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# THE SECOND FRONT: FREE EXPRESSION VERSUS INDIVIDUAL DIGNITY

GEORGE D. HAIMBAUGH, JR.\*

## INTRODUCTION

The Second Front in the campaign to establish federal power to mediate between constitutional claims to free speech and state regulation favoring other social and individual interests was opened with the case of *New York Times v. Sullivan*<sup>1</sup> in March 1964 when the United States Supreme Court reversed a Montgomery, Alabama, police commissioner's five hundred thousand dollar libel judgment against the newspaper and a group of civil rights leaders.

The First Front had opened almost forty years before when the Supreme Court undertook to decide in *Gitlow v. New York*<sup>2</sup> whether the exercise by a state of its police power to prevent "criminal anarchy" deprived a defendant of "his liberty of expression in violation of the due process clause of the Fourteenth Amendment."<sup>3</sup> Since then under the banner of the First Amendment and employing such tactical doctrines as Tendency to Evil,<sup>4</sup> Clear and Present Danger,<sup>5</sup> and Balancing

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1. 376 U.S. 255 (1964).

2. 268 U.S. 652 (1925).

3. *Id.* at 644. The Court upheld a conviction, under a New York Criminal Anarchy statute, of the publisher of "The Left Wing Manifesto" and "The Revolutionary Age."

4. Speaking for the majority of the Court in *Gitlow*, Mr. Justice Sanford stated: "In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck v. United States*, supra, [249 U.S. 47], p. 51; *Debs v. United States*, supra [249 U.S. 211], pp. 215, 126. And the general statement in the *Schenck* case (p. 52) that the 'question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,'—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character." *id.* at 671.

5. The clear and present danger test as formulated by Mr. Justice Holmes in *Schenck* is quoted in note 4 *supra*. Dean McKay has written, "Only during the fourteen years from 1937 [*Herndon v. Lowry*, 301 U.S. 242, 260 (1937)] to 1951 can it be said that the danger test had any real impact, and even then its limited success was

of Interest—preferred and common<sup>6</sup>—the Supreme Court has brought under federal suzerainty broad areas of state law respecting public security,<sup>7</sup> order<sup>8</sup> and morality.<sup>9</sup>

It became clear that the Court was opening a new front when it stated the reasons for its reversal in *Times*. Although it had found that the evidence in that case “was incapable of supporting the jury’s finding<sup>10</sup> that the allegedly libelous statements were made ‘of and concerning’”<sup>11</sup> Sullivan, the Court passed up the opportunity to base its decision on this or on possibly available procedural grounds.<sup>12</sup> Instead, it

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dependent as often as not on the barest majority made up of differing members of the Court who agreed to the use of the test, one may suspect, for varied reasons. McKay, *The Preference for Freedom*, 34 N.Y.U.L.REV. 1183, 1207 (1959). A subsequent decision, *Wood v. Georgia*, 370 U.S. 375 (1962), indicates that the clear and present danger test continues to be the standard applied by the Court in contempt by publication cases. Comparing the bad tendency and clear and present danger test, Professor Emerson points out that, in theory, the danger test “protects some expression even though that expression interferes with the attainment of other social objectives. In practice, by drawing the line of allowable expression closer to the point of action, it opened up a wider area of protection.” Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910 (1963). See *Dennis v. U.S.*, 351 U.S. 494, 510 (1961).

6. See Kalven, *The New York Times Case; A Note on “The Central Meaning of the First Amendment”* 1964 S.Ct.REV. 191, 214-217.

7. See, e.g., *Whitney v. California*, 274 U.S. 357 (1927); and *Stromberg v. California*, 283 U.S. 359 (1931).

8. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); and *Adderley v. Florida*, 385 U.S. 39 (1966).

9. See, e.g., *Alberts v. California*, 354 U.S. 476 (1957); and *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts*, 383 U.S. 413 (1966).

10. In affirming the judgment of the trial court, the Supreme Court of Alabama approved the trial court’s ruling that the jury could find the statements to have been made “of and concerning” the respondent, state: “We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.” 376 U.S. at 263.

11. 376 U.S. at 288.

12. See, S. Pierce, *The Anatomy of An Historic Decision: New York Times Co. v. Sullivan*, 43 N.C. L. REV. 315, 348-352 (1965). Judge Pierce, who was a counsel for the individual petitioners in the *Times* case, believes the petitioners were also entitled to a reversal because of a lack of due process. He describes the atmosphere in the segregated trial court room, and notes a practice of excluding of Negroes from the jury panel, the lack of evidence of special damages and the size of the verdict. Compare with statement of Judge Hutchenson in his opinion in *Crowell Collier Pub. Co. v. Caldwell*, 170 F. 2d 941 (1949): “Carried away by the sense of unfolding drama pre-

created on behalf of the defendants a novel constitutional privilege which Mr. Justice Brennan stated as follows:

The constitutional guarantees require, we think, 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.<sup>13</sup>

This article is concerned with the emergence, constitutional justification and scope of this new privilege which, as adapted, is serving as the workhorse or jeep of the Supreme Court's offensive in the Second Front area of state protection of individual dignity.

#### EMERGENCE OF THE *Times* PRIVILEGE

The emotional overtones attending the *New York Times* case are evoked by descriptions of an atmosphere in which Alabama without distorting its libel law "somehow pounced on this opportunity to punish"<sup>14</sup> an outside newspaper, and in which the United States Supreme Court manifested an anxiety to reach the substantive issues.<sup>15</sup> The actual circumstances from which the *Times* privilege was developed is suggested by the following passages from the opinion of the Court concerning the defendants' offending words, acts and omissions.

The third paragraph and part of the sixth paragraph from the advertisement published in the *New York Times* and signed by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South:

In Montgomery, Alabama, after students sang 'My Country, Tis of Thee' on the State Capitol steps, their leaders were expelled

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sented by the spectacle of a sectional row, a struggle of North against South, Florida against New York, David against Goliath, Ivanhoe against the Templar, litigants, witnesses, lawyers, and jury seemed to regard the contest as a sporting event, a wager by battle, in which the best battler ought to win. For other statements concerning possible alternative grounds for reversal and remand, see A. Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1, 29 & n. 99 (1965), and n. 4 in Mr. Justice Brennan's opinion in *Times*, 376 U.S. 254, 265 (1964).

13. 376 at 279-80.

14. Kalven, *supra* note 6, at 200.

15. Pierce, *supra* note 12, at 363.

from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times . . .<sup>16</sup>

Part of the comment of the Court on the contents of the advertisement:

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred . . . The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus and they were not called to the campus in connection with demonstrations on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four . . .<sup>17</sup>

Proof presented by the plaintiff-respondent to show actual malice included "a statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was 'substantially correct,' . . . the Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, . . . [and] evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files."<sup>18</sup>

In making its reversal in *Times* depend on a holding that the inaccuracies in the advertisement were irrelevant and on a determination that the evidence of the defendants' conduct did not support a finding

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16. 376 U.S. at 257-58.

17. *Id.* at 258-259. The opinion also stated, "Three of Dr. King's four arrests took place before respondent became Commissioner. . . respondent had nothing to do with procuring the indictment [following that arrest]". *Id.* at 259.

18. *Id.* at 286-287. "Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction." *Id.* at 260.

of actual malice, the Court forged a new constitutional rule. Before the *Times* decision in a typical libel law jurisdiction such as Alabama, in an action brought by a public official who had been defamed by a critic of his official conduct, the critic could not defend himself unless he proved the truth of the statement complained of. But applying the rule in *Times* in Alabama—and all other states—the plaintiff in such a case cannot now prevail unless he proves actual malice on the part his detractor. As the three concurring justices—Black, Douglas and Goldberg—would have had it, the plaintiff in such a case could not prevail at all.

Directing attention beyond the immediate factual context of the case, The Supreme Court described the background against which the *Times* privilege emerged as one of “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.”<sup>19</sup>

#### CONSTITUTIONAL JUSTIFICATION

In the only previous case<sup>20</sup> that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. . . . In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet “libel” than we have to other “mere labels” of state law.<sup>21</sup>

So wrote Mr. Justice Brennan in his opinion for the majority of the Court in the *New York Times* case. Dr. Meiklejohn has pointed out that when the Supreme Court “introduces a new concept in constitutional interpretation, the Court takes pains to show continuity with

19. *Id.* at 270.

20. *Schenectady Union Publishing Co. v. Sweeney*, 316 U.S. 642 (1942). The Court affirmed, per curiam, a judgment (122 F.2d 288) which reversed an order granting defendant's motion to dismiss on the ground that no cause of action had been pleaded. This libel action was brought by a congressman who complained of a story in Pearson and Allen's syndicated column, “Washington Merry-Go-Round,” charging him with anti-Semitism in opposing a judicial appointment. For description of this and other cases based on the same column, see D. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 882-84 (1949).

21. 376 U.S. 254, 268-69 (1964).

precedent.”<sup>22</sup> This the Court sought to do in *Times* indirectly by means of general propositions from and analogies to earlier cases.

### *General Propositions*

The Supreme Court discounted statements from its opinions in earlier cases which were cited by the plaintiff in *Times* to the effect that libel is not protected by the Constitution explaining that none of those cases “sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.”<sup>23</sup> But the Court did not hesitate to draw upon other cases none of which involved the law of libel. Both sides, in fact, cited cases which were far from irrelevant.

The cases from which passages quoted by the plaintiff were in effect distinguished away, concerned state power to investigate bar<sup>23a</sup> applicants, to censor motion pictures,<sup>24</sup> to prosecute for obscenity,<sup>25</sup> for group libel,<sup>26</sup> and for “fighting” words,<sup>27</sup> and to provide for the abatement of libelous periodicals as public nuisances.<sup>28</sup> The last of these cases was *Near v. Minnesota*<sup>29</sup> in which the publisher of a newspaper had made charges of illicit relations with gangsters against the mayor and chief of police of Minneapolis and the county attorney and grand jury of Hennepin County. Although the Court disallowed relief under the nuisance statute because of the “prior restraint” involved, it had at the same time, apprised the plaintiffs that “the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions.”<sup>30</sup> In *Chaplinsky v. New Hampshire*, the case of the “fighting” words, the Jehovah’s Witness whose conviction had been sustained had addressed the following words to a city marshal near the entrance to city hall: “You are a God damned racketeer [and] a

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22. D. Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L. J. 234, 236 (1966). The author added, “Acceptance of novelty, as in *Brown v. Board of Educ.*, is comparatively rare.” *Ibid.*

23. 376 U.S. 719.

23a. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 & n.10 (1957).

24. *Times Film Corporation v. City of Chicago*, 365 U.S. 43, 48 (1961).

25. *Roth v. United States* (*Alberts v. California*), 354 U.S. 476, 486-487 (1957).

26. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

27. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

28. *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

29. *Id.* at 697.

30. *Id.* at 715.

damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." <sup>31</sup>

To establish continuity with precedent while "writing on a clean slate," <sup>32</sup> the Court offered a selection of quotations from its prior opinions. From cases dealing with state law prohibiting the publication of obscenity,<sup>33</sup> display of the red flag,<sup>34</sup> contempt of court by publication,<sup>35</sup> solicitation of legal business,<sup>36</sup> and advocacy of criminal syndicalism,<sup>37</sup> the Court quotes statements stressing the necessity for opportunities for "unfettered interchange of ideas," "free political discussion," speaking "one's mind—although not always with perfect good taste, on all public institutions," "vigorous advocacy," and the free discussion of "supposed grievances and proposed remedies." These the Court boils down to the "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." <sup>38</sup>

### *Analogies*

In its *New York Times* decision the Court acted to increase the opportunities for such expression by changing traditional libel law presumptions of falsity and malice to favor the defendants. Support for these shifts in the burden of proving those two elements of libel is offered by way of analogy with earlier cases the most apposite of which are *Barr v. Matteo*<sup>39</sup>, and the contempt by publication cases in the line which began with *Bridges v. California*.<sup>40</sup> "If judges are to be treated

31. 315 U.S. at 569. The Court stated that "The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances, is open to no Constitutional objection." *Id.* at 574.

32. 376 U.S. at 268-269 (concurring opinion of Mr. Justice Goldberg).

33. *Roth v. United States*, 354 U.S. 476, 784 (1957).

34. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

35. *Bridges v. California*, 314 U.S. 252, 270 (1941).

36. *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963).

37. *Whitney v. California*, 274 U.S. 357, 375-376 (concurring opinion of Mr. Justice Brandeis). Also quoted was the well-known statement by Judge Learned Hand (in an anti trust case) that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (1943).

38. 376 U.S. at 269.

39. 360 U.S. 564, 575 (1959).

40. 314 U.S. 252 (1941). For surveys of the development of this analogous line of cases, see E. Hudson, *Freedom of the Press versus Fair Trial: The Remedy Lies with the Courts*, 1 VALPARAISO U. L. REV. 8, 14-18 (1966) and G. Haimbaugh, *Free Press*



as men of fortitude, able to thrive in a hardy climate," the Court reasoned in *Bridges*, "surely the same must be true of other government officials, such as elected city commissioners."<sup>41</sup> Referring to the *Matteo* case, the Court argued that "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."<sup>42</sup> Comparing the *Times* case with *Smith v. California*<sup>43</sup> the Court added, "A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which . . . we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale."<sup>44</sup> And looking back to *Speiser v. Randall*,<sup>45</sup> a form of loyalty-oath case, the Court said, "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially not one that puts the burden of proving truth on the speaker."<sup>46</sup>

Justices Black and Douglas, the two members of the present Supreme Court who heard the case of *Beauharnais v. Illinois*<sup>47</sup> in 1952, believe that there is a strong similarity between that case and the cases in which the *Times* rule has been applied.<sup>48</sup> In the earlier case the president of the White Circle League was convicted under an Illinois statute<sup>49</sup> for circulating a leaflet which petitioned the Mayor and City Council of Chicago to "preserve and protect white neighborhoods" against the "infiltrations" and "aggressions" of Negroes.<sup>50</sup> Where a bare majority of

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*versus Fair Trial: The Contribution of Mr. Justice Frankfurter*, 26 U. PITT. L. REV. 491, 497-508 (1965).

41. 376 U.S. at 273.

42. 376 U.S. at 282-283. "In *Barr v. Matteo* . . . this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy." *Id.* at 282.

43. 361 U.S. 147 (1959).

44. 376 at 278. The Court's opinion in *Smith* as in *Times* was written by Mr. Justice Brennan.

45. 357 U.S. 513, 525-526 (1958).

46. 376 U.S. at 271.

47. 343 U.S. 250 (1952).

48. *Garrison v. Louisiana*, 379 U.S. 64, 79-80, 82 (1964) (dissenting opinions of Justices Black and Douglas). Douglas in an opinion in which Black joined stated that *Beauharnais* "should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment." *Id.* at 82.

49. Ill. Rev. Stat. c. 38, § 471, (1949).

50. A facsimile of the offending leaflet is reproduced in 343 U.S. at 276.

the Court found group libel tending to cause a breach of the peace,<sup>51</sup> these two dissenting Justices saw an exercise of the right to petition government.<sup>52</sup> The logic which aligns *Beaubarnais* with the *Times* and later *Garrison*<sup>53</sup> decisions is belief of those Justices that

[T]he First Amendment, made applicable to the States by the Fourteenth, protects every person from having a state or the federal government fine, imprison, or assess damages against him when he has been guilty of no conduct . . . other than expressing an opinion, even though others may believe that his views are unwholesome, unpatriotic, stupid or dangerous . . . Indeed, "malicious," "seditious," and other such evil-sounding words often have been invoked to punish people for expressing their views on public affairs.<sup>54</sup>

This view is in line with the "general proposition" on expression upon public questions stated by the Court in its *Times* opinion.<sup>55</sup> Both the League leaflet and the civil rights committee's advertisement were—again to use the language of the *Times* opinion—expressions of "grievance and protest on one of the major public issues of our time."<sup>56</sup> The defendant newspaper was represented before the Court in *Times* by the leading exponent<sup>57</sup> of neutral principles of law. Surely, the Court might have been expected to overrule *Beaubarnais* in clearing a path to its new position in *Times*.

Ignoring the question of the validity of the Illinois statute upheld in *Beaubarnais*, the Court turned its attention instead to that of the con-

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51. 343 U.S. at 254.

52. *Id.* at 274. Dissenting opinion of Mr. Justice Black who also stated, "The Court condones this expansive state censorship by painstakingly analogizing it to the law of criminal libel. As a result of this refined analysis, the Illinois statute emerges labeled a 'group libel law.' . . . However tagged, the Illinois law is not that criminal libel which has been 'defined, limited and constitutionally recognized time out of mind'. For as 'constitutionally recognized' that crime has provided for punishment of false, malicious, scurrilous charges against individuals, not against huge groups." *Id.* at 271-272.

53. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

54. *Id.* at 79-80.

55. 376 U.S. at 269.

56. *Id.* at 271.

57. H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). See Mr. Justice Black's dissent in *Beaubarnais*: "The same kind of state law that makes *Beaubarnais* a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states for advocating equality and nonsegregation." 343 U.S. at 274.

stitutionality of the Sedition Act<sup>58</sup> which expired in 1800. In so doing it chose a course akin to that of the French revolutionaries who in 1793 exhumed from the vaults at Saint Denis and decapitated the bodies of long-since deceased royalty while permitting their scion, Louis XVII, to live on though in virtual captivity.<sup>59</sup>

An affinity between the Alabama law as applied in *Times* and the Sedition Act of 1798 to 1800 was the Court's crowning analogy. Under its civil libel law, the Court pointed out, Alabama was able to penalize good faith critics of government "by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel of the officials of whom the government is composed."<sup>60</sup> Faced with the self-imposed problem of how to invalidate a statute that was not or never had been before it, the Court chose to accomplish its aim by affirming the decision of the "court of history."<sup>61</sup>

### *The Court of History*

What the court of history had decided was determined by the Supreme Court on the basis of the testimony of a blue ribbon panel of witnesses made up of four scholars (Levy, Smith, Cooley and Chafee), four Justices (Holmes, Brandeis, Jackson and Douglas), and three early statesmen (Jefferson, Madison and Calhoun). Most of the chosen authorities believed that the Sedition Act of 1798 was contrary to the First Amendment, but, if the proceedings of the court of history are to be adversary rather than *ex parte*, it is only appropriate also to elicit their views respecting that amendment's effect on *state* libel law.

In the Kentucky and Virginia Resolutions<sup>62</sup> of which they are the respective authors, Jefferson and Madison vigorously assert the nullity of the Alien and Sedition Acts. But, as Dean Levy—himself one of the

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58. Sedition Act of 1798, 1 Stat. 596.

59. See 1 S. BIRO, *THE GERMAN POLICY OF REVOLUTIONARY FRANCE 184-186* (1957). The uncrowned Dauphin was apprenticed to a shoemaker and died of mistreatment.

60. 376 U.S. at 292.

61. *Id.* at 276.

62. For text of The Kentucky Resolutions of November 10, 1798, see S. PADOVER, *THE COMPLETE JEFFERSON* 128-134 (1943). For text of the Virginia Resolutions of December 24, 1798, see VI G. HUNT, *WRITINGS OF JAMES MADISON* 326-331 (1906). It was in the Kentucky and Virginia Resolutions that Calhoun grounded his doctrine of nullification or interposition the best known expressions of which are the South Carolina Exposition and Protest of December 19, 1828 and the Fort Hill Address or Letter of July 26, 1831.

Court-chosen authorities—points out, “It would be misleading not to represent their theory of freedom of expression as inextricably part of their theory of federalism.”<sup>63</sup> It is therefore to be expected that, on the issue of the validity of state libel laws, these witnesses will turn hostile. Reading further into Madison’s Report in support of the Virginia Resolutions—and the Court’s opinion contains quotations from both documents—we find a reference to

the policy of binding the hand of the Federal government, from touching the channel which alone can give efficacy to its responsibility to its constituents; and of leaving those who administer it, to a remedy for injured reputation, under the same laws, and in the same tribunals, which protect their lives, their liberties and their properties.<sup>64</sup>

In the Resolutions which he prepared for the Kentucky legislature, Jefferson asserted that, in adopting the Tenth and First Amendments, the States

manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed.<sup>65</sup>

Thus it appears that the argument which the Court builds on selected texts from the basic literature of interposition is more facade than solid structure. Professor Kalven has referred to the court of history ap-

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63. L. LEVY, *LEGACY OF SUPPRESSION* 267 (1960).

64. HUNT, *supra* note 62, at 393. Report of the Committee to whom were referred the Communications of various States, relative to the Resolutions of the last General Assembly of this State, concerning the Alien and Sedition Laws.

65. PADOVER, *supra* note 63, at 129. Cf. the New Hampshire Resolution (of June 15, 1799) on the Virginia and Kentucky Resolutions. This resolution, which pointed the way to *Marbury v. Madison*, stated in part:

That the state legislatures are not proper tribunals to determine the constitutionality of the laws of the general government; that the duty of such decision is properly and exclusively confided to the judicial department.

That, if the legislature of New Hampshire, for mere speculative purposes, were to express an opinion on the acts of the general government, commonly called “the Alien and Sedition Bills,” that opinion would unreservedly be, that those acts are constitutional, and, in the present critical situation of our country, highly expedient.

1 R. HOFSTADTER, *GREAT ISSUES IN AMERICAN POLITICS* 185-186 (1956).

proach as "heady doctrine."<sup>66</sup> It is heady, indeed, to be conducted by the Warren Court through *this* Potemkin's Village.

The Supreme Court acknowledged that Jefferson believed that the states "fully possessed" the "right to control the freedom of the press,"<sup>67</sup> but, it pointed out, "this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions."<sup>68</sup> Fifty-four years after the adoption of that amendment, Justices Holmes and Brandeis joined the Court in a declaration that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . . nor does it confer any right of privacy upon either persons or corporations."<sup>69</sup> Later, in their dissent to *Gitlow*,<sup>70</sup> the two Justices announced a change of attitude. "The general principle of free speech," they wrote, "must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."<sup>71</sup> Their new position was embraced by Mr. Justice Jackson, who along with Justices Holmes, Brandeis and Douglas<sup>72</sup> were singled out and relied upon by the Court in *Times*. "What they wrote, with care and circumspection," Jackson said, "I accept as the wise and historically correct view of the Fourteenth Amendment."<sup>73</sup> He noted that Holmes and Brandeis had joined the Court majority in *Near v. Minnesota*<sup>74</sup> in declaring that the State appropriately afforded the defamed public officials of the case "both public and private redress by its libel laws."<sup>75</sup> In *Palko v. Connecticut*,<sup>76</sup>

66. Kalven, *supra* note 6 at 193.

67. 376 U.S. at 276-277, citing *Dennis v. United States*, 341 U.S. 494, 522, n. 4 (concurring opinion).

68. 376 U.S. at 277.

69. *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 543 (1922).

70. *Gitlow v. New York*, 268 U.S. 652 (1925).

71. *Id.* at 672.

72. On the page cited by the Court in *DOUGLAS*, *THE RIGHT OF THE PEOPLE TO KNOW* 47 (1958), the author states his agreement with the Holmes dissent in *Abrams v. United States* [250 U.S. 616, 630 (1919)] which indicated that the Alien and Sedition Laws would not pass judicial scrutiny today—thus telegraphing his agreement with the Court on this issue in *Times*.

73. *Beauharnais v. Illinois*, 343 U.S. 250, 291 (1952) (dissenting opinion).

74. 283 U.S. 697 (1931).

75. *Id.* at 715.

76. 302 U.S. 319 (1937).

the surviving Brandeis was one of a majority of eight who explained that the Fourteenth Amendment "qualified state power only by such general restraints as are essential to 'the concept of ordered liberty.'" <sup>77</sup> These pronouncements were interpreted by Jackson to mean that

When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquility to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.<sup>78</sup>

Mr. Justice Jackson also wrote in this opinion which the Supreme Court itself offered in evidence to establish what had been decided by the court of history:

More than forty State Constitutions, while extending broad protection to speech and press, reserve a responsibility for their abuse and implicitly or explicitly recognize validity of criminal libel laws. We are justified in assuming that the men who sponsored the Fourteenth Amendment in Congress, and those who ratified it in the State Legislatures, knew of such provisions then in many of their State Constitutions. Certainly they were not consciously canceling them or calling them into question, or we would have some evidence of it. Congresses, during the period while this Amendment was being considered or was but freshly adopted, approved Constitutions of "Reconstructed" states that expressly mentioned state libel laws, and also approved similar Constitutions for States erected out of the federal domain.<sup>79</sup>

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77. *Id.* at 324-325.

78. 343 U.S. at 295. "The inappropriateness of a single standard for restricting State and Nation, Mr. Justice Jackson further stated, "is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquility. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power, such as protection of interstate commerce." *Id.* at 294-295. For examples of cases of this latter type, see *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), in which the Court limited the availability of state remedies for libel to prevent interference with the effective administration of national labor policy; and *Farmers Educational and Cooperative Union of America v. WDAY*, 360 U.S. 525 (1959), holding that § 15 of the Federal Communication Act grants a licensee an immunity from liability for libelous material it broadcasts.

79. 343 U.S. at 292-293.

In support of its court of history argument, the Supreme Court also cited four scholarly works<sup>80</sup> all but one of which contain more to refute that theory than to support it. Dean Leonard Levy's *Legacy of Suppression* is cited by the Court for its description of the Jeffersonians' campaign against the Sedition Act, but that book also carries Levy's conclusion that the known evidence points strongly in favor of the proposition that, contrary to Holmes' version of history, the First Amendment "left the law of seditious libel in force."<sup>81</sup> Dean Levy also explains why he found "unsupportable"<sup>82</sup> the statements in James M. Smith's *Freedom's Fetters* that Republican speakers intended their arguments against seditious libel to be applied "to state governments as well as the federal government."<sup>83</sup> Views from Cooley's *Constitutional Limitations* more relevant than those cited by the Court in *Times* are summarized by Chief Justice Hughes, joined by Holmes, Brandeis and other Justices, in support of their belief that the common law rules of libel were not abolished by the Constitution.<sup>84</sup> Chafee's *Free Speech in*

80. L. LEVY, *LEGACY OF SUPPRESSION* 258 et seq. (1960); J. SMITH, *FREEDOM'S FETTERS* 426, 431 and passim. (1956); T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 899-900 (8th ed., Carrington, 1927); Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 27-28 (1942).

81. LEVY, *supra* note 80, at 248.

82. *Id.* at 265, note 45.

83. SMITH, *supra* note 80, at 149.

84. *Near v. Minnesota*, 233 U.S. 697, 715 (1931) relying on Cooley, *supra* note 80, at 883, 884. The dissent of Mr. Justice Butler in *Near* concludes as follows: "The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion." 233 U.S. at 737-738.

After announcing its "actual malice" rule in *Times*, the court added: "An oft-cited statement of a like rule, which has been adopted by a number of state courts is found in the Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908)." It then cites, in a footnote, cases from ten other states that have adopted similar rules and cites a number of favorable scholarly authorities along with a suggestion that another rule is to be found in the *RESTATEMENT OF TORTS* § 598, comment *a* (1938). § 598 reads:

An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that

(a) facts exist which affect a sufficiently important public interest, and  
(b) the public interest requires the communication of the defamatory matter to a public officer or private citizen to act if the defamatory matter is true.

Comment *a* includes the following:

The rule stated in this section does not afford a privilege to publish false

the *United States* left the question of the constitutionality of the Sedition Act of 1798 "unresolved,"<sup>85</sup> and a twenty-three page appendix to that work entitled "State War and Peace Statutes Affecting Freedom of Speech"<sup>86</sup> indicates that, if what happens in state legislatures is part of history, the constitutionality of state sedition laws also remained undecided by the court of history.

### WIDER APPLICATION

The *Times* rule reflected an increased concern on the part of the Supreme Court with the conduct of defendants and with the degree of justifiable public interest in their offending utterances. A declining stress on the false or defamatory character of such publication may be noted. Although the primary emphasis often appears to be on the status or position of plaintiffs, that inquiry is subsidiary and auxiliary to a preoccupation with determining the degree of public interest in the statement in question. This new emphasis in factor-weighting has been maintained by the Court since *Times* in the cases in which it has again decided between society's interests in free discussion and personal dignity.

The first of such cases<sup>87</sup> involved the validity of the conviction of New Orleans District Attorney Jim Garrison for impugning the motives of eight local judges in the following statement:

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defamatory statements of fact about public officers or candidates for office.

The last edition of Prosser's *THE LAW OF TORTS* to be published before the *Times* decision stated that "some three-fourths of the courts which have considered the question have held that the privilege of public discussion is limited to opinion, comment or criticism, and does not extend to any false assertion of fact." W. PROSSER, *THE LAW OF TORTS*, 621-622 (1955).

See also, Noel, *supra* note 20, at 896-897; he lists twenty-six states as following the majority view and nine the minority view.

Regarding the pre-*Times* majority rule, Dean Pedrick has written, "With upwards of thirty states aligning themselves on this side of a hard question involving the freedom of the press this strict liability position cannot be described as unreasonable. The circumstances that the position has been endorsed by the Restatement of Torts and that it represents the common law of England and the Commonwealth countries does not detract from its respectability. W. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 583-584 (1964).

85. Chafee, *supra* note 80, at 28. See comment by Kalven, *supra* note 6 at 206-207, 193.

86. Chafee, *supra* note 80, at 574-597. See also Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATION*, ch. 14 (1947). This chapter, entitled "Treason and Sedition in Peace," presents a brief survey of "American Sedition Legislation" both federal and state down to 1944.

87. *Garrison v. State of Louisiana*, 379 U.S. 64 (1964).



The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints . . .

This raises interesting questions about the racketeer influences on our eight vacation-minded judges.<sup>88</sup>

In reversing Garrison's conviction, the Supreme Court held the Louisiana Criminal Defamation Statute<sup>89</sup> to be contrary to the *Times* rule in that it covered false statements against public officials if made with ill will and it directed punishment for true statements made with "actual malice" defined by the Louisiana courts to mean "hatred, ill will or enmity or a wanton desire to injure."<sup>90</sup> In declaring that "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned,"<sup>91</sup> it struck down the "historic limitation of the defense of truth in criminal libel to utterances published with good motives and for justifiable ends."<sup>92</sup> "Under a rule like the Louisiana rule," the Court warned, "permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.'"<sup>93</sup>

In *Rosenblatt v. Baer*<sup>94</sup> the Supreme Court returned to the question, left open in *Times*, of "how far down into the lower ranks of government employees the 'public official' designation would extend."<sup>95</sup> The plaintiff in that case had been discharged as supervisor of a county-operated ski resort and recreational area six months before the defendant wrote in a column in a local newspaper that he was "thunderstruck" to learn of the "simply fantastic almost unbelievable" difference in cash income under the new regime at the resort. It was, he added, "doing literally hundreds of per cent BETTER than last year" . . . "What

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88. *Id.* at 66.

89. LA. REV. STAT. Title 14, §§ 48-50 (1950).

90. 379 U.S. at 78.

91. *Id.* at 74.

92. *Id.* at 71-72. See note 7 listing jurisdictions where truth was a defense if published with good motives and for justifiable ends. *Id.* at 71.

93. *Id.* at 73, quoting Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 (1949).

94. 383 U.S. 75 (1966).

95. 376 U.S. at 283, note 23.

happened to all the money last year?" he asked, "and every year?"<sup>96</sup> A judgment awarding the plaintiff \$31,500 was reversed by the Supreme Court and remanded. As the first trial was held before the decision in *Times* the presentations were not shaped to the "public official" issue. The initial determination of the plaintiff's status was to be left to the trial judge on remand and for his guidance the Court stated:

[T]he "public official" designation applied 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.<sup>97</sup>

The position of a "public official", the Court added, "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 government employees . . ." <sup>98</sup>

As in *Times* the matter complained of was, on its face, an impersonal discussion of the conduct of operations of government.<sup>99</sup> And the plaintiff may have been, in the *Times* sense, a public official.<sup>100</sup> If so, the instructions to the jury were clearly improper in that the jury was allowed to find that negligent falsehood would defeat the defendant's privilege. "The test which we laid down in *New York Times*, the Court reemphasized, "is not keyed to ordinary care; defeasance of the privilege is conditioned not on mere negligence, but on reckless disregard for truth." <sup>101</sup>

In *Time, Inc. v. Hill*,<sup>102</sup> the Supreme Court next turned its attention to the case of a private citizen who had won a judgment of \$30,000 under the New York state Right of Privacy statute<sup>103</sup> for a *Life* article entitled "True Crime Inspires Tense Play." This story carried pictures of the plaintiff's former home and gave the impression that the play, "The Desperate Hours," mirrored Mr. Hill's family's experience of

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96. *Id.* at 78.

97. *Id.* at 85.

98. *Id.* at 86.

99. *Id.* at 80.

100. *Id.* at 87.

101. *Id.* at 84.

102. 385 U.S. 374 (1967). For a prompt and detailed appraisal of this case, see Comment, *Privacy, Defamation, and the First Amendment: The Implications of Time, Inc. v. Hill*, 67 COLUM. L. REV. 926 (1967).

103. NEW YORK CIVIL RIGHTS LAW §§ 50-51 (McKinney 1948).

being held hostage by escaped convicts. "But unlike Hill's experience," it was pointed out by the Court, "the family of the story suffers violence at the hands of the convicts; the father and son are beaten and the daughter subjected to a verbal sexual insult."<sup>104</sup> Finding the opinion of the Court of Appeals of New York unclear as to whether the trial court required "proof of knowledge of the falsity or that the article was prepared with reckless disregard for the truth,"<sup>105</sup> the Court reversed and remanded.<sup>106</sup> Thus the use of the "actual malice" aspect of the *Times* rule is ordered in a case which involved neither a public official nor the discussion of governmental affairs. The assignment of such a burden of proof to a private citizen whose misfortune had been misrepresented by publicity attending the opening of a new play linked to an actual incident was explained by the Court in this way:

The 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 this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom 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 members of society to cope with the exigencies of their period."<sup>107</sup> . . . Erroneous statement is no less inevitable in such case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, . . . it must be protected if the freedoms of expression are to have the 'breathing space'

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104. 87 S. Ct. 534, 537 (1967).

105. *Id.* at 541.

106. The Court's opinion states that on remand, "The jury might reasonably conclude from this evidence . . . that Life knew or was reckless of the truth in stating in the article that 'the story re-enacted' the Hill family's experience. On the other hand, the jury might reasonably predicate a finding of innocent or only negligent misstatement on the testimony . . . that the [entertainment editor] thought beyond doubt that the 'heart and soul' of the play was the Hill incident. *Id.* at 545.

107. Quotation from *Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940). This well-known theme of Dr. Meiklejohn's was reiterated by him in *Public Speech and the First Amendment*, 55 Geo. L. J. 234, 263 (1966): "The interpretation of the first amendment must fall within, and be responsive to, our most difficult and important enterprise—the self-education of a self-governing public."

that they 'need . . . to survive' . . ." <sup>108</sup> We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the 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 a non-defamatory matter.<sup>109</sup>

The cases of *Curtis Publishing Company v. Butts*<sup>110</sup> and *Associated Press v. Walker*<sup>111</sup> were disposed of jointly. In an opinion in which he spoke also for Justices Clark, Stewart and Fortas—Chief Justice Warren concurred in the result but not in the opinion—Mr. Justice Harlan stated that certiorari had been granted in those two cases in order to give the Court an opportunity "to consider the impact of the *New York Times* decision on libel actions instituted by persons who are not public officials but who are "public figures" and involved in issues in which the public has a justified and important interest."<sup>112</sup> Cautioning that these two cases could not be analogized to prosecutions for seditious libel, Harlan undertook to consider the factors arising in the particular contexts of those cases.<sup>113</sup>

Although the Court found both plaintiffs to be "public figures," Butts' status as such was due to his position alone while Walker had thrust himself into the vortex of an important controversy.<sup>114</sup> The jury in *Butts* had found that Curtis' conduct amounted to a "wanton and reckless indifference," while the trial court in *Walker* found insufficient evidence to prove more than ordinary negligence on the part of *Associated Press*.<sup>115</sup> Curtis advertised its *Saturday Evening Post* editorial policy to be one of "sophisticated muckraking" while the Associated Press was engaged in the immediate dissemination of news. Coach Butts and General Walker were found to have an interest in not being falsely accused, respectively, of rigging a football game between two state universities and assuming command of a crowd and leading them in a

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108. This quotation from *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), appears also in *New York Times v. Sullivan*, 376 U.S. at 271-272; and in *Garrison v. State of Louisiana*, 379 U.S. 64 at 74 (1964); and *Curtis Publishing Co. v. Butts*, 87 S. Ct. 1975, 1988 (1967).

109. 87 S. Ct. at 542-543.

110. 87 S. Ct. 1975 (1967).

111. *Ibid.*

112. *Id.* at 1998.

113. *Id.* at 1991.

114. *Id.* at 1984, 1987.

115. *Id.* at 1992.

charge against federal marshals. Corresponding public interest lay in being informed about the "conduct of athletic affairs of educational institutions" and "the events and personalities involved in the Mississippi riots."<sup>116</sup>

In announcing the Court's affirmance of a \$430,000 judgment for Butts and the reversal<sup>117</sup> of a \$500,000 award to Walker, Harlan disclosed an alternative to the "rigorous" *Times* rule:

[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 showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.<sup>118</sup>

Mr. Justice Harlan pointed out that, like the *Times* rule, the new formulation focuses on the conduct which creates the false publication and that such must be the principal focus of any regulatory measure which is intended to be ideologically neutral.<sup>119</sup>

In the *Butts* case for the first time since the decision in *New York Times* the "actual malice" requirement failed to show up as a dominant characteristic in one of *Times*' progeny.<sup>120</sup> Only the Chief Justice and Justices Brennan and White were guided by that standard. Mr. Justice Black, in a dissent in which he was joined by Mr. Justice Douglas, stated that the *Butts* case illustrated the accuracy of his predictions that the *Times* constitutional rule concerning libel "is wholly inadequate to save the press from being destroyed."<sup>121</sup> He deplored jury-like fact-finding on the part of the Court as a flat violation of the Seventh Amendment,<sup>122</sup> warned the Court that it "is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity,"<sup>123</sup> and he called for an abandonment of the *Times* rule and for

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116. *Id.* at 1987.

117. Walker was reversed and remanded. The Court stated its conclusion that Walker should not be entitled to damages from the Associated Press. *Id.* at 1993-1994.

118. 87 S. Ct. at 1991.

119. *Id.* at 1990.

120. In *Time, Inc. v. Hill*, Mr. Justice Harlan referred to "the *Times* case and its progeny." 87 S. Ct. 534, 552 (1967).

121. 87 S. Ct. 1975, 1999 (1967).

122. *Id.* at 2000.

123. *Ibid.* For an argument that the *Times* case offers "an admirable model for the construction of a rule" for the regulation of pornographic materials, see *Dirty Words*

the adoption of one "to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments."<sup>124</sup>

In addition to the "absolutists"—Black, Douglas and Goldberg while the latter was on the Court—with whom the proponents of the *Times* malice test have been faced from the outset, a group is emerging who believe that that test is being used too extensively. The following references to concurrences and dissents in earlier cases further suggest the manner in which these two positions are being articulated.

In *Time, Inc. v. Hill*, Justices Black and Douglas concurred in the Court's opinion stating, as they did in the *Walker* case, that they did so "in order for the Court to be able at this time to agree on an opinion in this important case based on the prevailing doctrine expressed in *New York Times Co. v. Sullivan*."<sup>125</sup> But in both cases they made it clear that they were not receding from their position which they had first taken in *Times*—i.e., that which they had previously expressed "about the much wider press and speech freedoms" which the First and Fourteenth Amendments were designed to grant.<sup>126</sup> In support of their wider view, Douglas stated that, "A fictionalized treatment of the event is, in my view, as much in the public domain as would be a water color of the assassination of a public official."<sup>127</sup> Characterizing judicial balancing as a "Constitution ignoring and destroying technique", Black admonished that, "If judges have, however, by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created; then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms."<sup>128</sup>

To this Black received an answer in the dissenting opinion of Mr. Justice Fortas joined by the Chief Justice and Mr. Justice Clark. Fortas pointed out that the right of privacy which is "the right to be let alone" was recognized in at least 35 jurisdictions,<sup>129</sup> and quoted from opinions in *Olmstead v. United States*,<sup>130</sup> *Mapp v. Ohio*,<sup>131</sup> *Griswold v. Connecti-*

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*and Dirty Politics: Cognitive Dissonance in the First Amendment*, 34 U. CHI. L. REV. 367 (1967).

124. 87 S. Ct. 1975, 2000 (1967).

125. 87 S. Ct. 534, 547 (1967).

126. *Id.* at 547.

127. *Id.* at 549.

128. *Id.* at 548.

129. Citing W. PROSSER, LAW OF TORTS 831, 832 (1964, 3d ed.).

130. 277 U. S. 438 (1928).

131. 367 U. S. 643 (1961).

*cur*<sup>132</sup> and other cases to the effect that privacy is "the most comprehensive of rights and the right most valued by civilized men;"<sup>133</sup> that the right to privacy is "no less important than any other right carefully and particularly reserved to the people;"<sup>134</sup> and that privacy is a right which the Court "derived by implication from the specific guarantees of the Bill of Rights."<sup>135</sup>

To these three justices, the reckless<sup>136</sup> assault upon the privacy of a quiet family for no purpose except dramatic interest and commercial appeal was "not within the specially protected core of the First Amendment."<sup>137</sup> To subject Mr. Hill to the burden of a new trial after eleven years of litigation, they believed, was a drastic action by a remote court<sup>138</sup> deferring to those whose views are absolute as to the scope of the First Amendment. Mr. Justice Harlan, dissenting separately, stated his belief that a jury-finding of ordinary negligence would meet the federal constitutional requirements in a case, such as this, which lay outside "that area of discussion central to a free society," and that "thus the state interest in encouraging careful checking and preparation of published material is far stronger than in *Times*."<sup>139</sup>

To round out these illustrations of views of those within the Court who feel that the *Times* "malice test" is either frightening the press into timidity<sup>140</sup> or encouraging it to recklessness and carelessness<sup>141</sup> the following two statements, by Black and Stewart respectively, are offered:

The "weighing" doctrine plainly encourages and actively invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press.<sup>142</sup>

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132. 381 U. S. 479 (1965).

133. 277 U. S. at 478. (Brandeis dissenting)

134. 367 U. S. at 656.

135. 87 S. Ct. 534, 555 (1967).

136. *Id.* at 559.

137. *Ibid.*

138. *Id.* at 557-58. "But a jury instruction is not abracadabra," Mr. Justice Fortas wrote. "Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from trial judge to a jury of ordinary people . . . Instructions are to be viewed in this common sense perspective, and not through the remote and distorting knothole of a distant appellate fence." *Ibid.*

139. *Id.* at 549, 552.

140. *Id.* at 548.

141. *Id.* at 558.

142. *Id.* at 548.

And its counter:

The protection of private personality, like the protection of life itself, is left primarily to the individual States, under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.<sup>143</sup>

### CONCLUSION

In a line of decisions beginning with *New York Times v. Sullivan*, the United States Supreme Court for the first time has undertaken to impose new tort law upon the states in the areas of defamation and privacy invasion. These recent cases, which tend to tip the scales in favor of defendants, stand for the proposition that in order to recover in an action for injury to one's reputation, dignity or emotional tranquility caused by false statements on a matter of public interest, the plaintiff must be able to prove that the defendant uttered the untruths knowingly or with less than ordinary care. How much less, the Times opinion suggested, depends on how close the matter is to "the very center of the constitutionally protected area of free speech",<sup>144</sup> and made clear that "impersonal attack on governmental operations"<sup>145</sup> stands at this epicenter. But beyond this, by placing a greater burden of proof on non-hermit Hill than on "public figures" Butts and Walker, the court has thrown into question the relevance of such factors as the prominence of the plaintiff and public interest in the subject matter. The large award to Butts and the possibility of success by Baer and Hill on remand, show—to return to the metaphor of the introduction—that the calls by Justices Black and Douglas for total victory have not been heeded and the modification of the Times rule in the Butts and Walker cases may indicate some de-escalation on the Second Front.

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143. 383 U. S. 75, 92 (1966).

144. 376 U. S. at 292 (1964).

145. *Ibid.*