 N.Y.S.2d 621 (1957).

Chaplin v. National Broadcasting Co.,[61] in which the plaintiff was falsely accused of giving statements to a French Communist newspaper. In holding the publication libelous *per se*, the court stated:

> In times of extreme fear and suspicion, inflammatory inferences may be drawn from words which in calmer times sound completely innocent. It is impossible to ignore the repugnance and loathing which association with Communist organizations arouses today in the public mind and the widespread suspicion of those who evade disclosure or refuse to answer questions about such alleged connections. I cannot say, therefore, that as a matter of law reasonable men could not find that this publication in and of itself was sufficient to bring plaintiff into disrepute and subject him to hatred or contempt.[62]

If the activity or group is well known and association with it indicates disloyalty, courts have no trouble finding a publication libelous *per se*. However, it becomes difficult for a court to so hold when it is probable that the public is ignorant of the meaning of the terms used. An example of this problem is found in *Balabanoff v. Hearst Publications*,[63] in which the defendant published that plaintiff was a member of the "dread Cheka." Plaintiff's complaint stated that this was commonly known as a Russian terror organization. It was held that the plaintiff's allegations were only to explain what was generally known, and did not constitute extrinsic facts that would require the plaintiff to plead special damages.[64] The reasoning was that, though a word standing alone might at first appear harmless, its meaning must be taken in context and includes all that is publicly known about it.[65] While there is little doubt that the community would dislike the plaintiff if it knew what the Cheka was, there is doubt whether a substantial number of the community knew the nature of the organization.[66] (It

61. 15 F.R.D. 134 (S.D.N.Y. 1953).

62. *Id.* at 137; *see* Foltz v. News Syndicate Co., 114 F. Supp. 599 (S.D.N.Y. 1953), *continued by executor*, Palmisano v. News Syndicate Co., 130 F. Supp. 17 (S.D.N.Y. 1955).

63. 294 N.Y. 351, 62 N.E.2d 599 (1945).

64. *Id.* at 355, 62 N.E.2d at 601.

65. *Id.*; RESTATEMENT OF TORTS § 563, comment d (1938); Samore, *New York Libel Per Quod: Enigma Still?*, 31 ALBANY L. REV. 250, 252 (1967); *see* De Figuerola v. McGraw-Hill Publishing Co., 189 Misc. 840, 74 N.Y.S.2d 448 (Sup. Ct. 1947), *aff'd*, 273 App. Div. 875, 78 N.Y.S.2d 197 (1948), in which defendant published an article describing a man with the same name as plaintiff as the director of a five-year plan for Peron of Argentina. Plaintiff's picture appeared in the article. The court held that plaintiff's allegation that the Argentine Figuerola was found to be a war-time Axis agent by the United States government was sufficient to make the article libelous per se, based on the rule in the *Balabanoff* case.

66. Some courts have stated that the evil opinion should be in the minds of "right thinking persons." Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); Kimmerle v. New York Evening Journal, 262 N.Y. 99, 186 N.E. 217 (1933). However, the better

could be argued, however, that "dread" anything would be libelous, regardless of connotations of disloyalty.) Such knowledge was probably limited to a select, educated group.[67] Therefore, the *Balabanoff* court should not have allowed the plaintiff to recover on the basis of an epithet that was not known to a substantial number of the community.

Even if the term is familiar, such as "Communist tendencies," it can be argued that there is public confusion as to whether such term implies disloyalty. The certainty of a decade ago may no longer exist, and people may disagree as to what actions exhibit "Communist tendencies" or what is meant by "pro-Communist."[68] Since there is confusion and disagreement, the wisest course may be to permit free discussion of the problem of Communism without stifling the search for answers by the possibility of lawsuits.[69] Most courts, however, do not accept this reasoning when epithets clearly portray plaintiff as a Communist sympathizer, or a "fellow-traveler."[70] This result, however, should not be extended to such terms as "un-American,"[71] "left-winger,"[72] or "liberal,"[73] for they do not sufficiently impute disloyal beliefs to the plaintiff. The views and activities of loyal citizens frequently coincide with those of Communists or the Communist Party, but this concurrence does not reasonably permit the inference that these persons are Communists.[74] An example is the current protest against the war in Viet Nam by students and others. It cannot reasonably be said that their motives for opposing the war are connected with the objectives of the enemy, nor can their protest reasonably be construed as consciously supporting the enemy against the best interests of the United States.[75] It

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and predominant view is that any substantial number of the community is sufficient. Peck v. Tribune Co., 214 U.S. 185 (1909); Grant v. Reader's Digest Ass'n, 151 F.2d 733 (2d Cir. 1945), *cert. denied*, 326 U.S. 797 (1946); Herrmann v. Newark Morning Ledger Co., 49 N.J. Super. 551, 140 A.2d 529 (1958); W. PROSSER, TORTS § 106, at 760 (3d ed. 1964).

67. Samore, *supra* note 65, at 253.

68. Clark v. Allen, 415 Pa. 484, 495, 204 A.2d 42, 47 (1964).

69. *See id.*

70. *See* cases cited note 60 *supra.*

71. In Mosler v. Whelan, 28 N.J. 397, 405, 147 A.2d 7, 12 (1958), the jury found statements that plaintiff was influenced by the thinking of a foreign philosophy alien to the American way and practiced un-American activities not defamatory to the plaintiff.

72. Barton v. Barnett, 226 F. Supp. 375 (N.D. Miss. 1964); *see* Steinman v. DiRoberts, 23 App. Div. 2d 693, 257 N.Y.S.2d 695 (1965), *aff'd*, 17 N.Y.2d 510, 214 N.E.2d 89, 267 N.Y.S.2d 512 (1966).

73. *Id.*

74. Steinman v. DiRoberts, 23 App. Div. 2d 693, 257 N.Y.S.2d 695 (1965), *aff'd*, 17 N.Y.2d 510, 214 N.E.2d 89, 267 N.Y.S.2d 512 (1966).

75. This problem had been recognized in earlier cases. In Santana v. Item Co. 192 La. 819, 189 So. 442 (1939), the court found that to say falsely that a person attacked the pacifism of American youth was not libelous per se because this merely expressed a

is difficult to infer that one is a Communist, or otherwise disloyal to the United States, from a publication that one opposes the war; such imputations should not be held libelous *per se*. Patriotic activity may take many forms, and dissent from existing governmental policy is one of those forms. If this is accepted, it would not then be libelous per se to be charged with associating with dissenting groups or participating in activities expressing dissent.

C. *Libel by Comparison*

When the publication compares the plaintiff's activities with those of a known enemy, as by saying that his actions were like the Gestapo's,[76] courts have reached divergent results. The Gestapo comparison was held libelous per se when the United States was at war with Germany. There was a general public hatred of German institutions and a comparison to the activities of that government could damage the plaintiff in the eyes of the average reader. Other courts held that such a comparison alone did not state that a plaintiff was disloyal.[77] The reason was that the alleged defamation was only a characterization of what, in defendant's opinion, were objectionable activities carried on by the plaintiff. Such a statement, therefore, did not constitute libel per se.[78]

Those cases which hold comparisons not libelous per se ignore the fact that plaintiff's injuries are not necessarily dependent upon the imputation of disloyalty. The person or thing to which plaintiff is compared may be so hateful that the comparison will naturally cause the community to dislike the plaintiff. It can hardly be argued that to be denounced as "Hitler-like" in 1945 would not cause adverse feelings in the community.[79] "Gestapo-like"[80] or "acting in a manner more in keeping with Hitler"[81] appear to be equally damaging, yet these statements were held not libelous per se. In comparison cases, a court should consider whether the comparison is damaging without imputing disloyalty before it decides that there is no libel per se.

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view that many Americans held, thus, no disloyalty could be inferred from the publication. In Sack v. New York Times Co., 56 N.Y.S.2d 794 (Sup. Ct. 1945), the court held that the false statement that plaintiff defended Communism's implementation in the Soviet Union as a reasonable operation was not libelous per se. This was not equivalent to saying he advocated the system's implementation here.

76. Browder v. Cook, 59 F. Supp. 225 (D. Idaho 1944).

77. Schy v. Hearst Publishing Co., 205 F.2d 750 (7th Cir. 1953); Aiken v. Constitution Publishing Co., 72 Ga. App. 250, 33 S.E.2d 555 (1945).

78. Schy v. Hearst Publishing Co., 205 F.2d 750 (7th Cir. 1953).

79. Tidmore v. Mills, 33 Ala. App. 243, 32 So. 2d 769 (1947).

80. Schy v. Hearst Publishing Co., 205 F.2d 750 (7th Cir. 1953).

81. Aiken v. Constitution Publishing Co., 72 Ga. App. 250, 33 S.E.2d 555 (1945).

D. *Libel by Listing*

Inclusion of plaintiff's name on a list which is contained in a publication that attacks the loyalty of a group or organization can raise a possible inference of disloyalty against those on the list. An example of such a publication is found in *Hays v. American Defense Society,*[82] in which an organization was attacked as being part of the "Interlocking Directorates of the Communist Plan for world revolution." Plaintiff was named on a list as being a member of this organization, but was nowhere else mentioned in the publication. The court found no libel, reasoning that the organization was being attacked, and not the individual members.[83] This result is questionable because, although the plaintiff is not directly attacked, the mention of his name in the publication can still create suspicion about him.[84] The holding assumes that the public will always read the publication carefully and see that plaintiff is not being individually attacked. This assumption may not be valid: many readers will remember only that the plaintiff's name was connected with the disloyal organization or group in some manner. As a result, a defendant could cast suspicion on the plaintiff and escape liability. On the other hand, an argument can be made that the holding is reasonable. If the rule were different, a writer would never be free from the threat of a lawsuit if he mentioned any names in a discussion of disloyalty. Free discussion of the topic would be hindered. The best approach is to find no libel per se when the author explains that plaintiff does not adhere to the unpopular belief.[85] This would properly put the burden on the author to minimize the injury an innocent party might suffer.[86]

IV. The New York Times Doctrine and Fair Comment

The privilege of fair comment entitles one to publish criticism and opinion about another on matters of legitimate public concern to the com-

82. 252 N.Y. 266, 169 N.E. 380 (1929).

83. *Id*; *see* Julian v. American Business Consultants, 2 N.Y.2d 1, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956).

84. 32 Notre Dame Law. 339 (1957). This is particularly true if the author goes beyond mere listing and talks about the plaintiff specifically. *See* Derounian v. Stokes, 168 F.2d 305 (10th Cir. 1948).

85. Julian v. American Business Consultants, 2 N.Y.2d 1, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956).

86. Both the heightened potential for damage to reputation in current public sensitivity to Communism and subversion and the deep and irreparable nature of the harm when done require that those who take the risk of writing that about others which in fact does such damage be held to do so at their peril if the utterance be untrue and otherwise legally injustified.
Hermann v. Newark Morning Ledger Co., 49 N.J. Super. 551, 561, 140 A.2d 529, 534 (1958).

munity as a whole.[87] The privilege usually extends to expressions of opinion or criticism, but until recently has not gone to a false assertion of fact.[88] The privilege is limited to publications not motivated by improper or malicious purposes. If there is malice, the privilege is lost and the plaintiff may recover general damages.[89] In cases involving imputations of disloyalty, the privilege protects those who comment on public officials,[90] or persons taking a controversial position,[91] including non-officeholders who make speeches[92] and write articles.[93]

The decision in *New York Times Co. v. Sullivan*[94] extended the traditional fair comment privilege to those who make false statements of *fact* about public officials.[95] In order to recover, the plaintiff must prove that the false statement of fact was made with actual malice, *i.e.*, it was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[96] As a result of this decision, when the plaintiff is a public official the libel per se issue will not be reached unless plaintiff can prove actual malice on the part of the defendant.

The *New York Times* decision created confusion in the lower courts as to what "public official" meant.[97] Several courts have extended the actual malice requirement beyond public officeholders. For instance, plaintiff in *Pauling v. News Syndicate Co.*[98] was a scientist who spoke publicly against

87. W. PROSSER, *supra* note 66, § 110(5), at 812.

88. Potts v. Dies, 132 F.2d 734 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 762 (1943); Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947); Hall v. Binghampton Press Co., 263 App. Div. 403, 33 N.Y.S.2d 840 (1942), *aff'd*, 296 N.Y. 714, 7 N.E.2d 537 (1946). A minority view is that the privilege will also cover a misstatement of fact, at least for public officials and candidates for public office. W. PROSSER, *supra* note 66, § 110(5), at 814.

89. *See* Potts v. Dies, 132 F.2d 734 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 762 (1943); MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959); Hall v. Binghampton Press Co., 263 App. Div. 403, 33 N.Y.S.2d 840 (1942), *aff'd*, 296 N.Y. 714, 70 N.E.2d 537 (1946); Schwimmer v. Commercial Newspaper Co., 131 Misc. 552, 228 N.Y.S. 220 (Sup. Ct. 1928); Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952).

90. Hall v. Binghampton Press Co., 263 App. Div. 403, 33 N.Y.S.2d 840 (1942), *aff'd*, 296 N.Y. 714, 70 N.E.2d 537 (1946).

91. W. PROSSER, *supra* note 66, § 110, at 814.

92. Kellems v. California CIO Council, 68 F. Supp. 277 (N.D. Calif. 1946).

93. Potts v. Dies, 132 F.2d 734 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 762 (1943).

94. 376 U.S. 254 (1964).

95. Clark v. Allen, 415 Pa. 484, 488-89, 204 A.2d 42, 44 (1964).

96. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

97. *See* Bertelsman, *Libel and Public Men*, 52 A.B.A.J. 657 (1966). The Supreme Court refused to name specific categories to which the decision should apply. Rosenblatt v. Baer, 383 U.S. 75, 86 n.12 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 283 n.23 (1964).

98. 335 F.2d 659 (2d Cir. 1964), *cert. denied*, 379 U.S. 968 (1965).

the testing of nuclear weapons and had expressed displeasure at the resumption of testing by Russia. In a newspaper editorial defendant commented that it was nice to have Pauling "on the American side for once" and that Krushchev was Pauling's "friend in the Kremlin."[99] The Second Circuit held that the statement was not libelous as a matter of law and that the issue was properly sent to the jury, which found for defendant. In dictum, the court stated that the *New York Times* doctrine could not be limited to government officeholders, but should logically be extended to candidates for public office and to those who participate in public debate on matters of general concern.[100] Because he had voluntarily engaged in public discussion, Pauling became a public figure and had to meet the *New York Times* standards.[101]

Courts have already extended the *New York Times* doctrine[102] to appointed as well as elected officials, and to candidates for public office.[103] The *Pauling* court was correct in holding that the logic of the doctrine compels its extension beyond the government employee, for in many instances a public figure can affect community attitudes, especially in view of the wide circulation of information to the public from non-government people as well as government employees.[104] However, the Supreme Court, in a divided decision, refused to extend the doctrine to include public figures.[105]

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99. *Id.* at 663.

100. *Id.* at 671.

101. This was the result reached in two later cases involving the same plaintiff. Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967); Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966).

102. Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196-97 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967). *But see* Powell v. Monitor Publishing Co., 107 N.H. 83, 217 A.2d 193, (1966); Faulk v. Aware, Inc., 14 N.Y.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964), *cert. denied*, 380 U.S. 916 (1965); Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1965).

103. Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196-97 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967), and cases cited therein.

104. Bertelsman, *supra* note 97, at 659.

105. The occasion presented itself in the consolidated cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967). Four Justices refused to extend the *New York Times* standards to public figures, but rather decided the cases on the basis of whether there were unreasonable departures from the standards of investigation and reporting ordinarily followed by responsible publishers. *Id.* at 158 (Justices Harlan, Stewart, Fortas, and Clark). Three Justices would have made the extension to public figures. *Id.* at 163, 172 (Chief Justice Warren concurring in result in both cases; Justices Brennan and White concurring in *Walker*, dissenting in *Butts*). Two Justices

Refusal to extend the doctrine does appear to be sound. The person who is branded as disloyal will usually have said or done something to bring public attention to himself, which increases the possibility of being defamed. The effect of applying *New York Times* is that a person might avoid public discussions because he would be without a remedy if he were libeled.[106] This result is anomalous because the purpose of *New York Times* is to assure that debate on public issues would be open and uninhibited by the threat of lawsuit.[107] In the case of the public official, the public interest outweighs his private interest in his reputation,[108] for at least he is warned that when he enters office he assumes the risk of defamation. The same reasoning does not apply to the public figure, who has not decided to assume the risks of holding public office. It is reasonable to say that voluntary participation in public discussion should not divest one of his ability to protect himself by a libel action.

CONCLUSION

There is little doubt that a false statement of disloyalty will continue to be an actionable defamation because of its certain ability to injure the plaintiff's reputation in the community. Any community will naturally react unfavorably to beliefs, causes, or actions that threaten its institutions.[109] The only real question is the form the epithet takes and whether that form is capable of imputing disloyalty. Mere dissent from existing governmental policies is not sufficient, nor is advocating a different theory of government, as long as it is not based upon sabotage or violence.[110] Though Communist-related epithets have been successful bases for suits, it is possible that uncertainty about the meaning of the term, and the public awareness of a need for open discussion, might limit the libel per se doctrine to direct statements that one is a Communist or favors Communism above the government of the United States.[111] *New York Times v. Sullivan* has

felt that even *New York Times* was too great a restriction on the free speech guarantee of the First Amendment. *Id.* at 171 (Justices Black and Douglas, concurring in *Walker*, dissenting in *Butts*).

106. Pauling v. National Review, Inc., 49 Misc. 2d 975, 978-79, 269 N.Y.S.2d 11, 15-16 (Sup. Ct. 1966); Bertelsman, *supra* note 97, at 660.

107. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

108. *Id.;* Pauling v. National Review, Inc., 49 Misc. 2d 975, 978-80, 269 N.Y.S.2d 11, 15-16 (Sup. Ct. 1966).

109. *See* Grant v. Reader's Digest Ass'n, 151 F.2d 733 (2d Cir. 1945), *cert. denied,* 326 U.S. 797 (1946); Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N.E. 692 (1891).

110. *See* notes 68-75 *supra* and accompanying text.

111. *See* Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964); Mosler v. Whelan, 28 N.J. 397, 147 A.2d 7 (1958).

placed emphasis on the need for free discussion. It would be logical for this emphasis to go beyond the particular doctrine announced in that case and enter the libel per se area. The result would be that courts would not find a publication libelous per se unless it clearly meant that the plaintiff was disloyal. However, this proposition can only be tested by more decisions involving Communist imputations.