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Recent Developments in the Law of Privilege and Fair Comment

WALTER JENSEN, JR.*

Liberty of the press is a cherished right. Attempts by the sovereign to interfere with freedom of public expression have been combatted since the days of the infamous Star Chamber. The danger has existed for many centuries and still exists today. However, enlightened public opinion must not only guard against encroachments on freedom of the press by governmental edict, statute, or control but also must defend with equal vigor against the erosion of this right by private litigants through use of the libel laws.[1] By over-zealous use of the libel laws, private litigants pose a threat to freedom of speech and of the press which can equal or exceed that of stringent governmental control. Private litigants can easily discourage free public discussion, criticism, and the dissemination of ideas through the printed word. The libel suit can become a dangerous weapon! It poses both a threat and a challenge not only to the journalist, but to every citizen.

The constitutional guaranty of freedom of the press requires a broad interpretation of the defenses of "privilege" and "fair comment." A narrow interpretation of the defense of privilege can restrict liberty of the press by subjecting newspapers and other commentators to numerous expensive suits for damages. A newspaper publisher may be discouraged from publishing a commentary on matters of public conern, hence, he may decide that rather than risk a suit for thousands of dollars in damages, he would

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1. In a frightening discussion which should serve as a warning to Americans, Professor David delineates the past European experience in the use of the libel laws by Fascists and other groups, as a major political weapon of oppression and propaganda. See Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085-1123 (1942). In a subsequent article, the same author examines defamation, privilege and fair comment on the American scene. See Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282-1318 (1942). Defamation is a standard device of political propaganda. See Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 COLUM. L. REV. 591-622 (1938).

not publish the questionable material at all.[2] The general public would thus be deprived of newsworthy information.

On March 9, 1964, the Supreme Court of the United States struck a significant blow for freedom of speech and of the press. In the case of *New York Times* v *Sullivan*,[3] the High Court held that a public official may not recover damages for untrue statements of fact made by newspapers and by other critics of his official conduct unless the words were prompted by actual malice. This momentous decision should become a significant addition to the formidable bulwark of decisions, statutes, and constitutional provisions which already protect the right of the citizen and journalist to speak out on matters of public interest and concern. Considerable doubt still remains concerning the breadth and scope of the Court's decision. The commentator who believes that he now has a license to say anything he pleases concerning public officials without verifying the accuracy of his assertions of fact may indeed be headed for trouble. The purpose of this discussion is to examine the traditional privilege of fair comment and the extent to which it has been modified by this decision.

FREEDOM OF SPEECH AND OF THE PRESS

The significance of freedom of speech and of the press as a treasured heritage was succinctly stated by Thomas Jefferson:[4]

> The people are the only censors of their governors . . . people should be given full information of their affairs, through the channel of public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion off the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government, without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter . . . . No government ought to be without censors; and where the press is free, no one ever will.

Included in the charters and bills of rights of many of our colonies, which later became states in the United States of America, were provisions that guaranteed freedom of speech and of the press. When the Constitution was ratified by the thirteen colonies, provisions concerning freedom of speech and of the press were omitted. Alexander Hamilton believed that liberty of speech and of the press need not be specifically mentioned in the Constitution.[5] Thomas

2. John M. Hall, *Preserving Liberty of the Press by the Defense of Privilege in Libel Actions*, 26 CALIF. L. REV. 227 (1938).
3. 376 U.S. 254, 84 S. Ct. 710 (1964).
4. 18 *The Writings of Thomas Jefferson*, iii (Monticello Edition; Washington, D. C.: The Thomas Jefferson Memorial Association, (1904).
5. Alexander Hamilton, *The Federalist*, 559 (Washington, D. C.: National Home Library Foundation (1937).

Jefferson represented the contrary view which was based on mistrust of a highly centralized government; therefore, he insisted that a provision guaranteeing these liberties be included in the first ten amendments, later to be known as the Bill of Rights.[6]

Freedom of speech and of the press are among our most jealously guarded rights. These rights are guaranteed by the first amendment to the United States Constitution which provides that Congress shall make no law which abridges freedom of speech or of the press.[7] In their respective bills of rights, the constitutions of the individual states include provisions which prohibit enactment of laws which would limit these freedoms. The due process clause of the fourteenth amendment to the U. S. Constitution forbids a state from depriving a person of life, liberty, or property without due process of law. The rights of freedom of speech and of the press are included within the purview of those "liberties" protected against unreasonable restriction by state action through the due process clause of the fourteenth amendment.[8] Those who would destroy liberty of speech and of the press should remember the admonition of former Chief Justice Charles Evans Hughes of the United States Supreme Court:[9]

> . . . imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Freedom of speech and of the press concerning public matters is preserved by a broad interpretation of privilege, which is the right to speak and to criticize.

PRIVILEGE: A DEFENSE TO LIBEL

The concept of privilege as a defense to libel is based on a broad public policy which encourages free and open discussion. The late Chief Justice Taft, when a judge of the U. S. Court of Appeals, described the manner in which individual rights are sometimes sacrificed to the public good:

> . . . the existence and extent of privilege in communications are determined by balancing the needs and good of society

6. 6 *The Writings of Thomas Jefferson, op. cit. supra* at 387.
7. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, or to petition the government for a redress of grievances."
8. Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666 (1938).
9. DeJonge v. Oregon, 299 U.S. 353, 365; 57 S. Ct. 255, 260 (1937).

> against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it . . . .[10]

In the leading case of *Coleman* v *MacLennan*,[11] Justice Burch also clarified the conflicting interests involved:

> The importance to the state and to society of such discussions is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character is so small, that such discussion must be privileged . . . .

The doctrine of privileged communications recognizes that occasional injustice to an individual's good name will occur when published words are, in fact, defamatory; however, a wise public policy encourages unfettered discussion and interchange of ideas as basic to the public interest. Since the theory of privilege assumes that the public welfare will be benefited by disclosure of information, a qualified privilege relieves the commentator from legal liability if the occasion warrants.

In the law of libel and slander, a privileged communication is one which would be defamatory and hence subject to suit for damages if it were not for the circumstances or occasion under which it was made. The concept of privilege is important only when the words are both defamatory *and* untrue. If the statement made by the defendant is true, then no need for the defense of privilege exists. Privileged communications are divided into two general classes: (1) words which are absolutely privileged, and (2) words which are conditionally or qualifiedly privileged. The journalist is primarily concerned with qualified or conditional privilege.

Legislative and judicial proceedings and acts of state confer an absolute privilege upon its participants; hence, the words of legislators, judges, counsel, and witnesses are not subject to suit for damages as long as pertinent to the issues being tried or discussed. Absolute privilege protects the publication of defamatory matter even though it be both false and malicious. The privilege is based on public policy which permits those engaged in the administration of justice and formulation of our laws to speak candidly and act openly without fear of civil or criminal suit. The rule of absolute

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10. Post Publishing Company v. Hallam, 59 Fed. 530, 540 (1893); For a general discussion of the basic differences between *absolute* and *conditional* privilege, see Note, 19 ILL. L. REV. 684 (1928).

11. 78 Kan. 711, 98 Pac. 281, 286 (1908). This is the leading case for the minority view concerning criticism of public officials. It has been recently adopted by the U. S. Supreme Court.

privilege is strictly construed and is confined to those narrow limits of public concern in which the administration of justice or public service requires complete immunity.[12]

A conditional or qualified privilege assumes that the statement made would be the proper subject of a suit for defamation under ordinary circumstances; however, the speaker claims a qualified protection because of the special occasion under which the words were spoken or printed. A qualified privilege includes all statements made in good faith concerning any subject matter in which he owes a duty to a person having a corresponding interest or duty. The duty owed may be of a legal, moral, or social character. A conditionally privileged statement includes the following: (1) When an interest to be upheld exists. (2) The statements are restricted to this purpose. (3) The statements are made only to the proper person. (4) The statements are made in good faith.[13] Illustrative examples of conditional or qualified privilege are: fair, nonmalicious and accurate reports of legislative and judicial proceedings; the fair and accurate report of a grand jury when presented to the court for official consideration; reports of divorce proceedings; reports of proceedings before a police magistrate; and, criticism of the qualifications and actions of candidates for public office and incumbent public officials.

A conditional or qualified privilege protects the speaker or publisher of defamatory words unless actual malice is shown.[14] If the statement is motivated by malice, or is made in reckless disregard as to its truth or falsity, or in utter disregard of the rights of the person injured, the qualified privilege is forfeited.[15] Because the doctrine of conditional or qualified privilege is based on public interest in freedom of discussion, an occasional injury to a person's reputation is permitted; however, when the speaker or publisher is motivated by hatred or malice the underlying purpose of the defense of privilege is defeated. Therefore, "malice" or "wrong motive," if shown to exist, will deprive the speaker of the shield of privilege.[16] The existence of malice may be inferred from the violent or excessive character of the language used, from evidence of previous hostility or ill-will on the part of the defendant, or from an absence of probable cause for believing the words to be

12. Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222 (1954).

13. 33 AM. JUR. Libel & Slander § 126 (1959).

14. Montgomery Ward & Co. v. Watson, 55 F.2d 184 (1932).

15. Kroger Grocery & Baking Co. v. Yount, 66 F.2d 700 (1933).

16. The ambiguous word "malice," sometimes called "express malice" or "malice in fact," is not always used in a precise manner. For a scholary discussion of what is meant by "malice" and its effect on the defense of conditional privilege, see Jeremiah Smith, *Are Charges Against The Moral Character Of A Candidate For An Elective Office Conditionally Privileged?* 18 MICH. L. REV. 1-15 (1919). The author prefers the phrase "wrong motive" as the best description of malicious conduct. Also, see John E. Hallen, *Character Of Belief Necessary For The Conditional Privilege In Defamation,* 25 ILL. L. REV. 865-876 (1939). Note, 69 HARV. L. REV. 875, 929-931 (1956).

true.[17] When the words are conditionally privileged, the plaintiff must prove the existence of actual malice to defeat the privilege; the same rule applies when a newspaper has a qualified privilege.[18] It is the prerogative of the court to determine whether an occasion exists which warrants a privilege; it is the function of the jury to decide, as a question of fact, whether express malice exists.[19] It should be emphasized that although the presence of malice will defeat a qualified or conditional privilege, it will not affect the existence of an absolute privilege.[20]

FAIR COMMENT

Fair comment, which is another defense to suits for defamation, has its origin in the common law, in the U. S. Constitution, and in the individual state constitutions. Matters of public concern and interest are the proper subject of fair comment and honest criticism. When fair and honest comments on such matters are made they are privileged, even though not true in fact. To be legally acceptable as a defense, fair comment must include the following: (1) The criticism must relate to a matter of *public* interest and concern. (2) The criticism, which cannot be based on malice, must be the honest opinion of the critic or writer. (3) The comment must not be based on misstatement of fact. (4) The criticism should be directed not against the individual but rather against the public work, performance, or act itself. (5) The comment must not impute dishonest or corrupt motives.

The defenses of fair comment and privilege have both similarities and differences.[21] In communications which are privileged, the libelous and defamatory words are excused by law. In fair comment the words, which are often defamatory and libelous, are excused by the law of privilege. Fair comment, as a legal defense, is available to a journalist, publisher, or individual as long as it pertains to matters which are of the public interest and also represents the critic's honest opinion. In contrast, privilege exists only under certain circumstances where the occasion warrants or because public policy demands disclosure. Privilege and fair comment are alike in that the existence of express malice will destroy either of the defenses. When reporting legislative, executive, or judicial proceedings, the commentator should be careful to confine

17. Kenny v. Gurley, 208 Ala. 623, 95 So. 34 (1923); Stewart v. Sonneborn, 98 U.S. 187, 25 L. Ed. 116 (1879).
18. City of Mullens v. Davidson, 133 W. Va. 557, 57 S.E.2d 1 (1949); Broking v. Phoenix Newspapers, Inc. 76 Ariz. 334, 264 P.2d 413 (1953).
19. Jones v. Express Publishing Company, 87 Cal. App. 246, 262 Pac. 78 (1927). For a discussion of the function of judge and jury in defamation cases, see Leon Green, *Relational Interests*, 30 ILL. L. REV. 314-353 (1935).
20. Andrews v. Gardiner, 224 N.Y. 440, 121 N.E. 341 (1918).
21. For a detailed discussion of the defense of fair comment and criticism, see John Hallen, *Fair Comment*, 8 TEXAS L. REV. 41-100 (1929); See Notes, 26 MICH. L. REV. 709 (1927); 11 MINN. L. REV. 474 (1927); 62 HARV. L. REV. 1207 (1949); 37 GEO. L. J. 404 (1949).

his report to events which are recorded on the official records as having occurred and not to state another's opinion as to what occurred. In contrast, fair comment is a conclusion or opinion based on factual information.

Fair comment and criticism must be confined to matters of public interest or of general concern, as distinguished from matters of only private concern. Books, plays, and paintings which are exhibited to the public and which seek public approval, are matters of public concern and may be fairly commented upon or criticized. If the subject matter has not been published or does not invite public scrutiny, it is a private matter which may not be commented upon. For example, the personal correspondence of an author is ordinarily not subject to comment or analysis.

Other illustrative examples of subjects and persons which may be criticized are actors, public exhibits, architecture of public buildings, school football teams, clergymen in their ministerial duties, public officers, and candidates for public office.[22]

When an artist or author submits his work for public scrutiny or approbation, he must accept both praise and blame for the merits and weaknesses of his creations. The commentary may be caustic, severe, and bitter. The critic may use ridicule, sarcasm, exaggeration, and invective, as long as the criticism is relevant to the work being criticized.[23] However, the critic may not use his privilege of fair comment as a cloak for a malicious personal attack on the author himself.[24] To come under the protection of fair comment, the criticism must be "fair." The legal requirement of what is "fair" comment is not reasonableness but rather is an absence of malice.[25] A jury may conclude that his extreme criticism is prompted by personal malice rather than by the expression of an honest opinion; hence, when using invective, the critic should be aware of the risks involved.

Care must be taken to distinguish between comment and misstatement of fact. To be privileged, the facts upon which the citicism is based must be true or, if false, the critic's right to state them must be privileged. Comment is the expression of an opinion or conclusion which has a factual basis. Its legal justification rests on the "fairness" of the conclusions which were drawn from established facts. The facts upon which the opinion is based should be stated or be readily available to the readers of the critique. The comment should have some relation to the facts; however, the privilege is not lost merely because it expresses an opinion with which other reasonable people could not agree.[26]

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22. 33 AM. JUR. Libel & Slander §§ 163-168 (1959).
23. Hubbard v. Allyn, 200 Mass. 166, 86 N.E. 356 (1908).
24. Hoeppner v. Dunkirk Printing Company, 254 N.Y. 95, 172 N.E. 139 (1930).
25. Van Vechten Veeder, *Freedom Of Public Discussion,* 23 HARV. L. REV. 427 (1910).
26. RESTATEMENT, TORTS § 606 (1938).

The law extends its protection to comments—not to misstatements of fact. If the facts are described in a wholly misleading and slanted manner, and the reader is falsely induced to believe that a person's conduct is reprehensible or dishonorable, the commentator's remarks are libelous and are not privileged. On the other hand, if a writer accurately states the facts and infers, as a matter of opinion or belief, that the conduct is disgraceful or dishonorable, the words are privileged. To state a conclusion only without discussing its factual basis can give the reader the impression that the conclusion is a statement of fact; accordingly, the defense of fair comment may be forfeited. For example, if a writer were to state a true fact that a policeman is addicted to narcotics and conclude that because of this he is incompetent to be on the police force, the words are privileged as fair comment. However, if the writer merely states that the policeman is not competent to be a member of the police force, the words are not privileged; and, this is true even though the writer uses a phrase such as "in my opinion" or similar words indicating a belief or conclusion. The commentator should remember that the difference between fact and opinion is not only of black or white—there are varying shades of gray. And to the dismay of the commentator a jury may interpret the words as a misstatement of fact when they were intended as an opinion or a conclusion. An honest purpose or good intention alone will not be enough to excuse the author on the basis of fair comment. If the statement is unreasonable, malicious, unfair, or made in reckless disregard as to its truth or falsity, the defense of fair comment will evaporate.[27]

Although a substantial number of courts do not agree, the rule adopted by more than three-quarters of the states in the United States emphasizes that fair comment does not permit misstatement or falsification of facts, even though made without malice and in an honest belief that the words are true. This narrow rule of law has been applied to false statements even though made unintentionally, mistakenly, or accidentally.[28] About one-fourth of the states follow the broader view that if the other requirements of qualified privilege exist, the privilege includes even those statements which are not true.[29] These courts regard non-malicious comment or criticism as fair even though false statements of fact have been made. The application of this rule to criticism of public officials will be considered subsequently. This narrow or minority rule has been adopted by the U. S. Supreme Court and will gradually become

27. 33 AM. JUR. Libel & Slander §§ 163-169 (1959).

28. Washington Times Co. v. Bonner, 66 App. D.C. 280, 86 F.2d 836 (1936); Bowerman v. Detroit Free Press, 287 Mich. 443, 283 N.W. 642 (1939); See Annot., 110 A.L.R. 412 (1937), supplemented in Annot., 150 A.L.R. 358 (1944).

29. 110 A.L.R. 435 (1937), supplemented in Annot., 150 A.L.R. 362 (1944).

the overwhelming majority rule in the United States concerning criticism of public officials because of the recent decision in the *Sullivan* case. These decisions represent a dramatic reversal of the historical attitude that the actions of the sovereign were not subject to criticism, even when the words were true.

CRITICIZE THE SOVEREIGN?

Although the functions of government today are of primary concern to its citizens and therefore are the unquestioned subject of public inquiry, the privilege of criticizing affairs of state is of only recent origin. As a prerogative of the divine right of kings, the ruler's actions were regarded as beyond the question of his subjects. Criticism of the government was not only uninvited—it was not tolerated! To criticize the ruler or the government was to commit bot ha tort and a crime, punishable by the infamous Court of Star Chamber. The Star Chamber was abolished in 1641; however, the English Parliament continued to license publications until about 1694. Such prior restraint on publications was a formidable obstacle to freedom of speech and of the press.

Lord Holt's comments epitomized the pre-Revolutionary War attitude that acts of the government should not be freely and openly criticized. The proscribed commentaries included not only adverse criticism and untrue statements, but also words which were actually true:[30]

> To say that corrupt officers are appointed to administer affairs is certainly a reflection upon the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can exist for it is necessary for all governments that the people should have a good opinion of it.

Gradually, criticism of the government was tolerated provided the words stated were true; hence, truth, rather than qualified privilege, became the primary defense. The privilege of fair comment, already recognized as a valid defense concerning public offerings such as books, plays, literature, and art, was gradually extended to include criticism of public officers and candidates for public office. Unfortunately, the courts applied the same rules to criticism of public officers without emphasizing the differences in policy on which the rules were based.[31] This resulted in some inconsistency and confusion in the application of the fair comment rule.

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30. 14 STATE TRIALS 1095 (1704); And see Note, 10 N.Y.L.F. 249, 254 (1964).
31. Hallen, *Fair Comment, supra* note 21 at 53.

CRITICISM OF PUBLIC OFFICERS: A CONDITIONAL PRIVILEGE

Although a few courts have decided otherwise, the great weight of authority in the United States maintains that published statements concerning public officers, candidates for public office, and similar political matters are *conditionally* privileged.[32] When extending the fair comment rule to matters of public concern, the courts were forced to balance the interests involved. On the one side of the scale is the public interest in free discussion and interchange of ideas which requires that public officers and candidates be subject to criticism so that society will learn the truth concerning their conduct and qualifications for public office.[33] It has been held to be both the privilege and the duty of every citizen to fairly and impartially criticize the conduct and qualifications of public officials.[34] Indeed, the law has changed significantly since the days of Lord Holt when the government disallowed all criticism, including words which were true. On the other side of the scale is the right of a public servant not to have his reputation tarnished by false, unfair, or malicious statements. Although a public officer submits his qualifications and acts to public scrutiny when he seeks or holds public office, he should not be asked to bear the risk of unlimited defamation. Public service requires capable and honest men in its ranks; hence, it is argued, if no limits are placed on the extent to which they may be criticized, they may choose another calling and society will suffer a corresponding loss.

In the leading case of *Post Publishing Company v. Hallam*,[35] the court denied that a man who becomes a public officer must submit himself to untrue charges of disgraceful conduct:

> We think that not only is such a sacrifice not required of every one who consents to become a candidate for offfice, but to sanction such a doctrine would do the public more harm than good . . . . But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their character outweighs any benefit that might occasionally accrue to the public . . . .

The fears that worthy men will refrain from seeking public office if they are unduly criticized appear to be exaggerated. Fair comment on public matters has its limits, and no critic will be permitted by an antagonist to make defamatory remarks which he knows are untrue or malicious. The electorate should be given every possible opportunity to hear facts and comments about candi-

32. Baker v. Warner, 231 U.S. 588, 34 S.Ct. 175 (1913); Gandia v. Pettingill, 222 U.S. 452, 32 S.Ct. 127 (1911); Annot., 55 A.L.R. 860 (1928); 136 A.L.R. 547 (1942); RESTATEMENT, TORTS § 607 (1938); See generally, Notes, 15 HARV. L. REV. 159 (1902), 10 CALIF. L. REV. 84 (1921), 17 CALIF. L. REV. 693 (1929).

33. Pattangall v. Mooers, 113 Me. 412, 94 Atl. 561 (1915); and see RESTATEMENT, TORTS § 606, Comment C (1934).

34. Maidman v. Jewish Publications, Inc., 54 Calif. 2d 643, 355 P.2d 265 (1960).

35. 16 U.S. App. 652, 59 F. 530, 540-541 (1893).

dates and holders of public office. If a critic honestly believes that information which he possesses is true, he should not be deterred from disclosing it to the public because of fear of legal liability.[36] If the publisher is required to have reasonable grounds for believing that his words are true, there is little danger that unwarranted attacks on public servants or candidates will become the rule rather than the exception. After considering the interests protected on both sides of the scale of public policy, it is submitted that the needs of a free society demand that a public officer or candidate suffer an occasional injustice in order to encourage interested citizens to speak concerning matters of public importance. In any event, the number of lawsuits filed by candidates and by public officers is insignificant. This is probably due not only to the hazards which a plaintiff must face in proving his case but also to the unsympathetic attitude of society toward public officers and candidates who, it is believed, should be able to "take it" and "dish it out" without running to the courts for protection.[37] Included in the burden of criticism which the public officer must bear are non-malicious misstatements of fact.

MISSTATEMENTS OF FACT CONCERNING PUBLIC OFFICIALS

A substantial number of jurisdictions will not permit recovery of damages for derogatory statements concerning public officers and candidates for public office, assuming that the criticism is published in good faith, without actual malice, and with probable cause for belief that the words are true.[38] This liberal view has been adopted by a numerical minority of American courts and emphasizes the advantages to society of free and open discussion concerning its public servants and candidates for public office. A conditional privilege is extended to defamatory remarks based on misstatements of fact as to the qualifications of candidates for public office and acts of public officials. The basic philosophy of this view was succinctly stated by a legal scholar:[39]

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36. Note, 22 HARV. L. REV. 445, 446 (1909).

37. Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 876 (1949). The law of the press in many countries permits the person attacked to insert an immediate reply in the newspaper, thus using the same weapon as his attacker. In France, for example, the *Droit de Reponse* of the *Civil Code* gives the right of an immediate reply to defamatory statements. The reply may exceed the scope and length of the original defamatory statements, and provision is made for its publication by the newspapers. French Civil Code, article 13 (Act of July 29, 1881). For a discussion of this practice, see Richard Donnelly, *The Right of Reply, An Alternative To An Action For Libel*, 34 VA. L. REV. 867-900 (1948). In a recent article, Professor Willard Pedrick argues in favor of the right of reply to protect a person's reputation without recourse to the courts. See Pedrick, *Freedom Of The Press And The Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 603-608 (1964).

38. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908); Bailey v. Charleston Mail Assn., 126 W.V. 292, 27 S.E.2d 837 (1943); Annot., 150 A.L.R. 362 (1944); 110 A.L.R. 435 (1937); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962); Lawrence v. Fox, 357 Mich. 134, 97 N.W.2d 719 (1959); Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957).

39. Orrin B. Evans, *Legal Immunity For Defamation*, 24 MINN. L. REV. 618-619 (1940). Most of the legal scholars who have written on the subject have adopted this view. See George Chase, *Criticism of Public Officers and Candidates for Office*, 23 AM. L. REV. 363 (1889); Smith, *supra* note 16 at 115; Hallen, *Fair Comment, supra* note 21 at 61; Riesman, *supra* note 1 at 1314; Noel, *supra* note 37 at 897; Pedrick, *supra* note

> The doctrine of immunity rests on the policy that in given situations the importance of true information is so great that as an inducement to speech, protection will be given for bona fide communication *of what is false as well as what is true.* (Emphasis added)

Although truth is a defense, a commentator may hesitate to criticize suspected public evils if he must first be prepared to prove to a court that his charges are true in every detail. If the critic does not speak out, the dishonorable or incompetent official will escape public scrutiny, and the quality of candidates seeking public office may deteriorate. In a significant case which affirmed the dismissal of a libel suit by a Congressman based on a newspaper article which charged him with anti-Semitism, Judge Edgerton said:[40]

> Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to man's mental states and processes, are inevitable . . . . *Whatever is added to the field of libel is taken from the field of free debate.* (Emphasis added)

In the opinion of James Madison, the right of free public discussion and debate concerning the conduct of public servants was a fundamental principle of the democratic form of government in America. He emphasized that "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."[41] Criticism of public servants should not be restrained merely because their reputations may be tarnished or because the criticism is effective. If he must guarantee the literal truth of assertions of fact because of possible libel suits, the critic may impose what amounts to "self-censorship" in his publications; accordingly, the potential critic of official conduct may not publicly state his views at all or be so careful in his choice of words that the full impact of his criticism is lost. A citizen who has an interest in public affairs should not be held strictly accountable for

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37 at 588. The opposite view is supported by one legal scholar. See Veeder, *supra* note 25 at 419; and, the American Law Institute followed the minority view in its tentative draft but finally adopted the majority view in its final revision. RESTATEMENT, TORTS § 598, Comment A (1938), reversing position taken in RESTATEMENT, TORTS, TENT. Draft 13, § 1041 (2) (1936).

40. Sweeney v. Patterson, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458 (1942). See also, Notes 36 ILL. L. REV. 791 (1942); 55 HARV. L. REV. 298 (1941).

41. 4 ANNALS OF CONGRESS, 934 (1794).

misstatements of fact if he has tried to discover the truth and then publishes his statement in good faith and in reasonable belief that his words are true.[42]

The political philosopher John Stuart Mill contends that even false statements may significantly aid public discussion and debate because they accomplish "the clearer perception and livelier impression of truth, produced by its collision with error."[43] A critic should, however, have substantial evidence available before he speaks because, if sued, he must prove that the defamatory and untrue statement was made in good faith and in reasonable belief that it is true. If the defendant must establish the literal truth of his remarks, not only will false statements be restrained but also may true words will remain unspoken because of the hazards of convincing a dubious jury. The publisher's risks are magnified by the rule in some states that truth is a defense only if the statement is made "in good faith and for justifiable ends;" accordingly, the words may not be motivated by express malice.[44] If literal truth is made a strict, inflexible requirement, freedom of public discussion must deteriorate. Although an unrestrained press may become debauched, this appears to be a remote possibility. Instead, it seems likely that critics will temper their remarks with a sense of responsibility that will justify the trust which has been placed in them.

The weight of judicial authority in the United States maintains that misstatements of fact concerning public officials and candidates are not shielded by the defense of privilege. False statements of fact may not be made regardless of good faith or reasonable belief in the truth of what is stated. The rule applies to public servants, to candidates for public office, and to other matters of public concern.[45] Although a newspaper or individual may criticize a political candidate and discuss matters of public importance even though the words are defamatory, immunity applies only to opinion and comment, not to statements of untrue facts. It is argued that when untrue words receive widespread publication, the injury to an individual's reputation would surpass any benefit to be derived from public disclosure. Furthermore, trustworthy and capable men will not seek public office because they fear injury to their reputations;

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42. Bailey v. Charleston Mail Assn., 126 W. Va. 292, 27 S.E.2d 837 (1943); and see Comment, 48 MARQ. L. REV. 128, 129 (1964).

43. MILL, ON LIBERTY 15 (Oxford: Basil Blackwell Ltd. 1946). And see, *Areopagitica*, 32 GREAT BOOKS OF THE WESTERN WORLD, 389 (Hutchins Ed. 1952).

44. The applications of this rule are discussed by Roy Robert Ray, *Truth: A Defense To Libel*, 16 MINN. L. REV. 43-69 (1931); and Robert H. Wettach, *Recent Developments In Newspaper Libel*, 13 MINN. L. REV. 21-38 (1928).

45. Post Publishing Co. v. Hallam, 59 F. 530 (1893) and Post Publishing Co. v. Maloney, 50 Ohio St. 71, 33 N.E. 921 (1893) are the leading cases supporting this view; Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947); A.S. Abell Co. v. Kirby, 227 Md. 267, 176 A.2d 340 (1962). And see 33 AM. JUR. Libel & Slander § 169 (1959); Noel, *supra* note 37 at 896; Note, 22 HARV. L. REV. 445 (1909). The standards of libel *per se* concerning members of Congress are discussed in Note, 17 TENN. L. REV. 267 (1942).

hence, society will lose the benefit of their services, impairing the quality of public office. It is also argued that freedom of speech is not restricted since the right to speak freely and openly does not include license to disseminate falsehoods in the guise of freedom of expression. Mr. Justice Holmes, while on the bench of the Supreme Court of Massachusetts, spoke in favor of this view:[46]

> What is privileged, if that is the proper term, is criticism, not statement, and . . . if . . . a person . . . takes upon himself to allege facts otherwise libelous he will not be privileged if those facts are not true.

There are practical arguments to support this view.[47] If a newspaperman has too much latitude to misstate facts without fear of legal reprisal, it may result in poor reporting and careless editing. Under the pressure of a deadline, a newspaperman may permit untrue and defamatory words to "slip by." If a retraction is subsequently printed, it may be hidden in an obscure part of the newspaper where it will go unnoticed by most readers, or if the retraction received publicity equal to that of the original defamatory statement, it may be ignored by those who eagerly read the defamatory words. Although freedom to disseminate facts without the concomitant risk of legal liability would encourage newspaper "crusades" for good government, such matters also arouse public interest and increase newspaper circulation. It has been suggested that some libel suits result from an attempt to increase circulation at the expense of an individual.[48] A publisher may gamble on a lawsuit because the risk can be distributed among advertisers and readers,[49] or passed on to an insurance company in the form of libel insurance. A final argument for the majority view is that a licentious publisher may bring financial strength to bear against a plaintiff whose reputation has been unjustly tarnished by the publication of false statements. When confronted with a formidable battery of expert trial lawyers and with one-sided editorials and publicity, a courageous person may give up in despair. If the injured plaintiff is a political candidate, his tarnished reputation may not be restored until many months or even years after the election because of the extreme length of modern trial dockets. Libel is no easy matter to prove against a recalcitrant defendant. Although the public interest in free and open discussion may require an occasional injury to an individual's reputation, these significant arguments should not be swept under the rug of complacency.

When challenged, the defendant may prove the truth of his

46. Burt v. Advertiser Newspaper Co., 154 Mass. 238, 243, 28 N.E. 1, 4 (1891).
47. Note, 37 GEO. L. J. 404-417 (1949).
48. Note, 4 GEO. B. J. 66, 68 (1941). Suggestions for reform of the libel laws are discussed by Richard Donnelly, *The Law Of Defamation: Proposals For Reform*, 33 MINN. L. REV. 609-633 (1949).
49. Note, 51 YALE L. J. 693, 695 (1942).

statements or plead "fair comment."[50] Finally, it should be remembered that the violence or excessiveness of the language used may support an inference of malice.[51] Express malice, if shown to exist, will rebut the defense of fair comment; therefore, excessive publication is unprivileged defamation.

When facts about public servants and candidates are misstated, the defendant usually is a newspaper or publishing company. When applying the rule of conditional privilege, the courts make no distinction between private citizens and newspapers; hence, it is assumed that both newspapers and individual citizens have the same privilege to comment on public affairs. However, a newspaper's privilege of fair comment does not exceed that of an individual merely because of the constitutional guaranty of freedom of the press.[52] The attitude of the courts placing newspapers on the same footing with individuals as to the conditional privilege of fair comment seems justified. Although publication of defamatory statements will be more widespread when done by a newspaper, this is not considered to be excessive publication and is justified since newspapers are society's principle means of keeping the public informed about its public servants. Incorrect statements of fact are not the only source of danger; fair comment has additional limitations which should be recognized by the journalist.

LIMITATIONS ON FAIR COMMENT: PRIVATE CHARACTER

Although he is justified in publishing unflattering remarks concerning a candidate's qualifications for public office or his conduct in office since these are matters of public concern, should the writer be permitted to attack the official's private character? The privilege of fair comment is based on the public interest. It can be argued that matters of merely private concern are no one's business. A critic should not be permitted to attack an official's private affairs, as distinguished from his public affairs. As stated in a leading case,[53] "In our opinion, a person who enters upon an office, or becomes a candidate for one, no more surrenders to the public his private character, than he does his private property."

An official should not have his private life exposed to unmerciful public scrutiny merely because he is a public servant; however, when his private character has public significance, it is another matter. When his private character may affect his qualifications

50. In England, it is customary for the defendant to use the "rolled-up plea," which alleges that the statements of fact which appeared in the publication are true, and all other words are bona fide fair comment upon these facts, as stated. In America, this plea is rarely used except in New York. It merely invokes the defense of fair comment and the defendant must still prove the truth of his statements of fact. For a discussion of the "rolled-up plea," see Note, 49 COLUM. L. REV. 583 (1949).

51. Bausewine v. Norristown Herald, Inc., 351 Pa. 634, 41 A.2d 736 (1945); Note, 40 HARV. L. REV. 501 (1927).

52. Bailey v. Charleston Mail Assn., 126 W. Va. 292, 305-306, 27 S.E.2d 837 (1943).

53. Post Publishing Co. v. Maloney, *supra* note 45 at 71.

or fitness for public office, the public official's personal affairs become public affairs. The remarks of Justice Burch are a favorite quotation:[54]

> . . . a candidate must surrender to public scrutiny . . . so much of his private character as affects his fitness for office . . . but . . . the people have good authority for believing that grapes do not grow on thorns nor figs on thistles.

The early cases emphasized that a person's private life should not be subjected to the public limelight.[55] The privilege of fair comment, according to most courts, does not protect the publisher of libelous attacks on the private character of public servants.[56]

The argument that a person's private life should be open to public inquiry when it has direct bearing on his official qualifications for public office is impressive.[57] For example, if a person has a past record of homosexuality he should not be entrusted with military defense secrets, and a critic who exposes this fact should be protected under the rules of fair comment. It seems that the rules of fair comment should be enlarged to include statements concerning the private affairs of public servants provided the charges have significance as to the person's fitness to hold a position of public trust. If the publication is reasonably based on fact, both private and public interests would be protected.

LIMITATIONS ON FAIR COMMENT: MOTIVES, MORALS, AND CRIMES

When discussing the conduct of a public servant, should a critic be permitted to speculate on what motivation prompted the official to act as he did? It would seem to be within the realm of fair comment not only to discuss what a public servant does but also what motives are behind his actions. For example, suppose a state senator voted against a proposed bill to increase the size of relief payments to the unemployed. A critic published a statement which imputed the senator's motives in voting against the bill to a dislike of minority groups, which would have been the principle beneficiaries of the measure. In fact, the senator's motive in voting against the bill was not racial prejudice but rather concern for the cost of the plan and doubts regarding its ameliorative aspects. To allow a critic to impute dishonorable motives to a public official's conduct may impugn his honesty and fitness for public office. On the contrary, if the scope of fair comment is delimited by forbidding commentary concerning the possible motives behind

54. Coleman v. MacLennan, *supra* note 11 at 739.
55. Post Publishing Co. v. Maloney, *supra* note 45 at 71.
56. Newby v. Times-Mirror Co., 173 Cal. 387, 160 P. 233 (1916); Van Lonkhuyzen v. Daily News Co., 195 Mich. 283, 161 N.W. 979 (1917); Annot., 55 A.L.R. 863 (1928).
57. Scholarly opinion supports this view. See Noel *supra* note 37 at 888; Evans, *supra* note 39 at 619; Hallen, *Fair Comment*, *supra* note 21 at 81-86; Riesman, *supra* note 1 at 1289; Pedrick, *supra* note at 37 at 589.

official conduct, freedom of public discussion would be restricted. In effect, the courts are saying to the publisher, "you have full liberty of free discussion provided, however, you say nothing that counts."[58] The courts are in conflict concerning the imputation of corrupt or unworthy motives to public officials engaged in the performance of their public duties. Some courts treat such allegations as statements of fact and not comment. Other courts exclude such statements from the defense of fair comment by saying they are not concerned with the public interest. Both rules impose on a defendant who has published defamatory remarks an almost impossible burden of proving that his words were justified. The critic who attributes dishonorable or corrupt motives to a public official risks an expensive libel suit and will receive no protection from the privilege of fair comment. The English courts and a few American jurisdictions have adopted a sensible rule which permits the defense of fair comment provided there are reasonable grounds for making the allegations.[59] An English jurist's remarks are worth quoting:[60]

> . . . a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule . . . base, sordid, and wicked motives unless there is . . . ground . . . that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.

It is submitted that the boundaries of fair comment should include allegations of motive if the critic's words, which represent his honest opinion, are based on reasonable grounds.

In the United States, the weight of judicial authority does not extend the fair comment defense to untrue allegations of criminal acts by public officers.[61] A substantial minority of courts allow such statements to be made in the public interest when the publisher honestly and reasonably believes his words to be true.[62] Similarly, accusations of immorality by public servants are not privileged.[63] It is submitted that when allegations concerning criminal acts, immorality, and corrupt motives are added to forbidden commentary concerning a public official's private life and the require-

58. Quoted from the remarks of Mr. Justice Burch in Coleman v. MacLennan, *supra* note 11 at 738.

59. Peter Walker, Ltd. v. Hodgston, 1 K. B. 239, 253 (1909); Tanzer v. Crowley Press Publishing Co., 240 App. Div. 203, 268 N.Y. Supp. 620 (1934). Scholarly opinion supports this view. See Veeder, *supra* note 25 at 432; Hallen, *Fair Comment, supra* note 21 at 75; Smith, *supra* note 16 at 126; Noel, *supra* note 37 at 887.

60. Campbell v. Spottiswoode, 3 B. & S. 769, 770, 122 Eng. Rep. 288, 290 (1863).

61. Williams v. Standard Examiner Pub. Co., 83 Utah 31, 27 P.2d 1 (1933); 33 AM. JUR. Libel & Slander § 169 (1959).

62. Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1 (1921); and see Hallen, *Fair Comment, supra* note 21 at 76-80, in which the authorities are collected on a state-by-state basis.

63. Otero v. Ewing, 162 La. 453, 110 So. 648 (1926); Annot., 150 A.L.R. 360 (1944).

ment that facts cannot be misstated, not much is left to criticize. However, the *Sullivan* case will undoubtedly have significant impact on these traditional rules of privilege and fair comment.

MR. JUSTICE BRENNAN SPEAKS FOR THE COURT

In *New York Times* v *Sullivan*,[64] the majority opinion was based primarily on a broad interpretation of the rights of freedom of speech and of the press. Mr. Justice Brennan's words set the tone of the decision:[65]

> . . . we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open; and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

The Court denied that the constitutional guaranty of freedom of speech and of the press was forfeited merely because some of the words criticizing public officials were false. Quoting the words of James Madison,[66] the Court said: "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."

The First Amendment does not insist on the literal truth of the publisher's words; hence, ". . . the truth, popularity, or social utility of the ideas and beliefs which are offered . . ."[67] are not the test of constitutional protection. Nor should the burden of proving the literal truth of his statements be placed on the speaker. The Court emphasized:[68]

That erroneous statement is inevitable in free debate, and

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64. The case involved Commissioner L. B. Sullivan, who supervised the police department in Montgomery, Alabama. He filed civil suit against four Negro clergymen from Alabama and the *New York Times* because of a libelous advertisement published by the *Times* on March 29, 1960. Plaintiff Sullivan contended that because of untrue statements which appeared in the full-page editorial advertisement, his reputation was unjustly tarnished. An Alabama trial court awarded damages of $500,000 to the plaintiff. On appeal, the lower court's judgment was affirmed by the Supreme Court of Alabama. 273 Ala. 656, 144 So. 2d 25 (1962). The case was subsequently appealed to the United States Supreme Court.

The advertisement praised the policy of non-violence advocated by Dr. Martin Luther King, Jr. and the success of the Negro "sit-ins." It did not specifically mention the plaintiff by name; however, he contended that certain words, specifically the word "police," referred to him and therefore was defamatory to him.

It is significant to observe that some of the statements which appeared in these two paragraphs were false, or at least inaccurate, descriptions of what actually occurred. For example, the Negro students sang the National Anthem on the State Capitol steps and not "My County, 'Tis of Thee," and that the entire student body , as stated, did not protest the expulsion of students; rather, only a majority of the student body protested. The United States Supreme Court granted petitions for *certiorari* because of the significant constitutional issues involved.

The basic constitutional issue involved in the *Sullivan* case was the extent to which a state's power to award damages to a public official against critics of his official conduct is delimited by the constitutional guaranty of free speech and free press. The U. S. Supreme Court reversed the decision of the Alabama Supreme Court because of a failure to safeguard freedom of speech and of the press required by the first and fourteenth amendments to the U. S. Constitution.

65. New York Times v. Sullivan, *supra* note 3 at 270.
66. 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876).
67. 376 U.S. at 271.
68. *Id.* at 271-272.

> that it must be protected if the freedoms of expression are to have the breathing space that they need to survive . . . . Just as factual error affords no warrant for repressing speech that would otherwise be free, the same is true of injury to official reputation.

Nor did the court exclude criticism of the courts from its sweeping interpretation. "If judges are to be treated as 'men of fortitude able to survive in a hardy climate' "[69] they too must be subject to harsh criticism. The unflattering criticism directed against public servants may be harsh indeed:[70]

> Criticism of (government officers') official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

The attitude of the Court concerning the basic issues of freedom of speech and of the press was summarized by quoting its own words in *Cantwell* v *Connecticut*:[71]

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The Court emphasized that numerous expensive libel judgments against a newspaper or other publisher could so frighten would be critics that freedom to criticize would be inhibited.

> Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive . . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.[72]

The Suprene Court declared invalid the contention of the Alabama Supreme Court which held, in effect, that criticism of governmental actions can be interpreted as a personal attack on the public official himself even though no personal reference is made

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69. *Id.* at 273.
70. *Ibid.*
71. 310 U.S. 296, 310, 60 S. Ct. 900, 906 (1940).
72. New York Times v. Sullivan, *supra* note 3 at 278-279; and see Note, 42 TEXAS L. REV. 1080, 1083 (1964).

to the government officer except by way of attack on his official position. The Court emphasized that:[73]

> . . . by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel of the officials of whom the government is composed . . . [raises] . . . the possibility that a good-faith critic of government will be penalized for his criticism [and this will] . . . strike at the very center of the constitutionally protected area of free expression.

The Court concluded that an otherwise impersonal attack on governmental actions cannot be libelous to an official responsible for those actions.

The High Court adopted a rule of law which prohibits a public servant from recovering damages for untrue defamatory statements relating to his official conduct unless "actual malice" is shown to exist. The words "actual malice" are interpreted to mean that the publisher knows that his statements are false or made in reckless disregard as to their truth or falsity. The Court thereby adopted the minority view in the United States concerning criticism of public officials. In reviewing the record of the lower court, the Supreme Court concluded that the evidence did not warrant a finding of actual malice or bad faith by the *Times*. In the opinion of the Court, the *Times* was negligent in not discovering the false statements; however, such carelessness was not the equivalent of recklessness, as required to establish actual malice. Was the Court's decision sound? An analysis of the underlying issues involved may help to place the case in a proper perspective.

ANALYSIS

The U. S. Supreme Court has, in effect, ruled that citizens and newspapers have a conditional privilege to comment on the official conduct of public servants. False statements of fact are protected by the Constitution as long as not prompted by malice. It is submitted that the Court's decision is both wise and sound because it removes a major obstacle to untrammeled public discussion.

By permitting numerous and costly judgments to be awarded public servants under the cloak of libel, a state can threaten the fundamental existence of freedom of speech and of the press. If newspapers and other publishers in the United States are courageous enough to publish unflattering statements concerning our public servants' activities a state can, through its libel laws, intimidate and harass them into silence. When the *Sullivan* case was being argued, eleven other libel suits were pending seeking damages of

73. New York Times v. Sullivan, *supra* note 3 at 292.

$5,600,000 against the *Times*. Furthermore, five other suits asking $1,700,000 in damages had been filed against the Columbia Broadcasting System. Plaintiff Sullivan had been awarded $500,000 by the Alabama courts. As implied by Mr. Justice Black in his concurring opinion, feelings of hostility toward "outside agitators" who desired integration may have had ". . . at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages."[74] In a news story which appeared in the *New York Times* on April 4, 1963, it was reported that seventeen libel suits which sought more than $228,000,000 in damages were pending in southern courts. Although these cases and the *Sullivan* case had racial overtones which aroused public feelings and hostility, such damage suits are by no means limited to racial controversies. The libel laws can be used to muzzle criticism of our public servants in any kind of controversy. For example, in a widely-publicized case, the Curtis Publishing Company was sued for publishing statements which charged an athletic director with conspiracy to fix a football game. A jury awarded the plaintiff a verdict for $3,000,000. The judge gave the plaintiff the choice of a new trial or a reduced verdict of $460,000, which was accepted. In another case, a distinguished newspaper columnist and Hearst Publications were held legally responsible to pay $175,000 punitive damages.[75]

If the power of State courts can be used to award extensive judgments against critics of the political status quo, then state governments would have powers which previously had been denied the Federal Government. When the Sedition Act of 1798[76] declared it to be a crime to criticize the Federal Government or its officials, citizens realized that Congress had acted without wisdom, and the Act came to an ignominious end. That brief affront to the dignity of the First Amendment has never been repeated by the Federal Government.[77] Nor should such power be extended to the states because freedom of speech and of the press, protected against abridgement by the Federal Government by the First Amendment, is also protected against arbitrary invasion by state action through the Fourteenth Amendment. It should be emphasized that a government is not merely an abstract concept but is also those flesh and blood people who hold its offices and transact its affairs. Public servants must be subjected to the harsh, bitter, unfair and sometimes false criticism of their constituents if our

74. *Id.* at 294.
75. Reynolds v. Pegler, 123 F. Supp. 36 (1954).
76. Act of July 14, 1798, 1 Stat. 596.
77. However, an occasional attempt is made to repeat our errors of the past. A proposal was made in November 1964, by Representative Walter Rodgers, D-Texas, to adopt a federal libel law to prevent lies and smears in political campaigns. Although this proposal was made in good faith, it is a sobering reminder of the opprobrious Sedition Act of 1798.

democracy is to survive. Any question concerning the freedom to criticize public officials must be decided in favor of unfettered public inquiry.

What does the *Sullivan* case mean to journalists and to other potential critics of official conduct? Have the newspapers and other commentators been given a free rein to discuss public matters and to attack public officials? Can journalists now "shoot from the hip" by publishing defamatory statements first and then, only after the derogatory words appear in print, investigate the accuracy and truth of their charges? It is the writer's opinion that such an attitude is fraught with danger! Even a cursory analysis of the decision will disclose many hidden dangers which lurk in the dark shadows of the law.

Editorial comment in some newspapers gives the impression that "anything goes" when discussing matters of public concern.[78] The attitude seems to be that a journalist who publishes comments concerning public officials and candidates need not be bothered with the chore of first verifying the accuracy of the assertions of fact. Does the *Sullivan* decision actually permit slipshod journalism in the guise of freedom of the press? It does not. According to the majority opinion, a public official may not recover damages for defamatory untrue words ". . . relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[79] Mere carelessness in failing to verify the accuracy of the facts before publication would constitute ordinary negligence which seems to be excluded from the rule imposing liability. On the other hand, should misstatements of fact be published without reasonable grounds for believing the truth of the words, a jury may decide that the journalist acted in "reckless disregard of the truth or falsity" of the statements. The courts have not hesitated to find actual malice in situations where the defendant did not have reasonable grounds for believing his words to be true. Although the rule enunciated in the *Sullivan* case protects unintentional factual errors, if a critic does not investigate the truth and surrounding circumstances of his words, a dubious jury may conclude that he acted without probable cause. In the *Sullivan* case, the manager of the Advertising Acceptability Department testified that neither he nor anyone else investigated the accuracy of the defamatory advertisement by verifying the facts in the newspaper files. Nevertheless, the Court did not conclude that the *Times* acted in reckless disregard concerning the truth or

78. For example, see the statements which appeared in the Milwaukee Journal, Mar. 13, 1964, § 1, p. 18, col. 1.

79. New York Times v. Sullivan, *supra* note 3 at 280.

falsity of the advertisement. The Court decided instead that the *Times* was guilty of ordinary negligence which was not flagrant enough to constitute actual malice. A danger exists that the press will interpret the *Sullivan* decision to mean that all material which newspaper publish need not be accurate. However, the decision was not that broad in scope.

The defamatory material originated from an outside source. Journalists employed by the *Times* did not write the defamatory words. On the contrary, the words were written by a customer of the newspaper and were in the form of a paid advertisement. Although a newspaper owes no obligation to publish the defamatory words of an outsider, it seems that the High Court tacitly recognized that the source of the defamatory words was not the *Times* itself. The *Sullivan* case must be strictly limited to its facts; therefore, although the rule does condone inadvertent mistakes, it is likely that it also requires that newspapers investigate the truth of their factual assertions. The courts traditionally emphasize the word "fair" when discussing the privilege of fair comment, and it is undoubtedly true that this practice will continue. Journalists should not interpret the *Sullivan* case to mean an end to the era of responsible journalism and the beginning of an era of a perfunctory press.

Are all public officials fair game for fair comment? The High Court concluded that a public official must prove the existence of actual malice in order to recover damages for libel against critics of his official conduct. But who, it may be asked, is a public official? The Court leaves the answer to this question in serious doubt. Webster's Dictionary defines an "official" as one who "holds an office, or position of authority." According to this definition, anyone in office or in an authoritarian position can be criticized but not those who are not already in office. Does this mean then an incumbent public official can criticize his opponent while the latter is denied the same privilege of fair comment merely because he seeks public office? Although the Court does not specifically answer this question, it does cite cases in a footnote in a manner which indicates that the same rule does apply to candidates for public office.[80] It seems doubtful that the Court intended to limit the rule to people who actually hold public office. An obvious question to be asked is whether the rule includes only significant public officials or whether lesser public officers are also included? It seems safe to assume that the mayor, governor, President, and candidates for public office can be criticized; however, does the rule apply with equal vigor to the municipal garbage collector or to the local dog catcher? The Court does not answer this question

80. *Id.* at 284.

when it speaks of "public officials." Additional cases are needed to define what the Court has in mind. An additional problem arises when one asks what is meant by "official conduct"? The High Court has not defined this term, and critics must merely guess what this vague constitutional standard really means. In any event, the press should be cautious in applying too broad an interpretation to these uncertain terms, under penalty of an expensive libel suit.

The High Court has tacitly encouraged a uniform rule in the United States concerning criticism of the conduct of public officials. Although the case could have been disposed of on the basis of its facts, the Court instead decided the case on broad constitutional grounds and adopted a view which has been repudiated by a numerical majority of our state courts. Obviously, the Court recognized the need for uniformity in the application of our libel laws among the individual states. A final question to be answered is whether the Court did not go far enough in extending constitutional protection to public statements?

Mr. Justice Douglas joined Mr. Justice Black in suggesting that the press be granted an absolute privilege when criticizing the official acts of public servants. In the words of Mr. Justice Black:[81]

> An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment. I regret that the Court has stopped short of this holding [which is] indispensable to preserve our free press from destruction.

In a separate concurring opinion, Mr. Justice Goldberg argues that since judges, legislators, and executive officers, have an absolute privilege to comment on matters concerning their official duties, the same privilege should be extended to newspapers and to the general public. This means that critics who misstate facts would not be responsible even if actual malice prompted the statement. In the writer's opinion, the Court's decision to extend only a conditional privilege to critics of public affairs seems justified. A conditional privilege requires the publisher to have reasonable grounds for believing his statements to be true. Defamatory words which are malicious and untrue are not privileged. In contrast an absolute privilege is extended to legislative and judicial proceedings as long as the words are pertinent to the issues. It is based on the principle that the public interest demands that certain

81. New York Times v. Sullivan, 376 U.S. 254, 297, 84 S. Ct. 710, 735 (1964). This viewpoint is not new. See Robert H. Wettach, *Recent Developments In Newspaper Libel*, 13 MINN. L. REV. 38 (1928). See generally, Leon Green, *The Right To Communicate*, 35 N. Y. U. L. REV. 903-924 (1960); Robert A. Leflar, *The Free-ness of Free Speech*, 15 VAND. L. REV. 1073-1084 (1962); Clarence Morris, *Inadvertent Newspaper Libel and Retraction*, 32 ILL. L. REV. 36-49 (1937); Joel F. Handler & William A. Klein, *The Defense Of Privilege In Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44-79 (1960); Arno C. Becht, *The Absolute Privilege Of The Executive In Defamation*, 15 VAND. L. REV. 1127-1171 (1962); Note, 48 CORNELL L. Q. 199 (1962).

people be permitted to speak or write fearlessly without fear of liability for damages. The privilege is narrowly construed and includes statements which are false, defamatory, and malicious. Although an occasional injury to a person's reputation must be tolerated for the public good, the reputations of all public officials should not be continuously sacrificed on the altar of free press. If a publisher could make false and malicious defamatory statements with impunity and without any probable cause for believing his words to be true, then the era of a responsible press would be at an end. If an absolute privilege were extended to journalists and to other critics of public officials, untrue, malicious, unverified, and even fabricated allegations of misconduct could be made with impunity. These liberal justices apparently believe that our basic freedoms and the national interest would be best served by constant internecine wars of defamation. It is difficult to see how unhindered defamation can preserve unfettered freedom of speech and freedom of the press. It is submitted that a qualified privilege is sufficient to shield a commentator's remarks in every instance except where the words are malicious—in that case, the words do not deserve protection.

CONCLUSION

By enlarging the privilege of fair comment and by narrowing the permissible scope of libel, the United States Supreme Court has struck a significant blow in favor of untrammeled public discussion and inquiry. It has repudiated the ancient and obsolete precept that "the governed must not criticize their governors," and has embraced instead a tolerant attitude toward freedom of speech and freedom of the press. An incorruptible and dedicated press will not only accept the challenge but will justify the responsibility with which it has been entrusted. The High Court's decision in the *Sullivan* case has heeded the remonstrance of counsel in the historic Trial of John Peter Zenger two-hundred and thirty years ago. These prophetic words will echo across our great land whenever free inquiry and public discussion is threatened:[82] "Men who injure and oppress the people under their administration [and] provoke them to cry out and complain [should not be empowered] to make that very complaint the foundation for new oppressions and prosecutions."

82. From the words of Andrew Hamilton, 17 HOWELL'S STATE TRIALS 675, 721-722 (1735).