William & Mary Law Review

Volume 11 (1969-1970)
Issue 2

Article 4

December 1969

The Supreme Court and Libel

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LIBEL AND THE SUPREME COURT

Constitution of the United States, Article I:
Congress shall make no law . . . abridging . . . the freedom . . . of the press.

This article attempts to reconcile the law of libel with the First Amendment guarantee of freedom of the press. Libel law, ideally, is a manifestation of society's concern for the individual's reputation, while the guarantee of a free press represents society's interest in encouraging new ideas, peaceful reform and political awareness. This article focuses on the Supreme Court's treatment of the law of libel in the context of the history and underlying theories of both the First Amendment and libel law. The bulk of the Court's rulings concerning libel have been rendered since 1694. The conflict between libel and a free press, however, goes back to the days of Coke. The Supreme Court's decisions, therefore, like the law of libel itself, represent the continuing attempt to reconcile two important and often competing values: freedom of communication and the individual's concern for his reputation.

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In dealing with the problems arising from the clash between the law of libel and the first and fourteenth amendments to the Constitution of the United States, several of the Justices of the Supreme Court have turned to history to support their contention that the framers intended to either abolish or severely limit the law of libel. Interpreting the Constitution is not solely a function of historical research. History, however, may reveal what the framers meant to say (if that is indeed possible), and, more importantly, what some of the problems are and how other men, in earlier times, met those problems. Therefore, the first section of this article is an historical examination of the law of libel in an attempt to show the basis upon which the law was built. After scanning historical periods up to the First World War, it will focus on some of the United States Supreme Court cases that have set the groundwork for the Court's contemporary interpretation. The second half of the article discusses in depth the Supreme Court cases,

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starting with *New York Times Co. v. Sullivan*,[1] important to the development of the law of libel.

Historical Perspective: Seditious Libel

Freedom of the press has never been regarded as an absolute freedom. The printing press did not reach England until 1476 under the reign of Edward IV and it was strictly controlled by the Crown. The press was a theological weapon during these years and was used by Henry VIII (1509-47) in his theological-political duel with the Vatican.[2] The extent of governmental control of the press in England prior to the colonization of America varied with the stability of the government. Controls, under Henry VIII, Edward VI (1547-53), Mary (1553-58), and Elizabeth I (1558-1603), were rigorous since the Tudor throne was in constant danger of being toppled by the religious and dynastic jealousies that embroiled England and Western Europe during the sixteenth century.[3] Elizabeth kept a tight rein on the press through a combination of licensing, patent grants, monopolies, and regulations. Libel (seditious libel) was first prosecuted by the Court of the Star Chamber in 1606, during the reign of James I, whose government also continued to suppress printing in an era of religious controversies with the Puritans and the Catholics. In addition to restraints imposed by the ecclesiastical Court of the High Commission and the Star Chamber, the Stuarts continued the Tudor practice of awarding patents which were exclusive monopolies to print specified matter,[4] and the Elizabethan practice of licensing and regulating printers.[5] The Puritan Revolution of 1640 led to the abolition of the Court of the Star Chamber and the Court of the High Commission, but the Puritan Commonwealth also considered it a necessity to regulate the press. Indeed, one finds a trend toward more freedom of the press after the fall of Cromwell's Commonwealth. Nevertheless, even after the Glorious Revolution of 1688, the press was still kept under tight rein.[6] Seditious libel prosecutions continued to flourish in England well into the nineteenth century.[7] According to Blackstone, by the middle of the eighteenth century,

1. 376 U.S. 254 (1964).
2. F. Siebert, Freedom of the Press in England 1476-1776, at 25-30 (1952).
3. *Id.* at 10.
4. *Id.* at 127-33.
5. *Id.* at 141-46.
6. *Id.* at 10.
7. *Id.* at 365; G. Trevelyan, England Under the Stuarts 504 (1922).

freedom of the press was merely freedom from prior restraint. Blackstone wrote that "[n]either is any restraint hereby laid upon freedom of thought or injury: liberty of private settlement is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects." [8] Under this common law rule, the judge determined whether something was libelous, and the jury merely determined whether in fact it was said and by whom. It was not until the Fox Libel Act was passed in 1792 that the jury was allowed to decide whether there was a libel.[9]

Prior to the revolution, the American colonies adopted the English common law rule of libel. As in England, seditious libel was punished as a crime in the colonial courts and as a contempt by the colonial legislatures. There were, however, relatively few court prosecutions, for seditious libel was "enforced in America chiefly by the provincial legislatures exercising their power of punishing alleged breaches of parliamentary privilege, and secondly, by the executive officers in concert with the upper houses, and lastly, a poor third, by the common-law courts." [10] According to Professor Leonard Levy, the now famous *Zenger* case was an isolated phenomenon, lost in a sea of libel proceedings by the colonial legislatures, who kept a tight rein on printers in the colonies.[11] The legislatures were concerned less with the prerogatives of the Crown and its agents than with their own prerogatives and opinions. Statements critical of the legislature or of legislators were punished in every colony. The colonial courts punished blasphemy and defamation of the magistrates as well as seditious libel. Unlike England, the colonial legislatures did not impose direct licensing systems, but rather controlled the press by awarding valuable government printing contracts to "right-thinking" printers. Thus, freedom of the press, during the colonial years, was far from complete.

Prosecutions by the government and the legislatures were not only against seditious libel, a crime often amounting to mere criticism of officials, and contempt, but criticism of the church and the form of government as well. The legislature of Massachusetts Bay in 1661 humiliated John Eliot and ordered his book, *The Christian Commonwealth*, suppressed because it advocated popular election of officials.[12]

8. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 152 (E. Christian ed. 1818).

9. F. SIEBERT, *supra* note 2, at 491.

10. L. LEVY, LEGACY OF SUPPRESSION 20 (1960).

11. *Id.* at 19.

12. *Id.* at 31.

Likewise, in 1696, Thomas Maule, after spending a year in jail, was tried for publishing a book critical of the civil and ecclesiastical authorities in Massachusetts. Maule was acquitted, however, by the jury.[13] Prosecutions for seditious libel by the courts and the legislature in Massachusetts persisted until the Revolution.[14] In New York, as in Massachusetts, the legislature was vigilant in punishing libel directed against the legislature, but spoke openly of freedom of the press when the executive branch was libeled.[15] The situation was much the same in Pennsylvania. Indeed, Andrew Hamilton, the man who defended Zenger, was a member of the Council (Pennsylvania's upper house of legislature) which, in 1722, barred a printer (who wrote about the dying credit of the province) from publishing without permission anything that had to do with governmental affairs.[16]

In the South, Levy found conditions to have been about the same as in the Middle Atlantic and New England colonies:

> There were fewer cases, but not because a greater freedom prevailed. On the contrary, there seems to have been more acquiescence and less press activity. Virginia, for example, had no press until 1729 and no newspaper until 1733. Printing came to the Carolinas and Georgia even later and everywhere in the South was introduced under government auspices, closely controlled until the outbreak of the revolutionary controversy in the 1760's. There was not even a competitor to the government press in Virginia until 1766.[17]

The revolutionary ferment did much for the expansion and vitality of the colonial press, and it was during this period, when the press attacked the royal government, that the founding fathers sounded the tocsin in the name of freedom of the press. Freedom of the press, however, was a right available only to patriots, and Tory printers were silenced by either the mob or the lower house of a colony's legislature.[18]

It is not surprising to find that the English common law of libel was transported intact to the American colonies. Studies of colonial libraries show that the law treatises read by the colonists were those of Coke,

13. *Id.* at 33.
14. *Id.* at 67-73.
15. *Id.* at 41-49.
16. *Id.* at 49-50.
17. *Id.* at 61-62.
18. *Id.* at 63-87.

Grotius, Blackstone, and Henry Care.[19] Many of the founding fathers were educated in England, and from 1760 until the outbreak of the American Revolution one hundred and fifteen Americans studied law at the Inns of Court in London. A number of these became members of the Continental Congress (*e.g.*, Peyton Randolph), the Constitutional Convention (*e.g.*, John Blair and C. C. Pinckney) and the first Federal Government.[20] The philosophical and political background of most of the founding fathers was influenced by writers such as Locke and Milton, who recognized freedom of communication but only for certain approved categories of thought. Locke spoke in terms of absolute liberty in the realm of religious speech but qualified such freedom with regard to political speech.[21] Milton argued strongly for freedom of communication in his famous *Areopagitica*, but drew the line of freedom to exclude "Popery and open superstition" and that which was impious or evil.[22] Indeed, there were very few pamphleteers in England or the colonies during the eighteenth century who actually went beyond the Blackstonian formula.[23] American libertarian theory was likewise timid. Benjamin Franklin advocated freedom of the press but not to the extent of countenancing the publication of vice or corruption.[24] Indeed, with the exception of James Alexander (Zenger's attorney along with Hamilton) and William Bollan, political thinkers ventured little further than Blackstone in dealing with the freedom of communication.[25]

Freedom of the press does not seem to have been a political issue in the pre-Revolutionary period beginning in 1763. The authors of the *Stamp Act Resolutions* of 1765 complain of taxation and the lack of representation, trial by jury, and the right of petition, but make no mention of freedom of the press.[26] The *Declaration and Resolves of the First Continental Congress*, written in 1774, makes no reference to either the right of free speech or a free press.[27] Likewise, the Declaration of Independence contains no mention of incursions on the colonists' freedom of the press. Freedom of the press is spoken of in the *Address to the Inhabitants of Quebec*, which was proclaimed by the

19. A. HOWARD, THE ROAD FROM RUNNYMEADE 119-24 (1968).
20. *Id.* at 125-29.
21. J. LOCKE, A LETTER CONCERNING TOLERATION 167-224 (Appleton-Century ed. 1937).
22. L. LEVY, *supra* note 10, at 95-96.
23. *Id.* at 108-14.
24. *Id.* at 127; C. ROSSITER, SIX CHARACTERS IN SEARCH OF A REPUBLIC 238-39 (1953).
25. L. LEVY, *supra* note 10, at 175.
26. SOURCES OF OUR LIBERTIES 286-89 (R. Perry & J. Cooper eds. 1959).
27. *Id.* at 261-71.

Continental Congress in 1775, in an attempt to bring Canada over to the colonists' cause.[28] The promise to Quebec of liberty of the press, among other benefits, was apparently for external consumption, because throughout the colonies Tory printers were being harassed by mobs and by the new state legislatures.[29] Guarantees of freedom of press appear in eight state constitutions (Virginia (1776), Delaware (1776), Maryland (1776), North Carolina (1776), Vermont (1777), Massachusetts (1780), New Hampshire (1784)) in language so strikingly similar as to suggest the ritual enactment of a form.[30] Yet, the Continental Congress, in 1776, urged the new states to enact legislation to prevent people from being "deceived and drawn into erroneous opinion," and by 1778 every state had some form of sedition law which was broadly interpreted to penalize open denunciation of the patriot cause.[31] Levy notes that

> [t]here is no evidence to show that [the phrase "freedom of the press"] was not used in its prevailing common-law or Blackstonian sense to mean a guarantee against previous restraints . . . for licentious or seditious abuse. The evidence, in fact, shows that the Blackstonian definition was the intended one, just as it was the traditional and taught one.[32]

Despite Jefferson's *Statute of Religious Freedom*, Virginia did not adopt the liberal overt-acts test (*i.e.*, prosecution is undertaken only when ideas become overt acts) with regard to certain political utterances proscribed by the state legislature.[33] Libel actions, civil and criminal, were instituted in each of the original thirteen colonies throughout the nineteenth century and have continued to the present day. Delaware, Massachusetts, North Carolina, South Carolina, Connecticut, New Jersey, Pennsylvania, and Maryland entertained at least one action for criminal libel after 1790.[34] Libel actions for criticism of public officials were entertained in Connecticut, New York, North Carolina, Maryland, Georgia, Massachusetts, and Pennsylvania.[35]

28. *Id.* at 285.
29. L. LEVY, *supra* note 10, at 177.
30. SOURCES OF OUR LIBERTIES, *supra* note 26, at 306-85.
31. L. LEVY, *supra* note 10, at 181-82.
32. *Id.* at 185.
33. VA. CODE OF 1803, ch. CXXXVI (Act of Dec. 26, 1792, originally enacted in 1785).
34. 32 Am. Digest 1853-2494 (Century ed. 1902).
35. *Id.*

The debates in Congress and in the states over the Bill of Rights, furthermore, give us little clue as to what the framers had in mind when they stated that Congress should make no law abridging freedom of the press.[36] It would be time-consuming to reconstruct these debates for the reader; however, an attempt will be made to present the conclusions of several historians as to their meaning. Zachariah Chafee, Jr. felt that the provisions of the Bill of Rights could not be applied with absolute literalness. He argued that the framers intended to do away with the Blackstonian standard which countenanced actions for seditious libel and sought to replace it with a standard which allowed unrestricted discussion of public measures and public opinions. Chafee concluded that the framers meant to abolish seditious libel and to prevent any prosecutions by the federal government for criticism of the government.[37]

The framers of the Bill of Rights apparently meant to go beyond Blackstone's definition of libel. How far they were willing to go is unclear. The actual debates are far from explicit and the statements and writings of the framers offer little help. Men like Benjamin Franklin, John Adams, and William Cushing felt that freedom of the press ought to be limited to truthful statements. Framers such as James Wilson and Hugh Williamson advocated a restatement of the Blackstonian principles. The debate on the first amendment in Congress can best be characterized as abstract.[38]

Levy argues that, while it was understood that the ". . . First Amendment imposed limitations upon only the national government . . ." and the limitations seemed clear enough, the meanings of the subjects protected were not:

> The Congressional debate on the amendment, even as to its clause on establishments of religion as well as the free speech-and-press clause, was unclear and apathetic; ambiguity, brevity and imprecision of thought characterize the comments of the few members who spoke. It is doubtful that the House understood the debate, cared deeply about its outcome or shared a common understanding of the finished amendment. The meager records of the Senate tell us only that a motion was voted down to alter the amendment so that freedom of the press should be protected "in as ample a manner as hath at any time been secured by the

36. 1 ANNALS OF CONG. 729-808 (1789).
37. Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 7-23 (1954).
38. *Id.* at 214.

> common law." There is no way of knowing whether the motion was defeated on the ground that it was too narrow, too broad or simply unnecessary. But its phraseology reflects a belief in the mind of its proposer that the common law adequately protected freedom of the press.[39]

Even Madison expressed reservations as to the absoluteness of the first amendment "in cases that are doubtful or where emergencies may overrule" the protection of a free press.[40]

Brant's interpretation of the drafting of the Bill of Rights is more liberal than that of Levy or of Chafee. Brant argues that, under the spur of public demand, the conservatives and liberals joined in drafting and proposing for adoption "the strongest negative clause that could be framed," forbidding Congress to make any laws abridging the freedom of the press.[41] This was accomplished, according to Brant, because both liberals and conservatives feared the power of the new national government, because those who feared a free press looked to the states to limit its freedom, and because in 1789 no one could foresee the need for allowing Congress to punish political opinion.[42] Brant, like Levy, admits that the debates on the first amendment are unclear;[43] he argues, however, that the underlying truth of the Bill of Rights was that "the censorial power is in the people over the Government, and not in the Government over the people." [44] From where this truth is derived and whether it was meant to apply only to the federal government is not mentioned. Brant limits the free speech protection to political speech and criticism of the government.[45]

One of the most articulate members of the Congress in 1789 was James Madison. Madison, the evidence indicates, probably had a broader view of how free the press should be than his contemporaries and probably would have extended his protections to the states.[46] How far Madison was willing to go beyond protecting political speech is unclear. What is clear, however, is that Madison represented the ex-

39. L. LEVY, *supra* note 10, at 224.
40. *Id.* at 234.
41. I. BRANT, THE BILL OF RIGHTS 232 (1965).
42. *Id.* at 230-31.
43. *Id.* at 224.
44. *Id.* at 236 (quoting Madison).
45. *Id.*
46. A. SUTHERLAND, CONSTITUTIONALISM IN AMERICA 191, 195 (1965); 1 ANNALS OF CONG. 448-64, 784 (1789).

treme view among the men who debated and passed the Bill of Rights. Freedom of the press to most men meant freedom for my ideas but not for my opponents'. The fairest conclusion that can be drawn is that:

> [W]e do not know what the First Amendment's freedom of speech-and-press clause meant to the men who drafted and ratified it at the time that they did so. Moreover, they themselves were at the time sharply divided and possessed no clear understanding either. If, however, a choice must be made between two propositions, first, that the clause substantially embodied the Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the known evidence points strongly in support of the former proposition.[47]

So far, the writings of Thomas Jefferson have not been considered. Jefferson was neither a member of the Constitutional Convention nor of the first Congress which drafted the Bill of Rights. Furthermore, Jefferson's attitudes toward freedom of the press were by no means consistent. His attitude toward the press varied over time, and his conception of a free press was vague except in the desire to keep the press free from direct federal interference. In 1804, Jefferson wrote that

> [W]hile we deny that Congress has a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right to do so. They have accordingly, all of them, made provisions for punishing slander . . . .[48]

It is interesting to note that Jefferson accepted the Madisonian formula: "Congress shall make no law . . . abridging the freedom of speech or of the press" only after suggesting the following to Madison:

> The people shall not be deprived of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty, or reputation of others, or affecting the peace of the confederacy with other nations.[49]

Did Madison's proposal go beyond this? If so, how far? It is doubtful that the average member of Congress viewed the first amendment as

47. L. LEVY, *supra* note 10, at 247-48.
48. F. MOTT, JEFFERSON AND THE PRESS 7 (1943).
49. *Id.* at 14.

going even this far. Jefferson opposed public prosecutions for libel of government figures, but only within the context of their having recourse to private libel actions.[50] Furthermore, there exists some question as to Jefferson's opposition to libel actions when he himself was the target of the libel.[51] Writing to Governor Thomas McKean of Pennsylvania in 1803, concerning the publications of a Philadelphia Federalist Journal, Jefferson advised that "the press ought to be restored to its credibility if possible. . . ."

> The restraints provided by the laws of the states are sufficient for this if applied and I have therefore long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution: but a selected one.[52]

Jefferson's earlier writings concerning freedom of the press in the Kentucky and the Virginia Resolutions, during the Alien and Sedition Acts controversy, seem less absolute in the context of his other statements.

The next crisis in the history of freedom of the press in the United States occurred in 1798 when Congress passed the Alien and Sedition Acts. The Sedition Act made it unlawful to conspire to oppose proper measures of the United States, impede federal laws or interfere with federal officials in doing their duty. The Act also punished counseling or attempting riot or insurrection. The most controversial part, Section 2, made it a crime for any person to write or print or knowingly aid someone in writing or printing anything "false, scandalous and malicious" against the United States Government, Congress, or the President with the intent to defame them or bring them "into contempt or disrepute." Finally, the Sedition Act made it criminal to stir up sedition or excite any "unlawful combinations" for the purpose of opposing any constitutional law. The Sedition Act modified common law libel by providing that truth would be a defense and that the jury would determine *both* law and fact under the direction of the court.[53]

The Sedition Act, like the Alien Act, was passed by a Federalist Congress during a period of strained relations with the French Revolu-

50. *Id.* at 43.
51. L. LEVY, *supra* note 10, at 297-308.
52. F. MOTT, *supra* note 48, at 44.
53. Act of July 14, 1798, ch. 75, 1 Stat. 596.

tionary Government, and the spread of French conquests in Europe. Such a situation made it seem likely that the French Revolution would be exported to the United States either on the bayonets of French armies or by internal subversion. The Alien and Sedition Acts, passed as the country began hurriedly to mobilize, were aimed at subversion. Unfortunately, the legislation was indiscriminately used by the Federalists as a weapon against the attacks of the Jeffersonian-Republican press. The weapon was two-edged and gave the Jeffersonians an ideal political base from which to attack the Federalists. Thus, the outcry against the acts ran along political lines and was cast in the extreme language and doctrinaire rigidity of partisan political debate. The abuse and slander heaped on the Federalists by the Republican press must have been galling indeed, but when the Federalists left office their response to Republican rule was equally vituperative. One's position on the question of freedom of the press during this period seems to have been dictated by whether he was in or out of the administration. The prosecutions for seditious libel continued under the Jefferson Administration; they merely shifted from the federal to the state courts.[54]

Jefferson refused to use the Sedition Act, but his outrage at its passage was apparently not reflected by Congress, since the Act was not repealed until 1832.[55] It is ironic that the Jeffersonian prosecutions for common-law seditious libel under state law were more rigorous than those under the Sedition Act which, unlike the common-law, allowed truth as a defense and made the jury the judge of both law and fact. Indeed, it was Alexander Hamilton who argued unsuccessfully in the New York case of *People v. Crosswell* that "[f]reedom of discussion and a freedom of the press, under the guidance and sanction of truth, are essential to the liberties of our country, and to enable the people to select their rulers with discretion, and to judge correctly of their merits." [56] Hamilton argued that truth ought to be a defense in a charge of libel and that good intent ought to be a question for the jury.[57] The New York Court of Appeals ruled against Hamilton, but the following year the New York legislature enacted a bill declaring truth to be a defense *in criminal libel prosecutions* and making the jury the judge

54. L. LEVY, *supra* note 10, at 176-309; J. MILLER, CRISIS IN FREEDOM (1951).

55. F. MOTT, *supra* note 48, at 37.

56. 3 Johns. Cas. 337, 345 (N.Y. 1804).

57. *Id.* at 343, 356-57.

of both law and fact.[58] Seditious libel, however, remained a viable criminal action.

The period from 1800 through 1831 saw a general abandonment of federal prosecutions for seditious libel. Civil libel actions, however, flourished in both the federal courts and in the courts of every state in the Union.[59] In 1816, the Supreme Court held that there was no federal common law of crime and thus incidentally foreclosed any further federal prosecutions for common-law seditious libel.[60] The states, however, continued to prosecute seditious libel as well as blasphemy, contempt, and criminal libel.[61] A Congressional Act in 1831 attempted to curb the contempt power of federal judges by confining it to acts and speech occurring in or so near the court as to obstruct justice.[62] The attempt, however, was unsuccessful: in *State v. Morrill*,[63] the Arkansas Supreme Court, in 1855, held that the contempt power was inherent in the courts and could not be limited by a legislative act, thus providing the theory which soon spread to the federal courts and undermined the legislative limitation. The press was particularly vile during this period and during the years before the Civil War. A large number of civil libel actions and some criminal libel actions checked some of the excesses of the press, but the greatest deterrent during the ante-bellum period was public opinion and the mob.[64]

Between 1820 and 1861, the press, like the rest of the nation, was torn by the issue of slavery. The Jackson Administration attempted to curb abolitionist journals indirectly, by allowing southern postmasters to bar them from the mails. A number of southern states made it illegal to print matter advocating abolition or counseling slave insurrection. The mob, the bucket of tar and bag of feathers, and the torch, however, were the most effective and most widely used agents of censorship and led to the destruction of a number of abolitionist presses in both the North and the South. William Lloyd Garrison, the abolitionist crusader, was marched half-naked through the streets of Boston by a mob; abolitionist Elijah Lovejoy was killed when he resisted a

58. *Id.* at 412.

59. 32 Am. Digest, *supra* note 34.

60. *See* United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).

61. Commonwealth v. Clapp, 4 Tyng 163 (Mass., 1808). FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, xx (H. Nelson ed. 1967) [hereinafter cited as Nelson].

62. Act of Mar. 2, 1831, ch. 99, 4 Stat. 487.

63. 16 Ark. 384 (1855).

64. Nelson, *supra* note 61, at xxii.

mob that was attacking his printing office in Alton, Illinois.[65] When newspaper attacks were personal, the victim could resort to a civil libel suit or to the dueling pistol; both courses were widely followed. The pre-Civil War period, however, did see the demise of the "captive press" when the federal government established the Government Printing Office to do official printing thereby releasing the string of newspapers that clung to each new administration in order to receive the valuable government printing contracts that were distributed to the faithful.[66]

The Civil War led to a schizophrenic approach to freedom of the press. In the first years of the war and sporadically throughout its course, the Lincoln Administration either shut down or denied mailing privileges to or imprisoned the editors of newspapers urging insurrection, attacking the Union or seriously hindering the war effort.[67] Yet, the press remained surprisingly free and often made vicious attacks against President Lincoln and the members of his cabinet.

The post-Civil War period was one of economic boom and relative political stability. Politics in this era was shoddy and often corrupt, with many newspapers under the influence of political or economic interests. This was the era of Tammany Hall and Boss Tweed, of Rockefeller and Standard Oil, and of the railroad barons and Populist discontent. It was also the era of Thomas Nast, whose cartoons helped to wreck Tweed's machine and of Ida Tarbell, Upton Sinclair and the "muckrakers," who awakened the public to the conditions around them. The press was not always restrained, and as the nineteenth century came to a close, the number of criminal libel prosecutions and civil libel actions had risen sharply. The rise was to continue until the outbreak of World War I, but the exposés continued and the press was not silenced.[68] It was the outbreak of World War I and the increasing national concern over the activities of the newly emerging groups of radicals and anarchists that brought the federal government back into the area of control of the press.

America's entrance into World War I signaled the beginning of an era of repression of radicals. Congress enacted the Espionage Act of 1917 (amended in 1918) which was essentially a sedition act allowing the federal government to punish persons who made false reports or

65. *Id.*
66. *Id.* at xxv.
67. *Id.* at 173-78; D. SPRAGUE, FREEDOM UNDER LINCOLN (1965).
68. Nelson, *supra* note 61, at xxviii-ix.

statements with intent to wilfully interfere with the operations of American military forces or to promote the success of our enemies. The Act declared it illegal, in time of war, to cause insubordination, disloyalty, mutiny, or refusal of duty in the armed forces of the United States.[69] The Post Office Department closed the mails to radical and pro-German publications and the definition of these was often broad. Local vigilance committees pilloried suspected subversives, tarring and feathering them or worse. In addition to the effort against Germany, the period from 1917 to 1920 saw a growing national fear of radical subversion which was fed by anarchist bombings, the excesses of radical organizations and groups, and the success of the Russian Revolution of 1917. It was within this context that the cases of *Schenck v. United States* and *Abrams v. United States* arose.[70]

The Supreme Court After World War I

Most of our constitutional decisions concerning freedom of the press have occurred since 1917. In *Schenck*, which dealt with a conviction under the Espionage Act of 1917 for distributing pamphlets urging resistance to the draft, Mr. Justice Holmes laid down the classic formulation of when the government could abridge free speech:

> It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*, 205 U.S. 454, 462. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent.[71]

69. Act of June 15, 1917, ch. 30, 40 Stat. 217.

70. Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

71. 249 U.S. at 51-52.

Justice Holmes modified this view in his dissent in *Abrams v. United States*, when he added a reasonable tendency test to his original clear and present danger test. Thus, Holmes limited government interference with speech to cases where the speaker could accomplish or might accomplish what he was advocating. Holmes rejected the contention that free speech meant only freedom from prior restraint and argued that:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[72]

These statements of Justice Holmes, combined with Justice Brandeis' dissent in *Whitney v. California*, have had a profound effect on the Supreme Court's view of the first amendment. Even after the clear and present danger test had been modified and reworked, the theory from which it grew remained potent. Justice Brandeis, elaborating on the clear and present danger test in *Whitney v. California*, which dealt with a conviction for advocating and teaching criminal syndicalism, accepted this interpretation of history:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be conciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.[73]

72. 250 U.S. at 630.

73. 274 U.S. 357, 377 (1927).

As we have seen, this interpretation of history is not borne out by the facts. Furthermore, we must remember that the Court in these cases is not speaking of defamation and civil libel but rather of sedition or seditious libel.

The Brandeis and Holmes view of the first amendment was extremely persuasive. In *Dennis v. United States*, the Court, using a modified version of the clear and present danger test, upheld the conviction of eleven Communists for violating the Smith Act.[74] However, Justice Frankfurter, concurring in the decision, considered the history of the first amendment and rejected the argument that the purpose of the framers "was to give unqualified immunity to every expression that touched on matters within the range of political interest." [75] Justice Frankfurter proposed that free speech, in the last analysis, must be balanced against other competing interests.[76]

Leaving the area of sedition and returning to the problem of direct governmental control over the press, in 1931 the Supreme Court decided *Near v. Minnesota*, which struck down a state statute enjoining the printing of malicious and scandalous libels on the grounds that the first amendment, through the fourteenth amendment, barred prior restraint of publications.[77] The prohibition against prior restraint has been reaffirmed several times, and in 1966 the Court, in an opinion by Justice Black in *Mills v. Alabama*, declared an Alabama law unconstitutional which barred newspapers from electioneering on election day.[78] The Court has likewise declared unconstitutional laws that required written permission to distribute books and pamphlets,[79] an ordinance allowing a municipality to halt distribution of pamphlets because they caused litter,[80] and state taxation of newspapers based on the income of the newspaper.[81] The latter case, *Grosjean v. American*, with Justice Sutherland writing for the majority, quoted from Cooley, one of the nineteenth century's authorities on constitutional law, writing of the dangers of such a tax:

> The evils to be prevented were not the censorship of the press merely, but any action of government by means of which it might

74. 341 U.S. 494 (1951).
75. *Id.* at 521.
76. *Id.* at 519.
77. 283 U.S. 697 (1931).
78. 384 U.S. 214 (1966).
79. Lovel v. Griffin, 303 U.S. 444 (1938).
80. Schneider v. State, 308 U.S. 147 (1939).
81. Grosjean v. American Press Co., 297 U.S. 233 (1936).

> prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.[82]

The Supreme Court, in *Jones v. Opelika*, struck down in 1942 another tax imposed on the sale or distribution of books.[83] After affirming a flat license tax law, the Court reversed itself and adopted the dissenting position enunciated by Chief Justice Stone (joined by Justices Murphy, Douglas, and Black). Chief Justice Stone held that the first amendment freedoms had a "preferred position" in the Constitution and that the "First Amendment prohibits all laws abridging freedom of the press and religion, not merely some laws or all except tax laws" and since flat license tax laws were potent restrictions on the press, they were unconstitutional.[84] Mr. Justice Murphy concurred, but argued that freedom of the press was not unqualified and was "subject to regulation in the public interest which does not unduly infringe the right," but found no such abuses justifying regulation were advanced in the case at bar. Justice Murphy then referred to *Thornhill v. Alabama* and *Cantwell v. Connecticut* as supporting his position.[85]

Cantwell, decided in 1940, declared constitutionally invalid a Connecticut statute barring religious, charitable, or philanthropic solicitation without prior approval by the secretary of the public welfare council. The Court, in an opinion by Justice Roberts, recognized the right of the state to suppress communications under certain defined conditions when necessary to maintain peace and order, but, in this case, the Court found the Connecticut statute to be unconstitutionally broad.[86] *Thornhill*, like the previous cases, was not a libel case; it dealt with whether picketing was protected by the first and fourteenth amendments.[87] Justice Murphy, writing for the majority, held that in Alabama an anti-picketing law was unconstitutional on the grounds that picketing itself was not an instance where the "clear danger of substantial evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[88] Only under such circumstances might discussion be

82. *Id.* at 249-50.
83. 316 U.S. 584 (1942).
84. *Id.* at 608-09.
85. *Id.* at 618-19.
86. 310 U.S. 296 (1940).
87. 310 U.S. 88 (1940).
88. *Id.* at 105.

abridged. Mr. Justice Murphy thus recognized that freedom of communication, even in the context of the state/person relationship, was limited. In other parts of his opinion he spoke more expansively, declaring that:

> Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.[89]

The influence of Justice Brandeis is clearly apparent in this statement. Justice Murphy, applying this "Brandeis" view, felt that

> [f]reedom of discussion, if it would fulfill its historic function in this nation, 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.[90]

This statement was quoted by Mr. Justice Brennan in *Time, Inc. v. Hill* in justifying the proposition that "[t]he guarantees of speech and press are not the preserve of political expression or comment upon public affairs" but go farther to embrace all sectors of the community.[91]

How far was Mr. Justice Murphy willing to carry *Thornhill*? The answer seems to appear in *Chaplinsky v. New Hampshire*, where Justice Murphy, writing for a unanimous court, affirmed the conviction of the petitioner, who had been convicted of cursing a policeman and calling him "a damned Fascist." [92] This was not a free press case, but rather involved freedom of speech. Nevertheless, Justice Murphy's views have a bearing on freedom of the press; he wrote:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and

89. *Id.* at 95.
90. *Id.* at 102.
91. 385 U.S. 374, 388 (1967).
92. 315 U.S. 568 (1942).

> punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[93]

Freedom of communication, Justice Murphy felt, was not limited to prior restraint under the first amendment.[94] One would assume that in using libel, as an exception in *Chaplinsky*, Justice Murphy was speaking of freedom of the press as well as freedom of speech.

In 1941, Mr. Justice Black delivered the opinion in *Bridges v. California*, another case that greatly influenced *New York Times Co. v. Sullivan* and its successor cases.[95] In *Bridges* the Supreme Court put to rest the arguments advanced in *Morrill v. Arkansas* concerning the contempt power of the judiciary. Bridges, a longshoreman's union leader, had been found in contempt for sending a telegram to the Secretary of Labor referring to a judge's decision in a labor case as "outrageous" and threatening a labor tie-up as a result of the decision. The Court reversed the contempt conviction. In doing so, Justice Black drew once again on Justice Brandeis' concurring opinion in *Whitney v. California*, arguing along Holmes-Brandeis lines that the founding fathers intended the first amendment to have "the broadest scope that could be countenanced in an orderly society." [96] The clear and present danger test as modified by *Whitney* was thus applied to judicial contempt citations. A dissent by Mr. Justice Frankfurter, joined by Chief Justice Stone and Justices Roberts and Byrnes, argued that:

> Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. . . . In the cases before us, the claims on behalf of freedom of speech and of the press encounter claims on behalf of liberties no less precious. California asserts her right to do what she has done as a means of safeguarding her system of justice.[97]

Justice Frankfurter preferred to balance the interests involved rather than view the Constitution as a "doctrinaire document." [98] Once more

93. *Id.* at 571-72.
94. *Id.* at 572 n.3.
95. 314 U.S. 252 (1941).
96. *Id.* at 265.
97. *Id.* at 282.
98. *Id.* at 283.

one sees the clash between those members of the Court who viewed the Holmes-Brandeis test enunciated in *Abrams*, *Schenck*, and *Whitney* as extending to other areas, and those who preferred to balance the conflicting interests arising in each new problem.

Justice Black again presented his theory of the first amendment in the anti-trust case, *Associated Press v. United States*, where he noted that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." [99] The first amendment cases following *Associated Press* involved this same clash between the test applied by Justice Frankfurter and that applied by Justices Black and Douglas. The clash between the two tests did not always result in a divided court with regard to result, but it did divide the Court as to philosophy. The adherents of the balancing test sometimes divided when their weighting of the various conflicting values differed. Nevertheless, the approach taken by Justices Frankfurter and Jackson was pragmatic and flexible; it viewed the Bill of Rights not as an immutable absolute, but as encompassing values to be considered in the light of other values with the ultimate end being the democratic governing of a republic. The approach taken by Justices Black, Douglas, Murphy, and Stone is more doctrinaire and consequently less flexible. The first amendment, to these latter Justices, expressed a guaranty to individuals of certain "preferred" liberties which could only be abridged under the most extreme circumstances.

FROM *New York Times* FORWARD

> "The horror of that moment" the King went on, "I shall never, *never* forget!" "You will, though," the Queen said, "if you don't make a memorandum of it." [100]

On March 29, 1960, a full-page advertisement entitled "Heed Their Rising Voices" appeared in the *New York Times*. The advertisement was signed by the Reverend Ralph Abernathy and other well-known public figures, and charged the Montgomery, Alabama, police with maltreating Negro students and civil rights leaders who were protesting segregation in that city. The actual text of the advertisement contained

99. 326 U.S. 1, 20 (1945).

100. L. CARROLL, THROUGH THE LOOKING GLASS 139 (Airmont ed. 1965).

several factual discrepancies but did not name anyone as being the person responsible for the alleged brutality. Montgomery Commissioner of Public Affairs, L. B. Sullivan, felt, however, that the article charging police brutality was a libelous attack on him since one of his duties was to supervise the police department. He sued for libel. The trial court and the jury found the article to be libelous *per se* and not privileged because of the factual errors present; both general and punitive damages totaling $500,000 were awarded by the jury. The Alabama Supreme Court affirmed the judgment and the defendants appealed to the United States Supreme Court on the grounds that the Alabama court's decision violated their first amendment rights of freedom of speech and of the press as applied to the states through the fourteenth amendment.

The Supreme Court, in an opinion written by Mr. Justice Brennan, reversed, holding that the first amendment required

> . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[101]

Justice Brennan rejected the argument that a newspaper was held to a higher standard when dealing with commercial advertisements.[102] He found that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[103] Throughout the opinion, he spoke in terms of a constitutional protection of political discussion[104] which required toleration for erroneous statements in order to provide the "breathing space" for honest and vital opinions, concluding that "[w]hatever is added to the field of libel is taken from the field of free debate."[105] The opinion stated that neither factual error nor defamatory content removes the constitutional shield from criticism of official conduct, nor would a combination of the two elements remove the protection.[106] (The Court's new federal

101. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
102. *Id.* at 266.
103. *Id.* at 270.
104. *Id.* at 269-70.
105. *Id.* at 272.
106. *Id.* at 273.

rule will be referred to hereinafter as the *New York Times* rule.) The *New York Times* rule represented the adoption, as a national constitutional rule, of the minority view of the fair comment doctrine enunciated in the Kansas case of *Coleman v. MacLennan.*[107] Justice Brennan himself compared the new federal rule to the "like rule . . . found in the Kansas case of *Coleman v. MacLennan* . . . ." [108]

New York Times, it must be noted, did not attempt to extend first amendment protection to statements other than those made about a public official's public conduct. Brennan refused to consider which public officials were within the meaning of the rule or "to specify categories of persons who would or would not be included." [109] The Court also refused to delineate the boundaries of official conduct.

Looking to *Coleman v. MacLennan,* one finds little help in clarifying *New York Times. Coleman,* decided in 1908, involved an alleged libel against a candidate seeking reelection as state attorney general and involved facts concerning the candidate's official actions in a school-fund transaction.[110] The trial court rendered a verdict for the newspaper on the ground that the plaintiff had failed to prove malice.[111] The Kansas Supreme Court affirmed the trial court, holding that statements made about a public officer or candidate were privileged unless there was a showing of malice.[112] The rationale for this rule, quoted in *New York Times,*[113] was that

> it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small that such discussion must be privileged.[114]

107. 78 Kan. 711, 98 P. 281 (1908).
108. 376 U.S. at 280.
109. *Id.* at 283 n.23.
110. 78 Kan. at 712, 98 P. at 281.
111. *Id.* at 712-15, 98 P. at 281-82.
112. *Id.* at 723, 98 P. at 286.
113. 376 U.S. at 281.
114. 78 Kan. at 724, 98 P. at 286.

The Kansas court also stated that

> [t]he basis of the contention for a more liberal indulgence lies in the modern conditions which govern the collection of news items and the insistent popular expectation that newspapers will expose, and the insistent popular demand that they shall expose, actual and suspected fraud, graft, greed, malfeasance, and corruption in public affairs and questionable conduct on the part of public men and candidates for office without stint, leaving to the people themselves the final verdict as to whether charges made or opinions expressed were justified.[115]

The cases cited in support of the decision involved qualified privileges for common interest,[116] protection of a third party,[117] and fair comment about public men or candidates.[118] The Kansas Supreme Court, by way of dicta, applied the rule to all officers and agents of government, to the managers of all public institutions, and to the conduct of all corporate enterprises affecting the public interest.[119] The court had only harsh criticism for the limited fair comment rule which would apply merely to opinion and not to fact.

The Kansas court stated, however, that a libel action by public figures would lie where malice was found. Malice would no longer be presumed but must be proven and if proven would be of importance as to damages and in overcoming the initial privilege.[120] There must be proof of "actual evilmindedness" which is made from

> an interpretation of the writing, its malignity or intemperance by showing recklessness in making the charge, pernicious activity in circulating or repeating it, its falsity, the situation and relations of the parties, the facts and circumstances surrounding the publication, and by other evidence appropriate to a charge of bad motives as in other cases.[121]

The decision in *Coleman* was less liberal than *New York Times* as to the definition of malice, but the Kansas Supreme Court went well

115. *Id.* at 725, 98 P. at 286.
116. *Id.* at 726-28, 98 P. at 286-87.
117. *Id.* at 727-28, 98 P. at 287.
118. *Id.* at 728-32, 98 P. at 287-88.
119. *Id.* at 734-35, 98 P. at 289.
120. *Id.* at 740-41, 98 P. at 291-92.
121. *Id.* at 741, 98 P. at 292.

beyond the scope of the *New York Times* holding with regard to public officials covered. Both *New York Times* and *Coleman*, however, were vague as to what official conduct is and who are public figures. Neither case defined the phrases "affecting the public" or "of public concern" or even what constituted "the public."

The next case dealing with libel was decided nine months after the decision in *New York Times*. Jim Garrison, the district attorney for the Parish of New Orleans, Louisiana, made critical remarks at a press conference about the efficiency and ability of several judges in that parish. He was soon indicted for criminal libel, tried, and convicted.[122] Criminal libel differs from civil libel in that the plaintiff is the state and the primary underlying rationale is not to recompense for damage but to avoid breaches of the peace that might otherwise occur because of the libelous statements. Mr. Justice Brennan, again writing for the majority, held that the prosecution was unconstitutional under the standard announced in *New York Times*.[123] The Court held the Louisiana criminal libel statute overly broad in that it allowed prosecutions for criticism of public officials.[124] Mr. Justice Brennan went on to state that

> even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attacking adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be inhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.[125]

Invoking *New York Times*, the Court limited criminal libel prosecutions concerning public figures to instances where the statement was knowingly false or made with reckless disregard of the truth.[126] The fact that charges of laziness and dishonesty also involved private reputation was held to be irrelevant:

> The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public repu-

122. State v. Garrison, 244 La. 787, 154 So. 2d 400 (1963).
123. Garrison v. Louisiana, 379 U.S. 64, 67 (1964).
124. *Id.* at 67-70.
125. *Id.* at 73.
126. *Id.* at 75.

> tation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant.[127]

The Court, after stating that falsehoods were not protected because they had no social value, concluded the opinion by noting that the *New York Times* rule, in dealing with falsity of facts, adopted a standard requiring proof of more than a lack of ordinary care to sustain a charge of libel.[128]

Garrison broadened the *New York Times* rule by extending it from civil actions to criminal prosecutions and by widening its scope to cover statements touching on a public official's private life if such charges could be shown to bear on the official's public life. How close the relationship between private and public life had to be was not explained.

The *Times-Garrison* doctrine was reaffirmed in *Henry v. Collins*, a per curiam decision, in which the Supreme Court reversed libel judgments against a person who had charged that his arrest for disturbing the peace was the result of a plot on the part of the chief of police and the county attorney.[129] *Henry*, like *New York Times* and *Garrison*, did not go beyond considering libel of public officials, but the definition of "public figure" was soon expanded.

William Linn was a local officer of Pinkerton's National Detective Agency, Inc., a corporation which United Plant Guard Workers (apparently overlooking both history and the irony of unionized Pinkertons) was trying to organize. In the course of a labor dispute, the union charged that the Pinkerton management (in this case, Linn) had been cheating and lying to the workers. Linn sued for libel in the United States District Court, which dismissed the complaint on the grounds that it was within the jurisdiction of the National Labor Relations Board.[130] Linn appealed. Recognizing that the National Labor Relations Board exercised some control over the statements made in the area of union-management relations, Justice Clark, writing for the majority, still found an overriding state interest in the protection of persons from "malicious libels."[131] In sending the case back to the district court for trial, Justice Clark warned that such a case must be

127. *Id.* at 77.
128. *Id.* at 79.
129. 380 U.S. 356 (1965).
130. Linn v. Local 114, United Plant Guard Workers, 383 U.S. 53, 55-57 (1966).
131. *Id.* at 61.

considered with reference to the *New York Times* standard.[132] The standard in *New York Times* was "adopted by analogy, rather than under constitutional compulsion."[133] The court did not, however, rule out a stricter policy against libel if the National Labor Relations Board found that such a policy was necessary.[134]

Linn was not an aberration in the law of libel; rather it continued a trend that broadened the scope of the *New York Times* rule.

On the same day that the Supreme Court announced its opinion in *Linn*, it also decided *Rosenblatt v. Baer*.[135] Frank Baer had been employed by Belknap County, in New Hampshire, as the supervisor of the county recreation area which included a ski resort. After Baer left his job, Alfred Rosenblatt, a columnist for the Laconia *Evening Citizen*, wrote a column stating that the ski resort was making much greater profits than in prior years and asking what had happened to the previous years' profits. Baer viewed the article as accusing him of dishonesty and sued for libel. The jury agreed that Baer had been libeled and awarded damages.[136]

The Supreme Court, in an opinion by Mr. Justice Brennan, applied the *New York Times* rule. Brennan held that, if Baer's theory was that the column libeled him as one of the group of commissioners, then the *New York Times* rule would apply to that group and Baer, as a member, would be within the rule.[137] Justice Brennan declared that "[w]hether or not respondent was a public official, as a member of the group he bears the same burden."[138] The footnote supporting this proposition referred to the New York case of *Gilberg v. Goffi*, decided in 1964, which denied redress to the law partner of the mayor of Mt. Vernon, New York, when the former was mentioned in a political attack on the mayor.[139] Thus, in *Rosenblatt*, the Supreme Court broadened the meaning of "public official" to include non-public figures who were associated with public officials. *Rosenblatt* was reversed on this ground because the trial court failed to give proper instructions, under the *New York Times* rule, as to group libel.

Mr. Justice Brennan then considered the fact that the article had

132. *Id.* at 62-63.
133. *Id.* at 65.
134. *Id.* at 67.
135. 383 U.S. 75.
136. *Id.* at 77-79.
137. *Id.* at 80-83.
138. *Id.* at 83.
139. 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (1964).

referred to Baer as "the man-in-charge" at the ski area and found that this put Baer squarely within the public figure category of the *New York Times* rule.[140] Justice Brennan stated that the determination of who was a "public official" was not to be made by applying state law standards but by applying national constitutional standards of free expression.[141] He did not define these standards but rather reinvoked the rationale of *New York Times* by repeating that there was profound national commitment to debate on public issues and especially to "debate about those persons who are in a position significantly to influence the resolution of those issues." [142] He concluded:

> It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.[143]

What "substantial responsibility" means was left unclear. The most ominous phrase, however, was "appear to have" since this opens up the entire hierarchy of government. If one believes that an assistant clerk or typist influenced her superiors in some way and libels her, will he be protected by the *Rosenblatt* extension of the *New York Times* rule? The definition of what persons come within *New York Times* was not clarified by *Rosenblatt*. Indeed, considering that Baer was a relatively low-ranking bureaucrat in the New Hampshire government, Justice Brennan's definition appears to exempt only minor clerks and watchmen from the scrutiny of a press under the protection of the *New York Times* rule.[144] It does not help to say that *New York Times* applied "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all public officials . . . ." [145] This bars nothing if the defendant takes the trouble to show the plaintiff's relation to issues of public interest.

Another footnote in the decision was later used by the Eighth Circuit in *Pauling v. Globe-Democrat Publishing Co.*:

140. 383 U.S. at 83.
141. *Id.* at 84.
142. *Id.* at 85.
143. *Id.*
144. *Id.* at 86.
145. *Id.*

> We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing concern.[146]

Thus, the *New York Times* rule continued to expand. In 1966, Linus Pauling sued the *St. Louis Globe-Democrat* for a series of adverse comments and cartoons based on an editorial charging Pauling with contemptuously refusing to testify before a United States Senate committee.[147] The federal district court dismissed the complaint and the Court of Appeals for the Eighth Circuit affirmed, noting that Pauling was a renowned scientist, a recipient of the Nobel Peace Prize, and a well-known figure in the movement to halt nuclear testings. He was a public figure under the *New York Times* rule since he, "by his public statements and actions, was projecting himself into the arena of public controversy and into the very 'vortex of the discussion of a question of pressing public concern.'" [148] The court reached its conclusion after reviewing the trend of decisions in the Supreme Court beginning with *New York Times*:

> We feel that the majority opinions in these Supreme Court cases . . . establish for us the following: (1) The Court recognizes as a national "principle" the desirability of uninhibited debate about public issues. (2) It also recognizes "a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." (3) In the absence of malice, the First and Fourteenth Amendments afford a privilege to public discussion of official conduct even though it has some factually erroneous or defamatory content. (4) Malice, in this connection, equates with knowledge of the falsity of the statement or with reckless disregard of whether it is false or not. (5) The Court thus far has specifically refrained from fixing a limit for its concept of "public official", either among the ranks of government employees "or otherwise". (6) It has, however, included within the term a city commissioner, a trial judge, a prosecutor, and a chief of police, and it has not excluded a recreation supervisor appointed by elected county commissioners. (7) Similarly, the Court has not yet fixed a boundary for its "official conduct" concept. (8) At

146. *Id.* at 86 n.12.
147. 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967).
148. *Id.* at 195.

> least two present members of the Court feel that the majority's standard for privilege falls short of appropriate constitutional protection. (9) The Court thus far has also refrained from expressing a view as to "whether there are other bases" for applying the standards of *New York Times*, specifying, as a possible example, the subject who "has thrust himself into the vortex of the discussion of a question of pressing public concern." (10) The Court has applied the *New York Times* principle by analogy in the labor field.[149]

The Eighth Circuit was less concerned with the official position held by the plaintiff than with his position with regard to public issues and distinguished between persons seeking public attention—such as political candidates—and those receiving public attention through no fault of their own. The court placed in the latter category persons who were exploited or used by others because of their prominence in some activity or occurrence, such as Jack Dempsey (who sued a magazine for publishing an exposé of one of his early prizefights),[150] Warren Spahn (who sued the publisher of a fictional biography purporting to represent Spahn's life),[151] or a high society figure (who was charged with cruelty to his wife and with bigamy).[152] With regard to persons consciously entering public life, however, the court felt

> that a rational distinction cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of national policy will be less important to the public interest than will criticism of government officials. A lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader may possess a capacity for influencing public policy as great or greater than that of a comparatively minor public official who is clearly subject to *New York Times*. It would seem, therefore, that if such a person seeks to realize upon his capacity to guide public policy and in the process is criticized, he should have no greater remedy than does his counterpart in public office.[153]

The court saw the *New York Times* rule as an expanding and not a restrictive defense and therefore applicable to a person such as Dr.

149. *Id.*
150. Dempsey v. Time, Inc., 43 Misc. 2d 754, 252 N.Y.S.2d 186 (1964).
151. Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (1964).
152. Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 213 N.E.2d 1 (1965).
153. 362 F.2d at 196.

Pauling.[154] The decision in *Pauling* was appealed to the Supreme Court in 1967, but certiorari was denied.[155]

Pauling marked the outer reaches of the *New York Times* rule as of 1966 and was paralleled by a District of Columbia Circuit Court decision which drew what it believed to be the floor to the privilege. The court, in *Afro-American Publishing Co. v. Jaffe*, held that the *New York Times* rule did not protect a newspaper that insinuated that a newsdealer was bigoted because he discontinued selling a Negro magazine.[156] The court argued that such a man was a non-public figure since he had "not mounted a public rostrum, made an appeal to the public, sought or received public funds, offered a service or product for public use or comment, or organized a boycott or other group activity by members of the public." [157] Both *Pauling* and *Afro-American* proceed much farther than the public figure-public interest test enumerated in *New York Times*. The cases and the rulings after *New York Times* suggest that the courts were proceeding along the broader lines suggested by *Coleman v. MacLennan*. The test, by 1966, had become one that concentrated less on office or position, at least governmental position, and more on the relevance of the plaintiff's acts or statements to the general community. Public interest in a man and in problems became the chief criterion in determining whether or not one was a *New York Times* public figure. The decisions, through *Pauling*, however, applied the *New York Times* rule only to persons who actively sought public attention or placed themselves in an active role which might be of public interest. The Supreme Court, the very next year, carried the *New York Times* rule beyond this point.

The Court, in 1966, the same year as *Baer* and *Linn*, also decided the case of *Beckley Newspapers Corp. v. Hanks*, concerning a town clerk libeled during an election campaign. The Court reversed a judgment for plaintiff on the grounds that the plaintiff failed to prove the high degree of awareness of probable falsity demanded by *New York Times* on the *basis of the record as a whole*.[158] Malice thus became a "high degree of awareness of probable falsity" or reckless disregard of whether a statement is false or not, but the terms themselves remain unclear. What is a "high degree of probable falsity"? How does one

154. *Id.* at 196-97.
155. 388 U.S. 909 (1967).
156. 366 F.2d 649, 654 (D.C. Cir. 1966).
157. *Id.* at 658.
158. 389 U.S. 81, 83-85 (1967).

prove such a degree? Was the Court merging the two standards of malice? It seemed to be, since there is little perceptible difference between knowledge of falsity, a high degree of awareness of probable falsity, and reckless disregard of whether a statement is false or not.

The high-water mark of *New York Times* occurred in the 1967 Term of the Supreme Court in the case of *Time, Inc. v. Hill.*[159] The case was not a libel case but involved New York's "right-of-privacy" statute. The Supreme Court, in an opinion by Mr. Justice Brennan (representing a five-man majority), noted that the case was neither a civil libel action nor a criminal libel action and "although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discreet context." [160] The Court, however, specifically refused to apply their decision in *Time, Inc. v. Hill* to the questions raised by the *New York Times* case.[161] The actual holding in *Time, Inc. v. Hill* is far narrower than the language used in the opinion. The decision, however, applied the *New York Times* rule by analogy, and the entire case was finally incorporated into the rule by later decisions.

James Hill and his family moved to New York from Whitemarsh, Pennsylvania, in the mid-fifties in order to escape the memory of being held hostage by three escaped convicts. The Hills' ordeal was widely publicized, and inspired Joseph Hayes to write a book, *The Desperate Hours*, about a similar fictionalized incident based on the experiences of the Hills and of other persons. The book was made into a play and later a movie. When the play opened in Philadelphia for a pre-Broadway tryout, *Life* took the actors to the house where the Hills had formerly lived and had them re-enact scenes from the play. Photographs of these scenes were published in *Life*, and described as a re-enactment of the Hill ordeal. The play, however, differed from the real-life experience in that it depicted the father and son being beaten, the daughter being insulted and the father resisting the criminals. None of this happened to the Hills. Mr. Hill sued under the New York statute barring invasion of privacy; he did not sue for libel and defamation. The jury found for Hill and awarded damages and the New York Court of Appeals affirmed.[162]

The United States Supreme Court reversed, holding

159. 385 U.S. 374 (1967).
160. *Id.* at 390-91.
161. *Id.* at 391.
162. 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965).

> that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.[163]

The Court noted that

> [t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.[164]

Justice Brennan noted that freedom of discussion is necessary to enable a society to cope with the exigencies of its period.[165] Quoting from *Winters v. New York*,[166] he dismissed the argument that there was a distinction between statements that informed and statements that entertained.[167] Brennan explained that the press needed broad protection since there is an "impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter."[168] Under such circumstances, he felt that a negligence test would place an impossible burden on the news media who would be forced to outguess the jury's reactions.[169]

Though the above statements were only dicta, they indicated that at least five members of the Court were willing to view the *New York Times* rule as going beyond public officials and public figures, indeed going beyond persons seeking publicity or dealings with the public, to include persons who for some reason were involved in a matter of public interest. In using the words "public interest," the Court in *Hill*

163. 385 U.S. at 387-88.
164. *Id.* at 388.
165. *Id.*
166. 333 U.S. 507 (1948).
167. 385 U.S. at 388.
168. *Id.* at 389.
169. *Id.*

seems to have defined them as matters in which the public (or at least the news media) is interested. Public interest, however, may also be defined as that area in which the public has a societal stake or which is necessary to the public welfare. The former definition, as we shall see, removes the right of action against defamation from any person who may capture or arouse the public's interest because of some bizarre event. Under such a test, if the *New York Times* rule goes this far, the question of who is a public figure within the rule is determined by the fortuitous event of being seen by news media and being catapulted into the public arena. Everyone and everything, under such a rule, is a potential public figure. Justice Brennan's opinion in *Time, Inc. v. Hill* allows the defendant to determine who will be a public figure by demonstrating to the court some past, present, or future public interest in the plaintiff.

Justice Brennan continued, noting that there were "sanctions against *calculated* falsehood." [170] Nevertheless, calculated falsehood had to be proven. Since the instructions to the jury did not comply with this aspect of the *New York Times* rule, the Court reversed and remanded.[171]

The decisions in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[172] followed *Hill* and applied the *New York Times* rule to cases involving a state university athletic coach and a retired general. The precise meaning of the holdings in these cases is confused by the series of shifting majorities. In *Curtis Publishing Co. v. Butts*, the former athletic director at the University of Georgia, Wallace Butts, sued the publishers of the *Saturday Evening Post* in federal court, for printing an article charging that Butts had "fixed" a football game between the University of Georgia and the University of Alabama. The trial had begun before the decision in the *New York Times* case was announced, but the instructions to the jury were along the lines of the *New York Times* rule. Verdict was for Butts after the judge overruled a *New York Times* defense, and the jury awarded $3,060,000 in general and punitive damages which were reduced by remittitur to $460,000. Curtis appealed to the Court of Appeals for the Fifth Circuit, but the trial court was affirmed.[173]

In *Associated Press v. Walker*, a retired general active in politics, sued the Associated Press in a Texas state court, charging that A. P. had

170. *Id.*
171. *Id.* at 394-98.
172. 388 U.S. 130 (1967).
173. 351 F.2d 702 (5th Cir. 1965).

distributed a news story falsely stating that he had led a crowd of rioters against federal marshals in a disturbance at the University of Mississippi. The jury found that the story was false after being instructed that compensatory damages could be awarded if the story was not substantially true and punitive damages could be awarded if the jury found ill will, bad motive or entire want of care. The jury awarded $500,000 in compensatory damages and $300,000 in punitive damages, the latter being stricken by the trial judge who found no evidence to support a finding of punitive damages. Both sides appealed to the Texas Court of Civil Appeals, which affirmed the judgment.[174]

Curtis and *Walker* are key cases for a number of reasons. In writing their opinions, the Justices faced the problem of whether to accept the decision in *Time, Inc. v. Hill* as expanding the *New York Times* rule. Justices Harlan, Clark, Stewart, and Fortas were unable to do so and formulated a new test for persons who were not public officials. Justices White and Brennan and Chief Justice Warren viewed the cases in terms of the *New York Times* rule and were willing to incorporate *Hill* in the new cases. Justices Black and Douglas took a third position, which they had espoused since *New York Times*, arguing that the first amendment was absolute, and barred all libel suits. The *Curtis* and *Walker* cases, thus, brought to light the various theories of the Court which had previously been less clearly presented in dissenting and concurring opinions.

In an opinion joined by Justices Clark, Stewart, and Fortas, Mr. Justice Harlan reviewed the Supreme Court's earlier decisions in the field of libel law, beginning with *New York Times v. Sullivan*. He dealt first with the contention presented in *Curtis* that unless the *New York Times* defense is raised at trial it was waived. Harlan rejected this argument because it subjected a defendant's rights to the infirmities of his attorney's knowledge, and because the *New York Times* rule was in such flux that determining who was and who was not within it was not easily done.[175]

Turning to the merits of the cases, Justice Harlan reviewed the history of the conflict between freedom of the press and the need to protect a person's reputation. His review of the history and the cases was both accurate and incisive, and recognized that freedom of communication was not unconditional.

174. 393 S.W.2d 671 (Tex. Civ. App. 1965).
175. 388 U.S. 130, 143-45 (1967).

> Our touchstones are that acceptable limitations must neither affect "the impartial distribution of news" and ideas, . . . nor because of their history or impact constitute a special burden on the press, . . . nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.[176]

Justice Harlan noted the criminal origins of libel and concluded that libel had originated under conditions entirely different from those that developed in our free society. With commendable honesty he recognized that attitudes toward libel have changed since the early days of the country as a consequence of the friction between libel and freedom of speech. The basic theory of libel has not changed, however, and, the Justice noted, defamatory words are still viewed in terms of strict liability. Truth, as a defense, was not an adequate safeguard since it was inevitable that some error could be found and that what was true or false might not be determined if the jury was prejudiced. Justice Harlan noted that all of this did not mean that either the interests of the publishers or those of society preclude a damage award where there has been improper conduct. Reviewing the decisions in *New York Times* and *Garrison*, both cases involving government officials, he found them to be factually different from *Curtis* and *Walker*, and concluded that both Butts and Walker were public figures under ordinary tort rules. Butts was a public figure as the state university's athletic director and Walker had thrust himself into public affairs. Nevertheless, Justice Harlan saw a difference between public officials and public figures and found the *New York Times* rule too rigorous to be applied to the latter class of persons.[177]

Justice Harlan proposed a new test for those persons who were public figures but were not public officials.

> We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[178]

176. *Id.* at 150-51.
177. *Id.* at 151-55.
178. *Id.* at 155.

Under this standard, Justice Harlan found the Associated Press to be privileged, but not the Curtis Publishing Company. Curtis Publishing Company, Harlan wrote, had failed to check either the story or the sources in their exposé of Butts, even though their informant was on probation for a bad check charge. Furthermore, the *Post* reporter had not been a football expert, those assisting the reporter in the investigation were involved in a libel suit filed by the Alabama coach, and their information was never checked for accuracy against the actual game films. Finally, there was no pressure for an immediate release of the story since it was a feature article. Justice Harlan viewed *Walker* differently. The Associated Press reporter who submitted the story was considered generally trustworthy and competent, the dispatches were internally consistent (with a minor exception), and the report of General Walker's conduct was not unreasonable in the light of some of his earlier statements. The story, furthermore, was a news story which required rapid dissemination. There was nothing in the *Walker* case that "gives the slightest hint of a severe departure from accepted publishing standards." [179] Justice Harlan concluded his opinion by rejecting the argument that the Constitution barred awarding punitive damages against newspapers in libel suits.[180]

Chief Justice Warren concurred in the result reached by Justices Harlan, Clark, Fortas, and Stewart, but disagreed as to the test. The Chief Justice argued that the Harlan test was vague and that the *New York Times* rule was the proper test since it was impractical to differentiate between "public figures" and "public officials." The Chief Justice felt that modern history had seen a rapid growth in the power of the private sector to influence and control the lives of citizens. This increased power in the private sector, unrestrained by popular political pressures, made newspaper comment all the more essential to the control of non-governmental public figures. The *New York Times* rule compared with Justice Harlan's test, Chief Justice Warren felt, was more manageable, easier to understand, and thus better able to "safeguard . . . the rights of the press and public to inform and be informed on matters of legitimate interest." [181]

Turning to the *Curtis* and *Walker* cases, the Chief Justice agreed that General Walker was a public figure. Since the *New York Times* rule had not been applied by the trial court, he voted to reverse and re-

179. *Id.* at 156-59.
180. *Id.* at 159-61.
181. *Id.* at 162-65.

mand. In *Curtis*, Chief Justice Warren felt that, while the judge's instructions did not precisely comply with the *New York Times* rule, the judge had instructed the jury that to find punitive damages there had to be a finding of "wanton or reckless indifference or culpable negligence with regard to the rights of others," including ill will and intent to injure. Since the jury awarded punitive damages and thus impliedly found "reckless indifference," the Chief Justice believed that it was unnecessary to remand merely to have the precise *New York Times* rule applied to the question of specific damages. Chief Justice Warren also noted that the facts before the Court indicated that Curtis had been reckless in its disregard of the truth within the meaning of *Garrison* and *New York Times*.[182]

Justices Black and Douglas concurred with the result in *Walker* but dissented in *Curtis*. Justice Black wrote for both, arguing that the *New York Times* rule was merely a stopgap which provided an unworkable standard that barred the way to a complete prohibition of libel actions. Justice Black concluded that "it is time for this Court to abandon *New York Times Co. v. Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." [183] This position was consistent with both Douglas' and Black's attitudes in each of the previous cases concerning libel. In *New York Times*, Justice Black, with Justice Douglas concurring, wrote that the Constitution granted "the press an absolute immunity for criticism of the way public officials do their public duty" and "a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United States to do that is, in my judgment, precisely nil." [184] Justice Black reiterated this position in *Rosenblatt v. Baer*;[185] in *Time, Inc. v. Hill*, he broadened the constitutional bar to include "public figures" as public officials.[186] How Justice Black bridged the gap from public officials to public figures is not made clear in his opinions.

Justice Douglas had concurred with Justices Black and Goldberg in *New York Times*. Justice Goldberg had viewed the first and fourteenth amendments as affording "to the citizen and to the press an absolute, un-

182. *Id.* at 165-70.
183. *Id.* at 172.
184. 376 U.S. at 295-96.
185. 383 U.S. at 94.
186. 385 U.S. at 398-401.

conditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses." [187] He spoke in language that seemed to forecast *Time, Inc. v. Hill.*

> [E]very citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized.[188]

In *Rosenblatt v. Baer,* Justice Douglas, concurring in the decision to reverse the libel judgment for Baer, noted that it was impossible to determine who was a public figure and argued that the test was properly one of what was a public issue. As to what a public issue was, Justice Douglas seemed to include almost anything that touched the public.[189] In *Time, Inc. v. Hill,* Justice Douglas reiterated his position that "state action to abridge freedom of the press is barred by the First and Fourteenth Amendments where the discussion concerns matters in the public domain." [190] Mr. Hill's right of privacy and his unsought prominence. Douglas opined, were irrelevant since a person's privacy "ceases when his life has ceased to be private." [191] Justice Douglas did not add any in-depth observations in *Curtis* or in *Walker*; he simply concurred with Justice Black.

The last opinion in *Curtis* and *Walker* was written by Justice Brennan, with whom Justice White concurred. The two Justices agreed that *Walker* should be reversed but felt that *Curtis,* too, should be reversed and remanded on the grounds that the trial court's instructions to the jury did not comport with the *New York Times* rule. Justice Brennan objected to that portion of the trial court's charge that allowed the jury to inquire into the motives of the publisher. Such an inquiry, he felt, may have led the jury to find Curtis liable whether or not the company had been reckless. The Justice concluded by criticizing the Court for independently reviewing the facts concerning the recklessness of Curtis.[192]

187. 376 U.S. at 298.
188. *Id.* at 299.
189. 383 U.S. at 88-91.
190. 385 U.S. at 401.
191. *Id.*
192. 388 U.S. at 172-74.

When the smoke cleared, the Supreme Court had affirmed, by a five to four vote, the circuit court's decision in *Curtis*, and had unanimously voted to reverse and remand *Walker*. All of the Justices agreed that both Butts and Walker were public figures. Justices Harlan, Fortas, Clark, and Stewart voted to affirm *Curtis* on the basis of their "highly unreasonable conduct" test and Chief Justice Warren joined them on the grounds that Curtis Publishing Company had failed to qualify under the "reckless disregard of the truth" standard of the *New York Times* rule. Justices Brennan and White dissented in *Curtis*, arguing that while the proper rule was that of *New York Times*, it had not been met. Justices Black and Douglas dissented, apparently (their opinions are unclear), on the ground that the Constitution barred all libel suits against anyone of public interest. In *Walker*, the unanimity of decision merely camouflaged dissension in philosophy and legal interpretation. Justices Harlan, Fortas, Clark, and Stewart voted to reverse *Walker* on the grounds that their "unreasonable conduct" rule had not been met. Chief Justice Warren and Justices Brennan and White voted to reverse because the *New York Times* rule had not been applied. Justices Black and Douglas, as in *Curtis*, chided their colleagues for using any test and voted to reverse on the grounds that the Constitution barred all libel suits by persons of public interest.

The cases that have come before the Supreme Court since *Walker* and *Curtis* have not led to new theories about the first amendment but they are important since they have broadened the *New York Times* rule and because they show the attitudes of Justices White and Marshall toward the rule. In April, 1968, the Supreme Court handed down an opinion in the case of *St. Amant v. Thompson*,[193] reversing, by an eight to one majority, a libel judgment against a candidate for local office in Louisiana. St. Amant had read, on a television broadcast, a series of questions which he had asked J. D. Albin, a member of the local Teamsters' Union. Albin's answers, which were false, accused Herman Thompson, a deputy sheriff (who was not a political opponent of St. Amant), of accepting bribes from local Teamster officials. The jury awarded $5,000 in damages to Thompson, but the judgment was reversed by the Louisiana Court of Appeal on the ground that the record failed to establish that St. Amant had acted with the actual malice required by the *New York Times* rule. The Louisiana Supreme Court reversed the appellate court and restored the judgment.

193. 390 U.S. 727 (1968).

Justice White, writing for the majority, reversed the Louisiana Supreme Court. He argued that failure to check Albin's statement, sole reliance on Albin's facts, and his failure to anticipate the consequences of the exposé or appreciate his own liability were not proof of actual malice within the meaning of the *New York Times* rule (*i.e.*, reckless disregard of the truth, or knowledge of falsity):

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.[194]

Justice White recognized that "such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published in good faith and unaware of its probable falsity." [195] Nevertheless, he felt that such a test was necessary to implement the first amendment and to prevent censorship.

Justice Fortas, in an angry dissent, rejected the test formulated by Justice White. Since Thompson was a public official, he came within the *New York Times* rule and the "unreasonable conduct" test formulated in *Walker* and *Curtis* was not applicable. Fortas, however, argued that Justice White's test of "actual malice" under the *New York Times* rule went too far.

> The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living.[196]

Had St. Amant merely made a good-faith check, Justice Fortas wrote, he would have been within the *New York Times* rule; but having failed to do even that much, he should be liable.[197]

194. *Id.* at 731.
195. *Id.*
196. *Id.* at 734.
197. *Id.* at 734-35.

The last major opinion in the field of libel, to date, is *Pickering v. Board of Education,* decided by the Supreme Court on June 4, 1968.[198] Pickering had sued the school board, demanding reinstatement as a teacher after he had been dismissed for writing a letter to the local newspaper criticizing the school board's past use of revenues. The letter contained several false charges, relating to the allocation of funds between academics and athletics, in connection with a proposed tax increase. Pickering had not been aware that the statements were false. The school dismissed Pickering, after a hearing, on the grounds that his continued employment would disrupt faculty discipline and foment controversy. The Illinois lower courts merely reviewed the school board's proceedings to determine whether there was substantial evidence to warrant the dismissal. Finding such evidence, they refused to interfere, and Pickering's appeal to the Supreme Court of Illinois failed.[199]

Justice Marshall wrote for the majority and reversed the judgment of the Supreme Court of Illinois. Rejecting the contention that teachers could be compelled to relinquish their first amendment rights, Justice Marshall stated that the rights of public employees could not be unqualifiedly conditioned. The problem, the Justice felt, was to balance the interests of a teacher as a citizen commenting on public matters against the interests of the state as an employer anxious to promote efficient public services. Justice Marshall refused to set down a rule to deal with such situations because of the variety of fact situations in which criticism by public employees might occur. Reviewing the letter in question, he noted that it did not attack individual school board members personally nor did it attack anyone's reputation; the letter merely criticized board policy. The response of the public to Pickering's letter was apparently just short of massive apathy; the only people concerned were the members of the school board. The comments, furthermore, dealt with a tax increase which, the Court noted, was a matter of legitimate public concern. Justice Marshall concluded that under the circumstances of the case "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." [200]

Justice Marshall observed that, had Pickering been a member of the general public, his remarks would have been judged under the *New*

198. 391 U.S. 563 (1968).
199. 36 Ill. 2d 568, 225 N.E.2d 1 (1967).
200. 391 U.S. 563, 573 (1968).

York Times standard. Statements by public officials critical of their superiors, the Justice wrote, must also be protected. Though hesitant about formulating an across-the-board rule, Justice Marshall concluded that "[i]n sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." [201] Thus, balancing the values involved, Justice Marshall expanded the *New York Times* rule to cover statements made by public employees about public employees. Justice White, in a partial dissent, argued for an outright adoption of the *New York Times* rule and would have remanded the case for determination of the facts under that rule.[202] After *Pickering*, it seems that the *New York Times* rule does embrace statements by public employees.

In Summation

In the course of four years, the Supreme Court greatly restricted the scope of libel law. Proceeding from the theory espoused in *Thornhill v. Alabama* that 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," [203] the Court has all but abolished libel as a remedy available to public officials. *New York Times* allowed redress when statements were made by persons acting in "reckless disregard" of whether the statements were false or not or with knowledge of their falsity. *St. Amant*, however, watered down the meaning of "reckless disregard," making it almost synonymous with actual knowledge. After *St. Amant*, any showing of good faith by the libeler will bring down the protective curtain of the *New York Times* rule. Since the Court, in *New York Times*, rejected any inquiry into the libeler's motives and intent, bad faith can be proved only by the defendant's own admissions. Proof of reckless disregard of the truth, therefore, becomes almost impossible under the *New York Times* rule after *St. Amant*. The plaintiff, barred from civil action, cannot proceed by way of the criminal libel action since *Garrison* has closed that avenue. The public official, thus, is barred from suing for defamation except where the statements can be proved to be absolutely false and known to be false by the libeler.

201. *Id.* at 574-75.
202. *Id.* at 582-84.
203. 310 U.S. at 102.

New York Times was limited to statements made about public officials acting in their public capacity. The question of where "official conduct" ends and private life begins has not been expressly considered. The Court has cast light upon this in its treatment of what the issues are which the public has a privileged right to debate. The Court, initially, dealt only with governmental figures, but in *Linn* the Court intimated that a management official involved in an organizing campaign was also involved in a public issue. *Rosenblatt* expanded the category of persons barred from bringing libel suits to include those who are in a position to "significantly influence" the resolution of public issues, as well as those associated with public figures. Persons who thrust themselves into the "vortex of public affairs" were held to be within the ambit of the *New York Times* rule in *Pauling v. Globe-Democrat*; this position was also taken by other circuits and tacitly approved by the Supreme Court. *Time, Inc. v. Hill*, though not a libel action, was absorbed into the Supreme Court's decisions on libel law. *Time* expanded the category of public figure to include anyone in the public domain whether he chose to be there or was placed there by some fortuitous event. After *Time*, anyone who had received publicity, whatever the cause, was a public figure. At this point, the Court divided. Justices Douglas and Black, since *New York Times*, have consistently opposed any libel action brought by a public figure as being hostile to freedom of speech and press and thus unconstitutional. (How far Justices Black and Douglas would go is unclear.) Justices Clark, Harlan, Fortas, and Stewart had approved the *New York Times* rule as long as that rule was limited to public officials. In *Walker* and *Curtis*, cases involving non-governmental public figures, these Justices preferred a less rigorous test of malice which eased the plaintiffs' burden of proof. Chief Justice Warren and Justices Brennan and White chose not to differentiate between public figures and public officials and argued that the *New York Times* standard applied to both. In both *St. Amant* and *Pickering*, the persons suing for libel were clearly public figures; therefore, dissension which arose among the Court in *Walker* and *Curtis* was not revived. *St. Amant*, however, further reduced the protection available to public officials who had been libeled by virtually destroying the bar against statements made with "reckless disregard" of whether or not such statements were false. *Pickering* did not alter the *New York Times* test of what is libelous, but it broadened the scope of the rule by allowing public employees who criticized their superiors

to use the rule as a defense in dismissal proceedings instituted because of such criticism.

An Evaluation

The view of history taken by Holmes and Brandeis and, in *New York Times*, by Justices Brennan, Black, Douglas, and White, and Chief Justice Warren, is an idealized view of history unsupported by historical fact. The Brennan view, as well as the Black-Douglas view, seems to confuse seditious libel with criminal libel, and confuses both of these actions with civil libel. Historically, as well as philosophically, the difference among the three is sharp and it is helpful to distinguish sedition from defamation before proceeding to analyze what values are at stake. The dissenters in *Curtis* (Warren (concurring in result), Brennan, White, Douglas, and Black) furthermore, seem to be viewing history through a prism. These dissenters, relying on Justice Brennan's original opinion in *New York Times*, formulated a theory of the first amendment without considering the actual values at stake or the history of libel under the first amendment. Instead, they adopted Justices Holmes' and Brandeis' views of the meaning and origins of the first amendment. This might not be calamitous if the Justices did not attempt to stretch this theory to cover forms of printing and speech not dealt with by either Holmes or Brandeis, who wrote their opinions in the context of government enforcement of severe sedition laws. Indeed, Holmes, in *Patterson v. Colorado*, wrote that the first and fourteenth amendments prevent all prior restraints but "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[204] He never went beyond this position. Justice Brandeis, likewise, dissenting with Justice Holmes in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*,[205] written two years after *Abrams* and *Schenk*, never suggested that the clear and present danger test applied to the press or that freedom of the press went beyond a ban on prior censorship. *Near v. Minnesota*,[206] decided while both Justices Holmes and Brandeis were on the Court, merely barred prior restraint and explicitly noted that while an injunction would not lie, the petitioner had recourse to both the public and private libel laws of the state. Neither Holmes nor Brandeis dissented from the view taken in *Near*.

204. 205 U.S. 455, 462 (1907).
205. 255 U.S. 407 (1921).
206. 283 U.S. 697 (1931).

It is difficult to describe Justice Brennan as an absolutist; yet it seems that the *Curtis* dissenters (Justices Black and Douglas already representing the absolutist position) generally discarded any balancing test. Unfortunately, several of the Justices on the Court have been enamored of the phrases and doctrines of Holmes and Brandeis—phrases and doctrines which arose from limited problems in a specialized area of the first amendment. These principles have become rigid, and freedom of the press has become a doctrinaire phrase. The *Curtis* dissenters have converted the *New York Times* rule into a constitutional Procrustean bed onto which all other values are forced, even if they have to be cut or stretched to fit. Freedom of speech and of the press is a value that appears in many guises and comes into contact with many other values; it must be tested and weighed anew with each new conflict. The first amendment guarantees, like the whole Constitution, are not immutable, rigid standards fixed at one point in history, whether that point be 1790 or 1919, but are principles of a democratic society in which the highest authority is neither dogma nor society, but the individual. What standards can one use? Perhaps Judge Hand found the best guide in a statement written by Professor Freund, referring to the clear and present danger doctrine.

> No matter how rapidly we utter the phrase "clear and present danger", or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certainty when what is most certain is the complexity of the strands in the web of freedom that the judge must disentangle.[207]

Time has a way of turning villains into heroes and heroes into villains; new pressures arise to challenge even the most cherished value. Rigid doctrine resting on abstract theory has an uncomfortable tendency to smother the needs of individuals, needs which arise from and exist in reality.

CONCLUSION

The proposition that "[w]hatever is added to the field of libel is taken from the field of free debate" is not necessarily true. Free debate is not a simple phenomenon but is the result of many interrelated factors; it should not be an absolute end; it should be a means toward the

207. L. HAND, THE BILL OF RIGHTS 61 (1964).

end of a free and democratic society. Free debate may aid in achieving and maintaining a democratic society; but freedom cannot be equated with anarchy, since anarchy results in freedom only for the strongest, the richest, the loudest, or the most numerous. Freedom flourishes when it is limited by the boundaries of self-restraint and the rights of others. Free debate cannot be achieved merely by removing all barriers to public speech and writings because true debate also depends on the willingness of men to enter the public arena, on the presence of, and belief in, the presence of credible statements, and on a responsive, educated, and unintimidated populace.

Zachriah Chafee, Jr. wrote that

> [o]ne of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest.[208]

This is the Holmensian "marketplace of ideas" view derived, in large measure, from the philosophy of John Stuart Mill. The concept of a clash of conflicting ideas resulting in the truth, however, depends upon a prior assumption that all ideas will be presented in good faith and in a straightforward manner without the use of force or guile. If truth is to emerge from a free clash of ideas, all ideas must reach all citizens, and each citizen must be both interested in weighing the ideas presented and educated enough to evaluate them. The "marketplace of ideas" theory is a philosophic equivalent of the economic theory of laissez-faire which also developed in the nineteenth century. Like a laissez-faire economic marketplace, the "marketplace of ideas" theory is postulated upon an ideological abstraction—a perfect, frictionless society where all entrants in the market are equally powerful and honest and are dealing with a citizenry that will behave in an intelligent, rational manner. It is ironic that the very people who have rejected the theory of laissez-faire economics have feverishly embraced the theory of laissez-faire civil liberties.

Chafee did not, however, view a free press and free speech as unlimited; he believed that though the spread of truth was important,

208. Z. CHAFEE, JR., *supra* note 37, at 36.

> there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh heavily in the scales.[209]

Balancing values and rights requires a prior determination of what the conflicting interests are and the importance of those interests. Fixed abstract doctrines and popular clichés are injurious to consideration of even everyday problems; but they are disastrous when used to deal with problems of civil rights. Doctrinaire formulas lead to a substitution of words for thought and of easy platitudes for the difficult solutions and unsatisfying compromises that allow democracies to function.

The value of free expression, according to one authority, is that it assures individual self-fulfillment, provides a means of attaining the truth, creates a method of securing the participation of the members of a society in political and social decision-making, and serves as a means of maintaining the balance between stability and change in a society.[210] Limiting ourselves to the area of libel and freedom of the press, let us weigh these functions against the interest of the individual in his good name and sound reputation. Granting that man's ability to reason, to feel, and to think in abstract terms distinguishes him from other animals,[211] it does not follow that *any* limitation on the public expression of a man's opinions and beliefs is a denial of his humanity. A statement which jeopardizes others' lives or property or quality of living carries the ideal of individual self-fulfillment beyond the individual by affecting other individuals. In doing so, it also limits other individuals' right to self-fulfillment. A verbal trespass, to use a term from torts, can be just as injurious as a physical trespass. Indeed, it injures one more if he loses his job because someone falsely accused him of theft than if that person physically injures him and thus keeps him away from work for a week. Limitation of free speech becomes harmful only when it is broadly and thoughtlessly applied.

Having considered the ideal of free expression as a means to arrive at truth in the discussion of Holmes' marketplace theory, let us consider the role free expression plays in bringing people into the decision-making process.[212] A lack of free expression will either turn people

209. *Id.*
210. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (1966).
211. *Id.* at 4.
212. *Id.*

against a government or, as is more often the case, make citizens apathetic and docile in their dealings with the government. In a system where free expression is not allowed, decisions are made by the few and obeyed by the masses. Unlimited freedom of expression, however, may well result in the same situation if it allows the powerful, the unscrupulous, or the careless to defame those they oppose, shout into silence those who disagree, distort the truth to a guileless population, and make an interested citizenry cynical and jaded. Under such circumstances, unlimited debate may become the province of the few and potential debaters representing different points of view can be discouraged or intimidated from entering the decision-making process. One of the functions of the first amendment is to protect the press, but the first amendment must also protect the weak, the unpopular, and the isolated. The society's needs in the abstract ought not to preempt the individual's actual needs.

Freedom of expression is an agent of peaceful change.[213] Expression is also an agent of violence. Both of these statements have a bearing on the establishment of certain limits of expression, but the allowance of libel suits is not tantamount to foreclosure of freedom of expression. The same reasons advanced to justify safeguarding individual reputations and preventing verbal mudslinging and journalistic carelessness also apply here. A person who is afraid to express himself publicly because he may be defamed or ridiculed is as much the victim of suppression as the person who avoids proposing a reform because he fears the secret police.

Unfortunately, the Supreme Court's decisions, beginning with *New York Times v. Sullivan*, have steadily moved away from a flexible balancing test. The Court has not adopted the Black-Douglas test, but it has come to view the first amendment in a doctrinaire fashion that fails to take accurately into account either the intentions of the framers or the needs of individuals in a modern society. The Supreme Court has overemphasized society's commitment to free speech and has underemphasized the commitment of our scheme of government to the protection of the individual. The Court's opinions since *New York Times* have barred public officials, and quite possibly all public figures, from suing for libel unless the defendant used the libel knowing that it was false. At least five members of the Warren Court considered the *New York Times* test (which has been greatly broadened by subsequent

213. *Id.*

decisions) to extend to *any* member of the public who becomes of general interest. The malice test exception in the original *New York Times* rule has been truncated so that malice is now limited to cases where a defendant knows that a statement is false and prints it anyway. Such personal knowledge is almost impossible to prove. A minority of Justices on the Warren Court would distinguish between public figures and public officials and would hold publishers to a higher standard of responsibility when dealing with the former.

The decisions of the Supreme Court since *New York Times v. Sullivan* have radically modified the traditional law of libel. The Supreme Court has not made the crooked way straight but, has taken a tangled area of the law and rendered it almost impenetrable. The *New York Times* rule, when first announced, was merely the elevation of a minority view of the fair comment rule to constitutional status. The fair comment rule itself allowed a newspaper to comment on a public figure or event or work of public interest if the statement of fact, and if the facts of the opinion, were truly stated. The opinion, furthermore, had to be fair and could not have been made with ill will or malice.[214] The minority view extended the fair comment protection beyond opinions to statements of fact but restricted such comment to matters within the realm of government (although *Coleman v. McLennan* would have extended the fair comment privilege to statements about the managers of all public institutions and corporations dealing with the public). The Supreme Court has gone well beyond either version of the fair comment rule and has cast aside the general requirement of reasonableness of behavior which marked the outer limits of all qualified privileges in the law of libel. The Court has eliminated the fair comment requirement that the statements deal with persons who in some way have political or economic control over the public.

Having raised the fair comment rule to the level of a constitutional right, and having broadened it to protect not only opinions but also facts, the Court has cut loose the fair comment privilege from libel law and allowed it to float into the rarified heights of "free communication." Disregarding the conflicts which created the need for protection against defamation, Justices Brennan, White, Black, and Douglas, and Chief Justice Warren have viewed libelous comments in the light of principles that were formulated by Justices Holmes and Brandeis to deal with

214. R. PHELPS & D. HAMILTON, LIBEL 194-95 (1966).

prosecutions for seditious speech or writings. Perhaps the Court has equated seditious libel with civil libel?

Justice Brennan, who has written the most important decisions in this area, has further complicated matters by apparently importing the concept of redeeming social value from the Court's decisions in the area of obscenity and introducing them into libel law. Such a test is as meaningless when applied to libels as it is when applied to obscenities, since it bars almost nothing and never fully considers the problem of conflicting interests. The test has been tacitly incorporated into the decisions following *Garrison* and has moved the Court farther and farther along the road to barring libel suits in the name of a societal commitment to free debate. By invoking this commitment to free debate and protecting all statements that have some value, the Court has failed to balance clashing values or even to ascertain what those values are. A commitment to free debate is meaningless in itself and a statement's social value is a function of the time, the circumstances, and the countervailing interests existing at the time the statement is made. Socially redeeming value, like clear and present danger, is a meaningless test in the context of defamation. Society's valuation of free speech cannot utterly disregard the needs of the sum of the individuals who make up that society. An individual's good name and reputation determine, in large part, where that individual will live, where he will work, and whether or not he will be accepted as a member in good standing in the community. These are real needs; they are necessary to both the individual and the society.

The Supreme Court would not deny redress to a man against whom a newspaper arranged a boycott, nor would it consider it legal for a mob to drive a man from his home or from his town. Yet, if the same results are accomplished by the use of speech or newspapers or radio and television, they are considered privileged. This result is both unjust and unsound. There is undoubtedly a great interest and necessity for public comment about and public scrutiny of government officials and the heads of public institutions, as well as of the institutions themselves since they greatly affect the public. Likewise, certain private corporations and institutions deserve public scrutiny because they too play a great role in shaping public life. Being a public servant, however, should not mean that a man's private and public life is fair game for the vicious, the ignorant, and the self-interested. The malice test in the original *New York Times* rule recognized this and provided some limi-

tation on the press, but this check has been all but removed. Whatever the reasons for subjecting public officials to uncontrolled abuse, there is no reason not to provide some remedy to a "public figure" since his prominence generally does not affect the public, even though he may be of public interest.

The Court speaks of the need for "breathing space" for first amendment rights, but "breathing space," like "Lebensraum" is a limitless concept. The term "breathing space" is meaningless. If the Court fears that a deterrent effect on expression might result from either vague or Draconian laws, it is difficult to see how a clearly defined and liberally interpreted fair comment rule would have that effect on newspapers today. A much harsher rule failed to stifle comment prior to 1964.

The *New York Times* rule, it seems, is unwieldly and unsound because it results in legal overkill. The rule fails even to ask the questions: why is debate necessary, and, what kind of debate is useful? The Court confuses debate with cacaphony. We live in a democracy, yet the Court has failed to ask what the needs of democratic government are and how free expression meets these needs. Is completely free expression necessary or even desirable? Does free expression conflict with and jeopardize other values? If so, what are the other values and how important are they in furthering the ideal of a democracy of individuals, for individuals, and by individuals? What harms can result from free expression? What harms can result from the allowance of civil libel suits? The Court has not answered these questions; it has apparently not even considered them. Granting that the public must be able to criticize and scrutinize those persons controlling public or quasi-public institutions which affect the public's life, who are these persons and how far ought the public scrutiny go? Is there a strong social benefit in dissecting a public official's past, his private life, or the past of his associates and family? How vital is such exposure if it is accurate, and how damaging will it be if it is reckless? The Supreme Court seems to adopt the position that exposures of public officials are positive blessings no matter how recklessly inaccurate, and stops there. What about public figures and persons who have not chosen to enter the public arena? How relevant to the public welfare is the private life of an artist? Is there a public interest in allowing critics to make broad charges about an author's life if such charges are inaccurate? How vital are such exposures to the workings of a democracy? How harmful is such pub-

licity to the individual? These questions have been ignored. The Court has likewise failed to ask whether its goals can be accomplished within the law of libel.

Professor Paul Freund has suggested that the fair comment rule provides an adequate safeguard if it is liberally interpreted. He would differentiate between private citizens and the heads of public institutions such as government officials, heads of universities, and presidents of banks, but he states that

> even public officers who find themselves defamed and who, under the *New York Times* decision must show malice, ought to be able to have the judge instruct that what is malice, what is recklessness, may depend on the gravity of the libelous charge . . . . [W]hat would be required to avoid a charge of recklessness in asserting that a member of Congress or an executive official is a chronic party-goer, which might be libelous, is different from what would be required to avoid the charge of recklessness if the allegation was that so-and-so was a communist party member; that one ought not make that charge as glibly as one might make a charge of a less grave offense.[215]

Professor Freund would also allow plaintiffs to request a special verdict by which the jury could find that the utterances were untrue but not actionable because spoken without malice under the fair comment rule.[216] The Supreme Court, were it to adopt Professor Freund's suggestion, would once again leave the courts and legislatures free to balance conflicting social interests. There may be abuses, but abuses can be corrected on appeal.

Alternatively, the distinctions made by Justice Harlan in *Curtis Publishing Co.*, if combined with the original *New York Times* rule, would mitigate the rigors of the *New York Times* rule as it stands today. The Harlan rule applies the broader test of *New York Times* to public officials and returns to the libel test of reasonable behavior in the case of public figures.

The law of libel is an imperfect tool designed to protect individuals. Practically, libel law offers less protection to the average person than he needs. A libel suit is a long and difficult process which revitalizes old lies and reopens old wounds and often ends with only minimal damage awards. It does, however, allow men to redress their injuries

215. Freund, *Political Libel and Obscenity*, 42 F.R.D. 491, 497 (1966).

216. *Id.* at 498.

in the courts and not in the alleys or the dueling fields. The press may be restrained by the threat of a libel suit, but this restraint will only prompt more thorough investigation. Society has no interest in protecting lies or sheltering the character assassin or the printer who is grossly negligent. The question of whether or not libel law has a valid function cannot turn on the prejudices and ideals of one era but must be adapted to allow the greatest flexibility in dealing with future threats to the individual and the society. Indeed, a press that is in the vanguard of reform today may be in the last rank of reaction tomorrow.

We are living in an era in which newspapers and communications media are vast corporations which are unlikely to be snuffed out by a libel suit. News media have advanced far beyond the hand-press of Madison's day, and can obliterate a man's reputation within five minutes by telling the story in every state. Unlike the small, rural society of the nineteenth century, more people read or listen to the mass media and fewer people are acquainted with the person who is being discussed. The revolution in communications and the vast day-to-day power of the news media, which, in many cases, have a monopoly on the facts available because of time and space limitations, have created new problems in our mass society. In the decisions expanding the *New York Times* rule the Supreme Court has failed to recognize or to deal with these problems.