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FREEDOM OF THE PRESS AND THE LAW OF LIBEL: THE MODERN REVISED TRANSLATION

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Freedom is an unstable compound. Because one man's liberty can be another man's constraint, because conditions of life in our dynamic society continue to change and because freedom at large is grand but elusive in the particular, the task of formulation is never ending. Despite the difficulties, we are committed to the task and we believe that history will vindicate our faith in a society which undertakes to submit for participating individual decision a multitude of issues concerning the framework for life. In the economic sphere as workers, as managers, as investors, and as consumers, in the social sphere as members of a variety of social units, groups, and circles, and in the political sphere as citizens, voters, office seekers, and public officials our society undertakes to provide an opportunity for individual and collective decisions. The extent to which the individual is enabled in fact to determine his own destiny and to participate in shaping the social destiny is much affected, of course, by the practices of economic, social, and political institutions, by pervasive attitudes and in our society to some extent by the law.

One of the essentials to this democratic way of life is a flow of information enabling the individuals comprising society to discharge their various decisional responsibilities—to make up their minds. But the sheer mass of available information, the certain knowledge that part of what may pass for information is misinformation, false and sometimes mischievous, clogging the rational processes of public debate and threatening unwarranted damage to individuals, calls for some mechanism to secure a minimum standard of responsibility in the transmission of information. The formulation of the minimum standard has quite generally been assigned to the law and in the common-law world (with some notable ex-

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ceptions in the realms of commerce[1]) to the courts. The task of balancing the societal interest in the free flow of information against the interest in securing responsibility in dissemination of information and in protecting individual reputation from unwarranted injury is not an easy one. Nor for that matter has the common-law world's experience with this aspect of the law, the law of libel and slander, been a particularly happy one.

Operating in modern times with the money judgment sanction on the civil side as the principal mechanism, the courts have not generated great enthusiasm or public acclaim for their handiwork. A handful of claimants jubilant with huge judgments may understandably acclaim the law of libel as the palladium of liberty.[2] But the press does not join the celebration and for that matter there has been considerable misgiving about the law of libel in less directly interested circles.[3] The difficulties of translating injury to reputation into money damages at all, the latitude enjoyed by the defense in libel litigation in the United States, and the imposition of personal liability for unintended slights are some features of the common-law system that have occasioned criticism.

More recently there has been a growing appreciation of the significance of the increasingly national nature of our media of communication. News of politics, of business, of education, of fashion, and a variety of topics is increasingly national news. To have the standards of respon-

[1] The prohibitions against using the federal mails for fraudulent schemes 62 Stat. 763 (1948), 18 U.S.C. § 1341 (1958) and 39 U.S.C. § 4005 (1958), the regulation of securities offerings under the Securities Act of 1933, 48 Stat. 77, 15 U.S.C. § 77e (1958), and its later companion pieces, and the prohibition against introduction of false advertising into the mails and into commerce 52 Stat. 114 (1914), 15 U.S.C. §§ 52-53 (1958) with the FTC cast in the censor's role come to mind as illustrations of the proposition that on the commercial side there are significant statutory limitations on the freedom of communication.

[2] Among recent record libel judgments in addition to the Times award are Butts v. Curtis Publishing Co., N.Y. Times, April 8, 1964, p. 48, col. 2 (federal district judge denies motion for new trial in case where jury verdict for $3,000,000 scaled down to $460,000 as an alternative to a new trial; the incident involving a charge that an athletic director had conspired to rig a football game; two other claimants with respect to the same incident are reported to have settled for $300,000); Reynolds v. Pegler, 123 F. Supp. 36 (S.D.N.Y. 1954), aff'd, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955) (well known columnist and Hearst publications subjected to liability for $1 actual damages and $175,000 punitive damages); Chagnon v. Union-Leader Corp., 103 N.H. 426, 174 A.2d 825 (1961) ($99,000 award sustained); Faulk v. Aware, Inc., 19 App. Div. 2d 464, 244 N.Y.S.2d 259 (1st Dep't 1963) (award of $3,500,000 reduced to $400,000 compensatory damages plus $150,000 punitive damages). For other cases, see Annot., 35 A.L.R.2d 218, 237 (1954). A news story in the New York Times April 4, 1963, p. 12, col. 3 by John Herbers reports that 17 libel actions pending in the South and growing for the most part out of racial tension seek a total of $288,000,000 in damages. It is plain that libel claimants are beginning to shoot for the moon. For discussion of the English law, see Samuels, "Problems of Assessing Damages for Defamation," 79 L.Q. Rev. 63 (1963).

[3] Chaffee, Government and Mass Communications 95-117 (1947); Courtney, "Absurdities of the Law of Libel and Slander," 36 Am. L. Rev. 552 (1902); Donnelly, "The Right of Reply: An Alternative to an Action for Libel," 34 Va. L. Rev. 867 (1948); Leflar, "Legal Remedies for Defamation," 6 Ark. L. Rev. 423 (1952); Riesman, "Democracy and Defamation: Fair Game and Fair Comment," 42 Colum. L. Rev. 1085, 1282 (1942).

sibility hammered out on a states' rights basis when communications are disseminated to one Union is at least anomalous. The anomaly has been particularly disturbing with respect to the treatment in national communication media of public discussion of political matters. There are some hard questions to be resolved in the formulation of libel law and the balance between the interest in the free flow of information and the public interest in reasonable accuracy and in the protection of individual reputation from useless injury is not an easy one to strike. To have the balance struck not once but fifty times in as many states is ill calculated to serve the national interest.[4]

The problem has been dramatized over a period of years by the question of the legal responsibility of the press for well-meaning publication of false charges against public figures. In the United States the state courts sharply divided on the treatment to be given the publisher in such cases. All the courts agree that if the facts are accurately reported, then a rather wide range of adverse comment is permissible under the so-called "fair-comment" rule.[5] But if the publisher reports as adverse fact that which is false, though even in good faith, the majority of the courts in this country committed on the question have found the balance to lie on the side of subjecting the publisher to liability in favor of the victim of the baseless attack and against granting a license to the press in such cases.[6] As Justice Holmes said for the Massachusetts court: "What the interest of private citizens in public affairs requires is freedom of discussion rather than of statement."[7] With upwards of thirty states aligning

[4] It is well recognized that publications and broadcasts reaching into many states create difficulties in the administration of libel law. When the plaintiff claims injury in 50 different states what law applies, what statute of limitations governs, and how are damages to be determined? The so-called "single-publication" rule undertakes to cope with these issues. See Leflar, "The Single Publication Rule," 25 Rocky Mt. L. Rev. 263 (1953); Noel, "Defamation of Public Officers and Candidates," 49 Colum. L. Rev. 875, 882 (1949); Prosser, "Interstate Publication," 51 Mich. L. Rev. 959 (1953); Note, 32 U. Cinc. L. Rev. 520 (1963). There has been some attention given the desirability of uniformity in the substantive law of libel to better serve the national interest in freedom of communication. See Kalven, "Defamation and the First Amendment," in Conference on Arts, Publishing and the Law (1952); Green, "The Right to Communicate," 35 N.Y.U.L. Rev. 903 (1960); Leflar, supra note 3; Leflar, "The Free-ness of Free Speech," 15 Vand. L. Rev. 1073 (1962).

[5] Restatement, Torts §§ 606-10 (1938). For citation of illustrative cases, see Notes, 37 Geo. L.J. 404 (1949); 62 Harv. L. Rev. 1207, 1211 (1949). For critical examination of the rule see Boyer, "Fair Comment," 15 Ohio St. L.J. 280 (1954); Hallen, "Fair Comment," 8 Texas L. Rev. 41 (1929); Thayer, "Fair Comment as a Defense," 1950 Wis. L. Rev. 288.

[6] Burt v. Advertising Co., 154 Mass. 238, 243, 28 N.E. 1, 4 (1891).

[7] The cases are reviewed in Annots., 110 A.L.R. 412 (1937), 150 A.L.R. 358 (1944) listing some 27 states as supporting the majority position with 13 states listed as supporting the minority rule. Noel, supra note 4, at 896 (1949) reports that 26 of the 35 states support the majority position. A recent decision reviewing the state of the authorities is A. S. Abell Co. v. Kirby, 227 Md. 267, 273, 176 A.2d 340, 342-43 (1962) ("perhaps three-fourths" of the states hold misstatements of fact are not privileged). For condemnation of the fact-opinion dichotomy, see Titus, "Statement of Fact Versus State of Opinion—A Spurious Dispute in Fair Comment," 15 Vand. L. Rev. 1203 (1962).

themselves on this side of a hard question involving the freedom of the press this strict liability position cannot be described as unreasonable. The circumstance that the position has been endorsed by the Restatement of Torts[8] and that it represents the common law of England[9] and of the Commonwealth countries[10] does not detract from its respectability.

In support of the majority rule it can be said that strict liability as regards misstatement of defamatory statements of fact should encourage exercise of maximum care in publication of charges, should help insure the reliability of facts offered for public consideration, should tend to reassure men interested in public affairs that they will not be subjected to unwarranted attack, and will, where inevitable mistakes are made, place the loss on an enterprise better situated to distribute the loss over society than the hapless victim.[11]

The minority of the states in this country found those policy reasons wanting and chose instead to emphasize the importance to society of the free flow of information concerning public figures, particularly candidates for office. The risk of liability for large damages in the event of an innocent mistake of fact in the course of public discussion would, it was felt, restrain the press and handicap the democratic processes dependent as they are on free public debate. The leading decision expounding the minority position is *Coleman v. MacLennan*,[12] a 1908 decision of the Kansas Supreme Court. In holding that a newspaper publisher was protected by a privilege from liability for defamatory misstatements of fact made honestly and in good faith concerning a candidate for office, Justice Burch said in part that "the court is of the opinion that the rule . . . (of good faith privilege) accords with the best practical results obtainable through the law of libel under existing conditions, that it holds the balance fair between public need and private right, and that it is

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[8] Restatement, Torts § 598, comment a, at 261 (1938).

[9] Gatley, Libel and Slander 340 (4th ed. 1958); Street, Torts 331-33 (3d ed. 1963). Under § 6 of the United Kingdom Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66 the defense of fair comment is sustained if sufficient facts are proved true to sustain the expressed opinion as fair comment—thus resting on an assumption that misstatement of fact is not within the fair comment defense. For non-negligent publication of material not defamatory on its face, § 4 of the act excuses the publisher on condition of publication of a correction and apology. See Note, "Reform in the Law of Defamation; The English Defamation Act of 1952," 66 Harv. L. Rev. 476 (1953).

[10] Davis v. Shepstone, 11 A.C. 187, 190 (P.C. 1886) (the Privy Council announcing the common law for the Zululand); Bailey v. Truth and Sportsmen Ltd., 60 Commw. L.R. 700 (1938) (Australia insists on accuracy as to the facts in publication); Truth Ltd. v. Holloway, [1960] N.Z.L.R. 69, 80-85 (New Zealand to the same effect with a review of the authorities); Fleming, Torts 548-50 (2d ed. 1961) reviews the English, Australian, and New Zealand cases. For the Canadian cases, see Annot., 110 A.L.R. 412, 415 (1937).

[11] For an analysis in terms of the loss bearing capability of the press as compared with the individual victim of defamation, see Morris, "Inadvertent Newspaper Libel and Retraction," 32 Ill. L. Rev. 36 (1937).

[12] 78 Kan. 711, 98 Pac. 281 (1908).

well adapted to subserve all the high interests at stake—those of the individual, the press, and the public."[13] Despite the persuasive display of scholarship reflected in the opinion the rush to join up was not overwhelming and the minority position has remained a minority position numbering some twelve or thirteen states.[14]

In this posture, with the law of libel a tangled skein from state to state on the subject of honest misstatement of facts in discussion of public affairs, the New York Times accepted and published an advertisement with limited circulation in the State of Alabama. This advertisement, soliciting funds for legal defense of a central figure in the civil-rights controversy, was regarded by the Police Commissioner of Montgomery as defaming him with factual misrepresentations concerning the deployment and use of police officers of his department in certain racial incidents.[15] After making an unproductive and not very explicit demand for a retraction as required by Alabama law,[16] he brought a libel action against the New York Times and others seeking the tidy sum of $500,000 as damages. Asserting jurisdiction over the Times under its "long-arm" statute,[17] the Alabama courts heard the action, applied the majority doc-

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13 Id. at 742, 98 Pac. at 292.

14 See the references cited in note 7 supra. In addition to the minority group of states extending the qualified privilege to cover misstatements of fact with respect to "matters of public concern," there are a few decisions that have enunciated a "public officials' rule." Under this rule as variously formulated there is an absolute privilege to attack public officials so long as the attack does not charge commission of a crime or grounds for removal from office. See Sweeney v. Patterson, 128 F.2d 457 (D.C. Cir.) cert. denied, 317 U.S. 678 (1942).

15 One paragraph of the advertisement stated that when students in Montgomery, Alabama sang "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. Another paragraph stated that "again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. . . . They have arrested him seven times—'for speeding,' 'loitering' and similar 'offenses.'" In fact the Montgomery police did not "ring" the Alabama State College campus though they were deployed near the campus on 3 occasions and they were not called to the campus in connection with the demonstration on the Capitol steps. Dr. King had been arrested not 7 times but 4. New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 714-15 (1964). The advertisement itself is reproduced at id. at 740-41.

16 Ala. Code tit. 7, § 914 (1959) makes the filing of a written demand for a retraction and refusal to publish a retraction indispensable to the imposition of punitive damages in libel cases. The Times responded to the Commissioner's retraction demand with a letter stating their position that since he was not named, he was not defamed, and accordingly not entitled to a retraction. The letter stating their position invited the Commissioner to "let us know in what respect you claim that the statements in the advertisement reflect on you." The Commissioner did not respond to this invitation other than by institution of his libel action. New York Times Co. v. Sullivan, supra note 15, at 716.

17 The validity of the exercise of jurisdiction over the Times based on its limited contacts with the State of Alabama was challenged by the Times. The Alabama courts ruled that the Times entered a general appearance in the action, waiving its jurisdictional objection, and the Supreme Court declined to disturb this ruling. New York Times Co. v. Sullivan, supra note 15, at 717 n.4. For discussion of the "long-arm" jurisdictional problem see Notes, 17 Ark. L. Rev. 198 (1963); 16 Sw. L.J. 523 (1962), 29 U. Chi. L. Rev. 569 (1962).

trine imposing liability for defamatory misstatement of facts, accepted the jury determination that the advertisement in question made such defamatory misstatements regarding the plaintiff, and entered judgment on the jury verdict in the precise amount asked for—$500,000.

Until this case was taken to the Supreme Court of the United States on constitutional grounds, there had been little basis for expectation that the Constitution of the United States would become the vehicle for nationalizing or federalizing any aspect of the law of libel. It is true that the first amendment has from the early days of the Republic provided that "Congress shall make no law abridging the freedom of speech or of the press." It is true as well that in modern times the Court has discovered that the fourteenth amendment incorporates the first ten amendments so as to provide against the state governments the same basic guarantees.[18] Moreover, the Court has made it clear that common-law rules can be the vehicle for state action violative of the prohibitions of the fourteenth amendment quite as well as state action by legislation or administrative action.[19]

While the Supreme Court had perhaps thereby achieved a state of readiness as regards the federalization of a part of the law of libel, there was little appreciation of this state for two reasons. First of all, as concerned the Court, the basic vehicle would almost necessarily be the first amendment and its language is not happily chosen for an enlargement of the freedom of the press. The guarantee is against *abridgement* of freedom of speech and press. The language thus rather strongly implies a bench mark in time against which later abridgement was to be determined. Commentators generally agreed with the historical approach and agreed further that the historic protection afforded individual reputation by the common-law actions for libel and slander did not effect an abridgement of the freedom of the press.[20] The Supreme Court itself had said

[18] Since Gitlow v. New York, 268 U.S. 652, 666 (1925), this is an oft-repeated proposition. A recent repetition is found in Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

[19] Shelley v. Kraemer, 334 U.S. 1 (1948); AFL v. Swing, 312 U.S. 321 (1941). Apart from the decision in the Times case it might have been doubted that a prohibition as clearly directed against legislative action on the first amendment (Congress shall make no law abridging, etc.) could through the "incorporation" into the fourteenth amendment broaden out to encompass not only legislative but judicial law making as well. Now, the explicit reference to the Congress in the first amendment not only does not carry forward to the fourteenth amendment but there is a very great prospect that in the interaction of the two amendments the reference to Congress in the first amendment will lose significance.

[20] 2 Cooley, Constitutional Limitations 883-86, at 883 (8th ed. 1927) ("It is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions."); Kalven, supra note 4, at 3, 8-10; Hall, "Preserving Liberty of the Press by the Defense of Privilege in Libel Actions," 26 Calif. L. Rev. 226, 227 (1938); Hallen, supra note 5, at 56; Leflar, supra note 4, at 1080-81. See Chenery, Freedom of the Press 175-76 (1955); Levy, Legacy of Suppression (1960). One of the exponents of a type of absolutist approach to the first amend-

as much from time to time over the years.[21]

To argue under these circumstances that the established majority common-law rule, sanctioned by the Restatement of Torts, the law of England, and the countries of the Commonwealth,[22] was an abridgement of the freedom of press guaranteed by the first amendment called for a certain temerity, a certain boldness of spirit—qualities which counsel for the New York Times proceeded to demonstrate. The demonstration succeeded brilliantly and in the process the law of libel in this country has been nationalized to a considerable if somewhat uncertain extent.

There is little point at this stage in debating the merits of the Court's decision to adopt as a proposition of federal constitutional law the minority state-court position extending an honest mistake privilege for misstatements of fact relating to public figures. The entry of a judgment of $500,000 against the New York Times for publication of the advertisement in question was a patent miscarriage of justice and one genuinely posing a threat to free communication of ideas in this country. The Court might have dealt with the problem as one where grossly excessive damages would burden the freedom of the press.[23] It might even have taken the view that the performance of the Alabama courts did not measure up to "due process of law" in departing so far from a permissible relationship between accepted law and the evidence in the case but the Court chose instead to stand on a new proposition of constitutional law.[24] Criticism is easy. The decision represents a distinct departure from past constitutional development, it surmounts rather than interprets some language of the Constitution, and it does all of this to adopt a rule of law rejected by a heavy majority of state courts called upon to consider the matter.

Despite these objections, there is great merit in having a law of libel

ment concedes that the historical approach does not support his position. Meiklejohn, "The First Amendment Is an Absolute," 1961 Sup. Ct. Rev. 245, 263-66.

21 Mr. Justice Frankfurter for the majority in Beauharnais v. Illinois, 343 U.S. 250 (1952) after a considerable review of the historical setting for the Bill of Rights: "Libelous utterances not being within the area of constitutionally protected speech . . . ." Id. at 266. In the majority opinion of New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 719 n.6 some 7 cases are cited in which the Court had announced with clarity that the common-law liability for libel and slander did not abridge the freedom of speech or press.

22 See notes 9-10 supra.

23 Apart from the modern sensations cited note 2 supra, the American courts have supervised libel awards rather closely. See the cases reviewed in the Annot., 35 A.L.R.2d 218 (1954). Of interest here is the decision in Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941 (5th Cir. 1948) where a verdict of $237,500 in favor of the Governor on account of an article implying that he had condoned a lynching in his state was reversed by the court of appeals on the ground that the "spectacle of a sectional row" had unleashed passions prejudicing the fairness of the trial.

24 In fact the Court did review the evidence and conclude that a finding of actual malice could not be sustained. New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 729-30. The Court also found that the evidence would not sustain a finding that the advertisemeut in question was "of and concerning the . . . (plaintiff)." Id. at 730. The latter ground itself could have disposed of the entire case.

uniform over the country to govern debate and discussion of public affairs. Dispensing, in the area covered by the constitutional privilege, with the sticky distinction between factual representations and mere comment or criticism is a net gain. Further, we ought now to be somewhat accustomed to the creative role played by our Supreme Court. Finally the rule adopted as one approved by a number of respected state courts is clearly within the area of reason. Our concern now is not whether the Court ought to have done what it has done in fact. Our concern rather is to ascertain just what it is the Court has done. What is the doctrine and what are its implications? Are there further developments of significance yet to come?

In writing for the majority Mr. Justice Brennan announced that:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[25]

Reviewing the evidence to insure a proper application of the constitutional principle, the Court found that although the New York Times had in its own files information indicating the inaccuracy of some of the defamatory statements, "we think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."[26]

The Court further found that the evidence would not support a jury finding that the charge of improperly deploying and using police power was made of and concerning the plaintiff Commissioner of Police.

> We hold that such a proposition [that of command responsibility] may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.[27]

The decision cannot be viewed as a vote of confidence in the courts and juries of Alabama. But the concern here is with the brand new constitutional propositions announced by the Court. These propositions answer some questions and not unlike other decisions of the Court they raise others. In what subject matter area does the privilege operate?

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[25] Id. at 726.
[26] Id. at 730.
[27] Id. at 732.

How can a plaintiff establish malice sufficient to overcome the plea of privilege? Does the decision foreclose the innocent victim of privileged defamation from any relief? As to these matters the decision in the *Times* case is important as a point of departure.

The Subject Matter Coverage of the First Amendment Privilege

It is difficult to believe that the Court will adhere to the announced limitation of the privilege—that it applies only to criticism of "official conduct of public officials." Are office seekers to be treated more tenderly than office holders? What is "official conduct"? Where is the line to be drawn between official conduct and after-hours conduct? One can understand the desire of a public official, even a Supreme Court Justice, to enjoy a measure of privacy but where is the line to be drawn between conduct that is relevant to the question of fitness for office and non-relevant conduct? Ought the press not to be free to canvass an official's whole life, including perhaps his marital and extramarital affairs for the light that may be shed on his judgment and his adherence to accepted moral principles?[28] The Profumo affair comes at once to mind—sticking to the safe side of the Atlantic.[29] And who is a public official? Plainly more than elective officials and more than local officials are involved for the Times did not limit its communication to those responsible for the election of the Police Commissioner of Montgomery, Alabama.[30] How is

[28] On this matter of the permissible extent of inquiry into the private life of a public official or a candidate for office, Justice Burch in Coleman v. MacLennan, 78 Kan. 711, 739, 98 Pac. 281, 291 (1908) observed that:

> Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character, it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles.

For a trenchant statement that the privilege must extend to such matters as the official's or candidate's personal honesty, illicit sex affairs, mercenary or selfish nature, and the like, see Noel, supra note 4, at 887-88. To similar effect is the Restatement, Torts § 607, comment i (1938).

[29] The reader's recollection of the unsavory details of the Profumo scandal that rocked the MacMillan cabinet in 1963 will be refreshed by Brogan, "Profumo Affair," National Review, July 2, 1963, p. 528; "The Denning Report," Life, Oct. 4, 1963, p. 11; Panter-Downes, "Letter From London: Profumo Case," New Yorker, June 29, 1963, p. 66; Tabbel, "Thunder on the Thames, The British Press and the Profumo Case," Saturday Review, July 13, 1963, p. 44.

[30] The circulation for the Times on the day the advertisement was published numbered approximately 650,000 copies. Of these some 394 went to Alabama. New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 715 (1964). Some courts recognize a common interest good faith privilege for communications within a political group. Under this approach communications are privileged only as long as the communication goes to those who will participate in the election or removal of the particular official. For a decision recognizing such a group privilege, see Weinstein v. Phorer, 240 Ky. 679, 42 S.W.2d 892 (1931). The English Court of Appeal in Braddock v. Bevins, [1940] 1 K.B. 580 recognized such a privilege as to comments made to the electorate concerning a candidate's supporters. The English Defamation Act 1952, § 10, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66 expressly provides that no

the line to be drawn between public employees who are "public officials" and those who are not?[31] Quite apart from the obvious difficulties of administering a limitation cast in terms of official conduct and public officials, it is believed the limitation is not compatible with the base on which the announced federal privilege rests—the first amendment.

The opinion of the Court in the *Times* case offers two distinct grounds for constitutional privilege. The first ground is that imposition of money judgments for honest mistakes of fact in the course of discussion of public affairs impairs the freedom of speech and press protected by the first amendment. The other ground is the proposition that since public officials, and particularly high public officials, are privileged as regards the law of libel to defame citizens, there should be an analogous privilege in the citizenry to defame public officials. The latter "sauce for the goose, sauce for the gander" approach will not stand analysis. There is no need for a constitutional base for the right accorded by the common law of libel to issue a good faith countercharge by way of self defense.[32] The fact is, however, that there will rarely be any correspondence between those attacked by government officials and those attacking government officials.[33] It is the press that commonly attacks public officials. For reasons of discretion, if not of valor, public officials rarely attack the press—officials prefer smaller game less able to lash back in devastating fashion.[34] The real relevance of the cases according a privilege in libel

such privilege applies to parliamentary or local government elections. Some cases illustrating the operation of the group privilege in the nonpolitical setting are collected in Annot., 92 A.L.R. 1029 (1934).

[31] In New York Times Co. v. Sullivan, supra note 30, at 727-28 n.23 the majority of the Court simply states that it will not in this case undertake to define the term "public official." Since the Court leaned by way of analogy on its decision in Barr v. Matteo, 360 U.S. 564 (1959) involving an appointive officer it is clear indeed that both elective and appointive officials are encompassed. How far down the ladder of authority one can go and still deal with a "public official" will require an infinity of actions to resolve. For a survey of some of the cases to date, see Becht, "The Absolute Privilege of the Executive in Defamation," 15 Vand. L. Rev. 1127 (1962); Note, 48 Cornell L.Q. 199 (1962).

[32] Green, Malone, Pedrick & Rahl, Injuries to Relations 385-90 (1959); Prosser, Torts § 95, at 614 (2d ed. 1955); Restatement, Torts § 594, comment i (1938). An illustrative case is Shenkman v. O'Malley, 2 App. Div. 2d 567, 157 N.Y.S.2d 290 (1st Dep't 1956).

[33] As an incoming Cook County official in 1963 the writer's baptism of fire with the press came in the form of a front page blast in a Chicago daily newspaper charging that the agency, to which the writer had just been appointed as chairman, was subject to political "clout" or influence. The charge was elaborated in a long factual analysis of the matters decided by the agency over a period of years with the claim that those attorneys appearing before the agency who had strong political connections had an amazing record of success. A factual analysis by the agency of its decisions in relation to the attorneys appearing before it satisfied the writer that the news story was plainly wrong on the facts. An interesting conference with the managing editor of the paper was followed a fortnight later with publication of the writer's short letter to the editor denying the charge. The paper was not interested in publishing the data refuting in detail the published charge.

[34] As targets for defamation officialdom seems to prefer subordinates or former subordinates. Thus in Barr v. Matteo, supra note 31 it was underlings who were attacked in the press. Spalding v. Vilas, 161 U.S. 483 (1896) involved a blast by the Postmaster

law for public officials, never based it may be noted on the first amendment, lies in the present recognition of the desirability of public discussion of the affairs of government, discussion both by officials and by citizens. But once it is seen that more is involved than some notion of rough, frontier, or homespun justice, that there is here rather a recognition of the desirability of providing a federal guarantee for open debate of public issues, then it must be recognized that the sweep of the first amendment's protection of freedom of speech and press surely goes far beyond the discussion of "the public conduct of public officials." Of course, the Court can limit the protection of the first amendment so that the maximum freedom of the press is enjoyed only with respect to discussion of the official conduct of public officials. But to so limit the area of maximum freedom seems quixotic if weight is given to the function in democratic society served by the press and other media of public communication.

The real basis, the sound basis, for the *Times* decision is found in the Court's proposition that "freedom of expression upon public questions is secured by the First Amendment . . . ."[35] As the Court said in a later passage, we have in this country:

> [A] profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attack on government and public officials. . . . The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.[36]

The free press privilege includes honest attacks on public officials but it must include a very great deal more. The state court decision in *Coleman v. MacLennan*,[37] approved by the Court in the *Times* decision, involved a defamatory misstatement of fact concerning a candidate for re-election. A distinction between one seeking office for the first time and one seeking re-election would plainly be unsupportable. In extending the privilege for good faith mistakes of fact the state court placed its decision on the ground that liberty of the press as guaranteed by the Kansas Constitution should be implemented to meet the needs of modern democratic society. To the question concerning the proper sweep of the privilege the Kansas court responded that:

General at an attorney who had represented claimants before the Postal Department. In Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), cert. denied, 311 U.S. 718 (1941) a former employee of the Interior Department found himself in the sights of the Secretary of the Department. For review of the facts of many other cases see Becht, supra note 31, at 565.

[35] New York Times Co. v. Sullivan, supra note 30, at 720.

[36] Id. at 721.

[37] 78 Kan. 711, 98 Pac. 281 (1908).

> [T]he correct rule, whatever it is, must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government, municipal, state and national; to the management of all public institutions, educational, charitable, and penal; to the conduct of all corporate enterprises affected with a public interest, transportation, banking, insurance; and to innnmerable other subjects involving the public welfare.[38]

In the *Times* decision the Supreme Court quoted with approval a further statement in *Coleman* to the effect that the good faith privilege "extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office."[39]

The point must be emphasized that in defining the content of the first amendment, in determining the extent of the license to be accorded speech and press, the Court is a prisoner neither of history nor of language.[40] It is free to expound its conception of that measure of freedom calculated to enable the press to best serve our democratic institutions. If a qualified "good faith" privilege is needed to better assure open debate then the privilege ought to extend as stated by Judge Burch of Kansas to "all matters of public concern." The logic is simple. In modern democratic society the public judgment makes itself felt on a great variety of subjects in a great variety of ways, official and unofficial. If decision on these matters is to be adequately informed every effort ought to be made to free the channels of communication with respect to these subjects. It is therefore the function of the first amendment to protect the freedom of speech and press on all those matters as to which there is some element of public participation. At least on those issues where the public judgment can make itself felt through official or unofficial communication it can be said that the matter is one of proper public concern. The determination of "matters of public concern" should thus become the key to the application of the privilege recognized in the *Times* decision.

As to many such matters there will be little difficulty. Thus, with respect to the advertisement in the New York Times soliciting funds in counection with the civil-rights movement, the Court said: "The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection."[41] At this time in history the whole arena of race relations is plainly a matter of public concern. Beyond this, all matters within the province of governmental action, that is to say the field

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[38] Id. at 734-35, 98 Pac. at 289.

[39] New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 727 (1964) quoting Coleman v. MacLennon. supra note 37, at 723, 98 Pac. at 285.

[40] See the references in note 20 supra.

[41] New York Times Co. v. Sullivan, supra note 39, at 721.

of politics, are surely subjects of proper public concern. The performance of public officials, both elected and appointed, the past activities of candidates for elective and appointive posts, the activities of their supporters, events of potential interest to legislative and executive authority, the behavior of governmental agencies and of political organizations are all surely matters on which the press has an obligation to speak for the benefit of a democratic society. But those matters which are of public concern also go beyond the immediate province of government. A threatened labor strike affecting a critical industry may not provide any immediately discernible role for public opinion but who would doubt the legitimacy of the public concern and the strategic significance of the public attitude.[42] Even such pedestrian matters as the closing hours observed by business establishments, the hiring, retention, or dismissal of a symphony conductor or an athletic coach would seem clearly matters of proper public concern with respect to which the popular will plays a role.[43]

Whether it is possible to be more explicit than "matters of public concern" as distinguished from gossip for gossip's sake may be doubted. One can have some confidence that the "right of privacy" has not been swept away by the *Times* decision for the very reason that where matter is of public concern the right of privacy does not attach.[44] Some privacy cases

[42] Reisman, supra note 3, at 1290 in approving application of the "fair comment" defense to a nonoffice-holding state political boss:

> Surely it would have been a travesty to hold that fair comment only applies to civil servants or elected officials. To permit "fair comment" on a candidate for sheriff, and forbid it on politically-powerful figures like a newspaper publisher, a union boss (who may hold no union office), or the "X Family" of "Middletown," is to forget the need for criticism of authority which the rule implies.

[43] The contention that an athletic director for a state university was a "public official" within the meaning of the Times case was offered in connection with a motion for a new trial in the case of Butts v. Curtis Publishing Co. The federal district court judge held that the athletic director was not a public official but ruled that in any case the defendant was chargeable with a reckless disregard of the truth and hence chargeable with malice. N.Y. Times, April 8, 1964, p. 48, col. 2. If the thesis expounded in the text to the effect that "matters of public concern" can be identified by an inquiry concerning the role of public opinion, there are many former athletic directors and football coaches who would testify that their tenure is apparently a matter of public concern. In Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139 (1930) the New York Court of Appeals applied the "fair comment" privilege to a football coach with the observation that "his work and the play of his team were matters of keen public interest . . . ." Id. at 99, 172 N.E. at 140.

The Restatement, Torts §§ 606, 608, 610 (1938) embrace as matters of public concern for purposes of "fair comment" a very wide range of public activities. The question of the appropriate scope for the "fair comment" common-law privilege would seem to be substantially the same question raised under the first amendment concerning the subjects enjoying constitutional protection.

[44] Among the "right-of-privacy" cases struggling with the issue of the privilege for publication on matters of public interest are Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958) (by a 4 to 3 majority the Front Page Detective magazine was held privileged to publish photograph of the plaintiff widowed by a brutal slaying of some 3 months earlier together with a story of the killing); Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940) (story on former child prodigy some twenty years later was held to be privileged as a publication relating to a "public figure"); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942) (with a remarkable appreciation of the significance

may now present first amendment issues but the privacy cases of the past do not greatly assist in defining "matters of public concern."

We do know that the protection of the first amendment does not extend to commercial advertising.[45] It seems reasonably well settled that the mechanism of the Federal Trade Commission used to censor and to bar publication of false and misleading advertising does not violate the first amendment.[46] The Post Office can close the mail to fraudulent practices[47] and the Securities and Exchange Commission can enforce truthful disclosure in the marketing of securities.[48] From this area of permitted restraint on the flow of misinformation one might simply conclude that it is the taint of commercialism that deprives some communications of the protection of the first amendment. Perhaps so, but the advertisement in the *Times* case was an advertisement and it sought money—by way of contribution. Moreover, there are commercial institutions that feature institutional advertising treating public issues such as the role of the United Nations or race relations.[49]

Perhaps a distinction can be taken between communications that aim at securing adherence to a cause, to an idea, or to an opinion as against communications that aim at the individual and seek only to separate

of the first amendment on the right of the public information but denying such right as to publication in general press of medical history with photograph, of "starving glutton," a woman with glandular disorder); cf. Krebiozen Research Foundation v. Beacon Press, Inc., 334 Mass. 86, 134 N.E.2d 1 (1956) (suit to enjoin publication of an allegedly libelous book dismissed on ground that public interest in free press publication of book dealing with cancer was controlling). For comment on the problem posed by such cases, see Note, 30 U. Chi. L. Rev. 722 (1963).

Introduction of a commercial advertising element ought to tip the scales against the public interest in the publication but that is not yet clear. Cf. Booth v. Curtis Publishing Co., 15 App. Div. 2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962), 62 Colum. L. Rev. 1355 (1962), 48 Va. L. Rev. 978 (1962), with Flores v. Mosler Safe Co., 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959).

A recent "right of privacy" case brought against local police in the federal courts under the Federal Civil Rights Act contains a very interesting treatment of the question whether the "right-of-privacy" may not be one of the centrally protected freedoms at the core of the fourteenth amendment. If this be so, as indicated by the Ninth Circuit in York v. Story, 324 F.2d 450 (9th Cir. 1963), then not only privacy actions against state employees but privacy actions generally will become federal question cases—the more so because of the interaction of the rights of the press guaranteed by the incorporated first amendment and the right of privacy protected (if it is) by the fourteenth. For skepticism as to this latter point, see Beaney, "The Constitutional Right to Privacy in the Supreme Court," 1962 Sup. Ct. Rev. 212 (1962).

[45] Valentine v. Chrestensen, 316 U.S. 52 (1942) (handbills advertising submarine display are not protected by first amendment and protest against denial of permit on reverse side does not change "commercial" character of matter).

[46] E. F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956).

[47] Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948) (writing the Court's opinion was "absolutist" Justice Black).

[48] 1 Loss, Securities Regulation 178-79 n.1 (2d ed. 1961): "The question of constitutionality of the SEC statutes generally belongs to a bygone day." The lower court case sustaining the federal securities statutes are cited in Annot., 85 L. Ed. 506, 509-11 (1940).

[49] Advertising copy on public issues by International Latex, Inc., provoked the columnist Westbrook Pegler into a characteristically unrestrained attack and that in turn provoked the corporation and its president into libel litigation. Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947) (sustaining the action).

him from his money or his property. But this approach does not comfortably cover the sanctioned restraints on communication respecting the sale of corporate stock—aimed at organizing a group of investors. One would be reluctant to conclude that more stringent guarantees of accuracy can be required when financial interests are at stake than when political interests are involved. Perhaps it is simply that when private financial interests are involved, when the profit motive is present, truth will out even though an obstacle course in the form of administrative verification is provided. It may also be easier for the businessman to know his product or his enterprise and less burdensome to hold him to a high standard of accuracy in making his claims than is the case with a political debater. Commercial messages are characteristically and dully repetitive—not designed to produce a verbal response. Commercial advertising is doubtless communication. It is not discussion.

But any search for a unitary theory is likely to be unproductive. The first amendment cannot be viewed as an absolute command. Its content involves a constant balancing of competing interests. For present purposes it is enough to assert with some confidence that the step taken in the *Times* decision ought to mean that the press and all citizens for that matter will hereafter enjoy a good faith privilege with respect to discussion of "matters of public concern." That community of interest which supported a qualified privilege at common law is now extended under the first amendment to embrace all the members of our democratic order. The members of this larger group have a right, free from liability for honest mistake, to communicate as to matters of common interest, matters of public concern.[50] The resolution of the borderline cases will be left where it must be left—to future decisions.

[50] It is of some interest to compare with the position of the concurring Justices some comments offered in a 1953 public lecture at the University of Glasgow by Lord Radcliffe, one of the world's distinguished jurists and public servants, whose views are always entitled to weight. In raising some questions about the wisdom of the attempt by the United Nations to codify the principles to govern "freedom of information" Lord Radcliffe said in part:

> Freedom of Information then means directly, that people who want to disseminate news or to put forward opinions ought to be free to do so without interference from the government in the form of censorship, licensing or suppression. We have already seen that hardly anybody can go so far as to be absolute about it. An anarchist could: and so, I suppose, could an extreme liberal dissenter, who would say that the right to express opinions freely is more important than any of their consequences. Most of us cannot be as purist as that: we are inclined to compromise by saying that restrictions on this sort of liberty ought to be enforced only in accordance with law. That is the line taken by the draft Convention of the United Nations. . . .
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> Let us come to terms. What the public interest requires is much more than just to be told, "it is all right. The Government are not going to be allowed to interfere." If we are to live in a world besieged by the media of information—I am using the jargon phrase which extends, of course, far beyond newspapers or what is covered by the Press—we want the assurance of a standard of quality in those who make themselves responsible for these powerful engines. We want knowledge instead of

MALICE SUFFICIENT TO DEFEAT THE QUALIFIED PRIVILEGE

The concurring Justices, Black, Douglas, and Goldberg, would extend an absolute privilege to anyone who chooses to attack a public official.[51] In their view a completely open season on public officials would best serve the public interest. Fabricated charges of embezzlement of public funds, of bribery, of espionage for a foreign power, could be made freely and without legal accountability under this view. We have had figures on the American political scene who behaved as though they thought that might be the law of libel.[52] The test run afforded by their careers ought to be enough now to condemn the hunting license approach to political debate.[53] Fortunately for the country, the concurring Justices numbered only three and it is to be hoped this number will represent the highwater mark for support of this "absolutist" approach.

Under the doctrine laid down by the majority, the qualified privilege extended can be defeated only by a showing of malice, further defined by the Court as "actual malice," that is, actual knowledge of the falsity of the representation or a "reckless disregard of whether the statement is true or false." In short, ordinary negligence in uttering a defamatory misstatement of fact covered by the privilege will not expose the publisher to liability.

The circumstance that the New York Times had in its own news files information indicating the inaccuracy of some of the statements appearing in the provocative advertisement might have seemed damaging in-

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ignorance, some sense of history and perspective instead of a shallow cult of the passing event, decency of feeling and good taste instead of perness and triviality. Lord Radcliffe, Freedom of Information: A Human Right 20-22 (1953).

The leading spokesmen for somewhat varied "absolutist" positions as regards the first amendment are Douglas, The Right of the People 36-59 (1958); Meiklejohn, Free Speech and Its Relation to Self Government (1948); Black, "Justice Black and the First Amendment 'Absolutes': A Public Interview," 37 N.Y.U.L. Rev. 549 (1962); Meiklejohn, supra note 20.

A wholly unrestrained attack on the absolutist position is offered by Professor Sidney Hook in reviewing Dilliard's collection of Justice Black's opinions, One Man's Stand for Freedom (1963). In denouncing Justice Black's absolutism Professor Hook among other things observes that:

> Justice Black is under the illusion that his doctrinaire extremism is a bulwark of our freedom, especially of the strategic freedoms of the Bill of Rights. The truth is that if his views became the law of the land, and the citizens of our republic could libel and slander each other with impunity, democratic self-government would be impossible and the entire structure of our freedoms would go down in dust and turmoil.

Hook, Book Review, The New Leader, May 13, 1963, p. 11 at 15.

[51] For an eloquent development of this thesis see Green, "The Right to Communicate," 35 N.Y.U.L. Rev. 903 (1960).

[52] See Pedrick, "Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches." 48 Nw. U.L. Rev. 135 (1953).

[53] See Reisman, supra note 3, at 1118, 1120-21 crediting relatively stiff enforcement of civil liability for libel in Britain with restraining the Fascist movement in England in contrast to its tragic success in Germany. Writing in 1942 Professor Reisman saw virtue in having law play a positive role in securing responsibility in public debates.

deed. The Court took the view, however, that the Times was not chargeable with actual knowledge of the falsity of the misstatements on the ground that it was not bound to check its own files but was entitled to rely on the responsibility of the individuals sponsoring the advertisement and the fact that the advertisement did not appear to be a personal attack. Emphasizing the key question as the state of mind of the defendant at the time of the publication, the Court declined to attach any significance to the Times' later refusal to publish a retraction.[54] Taking all the circumstances into account the Court concluded that at most the Times was chargeable with ordinary negligence and that is not enough to defeat the privilege, defeasible only on proof of a reckless disregard or actual malice.

To attempt to define "reckless disregard" is to attempt the impossible as anyone with a casual acquaintance with the automobile guest cases will confirm.[55] Nevertheless, it is possible that the approach taken in the *Times* decision may lull the press into a false sense of security.

The material carried by the Times in the advertisement was not originated by it. By publishing the material as a paid advertisement the Times did not endorse the communication as its own. While conventionally the courts have not been disposed to apply a lesser standard to one who publishes another's libel,[56] the case should be different where there is some obligation imposed to publish and to publish without revision. Of some relevance here is the decision,[57] also by the Supreme Court, in a libel case against a radio station based on a political broadcast the station was obligated by federal law to carry without censorship. Making short work of it, the Court thought it clear that the congressional command to broadcast without censorship must carry with it freedom from

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[54] New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 729 (1964).

[55] For an entertaining approach to the subject, see Burrell, "Wilful and Wanton Misconduct—A New Approach to the Problem," 1949 Ins. L.J. 716 expounding the "Oh my God!" test. See generally Pedrick, "Taken for a Ride, The Automobile Guest and the Assumption of Risk," 22 La. L. Rev. 90 (1961).

The state court libel cases will not supply much guidance in the application of the "reckless disregard" objective standard for "malice." See Hallen, "Character of Belief Necessary for the Conditional Privilege in Defamation," 25 Ill. L. Rev. 865 (1931); Note, Developments in the Law of Defamation, 69 Harv. L. Rev. 875, 929-31 (1956).

In the action for deceit the requirement of scienter may be satisfied not only by knowing fraud but by a reckless disregard of whether the representation be true or false. "Fraud includes the pretense of knowledge when knowledge there is none." Cardozo, J., in Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931). Designed to protect very different interests the deceit cases may nevertheless provide some provocative language on the application to be given to the "reckless disregard" standard for establishing malice sufficient to defeat the qualified privilege. See generally, Keeton, "Actionable Misrepresentation: Legal Fault as a Requirement," 1 Okla. L. Rev. 21 (1948).

[56] 1 Harper & James, Torts § 5.18, at 402-08 (1955); Prosser, supra note 32, § 94, at 598-99 (2d ed. 1955); Restatement, Torts § 578 (1938).

[57] Farmers Educ. & Co-op. Union v. WDAY, Inc., 360 U.S. 525 (1959), 48 Geo. L.J. 544 (1960), 44 Minn. L. Rev. 787 (1960).

liability for any resulting libel—remitting the victim to an action against the originator of the libelous broadcast.

We have not reached as yet the point where the press is bound to publish offered advertisements with no power to censor.[58] It is certainly within the spirit of the first amendment as expounded by the Court, however, that the press be kept open for publication on a paid basis of views with which the particular publisher may strongly disagree.[59] That, indeed, is essential if the press is to be meaningfully free. The facts of economic life are such that in this country very few have access to freedom of the press by right of ownership. In our increasingly urbanized society most of our citizenry are served by one or two newspapers. It is difficult in such a setting to assure meaningful freedom for the expression of divergent viewpoints, an aspect of the problem of freedom of the press that has occasioned concern in responsible quarters.[60] Recognition of an obligation on a press operating as a monopoly or as an oligopoly to carry public issue messages on a paid basis at reasonable rates would positively serve the interests of freedom of communication and give substance to the guarantees of the first amendment. Nor would such an approach to the obligations of the press represent a departure from practice. The better elements of the press have long recognized and honored such a responsibility.

If this concept of a "common carrier" duty on the press to carry divergent views when offered as paid advertisements is to be implemented, it follows that exposure to liability for libel in publication of the ideas of others should be sharply limited. That limitation is accomplished by the doctrine of the *Times* case that the publisher of a paid advertisement can rely on the character of the sponsors of the advertisement, at least with respect to statements not obviously in the nature of personal attack and need not, in such cases, independently check the accuracy of

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58 For development of the thesis that the newspapers should operate as common carriers obligated to carry to the public a great diversity of viewpoints, see "The Statement of the Commission on the Freedom of the Press," set forth in Hocking, Freedom of the Press, app., at 224-25 (1947).

59 In rejecting the argument of the claimant that the racial justice advertisement was outside the protection of the first amendment because it was a paid advertisement, the Court in the New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 718 (1964) replied:

> Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. . . . The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination from diverse and antagonistic sources."

For expressions that the press is obligated to carry a diversity of messages, see Gerald, The Social Responsibility of the Press 139, 163 (1963); Lacy, Freedom and Communication 24 (1961).

60 See notes 58-59 supra.

the statements appearing in the advertisement. Perhaps even personal attack ought to be within the protection of the rule if made by responsible persons with some foundation in fact where it is clear the press is merely the transmitting agency.[61] The problem is the balance to be struck between freedom for public debate and protection of reputation. As regards the first amendment, the balance has not yet been definitively struck.

The question may well be raised whether a similarly relaxed standard of vigilance may not be appropriate for any news story providing a fair and accurate report of a statement made by a responsible person on any matter of public concern. As regards the matter of the public interest under the first amendment in facilitating the free dissemination of information and ideas there would seem to be little merit in distinguishing between paid advertisements and a news story accurately reporting information or ideas offered for public consideration by a responsible person. Here again if the charge is made by a responsible source for public consideration with some basis in fact (and it will be recalled that in the *Times* case the defamatory statements were true in considerable part), the censor's role for the press ought to be very restricted.[62] In short, no distinction ought to be made between the case of the paid advertisement and a fair and accurate report of a public statement by a responsible person. By court decision in some of the states of this country and by legislation in other countries a good faith privilege has been accorded the press for fair and accurate reports of such public statements.[63]

As to material originated by the press itself, however, the position

[61] Unless an explicit personal attack is within the ambit of the privilege, all that the court said apart from the proposition that impersonal criticism is absolutely privileged was wasted motion. There appear to be distinct and alternative grounds for the decision in the Times case. The labor the Court put into the construction of a qualified privilege for good faith defamatory misstatements concerning public officials cannot have been intended as an idle exercise.

[62] It may be noted that in nonprivileged situations evidence that the report in question was merely republished from another source is usually admitted on the issue of actual malice. See the cases collected in Annot., 74 A.L.R. 738 (1931).

[63] American cases supporting such a privilege are Phoenix Newspapers, Inc. v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957) (open forum political meeting sponsored by Junior Chamber of Commerce a privileged occasion); Barrows v. Bell, 73 Mass. 301 (1856) (medical association meeting); Tilles v. Pulitizer Publishing Co., 241 Mo. 609, 145 S.W. 1143 (1912) (race track association); Jackson v. Record Publishing Co., 175 S.C. 211, 178 S.E. 833 (1935) (political meeting proceedings privileged). For a liberal state statute extending a privilege to report "a fair, true and impartial account of the proceedings of public meetings dealing with public purposes," see Tex. Rev. Civ. Stat. art. 5432 (1948). The English Defamation Act 1952, § 7, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66 provides a special type of qualified privilege for reports of a wide range of matters of public concern including "Proceedings at any meeting bona fide held in the United Kingdom for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted." The privilege of reporting on such meetings is subject to a special requirement that the publisher shall not unreasonably refuse a request to publish on request a further statement by way of explanation or contradiction. See Street, Torts 326-28 (3d ed. 1963).

should be quite different. What the press publishes by way of its own news story or by way of editorial should be subjected to the standard of responsibility appropriate to any originator. One who publishes on his own authority a statement as fact without reasonable grounds for knowing whether it is true or false is surely chargeable with a reckless indifference as to whether it is true.[64] The first amendment is concerned with protecting the free flow of information—not slipshod reportorial work.[65] If a paper publishes as fact on its own authority a proposition disprovable by information in its own files we will not await the further development of electronic memory aids to charge the publisher with a reckless disregard of the truth. Nor for that matter should one defamed even be required to demonstrate that the paper had previous information at odds with the later defamatory falsehood. What the press offers as fact on its own responsibility (and the news services on which it relies[66]) must be backed with reasonably diligent reportorial work or it ought to be chargeable with a reckless disregard whether its statement was true or false and subjected to liability.

In one respect the privilege recognized by the majority of the Court appears to be an absolute privilege. Reviewing the evidence in the *Times* case to insure that the constitutional privilege announced would be protected, the Court held that an impersonal defamatory statement concerning a governmental department could not be converted by the principle of command responsibility into a statement "of and concerning" the departmental head.[67] This does in fact confer an absolute privilege

[64] Hallen, supra note 55, at 875: "And it does not seem unjust to impose liability . . . upon a newspaper for attacks upon a candidate for office, even though they are made to someone with a recognized interest, if the statements, in addition to being defamatory and false, are made without due care."

Little light is shed on the concept of "reckless disregard" for the truth in the state court libel cases. Compare Sheehan v. Tobin, 326 Mass. 185, 93 N.E.2d 524 (1950) (statement with no personal knowledge could be found malicious), with Phoenix Newspapers, Inc. v. Choisser. 82 Ariz. 271, 278, 312 P.2d 150, 155 (1957) (candidate could rely on staff for facts). For perceptive comments on this problem, see Gregory & Kalven, Cases on Torts 1018-19 (1959). See also the material cited note 55 supra. A demanding application of the standard with respect to material published by the press on its own responsibility would best serve the public interest.

[65] Canons of Journalism of the Am. Soc'y of Newspaper Editors (1923) quoted in 2 United Nations, Freedom of Information 213 (1950):

> Article IV. Sincerity, Truthfulness, Accuracy—Good faith with the reader is the foundation of all journalism worthy of the name.
>
> 1. By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control, or failure to obtain command of these essential qualities.

[66] A few states extend a privilege to newspapers with respect to material supplied by the wire service. The leading case supporting such a privilege is Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933), 33 Colum. L. Rev. 373 (1933), 46 Harv. L. Rev. 1032 (1933), 1 U. Chi. L. Rev. 156 (1933). The majority position holds the local newspaper for defamatory news-wire stories. 1 Harper & James, Torts § 5.18 at 404 (1956). The local paper would, of course, have a claim over against the wire service.

[67] New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 732 (1964). The Court's rejection

for impersonal criticism of a governmental agency or department and provides a separate and independent ground for the decision.[68] So long as the attack is impersonal, its utterly vicious and baseless nature will not expose the launcher to civil liability. When is an attack wholly "impersonal" within the meaning of this proposition? Merely avoiding the name of the target official will not insure immunity. To be impersonal the attack should be a diffused one offering the possibility that someone other than the supervisory official may be the culprit. In ordinary political warfare this principle is likely not to be available to opposing candidates as their very stance of confrontation makes an "impersonal" attack a practical impossibility.

What Remedy for Defamation Privileged Under the First Amendment?

The realization that the Court in one decision has federalized at least one segment of the law of libel under the first amendment and generated a number of intellectually fascinating issues in the process can easily give a distorted perspective on the role to be played by the law in the continuing emancipation of communication.[69] A great many forces in our society operate to determine the extent to which men are free in fact to express their ideas. Whether there is a privilege for good faith defamatory misstatements on matters of public concern or whether there is strict liability for such statements may not greatly affect the course of public discussion. How different has life been in those states which heretofore followed the majority rule imposing strict liability for misstatements of fact defaming public figures from life in the minority states

as a matter of law of the principle of command responsibility as regards attacks on governmental departments is somewhat reminiscent of the discredited doctrine of "innocent construction" under which an ambiguous statement had to be given an innocent interpretation if that was possible. See Comment, 30 U. Chi. L. Rev. 524 (1963). Though irrelevant it is interesting to recall that the principle of command responsibility was the basis on which the execution of General Yamashita was authorized. In re Yamashita, 327 U.S. 1 (1946). The popular appreciation of the principle is obviously another matter.

[68] It is difficult to see how there can be any further proceedings in the Times case other than dismissal in light of the flat holding that the statements in the advertisement were wholly impersonal and hence absolutely privileged.

[69] Consider the comments by Lord Radcliffe, supra note 50, at 16-17:

> I think that there is, so to speak, an American political folk-lore that, oblivious of the rich native generosity that lies at the root of American character, attributes an almost magical importance to a recital of the Rights of Man, and beside it a ready disposition in other countries to accept the view that there must be some peculiar power abiding in such an incantation. That makes it the more important to be certain in time what we mean by these fundamental freedoms, if they are to be put forward as the touchstone of the decent world that we are pledged to seek to bring about.
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> But have they not as has often been said, one outstanding limitation: they are negatives? . . . These are addressed to governments and nothing else. They are just the thunders of the Opposition presented as abstract justice. . . . But in modern democracy governments are not any longer to be thought of as arbitrary or non-representative. . . . It does make a difference. The question is how much difference.

where the good faith privilege held sway? Nonetheless, while the law cannot make freedom it can, within its domain, both reflect and serve freedom's ideal. The beginning of our experience with the first amendment as a vehicle for reform of the law of libel in the interest of better protecting freedom of discussion is a good time to inquire whether the law of libel in certain other respects is in a satisfactory state, whether the *Times* decision should be regarded as the last step or the first in better accommodating the law to the free flow of communication.

The Court in the *Times* decision referred with apparent pride to its earlier decision in *Barr v. Matteo*[70] granting complete or absolute immunity to federal officials issuing defamatory press releases within the periphery of official responsibility. A similar privilege is extended in many states to other officials.[71] There is something to be said for this doctrine in terms of freeing government officials from the harassment of defending civil libel suits (as though the official himself would spend much of his own time or energy on such matters) and more importantly in providing maximum freedom for the public discussion of governmental activity from the government point of view.[72] What, however, of the fate of the innocent victim of a malicious attack by a government official! With an absolute privilege for the attacking official no libel suit can be brought. Officially denounced, there is no opportunity for an official hearing, no provision for a solemn and responsible inquiry into the truth or falsity of the official charge levied. True, it may be said that under the new doctrine announced in the *Times* decision the victim of official defamation can reply with the protection of at least a good faith privilege of his own. Reply where? If he is fortunate perhaps the press will carry his reply and if he is prominent enough perhaps his response will be carried where it can be found—not with the obituaries. When the charge comes from an official source, however, an essentially private response on at least some occasions will fall far short of the protection the law could and should afford. It ought to be a reproach to a civilized society that a nation so affluent as ours should willingly in modern times immunize our federal officials from responsibility for character assassination without at the same time making provision for an alternative official vindication for the citizen victim, if victim he is. The federal government is still immune from liability in tort as regards defamation.[73] But is this just? Do we thereby serve adequately our ideal of freeing the

[70] 360 U.S. 564 (1959).

[71] See Becht, "The Absolute Privilege of the Executive in Defamation," 15 Vand. L. Rev. 1127 (1962) reviewing the cases.

[72] In Barr v. Matteo, supra note 70, at 577 Justice Black, concurring, emphasized the desirability of free public discussion of governmental activity.

[73] 28 U.S.C. § 2680(h) (1958).

channels of communication so as to try to insure presentation of both charge and countercharge? If, as the Court proclaims in the *Times* decision, we have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open," we ought to provide a judicial hearing for anyone defamed by a federal official by permitting libel actions against the United States and it cannot be done too soon.[74]

A similar inquiry is appropriate for the area of communication now occupied by the doctrine of the *Times* decision. The attacker, and the attacker will commonly be the press, on privileged occasions is freed from liability for defamatory misstatements of fact if the mistake is made in good faith, not in reckless disregard of the truth. The privilege covers attacks on public officials and in all probability attacks on anyone involved in a "matter of public concern." What measures does the law now provide to assure the flow of information which the object of the defamatory attack may wish to release in response to the attack?[75]

It is important first of all to note that the Court with some care limited the privilege so as to immunize from "damages for libel"[76] and plainly it was the sheer size of the $500,000 judgment that brought home to the Court the fact that common-law libel actions for money damages could seriously restrain the desired freedom of the press. The decision in the *Times* case concludes with a remand of the case to the Supreme Court of Alabama "for further proceedings not inconsistent with this opinion."[77] Those further proceedings clearly cannot look toward imposition of money damages for libel. There are some other possibilities. It would, for example, seem entirely open to the Alabama courts to determine the falsity of the defamatory statements and to fashion some remedy not in the nature of a monetary damage award. Even the absolute privilege for impersonal criticism should not bar relief designed to add to the store of public information.

As to personal attack, a state or federal court could insofar as the first amendment is concerned enter a declaratory judgment vindicating the reputation of one defamed falsely even though in good faith on a "mat-

[74] For powerful advocacy of his view, see Becht, supra note 71; Davis, "Administrative Officer's Tort Liability," 55 Mich. L. Rev. 201 (1956); Handler & Klein, "The Defense of Privilege in Defamation Suits Against Government Executive Officials," 74 Harv. L. Rev. 44 (1960).

As law clerk for Justice Vinson at the time of the decision in Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), I then had no doubts of the wisdom of the absolute privilege for executive officers. I was a bit disturbed, however, by the opinion of Groner, C.J., in that case concurring with misgivings. I now share those misgivings.

[75] For a statement of the writer's basis for keen appreciation of the desire of the "victim" to release a flood of corrective information, see note 33 supra.

[76] New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 726-27 (1964).

[77] Id. at 733.

ter of public concern." A court might even require a defending newspaper to publish the judgment of the court vindicating the plaintiff and enforce its order with the contempt sanction.[78] So long as the thrust of the judicial action is to facilitate the flow of information and not to deter its publication the law ought to be seen as carrying out the philosophy of the first amendment, aimed at securing the freedom of public discussion. While these specific, official vindication remedies are still open they suffer from certain serious disadvantages.

If the one defamed must pursue his remedy without hope of any financial recompense, the prospect of jousting at law with the array of legal talent commonly enlisted by the press in libel litigation will discourage all but relatively wealthy victims. There is an interesting question whether in connection with an action for declaratory relief from privileged defamation it would be permissible within the newly announced constraints of the first amendment to permit a successful plaintiff to recover reasonable attorney's fees under implementing legislation.[79] It is arguable that with the removal of the "at large" characteristics of the common-law action for damages, the substitution of an allowance for attorney's fees in an action that had as its object the contribution of further positive and verified information on a matter of public concern would serve the basic purposes of the first amendment. The reasonable costs of correction of misstatements of fact bringing unwarranted injury to reputation ought to be a cost bearable by a press both free and dedicated to the search for truth. Whether such an allowance for attorney's fees would in fact be permissible will await further future developments.

Perhaps the most serious disadvantages of an action for declaratory relief apart from its cost, and that is a serious disadvantage, is the factor of delay so characteristic of judicial proceedings in much of this country. A judicial proceeding to counter a defamatory falsehood is so slow off the mark that the search for truth by this means will never be confused

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[78] This is the practice in some other countries. Rothenberg, The Newspaper 91-92 (1946); Ouchi, "Defamation and Constitutional Freedoms in Japan," 11 Am. J. Comp. L. 73 (1962). For a fascinating account of the early action for a "liebill" in Arkansas apparently in the nature of an action for specific performance to get an admission from the defendant that he had lied about the plaintiff, see Leflar, "Legal Remedies for Defamation," 6 Ark. L. Rev. 423 (1952), also reviewing the early English common-law practice of granting a type of specific relief. In Finnish Temperance Soc'y Sovittaja v. Raivaaja Publishing Co., 219 Mass. 28, 106 N.E. 561 (1914) the Massachusetts court declined to entertain a suit for a mandatory injunction to compel a retraction but the principle on which the court rested that equity will not enjoin a libel, is not persuasive. See also Riesman, "Democracy and Defamation: Fair Game and Fair Comment," 42 Colum. L. Rev. 1282, 1314-18 (1942).

[79] A suggestion that counsel fees be allowed in actions against the government for defamation by officials in the event such a remedy should be provided by legislation is made by Professor Becht, supra note 71, at 1170.

with the doctrine of hot pursuit. What is needed, and the need is dramatized in a fresh way by the *Times* decision, is some procedure enabling one attacked in the press or in other media to respond in the same media and without delay.

A great many countries have made legal provision for just such a procedure in the "right of reply."[80] Perhaps the best known and the most widely admired is the "Droit de Response" of the French Civil Code.[81] By law one named in the press may, within a stated period, supply to the publisher his reply, which may extend to twice the length of the original article or at least fifty lines and the newspaper is bound speedily to publish the reply as written.[82] There are, of course, some problems in administering such a right of reply and there are problems of adaptation to other media than the press which perhaps lends itself best of all to this remedy.[83] Moreover, the right of reply is by no means the whole answer to the problems of freeing the channels of public discussion and providing some protection for reputation. Nevertheless the right of reply has a contribution to make. It does work. Moreover, it seems well designed to serve our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . ." In short it is a mechanism that is ideally suited to the philosophy of the first amendment as expounded by the Court. Among those scholars who have addressed themselves to the subject there is virtual unanimity of enthusiasm for adoption in this country of the right of reply.[84]

A decade ago the present writer supported this proposal with the argument that:

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80 For discussion of the "right of reply" legislation in the various nations of the world, see 1 Chaffee, Government and Mass Communication 145-99 (1947); Rothenberg, supra note 78, at 114-32 (listing some 20 nations and the American State of Nevada as affording a right of reply); 1 United Nations, supra note 65, at 254-63 (summarizing the laws of some 11 nations providing for the right of reply); Donnelly, "The Right of Reply: An Alternative to an Action for Libel," 34 Va. L. Rev. 867 (1948); Leflar, supra note 78; Ouchi, supra note 78; Riesman, supra note 78.

The press itself recognizes that decency and a regard for the public interest requires an opportunity to be heard. Article VI of the Canons of Journalism of the Am. Soc'y of Newspaper Editors, supra note 65 provides as follows:

> Fair Play. A newspaper should not publish unofficial charges affecting reputation or moral character without opportunity given to the accused to be heard; right practice demands the giving of such opportunity in all cases of serious accusation outside judicial proceedings.
>
> 1. A newspaper should not invade private rights or feeling without sure warrant of public right as distinguished from public curiosity.
>
> 2. It is the privilege, as it is the duty, of a newspaper to make prompt and complete correction of its own serious mistakes of fact or opinion, whatever their origin.

81 French Civ. Code, art. 13 (Act of 29 July 1881). The French right of reply is described in 1 United Nations, supra note 65, at 247-48 in some detail; see 1 Chaffee, supra note 80, at 147-58.

82 Court of Cassation, Criminal Chamber, 3 May 1923, D.P. 1923-1-93.

83 For discussion of the problems, see 1 Chaffee, supra note 80, at 172-95 and the other references cited note 80 supra.

84 Ibid.

> The Right of Reply would seem to give significant protection to private reputation beyond that provided by the cumbersome law suit for money damages. To strike out after falsehood in hot pursuit with truth is far better than to rattle the chain on the courthouse door. The publication of the reply, moreover, by adding to the store of public information, would seem to serve affirmatively the public interest. A reply will not guarantee that the public will get the truth. It will dramatize the fact that there are two sides to the controversy. Any measure that promises to teach a public attitude of skepticism, of interest in hearing the other side of the story deserves trial. Demagoguery does not easily flourish in such an atmosphere. To establish a Right of Reply is merely to give new meaning to freedom of speech and freedom of the press to the end that these institutions can better nourish and sustain the democratic tradition.[85]

The *Times* decision freeing the press from money damages for nonmalicious defamatory misstatements of fact certainly brings into new and sharper focus the desirability of the institution in this country of the right of reply. Is there anything in the opinion raising any constitutional doubts with respect to such a proposal? Alabama, in company with many other states, has legislation limiting damages recoverable by a libel claimant unless the claimant calls on the publisher of the libel to publish a retraction and the latter refuses.[86] The Montgomery Police Commissioner did call on the Times for a retraction. None was forthcoming on the ground that the published advertisement was not thought by the Times to reflect on the Police Commissioner who, it will be recalled, was not named in the advertisement. In announcing the constitutional privilege for nonmalicious defamation of public figures the Court attached no significance to the Alabama retraction statute.[87]

It is believed that the Court's treatment of the Alabama retraction statute raises no constitutional doubt concerning the validity of statutory right of reply. The Alabama retraction statute provides only for a mitigation of punitive damages leaving untouched the at large characteristics of compensatory damages for libel at common law. Retraction statutes providing for limitation of actual damages to so-called "special damages" on publication of a retraction, as in some states, might be treated differently as regards the first amendment. The *Times* decision may not have freed the press from all monetary liability in cases where it declines to retract in the face of convincing proof of error.[88] Damages in such a

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[85] Pedrick, supra note 52, at 179.

[86] Ala. Code tit. 7, § 914 (1959). For discussion of retraction statutes to be found in some 20 states see Morris, "Inadvertent Newspaper Libel and Retraction," 32 Ill. L. Rev. 36 (1937); Comment, 27 Fordham L. Rev. 254 (1958); Annot., 13 A.L.R.2d 277 (1950).

[87] New York Times Co. v. Sullivan, 84 Sup. Ct. 710, 729-30 (1964).

[88] The Court left this question open with the following comment:

> The Times' failure to retract upon respondent's demand . . . is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. . . .

case could be based on the intentional refusal to mitigate damage previously inflicted. The *Times* decision certainly does not touch such a case. Whatever the position as to compulsory retraction, however, the right of reply proposal stands on a somewhat different constitutional footing.

From the standpoint of the freedom of the press it is one thing to use a monetary sanction to force the press to publicly eat crow, a dietary item singularly repulsive to newspaper publishers, and quite another to require the press to publish another's self defense statement clearly identified as that other's statement.[89] That, after all, is simply publishing the news! Accordingly, it is believed that a measure designed to increase the flow of information of matters of public concern without calling for official determination of the validity of the claims and counterclaims is ideally designed to serve the purposes of the first amendment.

It is difficult, however, to see how the Court as a judicial institution could effectively institute a right of reply. The decision in the *Times* case is essentially negative, interposing the shield of the Constitution to prevent the imposition of monetary liability. The first amendment itself may well encompass a positive philosophy of the democracy-serving-function of the media of information in our society but the amendment is not phrased in terms authorizing affirmative exercise of governmental power. There are other sources of affirmative governmental authority, however, and the point is that the first amendment ought not to hamper use of that authority.

Under its authority over the postal system and its power to regulate interstate commerce, Congress could provide for a right of reply as to all media subject to regulation under these grants of federal legislative authority and might appropriately deal as well with other aspects of interstate defamation.[90] If it is in the public interest to protect the public from misleading advertising, from misleading misrepresentations in the sale of securities, from the promotion of fraudulent schemes through the mails, is it not also in the public interest to free the interstate channels

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It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. Id. at 729.

89 See the very interesting comment on the 1956 decision of the Japanese Supreme Court in Kiyomi Oguri v. Shigeo Kageyama by Ouchi, supra note 78. The Japanese Code provides for an order "requiring the (defendant in a libel case) to take suitable measures for the restoration of the latter's reputation either in lieu of or together with damages." The Japanese Supreme Court held that a court order requiring a published retraction did not infringe a constitutional guarantee against abridgement of freedom of conscience. It is argued by the Ouchi comment that publication of the court's judgment would adequately serve the public interest in the truth without infringing the conscience of the defendant.

90 This suggestion was offered more than a decade ago by Leflar, supra note 78, at 450-54; Prosser, "Interstate Publication," 51 Mich. L. Rev. 959, 995 (1953).

of communication for the expression of divergent views at least to the extent of giving those attacked in such media a right to offer their defense? Congress may not restrain the press in its vital function of presenting public issues. As the price for exemption from common-law liability for nonmalicious libel, Congress surely has the power to require that the press, moving in and affecting interstate commerce and using the mails, be opened for the reply of individuals defamed.

It would, of course, be open to the several states to adopt right of reply legislation but with the *Times* decision the federal authority has entered the field on a broad front. A positive federal remedy is indicated. There are a variety of problems to be solved in fashioning such a right of reply, its relationship to voluntary or involuntary retraction and a host of other issues. The problems are not insolvable. It is now seventeen years since the distinguished Commission on Freedom of the Press reported that "as an alternative to the present remedy for libel, we recommend legislation by which the injured party might obtain a retraction or a restatement of the facts by the offender or an opportunity to reply."[91] The Court has now eliminated the libel remedy in cases involving good faith defamatory misstatements on matters of public concern. The alternative of a right of reply at last and at least deserves a trial. It would be a happy development if the press would undertake such a trial on its own volition.

We must bear in mind that our Bill of Rights was written in another age for another society. This heritage with its noble concepts of liberty and freedom has to be re-defined and re-defended by every generation. In the *New York Times* decision the Court has provided us with a modern revised translation of the freedom of the press, suited to our time. In this aspect of life, as in others, the law moves—and may yet move us all.

[91] Commissioner of the Freedom of the Press, "Recommendations," set forth in 2 Chaffee, supra note 80, at 801 (1947).