Thomas M. Cooley, Liberal Jurisprudence, And The Law Of Libel, 1868-1884

*Norman L. Rosenberg**

During the past two decades, and especially since 1970, there has been a steadily growing interest in American legal history.[1] This new interest has helped to redirect attention to the work of nineteenth century legal figures, including Thomas M. Cooley. Most scholars once dismissed Cooley as a simplistic apologist for laissez faire economics and late nineteenth century capitalism.[2] Recently, however, legal and constitutional historians have realized that his legal thought was much more complex.[3] In part, this article seeks to extend recent work on Cooley and to examine his ideas and judicial opinions on freedom of expression and the law of libel. Cooley's views about free expression, defamation law, and American journalism are excellent examples of the development and transformation of liberal ideas in the mid-to-late-nineteenth century legal community. In addi-

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* B.A., University of Nebraska—Lincoln 1964; M.A., University of Nebraska—Lincoln, 1967; Ph.D., S.U.N.Y. at Stony Brook 1972; Associate Professor, Macalester College. I wish to thank John Pratt for suggesting a study of the history of libel law; the Department of Journalism at the University of California, Berkeley, for encouraging my interest in mass media law; and Harlan Abrahams, the editors of the *University of Puget Sound Law Review,* and Emily Rosenberg for commenting upon earlier drafts of this article. I remain responsible for any errors and eccentric interpretations. The Jerome Foundation helped underwrite some of the research, and a summer grant from the NEH helped to support another study that eventually led me back to Thomas Cooley.

1. *See, e.g.,* Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography,* 10 L. & Soc'y Rev. 9 (1975). Much of this "new legal history"—including the work of Duncan Kennedy, Morton Horwitz, and Mark Tushnet—has concerned itself with integrating legal history and critical theory. *See* Abrahams, *The Emergence of Critical Social Theory in American Jurisprudence: An Introduction to Professor Rosenberg's Perspective,* 4 U. Puget Sd. L. Rev. 39 (1980).

2. *See, e.g.,* C. Jacobs, Law Writers and the Courts (1954); B. Twiss, Lawyers and the Constitution (1942).

3. *See, e.g.,* P. Paludan, A Covenant With Death 249-73 (1975); G. White, The American Judicial Tradition 109-22 (1975); Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865-1885,* 10 Am. J. Legal Hist. 97 (1966); Jones, *Thomas M. Cooley and "Laissez Faire Constitutionalism": A Reconsideration,* 53 J. Am. Hist. 751 (1967).

tion, Cooley's attempts to resolve the problems raised by some of the earliest mass media libel cases offer some historical perspective on recent efforts to sort out the conflicting issues and interests in political and public libel cases.[4]

Thomas Cooley's labors merit special attention because he approached the problem of libel and the press from two vantage points. First, as a writer of numerous legal treatises, Cooley served as one of the nineteenth century's most widely-read conceptualizers and "glossators."[5] One of America's first prominent lawyer-academicians, Cooley sought to derive and articulate justifications for prevailing legal rules and to formulate and advocate modifications to those standards. Second, as a member of the Michigan Supreme Court from 1864 to 1885, Cooley had the opportunity to argue with his skeptical colleagues about the viability of his approach and to apply the theories of the treatise-writer to the concrete problems of the appellate judge. In his application of legal rules to the realities of late-nineteenth century journalism, Thomas Cooley spoke to the problems of our own time as well. A comparison of Cooley's early efforts as a treatise-writer with his later work as a judge suggests that contemporary conflicts between libel law and freedom of the press are not simply the result of improperly-framed rules or the "conservatism" of President Nixon's Supreme Court appointees.[6] Ultimately, the dilemmas that faced Cooley, as well as those that confronted the Supreme Court of the past fifteen years, grow out of contradictions within the liberal marketplace view of free expression.[7]

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American liberals, including Thomas Cooley, have always placed great importance on a series of supposedly self-regulating

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4. *See, e.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Herbert v. Lando, 441 U.S. 153 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

5. Professor G. Edward White coined the term "glossator" to connote the important role played by "lawyer intellectuals" in developing nineteenth century legal doctrines. *See* G. WHITE, *The Intellectual Origins of Torts in America*, in PATTERNS OF AMERICAN LEGAL THOUGHT 163, 165 (1978).

6. *See, e.g.*, Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L.J. 471 (1979).

7. *See* text accompanying notes 86-166 *infra*.

marketplaces.[8] Cooley's earliest and most influential treatise, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union (Constitutional Limitations)*,[9] became famous for its implicit endorsement of a free, largely self-adjusting, economic marketplace. But Cooley's legalistic version of "marketplace theology" was more than a set of arbitrary doctrines which cynically or unwittingly sanctified the growth of capitalism and the profits of the robber barons.[10] In his writings, Cooley also glorified several other "liberal marketplaces," including the intellectual and the political. In Cooley's view, maintenance of these three marketplaces—the economic, the intellectual, and the political—provided the essential framework for the continued development of a liberal republic.

Writing, in *Constitutional Limitations*, about freedom of expression and American journalism, Cooley often used analogies from the expanding economic marketplace to bolster his arguments that similar benefits would follow from the free flow of ideas and from the unhindered clash of rival political forces.[11] Cooley believed that if political aspirants and ideas could freely compete for support, Americans would enjoy the steady advance of social and political wisdom; America's culture, government, and economy would thrive. And so, the task of lawmakers was to see that legal institutions released, rather than restricted, the flow of individual ideas into the intellectual marketplace.[12] Both as a treatise-writer and as a judge, Cooley sought to promote intellectual and political development by removing illiberal restrictions from public debate and from the primary channel of popular communication, the American press.

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8. For an analysis of liberalism in terms of "self-regulating" marketplaces, see G. WILLS, NIXON AGONISTES (2d ed. 1979).

9. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION (1868) [hereinafter cited as CONSTITUTIONAL LIMITATIONS]. Cooley also discussed libel and freedom of expression, though much more briefly, in his TREATISE ON THE LAW OF TORTS (1879) [hereinafter cited as TORTS]. (All citations, unless otherwise noted, are to the first editions of Cooley's treatises.)

10. This was the view of older studies. *See, e.g.*, note 2 *supra*.

11. *See* text accompanying notes 46-47 *infra*.

12. The thesis that nineteenth century legal doctrines were designed to release individual energies, particularly in the economic realm, was first developed in J. W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956). For a recent effort to join the intellectual and economic marketplaces, see Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974).

Traditionally, libel law was the most significant legal check upon political discussion and the press. Thomas Cooley, therefore, devoted considerable attention to eliminating what he considered the antiliberal features of defamation law. In *Constitutional Limitations*,[13] Cooley began to question the wisdom of common law doctrines.

Although some Jeffersonian opponents of the national Sedition Act of 1798 had articulated broad, theoretical defenses of free expression,[14] most of the leading spokesmen for the Democratic-Republican party ultimately supported libel doctrines, especially in the area of civil defamation, similar to those endorsed by their Federalist adversaries. Once partisan differences over the Sedition Act ended, prominent political and legal figures agreed that libelous falsehoods about individual political leaders could not be permitted.[15] Early nineteenth century legal authorities, such as James Kent and Joseph Story, demanded that courts retain the sturdy barrier of defamation law against those who sought to traffic in political libels. Judges and commentators feared that if courts tolerated circulation of libelous falsehoods in the political arena, voters might be fooled into rejecting the "best men" in favor of less qualified candidates or even totally unscrupulous demagogues. Nearly every judicial decision endorsed the principle of strict liability, a legal doctrine that neatly reinforced the "deferential-elitist" spirit of early nineteenth-century political culture. This theory of libel law implied that most citizens lacked the political sophistication to detect the lies and hyperboles of wily propagandists.[16]

Early American judges and legal commentators viewed partisan newspapers as the most dangerous source of libelous political attacks. Although some Americans might consider the politi-

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13. CONSTITUTIONAL LIMITATIONS, *supra* note 9.

14. On the "Jeffersonian libertarians," see L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 258-97 (1963). Although some Jeffersonians penned sweeping attacks on the Sedition Act, most carefully qualified their own theories of free expression. *See* Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109; Rosenberg, *The Law of Political Libel and Freedom of Press in Nineteenth Century America: An Interpretation*, 17 AM. J. LEGAL HIST. 336 (1973).

15. *See, e.g.*, King v. Root, 4 Wend. 113, 135-42 (N.Y. 1829); T. COOPER, A TREATISE ON THE LAW OF LIBEL AND THE LIBERTY OF THE PRESS 42-47, 109-12 (1830); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 597-98 (1833); Holt, *The Law of Libel*, 5 AM. Q. REV. 71 (1829).

16. *See* Rosenberg, *The New Law of Political Libel: A Historical Perspective*, 28 RUTGERS L. REV. 1141, 1143-46 (1975).

cal press the great security of our liberty, Joseph Story complained to a colleague at Harvard Law School, "it seems to be forgotten that the same instrument which can preserve, may be employed to destory."[17] The great task of clear-headed citizens was "to make the mass of the people see their true interests, there being so many political demagogues, and so many party presses, that are in league to deceive them."[18] Such fears about the dangers of "licentious" presses were expressed not only in political libel cases but also in a number of other early nineteenth century libel decisions which rejected any sort of special legal privileges for the press. Thus, in 1813, Judge James Kent held a printer absolutely responsible for a libelous piece, even though the newspaperman had identified the author and had merely provided him access to the public. "The injury is inflicted by the press, which, like other powerful engines, is mighty for mischief as well as for good."[19] Kent concluded that the printer's claim for some type of legal protection for inadvertent libels was "as destitute of foundation in law as it [was] repugnant to principles of public policy."[20] And in 1825, the Massachusetts Supreme Court compared the newspaper operator to the person who stored firearms at home: both possessed dangerous instruments and must be responsible for all harmful consequences.[21]

The early nineteenth century law of libel thus made few concessions to journalists who published untruthful, and in some cases truthful, political criticism. In criminal prosecutions for libel, most jurisdictions employed the so-called "truth-plus standard" first articulated by Alexander Hamilton and James Kent: defendants were required to demonstrate not only that they had published the truth but also that they had done so with "good motives" and for "justifiable ends."[22] In civil defamation cases, most courts held that proof of the truth of libelous political charges, by itself, could be a complete justification, but some even applied the more restrictive Hamiltonian standard in both

17. Letter from J. Story to J. Ashmun (Feb. 13, 1831) *reprinted in* 2 LIFE AND LETTERS OF JOSEPH STORY 50 (W.W. Story ed. 1851).

18. *Id.* at 49.

19. Dole v. Lyon, 10 Johns. 447, 450 (N.Y. Sup. Ct. 1813).

20. *Id.; see* Tillotson v. Cheetham, 2 Johns. 63, 74 (N.Y. Sup. Ct. 1806).

21. Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825).

22. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 808-42 (J. Goebel, Jr. ed. 1964) (Hamilton's views); *cf.* People v. Croswell, 1 Cai. R. 149 (N.Y. Sup. Ct. 1803) (Kent's views).

civil and criminal cases.[23]

Insistence upon strict liability for libelous falsehoods, even in newspaper stories about public officials and candidates, constituted a significant exception to the general trend in nineteenth century tort law. In other areas, courts generally rejected strict liability in favor of less stringent standards such as negligence.[24] In a few types of defamation cases, particularly those arising out of business dealings, some courts did reject strict liability,[25] but most American courts refused to concede any privilege when newspapers and periodicals published libelous falsehoods about political leaders or private citizens.[26] When it came to the reputations of prominent citizens, the press remained an inherently dangerous instrument.

Beginning his political and legal career as a Jacksonian Democrat, and as a supporter of free soil, free trade, and free public education, Thomas Cooley found traditional libel doctrines in direct conflict with his theory of free expression, a theory which grew out of his ideas about the relationship between the liberal marketplaces and America's future development. He devoted an entire chapter of *Constitutional Limitations* to "Liberty of Speech and of the Press," and he took direct aim on English and early American authorities.[27] After a review of English constitutional history, Cooley concluded that Sir William Blackstone's famous definition, equating liberty of expression with liberation from prior restraints, was woefully inadequate.[28]

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23. *See* Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 790-805 (1964).

24. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 85-99 (1977).

25. For a brief, contemporary analysis, see CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 425-26; TORTS, *supra* note 9, at 216-17.

26. State courts consistently rejected the argument that printing non-malicious falsehoods about political figures should be privileged. *See, e.g.*, Lewis v. Few, 5 Johns. 1 (N.Y. Sup. Ct. 1809); King v. Root, 4 Wend. 113 (N.Y. 1829). Some courts did make an exception for bona fide petitions to proper authorities but not for libelous stories published in the press. *See, e.g.*, Thorn v. Blanchard, 5 Johns. 508 (N.Y. Sup. Ct. 1809); Gray v. Pentland, 4 Serg. & Rawl. 420 (Pa. 1819); Harris v. Huntington, 2 Tyl. 129 (Vt. 1802).

27. *See* CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 414-65.

28. . . . mere exemption from previous restraints cannot be all that is secured by constitutional provisions, in as much as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion . . . if, while every man was at liberty to publish whatever he pleased, the public authorities might nevertheless punish him for

Post-Revolutionary adaptations of English doctrines also failed to satisfy Cooley. He contended that the national Sedition Act of 1798, although it rejected common law orthodoxy by permitting truth as a defense, still violated the first amendment. He argued that it was "impossible to conceive at the present time . . . the passage of any similar repressive statute."[29] Cooley conceded that public debates might become impassioned and that some people would call for criminal libel prosecutions, but he counseled that "the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent this discussion."[30] Cooley also believed that civil suits for damages, which were far more frequent than criminal prosecutions, could also infringe upon liberty of expression. He insisted that courts become more sensitive to complex issues raised by libel suits in which political leaders sued their critics for defamation.[31]

A one-time newspaper editor and an active political partisan before becoming a judge, Cooley drew upon the ideas and the spirit of Jacksonian political culture to bolster his critique of existing libel doctrines.[32] The new national parties of the Jacksonian era made politics a mass participant, or at least a mass spectator, sport. Calling forth the loyalties of vast segments of the white male population, this system of mass politics won over most mid-nineteenth century political theorists. Rejecting traditional fears about the dangers of factions, political analysts, including Thomas Cooley, viewed permanent conflict between organized parties in the political marketplace as an essential

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harmless publication.

Id. at 421. When discussing the use of prosecutions for libel, Cooley placed more blame upon British officials, who enforced the laws "with great harshness beyond any reasonable construction which those rules would bear," than on the common law of libel itself. *Id.* at 427. Throughout his career as a treatise-writer and as a judge, Thomas Cooley insisted that common law principles, properly interpreted, fully protected freedom of discussion. *See* text accompanying notes 62-84, 127-30 *infra*.

29. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 428.

30. *Id.* at 429.

31. *Id.* at 435-41.

32. From the outset of party conflict in Michigan, members of the Democratic Party favored more wide-open political debate and less restrictive libel laws than members of the Whig Party. For an exchange of views at the state constitutional convention of 1835, especially the opinions of William Woodbridge, a Whig leader, and the Democratic chieftain, John Norvell, see THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835-36: DEBATES AND PROCEEDINGS 290-96 (H.M. Dorr ed. 1940). *See* R. FORMISANO, THE BIRTH OF MASS POLITICAL PARTIES 107 (1971).

part of American government.[33]

Cooley also endorsed free-swinging political debates, and he extolled the rationality of most voters and the ultimate integrity of the free marketplace of political ideas. He attributed the Sedition Act's passage to the apprehensions of an earlier age, a time when "the fabric of government was still new and untried, and when many men seemed to think that the breath of heated party discussion might tumble it about their heads."[34] Fears about the bad tendency of party polemics could no longer justify such limitations on the right of free expression. Constitutional guarantees, Cooley argued, insured "every citizen at any time" the liberty to "bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them."[35] Repressive libel laws only frustrated translation of public opinion into public policy and undermined the operation of the new system of popular politics. Traditional common law restraints could easily become tools of political repression. In "times of high party excitement," Cooley feared, the party in power might be tempted "to bolster up wrongs and sustain abuses and oppressions by crushing adverse criticism and discussion."[36] On the basis of both republican principles and political realities, Cooley urged elimination of outdated libel laws. He believed citizens should recognize that enlightened public sentiment would provide a safer and more effective remedy for libelous publications than the old system of legal controls.

Although between 1798 and 1800 some of the "Jeffersonian libertarians" had expressed similar sentiments about free expression and public opinion, virtually all of them had qualified their broad rhetoric when it came to specific discussions of defamation law and to personal attacks upon the reputations of the "best men."[37] In contrast, Cooley believed that the reputations of public officials should not receive the same, and certainly no

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33. Most political historians now agree that between 1776 and the early 1840s American political culture changed in this manner. *See* R. HOFSTADTER, THE IDEA OF A PARTY SYSTEM (1969); Formisano, *Deferential-Participant Politics: The Early Republic's Political Culture, 1789-1840*, 68 AM. POL. SCI. REV. 473 (1974).

34. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 427.

35. *Id.* at 422.

36. *Id.* at 429.

37. N. Rosenberg, The Law of Libel and Partisan Politics in the Early Republic (unpublished manuscript, 1980).

greater, legal protection than the good names of ordinary citizens. He felt that people who entered public life should expect to submit their actions and characters to searching, and sometimes even libelous, criticism.[38]

Cooley also argued that the American newspaper press deserved liberation from the burdens of traditional defamation law. His views about American newspapers, like his ideas about politics, contrasted with those of early nineteenth century jurists and represented the high tide of nineteenth century libertarian thought. Although Cooley acknowledged the venality of some newspapers, *Constitutional Limitations* also included a glowing sketch of the American press.[39] Differing sharply with Kent and Story, Cooley praised political newspapers for their progressive contributions to public enlightenment. He claimed the political press was "gradually becoming more just, liberal, and dignified in its dealings with political opponents, and vituperation is much less common, reckless, and bitter now." The daily newspaper, he continued, "may be said to be the chief educator of the people; its influence is potent in every legislative body; it gives tone and direction to public sentiment on each important subject as it arises." He also praised journalists for reporting events from "every civilized country" and for scrutinizing the conduct of politicians and any one else "sufficiently interesting or notorious to become an object of public interest."[40] Cooley went even further in his *General Principles of Constitutional Law,* assigning the press quasi-constitutional status. The press, he argued, operated as "a public convenience, which gathers up the intelligence of the day to lay before its readers, notifies coming events, gives warning against disasters, and in various ways contributes to the happiness, comfort, safety, and protection of the people."[41] "[I]n a constitutional point of view," the press enabled "the citizen to bring any person in authority, any public

38. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 431-41; TORTS, *supra* note 9, at 217-19.

39. *See* CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 454. Cooley included a lengthy excerpt from an opinion by Judge Samuel Nelson of the New York Supreme Court which condemned the press for its tendency "to pamper a depraved public appetite or taste." *Id.* at 453 (quoting Hotchkiss v. Oliphant, 2 Hill 510, 513 (N.Y. 1842)). Cooley disputed Judge Nelson's sweeping indictment, claiming that the press did not deserve such venom.

40. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 451-52, 456 n.4.

41. T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 274 (1880) [hereinafter cited as GENERAL PRINCIPLES].

corporation or agency, or even the government in all its departments, to the bar of public opinion."[42]

Cooley recognized that the American press had changed since the early days of the republic. By mid-century, the United States had far more newspapers and periodicals than in 1810; these publications provided their readers with larger amounts and greater diversity of information than the small, largely political journals of the Jeffersonian era.[43] Cooley enthusiastically endorsed these changes and lauded the positive contributions of the press. "Every party has its newspaper organs; every shade of opinion . . . has its representative; every locality has its press to advocate its claims, and advance its interests . . . ."[44] Evidence that the nation's presses were prospering buoyed Cooley's liberal romantic faith that the mid-nineteenth century newspaper was a medium of mass communication that could bind together people in diverse places and from different socio-economic circumstances. The new mass media, Cooley hoped, could provide a non-coercive, largely self-regulating means to temper the possessive individualism that was at the heart of liberal society. He also anticipated that the press would help to combat difficulties raised by the great size of the American republic. Through specialized publications, the press would enable people with similar occupations and interests, such as merchants or spiritualists, to communicate with one another at great distances. In short, Cooley praised the mid-nineteenth century press as prime force in the expansion and improvement of almost every aspect of American life. Outdated laws that unnecessarily hampered the flow of ideas and opinions threatened to slow the United States' march into the modern world.[45]

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42. *Id.*

43. *See* F. MOTT, AMERICAN JOURNALISM: A HISTORY: 1690-1960, at 215-52 (3d ed. 1962); M. SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 12-60 (1978); B. WEISBERGER, THE AMERICAN NEWSPAPERMAN 69-82 (1961); Crouthamel, *The Newspaper Revolution in New York, 1830-60,* 45 N.Y. HIST. 91 (1964).

44. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 452.

45. *Id.* at 451-52. Thomas Cooley, in Dean Wellington's terms, was a thorough-going "consequentialist." *See* Wellington, *On Freedom of Expression,* 88 YALE L.J. 1105, 1115 (1979). With considerable passion, Cooley argued that a variety of beneficial consequences result from a healthy marketplace of ideas. Thus, Cooley did not justify his view of free expression solely on what has been called "the marketplace theory of truth," the Mills-Holmesian notion that the marketplace should provide the battleground for the contest between truth and falsehood. *See* Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Cantor,* 64 VA. L. REV. 263, 268-72 (1978). In Cooley's view, the marketplace of ideas was not simply a vehicle for finding truth; in

In Cooley's view, supporters of neo-Blackstonian libel doctrines ignored the value of the marketplace of ideas and the important role of the modern press. In other areas of law, he complained, courts and legal theorists had acknowledged the reality of technological and economic progress. "The railway has become the successor of the king's highway, and the plastic rules of the common law have accommodated themselves to the new conditions of things." Yet, "the changes accomplished by the public press seem to have passed unnoticed in the law."[46] Except for a few minor legislative and constitutional modifications, "the publisher of the daily paper occupies to-day the position in the courts that the village gossip and retailer of scandal occupied two hundred years ago, with no more privilege and no more protection."[47]

Cooley argued that American courts must bring libel law into line with new political and social realities. The mere existence of restrictive libel doctrines might tempt venal party leaders to defy popular opinion and to attempt legal suppression of political dissent. Inevitably, the result would be the kind of popular and constitutional tempest that a system of free debate helped to prevent.[48] In addition, courts should recognize that old libel doctrines must be adjusted to the new realities, if the American press and the American Republic were to reach their fullest potential.

Cooley argued, for example, that the rapid development of mass communications systems during the nineteenth century made it unreasonable to hold newspaper publishers legally responsible for all libelous falsehoods in their papers. Strict liability ignored the essential dynamics of the journalistic marketplace—the buyer-seller relationship. Readers, the sovereign buyers of information, "demanded of the newspaper publisher . . . a complete summary of the events transpiring in the world, public or private, . . . and [the journalist] who does not comply with

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conjunction with several other "marketplaces," it was the very foundation for a prosperous and progressive republic. Seen in these terms, the emergence of a free marketplace of ideas, and a free press, become a part of a larger historical process that some contemporary liberal social scientists label "modernization." *See* R. BROWN, MODERNIZATION 117-19 (1976); B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 44-48 (1975). For a different perspective, that of a self-proclaimed "Marxist outlaw," see A. GOULDNER, THE DIALECTIC OF IDEALOGY AND TECHNOLOGY 96-137 (1976).

46. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 452.

47. *Id.*

48. *Id.* at 429. *See* text accompanying notes 57-61 *infra*.

this demand must give way to him who will."[49] The reading public, Cooley continued, "demand and expect accounts" about a wide range of events; it was impossible "that these shall be given in all cases without matters being mentioned derogatory to individuals."[50] Cooley strongly suggested that a newspaper publisher should be able to reprint items from reputable sources, such as wire services, without fear of legal difficulties. But, in the end, he was forced to concede that firmly established precedent held newspapers "to the same rigid responsibility with any other person who makes injurious communications."[51] If the press wished special protection, "it would seem that publishers of news must appeal to the protection of public opinion, or to the legislature."[52]

But in cases where libelous material related to the activities of governmental officials and other public people, Cooley believed courts could easily invoke common law principles to relieve the press from some of the burdens of strict liability. Because criminal libel prosecutions occurred so infrequently, Cooley was most concerned about civil defamation suits. He was particularly critical of the leading American precedent, *King v. Root*,[53] an 1829 case in which the New York Court of Errors imposed strict liability for libelous falsehoods, even when they concerned the official conduct of governmental officers. Such a rule, he complained, was not "very satisfactory to those who claim the utmost freedom of discussion in public affairs."[54] In deciding the *Root* case, he argued, the New York Court of Errors wrongfully assumed that "no public consideration had in any way been involved" and erroneously decided that there was "no middle ground between absolute immunity for falsehood and the application of the same strict rules which prevail" in purely private libel cases.[55] Cooley took some solace in his belief that "the general public sentiment and the prevailing customs allow a greater freedom of discussion" and hold a newspaper publisher "less strictly to what he may be able to justify as true."[56] But he

49. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 452.
50. *Id.* at 454.
51. *Id.* at 454-55.
52. *Id.* at 457.
53. 4 Wend. 113 (N.Y. 1829).
54. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 438.
55. *Id.*
56. *Id.*

also urged acceptance of legal doctrines which could bridge the gulf between these prevailing customs and libel law.

Thomas Cooley became, and remains, most famous for his jeremiads on the dangers of governmental power. Cooley firmly believed that, in a liberal republic, the powers of the state must remain limited. For example, even though he had supported the antislavery cause before 1860 and abolitionism during the Civil War, Cooley saw ratification of the fourteenth amendment in 1867 as the end of the crusade for the rights of black people. By purging slavery, the war had secured equality for all Americans, including blacks; in Cooley's view, the fourteenth amendment merely confirmed this reality and granted the national government no new powers which it could use to assist black people.[57] Similarly, his activist stance toward the protection of political speech was intended not so much to quicken the engine of government—one of the policy goals behind the libertarian libel decision of the Warren court in the 1960s[58]—but primarily to provide further obstacles to governmental activity.

Thus, Cooley's ideas on the importance of free expression nicely dovetailed with his larger emphasis upon the necessity for minimizing the opportunities for the use of governmental power. As the historian David Potter has observed, "the marked American reliance on endless discussion as a means of finding solutions for controversies reflects less a faith in the powers of rational persuasion than an unwillingness to let anything reach a point where authority will have to be invoked."[59] Although Professor Potter's sweeping thesis is too broad, it captures an essential tenet of Cooley's view of free expression. Like many other nineteenth century liberals, Cooley valued the "marketplace of ideas" as a safety valve for public and private tensions. People who talked out their problems were less likely to meet later on the streets as enemies. The process of free expression enabled citizens to release their anger in words and print, rather than in clashes requiring mobilization of governmental power to restore public order.[60] Moreover, if political leaders had to wait until the people and the party presses had debated every political issue at

57. P. PALUDAN, *supra* note 3, at 260-70.

58. The decision in *New York Times Co. v. Sullivan*, for example, cannot be separated from the drive for civil rights legislation. *See* Pierce, *The Anatomy of an Historic Decision:* New York Times Co. v. Sullivan, 43 N.C.L. REV. 315 (1965).

59. D. POTTER, FREEDOM AND ITS LIMITATIONS IN AMERICAN LIFE 14 (1976).

60. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 429.

full length, the engine of government would generally be at a slow idle, remaining in neutral until a coherent public opinion formed. Finally, it seemed axiomatic to Cooley that a political culture based upon a wide freedom of public discussion would allow citizens to detect and remedy governmental abuses more quickly than in one where restrictive laws limited the force of political criticism. In a variety of ways, then, Cooley thought enlightened libel laws helped to limit the powers of government and to expand the self-correcting mechanisms of the political and intellectual marketplaces.[61]

In his attempts to liberalize libel law, Cooley constantly swore allegiance to existing common law doctrines. The changes he proposed, Cooley insisted, were not simply necessary judicial responses to external pressures; they were logically consistent with the nation's common law heritage. Properly defined, Cooley asserted, freedom of the press meant not only liberation from prior restraints, but "complete immunity for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords."[62] To find these legal standards, Cooley would "look to the common law rules which were in force when the constitutional guarantees were established."[63]

If Cooley's approach to libel law showed both "instrumentalist" and "formalistic" styles of legal reasoning,[64] his formalism was, by his own admission, not based upon slavish devotion to earlier libel decisions. For Cooley, the common law of defamation consisted of general principles and logically related rules. Common law doctrines, he insisted, were not fixed in stone: the common law was "plastic."[65] This metaphor, however, also sug-

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61. Some of this remained implicit, rather than explicit, in Cooley's analysis. For an example of the more systematic development of the nineteenth century liberal faith in the marketplace of ideas, see F. GRIMKE, NATURE AND TENDENCY OF FREE INSTITUTIONS 43-46, 399-406 (J. Ward ed. 1968) (1st ed. n.p. 1848).

62. TORTS, *supra* note 9, at 218.

63. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 422.

64. On the distinction between "instrumentalism" and "formalism" in nineteenth century law, see M. HORWITZ, *supra* note 24, at 16-30, 253-66. Cooley's approach to legal decision-making should caution against the acceptance of any simple model of legal history in which pre-Civil War law is instrumentalist in nature while post-Civil War law is highly formalistic. As one somewhat skeptical commentator has noted, such a model has already gained considerable support. Tushnet, *A Marxist Analysis of American Law*, 1978 MARXIST PERSPECTIVES 96, 98. *See* Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WISC. L. REV. 1.

65. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 452.

gested some limits to Cooley's instrumentalism: old legal rules could be reworked and remolded, but they were not supposed to be broken arbitrarily or bent in any convenient direction.[66] Even though Cooley suggested that the press should be able to print reports from other papers without fear of liability, he also conceded that precedent barred judicial adoption of such protection.[67] But in other areas of libel law, Cooley did not restrict himself to such a formalistic approach. Judges, he argued, possessed considerable latitude to interpret established doctrines in more libertarian directions than those taken by jurists of the Revolutionary era. More important, Cooley believed courts had a constitutional responsibility to protect the right of free expression. In his view, adoption of the common law rule of "conditional privilege" offered the means by which judges could fulfill their responsibilities to common law orthodoxy, constitutional commands, and the needs of a progressive liberal society.

Cooley believed the common law doctrine of conditional privilege would give new vitality to the guarantees of free expression that had been included in virtually every state constitution, as well as in the first amendment to the national charter. These constitutional provisions, he contended, were meant to stop "those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned."[68] Courts should not interpret them narrowly. But if Cooley was not a neo-Blackstonian restrictionist like Chancellor Kent, neither was he an early advocate of the absolutist position championed by Justices Black and Douglas during the 1960s.[69] Cooley's doctrine of conditional privilege was not designed to eliminate entirely the law of political libel; but it was intended to expand the legal meaning of "liberty of expression."

> The term "privileged," as applied to a communication alleged to be libellous [*sic*], means generally that the circumstances under which it was made were such as to rebut the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity

66. On Cooley's concern with consistency, see G.E. WHITE, *supra* note 3, at 115-22.

67. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 455-56.

68. TORTS, *supra* note 9, at 217.

69. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 293-97 (1964) (Black, J., concurring).

of the charge.[70]

Cooley would place this burden upon all libel plaintiffs who were public officials or candidates for public office. And, because he believed that most readers demanded that the press critically discuss a wide range of "public" issues, he also urged extending the rule of conditional privilege to "all cases where the matter discussed is one of general public interest."[71]

In Cooley's view, "conditional privilege" was more than a common law rule: in republican America it had become part of the constitutional guarantees of free expression. There were, he argued, "special cases where, for some reason of general public policy, the publication is claimed to be privileged, and where consequently, it may be supposed to be within the constitutional protection."[72] In these constitutionally-protected situations, a plaintiff could not maintain a suit for civil libel "without proof of express malice." The right of free expression required a conditional privilege because of a public "duty" to speak out which

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70. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 425. For an exposition of the law of conditional privilege prior to 1964, see 1 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 5.25-.28 (1956). *See* L. ELDREDGE, THE LAW OF DEFAMATION §§ 83-93 (1978).

71. TORTS, *supra* note 9, at 218. Here and dissenting in Atkinson v. Detroit Free Press Co., 46 Mich. 341, 9 N.W. 501 (1881), Cooley seemed to advocate something akin to the law of "public libel" as expounded by the Supreme Court of Kansas in Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), a decision that relied heavily upon Cooley's doctrines, and by the United States Supreme Court in a series of cases beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and culminating in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). This line of cases ultimately focused on the subject matter of the alleged libelous story rather than the plaintiff's status as a "public" or "private" person. Cooley's rationale for such an approach was that the "public demand and expect accounts of every important meeting, of every important trial, and of all the events which have a bearing upon trade and business, or upon political affairs. It is impossible that these shall be given in all cases without matters being mentioned derogatory to individuals." CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 454. One modern commentator finds the "public interest" test also makes sense because publishers "rarely, if ever, have been involved in libel actions in which the plaintiff was a private individual and the defamatory statements concerned purely private matters." It is "reasonable to presume that everything published or broadcast, including coverage of private persons, involves only matters of general public interest." Ashdown, *supra* note 6, at 667. *See* Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 UCLA L. REV. 371 (1970).

Cooley ultimately backed away from a "public interest" or a "newsworthiness" test. Although it would be tempting to draw a straight line from Cooley to *Rosenbloom v. Metromedia, Inc., see, e.g.*, Schauer, *supra* note 45, at 288-89, such a neat progression would ignore both the ambiguities in Cooley's initial position, and more importantly, his final libel decisions on the Michigan Supreme Court. *See* text accompanying notes 145-66 *infra*.

72. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 425.

justified departure from the principle of strict liability in any subsequent libel suit. For libels made on such "lawful occasions," the law would "throw upon the plaintiff the burden of offering some evidence . . . beyond the mere falsity of the charge" that defamatory statements had been made "maliciously."[73] In order to effectuate the right of petition, for instance, courts granted a conditional privilege to official remonstrances, and persons who sent petitions to proper authorities would not be liable in civil suits "unless it be shown" that the libels were "both false and malicious."[74] The same type of privilege, Cooley reasoned, should apply to all citizens, including newspaper people, who fulfilled their duty to speak out on political issues.[75]

The key issue in Cooley's formula, then, became defining "malice;" yet, Cooley's treatises failed to enunciate a consistent view of "malice," and his colleagues on the Michigan Supreme Court thought his judicial opinions equally inconsistent.[76] Although Cooley emphasized that he used the term malice in a

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73. *Id.*

74. TORTS, *supra* note 9, at 215. *See* CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 431-34.

75. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 435.

76. Both prior to and following *New York Times Co. v. Sullivan*, the definition of "malice" has been one of the murkiest problems in the always muddy law of defamation. Under the common law of libel, "malice" was an extremely vague concept. *See* R. PHELPS & E.D. HAMILTON, LIBEL: RIGHTS, RISKS, RESPONSIBILITIES 248-80 (2d ed. 1978). In *New York Times Co. v. Sullivan*, the Court established a constitutional definition of "actual malice" to apply in cases involving public officials. The new constitutional standard in political libel cases meant that plaintiff-public officials must show that a defendant had published a libelous falsehood "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Later, the Court suggested that actual malice meant that there was a "high degree of awareness of probable falsehood," Garrison v. Louisiana, 479 U.S. 64, 74 (1964), and that the publisher "in fact entertained serious doubts as to the truth of his publication," St. Amant v. Thompson, 390 U.S. 729, 731 (1963). Such a constitutional definition, the Court emphasized, was more restrictive than the common law definition. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 10 (1970). By jettisoning the vague common law definition of malice, the new constitutional rule was supposed to eliminate the "chilling effect" of self-censorship. *See* Schauer, *Fear, Risk, and the First Amendment*, 58 B.U.L. REV. 685, 705-14 (1978).

But, in recent years, the Supreme Court has been no more consistent than Thomas Cooley in applying a uniform definition of malice, and some see the Court retreating from the strict standard of *New York Times Co. v. Sullivan*, a standard favorable to libel defendants, to a more vague position similar to the common law view. *See* Frakt, *supra* note 6, at 534, 585. For Justice Thomas Cooley's various definitions of malice, see text accompanying notes 167-96, *infra*.

"legal sense" rather than in its popular meaning of "ill will,"[77] this did not settle the ambiguities. He praised recent English decisions on the privilege of "fair comment," a defense that could protect expressions of "pure opinion" but not libelous misstatements of "fact,"[78] and suggested that "only good faith and just intention" limited the privilege to criticize public officials.[79] To determine whether the privilege had been breached, a jury could take into account the "nature of the charges made, and the reasons which existed for making them."[80] Later, he suggested a general rule designed to soothe the potential sting of political defamation suits but maintain some legal restraints over libelous attacks. Libel defendants, he argued, should not be liable for civil damages when they discussed "in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for a public office."[81]

Although Cooley's language might be read as nothing more than a version of the English rule of "fair comment," he clearly meant to develop broader protection than allowed under English decisions. He argued, for example, that the English doctrine limiting criticism about "private" matters was "not sufficiently comprehensive." He also clearly intended that his defense of conditional privilege apply to libelous misstatements of "fact."[82]

Despite their ambiguities as to the meaning of "malice," Cooley's treatises emphasized the expansive nature of both con-

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77. TORTS *supra* note 9, at 209 n.3.

78. On the evolution of the defense of fair comment, see 1 F. HARPER & F. JAMES, *supra* note 70, at 456-63; Hallen, *Fair Comment*, 8 TEX. L. REV. 41 (1929). *See* Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962). Most authorities hold that the landmark libel decisions by the United States Supreme Court since 1964 have, in effect, subsumed the old defense of fair comment within the new constitutional law of defamation. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 566 (1977); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1240-59 (1976).

79. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 440.

80. *Id.*

81. TORTS, *supra* note 9, at 218.

82. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 440. There has been some disagreement among scholars over the differences between the defense of fair comment and that of qualified privilege for libelous falsehoods. The majority view holds that because Cooley's position called for protection of libelous falsehoods, it should not be called "fair comment." Another view, however, asserts that the general privilege of fair comment has a minority position that protects both "fact" and "opinion." *See* Eaton, *The American Law of Defamation through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1363 n.52 (1975).

stitutional free speech-provisions and the common law doctrines which supported such guarantees. Moreover, Cooley believed that a rough approximation of the law of conditional privilege had already been absorbed into the mid-century political culture and that the political and intellectual marketplaces, rather than the law courts, would correct most libelous statements and comments. In its publications "upon public events and public men," the American press

> proceeds in all respects as though it were privileged . . . and the man who has a 'character to lose' presents himself for the suffrages of his fellow citizens in the full reliance that detraction by the public press will be corrected through the same instrumentality, and that unmerited abuse will react on the public opinion in his favor.[83]

But what about those occasions when the courts, not the marketplace, would be called upon to correct breaches of conditional privilege? Could common law doctrines and principles provide wise judges with clear and consistent answers? Thomas Cooley, like other members of the late nineteenth century legal elite, claimed that law "was a science, governed by axioms; one discovered the axioms, articulated and synthesized them, then applied them to resolve controversies. Solutions were evident, lines could be drawn, rules could be made."[84] The common law scholar, Cooley argued, could bring certainty to American jurisprudence.[85] But during his tenure as a Justice of the Michigan Supreme Court from 1864 to 1885, Cooley found that the task of bringing certainty to libel law and to constitutional guarantees of free expression was not simple.

Thomas Cooley's approach to libel law, as a member of the Michigan Supreme Court, deserves attention for several reasons. First, a close study of Cooley's opinions shows his inability to develop any clear, consistent approach to cases involving defamation and freedom of expression. Second, Cooley's confrontation with the social and legal meaning of public libel law highlights the contradictions within his marketplace liberalism. Increasingly, Cooley began to temper his earlier enthusiasm about self-regulating intellectual marketplaces and the free flow of ideas. As he struggled to hold together his liberal faiths, Coo-

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83. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 455-56 n.4.
84. G. WHITE, *supra* note 3, at 121.
85. *Id.*

ley authorized deeper and deeper legal incursions into the give-and-take of political debate.

II.

Justice Cooley did not, in any event, suddenly turn Michigan's libel laws in a libertarian direction. For a number of years, in fact, he had few chances to review any libel cases at all. During Cooley's first twelve years of service, the Michigan Supreme Court heard only two libel appeals. More important, his colleagues, particularly Justice James Campbell, resisted any attempt to write Cooley's ideas about conditional privilege into Michigan's case law. In the earliest newspaper libel decision of Cooley's judicial career, however, his colleagues did prove willing to offer some relief to "responsible" publishers. In *Detroit Daily Post Co. v. McArthur*,[86] in which the press did not raise the issue of conditional privilege but tried instead to limit recovery of punitive damages, Justice Campbell wrote an opinion reversing two judgments against the paper. In so doing, he ruled that plaintiffs could not collect exemplary damages against newspapers unless they could scale the corporate ladder and show that newspaper publishers themselves failed to take reasonable precautions to eliminate libelous stories by their employees.[87] To justify exemplary damages, he suggested, a plaintiff might show that a paper failed to employ competent editors, that it exercised lax supervision over its reporters, or that its columns frequently contained libelous falsehoods.[88] Such a doctrine, particularly if the burdens on plaintiffs were strictly applied, promised the press considerable protection from large damage awards.

Thomas Cooley quickly incorporated the *McArthur* holding into the first edition of *Constitutional Limitations*. After his concession that case law did not support his suggestion that the doctrine of conditional privilege be extended to a wide variety of "newsworthy" stories, he offered the press the following consolation, citing *McArthur* as his sole authority:

> The publisher of a newspaper, however, though responsi-

86. 16 Mich. 447 (1868). The first libel appeal heard by the court during Justice Cooley's tenure involved a private letter. Edwards v. Chandler, 14 Mich. 471 (1866).

87. 16 Mich. 447, 455 (1868). The court held that the charge to the jury by the trial judge was prejudicial to publishers of newspapers since it "left it in the power of the jury to hold them in all respects identified with the faults of their agents." *Id.*

88. *Id.* at 554.

> ble for all the actual damage which a party may suffer in consequence of injurious publications in his paper, cannot properly be made liable for exemplary or vindictive damages, where the article complained of was inserted in his paper without his personal knowledge, and he has been guilty of no negligence in the selection of agents, or of personal misconduct, and is not shown habitually to make his paper the vehicle of detraction and malice.[89]

But Justice Campbell's opinion in *McArthur* showed that his views about the American press were closer to those of Chancellor Kent than to the sentiments expressed by Thomas Cooley. The press was, Justice Campbell acknowledged, "one of the necessities of civilization," and the laws which affected its operation "should not be unreasonable or vexatious." But "the reading public are not entitled to discussion in print upon the character or doing of private persons, except as developed in legal tribunals or voluntarily subjected to public scrutiny." In Justice Campbell's view, newspaper publishers owned a dangerous weapon, and they owed the public a special duty "to reduce the risk of having . . . libels creep into their columns, to the lowest degree which reasonable foresight can assure."[90] As he would make clear in his later opinions, Justice Campbell believed that maintenance of the rule of strict liability and rejection of the doctrine of conditional privilege, even in political cases, advanced the sound policy of reducing the publication of libels.

Although nearly ten years passed before the Michigan Supreme Court heard another newspaper libel case, Justice Cooley ultimately had the chance to hear a number of libel appeals between 1878 and 1884. Many of these involved James E. Scripps, the publisher who brought "popular journalism" to Michigan when he founded the *Detroit Evening News* in 1873. During his earlier experiences with the *Chicago* and *Detroit Tribunes,* Scripps revolted against the traditional large sheet-small type format and the staid content of midwestern newspapers. Using the "penny press" of cities along the Atlantic seaboard as his model, Scripps offered a paper which was smaller in size than the old "blanket" papers, yet one printed with large,

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89. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 457. At least one late nineteenth century commentator on libel law saw the *McArthur* holding as a real victory for the press. *See* Proffat, *The Law of Newspaper Libel,* 131 N. AM. REV. 109, 114 n.11 (1880).

90. 16 Mich. 447, 452 (1868).

easy-to-read type;[91] most important, he published a paper filled with many brief stories. In Scripps' view, it was easy to distinguish a good newspaper from a mediocre journal: all one had to do was to count the number of stories it contained.[92]

James Scripps espoused essentially the same liberal marketplace views as Thomas Cooley. Both agreed that the successful publisher had to satisfy the reader's demand for a journalistic product that could capture the dynamic pace and the tremendous diversity of nineteenth-century America. To prosper, a publisher also had to capture the interest of new readers while maintaining that of former purchasers.[93]

Offering his *Evening News* at two cents, Scripps thought he could appeal to Detroit's growing working class. Many Detroiters, he believed, could not afford the city's other papers, which sold at five cents, or digest their immense helpings of political and financial doings. In his inaugural issue, Scripps scolded the party newspapers for leaving a vast potential market of readers untapped. Political papers, Scripps recognized, had left the field of popular journalism entirely

> unoccupied. . . . In my opinion there should be papers in which only such things are published as are of interest to the great mass of their readers. . . . They will be useful to all classes who desire to keep up with the news of the day. . . . Popularity and usefulness are our only aim: the wants of the great public our only criterions in the choice of matter for our columns.[94]

Scripps initially found little support, particularly from Detroit's financial community; in time, though, the *Evening News* caught on, apparently with many people who previously had not purchased papers.[95] Scripps' style—generally called

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91. W. LUTZ, THE NEWS OF DETROIT 4-10 (1973). *See* A. BRITT, ELLEN BROWNING SCRIPPS (1961); I PROTEST! SELECTED DISQUISITIONS OF E.W. SCRIPPS 28-33 (O. Knight ed. 1966). *See generally* E. EMERY, THE PRESS AND AMERICA 296-97 (1972).

92. Park, *The Natural History of the Newspaper*, 29 AM. J. SOC. 273, 284 (1923), *reprinted in* R. PARK, ON SOCIAL CONTROL AND COLLECTIVE BEHAVIOR 97, 108 (R. Turner ed. 1967).

93. By insisting that all the interests of news buyers, however trivial, should be served, James Scripps emphasized the democratic implications of the marketplace of ideas. *See* A. GOULDNER, *supra* note 45, at 121-22. Thomas Cooley found such a view of the marketplace of ideas, particularly as it was implemented by James Scripps, unacceptable. *See* text accompanying notes 106-16, 154-62, 176-84 *infra*.

94. W. LUTZ, *supra* note 91, at 9.

95. The working-class population of Detroit expanded, and despite the depression of

"popular" or "personal" journalism—featured exposés about supposedly respectable citizens who, the *News* claimed, actually lived quite different lives and about political skullduggery in high places. Not surprisingly, this journalism produced numerous threats of libel suits, particularly after James' youthful half-brother, E. W. Scripps, became city editor in 1875. The eventual founder of the huge Scripps newspaper chain, E. W. proudly boasted that he gave his staff of reporters one basic order: "to raise as much hell as possible."[96]

The Scripps' style of "hell" provided the Michigan Supreme Court with several opportunities to clarify the broad theoretical issues Thomas Cooley had raised in his treatises. It became evident that Justice James Campbell and Justice Cooley's other colleagues had little sympathy for the defense of conditional privilege in cases involving newspaper libels. In 1878, for example, Justice Campbell reversed a lower court judgment in favor of the *Evening News*.[97] The trial judge had clearly erred, he ruled, when he ordered a directed verdict in favor of the *News* and against a newspaper reporter who claimed that he had been libeled in a story about police corruption. Despite the presumed public interest in an account of police malfeasance, Justice Campbell ruled that there was no possible ground for a conditional privilege.

> The general public to whose entertainment or instruction all newspapers are supposed to be devoted, has no concern whatever with the lawful doings and affairs of private persons; and all mention of them in print must be made under the private obligation of publishing no untruths to their prejudice and the public obligation of saying nothing to their prejudice at all unless upon adequate occasion.[98]

Justice Cooley silently concurred.

Although the majority of the Michigan Supreme Court desired to impose strict liability for libelous falsehoods, the justices tried to reduce some of the danger when plaintiffs sought punitive damages. In *Scripps v. Reilly*,[99] the court overturned a

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mid-1870's, the city's economy steadily expanded. M. HOLLI, DETROIT 54-59 (1976). Thus, James Scripps found the demographic and economic bases for success, and his type of journalism capitalized on the opportunities.

96. *See* I PROTEST!, *supra* note 91, at 32.

97. Tyron v. Evening News Ass'n, 39 Mich. 636 (1878).

98. *Id.* at 638.

99. 38 Mich. 10 (1878).

$5,000 judgment in favor of a circuit court judge.[100] Writing for a unanimous court, Justice Isaac Marston denounced the story, which focused on the judge's marital problems, as a "sensational and wholly unjustifiable article,"[101] but he also rejected the trial judge's instructions as insensitive to the problems of newspaper publishers. "We must recognize," the court stated, that publishers sometimes rushed into print in order to give their readers "the very latest and most reliable news" and "that on such occasions the same careful scrutiny cannot [be] exercised that would at others."[102] The need to get out the news quickly offered no legal justification for libelous falsehoods, but it might be relevant to the amount of damages. In determining damages, the court held that the jury should consider not only whether the paper exercised "due care" under the particular circumstances, but also "the character the paper had earned" by its earlier issues.[103] Such a formula was intended to protect respectable publishers "from such damages as a jury would be sure to inflict upon those who are reckless and indifferent as to the right and feelings of others, who hesitate not to publish scandalous matter" which served "no good or useful public purpose."[104] A paper's reputation and its publisher's motives were relevant issues, and juries should receive evidence on both questions before determining the amount of damages.[105] Once again, Justice Cooley concurred.

In *Foster v. Scripps*,[106] a suit arising from an *Evening News* story alleging that a physician had been criminally negligent in

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100. The preceding year the court overturned a $4500 judgment because of procedural errors. Scripps v. Reilly, 35 Mich. 371 (1877).

101. The *Evening News* based its story, in part, upon the official divorce proceedings; in addition, however, it provided its own commentaries upon the affair. Scripps v. Reilly, 38 Mich. at 17-18.

102. *Id.* at 27.

103. *Id.* at 27-29.

104. *Id.* at 29.

105. *Id.* at 28-29. Thus, Justice Marston made a distinction between articles published with "pure motives and with an earnest desire to give the public what" the writer "considered an important item of news" and stories "published from impure and sordid motives" which dragged reputations before the public in order "to pander to a depraved appetite for scandal. . . . " *Id.* at 27-28. Even if the libelous statements in the latter type of article were true, he argued, the "bad motives" showed the kind of "recklessness and want of due care" that would justify exemplary damages. *Id.* Although Justice Marston suggested this "bad motives" test as a means of determining damages and not civil liability, the Michigan Supreme Court would eventually invoke an analogous test in "public libel" cases. *See* text accompanying notes 154-57 *infra*.

106. 39 Mich. 376 (1878).

vaccinating children, Justice Campbell rejected the contention that the doctor's public position should render the story privileged. The supreme court overturned a directed verdict in favor of James Scripps.[107] Although Justice Campbell disapproved of a broad privilege for any type of political criticism, he argued that the court could decide *Scripps v. Foster* on narrower grounds, because the plaintiff occupied an appointive rather than an elective office, there was no possible basis for a privilege. Because his colleague's dicta about privileged communications clashed so loudly with treatise-writer Cooley's views, Justice Cooley issued a concurring opinion asserting a broad conditional privilege but concluding that Scripps had abused his privilege in this particular case.

To reach this result, Justice Cooley ignored most of the ambiguous ideas presented in his treatises; instead, he adopted an "ad hoc balancing" test. As he tacitly acknowledged, Cooley had always grounded his general theory of public libel law upon the "principled balancing" of a private individual's right to reputation and the public's interest in the free discussion of vital issues.[108] This obviously meant that "individuals whose characters or actions are impugned may suffer without remedy."[109] Because the "plainest principles of justice" required courts to grant such a privilege only "on reasonable grounds,"[110] Cooley urged judges to examine the nature and subject matter of libelous publications. In most suits involving a claim of conditional privilege, courts would have no difficulty: the public's interest would clearly outweigh the individual's right of reputation. Some publications, however, would carry a "bad tendency" and courts would have to employ a second balancing test. This second balancing should weigh the "public benefits of free discussion" against (1) the individual right of reputation and (2) the potential "public evils" arising from the publication.[111]

Justice Cooley concluded that *Foster v. Scripps* required two trips to the scales. Because the *Evening News* had published the libel about an official who was not elected, he felt there had been both an injury to private reputation and a serious public

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107. *Id.* at 379-83.

108. On "principled" versus "ad hoc" balancing in a different, though analogous, context, see Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

109. Foster v. Scripps, 39 Mich. 376, 383 (1878).

110. *Id.*

111. *Id.*

injury. Certain appointed officials, Cooley now implied, did not come within his marketplace principles. The public's confidence "in an officer whose duties are such as to render confidence extremely important to the continuous useful discharge of his duties," Justice Cooley feared, had been "weakened or destroyed unjustly when it ought to have been supported and strengthened."[112] This line of reasoning, which required judicial scrutiny of the publication's supposed tendency, seemed a departure from Cooley's general view, and he cautioned that "in assenting to the conclusions of the court I confine my concurrence to the exact case before us."[113] Had the doctor been a candidate for appointment rather than the incumbent city physician, he suggested, his decision would have been different,[114] a policy position that seemed to imply that the public had more to fear from an incompetent who wanted to become a city physician than from one who already held the job.

Cooley's concurrence helped to clarify his position on libel law and freedom of the press. It underscored Cooley's belief that freedom of political expression was not absolute in scope:[115] constitutional guarantees did not free citizens to say or write anything they pleased about political affairs. Also, Justice Cooley's use of an ad hoc balancing test distinguished his theory of free expression from those of twentieth century libertarians who insist that once a publication falls within the category of protected expression, "no further consideration of its offensiveness or potential harmfulness can be offered as a ground for opposing its untrammeled performance."[116]

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112. *Id.* at 383-84.

113. *Id.* at 384.

114. *Id.* Although Dr. Foster secured a judgment against Scripps at a second trial, the Michigan Supreme Court reversed. Relying upon the doctrines set forth in the first appeal, the court held that the trial judge improperly denied Scripps the right to introduce evidence to defeat a claim for exemplary damages. Scripps v. Foster, 41 Mich. 742, 746, 3 N.W. 216, 219 (1879).

115. For a discussion of the theory that the right of free expression is "absolute in weight though limited in 'scope'," see Fuchs, *Further Steps Toward a General Theory of Freedom of Expression*, 18 WM. & MARY L. REV. 347, 358 (1976). Relying in large part upon the philosophical work of J. RAWLS, A THEORY OF JUSTICE (1971) and R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977), Professor Fuchs suggests a theory that would prohibit the kind of balancing used by Thomas Cooley in *Scripps v. Foster*. *See* note 116 *infra*.

116. Fuchs, *supra* note 115, at 358. Combining several approaches to free speech questions, Professor Fuchs suggests that "freedom of expression can be given full protection unless it presents a clear and present threat to the equally protected rights of others or to the total system of rights." *Id.* at 377. He would reject Justice Cooley's test, which balanced the right of free expression against a potential "public evil," as too problemati-

Despite its limitations when measured against some twentieth century theories, Justice Cooley's concurrence in *Foster v. Scripps* foreshadowed his complete break with the rest of the court in *Atkinson v. Detroit Free Press.*[117] Again, the Michigan Supreme Court reversed a verdict for the press and sent back for retrial a suit by an attorney who represented a member of the Detroit Board of Trade. The *Free Press* story had alleged various fraudulent activities by both the plaintiff and his client. Atkinson employed at least four other lawyers who raised no less than forty-one assignments of error on evidentiary questions alone.[118] In addition to attempting to unravel all of these claims, Justice Campbell considered the qualified privilege issue. Predictably, he held that the article was not "connected with any matter concerning which it could be regarded as privileged,"[119] only proof of truth would suffice as a defense.

In a vigorous dissent, Justice Cooley issued his most famous judicial statement on behalf of free expression. After tilting with his colleagues on some evidentiary issues, he declared that their whole theory of the case was "radically erroneous." The story and the *Atkinson* case did not involve "only private considerations," but also raised public issues in which "all consideration of mere technical accuracy become irrelevant."[120] The law must extend a qualified privilege to such a story, he argued, because of the public interest in Detroit's commercial health which depended, in large part, upon the honesty of members of the Board of Trade. Thus he urged the court to treat stories about quasi-public institutions the same as those about governmental institutions and public officials.[121]

Although Justice Cooley never raised the issue of balancing

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cal and speculative. *Id.* at 371-73, 376.

117. 46 Mich. 341, 9 N.W. 501 (1881). Although Cooley issued a ringing dissent in this case, two years earlier he had silently concurred as Justice Campbell denied any privilege for a story about a candidate for Congress. Baily v. Kalamazoo Publishing Co., 40 Mich. 251 (1879). Perhaps he let Justice Campbell's position go unchallenged because it was dictum, the court having reversed a judgment in favor of the publisher on other grounds. *Id.* at 257.

118. Atkinson v. Detroit Free Press Co., 46 Mich. 341, 367-68, 9 N.W. 501, 515 (1881).

119. *Id.* at 349, 9 N.W. at 505.

120. *Id.* at 375-76, 9 N.W. at 520 (Cooley, J., dissenting).

121. "It is as important to the city of Detroit that it should have an honorable and trustworthy board of trade . . . as it is that it should have trustworthy mayor or controller, or police authorities or other public functionaries." *Id.* at 381, 9 N.W. at 523 (Cooley, J., dissenting).

public benefits against public evils, he apparently thought the story, though intemperate, carried no "bad tendency." The newspaper had a duty to investigate and report rumors of wrongdoing by members of the board and to report its findings, particularly to readers from the business community. The *Free Press* "would have been unworthy of the confidence and support of commercial men if its conductors had shut their eyes to such a transaction."[122] The paper "might have used more carefully-guarded language, and avoided irritating headlines," but Justice Cooley excused such indiscretions as "honest indignation."[123] He appeared, then, to endorse rough-and-tumble political journalism as inseparable from a system of free expression.[124] Even if the plaintiff were wholly innocent, Justice Cooley argued, "it was his misfortune that it was impossible to deal with the case without bringing him into the discussion."[125] Cooley concluded that the circumstances of the *Atkinson* case demanded that the story be protected. "If such a discussion of a matter of public interest were prima facie an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value."[126] The principled balancing inherent in Cooley's view of conditional privilege had already occurred.

Justice Cooley believed his dissent announced a wise public policy that stood on firm legal and constitutional grounds. He thought the majority opinion departed from common law traditions of liberty and constitutional guarantees of free speech. "In what I say in this case I advance no new doctrines, but justify every statement of principle upon approved authorities."[127] Cooley noted that Justice Campbell cited many cases "from which a different argument may be constructed," but these precedents were "no longer deserving of credit if they ever were."[128] Regrettably, Justice Cooley suggested, the privilege of discussing issues

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122. *Id.* at 383, 9 N.W. at 523 (Cooley, J., dissenting).

123. *Id.* at 382, 9 N.W. at 523 (Cooley, J., dissenting).

124. [All of] the beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference.

Id. (Cooley, J., dissenting).

125. *Id.* at 383, 9 N.W. at 523 (Cooley, J., dissenting).

126. *Id.* at 383, 9 N.W. at 524 (Cooley, J., dissenting).

127. *Id.* at 384, 9 N.W. at 524 (Cooley, J., dissenting).

128. *Id.*

of public interest had never received enough recognition in the courts. "Perhaps the privilege would have seemed to stand out more boldly and appeared more sacred if the provisions deliberately incorporated for its protection and perpetuation in every American constitution had been collated and given prominence. . . ."[129] But although his ideas might seem a novel interpretation of state constitutional guarantees, he concluded, they still had support in the common law. Defenders of free expression could find the privilege of public discussion "embodied in the good sense of the common law, where it has constituted one of the most important elements in the beneficent growth and progress of free States."[130]

The following year, Justice Cooley briefly received support from a majority of the court for his views on free expression. In *Miner v. Detroit Post & Tribune Co.*,[131] the paper accused the plaintiff, a police judge, of several violations of judicial ethics. The paper's attorneys did not attempt to prove the truth of the charges and argued instead that the article "related to matters of public interest and importance, and was for that reason privileged."[132] The trial court accepted the claim of privilege for the paper's charge that the judge failed to enforce liquor and gambling laws, but it rejected any privilege for allegations that he falsely imprisoned "a Chinaman." The trial judge held that a newspaper could claim a privilege for general expressions of opinion about the actions of public officials—what most American courts would eventually accept as the right of "fair comment"— but not for specific charges of "an act nearly amounting to a crime" or imputations of "specific moral delinquency."[133] For libelous statements of fact, only truth would be a defense.[134]

The jury found for the plaintiff, but the supreme court overturned the judgment. Justice Cooley felt that the trial judge had erred by permitting portions of the story that he had declared privileged "to be made the subject of comment [by the plaintiff's attorney] to the prejudice of the defendant."[135] But Cooley fur-

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129. *Id.* at 385, 9 N.W. at 525 (Cooley, J., dissenting).

130. *Id.*

131. 49 Mich. 358, 13 N.W. at 773 (1882).

132. *Id.* at 361, 13 N.W. at 774.

133. *Id.* at 361-62, 13 N.W. at 773. On the development of the defense of fair comment, see works cited in note 78 *supra*.

134. Miner v. Detroit Post & Tribune Co., 49 Mich. 358, 362, 13 N.W. 773, 774-75 (1882).

135. *Id.* at 362, 13 N.W. at 774.

ther argued that a qualified privilege attached to the entire story, rather than only to the portions about liquor and gambling. "A much more serious and more dangerous error," stated Cooley, "is found in that part of the article which concerned the proceedings in the case of the Chinaman."[136]

Relying upon his lengthy dissent in *Atkinson,* Justice Cooley only briefly discussed the conditional privilege issue in *Miner.*[137] The trial judge, Cooley bristled, erroneously "put the case upon precisely the same footing with publications which involved merely private gossip and scandal."[138] A story about alleged judicial corruption clearly involved the public interest.[139] The *Post,* then, properly exercised its duty "to challenge public attention to the official disregard of the principles which protect public and personal liberty."[140] The theory of the trial court and of a dissent by Justice Campbell—that there was no privilege for libelous misstatements of fact—was valid only if there were "no difference in moral quality between the publication of mere personal abuse and matters of grave public concern."[141] The common law, Justice Cooley concluded, could never justify such an absurd conclusion. To do so would place "the reckless libeler . . . in the same company with respectable and public spirited

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136. *Id.* at 363, 13 N.W. at 775.

137. *Id.* at 363-64, 13 N.W. at 775-76.

138. *Id.* at 364, 13 N.W. at 775-76.

139. When a judge orders a man into confinement without a charge against him, he deprives him of liberty without due process of law; and in doing so violates the earliest and most important guaranty of constitutional freedom. . . . There must be some great and most serious defect in the administration of the law when such things can take place, and the matter is one which concerns every member of the political community. . . .

Id. at 363-64, 13 N.W. at 775.

140. *Id.* at 364, 13 N.W. at 776.

141. *Id.* In a sharp dissent, Justice Campbell argued that although there should be "the amplest right to draw inferences from facts," there could be no justification "when the facts themselves are wanting. . . ." *Id.* at 366, 13 N.W. at 776 (Campbell, J., dissenting). He was satisfied that the interests of the press had been safeguarded adequately because the trial judge had directed the jury "to confine damages to actual damages in case they were satisfied the publication was made in good faith and on reasonable grounds of belief." *Id.* at 365, 13 N.W. at 776. "The line is clearly drawn," he argued, "between false assertions and false deductions." *Id.* at 366, 13 N.W. at 777. False assertions of fact, he concluded, deserved no legal protection. This was "the only doctrine under which the reputation of citizens can be preserved from assaults. Good faith diminishes the injury, and in many cases may reduce damages to a minimum, but it is impossible to hold that it entirely destroys the damages, and in civil cases such is not the accepted law." *Id.*

journalists."[142] Justice Cooley's opinion in *Miner* reiterated his earlier break with neo-Blackstonian libel doctrines and his conviction that even the defense of "fair comment" restricted free discussion too tightly. Nonetheless, his majority opinion in *Miner* also made it clear that he was not prepared to tolerate all libelous falsehoods.

Cooley now emphasized that his ideas on libel did more than protect freedom of the press; they also helped to isolate journalistic renegades and to place them under proper legal restraints.[143] Only carefully-crafted libel doctrines that attempted to distinguish between stories in the public interest and sensationalist accounts that pandered to popular tastes—doctrines that separated legitimate journalists from gossip-mongers—could gain enough public support to provide effective restraints. Cooley still endorsed libel laws that did not discourage discussion of "legitimate" public issues; but it was becoming clear that he would focus more upon the character of the publication, and the supposed motives behind its appearance, and less upon the more objective circumstances that preceded the decision to publish libelous items that later proved to be false.[144]

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142. *Id.* at 365, 13 N.W. at 776.

143. I know of nothing more likely to encourage the license of a dissolute press than to establish the principle that the discussion of matters of general concern involving public wrongs and the publication of personal scandal come under the same condemnation in the law; for this inevitably brings the law into contempt and creates public sentiment against its enforcement. If a law is to be efficiently enforced the approval of the people must attend its penalties, and there must be some presumption at least that an act which its [*sic*] punishes involves some elements of wrong-doing.

Id. at 364-65, 13 N.W. at 776.

144. Recently, the United States Supreme Court has dealt with such an inquiry into the journalist's state of mind while he or she was formulating and writing a libelous story. Herbert v. Lando, 441 U.S. 153 (1979). Thomas Cooley seemed to suggest the appropriateness of such a test in his critique of early nineteenth century libel cases from New York. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 438-39. In another work, he indicated that the doctrine of qualified privilege allowed a person to publish "what he believes" and only required that "the occasion of the publications be such as to justify if true." GENERAL PRINCIPLES, *supra* note 41, at 279. In the *Herbert* case, even the dissenters viewed such an inquiry, under the discovery process, as the logical extension of the "actual malice" test. *See* Herbert v. Lando, 441 U.S. 153, 192-93 (Brennan, J., dissenting); *Id.* at 206 (Marshall, J., dissenting). On the other hand, Chief Justice Kaufman of the Circuit Court of Appeals condemned such inquiries because of their "chilling effect" on free expression. Herbert v. Lando, 568 F.2d 974, 984 (2d Cir. 1977). Not surprisingly, most journalists have agreed with Chief Justice Kaufman's view. *See, e.g.*, EDITOR & PUBLISHER, April 28, 1979, at 12; *id.*, May 5, 1979, at 24. In the late nineteenth century, journalists would have welcomed such inquiries while judges such as James Campbell

A year later, Justice Cooley underscored his belief that courts should attempt to assess the motives of newspaper publishers. In *Bathrick v. Detroit Post & Tribune Co.*,[145] the court upheld a decision against the *Post*. The paper reported the indictment of a physician charged with seducing a young patient, having sexual relations with her, and performing a criminal abortion. The court found several errors in the lower court proceedings and sent the case back for retrial. But, significantly, Justice Cooley also rejected the defendant's challenge to the trial judge's interpretation of the doctrine of privileged publications. The article—a typical example of crime reporting by late nineteenth century urban newspapers—did not pretend to be "a mere recital of the proceedings which had taken place in a court of justice," complained Justice Cooley. The newspaper writer had brought in other facts and "assumed himself to be the judge, and to pronounce guilt and suggest a probable punishment unknown to law."[146] There could be no privilege for such a sensationalized story.

Cooley's judicial experience soon found its way into the fifth edition of *Constitutional Limitations*.[147] In revising his discussion of libel law and the press, Cooley drew upon the *Atkinson* and *Miner* cases. Cautioning readers that the libertarian opinion in *Atkinson* (the author of which he modestly left unidentified) represented only dictum, he devoted one footnote, nearly four pages of the new edition, to his dissent.[148] He suggested that the press should enjoy a qualified privilege for stories that discussed "matters of government in all its grades and all its branches," the "performances of official duty by all classes of public officers and agents," and "all means of transportation and carriage, even when in private hands and management."[149] And, he went on, this privilege should also extend to discussions of "all schemes, projects, enterprises and organizations of a semi-public nature,

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opposed them. *See, e.g.*, MacLean v. Scripps, 52 Mich. 214, 241-42, 17 N.W. 815, 816-17 (1883) (Sherwood, J., dissenting) (conflict over the inquiry into James Scripps' "state of mind").

145. 50 Mich. 629, 16 N.W. 172 (1883).

146. *Id.* at 644, 16 N.W. at 179.

147. Cooley finished the preface to the Fifth Edition in February, 1883, and the work was published later that year: T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION (5th ed. 1883) [hereinafter cited as CONSTITUTIONAL LIMITATIONS (5th ed.)].

148. *Id.* at 563-66 n.1.

149. *Id.* at 562.

which invite the public favor, and depend for their success on public confidence," including the activities of banks, insurance companies, private asylums, and public fairs.[150]

In contrast to his earlier musings, though, Cooley now emphasized that such a privilege implied no special legal status for the press. In fact, he categorically denied that the institutional press possessed any special legal protection under the common law. "The publisher of a newspaper," he concluded, could freely open his columns to sharp, critical examinations "so long as they are restricted within the limits of good faith, not because he makes the furnishing of news his business, but because the discussion is the common right and liberty of every citizen."[151]

Finally, the fifth edition of *Constitutional Limitations* underscored Cooley's policy argument in *Miner:* libel doctrines that protected "good faith" criticism actually helped to differentiate significant journalistic pieces from trivial ones; they distinguished information the sovereign people *needed* to know to act as intelligent citizens from items they merely *wished* to discover in order to satisfy their curiosity. Thus, Cooley drew a sharp distinction between "the mere publication of items of news in which the public may take an interest as news merely, and the discussion of matters which concern the public because they are their own affairs."[152] Moreover, he clearly distinguished between libelous stories involving "public characters" and those dealing with "private individual(s)." In Cooley's view, a "private individual only challenges public criticism when his conduct becomes or threatens to be injurious to others; public characters and public institutions invite it at all times."[153]

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150. *Id.*

151. *Id.* at 563.

152. *Id.* at 562. Here, Cooley's views on freedom of expression appear close to those of Alexander Meiklejohn. *See* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUP. CT. REV. 245. "What a wonderful faith Meiklejohn must have had in human abilities," observed Dean Wellington, "if he believed that any person could draw the public-private line sharply and clearly." Wellington, *supra* note 45, at 1111. *See also* Silver, *Essay: Libel, the "Higher Truths" of Art and the First Amendment,* 126 U. PA. L. REV. 1065, 1073-74 (1978). Although some slight nuances separate the marketplace and the Meiklejohn approaches, the two are very similar. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 577 (1978).

153. CONSTITUTIONAL LIMITATIONS (5th ed.), *supra* note 147, at 562. Cooley's effort here to distinguish between "public" and "private" persons resembles the more recent attempts of the United States Supreme Court to accomplish the same task. The more

In 1883, Justice Cooley and his colleagues heard *MacLean v. Scripps*,[154] a case involving a member of the faculty at the University of Michigan School of Medicine and, once again, James Scripps. The *Evening News* had carried a story alleging that the doctor had taken sexual liberties with one of his patients, and the physician-professor successfully sued for damages. With only one justice dissenting, the Michigan Supreme Court affirmed the award. Most of the issues before the supreme court concerned the trial judge's refusal to allow Scripps and his managing editor to testify as to the absence of "malice." The judge had rejected their testimony on this point, and Justice Campbell, with Cooley's support, affirmed the ruling. Campbell invoked a "good motives" test, which he borrowed from Michigan's constitutional provision on criminal libel, against Scripps and the *Evening News*. According to Justice Campbell, the constitutional language, which provided that in criminal libel cases truth was a justification only if published with "good motives" and for "justifiable ends,"[155] was "only another form of saying that malicious publications are not *privileged* from criminal prosecution, even if true."[156] Thus, in civil libel suits, he ingeniously argued, there should be no analogous privilege for falsehoods if publishers lacked "good motives." The theory that "a person may publish falsehoods of another who occupies a position in which his conduct is open to public scrutiny and criticism, without any reference to the object to be secured by the publication, is a doctrine which has no foundation that we have been able to discover."[157] In short, a newspaper could invoke the defense of privilege in civil suits only if the motives behind libelous stories could pass

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recent effort has been even more difficult because the court has attempted not only to distinguish between "private" and "public" persons but between "all purpose" and "limited purpose" public persons as well. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1964) (prominent attorney and author not a public figure); Time, Inc. v. Firestone, 424 U.S. 448, 453-55 (1976) (prominent socialite not a public figure); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166-68 (1979) (nephew of admitted Soviet spy not a public figure). In the first edition of CONSTITUTIONAL LIMITATIONS and in his *Atkinson* dissent, Cooley had recognized, at least implicitly, that it was difficult, if not irrational, to insist upon sharp distinctions between the "public" and the "private" spheres. *See* Atkinson v. Detroit Free Press, 46 Mich. 341, 383, 9 N.W. 501, 523 (1881) (Cooley, J., dissenting); CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 440, 454.

154. 52 Mich. 214, 17 N.W. 815 (1883). The plaintiff was a colleague of Justices Campbell and Cooley at the University of Michigan.

155. MICH. CONST. of 1850, art. VI, § 25.

156. MacLean v. Scripps, 52 Mich. 214, 221, 17 N.W. 815, 817 (1883) (emphasis added).

157. *Id.* at 220, 17 N.W. at 817.

judicial scrutiny.

Justice Campbell's new construction of Michigan's libel law produced a sharp dissent relying heavily on Cooley's earlier dissent in the *Atkinson* case.[158] A story alleging immoral and unethical conduct by a professor at the state university, the dissent maintained, raised important public issues, and testimony from Scripps was relevant to the issues of "malice" and conditional privilege.[159]

> The charge concerned a public man in a high public position, in charge of most important public interests; those in which all the people were interested. He was a public servant, paid from the public funds; and the article concerns his conduct while in that service . . . and I think the article was privileged within the law as expounded by this Court.[160]

"Certainly it must be so," the dissent pointedly added, "if charges of alleged fraud against a member of a board of trade is within the protection, as held . . . in *Atkinson v. Detroit Free Press* . . . in which opinion upon this subject I fully concur."[161]

Despite the strong endorsement of Cooley's opinion in *Atkinson,* this dissent was not written by Thomas Cooley but by Justice Thomas Sherwood.[162] Justice Cooley not only concurred in Justice Campbell's majority opinion, but he stated his own position when Scripps petitioned for a rehearing.[163] "No court has gone further than has this in upholding the privileges of the press, and very few so far," Justice Cooley boasted.[164] The court would promptly rectify any violation of free expression, but there had been none. The need for evidence of malice had been satisfied by "proofs from which the jury might infer that the publication was made in entire disregard of the plaintiff's rights, and from interested motives."[165]

In *MacLean v. Scripps,* then, Cooley announced yet another

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158. *Id.* at 223-50, 17 N.W. at 818-33.

159. *Id.* at 241-42, 17 N.W. at 828 (Sherwood, J., dissenting). On this point, the dissent relied upon Scripps v. Foster, 41 Mich. 742, 746, 3 N.W. 216, 218 (1879). *See* note 114, *supra.*

160. MacLean v. Scripps, 52 Mich. 214, 244, 17 N.W. 815, 827 (1883) (Sherwood, J., dissenting).

161. *Id.,* 17 N.W. at 829.

162. Justice Sherwood became a member of court in April, 1883.

163. The petition was denied, and Justice Cooley authored the court's opinion. MacLean v. Scripps, 52 Mich. 214, 18 N.W. 209 (1884).

164. *Id.* at 253, 18 N.W. at 210.

165. *Id.*

definition of "malice." Apparently, the publication of libelous falsehoods with a reckless disregard of a plaintiff's reputation—with "entire disregard" for his rights—might constitute legal malice. But without a doubt, evidence of "bad motives," in the form of sensationalism and search for monetary gain, could satisfy Cooley's definition of malice. Thus, for Cooley, courts need not even probe a journalist's "state of mind" in order to find whether or not there had been an "entire disregard" for the right of reputation. Rather, a false and injurious publication made in a public journal for sensation and increase of circulation, Cooley ruled, "is unquestionably in a legal sense malicious."[166] Justice Cooley's efforts to realign Michigan's libel laws, when judged even by his own standards, ended in failure. Chaotically mixing rulebounded jurisprudence and ad hoc balancing, Cooley produced neither doctrinal clarity nor consistent judicial policy-making.

III

Viewed from a narrowly legalistic perspective, one could argue that Cooley's position in *Bathrick* and *MacLean* did not really clash with a strict reading of his earlier ambiguous constructions of the law of conditional privilege. In his *Treatise on the Law of Torts,* Cooley had denied any protection for publica-

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166. *Id.* The theory that "actual malice" meant "reckless disregard" for the truth or falsehood of libelous statements, the view ascribed to by the United States Supreme Court in *New York Times* and its progeny, proposed a fairly objective test that presumably focused upon the manner in which publishers went about investigating, verifying, and preparing stories that contained allegedly defamatory falsehoods. *See* notes 76 & 144 *supra.* On the other hand, since 1974, a majority of the United States Supreme Court has used a theory that is closer to the dictionary definition of "malice"—i.e. "ill-will." See the pointed discussion of Justice Potter Stewart, distinguishing between the two theories of "malice" in constitutionally-protected cases and suggesting the pitfalls inherent in the very term "malice." Herbert v. Lando, 441 U.S. 153, 199-202 (1979) (Stewart, J., dissenting).

As a treatise-writer, Thomas Cooley rejected the idea that "legal malice" equaled "ill-will" or had anything to do with the supposed motives of publishers. The term itself was inherently misleading, Cooley conceded, but he argued that "in a legal sense" it could "only mean that the false and injurious publication had been made without legal excuse." TORTS, *supra* note 9, at 209. In addition, he asserted that the law must ignore the motives of publishers in determining the malice element: "it is the protection of the party injured the law aims at, not the punishment of bad motives instigating bad action in the party injuring him." *Id.* In *MacLean,* however, Justice Cooley merged the two very different conceptions of "malice." "Malice" could be the result of an "entire disregard" for the plaintiff's reputation or the result of a publisher's "bad motives." For further analysis of Justice Cooley's changing position, see text accompanying notes 167-96 *infra.*

tions that went beyond the record of judicial proceedings,[167] and *Bathrick* can be read as merely reinforcing that view. Similarly, one can reconcile Cooley's invocation of a "good motives" test in *MacLean* with his caveat in *Miner* and with a narrow reading of his treatises. Even in *Constitutional Limitations* he suggested that courts and jurors might take into account "the nature of the charges made and the reasons which existed for making them" in determining whether the conditional privilege had been exceeded.[168] In addition, Cooley's position in *MacLean,* that the motives of the publisher could indicate legal malice, followed a view of libel law proposed nearly a half-century earlier in *State v. Burnham*[169]—an influential American opinion on privileged publications by Justice Joel Parker of the New Hampshire Supreme Court. Although Justice Parker's ambitious attempt to revise the American law of libel lacked clarity, it was unequivocal on one point: courts should grant no protection for libelous political falsehoods that stemmed from "bad motives."[170]

In another sense, though, the opinions in *Bathrick* and *MacLean* indicated that Cooley was gradually adopting a new approach to the conflict between libel law and the constitutional guarantees of free expression. In contrast to his dissent in *Atkinson* and his more cautious majority opinion in *Miner,* for instance, Cooley was unwilling to adopt a broad, instrumentalist interpretation of precedents. Moreover, as the additions to *Constitutional Limitations* suggest, he seemed to express a new hostility toward at least some segments of the press and a new caution about granting publishers like James Scripps the benefit of the doubt—or the privileges of the law—in libel cases.

Thus, Justice Cooley's later libel opinions offered his judicial response to developments in urban journalism and in the general system of public communication. Cooley had written the first edition of *Constitutional Limitations* in the days when

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167. TORTS, *supra* note 9, at 218-19.

168. *See* Miner v. Detroit Post & Tribune Co., 49 Mich. 358, 364-65, 13 N.W. 773, 776 (1882); CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 440. *See also id.* at 454 (where Cooley supported the reasoning of Hotchkiss v. Oliphant, 2 Hill 513 (N.Y. 1842), in those cases "where private character is dragged before the public . . . to pander to a depraved appetite for scandal. . . . ").

169. 9 N.H. 34 (1837). Justice Parker was one of the foremost jurists of the antebellum era. For sketches of his career, see 14 DICTIONARY OF AMERICAN BIOGRAPHY 230-31 (1934); P. PALUDAN, *supra* note 3, at 109-24.

170. State v. Burnham, 9 N.H. 34, 45 (1837).

"popular journalism" had spread to only a few cities and when the system of centrally-directed party presses remained largely intact. By the mid-1880s, all this had changed. Flexing the power that came with rising circulation figures, and rising advertising revenues, a new generation of urban journalists began to experiment with the kind of political reporting Theodore Roosevelt would later call "muckraking." Breaking free from party organizations, they set their own courses, mounting bombastic crusades on behalf of "ordinary citizens," their own consumer group and against public "corrupters," whatever their political affiliation or official position. At the same time, publishers expanded "human interest" reporting—begun by the "penny presses" of the 1830s—and featured stories about illicit and immoral activities by all kinds of people and highlighted exposes of those who travelled in high society.[171]

In short, urban publishers, like the Scripps brothers were aggressively marketing "news," a highly profitable commodity. The business of "news" clashed with many of the assumptions underlying the liberal faith in the marketplace of ideas. Although the claim that late nineteenth-century journalists were in the business of "news-making," rather than "news-gathering,"[172] might have been a bit harsh, Cooley's view that journalists merely responded to the "demand" that they supply "a complete summary of the events transpiring in the world" erred in the other direction.[173] As Justice Cooley came to recognize in suits involving the *Detroit Evening News,* popular journalists employed a variety of techniques to "discover" items of interest to their readers, to shape this material into "news," and to market the final product to a mass audience.[174]

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171. On the decline of centrally-directed party presses, see C. SMITH, THE PRESS, POLITICS AND PATRONAGE *passim* (1977). On the changes in late nineteenth century journalism, see E. EMERY, *supra* note 91, at 307-410; G. JUERGENS, JOSEPH PULITZER AND THE NEW YORK WORLD 50-92 (1966); M. SCHUDSON, *supra* note 43, at 61-106; B. WEISBERGER, *supra* note 43, at 121-55.

172. *See* D. BOORSTIN, THE IMAGE 181-261 (1962).

173. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 452.

174. For a suggestive analysis of journalism as a manufactured commodity, see Carey, *Journalism and Criticism: The Case of an Undeveloped Profession,* 36 REV. POL. 227 (1974):

> Journalism is not only literary art; it is industrial art. The inverted pyramid, the 5 W's lead, and associated techniques are as much a product of industrialization as tin cans. The methods, procedures and canons of journalism were developed not only to satisfy the demands of the profession but to meet the needs of industry to turn out a mass-produced commodity.

With the rise of large-scale corporate publishing and the invention of "mass-mediated news,"[175] Cooley's old liberal faith that private channels of mass communication could offer neutral conduits for the free exchange of ideas and information began to fade. In urban areas, corporate publishers were not part of an open forum in which buyers and sellers could exchange ideas and information to the ultimate benefit, and the greater enlightenment, of all. Even worse, the bombastic stories of James and E. W. Scripps seemed more likely to produce social conflict than social cohesion. For Thomas Cooley, these new developments revealed some fundamental difficulties with his earlier views about libel and freedom of expression, ideas which drew heavily upon his larger vision of marketplace liberalism.

Thomas Cooley shared the common liberal faith that the economic, political, and intellectual marketplaces operated in conjunction with yet a fourth marketplace—a moral one. Indeed, one of the basic justifications for the liberal devotion to all of these marketplaces was the claim that they allowed good and honest people (as well as good and honest ideas) to prevail. In all of these liberal marketplaces, the best products, the best people, and the best ideas supposedly reached the "front shelves" on their intrinsic merits rather than because of some artificial and often governmentally-conferred advantage. Conversely, the self-regulating mechanisms of the marketplace caused evil and dishonest schemers to stay in the background. In a truly free marketplace, all types of "rotten apples," both people and ideas, would be left to wither and decay on the "back shelves."[176]

In his treatises, Cooley confidently combined the various marketplaces. He invoked the moral marketplace along with the intellectual, insisting that a qualified privilege could apply to libelous stories about even the private lives of public people. The notion, he argued indignantly, "that a judge who is corrupt and debauched in private life may be pure and upright in his judgments" was "false to human nature," and "contradictory to general experience."[177] The idea, of course, was also "false" and "contradictory" to the liberal faith that, in the race for success

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Id. at 246. *See also* M. SCHUDSON, *supra* note 43, at 61-106.

175. *See generally,* M. REAL, MASS-MEDIATED CULTURE (1977).

176. On the moral marketplace, *see* G. WILLS, *supra* note 8, at 15-177. As Professor Frakt has noted, the Burger court also has applied the test of the moral marketplace in some of its recent free speech decisions. Frakt, *supra* note 6, at 530 n.69.

177. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 440.

in business or in politics, victory went to not only the swiftest and sharpest but also the "best." A liberalized intellectual marketplace, in other words, would help to ensure proper functioning of the moral realm.

Cooley, the quintessential nineteenth-century liberal, made no secret of his belief that his judicial decisions were consistent with his view of the proper settlement of competing moral issues.[178] Dissenting in *Atkinson,* Cooley left no doubt that he considered the conduct of the plaintiff, an attorney, and of his client-friend, a member of Detroit's Board of Trade, morally and ethically reprehensible. To "any disinterested business man," Cooley argued, the machinations of the attorney and the official "would have been suspicious." As Cooley recited the "facts," he observed that no honest attorney could "undertake to justify such conduct. . . . [i]n morals."[179] In *Miner,* he was equally forthright in denouncing as immoral and unethical the conduct of another member of the legal profession—a police judge in Detroit. In Cooley's view, the morals of a judge, like those of Caesar's wife, must be above suspicion. "When a judge orders a man into confinement with a charge against him. . . . [t]here must be some great and most serious defect in the administration of the law. . . . "[180] And, he concluded, any legal theory that did not provide some protection for stories revealing allegations of judicial misconduct ignored the "moral" quality of such journalism.[181]

Although in *Miner,* Cooley praised the "respectable and public spirited" journalist,[182] in *Bathrick,* and especially in *MacLean,* Cooley obviously found the moral scales tilting against the press. In *MacLean,* Cooley was uninterested in testimony about the defendants' "state[s] of mind." From the content and tone of the story, Cooley confidently concluded that the motives of the *Evening News* had been immoral, and therefore,

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178. *See* text accompanying notes 106-16 *supra.* Cooley seemed especially troubled when libels touched the reputations of physicians. The cases in which he took his hardest line against the press—*Foster, Bathrick,* and *MacLean*—all involved lawsuits by physicians.

179. Atkinson v. Detroit Free Press Co., 46 Mich. 341, 381, 9 N.W. 501, 522-23 (1881).

180. Miner v. Detroit Post & Tribune Co., 49 Mich. 358, 363-64, 13 N.W. 773, 775 (1882).

181. *Id.* at 364, 13 N.W. at 776.

182. *Id.* at 365, 13 N.W. at 776.

constituted "legal malice."[183] Cooley was not content to rest his finding of liability on the fact that Scripps' paper had exceeded its qualified privilege by publishing a libelous falsehood with "entire disregard" for the rights of the plaintiff. By seeking to peddle sensationalist stories, and thereby to increase the sales and profits of his paper, James Scripps threatened the fundamental principles of the moral marketplace. To allow such stories to escape legal liability, simply because they touched the reading public's fancy, would subvert Cooley's view of the benefits to be gained from the moral marketplace.

The sanctity of the moral marketplace was particularly important to people like Thomas Cooley. As the historian Burton J. Bledstein has argued, the new middle-class professionals who came into prominence and power during the mid-Victorian era placed great importance on their reputations—both personal and professional. To these professionals, success, and the esteem that followed, represented measures of individual moral worth, of personal as well as professional qualities. Moreover, the mechanisms of the moral marketplace did not operate simply to aggrandize members of the new professions. Professionals passionately argued that their own ascending careers—be they in law, medicine, or some other area—also advanced the general public interest, especially when professionals offered their private talents to public service. Those who would wrongfully tear down the reputations of professionals, as did James Scripps, were attacking the whole mechanism of middle-class mobility and national growth.[184]

Thomas Cooley was not alone in his doubts about the direction of urban journalism.[185] The oft-lamented problem of "irresponsible" journalism produced numerous demands for new legal controls—the most famous and successful innovation was, of course, Samuel Warren's and Louis B. Brandeis' call for a new right of privacy[186]—but most immediate legal response came in

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183. MacLean v. Scripps, 52 Mich. 251, 253, 18 N.W. 209, 210 (1884) (motion for rehearing).

184. *See* B. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM 65-79 (1976); Godkin, *The Rights of the Citizen*, 8 SCRIBNER'S MAGAZINE 58-67 (1890).

185. *See* L. HAUSMAN, CRITICISM OF THE PRESS IN U.S. PERIODICALS, 1900-1939 (Journalism Monographs No. 4, 1967).

186. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See* Adams, *The Right of Privacy, and Its Relation to the Law of Libel*, 39 AM. L. REV. 37 (1905); Speed, *The Right of Privacy*, 163 N. AM. REV. 74 (1896). For a historical treatment, see Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979). One

the form of more libel suits against the press. Lawyers and journalists of the late nineteenth century, as well as later historians, have noted the rising number of defamation cases, particularly those involving political figures.[187]

At the same time, critics of the press called for retention of traditional libel doctrines. During the 1880s and 1890s, for example, both legal journals and general periodicals contained numerous articles demanding that courts retain or strengthen neo-Blackstonian rules. By the first decade of the twentieth century, most legal commentators and the vast majority of courts rejected anything resembling Thomas Cooley's view of conditional privilege. In all but a few states, the courts imposed strict liability for most libelous falsehoods and denied the press any general privilege for publications involving public officials or stories of "public interest."[188] This trend toward increased regulation of the intellectual marketplace, of course, paralleled a similar retreat from the doctrines of classical economic liberalism in favor of new theories justifying increased governmental involvement in the marketplace.[189]

The third edition of Cooley's *Treatise on the Law of Torts*, which appeared in 1906 (eight years after the author's death), graphically illustrated the general repudiation of mid-nineteenth century libertarianism. To Cooley's original statement that constitutional guarantees of free expression required both freedom from prior restraints and exemption from liability for non-malicious political falsehoods, the editor of the new edition, John Lewis, added a significant qualification: "But a candidate for

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of the authorities Warren and Brandeis could cite was none other than Thomas Cooley. *See* TORTS, *supra* note 9, at 290.

187. *See* Rosenberg, *supra* note 16, at 1155-56.

188. *Id.* at 1157-59. In the case of libel suits involving public officials and candidates, the doctrine imposing strict liability for libelous falsehoods became known as the "majority rule." *See* Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949). Despite Cooley's dissent in *Atkinson* and his opinion in *Miner*, Michigan eventually embraced the majority rather than the minority rule. *See* Belknap v. Ball, 83 Mich. 583, 47 N.W. 674 (1890). A few jurisdictions adopted positions similar to Cooley's—doctrines which were collectively known as "the minority rule." The leading statement of the "minority rule" came in an opinion by Justice Rousseau Burch of Kansas in Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). The Kansas rule, in a slightly different form, became the national standard for political libel cases. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

189. *See, e.g.*, G. KOLKO, MAIN CURRENTS IN AMERICAN HISTORY 1-33 (1976); A. WOLFE, THE LIMITS OF LEGITIMACY *passim* (1977). For Cooley's changing ideas about economic regulation, see A. & O. HOOGENBOOM, A HISTORY OF THE ICC 19-38, 188-89 (1976).

public office does not surrender his private character to the public and he has the same remedy for defamation as before. And the publication of false and defamatory statements concerning him, whether relating to his private character or public acts, are not privileged."[190] This position, of course, represented a significant retreat from the libertarian position taken by Cooley, the treatise's original author.

During his own judicial career, Thomas Cooley never went this far toward abandoning treatise-writer Cooley's theories about freedom of expression and libel law. He never resorted, for instance, to the tenuous distinction between statements of "fact" and statements of "opinion" that became the basis for differentiating between the doctrine of a qualified privilege for "fair comments" and that of strict liability for libelous misstatements of "fact."[191]

Nevertheless, Thomas Cooley's published comments indicated that he was revising his optimistic judgment of 1868 that courts could generally trust the improving quality of American journalism to solve the dilemmas raised by libel law.[192] Concurring with most other jurists of the late nineteenth century, for example, Cooley insisted in the fifth edition of *Constitutional Limitations* that judges could, and should, draw a sharp line between libelous publications that involve the "public" sphere and those that invade the "private" sanctuaries of American life.[193] Most important, his final libel opinions underscored a crucial point: Thomas Cooley would insist upon using his own judicial scales to measure the degree to which journalists had violated the moral and legal limits of the marketplace of ideas.

In 1868, Thomas Cooley had argued that the doctrine of conditional privilege had been incorporated into the everyday operation of the marketplace of ideas, if not into American defamation law. Whatever the neo-Blackstonian law of libel might have said, "the general public sentiment and the prevailing customs" permitted the American press to operate "as though it were privileged" when it published critical stories about "public

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190. 1 T. COOLEY, A TREATISE ON THE LAW OF TORTS 443 (3d ed. 1906).

191. *See* Schauer, *supra* note 45, at 276-81; Titus, *supra* note 78, *passim*.

192. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 455-56 n.4.

193. On the importance of "private" sanctuaries as a refuge from the disorders of late nineteenth century life, see B. BLEDSTEIN, *supra* note 184, at 55-65; R. SENNETT, FAMILIES AGAINST THE CITY *passim* (1970).

events and public men."[194] But by the early 1880s, Justice Cooley was coming to see the law of libel, including the doctrine of conditional privilege, as a useful legal tool that courts could use to discourage certain types of journalism as well as to protect the right of reputation. Although the "general public sentiment and the prevailing customs" meant that popular journalists could sell their products, the law of civil libel seemed to offer a means of "purifying" the marketplace of ideas without the use of criminal controls.

Thus, Justice Cooley abandoned the view that the intellectual marketplace could be as open and self-regulating as he had suggested in *Constitutional Limitations* or in his dissent in *Atkinson*. Rather than primarily relying upon the "invisible hand" of public opinion, Cooley was fully ready to apply the visible hand of the legal system to discourage the type of stories that, in his view, destroyed the reputations of professionals who entered public service and the styles of journalism that debased his version of the moral marketplace. In the end, Thomas Cooley insisted upon a clear differentiation between journalism that *interested* the public and journalism that he believed served the *public interest*.[195]

One of the nineteenth century's most famous exponents of marketplace liberalism and one of its staunchest libertarians on the issue of free expression, Thomas Cooley ultimately abandoned a good deal of his 1868 version of marketplace theology. On the basis of both individual rights (especially the rights of citizens, including public officials, to their reputations) and general social interests (particularly the public interest in seeing that private corporations did not fill the marketplace with socially dangerous libels or pervert it for their own "immoral" purposes), he came to believe that libel law should help to guide and direct the flow of ideas. In essence, Justice Cooley and his colleagues on the Michigan Supreme Court assumed a role similar to that of the United States Supreme Court majority since the retreat from the romantic marketplace implications of *New*

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194. CONSTITUTIONAL LIMITATIONS, *supra* note 9, at 455 n.4.

195. *See generally* Dennis, *The Press and the Public Interest: A Definitional Dilemma*, 23 DE PAUL L. REV. 937 (1974). In Time, Inc. v. Firestone, 424 U.S. 448 (1974), the United States Supreme Court rejected a simple "newsworthiness" test and, in effect, distinguished between stories *in the public interest* and those merely *of public interest*. For a critique, see Ashdown, *supra* note 6, at 667-69; note 202 *infra*.

York Times Co. v. Sullivan[195.1] and of *Rosenbloom v. Metromedia, Inc.*—as editors of last resort for American journalism.[196]

IV

The lengthy list of "public" libel cases decided by the United States Supreme Court since 1964 indicates the contemporary relevance of Thomas Cooley's difficulties. The Burger court in 1974, as Justice Cooley had nearly a century earlier, retreated from libel doctrines designed to remove the "chilling effect" of self-censorship.[197] In response to the specter of a "thawed out" media, a majority of the Court then attempted to devise more carefully-crafted doctrines to protect individual reputations *and* to refurbish what they considered a rather shabby marketplace of ideas. The problem, as the justices saw it, was not simply that a broad application of the "actual malice" doctrine of *New York Times Co. v. Sullivan* would generate publications harmful to individual reputations; equally important, *Sullivan* seemed to encourage intellectual products that the justices found shoddily-constructed and improperly-marketed.[198]

In the name of ensuring a cleaner, and hopefully more useful, marketplace of ideas, courts assumed a quasi-editorial role. Thus, they found themselves the ad hoc arbiters of publishers' motives,[199] of their use of language,[200] of their judgment in head-

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195.1. 376 U.S. 254 (1964).

196. For a critical view of such a role, see Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975). For a general defense of the "retreat," see Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976). *But see* Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271 (1976).

A thorough-going analysis of the libel decisions of the past fifteen years is beyond the scope of this article. Thus, Section IV *infra* is intended merely to indicate certain broad parallels between recent libel cases and those decided by Thomas Cooley and to suggest possible lines for a critical investigation of recent free expression decisions. For two attempts to examine the work of the Burger court, see Cox, *Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980); Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422 (1980).

197. *See* Frakt, *The Evolving Law of Defamation:* New York Times Co. v. Sullivan *to* Gertz v. Robert Welch, Inc. *and Beyond*, 5 RUT.-CAM. L.J. 471 (1975).

198. For development of the thesis that the primary goal of the libel decisions of the mid-1970s was to restrain the press, see Ashdown, *supra* note 6.

199. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

200. *See, e.g.*, Sprouse v. Clay Communications, Inc., 211 S.E.2d 674, 682 (W. Va.), *cert. denied*, 423 U.S. 882 (1975); Anderson, *A Response*, *supra* note 196, at 277-82.

line construction,[201] and, inevitably, of the intellectual significance of their publications.[202] Critics have rightly charged that the results of such a judicial process belied the claim of clear and consistent defamation doctrines.[203] But as a study of Thomas Cooley's career should suggest, the problem goes beyond the Burger court or their failure to construct consistent rules: it stems from fundamental contradictions within the general system of marketplace liberalism.

As a young man, Thomas Cooley embraced an essentially romantic view of a liberal, progressive society, in which the maximum release of economic energies and public information contributed to freedom and social betterment.[204] But liberalism, as a body of ideas and a guide for social policy, derived from an economic and social setting that, in the mid-nineteenth-century United States, already was being rapidly transformed. The traditional liberal tenets upon which Cooley based his legal ideas developed in a society characterized by localistic marketplaces, small-scale social institutions, and a political culture that regarded the power of the state as the primary threat to the individual. By the late nineteenth century, new technological breakthroughs that created mass production industries, including some manufacturing new cultural products, dramatically increased both the economic and social scales of life. At the same time, the growth of corporate capitalism raised the inescapable political problem of excessive private power. The main tenets of Cooley's "marketplace theology," including his idea that a marketplace of ideas co-existed in harmony with other

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201. *See, e.g.*, Sprouse v. Clay Communications, Inc., 211 S.E.2d 674, 682-83 (W. Va.), *cert. denied*, 423 U.S. 882 (1975).

202. Clearly, in Time, Inc. v. Firestone, 424 U.S. 448 (1976), a majority of the Court found the libelous item about a divorce between two prominent socialites to be more a piece of gossip of interest to readers of TIME's "Milestones" section than a story in the general public interest. The majority opinion, however, obscured this editorial judgment by supposedly focusing upon the issue of the plaintiff's "public" versus "private" status. This shift in focus from the story to the plaintiff is illusory since the *Gertz-Firestone* "public figure" test can still turn upon a person's involvement in "public controversies." *See* Frakt, *supra* note 6, at 585-86.

203. *See, e.g.*, Frakt, *supra* note 6, at 585-86.

204. By the time Thomas Cooley had published CONSTITUTIONAL LIMITATIONS, many of the central tenets of marketplace liberalism already applied to a bygone age. *See, e.g.*, E. FONER, FREE SOIL, FREE LABOR, FREE MEN *passim* (1970); R. WELTER, THE MIND OF AMERICA, 1820-1860 *passim* (1975). On the lack of a true marketplace of ideas in the urban newspapers of the mid-nineteenth century, see Pessen, *Who Has Power in the Democratic Capitalistic Community? Reflections on Antebellum New York City*, 52 N.Y. HIST. 129, 145 (1977).

marketplaces, no longer explained this environment. Yet, Cooley and other American liberals clung to the outlines of their old faiths, struggling to adapt them to new conditions.[205] Thus, in defamation law, Cooley spent his judicial career trying to reconcile his Jacksonian models of free expression and "the moral marketplace" to the new realities of corporate publishing and popular journalism. He tried, in brief, to reconcile the irreconcilable.

Justice Cooley's quest for a consistent marketplace approach to defamation law ultimately bogged him down in tenuous legal distinctions. The contradictions that he tried to paste together, far from being resolved by subsequent judges and theorists, have only become more severe. In the landmark *Gertz* decision of 1974, for example, the Burger court decided that judges must intervene more actively in the marketplace of ideas in order to correct the sins of American journalism; yet during the same term, the Court fell back upon the romantic images of ink-stained printers and the shibboleth of "editorial judgment" to rebuff Professor Barron's plea for re-adjusting the marketplace of ideas through the use of right-of-reply laws.[206] The following term, the Court issued the *Firestone* decision,[207] which mandated even deeper judicial incursions into the marketplace, and into editorial judgment, than *Gertz* did, and then it returned to the old doctrines of "marketplace theology" in order to confer a limited first amendment status on the least open stall in the intellectual marketplace—commercial speech.[208]

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205. *See* P.GOLDSTONE, THE RISE AND FALL OF THE LIBERAL EMPIRE (1977); J. HABERMAS, LEGITIMATION CRISIS (1975); T. LOWI, THE END OF LIBERALISM (2d ed. 1979); R. UNGER, KNOWLEDGE & POLITICS (1975); A. WOLFE, *supra* note 189; R.P. WOLFF, THE POVERTY OF LIBERALISM (1968).

206. Jerome Barron's attempt to gain recognition of a constitutional right of reply, as part of his continuing attack on the Court's adoption of a "romantic" view of the marketplace of ideas, failed to persuade a single member of the Court. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Even a supporter of the theory, as well as the reality, of the marketplace of ideas and a believer in the power of editorial judgment has observed that Chief Justice Burger's opinion in the *Tornillo* case relied more upon "rhetorical flourishes" than "reasoned explanation." Bezanson, Herbert v. Lando, *Editorial Judgment, and Freedom of the Press: An Essay*, 1978 ILL. L.F. 605, 608.

207. *See* Frakt, *supra* note 6, at 531.

208. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976); Bigelow v. Virginia, 421 U.S. 809, 828-29 (1975). This essay is not the place for a lengthy excursion into the implications of the new commercial speech doctrines, especially when their precise boundaries remain unclear. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976). But the

Liberals can, of course, throw their hands up and do their best to blur the contradictions in modern liberalism, but they can never escape them.[209] Defamation law provides an excellent example. Any set of defamation rules that seeks to expand "free speech" by removing the general threat of self-censorship will not, by some automatic process, increase the flow of ideas and information to buyers within some mythical marketplace of ideas. But there can be no doubt that policies such as those enunciated by Thomas Cooley in *Atkinson* and by the Supreme Court in *New York Times Co. v. Sullivan* would confer very real, and economically valuable, privileges upon the people who own the media and upon the journalists who help to create "news."[210] On the other hand, attempts to intervene, through the use of libel law, will necessarily undermine some of the basic tenets of marketplace theology. Tougher ad hoc decisions will do more than produce greater pre-publication care by the press. They will, in one way or another, not only limit the flow of information to the consumers of news but also will, in effect, produce a kind of judicially-created index of illegal words and phrases.[211]

Court's use of marketplace analogies in the commercial speech area does help to highlight the inherent contradictions in the entire liberal marketplace framework. For an extended critique, see Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

Even if one concedes that the interest the Court is protecting is that of listeners (consumers) rather than speakers (advertisers)—*see* Note, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO L.J. 775 (1975)—one must still confront the argument that commercial speech, even when "non-deceptive" and "truthful," remains a "distorted" form of communication. *See* S. EWEN, CAPTAINS OF CONSCIOUSNESS (1976). For a discussion of "distorted" communication, see C. MUELLER, THE POLITICS OF COMMUNICATION *passim* (1973).

209. The late Alexander Bickel, for example, fully acknowledged the contradictions in the first amendment decisions of the 1970s, but then retreated to a ritualistic pluralism—his version of the political marketplace—as the only solution. A. BICKEL, *Domesticated Civil Disobedience: The First Amendment, from* Sullivan *to the Pentagon Papers*, in THE MORALITY OF CONSENT 57, 86-87 (1975). Such an approach, as Professor Silver has noted, marked a significant retreat from the earlier position of Professor Bickel and other advocates of "reasoned" decisions. SILVER, *The Warren Court Critics: Where Are They Now That We Need Them?*, 3 HASTINGS CONST. L.Q. 373, 409-19 (1976).

210. This was the gist of Professor Barron's criticism of the libel decisions of the 1960s and early 1970s. *See* J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 7-12, 340-41 (1973); Miller & Barron, *The Supreme Court, the Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1204-07 (1975).

211. *See* Schauer, *supra* note 45, at 276-87, 291-94. Compare the more overt examples of governmentally-sanctioned language in C. *Mueller, supra*, note 208, at 30-32, 37-39. The problems, of course, do not end here. The impact of governmental intrusion, for example, is hardly neutral. The public-private distinction, for instance, means that journalists and papers who investigate the role of "private" individuals, such as heads of

Legal history can provide no clear map of future courses, but the study of the past can offer valuable perspectives as to where we have come and where we might go.[212] The case of Thomas Cooley, hopefully, provides a clearer perspective on the many "crooked paths" that lie before us in this post-liberal age. Nonetheless, any search for more rational and equitable approaches to issues of free expression must surely move beyond the paths of marketplace liberalism.[213]

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large corporations, have less legal protection than those who deal with more traditional stories involving governmental officials. *See* Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 841-42 (1979).

212. On the value of legal history, see J. NOONAN, PERSONS AND MASKS OF THE LAW 152-67 (1976).

213. Defending the viability of the marketplace of ideas, in both theory and practice, Professor Bezanson invokes the authority of "basic and widely accepted doctrines of communication theory." Bezanson, *supra* note 192, at 614. Although it is impossible to find a single, coherent alternative to the marketplace model espoused by Professor Bezanson's sources, many of which were published nearly twenty years ago, communications research is not nearly as one-dimensional as he claims. *See, e.g.*, J. ELLUL, THE POLITICAL ILLUSION 96-135 (1967); J. ELLUL, PROPAGANDA (1965); E. EPSTEIN, BETWEEN FACT AND FICTION: THE PROBLEM OF JOURNALISM (1975); E. EPSTEIN, NEWS FROM NOWHERE (1973); A. GOULDNER, *supra* note 45, at 138; C. MUELLER, *supra* note 208; H. SCHILLER, COMMUNICATION AND CULTURE DOMINATION (1976); H. SCHILLER, THE MIND MANAGERS (1973); Christians & Real, *Jacques Ellul's Contributions to Critical Media Theory*, 29 J. COM. 83 (1979); Enzensberger, *Constituents of a Theory of the Media*, 1964 NEW LEFT REV. 13 (1970); Habermas, *On Systematically Distorted Communication*, 13 INQUIRY 205 (1970); Habermas, *Towards a Theory of Communicative Competency*, 13 INQUIRY 360 (1970); McCarthy, *A Theory of Communicative Competency*, 3 PHILOSOPHY SOC. SCI. 135 (1973) (analyzing Jurgen Habermas' theory of "the ideal speech situation").

It would be naive, of course, to underestimate the dangers of a post-liberal age, especially in the realm of free expression. Alvin Gouldner, one of the most perceptive critics of liberal society, for example, argues that Habermas' "ideal speech situation," while focusing on the distortions of communication grounded in private property, glosses over the problem of state domination. A. GOULDNER, *supra* note 45, at 150-52, 164-65. Yet, the vision of a world beyond liberalism can—and must—include a society in which citizens enjoy a true freedom of expression. *See, e.g., id.* at 160; R. UNGER, *supra* note 205, at 280-81. For an extended argument that there will be nothing but "crooked paths" out of the liberal present, see P. CLECAK, CROOKED PATHS: REFLECTION ON SOCIALISM, CONSERVATISM, AND THE WELFARE STATE (1977); and on the impossibility of avoiding the trip down these paths, beyond liberalism, see R. UNGER, LAW AND MODERN SOCIETY 266-68 (1976). Any adequate alternative to the market theory of free expression must extend protection beyond the public sphere into other areas such as the workplace. *See* R. PFEFFER, WORKING FOR CAPITALISM *passim* (1979). Finally, theories by themselves will prove of little use unless they are connected to organized efforts to bring about significant social and political change. *See* A. GOULDNER, *supra* note 45, at 155-60; Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1345, 1359 (1979). For a historical study of the Populist movement of the late nineteenth century, see L. GOODWYN, DEMOCRATIC PROMISE (1976). The Populist crusade, especially in the efforts of grass-roots "lecturers" and small town newspaper editors, offered a good example of the power of non-distorted communication. *See id.* at 87-

107, 351-86. The larger experience of Populism, however, demonstrated the obstacles—in both the political and intellectual "marketplaces"—to significant social change. *Id.* at 515-55.