Public Speech and Libel Litigation: Are They Compatible?

Donald Meiklejohn
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"A lawsuit is a fruit tree planted in a lawyer's garden."

Italian Proverb

"A lawsuit is a good experience."

Alan Abelson, columnist and editor of Barron's Weekly, on the third libel suit brought against him in five years.¹

I. LIBEL LITIGATION: THE PROBLEM

At the meeting of the American Bar Association in July of 1985, Dick Cunningham, associate professor of journalism at New York University, argued that, in libel cases, procedures other than litigation are needed.² He conceded that although such changes are unlikely, a resort to arbitration might be possible. In contrast, Bruce Sanford, a noted authority on libel, asserted that the unsettled state of libel law makes any alternative to litigation unlikely, since it is unrealistic to believe that attorneys will not resort to litigation.³

The impact of libel litigation on public discussion has been considerable: It has been characterized as leading to censorship of the

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² 54 U.S.L.W. 2057 (July 23, 1985).
³ Id.
press by libel lawyers. Various remedies have been proposed, including the award of attorney's fees in suits determined to be frivolous. There have been such awards in cases where the court has found genuine frivolity or bad faith, but how far such a practice may be encouraged in libel cases heard by the present Supreme Court is open to question.

The following discussion argues for an absolute privilege for all comment on public affairs. This thesis is based upon the concurring opinions of Justices Black, Goldberg, and Douglas in New York Times Co. v. Sullivan, in which they asserted that the absolute privilege affirmed for statements by public officials should be matched by a comparable privilege for the public on matters of public concern.

The libel litigations involving Generals Sharon and Westmore-
land\textsuperscript{13} are recent notable cases in a well-traced history\textsuperscript{14} that began with the \textit{Times v. Sullivan} decision in 1964. The \textit{Times v. Sullivan} decision was based on a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."\textsuperscript{15} To further that commitment, the Court developed the \textit{Times v. Sullivan} standard, that a public official be prohibited 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."\textsuperscript{16}

As summarized by the late Harry Kalven, Jr., of the University of Chicago, the \textit{Times v. Sullivan} decision "involved a rare instance of measuring the common law of defamation by constitutional standards."\textsuperscript{17} The Court was forced "back to the discovery of a basic truth about the First Amendment, namely that the core of its constitutional protection must be to guard against treating seditious libel as an offense."\textsuperscript{18} As Kalven had said for himself earlier, "A free society is one in which you cannot defame the government."\textsuperscript{19}

A recent comment by Judge Irving Kaufman brings the history to its present posture. Taking note of the flood tide of libel proceedings and the heavy damages awarded, Judge Kaufman concludes with regret that the promise of the \textit{Times v. Sullivan} decision has not been fulfilled.\textsuperscript{20} The elasticity of the test of actual malice, the

\begin{thebibliography}{99}
\item[15.] 376 U.S. at 270.
\item[16.] \textit{Id.} at 279-80.
\item[18.] H. Kalven, \textit{The Negro and the First Amendment} 59 (1965).
\item[19.] \textit{Id.} at 16. Kalven analyzed with thoroughness and characteristic felicity the arguments of Justice Brennan's opinion and the concurring opinions of Justices Black and Goldberg. He noted that all members of the Court accepted the analogy between the expression of a citizen-critic and the utterances of a public official. Given this analogy, he thought, Justice Brennan might have joined Black, Goldberg, and Douglas in affirming absolute protection for comments on public affairs. It is not quite clear whether Kalven approved the restriction advanced by Justice Brennan in terms of actual malice. Kalven did, however, express his enthusiasm for Justice Brennan's formulation of the theme of self-government as the basis for freedom of discussion. \textit{Id.} at 52-64.
\end{thebibliography}
responsiveness of juries to bias against unpopular defendants, and a
growing animosity against the press have resulted in a series of
awards which have made the well-financed press cautious and the
smaller press silent.  

The issue considered here is broader than a simple struggle over
the rights of the press. Recent libel proceedings have involved such
nonpress defendants as a civil rights group protesting a town council
dismissal of a black secretary, civic associations combining to resist a
development project, a farmer sued by a toxic waste disposal com-
pany, and a group of mayoral candidates charged with defamation
by another, unsuccessful candidate. In June of 1985, the Supreme
Court unanimously denied absolute immunity of petition claimed by
the author of a letter which had challenged the qualifications of a
candidate for a position as a United States Attorney. It is esti-

mated that similar libel suits involving nonmedia defendants num-
bered a few hundred a year in the 1970's but are now approaching a
thousand a year or even more. The same constitutional issues are
involved in these cases as in those concerning the print or broadcast
media.

Some commentators have endorsed the bringing of such libel
suits against private individuals who allegedly lack a sense of public
responsibility. The central theme of the Times v. Sullivan decision,
however, was that we must expect public discussion, when it is unin-

Like Professor Kalven, Judge Kaufman does not affirm the Black position of absolute protec-
tion, since he believes that it would close off access to some deserving plaintiffs. But he indi-
cates his belief that some change is necessary if public deliberation on public issues is to be
genuinely free.

21. Id. Judge Kaufman cited a study by the Libel Defense Resource Center, a private
information clearing house for the media:

[O]ut of a sample of 54 defamation and invasion-of-privacy cases brought against
the media since 1978, the defendants were ordered to pay damages in 47. Thirty of
these awards totaled more than $100,000, 12 exceeded $250,000, and 9 went be-

Id.

22. Greenhouse, Outspoken Private Critics of Officials Increasingly Face Slander Law-

23. McDonald v. Smith, 472 U.S. 479 (1985). The court in McDonald held that the
petition clause of the first amendment is subject to the same restrictions as other first amend-
ment freedoms. Thus, a petitioner may be subject to liability for libel. Greater constitutional
protection is not afforded to petitions to the President. Id. at 485.

24. See Greenhouse, supra note 22.

23, 1985, at A47, col. 2, where the President's Science Adviser, George A. Keyworth, asserted
that "the press is trying to tear down America."
hibited, to be robust and on occasion intemperate. Society has more to fear from inertia and apathy in public affairs than it does from the free expression of strongly held opinions. Americans have never proposed to live in a society in which the bland lead the bland. We expect deep differences of opinion and we thrive on them. Certainly the issues which have given rise to the recent libel suits against nonmedia defendants — civil rights, pollution, political rivalry — are important issues which call for comment.

Adoption of the position that all comment on public affairs should be absolutely privileged would simplify much of the current litigation. Some significant questions, however, must first be answered. Formulation of the privilege requires a clear definition of “public affairs,” and an accurate determination of the role of “truth” and “falsity” in public discussion.

II. WHAT IS “PUBLIC”?

Justice Goldberg, in his Times v. Sullivan opinion, noted the importance of defining the limits of “public.” He disclaimed any intention of extending the absolute privilege of comment to purely private libels. The Court, as a whole, has had great difficulty in defining the concept of “public” beyond attributing to it all conduct by public officials in the discharge of their official duties. The standard developed was that of the “public figure.” In order to qualify for constitutional protection, a public figure must be the object of the speech in question. Later, the protection was extended to include comment on subjects of public or general interest.

26. 376 U.S. at 270.
27. 376 U.S. at 302 n.4 (Goldberg, J., concurring in result).
28. See Hutchinson v. Proxmire, 443 U.S. 111 (1979) (Senator Proxmire's publication of his Golden Fleece awards was declared not part of his official duties).
29. See, e.g., Associated Press v. Walker, 388 U.S. 130 (1967) (involving a retired general who was active in civil rights agitation and who had attained some political prominence; Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (involving the athletic director/ex-footbal coach of a major university); Time, Inc. v. Hill, 385 U.S. 374 (1967) (involving the invasion of a private home by convicts); Rosenblatt v. Baer, 383 U.S. 75 (1966) (involving the operator of a public recreation area). In Time, Inc. v. Hill, a minority of the Court contended that the plaintiff had been involuntarily brought into public attention by the press after he and his family had tried strenuously to escape public notice. To this the majority, through Justice Brennan, replied, in effect, that what the press finds to be of public concern is, by that token, of public concern and newsworthy. Id. at 388-89.
v. Metromedia, Inc., the Court mustered a bare majority to support this extension. Justice Marshall joined other dissenters in finding the plaintiff to be a private person even though he had been arrested on a charge of distributing obscene materials. The case highlighted the problem of identifying the public aspect in the activity of a person previously unnoticed by the press.

Since Rosenbloom, the Court has moved away from its expansion of the area of protected comment. In Gertz v. Robert Welch, Inc., the majority, in an opinion by Justice Powell, declared that the plaintiff was not a public figure although he was a well-known lawyer who had been criticized in the defendant's magazine, American Opinion, for his part in the murder prosecution of a Chicago policeman. The magazine had accused Gertz of being part of a Communist conspiracy to discredit the police. In affirming Gertz's private status, the Court declared that the standard for establishing libel should not be actual malice as defined in Times v. Sullivan, but rather negligence as the state might define it.

Two years later, in Time, Inc. v. Firestone, the Court continued to narrow the area in which comment was to be protected under the "actual malice" rule. A majority of the Court held that the respondent, whose seventeen-month litigation for divorce was the subject of a Time magazine report, was not a public figure, despite her visibility in Palm Beach society and the fact that the case was widely reported. Justices Brennan and Marshall dissented from this denial of public status. Brennan reviewed the rulings since Times v. Sullivan and stressed that "[a]t stake . . . is the ability of the press to report to the citizenry the events transpiring in the Nation's judicial systems." Marshall argued that, given the respondent's prominence in Palm Beach society, her subscription to a clipping service, and the press interviews she held during the trial, she qualified as a public figure.

31. Id.
32. Id. at 78.
34. Id. at 352.
35. Id. at 325-26.
36. Id. at 347.
38. Id. at 455.
39. Id. at 476 (Brennan, J., dissenting).
40. Id. at 485 (Marshall, J., dissenting). Marshall did indeed go on to contend that in Gertz the Court had agreed with his assertion (in his Rosenbloom dissent) that a criterion as broad as "information . . . relevant to self-government" is not suitable as a basis for decision.
Since 1976, state and federal courts have struggled with the concept of "public" and have emerged with a variety of meanings. The time is ripe to reconsider the rationale which was first set forth in *Times v. Sullivan* and which has been obscured by the debate over "public figure." As Justice Black, in his later years, reflected on the course of the Court's libel decisions, he asserted that "the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings."42

The essence of the *Times v. Sullivan* rationale was the necessity for uninhibited debate about public affairs and matters of public concern.43 The fact that the plaintiff was a public official led the Court to formulate its principle of press protection in terms of the relationship between the public and its agents.44 In the cases which followed, it became clear that the relationship had to be more broadly conceived, though some members of the Court have resisted this,45 so that protection was to be accorded, absent actual malice, to persons, official or not, involved in matters of public concern. Hence, the public figure appeared in the persons of the Hill family,46 General Walker,47 and Wally Butts.48 Subsequently, when *Rosenbloom* was decided, the Court considered the public nature of the controversy rather than that of the individual to be crucial.49 The refusal to acknowledge this distinction led the Court to its decision in *Gertz.*50

The dissents of Brennan and Marshall in *Firestone* exemplify the two approaches. Brennan based his argument on the fact that *Time* was reporting a trial and the divorce judgment which issued from it.51 Marshall, responding to the Court's majority more di-

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43. 376 U.S. at 270.
44. *Id.* at 279-80.
46. *Id.* at 387-88.
49. 403 U.S. at 43 (Justice Brennan stating, "The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.").
50. 418 U.S. at 352.
51. 424 U.S. at 473-74 (Brennan, J., dissenting).
rectly, stressed the public character of the respondent. The Brennan argument, which focused on the nature of the controversy, was more directly responsive to the first amendment. The freedoms of speech and press are not primarily concerned with individuals, either as speakers or writers, or as the objects of comment. The first amendment freedoms have to do with the exercise of public opinion regarding matters of public concern, and the response to that exercise. First amendment freedoms do not consist of the ability to say or write anything, anywhere, anytime, but rather consist of our ability to comment freely on matters that are of concern to the public. When we praise or criticize individuals who are involved in matters of public concern, our comment is only incidentally "personal." It is essentially a reflection on the quality of the public action in which they are taking part. As Justice Brennan stressed in *Rosenbloom*, the *Times v. Sullivan* privilege is applicable "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."

The recent case of a Consumers Union report about the loudspeaker system developed by Dr. Bose illustrates and confirms the distinction between public conduct and the conduct of individuals. While anyone connected with the communications industry may achieve considerable notoriety, it can hardly be said that Dr. Bose's name is a "household word." On the basis of the language used in the lower courts, Dr. Bose would be called a "qualified" or "limited" public figure rather than a "general purpose" public figure. One can imagine Justice Black's skepticism concerning such distinctions and his insistence that it is the public concern that is crucial. The freedom to comment needs protection in commercial as well as in narrowly "political" matters when it is relevant to the public's ability to make up its mind. The process of public deliberation, whether or

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52. *Id.* at 485 (Marshall, J., dissenting). See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), where a reporter was sued for broadcasting the name of a deceased rape victim, in violation of a state privacy statute. The Court held in favor of the defendant reporter, however, because the victim's name was available on the public judicial records which the defendant utilized. *Id.* at 496.

53. 403 U.S. at 44.


not it results in public action such as legislation, requires that all relevant information be available.

The definition of the public deliberation which requires protection has been delineated by *Chaplinsky v. New Hampshire,* the classic text for libel actions in the constitutional framework. In that case, the Court declared that “the libelous, and the insulting or ‘fighting’ words” fall outside the scope of first amendment protection. Chaplinsky, a Jehovah’s Witness, called the town marshal a “God damned racketeer” and “damned fascist” while being arrested for provoking a disturbance. In retrospect it seems a pity that no member of the Court, not even Justice Black, pointed out the distinction between Chaplinsky’s comment on the conduct of public affairs and his “picking a fight” with the marshal. Chaplinsky may well have been guilty of the latter, but the former surely would have been protected as a contribution, however unpopular in war-time, to public discussion.

In an attempt to define what constitutes public discussion, the Court has also drawn a distinction between “ideas” and “facts.” In *Gertz,* Justice Powell wrote that “[u]nder the First Amendment there is no such thing as a false idea,” implying that all ideas are matters of opinion and therefore not relevant to the determination of actual malice. Facts, on the other hand, may be known and statements about them are susceptible of truth or falsity. But serious political discussion is almost always about “facts-in-theories.” The John Birch Society’s charge that Elmer Gertz was a member of a Communist conspiracy to discredit the police involved both theory and fact. This charge was intended to influence public opinion respecting the activity of alleged Communists in the United States. Any and all reports about court proceedings, as in *Firestone,* are likewise a mixture of theory and fact.

First amendment protection must extend to all statements of

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57. 315 U.S. 568 (1942).
58. Id. at 572.
59. Id. at 569-70.
60. See Cahn, *Justice Black and First Amendment "Absolutas": A Public Interview,* 37 N.Y.U. L. REV. 549, 558 (1962), where Justice Black commented on the aphorism about falsely shouting “fire” in a crowded theater: “If a person creates a disorder in a theater they would get him there not because of what he hollered, but because he hollered.”
61. 418 U.S. at 339.
62. Id. at 325.
63. 424 U.S. at 452.
fact which are of general, public importance. The crucial consideration is the assertion's relevance to the formation of public opinion. Rather than invoking the "idea-fact" distinction, courts should employ the conception formulated by Judge Kaufman in *Edwards v. National Audubon Society, Inc.*, in which the Second Circuit Court of Appeals reversed a $61,000 libel judgment against the *New York Times*. Judge Kaufman wrote that "a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves." The public needs information, regardless of the form or the source, to make important decisions. Of course, one who advances a general idea believes it is based upon actual experience, but as the idea is made public, its significance lies in its potential influence on public policy. The idea's validity as a basis for such policy is for individuals or legislators, not courts, to determine. In sum, public is that which the media or other groups or persons make public, i.e., "publish." If this challenges the common law tradition of defamation, so be it. For insofar as that tradition punishes written comments, it interferes with the process by which the public makes up its mind, and, indeed, is generated and maintained. It is not possible, a priori, to denote the precise range of "public affairs." Public opinion is what determines the focus of what the public undertakes as policy at any given time. To interpose the hurdle of a libel suit between public opinion and public action is to handicap the process of self-government.

Are there, then, any publications or other written comments which deal with purely private affairs? Justice Goldberg's note in *Times v. Sullivan* indicates that a gray area exists between public and private conduct, and that the public-private distinction is not as intractable as that between a "malicious" and a "non-malicious" state of mind. Letters of recommendation for employees or for students are normally private communications, yet employment and teaching relationships may be publicly significant in certain contexts. Comment on Carol Burnett's dinner in a Washington restaurant

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64. 556 F.2d 113 (2d Cir. 1977).
65. *Id.* at 115.
66. See J. Dewey, THE PUBLIC AND ITS PROBLEMS 33-34 (1954) (stating that as a result of our constantly changing social environment, the range of public affairs fluctuates).
67. 376 U.S. at 302 n.4 (Goldberg, J., concurring). *Cf.* Rosenbloom, 403 U.S. at 48 (Justice Brennan stating that "some aspects of the lives of even the most public men fall outside the area of matters of public or general concern").
might appear to provide an instance of purely private communication, despite her national prominence.\(^6\) What and where a person eats is presumably her own business, even if she is a "public figure."

Yet, when the *National Enquirer* published a gossip item, which it later conceded to be false, that Burnett was drunk at the restaurant, the report clearly had import for her dedicated activities against alcoholism. The remedy which the public and Carol Burnett need is not a pecuniary penalty, but rather the issuance of a retraction which would be more influential than the "correction" which the *National Enquirer* actually published. Alternatively, the *Enquirer* might have made space available for a fully adequate reply by Carol Burnett. In sum, the report about her evening out did in fact affect public interest on an important public issue in which she is vitally concerned. The central question that her libel remedy should address is that of her effectiveness as an advocate against alcoholism.\(^7\)

Another example of conduct which might be considered to fall entirely in the private sphere is commercial activity involving only private participants. In *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*,\(^7\) the adverse credit rating of a firm was circulated confidentially only to a limited set of subscribers. In light of its decision that the statements did not involve matters of public concern, the Vermont Supreme Court affirmed an award of $50,000 compensatory and $300,000 punitive damages for a concededly false report of bankruptcy.\(^8\) The Vermont Supreme Court, taking note of the United States Supreme Court's silence on the issue, asserted that the *Times v. Sullivan* privilege does not extend to nonmedia publishers,\(^9\) adding, "Our common law has never recognized a qualified privilege against defamation actions for credit reporting agencies . . . ."\(^\)\(^10\)

The Vermont decision was affirmed by the United States Supreme Court,\(^11\) but only by a divided majority: Justices Rehnquist and O'Connor concurred with Justice Powell's opinion, and two other Justices concurred separately. Contrary to Justice Powell's


\(^7\) For a thoughtful discussion of the public-private distinction, see F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 68-86 (1981).

contention that the credit rating was a private communication, Justice Brennan, for himself and Justices Blackmun, Marshall, and Stevens, declared that “[t]he credit reporting of Dun & Bradstreet falls within any reasonable definition of ‘public concern’ consistent with our precedents.” Justice Brennan cited the dissent of Justice Douglas in *Dun & Bradstreet, Inc. v. Grove* to the effect that particular financial data “are part of the fabric of national commercial communication.”

Publication respecting commercial activity has been explicitly affirmed by the Supreme Court to be protected under the first amendment. Advertising of job opportunities, the operation of an abortion clinic, the prices of prescription drugs, and professional legal services have all been declared to be forms of public expression conveying what the public needs to know. It is not primarily the individual interests of consumers that these publications serve, but rather the concern of the public as a whole, which conceivably may affect legislation. The availability of such information in terms independent of special commercial and professional interests is what the public needs, especially in a period of technologically refined manufacture and service. If Ralph Nader is to be free to rate commercial products, so should those who work to sell them.

### III. TRUTH-FALSITY: THE TEST OF ACTUAL MALICE

The *Times v. Sullivan* decision challenged the traditional law of defamation, not only in bringing public affairs to the center of consideration, but also by sharply limiting the reach of falsehood as a basis for a libel judgment. From that case and its progeny there has developed the now familiar test of “actual malice” — publication of a defamatory falsehood or reckless disregard for truth or falsity. It was that test which Justices Black, Goldberg, and Douglas re-

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76. Id. at 762.
77. Id. at 789.
84. 376 U.S. at 279-80.
jected in *Times v. Sullivan* and the cases which followed. They maintained that the test of actual malice would not, in the hands of emotional juries and judges, afford real protection to a genuinely independent press.

The strongest argument for the test of actual malice has been set forth by Justice Brennan, in whose opinions and dissents the test has been very narrowly defined. With all deference to his gallant concern for the freedom of public discussion, it seems that his logic is incomplete. Attention to individuals has, on occasion, appeared to divert his reasoning from the needs of the public as a whole.

The double criterion of deliberate falsehood and reckless disregard for truth or falsity focuses on the intentions of the speaker or writer; the important question, however, is the content of what was said or written. According to the tradition of common law libel, the question is whether the publisher, reporter, or author is trying to hurt another person by damaging his reputation. In first amendment cases, however, that is not determinative. Rather, what must be asked is: Does this expression provide information relevant to the process of the public's self-government in the face of "the exigencies of their period"?

The argument that the deliberate lie or the negligent or reckless report corrupts public discussion rests upon a confusion between the state of mind of the writer or speaker and the objective situation written about. Indeed, for all we know, a deliberate liar may hit the truth in spite of himself, and a reckless gossip may throw unintended light on an area of popular interest. They may often do otherwise. But the first amendment's premise is that the public is able to receive and appraise the reporting of a genuinely free press. The amendment does not limit its protection to good peo-

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85. 376 U.S. at 293 (Black and Douglas, J.J., dissenting), 297-98 (Goldberg and Douglas, J.J., dissenting).
86. See *supra* note 29 for the series of cases identified as the "progeny" of *Times v. Sullivan*.
89. See *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), where the Court stated: "The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times."
people, honest people, or careful people. All Americans may contribute, as they see fit, to the formation of public opinion.

The attempt to exclude the deliberately false or reckless statement from first amendment protection harks back to the concept of seditious libel which *Times v. Sullivan* has generally been understood to have rejected. That concept rested on the notion that there are bad people who are against the government and who would upset it by stirring discontent among the good people of the country. Criticism of the government was interpreted as evidence of a lack of patriotism. But we have long since come to believe (with some regrettable lapses) that criticism of government is a patriotic duty, that the tendency of every government is to assume its own virtue, and that the role of the press, as well as of academics and of citizens at large, is to keep government under incessant scrutiny.

When a libel controversy is explicitly focused on public affairs, questions of truth and falsity are secondary. While the expression of a given opinion about a public issue may be deeply harmful to the public, the remedy inherent in the first amendment is more expression. Adverse comments about so-called public figures, as well as public officials, reflect genuine perspectives on the policies and ideas those people represent. To speak of the truth or falsity of such ideas makes no sense. What does make sense is to examine the adverse comments in the context of the infinitely varied complex of political and social views that make up the public opinion of the United States.

Judge Kaufman and other judicial authorities on the first amendment advise us that on occasion we must tolerate some abuses of free speech in order to enjoy its blessings. For many decades the group most widely thought to lie about American society has been the Communist Party. Yet in time the courts have come to distinguish between radical words and radical actions and to accord to the former the protections of the first amendment. The “falsehood” of which Communists and other radicals are said to be the authors is simply their unpopular conception of who we are and how we are

92. See H. Kalven, *supra* note 18 and accompanying text.
93. See *supra* note 25.
doing. Even General Westmoreland's suit against CBS ultimately amounted to a claim that 60 Minutes had improperly depicted one phase of the Vietnam campaign. To submit to a jury trial the question of whether CBS deliberately lied is to invite jury and judge to take sides on a deeply controversial public issue. The really serious charge that might have been brought against CBS is that the program did not give the General a fair chance to present his side of the case.

The development of the test of actual malice is, in some ways, similar to that of the test of clear and present danger. The latter test, first formulated by a judge regarded as especially partial to free speech claims, was, in its early years, often construed rather loosely. In the later days of the Warren Court, clear and present danger came to be construed with such strictness that it virtually disappeared. It has not, however, been explicitly discarded by the Court and may be available for further interpretation as the Court changes. Similarly, actual malice in its early formulation clearly provided a basis for imposing first amendment restrictions on libel law, and it was expanded for a decade to protect a widening area of public discussion. Since 1974, the Court has steadily contracted the protections afforded under the test. As this present trend is contemplated, it seems appropriate to recall Justice Black's wistful conclusion to his dissent in Dennis v. United States:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties

98. The "clear and present danger" test was first formulated by Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").
99. In a letter to Sir Frederick Pollock, Holmes stated that the Chief Justice had assigned him the writing of the opinion in a later free speech case, Debs v. United States, 249 U.S. 211 (1919), because he would "go farther" than the majority in his support for free speech. 2 HOLMES-POLLOCK LETTERS 7 (M. Howe ed. 1941).
101. See cases cited supra note 96.
102. See supra notes 29-39 and accompanying text.
to the high preferred place where they belong in a free society.\textsuperscript{105}

Justice Black might have found some comfort in the recent treatment of the truth-falsity issue in \textit{Philadelphia Newspapers, Inc. v. Hepps}.\textsuperscript{106} A majority of the Supreme Court, speaking through Justice O’Connor, declared that the plaintiffs must bear the burden of proving falsity; the four dissenters contended that the defendants should bear the burden of proving truth.\textsuperscript{107} Justices Brennan and Blackmun, concurring, asserted that the Court’s rule should apply to nonmedia defendants as well as media defendants.\textsuperscript{108} The crux of the Court’s opinion was that “[t]o ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”\textsuperscript{109} In effect, this grants the publisher a presumption of truthfulness on public issues. When the media speak to a public issue, the public should listen, and evaluate it for themselves. This opinion does not appear “pernicious,” as claimed by the dissenters,\textsuperscript{110} nor indifferent to concerns for reputation. Plaintiffs are left with a possible recourse of direct refutation. But the more substantial recourse is to be found in the public’s appraisal of the challenged statement.

\section*{IV. \的发展 Remedies}

Assuring an absolute privilege for comment on public affairs need not leave deserving plaintiffs entirely without remedy. In his comments on \textit{Edwards v. National Audubon Society, Inc.},\textsuperscript{111} Judge Kaufman explained his disagreement with Justices Black and Douglas by saying that “an absolute prohibition . . . necessarily leaves some individuals who have suffered real injury without legal recourse against a press that does not always exercise its responsibilities wisely.”\textsuperscript{112} In recent decades, however, there have been a number of proposals for providing alternative remedies to the public figure or official who has been the aggrieved subject of adverse comment.

\begin{footnotesize}
\begin{enumerate}
\item 105. \textit{Id.} at 581.
\item 106. \textit{106 S. Ct.} 1558, 1561-67 (1986).
\item 107. \textit{Id.} at 1566.
\item 108. \textit{Id.} at 1565-66.
\item 109. \textit{Id.} at 1564.
\item 110. \textit{Id.} at 1566.
\item 111. 556 F.2d 113 (2d Cir.), \textit{cert. denied}, 434 U.S. 1002 (1977).
\item 112. Kaufman, \textit{supra} note 20, at A27, col. 4. \textit{See also} text accompanying \textit{supra} note 20.
\end{enumerate}
\end{footnotesize}
Such responses to Judge Kaufman’s challenge include voluntary or mandatory retraction, and the right to reply.\textsuperscript{113}

The remedy of mandatory retraction was advocated by \textit{New York Times} columnist Anthony Lewis at the end of the Sharon-Time trial.\textsuperscript{114} Although Lewis believes that the trial should not have taken place at all, he has not generalized that view into the Black-Douglas absolute privilege position. Rather, he believes, like Justice Brennan, that such an absolute view disregards the legitimate concern for reputation.\textsuperscript{115} Lewis would modify current libel trial procedure in order to reduce its cost; he estimates that \textit{Time} and General Sharon together spent over $3 million in legal fees, not to speak of the impact of the two-month trial on the litigants and the federal court system. Accordingly, he proposes that such libel litigation should be replaced by an action to challenge the truth of the allegedly defamatory publication. No damages would be awarded or questions raised about the state of mind of the authors of the publication. If the plaintiff proved the publication false, the defendant would have to pay reasonable counsel fees and publish a retraction. Thus, the demands of both reputation and public information would be fairly met.\textsuperscript{116}

Though retraction of factual statements conceded to be false would provide a measure of relief, the validity of the publication remains a matter unsuitable for resolution in a legal proceeding. The significance of the Westmoreland and Sharon trials was not that one side or the other was “right about the facts” or that one side had to retract. In fact, all parties claimed victory. To some extent, as in both of these cases, a publication may concede error. But such concessions still leave the court, confronted by the conflicting presentations, with the task of making up its mind. A libel court, acting by


\textsuperscript{115} Assertion of an absolute privilege or of an absolute right to expression is often caricatured to imply irresponsibility. Yet there are many accepted absolutes prescribed in the Constitution, notably those belonging to members of Congress. Members of the judiciary and of the executive branch generally are privileged in respect to what they say in the course of their official activities.

\textsuperscript{116} See Lewis, \textit{supra} note 114. It may be contended that the outcome of the Sharon-Time trial resembled that envisioned by Lewis, in that \textit{Time}, in fact, conceded error with respect to a crucial document while still affirming the general validity of its report. On the other hand, costs to both sides were very heavy even though, in the absence of a finding of actual malice, no monetary damages were awarded.
itself, is not the proper forum for the resolution of these basic differences on public policy.

More promising than the retraction remedy is that proposed by Zechariah Chafee in *Government and Mass Communications*.117 In that book, published seventeen years before the *Times v. Sullivan* decision, Chafee developed an argument for introducing “An American Statute Embodying the Right of Reply.”118 Writing as a member of the Commission on Freedom of the Press,119 Chafee argued that such a statute could be a basis for meeting many of the problems of libel litigation in the United States.

Chafee would not have accepted an absolute prohibition of libel proceedings in cases involving public affairs; characteristically, he balanced his concern for informing the public with his concern for protecting reputation.120 In both public and private matters, however, he found two great merits in the right of reply — it is “cheap, expeditious, and convenient,”121 and it “presents only simple issues for decision.”122 Conversely, he conceded that “the right of reply is open to at least three objections:”123 the right may impose serious burdens on the press and on judges; a defendant publisher may match a reply with another story even more objectionable than the original; and the introduction of a new statutory procedure might disturb existing mitigatory procedures such as the publication of voluntary retractions.124 Of these objections, Chafee found only the first to be very serious, and he concurred with the Commission in urging that the right of reply should be carefully considered as an alternative remedy.125

To this end, Chafee outlined a procedure which adapted the French and German right of reply statutes to American conditions.126 Rather than the right to automatic publication of a reply to

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117. See Z. CHAFE, supra note 68, at 172-95.
118. Id. at 190-95.
119. The Commission on the Freedom of the Press was an independent, nongovernment group operating under a grant to the University of Chicago by Time, Inc. and Encyclopedia Britannica, Inc. It was created to “consider the freedom, functions, and responsibilities of the major agencies of mass communication in our time.” Id. at iv.
120. See Z. CHAFE, FREE SPEECH IN THE UNITED STATES 3-35 (1941) (Chafee’s general theory of free speech).
121. See Z. CHAFE, supra note 68, at 179.
122. Id. at 179.
123. Id. at 180.
124. Id. at 180-82.
125. Id. at 183-84.
126. Id. at 190-95.
any mention of one's name, the proposed reply would be submitted to a judge who would pass on its decency and grammar and thereupon order it printed.\textsuperscript{127} If the publisher conceded the truth of the reply, a retraction could be published instead.\textsuperscript{128} The judge could limit the length of the reply and protect the newspaper from potential libel charges by third parties.\textsuperscript{129} The details of these proposals are somewhat dated now. Indeed, Chafee stressed the prior importance of developing a greater dedication to honest and objective communication in the press and the community.\textsuperscript{130}

Enactment of a statutory right of reply would have to contend with a strong trend in the judicial system against the press. The argument for the right to reply did not prevail in \textit{Miami Herald Publishing Co. v. Tornillo}.\textsuperscript{131} There the Supreme Court unanimously rejected the claim of a candidate for public office who sought to have the \textit{Herald} print his reply to a critical editorial.\textsuperscript{132} Although the Florida Supreme Court, pursuant to Florida's right of reply statute, ruled in favor of the candidate, arguing that the statute enhanced rather than inhibited public discussion, Chief Justice Burger condemned the law as empowering government to tell papers what to print.\textsuperscript{133} Justice Brennan, concurring, reserved judgment on whether the \textit{Herald} might be required to issue a retraction.\textsuperscript{134}

It may be argued that the issue of a right to reply on radio or television differs from such a right with respect to the print media,
and that the issue in libel actions is still something else.\textsuperscript{135} There are indeed significant differences in the availability of the information which the public needs. The crucial question is that of access for reply through alternative channels. In libel proceedings, the media involved are the logical proximate channels; when newspaper reports are at issue, there may be other newspapers which can provide the requisite equal access. But it must be conceded that the press, like the broadcast media, has become increasingly concentrated in ownership and operation. The point is not to balance the government's power against that of the press, but rather to employ the government so as to help the press be fully responsive to the public's need. When government helps individuals to reply to other individuals, it seems irrelevant to insist that we must "keep government off people's backs."

Similar issues are now being debated in the Federal Communications Commission (FCC) and outside it, over whether the Commission should alter the fairness doctrine under which, according to Congressional action in 1959, the Commission requires broadcasters to present opposing views on important public policies.\textsuperscript{136} The present Commission chief, Mark Fowler, and the distinguished first amendment lawyer, Floyd Abrams, oppose the fairness doctrine; government, they say, should not participate actively in regulating the air waves.\textsuperscript{137} Other arguments against the doctrine are based on the multiplicity of radio and television channels as contrasted with the relative scarcity of newspapers, which are not subject to the fairness rule. On the other hand, support for the rule also is strong both in Congress and among former FCC members, such as Charles Ferris, who headed the Commission under President Carter. The FCC, according to Ferris, does no more under the rule than to advise broadcasters that there has been an unbalance in the listener's rights that needs to be corrected.\textsuperscript{138}

The theory of public speech which has been the central theme of this Article comes down firmly on the side of maintaining the fairness rule in substantially its present form. As Ferris points out, the FCC does not regulate content — it extends only to the form of


\textsuperscript{137} Id.

\textsuperscript{138} Id.
public discussion. As to the more general complaint against regulation, it is difficult to understand why the enforcement of the fairness rule is more regulatory than the judicial control of expression through laws which punish libel and obscenity.\textsuperscript{139} A broadcaster like CBS might well prefer to allow General Westmoreland adequate time to reply (indeed, CBS seems to have offered that throughout the long trial)\textsuperscript{140} than to be subject to the exhausting and costly burdens of libel litigation. As for the contention that an adequate multiplicity of radio and television channels are available for all views to have access to the public, it is simply not the case that there are more than a handful in the major cities. The rivalry of the networks does not work with notable success to present opposing views. Furthermore, the fact that newspapers have been free from fairness restrictions in the past should not, given the increasingly noncompetitive status of the print media, preclude serious consideration of some form of fairness or right-to-reply legislation.

V. CONCLUSION

In the fall of 1979, Justice Brennan delivered a speech concerning the strain between the press and the Court over first amendment guarantees of a free press.\textsuperscript{141} At that time, the press was deeply concerned over recent Supreme Court decisions denying editors and reporters the right to refuse to identify their sources of information.\textsuperscript{142} In attempting to mitigate the animosity between the press and the Court, Justice Brennan identified two models which he believes operative in press activities today. The "speech model" assures the press protection for anything published; the "structural model" calls for the adjustment of press activity to "other societal interests."\textsuperscript{143} The latter model, which Justice Brennan favors, calls for restricting the press in favor of other societal interests in both the gathering of news and the nondisclosure of sources of information. In principle, Justice Brennan urged the press to forego the "absoluteness" of the speech model — that is, of a "personal" right to expression; rather, he ar-

\textsuperscript{139}. See Abrams, supra note 113, at 34 (concerning the unpublishability of an important paper on medical research, because of the prospect of a libel suit).
\textsuperscript{140}. \textit{A General Surrenders}, N.Y. Times, Feb. 18, 1985, at A22 (Editorials), col. 1.
\textsuperscript{142}. See, e.g., Herbert v. Lando, 441 U.S. 153 (1979).
\textsuperscript{143}. Brennan Address, supra note 141, at 176.
gued, the press should be concerned with protecting the social functions of impersonal dimensions.¹⁴⁴

The freedom of the press to fulfill its communication function does not per se involve persons. One hopes that such freedom will not injure or distress the individuals about whom it reports. But, as Justice Brennan aptly quotes Lord Acton: "Everything secret degenerates, even the administration of justice."¹⁴⁵ Perhaps our confidence in full publicity is misplaced, but as long as we hold to that confidence we must expect damage to reputations and feelings. As Judge Edgerton said more than twenty years before Times v. Sullivan, "[w]hatever is added to the field of libel is taken from the field of free debate."¹⁴⁶

I am uncertain whether Justice Brennan would regard the combination of absolute privilege and the right of reply as conforming to one of his two models. But I believe that such a combination would satisfy the requirements of the "structural model" in that both press freedom and individual reputation are afforded protection. The most frequently voiced criticism of the right to reply, i.e., that the reply never catches up with the original story, seems valid only in a measure inversely proportional to the attentiveness and reflectiveness of the audience or readers. It seems reasonable to hope that conclusions based on adverse comment about individuals, especially those who are prominent in society, will be held in suspense until both sides have been heard. A free press cannot be fully responsible unless its readers or listeners also are responsible. As Chafee said in his suggestions for a right-to-reply statute, the "chief cure for falsehoods in mass communications should be sought outside the realm of law . . . . Somehow the community must make the newspaper want to be better."¹⁴⁷

The award of attorney’s fees, noted at the beginning of this Article, may have considerable merit in reducing the likelihood of press self-censorship. But the right-of-reply remedy seems better calculated to insure, without heavy financial burdens on either side, a reconciliation of the press perspective with a matching presentation of the situation by those who find themselves and their causes misrepresented. Such a resolution would not involve prescriptions as to the

¹⁴⁴. Id. at 177.
¹⁴⁵. Id. at 182.
¹⁴⁷. Z. CHAFEE, supra note 68, at 195.
substance of what the press chooses to report. It would simply insure
that anyone written or spoken about would have the chance to re-
ply. The American legal system should be able to work out equita-
bly a method of achieving such a resolution. In a comment reported
at the end of the Westmoreland-CBS litigation, Marc Franklin of
the Stanford Law School said:

Not everyone who comes in off the street should be given equal
time, but the proper treatment in cases where truth and falsity are
murky and there is a morass of contradictory testimony is to let the
plaintiff state his perceptions . . . . This was a case for more free
speech, not for a lawsuit.\textsuperscript{149}

\begin{footnotes}
L. Rev. 867 (1948); Note, supra note 113.
\textsuperscript{149} Margolick, Risks in Litigation, N.Y. Times, Feb. 19, 1985, at B7, col. 1.
\end{footnotes}