NORTHERN KENTUCKY
LAW REVIEW

Volume 15  1988  Number 1

ARTICLES

PREFACE: FIRST AMENDMENT SYMPOSIUM—AN INTRODUCTION
David A. Elder ....................................................... 1

TAKING A LOOK AT "THE DISTORTED SHAPE OF AN UGLY TREE": EFFORTS AT POLICY-SURGERY ON THE LAW OF LIBEL DURING THE DECADE OF THE 1940s
Norman Rosenberg ................................................. 11

DEBATE ON THE CONSTITUTIONALITY AND DESIRABILITY OF A TOBACCO-PRODUCTS ADVERTISING BAN
Paul J. Weber ....................................................... 57

DEFAMATION IN THE WORKPLACE: "THE NEW WORKHORSE IN TERMINATION LITIGATION"
John Jay Fossett ................................................... 93

COMMENT

THE FIRST AMENDMENT AND ATTORNEY DISCIPLINE FOR CRITICISM OF THE JUDICIARY: LET THE LAWYER BEWARE ................................................... 129

NOTES

OHIO PROVIDES EVEN GREATER PROTECTION FOR ITS PRESS:
SCOTT v. NEWS-HERALD .............................................. 153

MEESE v. KEENE — CONGRESS CAN SIDE-STEP THE FIRST AMENDMENT BY INDIRECT LEGISLATION ................................................... 181

BETHEL SCHOOL DIST. NO. 403 v. FRASER — IS THE PIG IN THE PARLOR? ................................................... 205

BOOK REVIEW

IN SEARCH OF TRUTH: A REVIEW OF RENATA ADLER'S RECKLESS DISREGARD
Dale M. Cendali ....................................................... 227
First Amendment Symposium—An Introduction

David A. Elder

The Supreme Court's decision in New York Times v. Sullivan, addressing an attempt by Southern politicians to squelch criticism from the eastern liberal press, constitutes a landmark decision in the development of freedom of expression which has had a significant impact beyond the realm of libel law in focusing interest on the "central meaning" of the first amendment. For example, the first incursion on the then existing doctrine that commercial advertising was unprotected speech was New York Times' declination to treat the libel case before it, based on an advertisement entitled "Heed Their Rising Voices," as involving unprotected "commercial speech."

The almost quarter-century of precedent from New York Times to the recently-decided case of Hustler Magazine v. Falwell is well-known and will not be delineated in detail herein. It is worthwhile, however, to examine briefly the three roughly-sketched epochs in the Court's libel jurisprudence. The period from 1964 when New York Times was issued until Rosenbloom v. Metromedia in 1971 broadly constituted a period of expansion of the protection of freedom of expression—the subjective standard.

3. Id. at 273.
4. Distinguishing the then leading case of Valentine v. Chrestensen, 316 U.S. 52 (1942)(holding that an ordinance prohibiting street dissemination of commercial advertising did not violate the first amendment), the Court held that the advertisement before it was protected by the first amendment, as it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." 376 U.S. at 266.
7. St. Amant v. Thompson, 390 U.S. 727, 730-32 (1968)(The Court rejected an objective standard and required that complainant demonstrate defendant "in fact entertained serious doubts as to the truth" of the publication).
of "actual malice" (knowing or reckless falsity) was extended to public officials,8 public figures,9 candidates for public office,10 and, ultimately, by the Rosenbloom plurality, to all matters of public interest without regard to the plaintiff's status.11

In 1974 in Gertz v. Robert Welch, Inc.,12 the Court majority initiated a counter-revolution of sorts, retrenching from its briefly-lived expansionist plurality posture in Rosenblom, revivifying the status approach and adopting a negligence standard for private individuals suing the media.13 The Gertz court also rejected an attempt to give an open-ended definition to "public official" (by subsuming all attorneys thereunder as "officers of the court")14 and elucidated a detailed policy substratum for treating "public" persons differently from "private" persons—their greater access to the means of counter-argument and reply and the "normative" consideration of the "public" person's risk of enhanced media scrutiny.15 In this second period, initiated by Gertz and ending with a trio of libel decisions in 1979,16 the media suffered a number of setbacks by a Court that seemed intent on providing a better balance between the freedom of expression and the "basic" interest17 in individual reputation. In these decisions the Court applied its new "all purpose" and "limited purpose" or

---


11. Rosenbloom, 403 U.S. at 41-43. The views of the dissenters, i.e., that negligence was sufficient in private person cases, later became the majority view in Gertz. For a discussion of this development see Elder, supra note 8, at 604-14.


15. Id. at 344-45.


17. Herbert, 441 U.S. at 169.
“vortex” public figure criteria very restrictively, declined to revive New York Times for all cases involving abuse of the “fair report” privilege, substantially aided public persons endeavoring to prove “actual malice” by permitting broad discovery, declined to proscribe in toto presumed or punitive damages, and broadly intimated that the “public official” doctrine did not encompass all “public employees.” The Court’s next grouping of decisions in the third period, 1984 to the present, constitutes a mixed bag of decisions in which defamation plaintiffs and defendants each received some significant victories and decided setbacks. The Court finally resolved the dispute that existed (at least in private person cases) concerning the burden of proving fault and falsity and rejected imposition on the defendant of the burden of proving

18. In four decisions, including Gertz, between 1974 and 1979 the Court held all the plaintiffs not to be public figures: Gertz, 418 U.S. at 351-52 (A well-known attorney participating in a civil rights proceeding was not a “public figure”); Time, Inc. v. Firestone, 424 U.S. 448, 454-55 (1976) (A participant in a divorce, a cause celebre, was not a “public figure” despite her participation in several press conferences); Hutchinson, 443 U.S. at 134-36 (A recipient of federal funds for research was not a “public figure” prior to the controversy generated by the award, the “Golden Fleece” award, bestowed by defendant—“those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure”); Wolston, 443 U.S. at 165-69 (Neither plaintiff’s voluntary decision to not appear before a grand jury, with knowledge this might precipitate press publicity, nor his consequent citation for contempt rendered him a “public figure”). A third type, an “exceedingly rare,” “involuntary,” “public figure” was referenced by Gertz, 418 U.S. at 345. Subsequent decisions had generally ignored this variety and the Court’s rejection of mere newsworthiness as sufficient for “public figure” status seemed to have implicitly repudiated the “involuntary” category. But see Dameron v. Washington Magazine, Inc. 779 F.3d 736 (D.C. Cir. 1985) (An air traffic controller at the time of a crash was held to be an “involuntary” “public figure”), cert. denied, 476 U.S. 1141 (1986).

19. Firestone, 424 U.S. at 456-57. For private persons alleging abuse of “fair report” the standard is negligence. Id. at 457. For public persons the standard is “actual malice.” Id. at 459 n.4 (citing Time, Inc. v. Pape, 401 U.S. 279 (1971)). For accurate reports of judicial proceedings the Court opined in dicta that the absolute immunity provided in Cox Broadcasting, 420 U.S. 469, applied. For an analysis of these issues of the “fair report” privilege see D. Elder, The Fair Report Privilege (1988).

20. Herbert, 411 U.S. at 155, 169, 171 (The first amendment did not preclude a public plaintiff’s inquiry into the “editorial processes of those responsible” for libel in endeavoring to prove “actual malice,” a “critical element” of his case).

21. Gertz, 418 U.S. at 349-50; Herbert, 441 U.S. at 162 n.7 (dicta).

22. Hutchinson, 443 U.S. at 119 n.8.

23. There had been clear indications from New York Times onward that the public person had the burden of proving fault and falsity. See D. Elder, Kentucky Tort Law: Defamation and the Right of Privacy §2.06(A) (1983).
truth in cases involving issues of "public concern." 24 The Court refused, however, to extend the Gertz fault and damage limitations to a non-media publication of a matter—a limited subscriber credit report—not of "public concern." 25 It also rejected in a Petition Clause case the suggestion that one libeling a nominee for a federal position was entitled to an absolute privilege. 26 Most recently, however, the Court did provide an absolute privilege from liability for intentional infliction of emotional distress for cartoonist satire in its most recent media tort case, Hustler Magazine v. Falwell. 27

Viewed in the context of this almost quarter century of burgeoning jurisprudence, the articles in this Symposium on The First Amendment deal with a wide variety of topical and significant issues. The article by Professor Norman Rosenberg, undoubtedly the premier historian on the history of American libel law and the antecedents of New York Times, suggests that the latter decision was not created out of whole cloth or written on a "clean slate" 28 but was a product of a decades-long ongoing policy debate concerning the extension of constitutional free expression to the existent protection for expression contained in the common law. Moving to the modern era, Dale Cendali pro-


26. McDonald v. Smith, 472 U.S. 479, 482-85 (1985). The logic of McDonald would also reject the minority doctrine of neutral reportage adopted in a few jurisdictions. For an analysis see Elder, supra note 19.

27. Hustler Magazine, __ U.S. __, 108 S. Ct. 876. The Court refused to allow damage liability to be imposed based on the intentional infliction of emotional distress tort based on the "outrageous" content of an advertisement "parody," i.e., portraying respondent as having had a "drunken incestuous rendezvous with his mother in an outhouse." Id. at __, 108 S. Ct. at 878. The court rejected the "outrageousness" criterion as containing an "inherent subjectiveness" "in the area of political and social discourse" and which would permit juries to impose damages based on their own "tastes or views, or perhaps on the basis of their dislike of a particular expression." Id. at __, 108 S. Ct. at 882. It held that public persons could only sue under the intentional infliction tort if the parody contained a factual falsity made with constitutional "actual malice." Id.


Two of the student articles deal with issues of major contemporary controversy on which the Supreme Court has yet to give definitive guidance. The comment by Ms. Jeanne D. Dodd on application of *New York Times* and its progeny to criticism of the judiciary, particularly that occurring out of court, delves into an area in which the Court has issued no opinions in the post-*New York Times* era directly dealing with the constitutional freedom of expression issues. A brief perusal of *New York Times* and its 1964 twin, *Garrison v. Louisiana*, extending *New York Times* to criminal defamation prosecutions, in conjunction with *Landmark Communications, Inc. v. Virginia*, would have led a student of the first amendment to the view that a lawyer who was immune from civil or criminal sanctions for speech protected by the *New York Times*-Garrison duet would be likewise immune from attorney discipline—including the possible catastrophic loss of his or her right to practice law. However, as Ms. Dodd clearly indicates, the decisions are mixed and several of them, including *Kentucky Bar Ass'n v. Heleringer*, a decision in which only

---

29. In *In Re Snyder*, 472 U.S. 634, 645-47 (1985), the Court concluded, on non-constitutional grounds, that the "harsh" tone in a letter to a judge criticizing attorney fee documentation requirements under a federal statute dealing with indigent criminal defendants was not "contemptuous or contumacious conduct" justifying suspension from federal practice.


31. 435 U.S. 829 (1978). In refusing to permit the imposition of criminal sanctions on a newspaper for accurate reporting upon a pending confidential inquiry of a state judicial commission, the Court rejected any suggestion that the institutional reputation of the courts or the individual reputations of specific judges was sufficient to justify the criminal sanction. The Court quoted from *Bridges v. California*, 314 U.S. at 270-71, to the effect that "... an enforced silence ... solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect." *Landmark*, 435 U.S. at 842.

32. 602 S.W.2d 165 (Ky. 1980) (The court held that respondents comments on a press conference describing the judge's action of the previous day — granting an *ex parte* injunction against an unconstitutional ordinance regulating abortion — as "highly unethical and grossly unfair" were statements he knew "or should have known" were inaccurate. Such statements were "unethical and unprofessional conduct tending to bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process." The court stated that the "proper forum" for such criticism was the judicial retirement and removal commission).
Justice Brennan dissented from a denial of certiorari, reject an attorney's right to engage in such criticism free of professional sanction unless the libel criteria are met.

A second student note develops in detail the recent press protective opinion of the Ohio Supreme Court, Scott v. News-Herald. In the latter decision the court, in a counterrevolution reflecting changes in personnel and ongoing internecine warfare and vociferous vitriole among court factions, overruled its then recent precedent arising from companion libel litigation arising from the same factual circumstances, Milkovich v. News Herald. In the latter decision the court majority had declined to extend the Rosenblatt v. Baer criteria for public officialdom to include a high school teacher/coach, a decision consistent with the ma-

34. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986). The Supreme Court has given very little guidance on what constitutes "opinion" other than two cases involving "rhetorical hyperbole," Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970)(The Court held that use of the term "blackmail," viewed in the disclosed context of economic leverage used by plaintiff to get a zoning variation, could not be reasonably understood as imputing a crime); Letter Carriers v. Austin, 418 U.S. 264, 283-86 (1974)(The epithet "scab" was non-actionable under federal labor law), the "parody" rule in Hustler, see supra note 27 and accompanying text; and limited dicta in Gertz, 418 U.S. at 339 (The Court in dicta stated "[there is no such thing as a false idea]"). Note that among the factual inaccuracies the plaintiff complained of were "Leninist," "Communist-fronter," "architect of the "frame-up,” and having a criminal file requiring "a big, Irish cop to lift." Id. at 325-26. And note that two members of the Court have stated that Gertz did not intend to "wipe out this rich and complex" history of the common law opinion rule. See Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923, 925 (1982)(Rehnquist, J., with White, J., joining, dissenting from a denial of certiorari). See also New York Times, 376 U.S. at 292 n.30 (1964)(The Court noted the "fair comment" privilege would be defeasible by "actual malice"); Pickering v. Board of Education, 391 U.S. 563, 580 (1968)("Fair comment" mentioned in a teacher-discharge case applying New York Times).
36. 383 U.S. 75 (1966). The Court adopted two general tests for "public official" status—it extended to those who "have or appear to the public to have, substantial responsibility for or control over the conduct of government affairs" and to those government employees whose "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general interest in the qualifications and performance of all government employees." Id. at 86-88. The latter tests would not permit, however, the imposition of "public official" status "merely because a statement defamatory of some person in government employ catches the public interest"—such a conclusion "would virtually disregard society's interest in protecting reputation." Id. at 86 n.13. On the Rosenblatt criteria and their application by the courts see generally Elder, supra, note 8.
37. 15 Ohio St. 3d at 298, 473 N.E.2d at 1196.
jority view of the cases and reflecting the likely view of the Supreme Court. The *Milkovich* majority also accepted the view of the majority of decisions and held that an imputation of crime, i.e., prevarication under oath or perjury, was not absolutely protected opinion under the first amendment.

The *Milkovich* decision was appealed to the Supreme Court, which denied certiorari over a lengthy dissent by Justice William Brennan, joined by Justice Marshall. Yet, the following year the Ohio Supreme Court overruled *Milkovich*, repudiating both of its major conclusions. The plaintiff in *Scott*, a school superintendent, was clearly a "public official" under the *Rosenblatt* criteria and the court could have easily distinguished the two plaintiffs in a principled fashion. However, the court decided, apparently on the basis of the Ohio Constitution, to extend greater protection than required under the first amendment. The *Scott* majority's repudiation of a bright-line rule for imputations of criminality, at least as to sports section articles, in favor of adoption of the four-part test by a divided court in *Ollman v. Evans*, comes perilously close to according to the media absolute immunity for libel by a sports-writer in the sports section—based on specious assumptions about the low level of knowledge, competence, and professionalism of sports columnists. The opinion, which has been received with a modest amount of "dancing in the streets" by media lawyers, may have

38. See generally Elder, supra note 8, at 641 (and n.327-n.329) and 673.
40. See Elder, supra note 40.
42. See Elder, 474 U.S. 953; *Scott*, 25 Ohio St. 3d at 247, 496 N.E.2d at 703.
43. See Elder, supra note 8, at 634 (and n.274-n.275) and 673.
44. 25 Ohio St. 3d at 247, 496 N.E.2d at 703 n.2.
45. Id. at 249-254, 496 N.E.2d at 705-09.
47. 25 Ohio St. 3d at 264, 496 N.E.2d at 717 (Celebrezze, C.J., concurring in judgment only, and dissenting in part).
little real precedential value outside Ohio because of its reliance on the Ohio Constitution.\(^49\)

The article by Mr. Jay Fossett reinforces what the Supreme Court made quite clear in *Dun & Bradstreet, Inc. v. Greenmoss Builders*,\(^50\) i.e., the continuing vitality of the common law of defamation in non-"public concern" cases. The common law, warts and all, is, as Mr. Fossett indicates, the basis for roughly a third of all modern defamation litigation and constitutes an area of defamation where, as I often tell my students, the plaintiff has enhanced chances of success and the myriad constitutional limitations and defenses are not, despite the Restatement (Second) of Torts\(^51\) view *contra*, generally applicable unless adopted as a matter of state law. As Mr. Fossett indicates in detail, the common law prima facie case and the attendant common law defenses may become the "new workhorse" in termination litigation.

Three of the remaining articles deal with freedom of expression regarding "commercial advertising," an issue delved into cautiously by *New York Times* in 1964 and developed greatly by the Court in the last decade. The point-counterpoint of Professor Paul J. Weber and Mr. Greg Marks concerning the constitutionality of a total ban on cigarette advertising provides a fascinating juxtaposition of the constitutional issues of freedom of expression in light of the Court's decisions in *Central Hudson Gas & Electric Co. v. New York Public Service Commission*\(^52\) and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.\(^53\) A third comment by William Knoebel delves into *Meese v. Keene*\(^54\) and its curious reliance on the "commercial advertising" cases as a partial justification for allowing a "political propaganda" stigmatization of films registered under The Foreign Agents Registration Act. Lastly, Ms. Nancy Tessaro critically analyzes *Bethel School District No. 408 v. Fraser*,\(^55\) involving the rights of high school students to engage in offensive speech in a political campaign

\(^{49}\) 25 Ohio St. 3d at 244-45, 254, 496 N.E.2d at 701-02, 708.
\(^{50}\) See *Dun & Bradstreet*, 472 U.S. at 783.
\(^{51}\) RESTATEMENT (SECOND) OF TORTS §§ 566, 580 (1977) seems to extend the *Gertz* opinion and fault rules to all defamation cases. Of course, there is no constitutional requirement of such in "purely private" cases in light of *Dun & Bradstreet*.
\(^{52}\) 447 U.S. 557 (1980).
\(^{53}\) ———, 106 S. Ct. 2968 (1986).
\(^{55}\) ———, 106 S. Ct. 3159 (1986).
context, a decision, which when read in conjunction with the Court's recent decision in *Hazelwood School District v. Kuhlmeier*, suggests a substantially diminished level of protection for freedom of speech and press for high school students and their publications.
TAKING A LOOK AT "THE DISTORTED SHAPE OF AN UGLY TREE": EFFORTS AT POLICY-SURGERY ON THE LAW OF LIBEL DURING THE DECADE OF THE 1940s

Norman Rosenberg*

Recently, legal scholars have begun vigorously courting Clio, the muse of history. Some of this ardor stems from the ways in which critical writers have invoked history in their attacks on prevailing legal orthodoxies. Indeed, critics of scholars associated with the Conference on Critical Legal Studies have devoted considerable attention to the past and present conditions of conventional legal ideas and institutions. However appealing (or frightening) the vision of critical legal scholars marshalling history in order to vanquish main- and right-stream legal writers might be, those of us whose professional training and careers lay largely outside the law school academy sometimes feel more than a little skeptical about inflated claims, from any and all sides, for the power of Clio.

"History" is hardly a self-defining, self-contained, unitary way of viewing human societies. Much as legal realists and their descendants have shown the possibility of constructing a number of equally plausible accounts of how "law," even specific doctrines in concrete cases, should operate, critical historians have likewise rejected the idea that study of the past necessarily unlocks the

* Professor of History, MacAlester College, St. Paul, Minnesota.
1. For example, Robert Gordon has suggested that historically grounded legal discourse, which is sensitive to the time- and place-bound contingency of legal materials, tends to undermine the "conservative" and "apologetic" traditions in legal writing. Gordon, Historicism in Legal Scholarship, 90 YALE L.J. 1017 (1981).
mysteries of literature, politics, or even law. "History," no more than "law," magically captures transcendent truths, pure gems of insight waiting to lead "us" out of intellectual cul-de-sacs. The cultural historian Hayden White, for example, rebuffs the plea by many literary scholars that history offers a way out of what traditionalists see as "the fall into 'radical relativism'" in the interpretation of individual texts or traditional groups of literary masterpieces. White's warning about the ambiguous fit between history and literature seems equally relevant for the use of history in legal analysis: "Neither the reality nor the meaning of history is 'out there' in the form of a story awaiting only a historian to discern its outline and identify the plot that comprises its meaning."5

White's caveat applies with particular power to defamation law.6 Although libel law can already claim many different histories, new ones are constantly being added. This additional, admittedly selective, examination of a discrete period in libel law's past, the decade of the 1940s, is intended both to underscore the relevance of White's views for legal and literary scholars, and to cast doubt upon a story about libel law's history that has recently surfaced among legal scholars troubled by the origins of *New York Times v. Sullivan*.7

I. DEFAMATION LAW AND THE SULLIVAN PROBLEM

*Sullivan* has inevitably come to dominate most recent considerations of defamation law. Decided amidst a spirit of liberal reform that extended from the marbled halls of the Supreme Court to the Black Belt of the Deep South, *Sullivan* offered the hope of bringing together the progressive causes of civil rights and first amendment libertarianism. In *Sullivan*, an all-white

southern jury, the stereotypical source of racist perversion of liberal legal forms, had returned a $500,000 judgment against the New York Times for printing a pro-civil rights advertisement that contained false and defamatory charges about a police commissioner from Birmingham, Alabama.9 By analogizing supposedly private defamation suits such as Sullivan’s to the clearly public libel prosecutions under the infamous Sedition Act of 1798,10 Justice William Brennan laid the groundwork for a decision that not only denied segregationists a powerful legal weapon but also, in the affirmative style favored by liberal reformers, promised to recast both defamation and first amendment law.

Justice William Brennan’s majority opinion held that the application of Alabama’s uncompromising libel law clashed with constitutional requirements.11 In his view, libelous publications, at least for some purposes, merited first amendment protection, and the libel law of Alabama and other states would hitherto have to conform to a uniform, national standard when public officials appeared as plaintiffs.12

According to Justice Brennan’s test, public officials could not successfully maintain libel suits unless they could prove with convincing clarity that they had been the victims of libelous falsehoods published with “actual malice,” defined as actual knowledge of falsity or “reckless disregard” for the truth.13 He argued that the proof presented by respondent Sullivan had failed to meet this new constitutional standard and, therefore, the judgment on his behalf could not be sustained.14

Finally, Justice Brennan grounded nationalization of large portions of defamation law in a newer, more general theory of free speech that drew from the ancient history of libel law, especially from the controversy over the constitutionality of the Sedition Act of 1798.15 According to this theory, both the Sedition Act

---

10. Id. at 264, 283.
11. Id. at 282-84.
12. Id. at 279-80.
13. Id. at 285-88.
14. Id. at 273-77; Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798). On the origins and enforcement of the Sedition Act, see, e.g., J. M. SMITH, FREEDOM’S FETTERS (1956) and N. ROSENBERG, supra note 6, at 79-100.
and, today, the traditional common law rules for political libel cases were unconstitutional because of their clash with the central meaning of the first amendment.\textsuperscript{16} The law of libel, which puts citizens and the media at risk when they criticize public officials, must, in this view, conform to the principle that "debate on public issues should be uninhibited, robust, and wide open," even if this means toleration of "vehement, caustic, and unpleasantly sharp attacks" against public officials.\textsuperscript{17} Balancing the interests of reputation and free speech any differently, he argued, represented an unwise policy that would chill potentially valuable political debate.\textsuperscript{18}

Supporters initially praised \textit{Sullivan} as a dramatic, positive breakthrough. Indeed, one might even think of two distinct eras in the history of American libel law—BS, the more than a century and-a-half history of defamation law that preceded \textit{Sullivan}, and AS, the less than twenty-five year period since the Supreme Court heard L. B. Sullivan's appeal. Legal commentators writing in 1964 and 1965 had already identified \textit{Sullivan} as a truly landmark case.\textsuperscript{19} In one oft-quoted appraisal, the doyen of post-World War II libertarians, Alexander Meiklejohn, even judged the decision as "an occasion for dancing in the streets."\textsuperscript{20} Considerable activity, including dancing, did take place in the streets after 1964; but today, in the midst of an anti-liberal backlash of still undetermined strength, fewer and fewer people look back at the immediate post-\textit{Sullivan} years with great enthusiasm.\textsuperscript{21} Similarly, \textit{Sullivan} itself has met increasing disfavor.\textsuperscript{22}

\begin{footnotesize}
\begin{enumerate}
\item[16.] Id. at 270.
\item[19.] Quoted in Id. at 221 n.125.
\item[22.] For a critique of the rehabilitation of Eisenhower, see, for example, N. ROSENBERG AND E. ROSENBERG, \textit{IN OUR TIMES: AMERICAN SINCE WORLD WAR II} 61-64, 92-108 (3rd ed. 1987). Nixon, of course, has long been anticipating historical rebirth. See, e.g., R. NIXON, \textit{RN} (1978). "Serious" scholarship seems only a couple of years behind. See, e.g., Hoff-\end{enumerate}
\end{footnotesize}
Ironically, as some of Sullivan's early promise has faded, especially the hope that it would inaugurate a period in which defamation law would become more rational and easier to apply, some libel law watchers have even begun to look back nostalgically to the pre-Sullivan era. Readers of recent history can now sample a new generation of revisionists, writing in the wake of so many aftermaths—of the 60s, of Vietnam, of "Watergate"—who are busily rehabilitating an unlikely cast of once unappreciated characters including Dwight Eisenhower, Richard Nixon, and the common law of defamation.23

Richard Epstein's Was New York Times v. Sullivan Wrong? takes a particularly loving look back at the supposed glory days of pre-Sullivan defamation law.24 Epstein offers a number of important points, but several are central to his attempted rehabilitation of pre-Sullivan libel law. He first argues that, prior to Sullivan, Supreme Court decisions on the first amendment contained "not the slightest hint of any constitutional infirmity in private tort action for defamation."25 By rushing in where wise judicial angels had always declined to tread, he suggests, the Warren Court trampled all over sacred "common law turf."26 Thus, Epstein argues that common law defamation, though "a highly complex body of rules," actually contained "a greater inner coherence than first meets the eye."27 The Sullivan Court, he suggests, unwisely upset this inner coherence in a well meaning attempt to protect the civil rights movement from racists who were misusing defamation laws. Finally, he contends that while it was stomping on carefully plowed doctrinal ground, the Supreme Court never recognized the general satisfaction with the law of libel before Sullivan and the extensive protection it generally afforded criticism of public works and public figures.28


24. Epstein, supra note 21, at 788.

25. Id. at 791.

26. Id.

27. Id.

28. Id.
Epstein's history, especially the absolutist way in which he frames it, ignores other twentieth century views of libel law and the first amendment. In his telling, for instance, *Near v. Minnesota* had employed the proper analysis by recognizing that "prior restraint and common law actions were substitutes for one another." Quoting from Chief Justice Charles Evan Hughes' five to four opinion in this "Minnesota Gag Law Case," Epstein isolates a passage that "does not contain the slightest hint of any constitutional infirmity in private tort actions for defamation." However, Epstein's history of the case ignores one of the most crucial elements in its majority opinion.

*Near* involved a statute that was specifically based upon the state's policy finding that common law libel actions could not effectively stem dangerous political criticism. Chief Justice Hughes clearly noted the possibility that defamation suits could, in some circumstances, raise constitutional issues. Conducting a brief urban history lesson of his own, the Chief Justice observed that the changing times showed "the primary need of a vigilant and courageous press, especially in great cities." If, in the search for corruption and misdeeds, he continued, such a press endangered the reputations of particular individuals, the solution was not *prior restraint* statutes. The appropriate remedy, according to Hughes, was *subsequent punishment*, including defamation suits for damages, "consistent with constitutional privilege." Though hardly a model of clarity, the Chief Justice's statement, especially when read in the context of nineteenth century debates over defamation law and free expression, certainly appears to contain more than "the slightest hint" of constitutional issues lurking in the background.

At first glance, a later Supreme Court decision, *Chaplinsky v. New Hampshire*, offers firmer support for Epstein's thesis. In *Chaplinsky*, Justice Frank Murphy, writing for a unanimous Court, upheld a conviction under a New Hampshire statute exacted for
the purpose of punishing people who uttered "fighting words" (e.g., "damned racketeer" and "damned Fascist") and thereby created the risk that the verbal violence could escalate into some physical form. Murphy suggested that libels, like fighting words, were among those "well-defined and narrowly limited" kinds of expression that "have never been thought to raise any constitutional problem."36

But Justice Murphy's dicta of 1942, though supportive of Epstein's argument, simply ignored the complex history, both ancient and recent, of defamation law. Taking the longest view, it conveniently excluded nineteenth century legal thought. Though libel law had never become the subject of a definitive ruling by the United States Supreme Court in the era between the lapse of the Sedition Act in 1801 and the turn of the twentieth century, political defamation suits had remained closely associated with various constitutional definitions of free expression. The fundamental law of a number of states, for example, specifically defined the protection of the press in terms of the law of libel. Similarly, constitutional commentators, including Joseph Story, James Kent, and Thomas Cooley, also made the connection. Indeed, Cooley's famous treatises *Constitutional Limitations* and *The Law of Torts* endorsed a broad "qualified privilege" to defame public officials, candidates for office, and even public persons as necessary for protection of the public's interest in freedom of speech and of the press.37

Justice Murphy, however, was hardly alone in ignoring the nineteenth century history of defamation law, and especially the history addressing the debates over Thomas Cooley's broad theory of "qualified privilege."38 During the late nineteenth century, strong reaction had arisen against Cooley's theory and a reverse trend favoring strict liability for libelous political falsehoods had taken hold. At the same time, the creation of a host of other legal restrictions upon expression, in areas outside defamation law, had diverted attention from the older libel versus free speech controversy. By the World War I era, new issues related to the

36. Id. at 571-72.
37. See generally N. Rosenberg, supra note 6, at 101-77.
emphasis at the time upon national security measures had pushed defamation law further into the background.39

More surprising than his selective ignorance of the history of defamation law in the United States, however, was Justice Murphy's failure to relate *Chaplinsky* to another case that had come before the Court in that same term, *Sweeney v. Schenectady Union Publishing Co.*40 One in a series of "chain libel actions" brought by U.S. Representative Martin Sweeney of Ohio, the *Schenectady Union-Star* case had directly challenged the constitutional status of defamation law, and a number of briefs, including one by the American Civil Liberties Union, had insisted that, in some instances, defamation law could raise first amendment concerns.41

The debate over the *Sweeney* cases accompanied broader discussions, that had begun in the early 1940s and continued throughout the decade, about fundamental public policy issues related to defamation law. This paper will focus upon three important benchmarks in this debate: the appeal of the *Schenectady Union-Star* case, the pathbreaking libel studies of David Riesman, and Zechariah Chafee's 1947 report on the relationship between libel law and the American media.42 Taken together, these three events of the 1940s hardly suggest coherence in, or general enthusiasm about, defamation law. In addition, this article argues, the policy issues canvassed in these three episodes, considered together with the rise of a new view of libel law in the 1950s and 1960s that translated the public policy discussion of the 1940s into the framework of constitutional law, provided, in a curious way, the historical backdrop to the *Sullivan* decision.

39. See, e.g., P. MURPHY, WORLD WAR I AND THE ORIGINS OF CIVIL LIBERTIES IN THE UNITED STATES (1979) and N. ROSENBERG, supra note 6, at 207-12.

40. 122 F.2d 288 (2d Cir. 1942) aff'd by an equally divided Court, 316 U.S. 642 (1942) reh'g denied, 316 U.S. 710 (1942).

41. On the *Sweeney* chain libel suits, see D. ANDERSON, A "WASHINGTON MERRY-GO-ROUND" OF LIBEL ACTIONS 102-27 (1980). For a study showing the value to historians of studying, very carefully, the briefs of first amendment appeals to the Supreme Court, see Rabban, The First Amendment in Its Forgotten Years, 90 YALE L.J. 516 (1981).

II. THE SWEENEY CASES

The Schenectady case was one of nearly seventy “chain libel” suits brought by Martin Sweeney, a member of the House of Representatives from Ohio, against the nationally syndicated columnists Drew Pearson and Robert Allen, their news service, and individual newspapers. The suit originated in a charge made in Pearson’s and Allen’s celebrated “Washington Merry-Go-Round” column, against Sweeney, a right-wing Republican who admitted to being Father Charles Coughlin’s foremost congressional supporter. According to the “Merry-Go-Round” of December 23, 1938, “the allegedly anti-semitic Coughlin opposed appointment of a Jewish attorney to a federal judgeship in Cleveland, and Representative Sweeney [had accordingly] sought to block the Roosevelt administration’s judicial candidate because . . . he ‘is a Jew, and not born in the United States.’” Sweeney alleged that the charge was false and libelous, and he began his almost unprecedented series of lawsuits.

Sweeney opposed an old hand in libel fights when he confronted Drew Pearson. During the first four decades of the twentieth century, the established press had generally proved resourceful in turning back libel claims, but few newspeople could match Pearson’s battle tested skills. In 1934, for example, when General Douglas MacArthur had filed a $1,750,000 suit against the “The Merry-Go-Round,” Pearson and an ally had effectively “double teamed” him. In addition to threatening to use material obtained by Pearson which suggested that MacArthur detested his commander-in-chief, President Roosevelt, the columnist had coordinated his defense with Morris Ernst, a prominent New York City attorney who was, at the time, representing a young Korean woman who had allegedly been romantically involved with the then middle-aged general. Ernst’s ammunition, which included a series of love letters that the attorney shared with Pearson, had not only persuaded MacArthur to conclude a finan-

44. Sweeney, 122 F.2d at 289.
45. On the ability of the established media, “repeat players” in libel litigation, to prevail in most cases, see N. ROSENBERG, supra note 6, at 222-26; on Pearson’s particular skills see D. ANDERSON, supra note 43, passim.
cial settlement with his former girl friend, but also to fold his libel suit and pay all of the "Merry-Go-Round" legal fees. 46

Lacking any similar secret weapons against Sweeney, Pearson employed more orthodox legal tactics. In every instance, save one, he and his attorneys succeeded in obtaining dismissal of Sweeney's suits, generally on the ground that the charges against the Representative were not "libelous per se." 47 The exception came in New York in 1942 when the United States Circuit Court of Appeals overturned dismissal of a suit against the Schenectady Union-Star and held that Sweeney had, indeed, stated a cause of action. 48 Divided two-to-one, the court held that, considering the large Jewish population of New York, charges that Sweeney had opposed a political candidate on the basis of religion constituted the kind of defamatory statements "which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons...." 49 Here, said the court, people "who hate intolerance are prone to regard the person who believes in and practises acts of intolerance with aversion and contempt." 50

This reasoning, which resulted in remand to the district court for trial on the merits, provoked both an appeal to the United States Supreme Court by Pearson and a stinging dissent from Circuit Court Justice Charles Clark, the former Dean of Yale Law School and a judicial appointee of Franklin Delano Roosevelt. Justice Clark's dissent, though ostensibly mounted in a nonconstitutional frame, raised basic defamation law issues upon which the appellate briefs to the Supreme Court would build in order to directly attack the constitutionality of traditional libel law. Famed as one of Yale's foremost "realist" scholars, Clark tried to cut through abstract legal doctrines and "the naive view that

46. 111 Morris Ernst Papers, Harry Ransom Humanities Research Center, Austin Texas. (File of correspondence between Ernst and Pearson that includes photocopies of General MacArthur's "love letters.")
48. Sweeney, 122 F.2d at 291.
49. Id. at 290 (quoting Kimmerle v. New York Evening Journal, 262 N.Y. 99, 186 N.E. 217, 218 (1933)). The majority opinion was written by Judge Harrie Chase and joined by Justice Learned Hand, one of the period's most famous jurists.
50. Id.
what ought to be is" in order to reach the real issues at stake.\textsuperscript{51} He emphasized, for example, the extent to which the rule of the majority opinion simply clashed with the reality of day-to-day journalism in the United States. If comments such as those directed against Sweeney in the "Merry-Go-Round" could support libel suits, he remarked, even the most staid political commentary would be at risk. According to Clark, this case raised an equally pressing public issue for the 1940s—the ability of democratic critics to reveal the intolerance or prejudice of public officials such as Sweeney and Coughlin.

It would be a fine world to live in if only tolerance were so usual that a charge of the lack thereof against a public official could be so presumptively untrue that it would seem on its face unfair and libelous. But in our present world we must not take the naive view that "what ought to be is," and that whoever suggests the contrary is a slanderer; for if we do, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity.\textsuperscript{52}

Clark also objected to any process that would require defendants to prove the truth of their political charges, especially those that freely mixed "comment and inference." This was undesirable, he argued, because "the sporting element" in libel trials would otherwise expose often unpopular critics such as Pearson to the whims of local opinion.\textsuperscript{53}

Throughout the appeal process, attorneys for Representative Sweeney relied upon black letter law. Civil libel suits, they maintained, had never been thought to raise constitutional problems and the public policy questions had apparently been settled in favor of the so-called "majority rule."\textsuperscript{54} In opposing certi-
orari to the Supreme Court, Sweeney's counsel relied upon proven arguments in favor of the rule that publishers of libelous political criticism should be held strictly liable for all defamatory falsehoods.\footnote{55. Brief for Respondent in Opposition to Certiorari at 17-19, 38-43, Schenectady Union Publishing Co. v. Sweeney, 314 U.S. 605 (1942).} Thus, they cited as authority two Supreme Court heavyweights, the nineteenth century titan Justice Joseph Story and William Howard Taft, both of whom had warned that constitutional guarantees of free expression should never be extended to permit circulation of libelous falsehoods about public officials.\footnote{56. Id.}
The American judicial system, in this view, provided "ample safeguards for he who will comment fairly and honestly criticize and it even protects the publisher of libelous statements, if the truth is shown."\footnote{57. Id.} Any less stringent rule would place the powerful weapon of defamation "in the hands of the libeler, who at a stroke, may wreck the good reputation of decent men."\footnote{58. Id. at 19.}
This position had long been met with policy and general free speech arguments advocating the "minority rule" generally associated with Thomas Cooley.\footnote{59. Id.} It is significant, however, that the phalanx of attorneys who wanted the appellate court decision overturned by the Supreme Court were either disinterested or unaware (or both disinterested and unaware) of the conflicting historical stories about defamation law. Instead of arguing history, they focused upon public policy and recent first amendment rulings by the Supreme Court that showed, they insisted, the danger of strict defamation laws.

Attorneys for Pearson and the Schenectady Union-Star, including Pearson's old ally Morris Ernst, emphasized on appeal the conflict between libel law and democratic theory and practice. They argued, for example, that the Supreme Court should not allow libel suits to hamstring democratic elements that wished to use the marketplace of ideas in the struggle against bigotry. The newspaper's counsel argued, in effect, that the majority opinion "demand[ed] toleration for intolerance" and "protect[ed] the prejudiced from the imputation of prejudice."\footnote{60. N. ROSENBERG, supra note 6, at 156-206.} If this view were to prevail, a political office holder would be "immune to
challenge for prejudiced and bigoted action, provided he avoids statutory violation and official corruption. . . ."61

The petition for certiorari to the Supreme Court, apparently drafted by Ernst, expanded upon the argument that traditional libel doctrines hindered the fight for toleration in the United States. His argument was that, although the majority opinion was "understandable as the instinctive reaction" of people "who hate religious bigotry with all their heart," its impact would be to harm, rather than protect, minorities.62 He reasoned further that, since most states, including New York, barred criminal prosecutions for libels against groups, (so called "group libel" actions), the result, under traditional doctrine, would be that bigoted politicians could safely defame Jews and Catholics, but that members of the groups libelled could not retaliate in kind. They could not, if traditional doctrine were followed, "attack [the] demagogue by the name he deserves without exposure" to the risk of the kind of libel suits brought by Sweeney.63 Ernst's appeal for certiorari insisted that the majority rule "puts a siege gun in the hands of bigots which will be turned against minorities."64

This argument bolstered his broader contention that the law of libel could, and in this case did, raise serious constitutional issues. "[W]hatever is added to the realm of libel," according to Ernst's initial brief, "is practically withdrawn from the realm of free speech" and, therefore, libel law could become so harsh that it "must be held unduly to restrict the permissible range of free speech."65 Moreover, in this view, restrictions against speech counteracting bigotry go "to the essence of the democratic process . . . ."66 After the Supreme Court granted certiorari, Ernst, in his reply brief, expanded these points by arguing that to allow libel law to restrict criticism of anti-democratic bigotry would only cause it to become a tool in the hands of "bigots and the merchants of hate [and] would in practice destroy the right of reply [for democratic forces], thus abandoning the field [of public

62. Id. at 3.
63. Id. at 2.
64. Id. at 29.
65. Id. at 28.
66. Id. at 27 (emphasis original).
debate] to the depredations of the bigots.” 67 Accordingly, he concluded that “the unhappy prevalence of racial and other intolerance ... must be combatted by the free use of words.” 68

Ernst’s brief also suggested that the common law of libel clashed with contemporary democratic practice. Urging the Supreme Court to pay more attention to common practice than to common law in deciding this constitutional issue, he argued that the Justices should align legal ideas with the popular mores of free speech. Put simply, his brief urged the Court to read the newspapers, a medium of communication that the late Justice Oliver Wendell Holmes, Jr., one of the reigning oracles on free speech, had apparently avoided at all costs.69 The popular press of the 1940s, and not common law precedents, should, in this view, determine the proper bounds for democratic debate. Pressing this point, Ernst argued that popular mores, not common law precedents, showed the Court “what latitude is practically needed for the healthy exercise of the right of free speech....” 70 Therefore, he continued,

[by] keeping its ear to the ground in this fashion, the law does not abandon its claim to assert itself as a moral force; on the contrary, it yields to widespread public habits of expression precisely because this is a means toward preserving freedom of speech, which the law chooses to consider a high moral good. 71

Having thus identified the cause of Pearson and his newspaper clients with the moral core of democratic theory and practice, Ernst’s brief proceeded to its final thesis: the Supreme Court, given the conclusions of its recent decisions addressing the relationship between free speech and democratic government, would be inconsistent in allowing libel suits to interfere with free debate. At this point, Ernst’s brief began to develop the argument that would soon afterwards become the essence of a new "lib-

68. Id.
70. Reply Brief, supra note 67, at 29-30. The brief also contained a lengthy appendix, consisting of excerpts from various contemporary publications, which was intended to dramatize the gulf between the legal rule of the majority of the appeals court and the daily rhetoric of newspapers and the tone of influential magazines of opinion. Id. at 49-59.
71. Id. at 30.
ertarian" theory. It urged that the "right to criticize our rules distinguishes our way of life from that of the dictatorships; it is our major corrective and without it the democratic mode is impossible."\(^\text{72}\)

The celebration of freedom of expression had, up until the 1940s, always been a central part of both elite and popular constitutionalism in the United States. Particularly in the nineteenth century, the heyday of that species of romantic democracy associated with Jacksonianism, writers and orators had extolled the virtues of free speech and free press. In contrast, mainstream legal discourse, with exceptions such as Cooley's *Constitutional Limitations*, had always qualified its praise of free speech with warnings about the terrors of libelous falsehoods and other kinds of "dangerous" expression.\(^\text{73}\) Theories of the first amendment that were more libertarian in their rhetoric and potential gradually crept into arguments before the Supreme Court after World War I,\(^\text{74}\) and Justice Louis Brandeis' concurring opinion in *Whitney v. California* powerfully summarized them.\(^\text{75}\) But the free speech theory contained in Ernst's brief, though built on the Brandeisian tradition, was also significantly different because of its historical-internationalist context.

The new first amendment theory that began to emerge in the early 1940s was rooted in popular and legal cultures heavily influenced by the ongoing struggle between democratic and totalitarian systems. Again, it is appropriate to note that Ernst had identified the right to criticize one's rulers as the element that distinguishes democracy.\(^\text{76}\) This view—that the speech and press clause of the first amendment truly represented, in a democratic polity, the "first freedom"—became the title of a subsequent book by Morris Ernst, the *leitmotiv* of Alexander Meiklejohn's classic essay, *Free Speech and Its Relation to Self Government*, and the heart of a broad new "general theory" of

\(^{72}\) Id. at 32.


\(^{76}\) Reply Brief, supra note 67, at 32.
free speech associated with a group of writers who might be called "the Cold War libertarians."\textsuperscript{77}

During the Schenectady Union-Star appeal, an amicus curiae brief on behalf of four Jewish groups had taken the position that the appellate court's traditionalist reading of libel law clashed with contemporary democratic theory and practice. Although these Jewish groups had conceded that the "threat of anti-Semitism to our democratic institutions is manifest," they had remained convinced that "the democratic way of combatting this evil is by the process of education and open and free debate rather than by the suppression of anti-Semitic preachments by legislative fiat."\textsuperscript{78} In effect, the ultimate proof of a democratic society in this view was its capacity for tolerating distasteful expressions of opinion and for both tolerating and encouraging the clash of strong opinions and hostile ideas.

There is scarcely any issue in the field of public debate on which opinions do not strongly clash. The sharper the division, ... [the] more spirited is the debate of the opposing forces. [Thus], especially in these tragic days, any curb [upon the clash of ideas] ... would be fraught with the greatest danger to our democratic institutions and ways of life.\textsuperscript{79}

The Jewish amicus curiae brief also offered a further claim that was developed at greater length in Ernst's submission. It maintained that the Supreme Court, in the first amendment cases it had decided during the late 1930s and early 1940s, had already laid the groundwork for constitutionalizing at least part of the state law of libel. Various Supreme Court rulings — Thornhill v. Alabama, Cantwell v. Connecticut, Near v. Minnesota, Hague v. CIO, and Bridges v. California — had all rejected the bright-line distinction between prior and subsequent restraints, upon which


\textsuperscript{78} Amicus Curiae Brief for American Jewish Committee, B'nai Brith, Jewish Labor Committee and American Jewish Congress, Schenectady Union Publishing Co. v. Sweeney, 314 U.S. 605 (1942) [hereinafter Amicus Curiae Brief].

\textsuperscript{79} Id. at 9-10.
Sweeney's case and the free speech theories of Justices Story and Taft relied. These Supreme Court decisions had demonstrated, the brief insisted, that "a statute imposing a subsequent punishment which has the effect of trammelling or embarrassing unduly the expression of views on matters of public interest is likewise unconstitutional," notwithstanding that such a statute might not operate as a traditional prior restraint. 80 Once one recognized that libel laws, due to their vagueness, could interfere with "the interest of society in free debate on matters of public importance," 81 it was argued, the view that defamation suits lay outside the range of free speech issues must be rejected. Consequently, the brief concluded, "It becomes clear that a situation may undoubtedly be met where expansion of the range of libel must be held unduly to restrict the permissible range of free speech[.]" 82

Finally, Ernst's brief offered two points in passing that were to resurface twenty-two years later in New York Times v. Sullivan. First, it noted that, for constitutional purposes, the Court should draw no distinction between state prosecutions for criminal libel and private lawsuits for common law defamation. 83 Both forms of libel could have the same inhibiting impact upon free speech. 84 Adopting the "stream of history" argument that Justice Brennan would later employ in Sullivan, the brief noted that

80. Id. at 10-11. Bridges v. California, 314 U.S. 252 (1941) (Contempt of Court citation held, absent clear and present danger, to violate free speech guarantees); Thornhill v. Alabama, 310 U.S. 88 (1940) (State statute banning all labor picketing held unconstitutional); Cantwell v. Connecticut, 310 U.S. 296 (1940) (State may not suppress freedom of expression in pursuit of other, otherwise legitimate policy goals); Hauge v. CIO, 307 U.S. 496 (1939) (City cannot ban all meetings in public parks); Near v. Minnesota, 283 U.S. 697 (1931) (State statute providing for prior restraints on libellous and scandalous publications unconstitutional prior restraint); P. Murphy, THE MEANING OF FREEDOM OF SPEECH (1972) sees such decisions as part of a general expansion of first amendment guarantees during the interwar period.

81. Amicus Curiae Brief, supra note 78, at 10-11.

82. Id.

83. Reply Brief, supra note 67, at 33-35. Such a unified or "systemic" reading of individual cases, it should be noted, offered only one interpretation. A more common approach, one less favorable to an expansive view of first amendment protections, offered elaborate categorical classifications in which to pigeonhole individual cases and doctrines. See, e.g., a contemporary rendering of cases, according to a complex categorical scheme essentially at odds with arguments on behalf of the Sweeney defendants in G. STONE, L. SEIDMAN, C. SUNSTEIN, AND M. TUSHNET, CONSTITUTIONAL LAW 938-1359 (1986) [hereinafter G. STONE].

84. Reply Brief, supra note 67, at 33-35.
“much of the history of free speech in England and the United States is a history of successive limitations on the scope of criminal libel; and that this case involves an issue of civil libel is not a difference of ‘constitutional dimension.’”

In addition, Ernst’s brief raised a second issue central to the libel-versus-free expression paradigm adopted in Justice Brennan’s Sullivan opinion, the clash between locally-rooted customs, expressed in the form of libel suits, and supposedly more enlightened political and intellectual marketplaces that are nationwide in scope. In the Sweeney cases, the clash between state and national mores, at lease according to the Schenectady Union-Star’s brief, required a finding that the national Constitution overrode state libel laws. In the area of political criticism, “the Constitution compels a National pattern of freedom beyond the inhibitions of State statutes.”

Although Ernst’s argument for the Schenectady Union-Star did suggest the basis for a broad, new theory of a nationalized, constitutional liberty of expression, the constitutional portions of the brief lacked the legal sophistication generally associated with advocacy before the High Court. The argument on behalf of a national freedom to criticize officials, for example, rested upon an appeal to “the privileges and immunities clause” of the fourteenth amendment, a form of constitutional argument that Zechariah Chafee, the acknowledged dean of first amendment scholars during the early 1940s, once derided as “characteristic of laymen who write about constitutional law.” Even more serious, Ernst’s brief generally failed to employ the balancing idiom so characteristic of most constitutional advocacy in this century.

86. Reply Brief, supra note 67, at 37. See also Sweeney v. Schenectady Union Publishing Co., 122 F.2d at 288 (2d Cir. 1942) (Clark, J., dissenting).
87. Chafee’s remark is quoted in D. SMITH, Z. CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 90 (1986). For a recent summary of the tangled history of the “privileges and immunities” argument based on the 14th amendment, see G. STONE, supra note 83, at 698-707; and for a recent argument that the Court has misinterpreted the “original intent” of the clause, see Kaczorowski, To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War, 92 AM. HIST. REV. 45, 67-68 (1987).
88. On the dominance of the balancing mode see Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987). The reply brief, however, did hedge its constitutional bets by inserting a straight-forward, nonconstitutional argument, one that prevailed in most of the other Sweeney chain suits, that the charges against the Repre-
In this sense, the *amicus curiae* brief filed by Edmund D. Campbell on behalf of the American Civil Liberties Union represented a "safer," more conventional kind of constitutional discourse. Campbell claimed that the ACLU had always recognized that "the right to sue for libel" helped to define "the frontiers of the right of free speech." Yet, the organization feared that, in the *Sweeney* case, a finding of libel *per se* would "limit the area of free speech to the impairment of the petitioner's Constitutional rights." The proper solution, the ACLU suggested, was to balance the right of reputation against the right of free speech. Without suggesting precisely how this might be done, the ACLU argued that "[i]n determining the proper boundary at which the courts may limit free speech and free press ... [through libel damages], the individual interest in the integrity of one's personal reputation must be balanced against the broader social interest in freedom of expression." In libel suits brought by public officials, "[t]he policy requirements of the private interests are superseded by the public interest to discuss without fear the qualifications and opinions of elective officials." The ACLU endorsed Justice Clark's dissent as the proper rule for the Supreme Court to adopt in overturning the majority opinion of the court of appeals.

Thus, the *Schenectady Union-Star* appeal raised most of the basic issues that the Supreme Court would later confront in *Sullivan*. In general, *Sweeney's* various opponents directly challenged the idea, which had already been undercut by dicta in *Near v. Minnesota*, that the law of libel raised absolutely no constitutional issues. In more particular terms, the case squarely presented claims that the old majority rule of strict liability for libelous political falsehoods could not withstand, under newer theories of free expression, constitutional scrutiny and that the

---

sentative were "not libelous *per se* on any theory." Reply Brief, *supra* note 67, at 40 (emphasis original). The New York State Publishers Association made the same argument to the High Court. Amicus Curiae Brief of New York State Publishers Association at 8-11, Schenectady Union Publishing Co. v. Sweeney, 316 U.S. 605 [hereinafter ACLU Brief].

90. Id.
91. Id.
92. Id.
93. Id.
94. Id. at 5.
relevant audience for judging the issue of libel should be based upon a nationwide political marketplace, not smaller, particularly sensitive subcultures.

Ironically, despite the considerable attention this lawsuit produced, it quickly faded into historical oblivion, leaving a curiously unsatisfactory result. With Justice Robert Jackson mysteriously recusing himself, the Supreme Court divided four-to-four and could not render a binding decision. 95 Although Drew Pearson fumed about his failure to get any satisfaction on the larger legal issues, he ultimately gained yet another victory over Martin Sweeney when his once-determined opponent let the suit drop, without ever going to trial at the district court level. 96 Nonetheless, the four-to-four division within the Supreme Court over disposition of the Pearson appeal, twenty-two years before Sullivan, again refutes any notion that the Warren Court Justices were suddenly inventing new constitutional questions and upsetting well grounded defamation doctrines.

In fact, the Sweeney and Chaplinksy cases proceeded against the backdrop of growing doubts about the traditional restraints of defamation law and, in particular, two major studies in this area. David Riesman's series of articles for the Columbia Law Review in 1942, and Zechariah Chafee's extensive study of "government and mass communications," begun during World War II and finally published in 1947, both suggested, though in very different ways, that defamation law raised more public policy questions than are indicated either in Justice Murphy's Chaplinksy opinion or in Professor Epstein's more recent thesis about pre-Sullivan defamation law.

III. DAVID RIESMAN ON DEFAMATION AND DEMOCRACY (1942)

Issues that had been raised in the Sweeney cases received considerably more attention from a youthful law professor who would become truly famous only after abandoning law for sociology. 97 David Riesman's analysis refined the critique of the

95. 316 U.S. 642 (1942).
96. D. Anderson, supra note 41, at 118-23. A petition for rehearing was denied. 316 U.S. 710 (1942).
97. In the preface to his classic work on "American character," Riesman noted that his studies of defamation law had started him on the road to social science research, especially work that aimed at understanding the relationship between culture, commu-
restrictive impact of libel law that had been developed during appeal of *Schenectady Union-Star*. His discussion showed particular sensitivity, for instance, to the ways in which defamation affected the rich and powerful differently than it did less privileged, politically weaker members of American society. “[E]conomic and political leaders,” he argued, are “relatively unaffected by what is said about them.... If a Jay Gould, Moe Annenberg, Al Capone or Mayor Hague is called a crook or thief or skunk or robber, the term is even likely to conceal a certain admiration.” But defamatory statements against “groups or individuals who lack money or organizational power” might prove “altogether overwhelming.” A whole series of cases in this vein suggested that judges often failed “to appreciate—or they sympathize with—the reactionary significance of the typical patterns” of defamation against labor unions and their leaders. Similarly, judges have generally failed to acknowledge that the application of universal rules of defamation to all publishers, large and small alike, would inevitably affect “a small critical organ of opinion” much more adversely than “a chain newspaper.”

But Riesman, in contrast to Ernst in the *Sweeney* case, wrote deliberately in the dominant balancing mode. Indeed, given his fear that libels harmed relatively powerless minority groups, he placed considerable emphasis on the necessity of balancing the right of reputation, which he conceived as very much a social rather than simply an individual interest, against free speech claims. Noting that the Supreme Court had been asked in the appeal of the *Schenectady Union-Star* case “to settle the numerous *Sweeney* controversies once and for all,” Riesman seemed to sympathize with the Court’s decision to avoid any final determin-
mination. Unfortunately, he lamented, "there is no such easy road out of the disorder and confusion of our times as these are reflected in the things that people say and object to having said about them."\textsuperscript{103} Although his criticism was oblique, Riesman hinted that the attorneys for both Sweeney and "the other side" had failed to consider carefully, or try to balance correctly, the many complex considerations of public libel suits. His own articles were intended to explore, in great depth, many of the "[i]mportant policy considerations" that often become "lost or buried in the confusion" of libel law discussions.\textsuperscript{104}

Riesman, who had once clerked for Justice Brandeis and was teaching at Buffalo Law School when his articles on defamation appeared, employed a style of discourse heavily influenced by the legal realism of the 1920s and 1930s.\textsuperscript{105} By the mid-1940s, the legal academy, including those who worked with the law of torts, remained bitterly divided, often along institutional lines, about how best to approach legal matters. Those scholars and institutions who had been most heavily influenced by the legal realism of the 1920s and 1930s emphasized both the "unreal" nature of legal concepts and the importance of viewing tort law, including defamation, with an emphasis on its social-functional context. As a result, the generation of torts scholars who had risen to prominence during the twenties and thirties declared allegiance to the basic teachings of realism and ridiculed those jurists who retained a fascination with discovering or creating coherent doctrinal foundations for tort law.\textsuperscript{106}

Libel law, with its long and confused history, presented a perfect target for realist-oriented scholars. For example, William Prosser, in his famous \textit{Handbook on the Law of Torts}, was blunt: "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains

\textsuperscript{103.} Id. at 1314.
\textsuperscript{104.} Id. at 1293.
\textsuperscript{106.} G. WHITE, supra note 105, at 70-96.
anomalies and absurdities for which no legal writer has ever had a kind word...."107 A volume that skillfully blended the realist with more traditional doctrinal approaches, Prosser's *Handbook* warned readers of the danger to mental health if one tried to find some inner coherency in defamation doctrines. Prosser anticipated Riesman in finding the policy arguments underlying the doctrines hopelessly muddled and in decrying the results of published cases in which a "rigid and extreme" desire to bedevil "innocent defendants" clashed "with a blind and almost perverse refusal to compensate the plaintiff for a real and very serious harm."108 Thus, even when some general rule seemed at first reading to be fairly clear, "the courts have not been altogether in harmony in dealing with it, so that frequently a particular holding or rule is peculiar to a small number of courts."109

Writing at a time when most legal realists had already begun their retreat toward greater deference to traditional legal styles,110 Riesman tempered his debunking of doctrinal issues. Thus, he chided extreme realists for ignoring "[the] small legal changes produced by doctrinal development."111 However, his primary criticism of traditionalist legal writing addressed its strict adherence to the ancient language of libel law and its failure to consider the social context of speech. Displaying all the hallmarks of an "instrumental" realist,112 Riesman moved beyond a traditional, "formalist" reading of legal doctrines and tried to look at defamation law in its social context rather than according to its historical development or traditional categories of doctrinal writings. Moreover, he tried to suggest how a reformed version of defamation law could provide a powerful legal instrument for solving pressing social-political issues related to what he called

108. W. PROSSER, supra note 107, at 778.
109. Id. at 780.
112. On "instrumental realism" see ROSENBERG, supra note 110; c.f. Peller, supra note 105.
the "democratic-fascist" struggle in the United States.\textsuperscript{113}

One of the hallmarks of realist legal writers was a strong presentism, a "tendency to assess intellectual contributions in terms of their contemporary relevance and applicability."\textsuperscript{114} Accordingly, Riesman dismissed the historical roots of defamation law as largely irrelevant to everyday concerns of the early 1940s.\textsuperscript{115} Rather than making reference to the traditional constitutional framework of "large politics," which had characterized defamation law in terms of battles in which government sought to suppress expression, he preferred to locate the pre-1940 history of defamation law in the realm of "small politics," defined as grass-roots conflicts originating in local communities where essentially face-to-face encounters take place.\textsuperscript{116}

Riesman's brief historical sketch of defamation law also featured a comparative dimension.\textsuperscript{117} Thus, in contrast to Europe, where libel suits invariably had involved important political questions, defamation actions in the United States, even those involving prominent politicians, offered "a sort of sideshow which no one took too seriously."\textsuperscript{118} According to Riesman, nineteenth and early twentieth century defamation suits in the United States had rarely touched on fundamental issues but rather, invariably involved continuations of petty feuds and squabbles, escalated to legal forums via the route of defamation law.\textsuperscript{119} Although he saw defamation law raising more substantial issues for the first time in the history of the United States, he also saw the history of defamation law as offering little guidance for confronting issues of the 1940s.

Most striking to one familiar with the history of libel law arguments, Riesman also quickly dismissed nearly a century of debate over the "majority" versus the "minority" rules for qual-

\begin{itemize}
\item \textsuperscript{113} Riesman, \textit{Fair Game I}, supra note 42, at 1286.
\item \textsuperscript{114} G. White, supra note 105, at 66.
\item \textsuperscript{115} Riesman, \textit{Fair Game I}, supra note 42, at 1085.
\item \textsuperscript{116} The terms "large" and "small" politics are suggested in \textit{Gifts and Poison: The Politics of Reputation} 1-24, 281-99 (F.G. Bailey, ed. 1971).
\item \textsuperscript{117} Riesman, \textit{Fair Game I}, supra note 42, at 1088-1123; Riesman, \textit{Group Libel}, supra note 42, at 734-75.
\item \textsuperscript{118} Riesman, \textit{Fair Game II}, supra note 42, at 1282.
\item \textsuperscript{119} Riesman, \textit{Fair Game I}, supra note 42, at 1087-88. Here, Riesman's view bore a striking resemblance to that of the prominent 19th century political critic, Frederick Grimke. See, e.g., F. Grimke, \textit{The Nature and Tendency of Free Institutions} 402 (J. Ward ed. 1968).
\end{itemize}
ified privilege. According to the so-called majority view, the law should hold defendants strictly liable for defamatory falsehoods, even in cases where the plaintiff is a public official and in law suits that involve issues of general or public concern.\(^{120}\) Conversely, the minority view granted at least some qualified privilege for defamatory falsehoods that raise issues of freedom of expression.\(^{121}\) By the last third of the nineteenth century, debates over libel and freedom of expression had generally come to revolve around consideration of these two positions. The majority view became closely associated with Taft, who as a federal district court judge had written an 1893 opinion supporting strict liability for libelous political falsehoods.\(^{122}\) Advocates of the minority position generally invoked the conflicting authority of Thomas Cooley, the premier constitutional theorist of the late nineteenth century.\(^{123}\)

Less than a decade before Riesman published his analysis, echoes of the Taft-Cooley impasse had rebounded through the chambers of the American Law Institute when its members struggled to frame the first Restatement of Torts. Beginning with the premise that libel law already rested upon coherent, principled doctrines, some of the best men of the American bar tried to define what these principles might actually be. After some bitter exchanges, during which proponents of the Taft position seemed to suggest that the future of American politics depended upon the ALI’s endorsement of the majority rule, an attempt to vote in the minority doctrine was beaten back.\(^{124}\)

Riesman quickly cut through this debate. After briefly noting the doctrinal difference between the majority and minority positions, he made the familiar realist move, shifting the focus from allegedly universalistic principles to consideration of the results of individual cases.

As the cases come up, however, the difference between the two rules is not as wide as might be expected. In jurisdictions following

\(^{120}\) See, e.g., Noel, Defamation of Public Officers and Candidates, 49 COLUM. L. REV. 875, 888-900 (1949).

\(^{121}\) See Rosenberg, supra note 73, passim; the leading judicial statement of this position was Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908).


\(^{123}\) See generally N. Rosenberg, supra note 6, at 153-206.

\(^{124}\) Bohlen & Harper, Discussion of Torts Tentative Draft No. 13, 14 A.L.J PROC. 111, 134-57 (1936-37); 3 RESTATEMENT OF TORTS § 607, Comments b, c, d (1938).
the minority rule, courts often go out of their way to show that what the defendant said was in fact substantially true, although this is under the rule unnecessary. And in jurisdictions requiring a true statement of facts, the courts are apt either to be lenient in finding that the defendant told the truth, truth thus becoming "substantial" truth, or in finding that what he said, even if false, was not libelous "per se."\textsuperscript{125}

In Riesman's realistic frame, then, issues related to defamatory speech could not be explained according to doctrines and legal categories—mere verbal forms that displayed little coherence, internal or otherwise. Riesman underscored this view, though likely unintentionally, by relegating to the tail end of a footnote the traditional policy argument for the majority rule — "that 'good people' [would] be deterred from entering public life" if the minority rule of qualified privilege were to be accepted.\textsuperscript{126}

Riesman enthusiastically embraced the social science strain in legal realism and confidently cited the latest literature on propaganda, public opinion and comparative politics. It thus seemed to Riesman that in the actual operation of libel law, national cultural considerations loomed far larger than doctrinal forms, especially in cases involving public persons. Given "our egalitarian tradition," he argued, "no official could afford the imputation that he considered himself sacrosanct, or above criticism and invective."\textsuperscript{127} In other words, whatever the doctrines might suggest, libel suits rarely affected the give-and-take of public debate.\textsuperscript{128}

Riesman gave no more deference to doctrinal categories than he did to the history of libel law. For example, he quickly dismissed the fact/opinion distinction, which has become so important in post-Sullivan analyses of libel law,\textsuperscript{129} as just another verbal formula by which individual judges and courts could evade the seemingly tough strictures of black letter law and make up their own policy as they went along.\textsuperscript{130} Similarly, he argued that the incoherence of the "libel per se" requirement meant that

\textsuperscript{125} Riesman, \textit{Fair Game II}, supra note 42, at 1288 (footnote omitted).
\textsuperscript{126} Id. at 1288 n.27.
\textsuperscript{127} Id. at 1283.
\textsuperscript{128} Id.; see also Noel, supra note 120, at 875.
\textsuperscript{130} Riesman, \textit{Fair Game II}, supra note 42, at 1288-89.
important policy considerations were “often lost or buried in the
c confusion showered on this field by the opinion of the courts. . . .”131
Extending his view of how judges really decided cases, Riesman
offered his version of a realist truism stated most boldly by
Yale’s Walton Hamilton, i.e., instead of believing that legal prin-
ciples, including constitutional ones, “are to be found plainly
written, . . . [the wiser judges simply] make up arguments which
march straight to their chosen conclusions.”132 After looking at
the libel per se doctrine, Riesman concluded that it “is apparent
that the courts have introduced into the factual question of what
is defamatory both their notions as to what ought to be defam-
atory and their judgments as to what ought to be done in the
entire situation before them.”133
Riesman, in sum, found few coherent principles supporting
defamation law decisions—a fact, which in his opinion, the series
of more than seventy-five similar lawsuits brought in different
jurisdictions by Martin Sweeney amply highlighted.134 His ex-
haustive study of individual cases read in a social context re-
vealed to him an almost comic “confusion of issues.”135
However, he believed that this confusion carried the seeds of
tragedy, not comedy. Building upon his argument that previous
experience, whether captured in common law adjudication or in
doctrinal analyses, provided insufficient guidance for the early
1940s, Riesman feared that organized, anti-democratic forces were
threatening to pervert the process of public debate. Drawing
from social science literature that traced the rise of European
fascism, at least in part, to the use of systematic, defamatory
propaganda against democratic political leaders and special target
groups, he warned that traditional tolerance for defamatory false-

131. Id. at 1293.
132. Hamilton, Constitutionalism, in 4 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 257 (E.A.
Seligman, ed. 1935).
133. Riesman, Fair Game II, supra note 42, at 1300 (emphasis added).
134. Id. at 1298-1300.
135. Id. at 1300. Riesman’s use of “empirical” investigations to untangle issues that
more traditional appellate case law analysis left untouched has in recent years been
emulated by the Iowa Libel Research Project. See, e.g., Bezanson, The Libel Suit in
(preliminary report of materials to be published in forthcoming book-length study);
Franklin, Suing the Media for Libel: A litigation Study, 1981 AM. BUS. FOUND. RES. J. 797;
Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 AM. BUS.
FOUND. RES. J. 455.
hoods and the unsatisfactory state of American libel law left the United States peculiarly vulnerable to calculated campaigns of defamation by fascist groups.\footnote{138} Although his realistic analysis suggested that courts often did “escape the prison of precedent to do justice in individual cases,” he considered that judges in the United States simply lacked either the social experience or the analytical tools to “deal effectively with the sort of political defamation which [had been] unleashed in Germany and France, where the [one] who [was defamed was] a mere pawn in a calculated strategy.”\footnote{137} In this sense, Riesman saw the various chain libel suits as involving something more than a dispute by a single member of Congress against two prominent columnists, their news syndicate and individual papers. Indeed, he thought that this series of cases should have been viewed as warnings against the dangers of defamation. Unfortunately, in his view, most judges and legal analysts had failed to recognize that Sweeney’s crusade, with its undertones of anti-Semitism and nativism, “did not present simply a run-of-the-mill fair comment problem, but was [instead] a harbinger of the democratic-fascist struggle” in the United States.\footnote{138}

Riesman urged judges and other lawmakers to reshape libel law. “German and French experience shows how it can be a weapon for fascism,” he implored, “[t]here is no inherent reason why it cannot be a weapon for democracy.”\footnote{139} Courts, he charged, seemed unaware of “the need to guide the direction of social change by deciding what groups are to be free to criticize and what groups are to be curbed.”\footnote{140} In light of the “long somnolence” of libel law and the “few habitual patterns” that might “cramp decision into traditional forms,”\footnote{141} courts could, in this view, “be more ‘administrative’ than they realize” and engage in a frank “manipulation of privileges and defenses” in order to protect the weak against the powerful and the progressive against the re-

\footnote{136. See Riesman, Fair Game I, supra note 42, passim. Here Riesman also drew upon the earlier work of Karl Loewenstein. See, e.g., Loewenstein, Legislative Control of Political Extremism in European Democracies I, 38 COLUM. L. REV. 591 (1938). See also Hervey & Kelley, Some Constitutional Aspects of Statutory Regulation of Libels on Government, 15 TEMP. L.Q. 453 (1941).
137. Riesman, Fair Game II, supra note 42, at 1307.
138. Id. at 1298.
139. Id. at 1318.
140. Id. at 1310.
141. Id. at 1317.}
actionary. They were, thus, able to combat campaigns of systematic falsehood, even if this meant that they had to employ novel legal tools to achieve that end.\textsuperscript{142}

In addition to urging courts to borrow new social science techniques that would enable them to assess the real impact of defamatory language directed against democratic institutions, Riesman offered several other innovations. For instance, he suggested the use of injunctions and contempt proceedings as a means of combatting "wilful repetition" of defamatory falsehoods.\textsuperscript{143} Most important, he devoted an entire article in his trilogy to urging control of defamation through group libel laws. These, in his view, were a form of legal redress that were being resisted by deeply seated American tendencies to view defamation "only as a protection against individual injury" and to see the "chief dangers" to free expression as coming from "the 'state'" and never "from 'private' fascist groups in the community."\textsuperscript{144} Accordingly, he considered that no realistic policymaker could continue a negative policy premised upon the notion of protecting individuals from the state, for, in his view, such a policy would play "directly into the hands of the groups whom supporters of democracy need most to fear."\textsuperscript{145}

Riesman's contributions to libel law discourse were, at the same time radically audacious, quite conservative, and (most important) extremely revealing about the state of defamation law in the 1940s. Quite obviously, the audacity of his contributions grew out of Riesman's attempt to recast traditional defamation law and, more broadly, common law adjudication itself in an instrumentalist/reformist mode. He wanted judges to boldly embrace the new social science and to avowedly "manipulate" judicial results in light of the best policy considerations that social science could reveal.

Yet, in another sense, Riesman's views on defamation law and reputations were deeply conservative. Despite his quick dismissal of nineteenth century views of defamation and community, his

\textsuperscript{142} Id. at 1314, 1316. Riesman, however, was perceptive enough to note that use of social science research to make libel trials more "scientific" did raise the danger that wealthier litigants could make such expensive inquiries "an additional instrument of oppression, evidence which impoverished litigants could not afford." Id. at 1307.

\textsuperscript{143} Id. at 1317; Riesman, \textit{Group Libel}, supra note 42, at 775.

\textsuperscript{144} Riesman, \textit{Group Libel}, supra note 42, at 730.

\textsuperscript{145} Id. at 779.
view of the value of reputation remained within the confines of the “marketplace” social vision that had come to dominate American thought in the preceding century. Though the topic of defamation had public overtones for Riesman, especially as it was perceived to involve the sinister vilification of democratic institutions, he still evaluated individual reputation in property-marketplace terms. The action of defamation, in this view, protected a person’s “earning capacity [and] his social and commercial role.” Accordingly, “the normal case of defamation [would be] one where third persons have been caused to alter their relations with the plaintiff to his disadvantage.” Therefore, in contrast to liberal theorists who would begin any analysis of the action with a bias toward constitutional values of free speech, Riesman began it from the standpoint of balancing the right of reputation against other, competing public policy considerations.

Finally, and most important, Riesman’s pieces suggested that the traditional common law approaches to defamation no longer worked in the 1940s. Even if one disagreed with his particular theories of society and communication or his specific proposals for changing libel law, his work makes a powerful case for the realist view that the common law of defamation was not evolving toward any carefully considered consensus but was simply drifting along, case-by-case, beset by fundamental contradictions and tensions.

Many of the issues he canvassed received further attention five years later, when Harvard Law School’s Zechariah Chafee published his influential analysis of libel law. At first glance Chafee’s study, in contrast to Reisman’s, seems to support claims that Sullivan may have disrupted the hitherto happy history of common law defamation. Read quickly, Chafee’s study appears to support the view that the doctrinal substructure of defamation law showed no serious cracks and that it supported a viable, steadily growing tower of equally sound case law. But, a closer look at Chafee’s report, read in the context of other literature produced during the two decades preceding Sullivan and the realities of the Cold War society and culture, reveals that even

146. Id. at 780.
148. Riseman, Fair Game II, supra note 42, at 1302-03 (emphasis added).
greater tensions than were identified by Chafee have begun to emerge.

IV. THE CHAFEE REPORT ON THE LAW OF LIBEL

The leading first amendment scholar of the interwar era, Chafee investigated libel law as part of a massive, two-volume report on the media and law for the Commission on Freedom of the Press, popularly known as the Luce or Hutchins Commission. Insofar as Chafee's views on libel, (generally more favorable than Riesman's with respect to the intellectual coherence and the workability of the libel law of the 1940s) were significantly shaped by the goals of and pressures from the Luce Commission, the political/intellectual background of the Commission's work merits careful consideration.

The Commission on Freedom of the Press invited some of the premier intellectuals of the 1940s to consider the social role and political power of the American press. Jointly conceived in 1942 by Robert Maynard Hutchins, then president of the University of Chicago, and Henry Luce, founder and chair of Time, Inc., the Commission included no representatives from the media. Initially, Hutchins sought a quasi-judicial tone by asking Judge Learned Hand to chair the panel, but Hutchins, a former law professor at Yale, assumed the role after Hand declined. Chafee served as vice-chair. Struggling to frame both a statement of principles and a set of policy recommendations that might influence public discussion of free press issues in the post-World War II period, the panel spent several years gathering evidence and seeking consensus positions.149

Consensus, however, often proved elusive. Harold Lasswell, a political scientist who had recently left the University of Chicago in order to assist in the creation of Yale Law School's new "law and social policy" program, found that the Commission was veering away from its public policy emphasis and adopting a legalistic one.150 According to Laswell, traditional legal discourse, especially

149. See, e.g., Kalven, supra note 38, at 7-8. In this sense, Riesman satisfied Professor Shiffrin's view that "[g]enuine progress in free speech theory might well be achieved if commentators talked less about FREEDOM OF SPEECH and more about speech." Shiffrin, supra note 77, at 1212. For Shiffrin's support for a "balancing" approach, see id. at 1251 which can be compared with Aleinikoff, supra note 88, at 1004-05.

rhetoric about free speech rights, seemed "to perpetuate the negative conception of freedom of the press as absence of control, tempered by admonitions to goodness." Such legalistic discourse also tended to avoid the larger policy issues related to the actual "conduct on the part of the press that coincides with, or fosters, a free society."

A self-styled pragmatist, but one who was admittedly disinterested in immersing himself in the kind of "empirical" legal research David Riesman had called for, Chafee discussed libel in a manner that clearly showed the imprint of Lasswell's concerns.

Lasswell's fears about a traditionalist, legalistic emphasis, however, paled in comparison to the misgivings of William Hocking, a political philosopher and Chafee's colleague at Harvard. Hocking vigorously championed affirmative government action to control "abuses" by the press. In contrast to Chafee's views (and more in line with Riesman's), for example, Hocking worried about the social impact of libelous statements. In his view, a libel "moved out of the half-world between thought and action" and became "a deed ... destined to bring down the stock of a fellow man in the eyes of his neighbors and perhaps of his employers." The state should move in aggressively to halt the impact of such aggressive "behavior."

Hocking agreed with Riesman that the existing libel laws had worked poorly, often serving as "tools of intimidation by unscrupulous partisans." He favored a much more active oversight role by government, to include efforts on its part to redress not only libelous falsehoods but all injurious untruths and any expression that was the "equivalent [of] aggressive action...."

Led by Chafee, other members of the Commission, pursuing consensus, came to defer, in part, to Hocking's views. Chafee, for example, responded to Hocking's and Riesman's call for affirmative

---

151. On Lasswell's work at Yale Law School, see L. Kalman, supra note 51, at 176-87; on his broader intellectual views and career, see R. Seidelman, Disenchanted Realists: Political Science and the American Crisis, 1884-1984, at 133-48 (1985).

152. D. Smith, supra note 87, at 105-06.

153. Id. at 110-11 (emphasis added); McIntyre, supra note 150, passim.


155. Id.

156. Id. at 116 (emphasis added).
governmental judicial activism in the area of speech by considering a variety of remedies aimed at curbing the power of the "modern" media. He devoted an entire chapter to Riesman's pet proposal—group libel laws. However, while he admitted that "the existing law is almost incapable of punishing or otherwise discouraging the individuals and organizations who are deliberately stirring up racial and religious hatreds," Chafee nevertheless announced that the Luce Commission "was unanimously opposed to the enactment of group libel legislation." Although "methods must be found to combat radical and religious and economic antagonism," he explained, "... such methods must be largely sought outside the law." Chafee took faith in the power of the marketplace of ideas. "The remedy for bad discussion is not punishment" he declared, "but plenty of good discussion." After briefly evaluating cases involving invasions of privacy, Chafee found the Brandeis-created tort in a hopeless "muddle" and recommended "that respect for privacy be left to public opinion and the conscience of owners and editors." Chafee also confronted the argument, that had been urged on the Commission by Hocking and articulated by supporters of Roosevelt's New Deal, that a powerful, increasingly monopolistic mass media was misleading the public by spreading inaccurate information. Feigning the kind of socratic dialogue familiar to law students, Chafee queried whether "the time [had not] come for a more drastic legal attitude toward disregard of truth?" For example, he asked, if the government could step in with pure food and drug laws to stop deceptions in the economic marketplace, why couldn't critics of the press insist that citizens "be protected in the right to receive their mental food unadulterated?" And why, he continued, should "enemies of society" be permitted "to poison the wells of public opinion?" After a lengthy study

157. Id. at 126.
158. Z. CHAFEESUPRA note 42, at 118 (emphasis original).
159. Id. at 129.
160. Id.
162. Chafee, supra note 42, at 138.
163. McIntyre, supra note 150, at 143-47. For a good statement of the New Dealers' case, see H. ICKES, AMERICA'S HOUSE OF LORDS: AN INQUIRY INTO THE FREEDOM OF THE PRESS (1939); F. LUNDBERG, IMPERIAL HEARST, A SOCIAL BIOGRAPHY (1996).
164. Z. CHAFEESUPRA note 42, at 139.
of various policy options, Chafee rejected the possibility of applying compulsory retraction laws as too difficult to implement, even "if legislatures could constitutionally impose the novel and very burdensome task of enforcing them on busy judges." He was less emphatic in disposing of proposals for adopting "reply statutes," announcing that the Luce Commission had agreed that the reply law proposal would "be carefully considered in the near future." But he undercut these proposals along with others that had suggested a model reply law by adding his opinion that "the chief cure for falsehoods in mass communications should be sought outside the realm of law" because "law cannot reach what is inside human beings." In his view, the primary responsibility for improving the conduct of the media should be placed upon 1) a better informed community and, 2) media leaders who had accepted their "professional obligation to tell the truth."

The Commission's emphasis on private responsibility rather than legal remedies disappointed those New Dealers who had hoped for statements that would support more active governmental efforts to correct media falsehoods and to deal with the steadily increasing trend toward monopoly in the ownership of media outlets. After numerous compromise sessions, however, the Commission concluded that the enlightened people who managed and edited the media needed to recognize their responsibilities, moral as well as legal, and to uplift, rather than pander to, the tastes of their less enlightened readership. This emphasis on volunteerism and noblesse oblige, rather than on new legal solutions, seems to have pressed Chafee to put the most prominent legal remedy that remained, the law of libel, in the best light possible. If the Commission's leading lawyer could offer little new law, at least he could write reassuringly about old law.

At the same time, the zeitgeist at Chafee's home law school pushed him to accentuate the positive and eliminate the negative in his report on libel law. Even during the twenties and thirties,

165. Id. at 140.
166. Id. at 166-70 (emphasis added).
167. Id. at 184.
168. Id. at 195.
169. Id.
170. See Letter from Morris Ernst to Zechariah Chafee (Feb. 24, 1947); Letter from Chafee to Ernst (Feb. 26, 1947); Letter from Ernst to Chafee (Feb. 27, 1947) 147 Morris Ernst Papers, supra note 46.
the heyday of realism, Harvard had provided a refuge, especially in the area of tort law, for the traditionalist faith that learned lawyers could frame coherent, scientific, and meaningful legal concepts in the form of black letter doctrines. For instance, Harvard’s traditionalists had strongly backed the American Law Institute’s Restatement of Torts, issued in 1935.\textsuperscript{171}

In contrast to Reisman’s approach to libel law, Chafee’s bore the Harvard Restatement imprint. He did not agree with the assertion that the “outline of the main rules of libel look[ed] like a museum of antiquities.”\textsuperscript{172} In his view, the old doctrines expressed wise public policy decisions, especially in those areas where libel laws might otherwise intrude upon freedom of speech or freedom of the press. Thus, to him the primary rules of defamation law seemed “intelligent attempts to adjust conflicts between the need for an unblemished reputation and the need for frank discussion of important topics.”\textsuperscript{173} Having adopted the basic approach of the Harvard-ALI traditionalists, Chafee went on to endorse the specific language of the Restatement of Torts. He quoted, as blackletter gospel, the Restatement’s definition of what constituted defamation, and recommended it as one that had exerted “considerable influence on the bench and bar.”\textsuperscript{174}

More surprising for a renowned libertarian, Chafee also approved of the ALI’s rejection of the old Cooley position that had favored the protection of at least some defamatory political falsehoods. However, after citing the Restatement’s endorsement of Justice Taft’s rejection of any privilege for libelous political falsehoods, Chafee was moved to add that “a persuasive argument can be made” for the more libertarian position.\textsuperscript{175} It is noteworthy that Chafee’s discussion of the libertarian position followed the ahistoricism of twentieth century commentators and ignored Thomas Cooley’s significant nineteenth century contributions to the libel/free speech debate altogether. Chafee concluded that “this argument has won little acceptance outside of Kansas”\textsuperscript{176} and cited with approval the 1910 argument of Judge Van Vechten

---

\textsuperscript{171} McIntyre, supra note 150, at 143-43. See also the Commission’s joint report, Commission on Freedom of the Press, A Free and Responsible Press (1947).
\textsuperscript{172} G. White, supra note 105, at 153-54.
\textsuperscript{173} Z. Chafee, supra note 42, at 97.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 77 n.1 (citing Restatement of Torts § 559 (1938)).
\textsuperscript{176} Id. at 87.
Veeder, that had been published (perhaps significantly) in *Harvard Law Review*.

However, since both Chafee's report on legal matters and the entire Hutchins Commission effort aimed at consensus, Chafee could not completely ignore the realist critique of traditional defamation law. Thus, he tried to integrate a modified realist approach into his view.

First, Chafee employed the (watered down) realist tactic of admitting various problems but then quickly relegating their source to the periphery rather than doctrinal core of defamation law. For example, he observed that "although the main rules ... [of libel law] seem reasonably satisfactory," some justifiable criticism could be directed at various "subsidiary rules," especially those that varied "a good deal from state to state ..." At another point he commented that a "much more serious cause for the haphazard appearance of the outcomes of libel suits" was the "intangible nature of some of the chief issues." For example, he noted that many of the questions that arise in libel actions, such as those concerning the extent of damages a libelled person has sustained, or those concerning the intent of the libeler, defied easy measurement and oftentimes varied from suit to suit. He attributed the apparent incoherence in libel law results to the "jury's predominance in libel suits." He considered that jurors were no more able to comprehend and apply "the various reasonable rules of [libel] law" than readers were likely to prefer "the kind of newspaper which this Commission would like to have." Thus, in a world that failed to approach the sophistication of the American Law Institute, all of the "reasonable" libel doctrines became "fused into one simple human question: Which is worse, the plaintiff or the defendant?"

Second, although Chafee had implicitly conceded the realist case that a yawning chasm separated the black letter doctrines in various conceptual treatises from the law in its real life social context, he attempted to defuse the realist challenge with a brief

---

177. *Id.* at 87-88.
179. Z. CHAFFEE, *supra* note 42, at 97-98.
180. *Id.* at 99.
181. *Id.* at 100 (emphasis added).
182. *Id.*
183. *Id.*
review of the available evidence indicating how libel laws might affect the operation of the mass media. In essence, he argued that the evidence that the Luce Commission had received from journalists and libel lawyers cast doubts upon the primary policy argument for less stringent libel laws—the claim that libel laws, especially when complex and contradictory, encouraged "timidity" in political criticism.\textsuperscript{184} Chafee did not deny that media critics might be justified in condemning the press for "timidity," but he insisted that such behavior, most often motivated by an "honest" and "praiseworthy desire" to avoid libelling innocent people, could not be traced directly to libel law.\textsuperscript{185} Moreover, he insisted, the Commission's interviews had uncovered no pressing problems with the operation of libel law.\textsuperscript{186} Invoking the expertise and experience of a large city editor from New York, the impact portion of Chafee's report seemed to conclude that even New York's tough looking libel law "works well although it looks bad on paper. No newspaper editor has just cause for complaint."\textsuperscript{187}

Yet, despite its characterization of libel law as intrinsically sound and effective, Chafee's report revealed, underneath this smooth facade, a number of subterranean fissures and pressures. The policy behind reply statutes, for instance, rested upon a conviction that libel law had failed to deal with basic structural difficulties in the relationship between the media and citizens. Indeed, pressure from other members of the Hutchins Commission had forced Chafee to modify much of his own optimistic rhetoric about libel law and to consider various alternative legal measures. In addition, the study concluded with various proposals for "reform" of defamation law itself and called for periodic meetings among "legal experts and representatives of the communications industries" for the purposes of assessing the operation of libel laws and to recommend "reforms through nationwide action by state legislatures."\textsuperscript{188}

\textsuperscript{184} Id. See, e.g., J. Barron, Freedom of the Press for Whom? (1973); for one of the classic statements about the limits of traditional legal remedies to deal with an "irresponsible" press, see W. Lippman, Public Opinion 209 (1922).

\textsuperscript{185} Z. Chafee, supra note 42, at 101.

\textsuperscript{186} Id. at 102.

\textsuperscript{187} Id. at 103.

\textsuperscript{188} Id. at 105-14 (emphasis original); see also Chafee, Possible New Remedies for Errors in the Press, 60 Harv. L. Rev. 1 (1946).
But prominent libel law commentators thought the time for reform was already past due. Fredrick Siebert, a lawyer and professor of journalism who had previously clashed with Chafee on other mass communication issues, quickly challenged the upbeat conclusions of the Hutchins Commission and declared that libel laws were "woefully inadequate." Another influential lawyer/journalism professor, Frank Thayer, was also previously on record as having assessed libel laws as "ill defined and unsatisfactory." Although it is possible to construct a justification for 1940s style libel law, he mused, "it can be accounted for, however, only in the same manner that one would account 'for the distorted shape of an ugly trees.'" Similarly, Richard Donnelly, one of the leading "experts" on libel among the younger, postwar law school professorate, and a strong advocate of right-of-reply laws, urged both substantial changes in libel laws and introduction of new remedies for abuse of media power. And writing in 1949, the law professor Dix Noel also came down solidly in favor of change, endorsing universal adoption of the "minority" rule that accorded privilege to libelous political falsehoods and forecasting a clear judicial trend in favor of this position.

Although this review of the defamation debates of the 1940s helps to clarify some of the shadowy antecedents of Sullivan, it hopefully also raises some new lines of inquiry. One obvious question, of course, is "whatever happened to the pressures for change, so evident in the forties, during the fifties?"

Although the full story of defamation law in the 1950s remains to be written, certain general themes are clear. First, it seems clear that the basic issues that had been identified in the 1940s did not simply disappear. To the contrary, the evidence suggests

189. Z. CHAFEE, supra note 42, at 114.
190. Editor & Publisher Jan. 31, 1948 at 24; for earlier battles between Siebert and Chafee, see D. Smith, supra note 87, at 97-99. Professionals in journalism education, a group totally excluded from membership on the Hutchins Commission, had little good to say about the final report. See, e.g., Editor & Publisher, Jan. 3, 1948 at 10, 52.
192. Id.
194. Noel, supra note 120, at 897, 903.
that defamation suits may have been more of a problem for the media in the fifties and early sixties than they had been in previous decades. Second, in the red baiting culture of the Cold War era, the influential liberal elites most likely to have supported libertarian extensions of libel law worried a great deal about issues of reputation, and, much as Riesman had done in the early 1940s, they viewed defamation suits as an important remedy against political "character assassination." Third, although the steady growth of a vast "national security" surveillance bureaucracy often involved the politics of reputation, the old "democratic" versus "anti-democratic" analysis of David Riesman's 1942 studies hardly began to provide an illuminating paradigm for analyzing the relationship between defamation issues and the first amendment. In a rough parallel to what had happened at the birth of the surveillance state during World War I, defamation issues, at least temporarily, slipped to the

195. In contrast, it might be noted, the law of privacy, connected in many ways to defamation, underwent considerable change. As G. Edward White's excellent history has argued, the realist-traditionalist "synthesis" of William Prosser played an important role in providing an overarching consensus for this tort. G. WHITE, supra note 105, at 173-76. Alas, not even the redoubtable Prosser could bring consensus to the question of "what should 'we' do about defamation?" See, e.g., Prosser, Libel Per Quod, 46 VA. L. REV. 1839 (1960); Eldredge, The Spurious Rule of Libel Per Quod, 79 HARV. L. REV. 733 (1966); Prosser, More Libel Per Quod, 79 HARV. L. REV. 1629 (1966).


197. See, e.g., J. DAVIS, CHARACTER ASSASSINATION (1950); J. FAULK, FEAR ON TRIAL (1963); A. ROSE, LIBEL AND ACADEMIC FREEDOM: A LAWSUIT AGAINST POLITICAL EXTREMISM (1968); Marbury, The Hiss-Chambers Libel Suit, 41 MD. L. REV. 75 (1981). Indeed, one prominent study of McCarthyite smears, echoing Riesman's earlier studies on right wing propaganda of the 1940s, judged existing libel laws as totally inadequate. Pedrick, supra note 193, at 177-78. "To deal with character assassins whose voices can now race round the globe in a twinkling we bring law designed for the day of the town crier and the pamphleteer." Id. at 165.

back of popular first amendment consciousness. Finally, Robert Post's recent pathbreaking study of the "sociology of defamation" tends to suggest that the interaction between fundamental post-war social transformations were highlighting reputational issues that went beyond the "property-marketplace" approach assumed by Riesman in the pre-World War II studies of defamation law.

It would be a mistake to attempt to view post-1940 defamation law in a linear, glacial frame and to regard the historical trends of the fifties somehow building onto those of earlier decades until one arrives at the endpoint of the story, New York Times v. Sullivan. Discontinuities are every bit as much a part of "history" as continuities. In fact, a perspective sensitive to discontinuities and "silences"—in this case the apparent absence during the 1950s of the kind of defamation law debates that had occurred in the 1940s—helps to highlight one of the basic points of this paper. In several fundamental ways, the defamation law discourse of the 1940s served to focus debate over a set of issues that the Supreme Court ultimately tried to settle in Sullivan by drawing upon "general" free speech theories that had been developed during the Cold War era. In this sense, the effort to obtain substantial changes in political libel laws, like so many other

199. Consider, for example, the complex "politics of reputation" involved in charges by governmental and private groups against leading academics. Some liberal professors, for example, believed that colleagues who vigorously defended their own "right to reputation" against charges of unamericanism seriously damaged the "reputation" of the larger community of scholars. See generally E. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES, passim, but esp. 152-55 (1986). At the same time, the academic "watchdog" group, The American Association of University Professors (AAUP), when it acted at all, essentially engaged in the "politics of reputation" by "censoring" institutions who failed to live up to their standards of academic "freedom." See id., passim, but esp. 308-37.

200. See discussion supra, accompanying note 39. At the same time, however, those first amendment writers trying to work out a new "general" free speech theory kept the issue of defamation very much in mind. See discussion infra, accompanying notes 205, 206.

201. Riesman's definition of defamation was framed entirely in property-marketplace terms. Riesman, Fair Game II, supra note 42, at 1302-03. For other views, see generally Post, supra note 147. For an analysis that updated Riesman's social science analysis of the early 1940s with subsequent "behavioralist" studies that suggested a broader view of defamation, see Probert, Defamation, A Camouflage of Psychic Interests: The Beginnings of a Behavioral Analysis, 15 VAND. L. REV. 1173 (1962). And for an early attempt to relate defamation law to the new style "gossip" sheets, such as Confidential, which emerged in the 1950s, forerunners of People and National Enquirer, see Speigel, Defamation by Implication—in the Confidential Manner, 29 S. CAL. L. REV. 306 (1956).
political efforts, may have had to go "underground" in the fifties.\footnote{202}

V. CONCLUSION

More than twenty years before the United States Supreme Court decided \textit{Sullivan}, important segments of the legal community had thoroughly critiqued the alleged deficiencies in the common law action of defamation, especially during those times when the ancient tort had become embroiled in political conflicts. This paper has focused upon three of the extensive and important critiques that occurred in three very different forums during the 1940s. The first of these, the liberal coalition behind the appeal of the \textit{Sweeney} case attempted, and apparently only narrowly failed, to engage the Supreme Court in libel law discussions. The second of the critiques, contained in David Riesman's studies, represented both the use of law review articles as a means to influence legal policymaking and the instrumentalist-realist confidence in the power of social science "expertise" to shape wise legal policy outcomes. The third critique, Zechariah Chafee's work for the Luce Commission, took the instrumentalist realist assurance one step further and merged it with a corporate liberal faith in the ability of dominant elites not only to suggest specific policies but to set the agenda for broader discussions over principles and fundamental assumptions about public issues.\footnote{203}

It can be argued that these critiques helped to identify three major issues that culminated in the \textit{Sullivan} decision.\footnote{204} First,

\footnote{202. For a critique of evolutionary legal constitutional history see generally Gordon, \textit{Critical Legal Histories}, 36 STAN. L. REV. 57 (1984).}


\footnote{204. On the concept of "corporate liberalism," see generally R.J. Lustig, \textit{Corporate Liberalism} (1982); Hawley, \textit{The Discovery of a "Corporate Liberalism: The Origins of American Political Theory: 1890-1920"}, 52 BUS. HIST. REV. 309 (1978); but cf. Block, \textit{Beyond Corporate Liberalism}, 24 SOCIAL PROBLEMS 352 (1977). Obviously this study has generally ignored one area for possible legal innovation, common law adjudication. According to Professor Epstein's perspective, one accepts the idea that case-by-case litigation produces, by some type of "invisible hand," wise and efficient decisions. See, e.g., Epstein, \textit{supra} note 21, at 796-809. Others have offered point-}
both Riesman's articles and the Sweeney lawsuit related defamation law to basic policy and constitutional concerns that supposedly went to the heart of "democratic" values. Claims that the "free flow" of ideas was indispensable to a free society gained in both scope and power during World War II and the Cold War era. Although, quite obviously, nothing approaching a consensus about the actual meaning of "freedom of expression" emerged, allegiance to the so-called "First Freedom," as the briefs in the Schenectady Union-Star case suggested, became perhaps the most commonly cited criterion for distinguishing between an "open" and a "closed" society. Meanwhile, on the fringes of the Cold War culture, a small but ultimately influential group of "Cold War libertarians" increasingly argued that the ancient law of seditious libel provided one of the best places to begin framing constitutional safeguards that went beyond the "clear and present danger" paradigm that had been shaped during the World War I era.

During the height of the Cold War era, these general theories were developed "underground" and emerged again into mainstream legal consciousness relatively late in the decade. Still, as


This paper has tried to point out two very specific criticisms of Professor Epstein's history. First, even if one were to assume that the common law of defamation was evolving in a coherent manner prior to Sullivan, this presumed evolution totally escaped some of the most esteemed defamation analysts of the 1940s. Second, the "history" of defamation law in the 1940s also shows considerable dissatisfaction with prevailing doctrines and policies and a variety of "policy" proposals for changes. The interpretation that follows suggests a further point: that the literature produced in the 1940s clearly raised the major "policy" issues with which the Warren Court tried to deal in 1964. See infra, between notes 204 and 214. And for a recent defense of Sullivan, see Franklin, Public Officials and Libel: In Defense of New York Times v. Sullivan, 5 CARDOZO ARTS & ENT. L.J. 51 (1986).

205. I do not mean to imply anything like a "developmental" or "evolutionary" view of the "pre-Sullivan history" of defamation law. Rather, the point once again is that the Warren Court cannot fairly be charged with ignoring some mythical and happy history of the first amendment and defamation and then be indicted for suddenly inventing its own version of libel law. Most of the fundamental issues at stake in Sullivan had been identified and even debated before the Supreme Court back in 1942; and, as will be noted, (see infra between notes 205 and 208) the cold war period of the late 1940s and 1950s probably helped to deflect and ultimately to reshape the defamation versus free speech debate in very significant ways.
early as 1952, the law professor Harry Kalven was cautiously hinting at one of the basic issues decided twelve years later in Sullivan: the “most exciting free speech question of our day” he said, “is oddly enough, whether the Sedition Act of 1798 was and would remain constitutional, for it is on this issue that the real stakes in free speech turn.”

As other members of this new generation of libertarian theorists, successors to the first amendment stewardship of Holmes, Brandeis, and Chafee, searched for “general theories” or conceptual “systems” to be used by courts, they also pushed the issue of defamation law to the forefront of analysis, in contrast to earlier first amendment guardians.

In addition, all three of the major critiques of libel law in the 1940s identified a second crucial issue that the Supreme Court was to confront in Sullivan. In determining whether a plaintiff had been libelled, it was necessary to decide who, or what, was the relevant “audience” or “speech community” to be considered. As Justice Hugo Black of Alabama noted, the segregationist police commissioner in Sullivan likely had his reputation enhanced, rather than damaged, by being the target of allegedly libelous falsehoods by members of the civil rights movement in the primary organ of liberal outsiders, the New York Times.

Any construction of defamation law also inevitably constructs a vision of community, “an image of how people are tied together, or should be tied together, in a social setting.” In Sullivan,
Justice Brennan squarely faced this issue—the same one that had been presented to the 1942 Court in the Sweeney appeal. He insisted that defamation law must operate in the context of a national political community, one characterized by vigorous debate within vibrant political and intellectual marketplaces, and ultimately superintended by the Justices of the Supreme Court. It could not, in his view, be appropriately applied in local communities where “right thinking” jurors were free to impart to it the flavor of parochial convictions or concerns.

In this aspect, the Court’s choices in Sullivan, especially when it purported to make them in the name of advancing the interests of a “free” and “democratic” society, were not without their contradictions; but these contradictions were hardly new or suddenly created in the Sullivan case, or even (perhaps) resolvable under any general theory of libel law.

Third, though Sullivan has often been credited, or blamed, for resting upon an over-idealized concept of free expression growing out of Alexander Meiklejohn’s version of Cold War libertarianism, Justice Brennan’s majority opinion ultimately retreated to the public policy balancing approach that had characterized libel law and general constitutional discourse even before the 1940s. Whatever the precise origins of Brennan’s “actual malice” test, it represented a variation on “minority rule” balancing formulas that could be traced back, albeit with all kinds of historical twists and turns, to Thomas Cooley. In this sense, the Court’s majority refused to accept Justice Black’s apparent view that the term “right of reputation” really signified relatively trivial concerns,

210. Post, supra note 147, at 693.
211. On the conflict of such a judicial position with “democracy,” see, for example, Schauer, The Role of the People in First Amendment Theory, 74 CALIF. L. REV. 761, 787 (1986) (“Realistic” first amendment theory would face up to its “frankly paternalistic” nature).
212. “The ultimate metaphor of our national political life is that of public debate leading to the informed and personal consent of the governed. The metaphor assumes an image of mature and independent individuals mutually agreeing to together live a good life, rather than that of individuals socialized by a community into a commonly accepted vision of a good life. The differences between these two images are fundamental, and even if they are acknowledged it is not clear how they can ever be resolved.” Post, supra note 147, at 739. For a different version of “fundamental” conflicts in defamation law, see N. Rosenberg, supra note 6, esp. 265-68. And for a still different perspective relevant to the “relevant audience” issue in defamation law, see Seidman, Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law, 96 YALE L.J. 1006, 1025, 1053 (1987).
and adopted a legal rule that attempted to weigh competing interests and strike a “balance” between reputation and free speech. 213 If the bright hopes that so many had for Sullivan have wilted a bit, and if its viability in the “real” world 214 has, perhaps disappointingly, proved as time-bound and historically contingent as any other legal decision, this brief consideration of the libel law debates of the 1940s should assist an understanding that the Justices who decided Sullivan in the 1960s, though certainly not compelled to follow any particular doctrinal path, were not suddenly or blindly cutting a new one through the tangled thicket of defamation law.

Perhaps most important, Justice Brennan’s opinion, especially when viewed against the backdrop of postwar debates about the relationship between libel law and politics, should be seen for what it was, a complicated act of political coalition-building that involved juggling not simply first amendment concerns but also broader ones about the future of the civil rights movement and of liberal “reform” in general. 215 However gently or harshly one judges the defamation/first amendment “solutions” offered in Sullivan, can they really be viewed apart from the deeper contradictions related to equality, racial justice, and democracy that were championed by the civil rights movement of the 1960s? 216

---


216. For a summary of the differences within the Court with which Justice Brennan had to deal, see B. SCHWARTZ, SUPERCHIEF: EARL WARREN AND THE SUPREME COURT, 531-42 (1983).
Is it surprising, then, that as society and political cultures have changed, *Sullivan* would show many of the same contradictions that time and perspective have helped to highlight in other "liberal reform" efforts of that era?217

Today, those who seek ways to prune the "ugly trees" that exist in the defamation thicket would do well to consider, carefully and critically, previous policy-shaping efforts. Legal histories teach no simple lessons about what happened in the past, but more modestly, they might provide the kinds of complex perspectives so badly needed in an age devoted to embracing traditional nostrums or the latest techno-fix.218


218. See, e.g., N. Rosenberg & E. Rosenberg, supra note 22, at 283-308.
Debate on the Constitutionality and Desirability of a Tobacco-Products Advertising Ban*

Paul J. Weber and Greg Marks**

Congress shall make no law...abridging the freedom of speech, or of the press....

First Amendment, U.S. Constitution.

I. PROPOSITION: A TOTAL BAN ON CIGARETTE ADVERTISING IS PERMISSIBLE WITHIN THE SCOPE OF THE FIRST AMENDMENT—GREG MARKS

A. Commercial Speech

It is always difficult to make an argument for what appears, at first encounter, to be censorship. However, throughout its history, the first amendment has always been limited in its application. Originally it applied only to acts passed by Congress; it did not apply to the states. Consequently, any form of advertising could be banned or controlled by the states for the first 134 years after the passage of the Bill of Rights.1 It was not until 1925, that the first amendment was recognized as a limitation on state laws in the United States Supreme Court case of New York v. Gitlow.2

The proposition advanced in this debate is that a state’s interest in the “health, life, and safety” of its citizens is a more important interest than a tobacco company’s right to advertise cigarette’s in that state. This is principally because the Supreme Court has traditionally relegated “commercial speech” to a relatively less important position in the range of expressions pro-

---

* This article is arranged in the form of a debate between two authors. The format contains a proposition, response, and a rebuttal.

** Paul J. Weber is a professor of political science at the University of Louisville.

1. For a thorough treatment of the early development of Freedom of the Press, see L. LEVY, EMERGENCE OF A FREE PRESS (1985).

2. 268 U.S. 652 (1925).
ected by the first amendment. It has only been in the last twelve years that the Court has afforded even limited protection to commercial speech.

In 1942, in one of the early cases to address the issue of advertising as protected speech, the Supreme Court ruled that a New York entrepreneur had no constitutionally protected right to distribute handbills on the streets. The Court held that, although other forms of expression would have been given a high degree of protection under the first amendment, the Constitution "impose[ed] no such restraint on government as respects purely commercial advertising."4

In large part, this 1942 decision simply reflected the fact that, up until that time, advertising had been regarded, and treated, more as a form of commercial enterprise than as a form of expression intended to be protected under constitutional guarantees. In 1914, for example, Congress had created the Federal Trade Commission to prevent "unfair methods of competition in commerce." Before long, the commission began to regulate commercial advertising, treating it as though it were just another means by which an unfair competitive advantage could be gained. Initially, the Supreme Court showed some reluctance to allow the FTC to exercise its jurisdiction in this way,6 but by 1934 the Court had backed off and conceded that the FTC had at least some power to regulate advertising.7 With the passage of the Wheeler-Lea Amendments in 1938, the FTC was given specific authorization to regulate "unfair or deceptive acts or practices in commerce," and advertising was seen to fall within this jurisdictional scope.

Twenty five years later, in 1963, the Supreme Court held that the states as well had the power to regulate commercial advertising, even when such exercise affected interstate commerce. In Head v. New Mexico Board of Examiners in Optometry,8 the Court upheld a New Mexico statute that prohibited optometrists from advertising the price of eyeglasses in newspapers or over radio. The Court stated:

4. Id. at 54.
The Constitution “when conferring upon Congress the regulation of commerce...never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.”

In Head, the Court embraced the principle that a state may pass regulatory legislation affecting commerce (including regulation of advertising) where the regulatory purpose is justified by a legitimate exercise of the police powers of the state, i.e., to protect the “health, life, and safety” of citizens.

The following year, however, in New York Times v. Sullivan, the Supreme Court first indicated that some limitations upon the regulation of commercial speech by the states or the FTC may be appropriate in some circumstances. In Sullivan, the Court held that “editorial” advertisements were protected expression and fell within the protection of the first amendment. In this case, an Alabama police commissioner had demanded that the New York Times print a retraction of a full page advertisement protesting a “wave of terror” against blacks involved in non-violent demonstrations in Montgomery. Such a retraction was required by Alabama state law. However, the Court ruled that advertisements that communicated information, expressed grievances, protested abuses, or sought support for a movement whose objectives were matters of the highest public interest were protected by the first amendment.

Nine years later the pendulum seemed to swing back in the other direction when the Court held that a newspaper could be prevented from advertising jobs under the categories “Jobs—Male Interest,” “Jobs—Female Interest,” and “Male—Female” where such sex discrimination in hiring was illegal. Justice Powell, writing for the majority, noted that the Court had “...no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.” The Court specifically noted, however, that the

9. Id. at 428 (emphasis added).
12. Id. at 388.
newspaper was certainly not prohibited from running ads commenting on the ordinance which banned sex discrimination, or on the rationale behind the ordinance. Such speech, characterized as political in nature, was, in the Court's view, clearly protected by the first amendment. In contrast, an advertisement that merely discriminated and was not designed to inform or educate readers was clearly not protected.

In 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, the Supreme Court held that even some non-political commercial speech is entitled to first amendment protection. In that case, a group of Virginia consumers challenged a Virginia statute providing that a pharmacist who advertises specific prices for prescription drugs may be guilty of professional misconduct and subject to penalties. In holding that this particular form of commercial speech was protected, Justice Blackmun, writing for the majority, emphasized the keen interest of consumers in this kind of information, an interest that was likely to be as strong, if not stronger, than their interest in most political speech.

Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.

The Court explained that there had been no contention in the case that the advertising of the pharmacist was in any way misleading, because misleading advertising is clearly not protected. It further asserted that traditional time, place, and manner restrictions on commercial speech are allowable, provided they are justified and "content neutral."
In its attempt to balance the first amendment rights of consumers and pharmacists against the state's interest in regulating the professional conduct of pharmacists, the Court found it significant that other means of protecting the public existed which did not infringe on speech. The state's interest in regulation must be significant if it is to outweigh the public's right to know, said the Court. Moreover, such regulation must be accomplished by the least restrictive means. The Court, therefore, spoke in broad terms and did not attempt to set out more definitive criteria for determining the point at which the balance might tip in favor of the state. This apparently reflected the Court's intention also to weigh the likely effect on the public of granting protection to the form of commercial speech at issue in each individual case.

In 1977 and 1978, the Supreme Court considered two cases involving attorney advertising, Bates v. State Bar of Arizona, and Ohralik v. Ohio State Bar Association. In Bates, the Court prohibited a state from banning attorney advertising altogether. As it had in Virginia Pharmacy, the Court acknowledged the state's power to regulate false or deceptive advertising, as well as its legitimate interest in maintaining high professional standards for lawyers. However, it held that the complete ban on attorney advertising was more restrictive than was necessary to protect the state's interests. Noting that the prohibition had purportedly been designed to protect the "quality" of legal practice, the Court observed that "[r]estraints on advertising...are an ineffective way of deterring shoddy work."

In Ohralik, however, the Court seemed to take a step back from the protections that had been granted to commercial speech in Virginia Pharmacy and Bates, and upheld the suspension of an attorney found to have been "ambulance chasing" to personally solicit business from a young client. The court stated, "[W]e...have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First

20. Welkowitz, supra note 17, at 60.
Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."

Apparently, the attorney's conduct in this case was considered so outrageous that none of the Justices were disturbed by the first amendment implications in its regulation.

B. Central Hudson

Arguably the most important Supreme Court case addressing the protection of commercial speech is Central Hudson Gas & Electric Corp. v. Public Service Commission. Central Hudson challenged a regulation of the Public Service Commission of New York that completely banned advertising by an electric utility. The Court held that the regulation was a violation of the first amendment, and developed a four-part test to be applied in commercial speech cases generally. The test requires the court to first ascertain whether the activity or transaction being promoted is illegal or whether the advertisement is false or misleading; if either is the case, no first amendment protection is afforded. Second, if neither is the case, the court must determine whether there is any substantial government interest in prohibiting the advertisement. Third, if there is such an interest, the regulation must directly advance it. Fourth and finally, the regulation must be no more extensive than necessary to further the identified governmental interest. Only if all four prongs of this test are met, said the court, can a regulation restricting otherwise protected commercial speech be sustained.

Since the application of this test would have a direct and significant effect upon any determination as to whether a total ban on cigarette advertising might be upheld, it bears closer examination. The first part of the Central Hudson test reveals that the court treats commercial speech differently than it does other forms of expression. The truth of an expression is usually not considered under the ordinary first amendment analysis addressing the degree of protection to which such expression is

22. Ohralik, 436 U.S. at 456 (emphasis added).
24. Id. at 563-567.
25. My thanks to David Welkowitz on whose article, supra note 17, my discussion of the Central Hudson decision is based. I admire his reasoning, although we differ in our conclusions.
entitled. Only when the speech is commercial does its truth or
tendency to mislead become material in this determination. The
inquiry into the truthfulness or misleading character of the speech
necessarily will involve an inquiry into its content, and will
involve an assessment of how it might be received by the public.

The second prong of the test asks whether the regulation
advances a "substantial" government interest. This, of course,
encounters the problem of definition: what, exactly, does "sub-
stantial" mean? The government could claim a "substantial" in-
terest in virtually any area where its views run counter to those
of an advertiser. Certainly it could not be left to the government
itself to define what its substantial interests are and then to rely
upon this determination to justify its regulation of speech affect-
ing that interest. For example, in Central Hudson the government
sought to restrict an electric utility company in its promotional
advertising. The state argued that because the utility was a
monopoly, and because the nation was dependent on foreign
energy sources over which it had no control, the state had a
substantial interest in seeing that electrical consumption was not
stimulated by promotional advertising at a time when national
policy favored conservation. In this instance, the Court accepted
that the state's interest was "substantial." It did not, however,
set out any criteria that would assist future court determinations
as to whether a state's interests in any particular national policy
objective was to be considered "substantial." Later cases have
done little to clarify the uncertainty surrounding this question.

Similarly, the third part of the Central Hudson test, which asks
whether a restriction directly advances the government's as-
serted interest, is also non-specific. As David Welkowitz states,
"[i]t is probable that in the majority of the cases where a court
finds the state interest to be 'substantial' a finding that the
restriction on advertising 'directly advances' that interest will
follow." Accordingly, since the second and third prongs of the
test offer only generalized guidance, commercial speech case-s
are most likely to be resolved by the fourth.

The fourth prong of the Central Hudson test asks the question
whether the restriction on expression is more excessive than

27. Welkowitz, supra note 17, at 68.
needed to advance the state's interest. Indeed, this is the part of the test that was determinative in *Central Hudson*. The Court found that while it was true that the challenged regulations would prevent the utility from promoting increased electrical consumption, they would also prevent it from advertising devices (e.g., heat pumps) which would conserve electricity. The Court concluded that since the Public Services Commission's order was more restrictive than necessary, it could not stand.

**C. Posadas**

A recent United States Supreme Court case has led some commentators, including Professor Tribe, to believe that the Supreme Court would be inclined to uphold the validity of a total ban on cigarette advertising. In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, the Puerto Rican legislature had statutorily prohibited any advertising that specifically invited Puerto Rican residents to visit the legal gambling casinos which operated there. At the same time the law permitted advertising directed at non-resident tourists, even though such advertising might be seen by residents. The issue, as narrowed by the Superior Court of Puerto Rico, was whether such restrictions on commercial advertising were constitutional. The Supreme Court of the United States upheld the statute by a five to four majority.

Justice Rehnquist, writing for the majority, applied the four part *Central Hudson* test, finding first that "advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not misleading or fraudulent, at least in the abstract." Applying the second prong of the test, the Court found that the state's interest was in reducing demand for casino gambling among Puerto Rican residents. In its brief to the Court, the state enumerated the following adverse effects upon Puerto Rican residents that were anticipated to result from increased gambling

---

29. Professor Laurence Tribe, Harvard University Law School and Professor Henry P. Monaghan, Columbia University School of Law. Also the New York State Bar Association in a resolution submitted to the American Bar Association.
31. *Id.* at 2976.
"the disruption of moral and cultural patterns, the increase in
local crime, the fostering of prostitution, the development of
corruption, and the infiltration of organized crime.\textsuperscript{32}

The Court noted that these were the very same concerns that
had caused most of the fifty states to prohibit casino gambling
altogether. Accordingly, wrote Justice Rehnquist, "\textit{[w]e have no
difficulty in concluding that the \ldots health, safety, and welfare of
[the Puerto Rican] citizens constitutes a 'substantial' govern-
mental interest.}\textsuperscript{33}

In dissent, Justice Brennan (joined by Justices Marshall and
Blackmun) argued that the majority's deference to the Puerto
Rican legislature's predictions was not merited. He emphasized
that the legislature had chosen not to prohibit its own residents
from participation in other forms of gambling. For example, he
pointed out that residents were allowed to gamble on horse
racing, dog racing, cockfighting and the Puerto Rico lottery, all
of which were advertised to residents without restriction. He
even went so far as to suggest that the actual motive of the
legislature in enacting the contested law had not been to protect
its citizens from the "evils" of gambling at all, but rather to
courage them to spend their gambling dollars on the Puerto
Rico lottery. "\textit{[I]n light of the legislature's determination that
serious harm will not result if residents are permitted and en-
couraged to gamble, I do not see how Puerto Rico's interest in
discouraging its residents from engaging in casino gambling can
be characterized as 'substantial'].}\textsuperscript{34}

Justice Rehnquist addressed the third prong of the Central
Hudson test, in the following terms:

Step three asks the question whether the challenged restrictions
on commercial speech "directly advance" the government's as-
serted interest. In the instant case, the answer to this question is
clearly "yes." The Puerto Rico Legislature obviously believed,
when it established the advertising restrictions at issue here, [that]
the advertising of casino gambling aimed at the residents of Puerto
Rico would serve to increase the demand for the product adver-
tised. We think the legislature's belief a reasonable one.\textsuperscript{35}

\begin{flushleft}
\textsuperscript{32}\textit{Id.} at 2977.  \\
\textsuperscript{33} \textit{Id.}  \\
\textsuperscript{34} \textit{Id.} at 2983-84.  \\
\textsuperscript{35} \textit{Id.} at 2977.
\end{flushleft}
In support of this rationale, Justice Rehnquist cited the plurality opinion in *Metromedia, Inc. v. City of San Diego*, where the Court, in upholding a ban on billboard advertising, had asserted that the third prong of the *Central Hudson* test was satisfied where the legislative judgment under scrutiny was "not manifestly unreasonable."

In its application of the fourth prong, the *Posadas* majority ventured onto perilously thin ice. But to Justice Rehnquist, the issue was clear-cut: "[it is] clear beyond pure adventure that the challenged statute and regulations satisfy the fourth and last step of the *Central Hudson* analysis." Holding that the restrictions on commercial speech were no more extensive than necessary, Justice Rehnquist reasoned that the restrictions themselves were limited in that they dealt only with tourists, that the legislature apparently had concluded that this step was necessary, and that the alternative of informing citizens of the "evils" of casino gambling would not have been effective. He concluded by noting, "It would... be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising."

Dissenting from this argument, Justice Brennan suggested a number of ways in which Puerto Rico could have achieved its desired ends without having restricted commercial speech. For example, he noted that the legislature could have placed limits on bets, more vigorously enforced their criminal code, or made use of counterspeech. Moreover, convinced that the majority was in error in its placement of the burden of proof, he wrote:

Where the government seeks to restrict speech in order to advance an important interest, it is not, contrary to what the Court has stated, "up to the legislature" to decide whether or not the government's interest might be protected adequately by less intrusive measures. Rather, it is incumbent upon the government to prove that more limited means are not sufficient to protect its interests, and for a court to decide whether or not the government has

38. Id.
39. Id. at 2979.
Justice Brennan further observed that the “strange constitutional doctrine” to which the majority objected, one which would “concede to [the] legislature the authority to totally ban a product or activity” but deny to it the authority to prohibit the advertising of the same product or activity, was not so strange after all—it is called the first amendment.\(^4\)

Writing separately in dissent, Justice Stevens, joined by Justices Marshall and Blackmun, also found grave problems with banning advertising only to a certain audience and restricting only certain publications. In addition, he found an unconstitutional prior restraint in the statute’s requirement that a publication obtain approval from the Tourism Company of Puerto Rico before running an advertisement. In his view, “[t]he First Amendment surely does not permit Puerto Rico frank discrimination among publications, audiences, and words. Nor should sanctions for speech be as unpredictable and haphazardous as the roll of dice in a casino.”\(^4\)

D. Would A Total Ban Be Constitutional?

In determining whether a total ban on cigarette advertising would be constitutional, one should first review the cases in which more limited objective attacks on cigarette advertising have been sustained in the lower courts. In \textit{Branzhaf v. Federal Communications Commission},\(^4\) Professor John F. Branzhaf III, now head of Action on Smoking and Health, succeeded in having the “fairness doctrine” applied to cigarette commercials. Under this doctrine, radio or television stations that run cigarette ads are required to run anti-smoking public service messages as well. Compliance, however, did not necessarily require a station to run exactly one minute of public service for each minute of cigarette advertising.

Forces determined to do away with cigarette advertising on radio and television were not content with their gains in \textit{Branzhaf}.

\(^{40}\) \textit{Id.} at 2985 (citing \textit{In re R.M.J.}, 455 U.S. 191, 206 (1982)).
\(^{41}\) \textit{Id.} at 2979.
\(^{42}\) \textit{Id.} at 2984 n.5.
\(^{43}\) \textit{Id.} at 2988.
zhaf, however. Congress was under pressure to do more. Accordingly, four years after Branzhaf, in Capital Broadcasting Company v. Mitchell, broadcasters found it necessary to bring suit attacking the constitutionality of a newly enacted section of the Public Health Cigarette Smoking Act of 1969, which prohibited the broadcasting of any cigarette advertising over radio and television. The Circuit Court for the District of Columbia upheld the act, finding that the "public owns the airwaves" and that "licensees must operate broadcast facilities in the public interest under the supervision of a federal regulatory agency." Having succeeded in Capital Broadcasting, anti-cigarette advertising advocates could now turn their attention to other media. Unlike "the airwaves" however, the public did not own newspapers, magazines or billboards. But did Central Hudson or Posadas provide an opening?

Although some respected constitutional scholars were of the opinion, even before Posadas, that a total ban on cigarette advertising would be constitutional, others have since joined them. Moreover, the case for a total ban on cigarette advertising is, in a number of ways, stronger than the case made for the restriction of casino advertising in Posadas.

To begin with, a total ban on cigarette advertising would necessarily have to be accomplished by means of a federal statute. Such a statute would be entitled to even more deference than that given by the Supreme Court to the territorial statute in Posadas. Posadas, therefore, laid the framework for judicial acceptance of a broader federal ban.

Next, one must determine if there are any problems in applying the Central Hudson tests to cigarette advertising. The first prong of the test requires that the product advertised be legal and that the advertising not be illegal. Posadas teaches that it is not dispositive that cigarettes are a legal product. Casino gambling in Puerto Rico was also legal. In contrast, brothels and opium dens may not be advertised under the Central Hudson test.

49. See supra note 29.
The argument has been made, however, that cigarette ads are misleading. These ads typically portray young and active adults enjoying a smoke after having engaged in sports. They attempt to associate smoking with active, vibrant and athletic people. Blocked by Capital Broadcasting from advertising on radio or television, the tobacco companies have diverted their advertising dollars, into print media, outdoor advertising and the "sponsoring" of sporting events. Needless to say, these ads never make any reference to the highly addictive nature of smoking, or to the health problems that a smoker might encounter in the future. On the other hand, ads for sportscars are not likely to mention the increased risk of death in fiery crashes either. Ads for dairy products never mention cholesterol. Pharmaceutical ads never mention overdose. Budweiser also sponsors sporting events and its ads do not speak of alcoholism, of drunk driving, or of child abuse. Accordingly, it would perhaps be difficult for a court to find that cigarette ads are any more "misleading" than these others.

The second prong of the Central Hudson test requires the government to show a "substantial interest" to justify its suppression of advertising. What interest could be advanced to justify a ban on cigarette advertising as distinguished from a proposed ban on butter, sportscars, pharmaceuticals, or Budweiser? How about the fact that cigarettes are the only legal product that is harmful when used as directed!

In this country, approximately 350,000 people die every year from smoking related diseases. This amounts to 1,000 people a day and 1 out of every 7 deaths that occur in the United States. Cigarettes annually kill more Americans than heroin, cocaine, alcohol, fire, automobile accidents, homicide, suicide, and AIDS combined. From an economic standpoint, it has been estimated that in 1985, smoking cost the United States $22 billion in medical bills, $4.2 billion of which is borne by the federal government, and another $43 billion of which is borne by industry in lost

51. This includes 80,000 victims of lung cancer, 34,000 of whom died from smoking-related emphysema and chronic bronchitis and about 200,000 of whom will die from heart conditions attributable to smoking. FTC Staff Report, May, 1981, p. 11.
productivity through time missed from work due to tobacco related diseases. Surely an attempt to reduce this toll would qualify as a legitimate government attempt to protect the "health, life, and safety" of its citizens.

The third prong of Central Hudson requires that a total ban on cigarette advertising must be shown to advance the "substantial interest" of the government in reducing the use of cigarettes in the population? This may be where the anti-tobacco forces will face their most difficult challenge.

In 1973, Norway banned all forms of promotion and advertising of tobacco products. The program seems to have been a qualified success, reducing the number of male smokers from 51% to 40% while the percentage of women smoking remains about the same. Muddying the statistic, however, is the fact that, at the same time it banned advertising, the Norwegian government also instituted anti-smoking educational measures and sponsored clinics to help people quit smoking. The evidence from other countries that have banned tobacco advertising, some of whose economies and societal structure, however, differ markedly from the United States, is even less clearcut. Pro-tobacco forces contend that the total evidence shows that an ad ban has little effect on tobacco consumption. However, it is important to note the relatively undemanding "not manifestly unreasonable" standard applied by the Posadas majority to this third prong of the Central Hudson test. It certainly would not be "manifestly unreasonable" for Congress to ban all cigarette advertising.

Essentially, the Posadas Court determined that it was reasonable for the Puerto-Rican legislature to believe that banning casino advertising would benefit its residents. Therefore, it considered the third prong of the test to be met. Similarly, it is reasonable to believe that a total ban on cigarette advertising would advance the government's interest in protecting the health, safety, and welfare of its citizens. It is unlikely, for example, that the advertising is intended only to persuade adults who already smoke to switch brands. Statistics show that subtracting

56. Id. at 63-64.
the number of smokers who die each year from smoking related
diseases and other causes along with the number who quit, and
adding back the number of beginning smokers, 90% of whom are
teenage or younger, 5000 children and teenagers have to start
smoking every day for demand to stay constant. As an anonym-
ous Brown & Williamson marketing executive, told a reporter
at the Louisville Courier Journal:

Nobody is stupid enough to put it in writing, or even in words,
but there is always the assumption that your marketing approach
should contain some element of market expansion, and marketing
expansion in this industry means two things—kids and women. I
think that governs the thinking of all the companies.

The fourth prong of the Central Hudson test requires the
government to show that measures less restrictive than a total
ban on cigarette advertising are not available, or would not be
effective, to achieve the desired goal. In this regard, the govern-
ment could show that a number of less restrictive measures have
been tried without success. Since 1972, the government has
required that cigarette ads and packages include a warning that
cigarette smoking is hazardous to health. However, FTC studies
have shown that these warnings have been largely ignored and
that a large percentage of the population remains unpersuaded
as to the dangers of smoking. As previously discussed, cigarette
ads have already been banned from electronic media. Yet, the
only effect this ban seems to have had is to divert the substantial
investment previously expended for electronic advertising into
other media such as magazines and billboards, where cigarettes
are advertised more than any other product. Additionally, to-
bacco companies have cleverly circumvented the broadcast ban
to some degree by arranging to have numerous billboards prom-
inentely displayed and strategically located for the television ca-
meras at their “sponsored” televised athletic events. All of this
certainly seems to constitute a far stronger showing in satisfac-
tion of Central Hudson’s fourth prong than was accepted as

21, 1986, at 32, col. 4, and Ward, “A Ban on Tobacco Advertising Would be Ineffective
and Dangerously Paternalistic,” Quill 29 December, 1986.
58. WARNER, supra note 52, at 64.
59. FTC Staff Report, May 1981, Chap. 3.
60. Id. at 2-4.
sufficient in Posadas. However, there are similarities. In Posadas, the Court reasoned that the alternative of informing Puerto Rican residents of the "evils" of casino gambling would not be as effective as shutting off advertising to them.

Given the more substantial interests involved, therefore, the current Supreme Court is likely to uphold the validity of a federal statute banning cigarette advertising. Of the five justices who joined in the majority opinion of Posadas, three, Rehnquist, White and O'Connor, remain. Chief Justice Burger has since retired and has been replaced by Justice Scalia. There is little reason to believe that Justice Scalia, a judicial conservative, would vote differently than did the former Chief Justice. More recently, Justice Powell has also retired and has been replaced by Justice Kennedy, another conservative Reagan appointee. Although predicting the behavior of Supreme Court Justices is a risky proposition at best, there would appear to be prospects for a solid five vote majority that would continue to uphold the interpretation of Central Hudson that was applied in Posadas.

Moreover, it is likely that not all of the Justices who dissented in Posadas would find a congressional ban on cigarette advertising unconstitutional. Justice Brennan specifically mentioned a ban on cigarette advertising and said that he would reserve judgment on its constitutionality. Justice Stevens seemed concerned about the arbitrary and vague aspects of the Puerto Rico statute, particularly the fact that some publications were affected by it while others were not. A total ban on cigarette advertising would not invite this objection.

Finally, it is well known that the Court gives considerable weight to the social importance of the commercial speech that the state seeks to restrict. Cigarette ads offer no useful information to the public. The tobacco companies themselves, admit that they serve no purpose other than to adjust market shares.

E. Should All Cigarette Advertising Be Banned?

Even though Congress has the power to outlaw cigarettes entirely, very few people, given the failed experiment of Prohibition, would advocate that it do so despite the fact that cigarettes are a uniquely harmful product. There is no other product

in our society that we can point to and say, "this product kills 1000 people a day."

While other products may be harmful in certain aspects, their sale and advertisement can still be justified by rationales of social utility or moderate use. For example, many people die in auto accidents, but cars are the main means of transportation in our society and, when operated correctly, are usually safe. Similarly, most people can eat moderate quantities of dairy products with very slight cholesterol risk, and those products do provide a number of nutrients. Even alcohol, which would seem to be the product that has harmful effects comparable to cigarettes, has not been shown to be harmful in moderate quantities.

Cigarette manufacturers, however, can make none of these claims. Their product serves no purpose whatsoever, except to ease the craving of an already addicted individual. Cigarettes have no nutritional value, and even small amounts of cigarette smoke have been shown to be harmful to both the smoker and those around him. They kill large numbers of people, debilitate an even greater number, and require the expenditure of billions of tax dollars taking care of those with smoking-related diseases.

No form of advertising restriction, whether it be a total ban or some lesser prohibition, will prevent tobacco companies from publicizing their views on the smoking and health issue; they have a first amendment right to do so. However, the public interest in protecting the health, safety and welfare of citizens may override their right to do so through the enticing advertisement of their product. Some proponents have suggested limiting cigarette advertising to the "tombstone" format required for securities, i.e., companies would be permitted to advertise the brand name of a cigarette, the tar and nicotine levels and the company name — nothing else — in an ad composed of text only.

While it is true that eliminating advertising will not, by itself, solve the problem, it is a step in the right direction. The welfare of thousands of people is at stake each day. As columnist Ellen Goodman recently wrote: "This is perhaps the most powerful place to interrupt the cycle. A ban on advertising is an imperfect and unstable compromise. But the alternative is grim in its consistency: the seduction of yet another generation into disease."62

II. RESPONSE: RIGHT PROBLEM, WRONG SOLUTION—PAUL J. WEBER

A. Introduction

The current discussion of a proposed ban on tobacco advertising represents a disturbing trend in first amendment advocacy. It represents a selective abandonment by liberal intellectuals of their traditionally broad defense of free speech and press. Particularly upsetting was Professor Laurence Tribe's letter of January 16, 1987, to the New York State Bar Association's Henry Miller, in which he wrote:

Even if a product or service is entirely lawful in a particular jurisdiction, and even if advertising of that product is truthful and in no sense misleading, such advertising may be prohibited outright, consistent with the First Amendment as interpreted by Central Hudson and Posadas, so long as a legislature rationally determines that consumption of the product or service by the target audience is harmful; that such consumption is positively correlated with advertising; and that a ban on advertising would more successfully dampen consumption than would a campaign of counter-advertising by the government.63

On a factual level one cannot take exception to Professor Tribe's accurate statement of the law as interpreted by the Supreme Court in Central Hudson Gas & Electric Co. v. New York Public Service Commission64 and Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico.65 What is troubling is his failure to look at the proposed advertising ban within the broader framework of first amendment speech and press issues and to raise a hue and cry about the dangers of such a ban.

No less troubling is the argument of Mr. Greg Marks, who may represent the next generation of constitutional scholars, and who, in my opinion, is not sufficiently sensitive to the fragility of the structure of first amendment rights which has been so slowly and painstakingly built over a period of several decades. The basic argument of those who would ban tobacco advertising—

64. 447 U.S. 557.
beyond the fact that Supreme Court precedents would perhaps provide a basis for a ban's constitutionality—is that tobacco is a uniquely harmful product, and that banning advertisements would lead to a decline in usage. We shall return to that argument later, but first it is important to frame the entire issue in a traditional first amendment context.

As Professor Thomas Emerson wrote a quarter of a century ago in his seminal work, *Toward a General Theory of the First Amendment*:

> The right of the individual to freedom of expression has deep roots in our history. But the concept as we know it now is essentially a product of the development of the liberal, constitutional state. It is an integral part of the great intellectual and social movement beginning with the Renaissance which transformed the Western world from a feudal and authoritarian society to one whose faith rested upon the dignity, the reason, and the freedom of the individual....

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision making, and (4) as a means of maintaining the balance between stability and change in society.

Indeed, many of the classics taught in political philosophy courses trace the development of individual autonomy in political societies. Works such as John Milton's, *Areopagitica*; John Locke's, *Two Treatises of Government, An Essay Concerning Human Understanding*, and *A Letter Concerning Toleration*; and John Stuart Mill's *On Liberty*, form the foundation of this Western, liberal tradition.

In the United States, the development of free speech can be traced in the common law development of first amendment free-

---

66. See infra notes 89-107 and accompanying text.
68. Id. at 3.
70. J. LOCKE, TWO TREATISES ON GOVERNMENT (2d ed. 1967); ESSAY CONCERNING HUMAN UNDERSTANDING (1979); LETTERS ON TOLERATION (2d ed. 1955).
71. J. S. MILL, ON LIBERTY (1975).
doms. When the first Congress passed the Bill of Rights, and used the words, "Congress shall make no law...abridging freedom of speech or of the press...," it was understood that they limited only the federal government.\textsuperscript{72} The first amendment was first applied to the states in 1925 in \textit{Gitlow v. New York}\textsuperscript{73} and has been extended case by case to cover speech and press issues in a wide variety of contexts ever since. In fact, the history of first amendment case law can be seen as a struggle to achieve as broad and unfettered a range for free speech as is compatible with domestic tranquility,\textsuperscript{74} national security,\textsuperscript{75} and the competing rights of individuals to reputation,\textsuperscript{76} privacy,\textsuperscript{77} and a fair trial.\textsuperscript{78}

Even in those instances where suppression of speech has been upheld, the Court has appropriately placed the burden of proof on those who would infringe it and has required a compelling state interest for its suppression.\textsuperscript{79} In addition, the Court has consistently applied one of the primary safeguards provided by the first amendment — the prohibition against prior restraint of speech or press.\textsuperscript{80}

My first and major objection, therefore, to the proposed ban on the advertising of tobacco products is that it is contrary to the whole thrust toward individual autonomy which is inherent in the development of first amendment freedoms. It is a retrograde step toward paternalism.

There is a second theme in first amendment development, more recent and less established, but I believe quite important,
which would also be violated by such a ban. It is the right to know, the right to receive ideas. While such a right is not yet an established constitutional doctrine, Justice Brennan, for example, has argued that the right to receive ideas "follows ineluctably from the sender's first amendment right to send them, and is therefore an inherent corollary to rights explicitly guaranteed." What an advertising ban amounts to is a "covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation of the action of smoking or chewing tobacco, but by depriving the public of the information needed to make a free choice." I object to that covert action.

B. Commercial Speech

One part of Mr. Marks' argument is that commercial speech is different from other types of expression and receives substantially less constitutional protection than do other forms of speech. To some extent this is true, but the Court has, for the most part, moved toward greater and more extensive protections for commercial speech. In the first case to explicitly extend first amendment protection to commercial speech, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Court rejected paternalism as a proper role for the government, observing that

an alternative to this highly paternalistic approach...is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them.


83. Central Hudson, 447 U.S. at 574-75.

84. 425 U.S. 748.

85. Id. at 770.
A more energetic statement of this principle, and one precisely on point, was made by Judge Wright dissenting in Capital Broadcasting Company v. Mitchell.86

The essence of Mr. Marks' legal argument is that two of the more recent commercial speech cases, Central Hudson and Posadas, provide a firm constitutional basis for upholding a ban on tobacco advertising. Mr. Marks would apparently swallow whole Charles Evans Hughes' statement that "[we] are under a Constitution, but the Constitution is what the judges say it is."87 As I have tried to argue above, the constitutional development of first amendment freedoms is part of a much larger Western cultural and legal tradition to which the judges ought to be sensitive. In general, I believe Central Hudson is an imperfect precedent—even though it struck down an advertising ban—because it did not take adequate note of fundamental first amendment values. Other commentators share this perception.88 Nevertheless, Central Hudson provides the test for determining the constitutionality of advertising bans, and we may turn directly to that.

At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, (1) it at least must concern lawful activity and not be misleading. Next we ask (2) whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.89

1. Legal and Not Misleading

No party to the tobacco products advertising ban debate denies that smoking or chewing tobacco is a legal activity, and while some have argued that advertising of tobacco products is inher-

86. 333 F. Supp. at 594 (Wright, J., dissenting) ("The only interest which might conceivably justify such a total ban [on cigarette advertising] is the state's interest in preventing people from being convinced by what they hear—the very sort of paternalistic interest which the First Amendment precludes the state from asserting.").
89. Central Hudson, 447 U.S. at 566.
ently misleading and deceptive,\textsuperscript{90} this view has never been accepted by the courts. Moreover, it uses those terms in a sense contrary to their standard meaning.\textsuperscript{91} The difficulty is that much tobacco advertising is not factual (content, price, distributor, etc.), but rather is image-building. As Mr. Joe Tye, writing for the \textit{Wall Street Journal}, states, "The imagery of ski racers, wind surfers, aerobic dancers and other athletic role models belies the reality of addiction, disease, and death."\textsuperscript{92} But that is only part of the picture.

The whole story is that image-advertising is advocacy of a point of view, an idea, namely, that smoking is part of a desirable lifestyle. The point of view expressed is not that smoking is without risks, but that the pleasure or lifestyle it represents is worth the risk! While many of us will vigorously disagree with that point of view, it is precisely the function of the first amendment to protect unpopular ideas. The author of a Columbia Law Review observes,

> that advertising may seem to be an unusual context for advocacy must not deflect attention from the fact that it is a point of view the government is attempting to suppress. The government's ban is therefore not just a threat to the individual's stock of information but also to his beliefs. The government is not only attempting to control the individual's awareness of an option he may pursue...but also to control what the individual believes about this option (i.e., that it is fun...).\textsuperscript{93}

More generally, Professor Kurland of the University of Chicago Law School has written:

> Legislation completely prohibiting truthful advertising concerning any lawful product would violate basic First Amendment values


\textsuperscript{91} In dealing with a related issue (liquor advertising), a lower court directly confronted this issue, faced with the argument that image-ads "tended to project and image of wine drinkers as successful, fun-loving people, without warning of the dangers of alcohol," the court countered with the observation that the Supreme Court's objection to misleading advertising "is directed towards ... methods which tend to encourage fraud, overreaching, or confusion" rather than the imagery "present in the advertising of almost any product from automobiles to snack foods." Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 500 n. 9 (10th Cir. 1983).

\textsuperscript{92} Tye, \textit{supra} note 90.

\textsuperscript{93} Note, \textit{supra} note 88, at 651.
and would represent a dangerous and ill-advised attempt to control thought as an alternative to controlling behavior. ... I do not believe that legislation frankly designed to promote the general welfare through thought control can ever pass muster.\(^{94}\)

### 2. A Substantial Government Interest

Few people who have read the reports of the American Medical Association and other research interests would deny that tobacco products present a substantial health risk. I do not dispute the seriousness of that risk, but I do believe two comments are relevant. First, the critical question is whether the government interest is so substantial as to justify suppression of speech when less constitutionally suspect alternatives are available.\(^ {95}\) Figures normally given are that there are 53 million smokers in the United States and 350,000 premature deaths annually due to smoking related illnesses.\(^ {96}\) This means that 6.6 out of every thousand smokers will die prematurely each year as a consequence of their habits. For many individuals these odds are worth the risk of smoking. At what point does the government’s interest in health and well-being override specific individuals’ right to engage in “certain limited forms of pleasurable self-destruction?”\(^ {97}\) At some point we need to confront the reality that most of us are not so worried about the smokers’ lives as we are about the lost production time, insurance costs, the nasty smell, dirty droppings, and marginal health irritations we personally experience. Isn’t this the true “substantial government interest?” At the very least that question merits further exploration.

Second, I fear the ban on tobacco products advertising as a precedent. Those who argue in favor of a tobacco ban have attempted to distinguish this product from all others, but it is not so easily done.\(^ {98}\) The same arguments can be made for many other products. Blasi and Monaghan have contended that “...every cigarette smoked is intrinsically harmful to health. More starkly

---

94. Statement of Philip B. Kurland, dated December 16, 1986 opposing the New York State Bar Association’s Resolution on Tobacco-Product Advertising.
95. See supra note 81.
96. Blasi and Monaghan, supra note 90, at 502-03.
98. Blasi and Monaghan, supra note 90, at 502.
It would be more accurate, however, to say that cigarettes cause grave harm to some people at some times in their lives. This more precise impact statement could of course be applied to a variety of activities other than smoking, for example the use of handguns, motorcycle riding, boxing, playing football, auto racing, or liquor consumption. Government also has a substantial interest in preventing the harm resulting from each of these activities. But would banning advertising be an appropriate means to achieve that end? I think not.

3. Regulation Must Directly Advance A Governmental Interest

The substantial harm that government wishes to avoid is not advertising in and of itself, but the smoking and chewing of tobacco products. In order to meet the third level of the Central Hudson test, therefore, it would seem that proponents of a ban on tobacco advertising would have to show beyond a reasonable doubt that the ban would result in a decline in the use of tobacco products. This would appear to be an empirically verifiable hypothesis; yet the evidence does not support that conclusion. According to Professor J. J. Boddewyn of Baruch College (CUNY),

Tobacco advertising bans in the five market economies where they exist have not been followed by a decrease in per-capita tobacco consumption. In Italy, such consumption is up by 68% after a 22 year ban; in Iceland, by 13% after 13 years; in Singapore, by 12% after 14 years; in Norway, by 6% after nine years, and in Finland, by 3% after six years.... On the other hand, cigarette sales decreased by 26% between 1974 and 1983 in the United Kingdom where there is no ban but [only] restrictions similar to those [already imposed] in the U.S. These numbers are generally based on government statistics and hard to refute.100

My research for this article has turned up no evidence that disputes these findings. If an advertising ban wouldn't work, and

99. Arguments that an ad ban could be easily limited to tobacco products are not realistic. See "Beer and Wine Industry Girds for Battle as Campaigns to Ban Ads Gathers Steam," Wall St. J., Jan. 30, 1985, at 18, col. 1.
as Professor Boddewyn indicates, appears to backfire,\textsuperscript{101} it would hardly meet the \textit{Central Hudson} test for advancing the government's interest.\textsuperscript{102}

4. \textit{No More Extensive Than Necessary To Serve The Government Interest}

Given the evidence that a ban would not directly advance the government's interest, it may seem superfluous to address the issue of extensiveness. However, a broadened discussion may provide the most persuasive argument of all against the proposed total ban on tobacco products advertising.\textsuperscript{103}

First, it is important to recognize the tremendous success the anti-tobacco crusade has had and is enjoying. Tobacco consumption has declined in the United States, public awareness of the dangers of smoking has increased dramatically and, equally important, the economic infrastructure is rapidly changing in ways that will make further reduction feasible, i.e., tobacco companies have been diversifying into non-tobacco products and, in the face of declining markets, farmers are gradually shifting to other crops. Changes in economic and cultural habits which have roots reaching back into the 17th Century cannot be effected overnight, but they are beginning to occur. Impatience cannot be an excuse for taking a shortcut across protected freedoms.

Second, there are numerous alternative means to achieve a reduction in tobacco usage, some of which are currently being

\textsuperscript{101} One reason given for this is that, without the heavy advertising expenses, tobacco companies can substantially lower retail prices.

\textsuperscript{102} Those who directly urge an advertising ban would do well to consider two troubling realities: (1) The prohibition of advertisements for cocaine and marijuana has not stopped their rapid expansion and penetration of American society, and (2) no noticeable drop in consumption followed the removal of tobacco ads from television and radio. Apparently the decision to smoke or not comes from family, culture, sibling, and peer pressures.

\textsuperscript{103} In terms of legal analysis, two theories can be followed: (1) an overbreadth doctrine, see, e.g., Dunagin v. City of Oxford, 718 F.2d 738, 751 (5th Cir. 1983); and (2) a less restrictive means analysis which focuses on less oppressive means to reach the same end, see Note, \textit{Less Drastic Means and the First Amendment}, 78 \textit{Yale L. J.} 464 (1969); Ely, \textit{Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis}, 88 \textit{Harv. L. Rev.} 1462 (1975). Miller captures the spirit of the first approach when he writes, "In triumph of tautology, the Dunigan court argued that the ban was no more extensive than necessary to reduce liquor consumption because only liquor advertisements, and not those of other products, were restricted." Note, supra note 88, at 640.
pursued and some of which are not, but all of which are more protective of first amendment values than is a ban on advertising. The following are just a few examples of alternatives.

(a) Continue counter advertising.

Contrary to the view of some commentators,104 counter-advertising has been extraordinarily successful in alerting citizens to the dangers of tobacco. Moreover, it is consistent with the values underlying the first amendment. As Justice Holmes wrote in a dissenting opinion almost seventy years ago, "... the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."105 And as Justice Brandeis added eight years later, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not forced silence."106 The challenge, therefore, is to make anti-smoking ads more convincing than pro-smoking images. Numerous successful examples abound.

(b) Remove price supports for the production of tobacco products.

It is one of the ironies of American politics that while one part of government fights for a reduction in tobacco usage, another part simultaneously subsidizes its growth.107 Our energies might be better spent in trying to halt the subsidies than in banning advertising.

(c) Increase the luxury tax on tobacco products.

Research has shown that consumption is moderately sensitive to price. Higher tax will lead to lower consumption.108

104. Blasi and Monaghan, supra note 90, at 503.
108. The average retail price of a pack of cigarettes in 1986 was $1.08, of which approximately 32 cents was excise tax. "The economic woes of 1981-82 made it evident that some smokers were price-sensitive, refuting the concept that consumers will pay almost any price to support their smoking habits." Industry Surveys, June 26, 1986, P.F.33.
(d) Continue to restrict the public places where smoking is permitted.

Such restrictions delegitimize smoking far more than would a ban on advertising.

(e) Raise the legal age for the purchase and use of tobacco products to 21.

While this would not be easily enforceable, it would help delegitimize smoking among the young and raise the level of inconvenience for purchases. The major enforcement effect would be on the merchandisers who would comply rather than face fines or loss of licenses.

(f) Restrict access via machine and grocery shelves to controlled areas where I.D.'s could be checked.

Has anyone noted how universally, almost instantaneously, available cigarettes are? Anti-smoking groups could publically campaign to persuade people to avoid shopping in stores where cigarettes are too freely available.

(g) Require insurance companies to provide positive incentives.

Insurance companies could be required to offer rate reductions for non-smokers, not only on life insurance policies but on health policies as well.

What these seven proposed alternatives show is that there are other effective means available to achieve the government's purposes which are far less intrusive upon first amendment values than a total ban on cigarette advertising.

To summarize, the heart of Mr. Marks' argument is that Central Hudson's four-pronged test provides a constitutional basis for the suppression of tobacco products advertising. I have reservations about the adequacy of that test; nevertheless, I have demonstrated that even if the test is used, the conclusion must be that there is no constitutional foundation for such a ban. We now turn to the final portion of Mr. Marks' argument, the significance of Posadas.

C. Posadas

To the extent that the Supreme Court upheld the statutes and regulations of the Commonwealth of Puerto Rico that prohibited
casino gambling advertising aimed at Puerto Rican citizens while permitting such advertisements to be aimed at tourists, Posadas could be interpreted to provide a precedent for a ban on tobacco products advertising. How strong or sound that precedent is, however, is another question. Its 5-4 majority opinion was written by Justice Rehnquist, joined by then Chief Justice Burger and Justices White, Powell and O'Connor. Two members of that majority, Justices Burger and Powell, are no longer on the Court and it is not entirely clear how Justices Scalia and Kennedy, their replacements, would vote in a future case.

While I believe Posadas was wrongly decided,109 and that Justice Rehnquist’s majority opinion is extraordinarily weak in its application of the Central Hudson test,110 it is not at all clear that Posadas is an adequate precedent even if it stands. First it was a case from Puerto Rico whose special status the court may be inclined to accommodate while limiting application in other jurisdictions. Additionally, Posadas addressed only a partial ban on advertising—that part directed at Puerto Rican residents.111 The residents were not denied access to advertisements aimed at tourists. Arguably, there is a major difference between a partial ban on advertising affecting only the residents of a special status off-shore island, and a total ban that would affect all newspapers and magazines across the United States.

D. Conclusion

Censorship is bad business, nourishes a mindset, and sets precedents for expansion into other areas. While it occasionally may be necessary, those occasions should be limited to situations where other alternatives are demonstrably not feasible. Moreover, tobacco advertising is not the problem—consumption is. Unlike other products, that are perceived to pose serious social or health hazards, products such as cocaine, heroin, and mari-
juana, neither the public nor the political branches of government consider tobacco smoking or chewing to raise problems of such magnitude as to warrant making these acts illegal. If tobacco usage were illegal (and Congress clearly has the power to make it so), outlawing advertisements would present no first amendment problems. But because tobacco usage continues in a gray area—legal but unhealthy and socially déclassé—advocates of a ban on advertising are proposing an easier route: allow the activity but suppress the speech.

I find that solution appalling. It runs counter to basic values in Western culture, values of personal freedom and autonomy, and the right to be informed. Individual citizens are entitled to make their own choices, including those which entail risks. Additionally, the solution runs counter to the traditional development of first amendment law, a development that has been toward greater protections for commercial speech. First amendment protections have been hard won and, at best, remain a frail fortress against the assaults of paternalistic and authoritarian invaders.

I have argued above that I consider the four-pronged Central Hudson test to be flawed insofar as it does not give adequate weight to first amendment values. Recognizing, however, that the test is now regarded as stating established common law principles, I have proceeded to apply it. My conclusion is that a ban on tobacco advertising would not meet its requirements. Further, I regard Posadas as a weak precedent, certainly not controlling. If it is not overruled, it is certainly to be distinguished.

Although quaint in its language, a thought from John Stuart Mill would seem an appropriate conclusion:

The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.112

III. REBUTTAL—GREG MARKS

I share Dr. Weber's respect for the first amendment in general, and freedom of speech in particular. Indeed, freedom of speech

112. Mill, supra note 71, at. 15.
is what allows me to make my argument for a total ban on cigarette advertising, while living in the state which is home to such large tobacco concerns as Brown & Williamson and Phillip Morris, and where many small farmers make a living raising burley tobacco. The point, however, is not that freedom of speech is important; the point is that some forms of speech are not as important as others and other forms are not important at all. It is uncontested, for example, that one has no right to yell “fire” in a crowded movie theatre.

Commercial speech fits in the second category. It has been and will continue to be treated as less important than other forms of speech. As the United States Supreme Court puts it, its treatment is “commensurate with its subordinate position in the scale of First Amendment values.” To appreciate this, it may be helpful to examine another kind of commercial speech — securities offerings. The courts have not been hesitant to place restrictions upon the manner in which securities and new issues of stock can be offered for sale. A seller is not free to advertise a new issue of stock as the “best thing since sliced bread.” A claim cannot be made that the stock will soon double or triple its value in a short time, even if one believes this to be true, and it is, in fact, true. Regulations promulgated by the SEC restrict advertisement for new offerings not in excess of $100,000 to the following five pieces of information: (1) the name of the issuer of the security; (2) the title of the security, amount offered, and the per-unit offering price to the public; (3) the identity of the general type of business of the issuer; (4) a brief statement as to the general character and location of its property; and (5) by whom orders will be filled or from whom further information can be obtained. This is the so-called “tombstone” ad format. No illustrations, pictures or embellishments are allowed.

Is this a restriction of speech? It most certainly is; its purpose, however, seems quite clear. Unscrupulous speculators should not be allowed to make unsubstantiated claims about a security they are attempting to peddle lest some naive widow (or widower) invests her life savings in a stock which may later turn out to be worthless. Even though only a small percentage of speculators

114. 17 CFR § 230.257 (b)(1-5).
are unscrupulous, and only a small number of investors are naive, the danger is recognized to be sufficient to justify the restrictions upon the otherwise free speech of the seller. Yet here the danger justifying the restriction is only financial loss. If the danger of financial loss justifies restrictions upon the right of a securities seller to "advertise" his products, why the sensitivity to the "rights" of cigarette advertisers to promote a product that kills? In this case we are not talking about a widow's loss of her life's savings, we are talking about a product that may have made her a widow in the first place.

Dr. Weber refers to the "right to receive ideas." To this I would respond, "what ideas?" Is the "idea" of a cowboy lighting up a Marlboro one whose information a value must be protected? I would agree instead with those who have contended that cigarette advertising restricts the spread of ideas, at least accurate ones in regards to the smoking and health issue. For example, there appears to be a substantial correlation between the presence of cigarette advertising in a publication and the number of articles it permits to be printed about the dangers of cigarette smoking, or strategies for quitting. Accordingly, the cigarette advertising in this circumstance inhibits the free flow of information by exerting financial pressure against opposing views. The magazines are hesitant to bite the hand that feeds them.

Dr. Weber argues that cigarette advertising is image advertising, advocating the point of view that smoking is part of a desirable lifestyle. The protection of unpopular points of view, he urges, is precisely the function of the first amendment. But there is a distinction between "unpopular" and dangerous. We may have to tolerate the "point of view" of the Ku Klux Klan no matter how we may deplore it. But must we tolerate the dissemination of a "point of view" advising children or the educated that a teaspoon of arsenic before bedtime would help them sleep? How about the "point of view" implying, but not expressly stating, that cigarette smoking won't hurt you, or that it's part of a healthy, even athletic life-style?

Dr. Weber describes a number of activities which are permitted to be promoted but which also pose health risks. The list includes motorcycle riding, boxing, football, and auto racing. However, these are activities, not products. A football itself, for example, is not a dangerous product. Automobiles and motorcycles can be driven safely—and there are enforcement laws to see that they are. Even boxing has rules to protect the participants from injury. Auto racers are highly trained and racing is controlled. Racing on a public highway is illegal. But cigarettes are addictive. There is no referee to make sure you don't smoke too much. As I said earlier, they are dangerous when used as intended.

Dr. Weber also mentions two advertised products which can cause injury to consumers and others—handguns and alcohol. Guns are, of course, protected by the second amendment and are minimally advertised. Alcohol is probably the only legal product which is even remotely as dangerous as smoking. But it has not been shown that drinking alcohol in moderation is harmful. With the exception of alcohol, there are no other products that even remotely have the same impact on society as cigarettes. To contend that eggs or sugar-sweetened cereals might be the next target is ludicrous. This is a tobacco industry smoke screen—the much-maligned "domino theory" in another guise. On the other hand, the Food and Drug Administration did not hesitate to ban artificial sweeteners from the market when they were discovered to be carcinogens, and there is already a broadcast ban on liquor advertising.

Finally, Dr. Weber suggests less intrusive alternatives that might be employed to discourage smoking. All of these make sense and should be implemented. None of them, however, is strictly speaking an alternative to a ban on advertising. Rather, they are measures which should be taken as well. All of them would be inconsistent with a continuation of cigarette advertising. Additionally, some have limitations. Consider, for example, the limitations on using counter-speech to contradict the message of cigarette advertising. Public service organizations, such as Action on Smoking and Health, and others, operate on very limited budgets. In contrast, the annual advertising budget of the major tobacco companies is about two billion dollars. It is unlikely that all of the public service groups combined could manage to spend even a million dollars a year on anti-smoking ads. This would

not begin to suffice to counteract the impact of cigarette advertising.

It is difficult to state categorically that banning cigarette advertising will cause a decline in smoking. Dr. Weber cites evidence from Professor Boddewyn’s research that it would not.\(^\text{117}\) He also states that tobacco consumption in the United States has declined without the imposed advertising ban. However, in a footnote he writes that “no noticeable drop [in tobacco consumption] followed the removal of tobacco ads from television and radio.” This is obviously a contradiction. While indeed there may have been other factors which caused, or helped to cause, the decline in tobacco usage, Dr. Weber does not reveal them.

Those who oppose a ban on cigarette advertising often cite studies which purport to show that an insignificant percentage of people started smoking because of advertising.\(^\text{118}\) These are typical survey type studies which ask a smoker, “why did you start smoking?” Not surprisingly, very few of those surveyed respond that they started because of a cigarette ad. By its very nature, advertising influences decisionmaking without one’s being aware of it. Accordingly, if this same kind of “survey” were to inquire about consumers’ use of other products, it is likely that they would not admit (or know) that they had been swayed by advertising. They would probably give another reason instead. The man who purchased a sports car would not say that he bought it because an ad he saw convinced him that the car would make him more attractive to women; instead, he would talk about its “performance.” Similarly, the man who smokes a particular brand of cigarette will not admit that he chose it because of an ad which suggested that smokers of that brand were “macho.” Rather, he would assert that he smoked it for its “taste.” This response pattern is well-known to Madison Avenue. However, it seems strange that with no other product is the effect of advertising on consumption so arbitrarily analyzed.

Even if a total ban on tobacco advertising did not reduce consumption, it would be important symbolically. Nicotine is a dangerous, addictive drug. The nation’s children must be informed that even though we allow cigarette manufacture for the

\(^{117}\) BODDEWYN, supra note 55.

\(^{118}\) See, e.g., Ward, supra note 57, at 31.
use of those who are already hooked, we will take every other step possible to reduce the number of new victims. It is an important message whose time has come.
Defamation in the Work Place: "The New Workhorse in Termination Litigation"

John Jay Fossett*

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls;
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.

Shakespeare, Othello, act 3, scene 3.

I. INTRODUCTION

Defamation is an area of law that is well entrenched in our legal system. Its principles were applied by English courts long before Shakespeare put quill to parchment. The primary, if not the sole, purpose of an action for defamation is vindication of the plaintiff's good name.1 Good reputation "is probably the dearest possession that a man has, and once lost is almost impossible to regain."2

While defamation may take a variety of forms, the American public, for the most part, is familiar with only one recurring scenario: multimillion dollar lawsuits by public officials and public figures against large media defendants. Lawsuits such as Sharon v. Time, Inc.,3 Westmoreland v. CBS,4 and Burnett v. National Enquirer, Inc.5 were highly visible legal proceedings brought

* Law Clerk to Justice Craig Wright, Supreme Court of Ohio; B.A., University of Kentucky, 1981; J.D., Salmon P. Chase College of Law, Northern Kentucky University, 1987.

directly to our nation's homes via the evening news, cable television, and other media outlets.

Although such media litigation continues to capture the interest of the public, a more pervasive, albeit less visible, area of defamation law is hitting even closer to home—in the workplace. Employers are finding that defamation is becoming an "occupational hazard," especially among discharged employees who claim that any report to others about their work performance—whether to prospective employers or fellow employees—constitutes actionable defamation. At the same time, an erosion of constitutional protections for defendants in private defamation actions has generated more activity in this area.

Termed the "new workhorse in termination litigation," it has been estimated that defamation suits filed by fired employees against their former employers now account for about one-third of all defamation suits today. The explosion of lawsuits in this area in recent years "has fostered new sensitivity and focused new attention on such traditional torts as defamation for remediating work place complaints."

II. DEFAMATION PRINCIPLES

A. Common Law Defamation

"Defamation is ... that which tends to injure reputation in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." The Restatement (Second) of Torts states that "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." The Restatement (Second) of Torts states that "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

Two types of defamation existed at common law: libel and slander. These two forms distinguish the means by which defam-

7. Id. (quoting statistics supplied by Jury Verdict Research Inc. in Solon, Ohio).
atory matter is "published" to third persons. Generally, libel refers to written or printed words but has been extended to include any publication embodied in a relatively permanent, physical form, while slander generally refers to oral communications.  

1. Slander

Slander can be divided into two categories: slander per se and slander per quod. In slander per se, the slanderous words are considered defamatory on their face and the plaintiff may recover without pleading or proving that he has suffered any "special damage." "Special damage is some 'actual temporal loss'—the loss of some 'material' or 'temporal advantage' which is 'pecuniary' or 'capable of being estimated in money.'" All other slander is slander per quod, which is not defamatory on its face and requires the plaintiff to prove that the publication of the slander was the legal cause of the special damage.

Commonly recognized forms of slander per se are "the imputation of crime, of a loathsome disease, and those [defamatory words] affecting the plaintiff in his business, trade, profession, office or calling[.]" The last of these three categories is of particular interest here.

Under the English common law, it was necessary for a plaintiff alleging slander to his professional reputation to prove two elements. First, he had to prove that the slander was imputed to him in his calling or profession. Secondly, he was required to prove the manner in which the defendant connected the conduct with his calling or profession. An exception to this rule was where the imputation concerned a trader. "The law has always been very tender to the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person."

---

11. The term "published" is a word of art that means communicated to a third party by means of written or spoken words, pictures, symbols, or drawings. BLACK'S LAW DICTIONARY 1105 (5th ed. 1979)

12. PROSSER, supra note 9, at § 112. As Prosser points out, the distinction between libel and slander "is not free from difficulty and uncertainty," especially in light of the advent of mass media and new methods of communication.


14. PROSSER, supra note 9, at § 112.

15. ELDREDGE, supra note 1, at § 22.

While American courts have followed the English rule that words must touch the plaintiff in his office, profession, or calling, they have not been as strict as English judges in requiring that words about one other than a trader refer to the calling or profession. 17 "It is not necessary that the defamer refer to the other as engaged in the particular profession or calling in question. It is enough if the statement is of a character to be particularly disparaging of one engaged in such an occupation." 18

In addition, the rule applies to any lawful profession or trade, "be it ever so base." 19 The rule "is equally applicable to artisans, mechanics and workmen generally, whether skilled or unskilled." 20

2. Libel

A libel action was similar at common law to an action for slander per se. That is, if the words were defamatory and published in the form of libel, the plaintiff could recover without pleading or proving that he suffered special damage. 21 But some American courts, "in opinions which reflect ignorance of the history of the development of the law of defamation in the common law of England, and little understanding of certain terms of art in this field of law, have created the spurious rule of libel per quod." 22

In many states that have adopted this "spurious rule," libel is treated essentially the same as common law slander. Libel actionable per se is defamatory on its face while "libel per quod" is found when the publication, innocent on its face, is defamatory to those aware of defamatory facts that are "extrinsic" to the matter published. 23

3. Damages

The damages available in an action for defamation are (1) nominal damages, 24 (2) general damages for harm to reputation, 25

17. ELDREDGE, supra note 1, at § 22.
18. RESTATEMENT (SECOND) OF TORTS § 573, comment e.
19. ELDREDGE, supra note 1, at § 22.
20. RESTATEMENT (SECOND) OF TORTS § 573, comment b.
21. ELDREDGE, supra note 1, at § 23.
22. Id. at § 17.
23. PROSSER, supra note 9, at § 112.
24. Nominal damages are usually awarded to the victim of a false, defamatory statement who is unable to identify any actual loss.
25. General damages redress the usual reputational harm one expects a false defamatory
(3) damages for proved special harm caused by harm to reputation, and (4) punitive damages when the requirements of such damages appear in the record.

Under the common law principles previously mentioned, in cases of libel and slander per se, harm to reputation was presumed from the publication of the defamatory communication and damages could be awarded without any proof of actual harm to reputation. But in the 1974 case of Gertz v. Robert Welch, Inc., the United States Supreme Court held that the first amendment prohibited states from permitting recovery for presumed and punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

The Gertz Court balanced the constitutionally guaranteed freedoms of speech and press with "the individual's right to the protection of his good name." The Court found that the state's interest in providing remedies for harm to a private individual's reputation was "strong and legitimate," because private individuals are not only more vulnerable to injury than public officials and public figures, but they are also more deserving of recovery.

However, the Court viewed this strong and legitimate state interest as justifying no more than compensation for actual injury. Accordingly, it held that private individuals could recover only actual damages under a state standard less demanding than

statement to cause, giving rise to a presumption of such damages at common law. These damages may include a sum for mental distress and loss of friends and associates as well as loss of employment and business profits.

Special damages are those not readily foreseeable from an injury to reputation and therefore the plaintiff must prove that the defamatory publication proximately caused the special damage.

If the defamatory speech does not involve matters of public concern, punitive damages may be recovered by the plaintiff if he can show that the defendant published the falsehood with "malice." Some jurisdictions require a showing of common law malice—that is, careless indifference to the plaintiff's rights and feelings, or bad faith, ill will, spite, or bad motives. Other jurisdictions require a showing of "actual malice," the standard set forth in New York Times v. Sullivan, 376 U.S. 254 (1964); see infra notes 41-51 and accompanying text.

26. Eldredge, supra note 1, at § 95.
32. Id. at 348-49.
33. Id. at 350.
“actual malice.” Insofar as punitive damages are not compensation for actual injury to reputation, the Court held that to allow jury discretion in awarding such damages in unpredictable amounts would “unnecessarily ... exacerbate the danger ... of self-censorship.”

In 1985, however, the Supreme Court, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., severely limited the Gertz holding with respect to the availability of presumed and punitive damages. The Court, in a plurality opinion, held that constitutional limitations on presumed and punitive damages set forth in Gertz did not apply to “to speech on matters of purely private concern.”

“In light of the reduced constitutional value of speech involving no matters of public concern,” Justice Powell wrote, “we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”

Dun & Bradstreet involved a defamatory credit report, which the Court found—by looking at its content, form, and context—did not involve a matter of public concern. “It was speech solely in the interest of the speaker and its specific business audience.... This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim’s business reputation.”

For employers who defame current or former employees through references or other communication, this language should serve as a portent of things to come. Indeed, most work place communication involves private individuals and matters of purely private concern. In addition, defaming an employee in his professional capacity may lead to presumed damages under the common law principles of slander per se and libel (or libel actionable per se in those jurisdictions that recognize such a cause of action). Therefore, employers may again be subject to common law liability for

34. Id.
35. Id. at 346-47. The Court also rejected the Rosenbloom distinction between matters of public and private concern because it presented the “additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not[.]” Id. at 346.
37. Id. at 759.
38. Id. at 761
39. Id. at 762.
40. Id.
presumed and punitive damages if circumstances so warrant.

B. Constitutional Privilege in Defamation Cases

For those employees whose jobs are by their nature more public than private, a more demanding defamation standard may be imposed. Such employees—if they can be classified as “public officials” or “public figures”—must prove defamation in accordance with guidelines set forth by the Supreme Court in *New York Times v. Sullivan*41 and its progeny.

At one time, state defamation law was considered to be wholly outside the scope of the first amendment. The first amendment freedoms of speech and press were not considered absolute rights, but rather were conditional rights under common law defamation principles.42 In one decade, however, from 1964 to 1974, the Supreme Court discarded its previous view that defamation was not “within the area of constitutionally protected speech,”43 and extended first amendment protection to various types of defamation.

In 1964, the Supreme Court’s decision in *New York Times* changed the course of defamation law in the United States. In that case, an Alabama police commissioner sued the *New York Times*, claiming that an advertisement that had run in the newspaper alleging civil rights violations by his department was defamatory. After rejecting the newspaper’s contention that the advertisement was protected under Alabama’s “fair comment” privilege,44 the jury found liability solely on the basis of some relatively minor inaccuracies in the ad45 and awarded the commissioner $50,000 in damages. The Alabama Supreme Court affirmed.46

The Supreme Court of the United States reversed the state supreme court, holding that the first amendment limited the

42. “[T]he freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation.” Robertson v. Baldwin, 165 U.S. 275, 281 (1897).
44. At common law, the qualified privilege of “fair comment” protected criticism or expressions of opinion on matters of public concern. See *Restatement (Second) of Torts* § 566 comment a.
45. The *New York Times* opinion noted that Sullivan’s own proof tended to show that the advertisement was “substantially correct.” *New York Times*, 376 U.S. at 286.
states’ power to award damages in defamation actions brought by public officials.\textsuperscript{47} The Court reasoned that the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”\textsuperscript{48} required that erroneous statements of fact be protected to give freedom of expression the “breathing space” it needed to survive.\textsuperscript{49} Requiring critics of a public official to prove the truth of their assertions, the Court added, would result in self-censorship incompatible with the first amendment.\textsuperscript{50} The Court held that a public official could not recover any damages for a defamatory falsehood “unless he prove[d] that the statement was made with ‘actual malice’ ... with knowledge that it was false or with reckless disregard of whether it was false or not.”\textsuperscript{51}

The \textit{New York Times} “actual malice” requirement was extended in \textit{Rosenblatt v. Baer}\textsuperscript{52} to include a former supervisor of a county-owned ski area within the designation of “public official.” The Court ruled that the designation applied to government employees (and former employees) who “have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”\textsuperscript{53}

The “actual malice” standard was further extended to public figures in the companion cases of \textit{Curtis Publishing Co. v. Butts}\textsuperscript{54} and \textit{Associated Press v. Walker.}\textsuperscript{55} Chief Justice Warren, concurring in the majority opinion, observed that “‘public figures,’ like ‘public officials,’ often play an influential role in ordering society,” and that “many who do not hold public office ... are nevertheless intimately involved in the resolution of important public questions.”\textsuperscript{56}

Six years after deciding \textit{New York Times}, the Supreme Court addressed for the first time whether the “actual malice” standard extended to defamation actions brought by private individuals

\textsuperscript{47} \textit{New York Times}, 376 U.S. at 283.
\textsuperscript{48} Id. at 270.
\textsuperscript{49} Id. at 271-72.
\textsuperscript{50} Id. at 278-79.
\textsuperscript{51} Id. at 279-80.
\textsuperscript{52} 383 U.S. 75 (1966).
\textsuperscript{53} Id. at 85.
\textsuperscript{54} 388 U.S. 130 (1967).
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 164.
against either media or nonmedia defendants. In *Rosenbloom v, Metromedia, Inc.*, 57 Rosenbloom, a distributor of "nudist" magazines who had been charged and later acquitted of obscenity charges, sued a radio station that characterized him as a "girlie-book peddler" and a "smut distributor." 58 In a plurality opinion, the Court held that the "actual malice" standard applied to defamation actions whenever the allegedly defamatory words concerned a matter of public or general interest. 59 Thus, the *Rosenbloom* Court rejected any distinction between public and private figures 60 and shifted the basis of the "actual malice" requirement from the status of the plaintiff to the subject matter of the defamatory falsehood. 61

Three years later, however, the Court repudiated this wide reaching rationale in *Gertz v. Robert Welch, Inc.* 62 Gertz, a Chicago attorney, brought a defamation action against the publisher of a John Birch Society magazine, *The American Opinion*, because the magazine had falsely accused Gertz of being the architect of a Communist campaign to discredit the Chicago Police Department. 63 The jury, after finding that Gertz did not qualify as a public figure, awarded him $50,000. The federal district court ordered a judgment notwithstanding the verdict, holding that the *New York Times* standard should apply to expressions on any public issue and that the defamatory statements about Gertz involved such an issue. 64 Gertz was unable to meet the "actual malice" standard. While Gertz's appeal was pending before the Seventh Circuit, the Supreme Court decided *Rosenbloom* and the Seventh Circuit used the rationale of that case to uphold the lower court decision. 65 The Supreme Court, however, apparently deciding to reconsider its *Rosenbloom* holdings, granted certiorari. 66

57. 403 U.S. 29 (1971).
58. Id. at 32-36.
59. Id. at 44-45.
60. Id. at 45-46.
61. Id. at 44.
62. 418 U.S. 323.
63. Id. at 325-26.
66. "We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen." *Gertz*, 418 U.S. at 325.
In Gertz, the Supreme Court held that states could define their own standard of liability for defamation of private individuals "so long as they do not impose liability without fault." As previously mentioned, the Court also addressed the issue of the availability of presumed and punitive damages in such cases, which has since been limited by Dun & Bradstreet.

Nevertheless, the "actual malice" requirement will still apply if the plaintiff/employee is a public official or public figure. But, by far, the vast majority of defamation cases that arise in the workplace involve employees who are neither public officials nor public figures. Accordingly, common law defamation principles still apply in the majority of these cases. Therefore, three common law defenses may be available to an employer who publishes an allegedly defamatory statement concerning one of his employees: truth, opinion, and privilege.

C. Employer Defamation Defenses

1. Truth

"One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." It is a well-settled common law rule that truth is an affirmative defense that the defendant must plead and prove. The defendant need not prove "the literal truth of the accusation in every detail;" he must only prove that the alleged defamation was substantially true or true in its essential parts.

Where truth has been asserted as a defense in cases involving employers and employees, the results have been mixed. Some appellate courts have upheld lower court rulings that defamatory statements by employers are indeed untruthful and therefore not protected. Other courts have found truth to be an absolute defense to an employee's defamation claim.

In Burdette v. FMC Corp., the plaintiff, following her termination, filed both a Title VII claim for sex discrimination and a

67. Id. at 347-349.
68. See infra notes 29-40 and accompanying text.
70. PROSSER, supra note 9, § 116.
71. Id.
defamation claim alleging that the defendant corporation had recklessly published rumors concerning her private life, specifically that she had been having an affair with a co-worker. The plaintiff later conceded in a deposition that it was true that she had been having such an affair at the time. The court found that her admission constituted an absolute defense for the defendant.

Of course, while truth is a complete defense against a claim of defamation, it is not a complete defense in a right-to-privacy action. Consequently, the plaintiff in Burdette might have been better advised to have alleged an invasion of her privacy rather than a defamation of her character.

2. Opinion

Restatement (Second) of Torts states that "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." 74

In this regard, the Restatement distinguishes between "pure" opinion, which is absolutely immune from liability, and "mixed" opinion, which will incur liability only if the requisite quantum of fault is met. 75

In the "pure" variety the comment-maker explicitly states the factors upon which the opinion is based or such facts are assumed or known by the parties to the communicated opinion—"as a result of their notoriety or otherwise." The second and nonabsolutely privileged category of "mixed opinion" includes statements which are "apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication ... the expression of the opinion gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant." 76

3. Privilege

The most common defense raised by employers in defamation actions instituted by terminated employees is privilege. Common

75. Id. at comment b.
law privileges are of two types: absolute or qualified. Both are predicated upon the same idea, that "conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." 77

a. Absolute privilege

Absolute privilege protects the speaker notwithstanding his purpose and motive. It is limited to those situations where social policy favors complete and uninhibited freedom of expression. 78 Absolute privilege has been extended only to defamatory statements made: (1) during judicial proceedings; (2) during legislative proceedings; (3) by executive officers of government in the discharge of their governmental duties; (4) with the consent of the plaintiff; (5) between husband and wife; or (6) when required by law. 79 Absolute privilege may be asserted with respect to statements made during judicial and administrative proceedings that deal with employer-employee relations or disputes. For example, defamatory statements made in hearings before or investigations by governmental agencies, such as the National Labor Relations Board, the Equal Employment Opportunity Commission, and other regulatory agencies, are absolutely privileged. 80

Another form of absolute privilege commonly invoked, especially in the employee termination/defamation scenario, is "consent." "One who has himself invited or instigated the publication of defamatory words cannot be heard to complain of the resulting damage to his reputation[.]." 81 As with other forms of consent, the privilege is limited by the scope of the assent given. Consent to one kind of publication does not confer a license to publish to

77. Prosser, supra note 9, § 114.
78. Id.
79. Id.
80. "[T]here is some question regarding the degree to which absolute privilege applies to lower-level government officials disseminating information regarding discharged employees. As a result, it may be prudent for government officials, especially those at lower levels, to operate under the assumption that they are covered by qualified, rather than absolute, privilege when they are dealing with information related to former employees." Martin & Bartol, Potential Libel and Slander Issues Involving Discharged Employees, 13 Employee Rel. L.J. 43, 48 (1987).
81. Prosser, supra note 9, at § 114.
other persons, or in a different manner. Typical situations in which the consent issue may arise are when a former employee requests—and receives from his employer—an explanation for his termination, or when he authorizes a prospective employer to question the former employer about his termination.

b. Qualified privilege

By far, the most common defense asserted by employers in employment defamation cases is qualified privilege. This privilege arises from society's interest in encouraging the free flow of information under certain circumstances. Qualified privilege, however, does not afford a defense to one who defames maliciously or for any other inappropriate reason. Unlike absolute privilege, qualified privilege may be lost if abused.

Employers were first granted qualified privilege in the 1700s, before the growth of large-scale industrial enterprises. The early cases involved defamation suits by household servants against their former masters. Today, the qualified privilege to defame has been extended to cover five main situations: (1) where the employer publishes defamatory matter for the protection or advancement of his own lawful interests; (2) where he publishes defamatory matter for the protection or advancement of a lawful interest of another; (3) where he and the recipient of the defamatory communication have a common interest in the communication and the communication is reasonably calculated to protect or further that interest; (4) where the communication is made to someone who may reasonably be expected to take official action to protect a public interest, or where an employer publishes the defamatory matter while engaged in public discussion on a subject of legitimate public interest; and (5) where reports of judicial,
legislative, executive, or administrative proceedings are not afforded an absolute privilege. While all five forms of qualified privilege have been raised in cases involving former and current employees claiming defamation, the first three are the most common.

i. Interest of the employer

An occasion makes a publication conditionally privileged if the circumstances [surrounding it] induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher [employer], and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest. Comment f to Section 594 of the Restatement (Second) of Torts states that the interests that may be protected under Clause (a) include "any lawful pecuniary interest of the publisher [employer], other than his interest in competition for prospective pecuniary benefits[]." Thus, a businessman may communicate defamatory material to protect nearly all of his legitimate business interests, except his interest in competing for new business. Numerous cases reveal the broad scope of this privilege, holding that the employer is protected when he makes accusations of theft, communicates to a polygraph operator, communicates through internal reports, or places material in confidential files.

Of course, competition for prospective business is not a protected interest.

One businessman who, in order to acquire customers for himself, personally defames another, is not [protected by] Clause (a). The interest is not one that is entitled to this type of protection, and whatever importance and value it may have from a social point of view, the recognized necessity of keeping competitive methods within "fair" and reasonable bounds excludes personal defamation as a legitimate means of depriving a rival of potential benefits.

91. Id.
97. Restatement (Second) of Torts § 594 comment f (1977).
Comment i, which explains Clause (b), states that "it is not only necessary that the publisher [employer] have a sufficiently important interest that appears to be in peril, but it is further necessary that the publication be made to a person, who, if the defamatory matter is true, may reasonably be expected to be of service in the protection of the interest."\(^{98}\) In other words, most internal business-related communications, such as discussions between supervisors relating to an employee's performance or trustworthiness, are protected by the privilege.

\(\textit{ii. Interest of others}\)

\((1)\) An occasion makes a publication conditionally privileged if the circumstances [surrounding it] induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the recipient or third person, and (b) the recipient is one to whom the publisher [employer] is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.

\((2)\) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that (a) the publication is made in response to a request rather than volunteered by the publisher or (b) a family or other relationship exists between the parties.\(^{99}\)

Comment d Section 595 explains that the protection afforded is similar to that under Section 594. "[A] statement made for the protection of a lawful business, professional[,] property or other pecuniary interest ... comes within the rule[.]"\(^{100}\) Therefore, it is permissible for one asked to provide an employment reference to warn a present or prospective employer of the misconduct or bad character of an employee. Most employment references not only affect a sufficiently important interest of the recipient, but also fall within generally accepted standards of decent conduct. Comment i specifically addresses this issue:

Under many circumstances, a former employer of a servant is conditionally privileged to make a defamatory communication about

---

\(^{98}\) Id. at comment i.

\(^{99}\) \textsc{Restatement (Second) of Torts} § 595 (1977).

\(^{100}\) Id. at comment d.
the character or conduct of the servant to a present or prospective employer. The defamatory imputations, however, must be made for the purpose of enabling that person to protect his own interests, and they must be reasonably calculated to do so. Accordingly, only information that is likely to affect the honesty and efficiency of the servant's work comes within the privilege. 101

101. Id. at comment i.

iii. Common interest

An occasion makes a publication conditionally privileged if the circumstances [surrounding it] lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know. 102

This rule is based on "the fact that one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them." 103 Comment c of Section 596 of the Restatement (Second) of Torts addresses this privilege in the terminated employee setting:

[A] partner is entitled to be told not only of the discharge of an employee by his fellow partner but also of the reasons for [the] discharge, and the fellow partner is conditionally privileged to state the reason even though it reflects upon the conduct or character of the employee in question. 104

Some courts apply this privilege not only to partners or those with executive or supervisory positions in the business, but also to all employees who are informed as to the reason for another employee's termination. 105 Other courts have denied any privilege to communicate such information to nonsupervisory employees. 106

102. Id. at comment c.

103. Id.

104. Id.

105. See infra notes 134-38 and accompanying text.

106. See infra notes 139-50 and accompanying text.

107. Comment, supra note 86, at 144.
A number of factors—including a recognition that the privilege protects business from the effects of unsound practices, changes in social conditions and economic understanding since the privilege was created, a flourishing of the free flow of information even without such a privilege, and the changes in judicial evaluation of relative interests—suggest that qualified privilege will be further weakened or abolished in the future.\(^{108}\)

When qualified privilege was first created in England to protect masters who wrote references for their former servants, a plaintiff could overcome the privilege only by showing that the defamer had been motivated by malice in writing the recommendation.\(^{109}\) American courts, however, developed an objective standard by which to judge whether the qualified privilege had been abused. In *White v. Nicholls*,\(^{110}\) the Supreme Court held that, whatever a defamer's state of mind, proof that his defamatory utterances were false and had been uttered without probable cause would "amount to" proof of malice sufficient to overcome privilege.\(^{111}\)

*White v. Nicholls* and corresponding state cases laid the groundwork for the modern reasonableness standard in abuse of privilege, for although they came before the spread of the "reasonable man" concept in negligence law, the standard of probable cause they adopted "resembles very closely the reasonable conduct under the circumstances which is the fundamental issue in negligence cases."\(^{112}\)

Under this reasonableness standard, three specific types of objective criteria may be used to determine whether or not defamatory communication falls outside qualified privilege: excessive publication, excessive language, and adequacy and basis for the defamatory statement.\(^{113}\) In addition, some courts today continue to allow a showing of common law malice or actual malice as a means of defeating a qualified privilege.

Excessive publication can occur in one of two ways, either by using an excessive *means*, such as a broadcast on radio or television; or by publishing to an excessively large *number* of persons, that is, to persons who have no need to know the information.

\(^{108}\) *Id.* at 144-45.

\(^{109}\) *Id.* at 157.

\(^{110}\) 44 U.S. (3 How.) 439 (1845).

\(^{111}\) *Id.* at 450.

\(^{112}\) Comment, supra note 86, at 159.

\(^{113}\) *Id.* at 161.
For an employer to post an employee's discharge notice on the employee's locker instead of giving it to him privately would be excessive publication in the former sense; to make statements concerning an employee's misconduct to persons who had no connection with the business would be excessive publication in the latter sense. To publish the reason for an employee's termination in a company newspaper likely would be excessive publication in either sense. 114

The use of excessive language, also known as the doctrine of "consent limitation," entails communicating too much or using vituperative language. "To include nonwork-related information or racial or ethnic epithets in referenced information otherwise privileged ... would be to lose the privilege under traditional law." 115

Common law malice refers to communication made with spite, ill will, or hostility. An employer who dislikes an employee or has had an argument with him, and who subsequently gives false, injurious reference information to prevent the employee from getting a new job, acts with common law malice. 116

Some courts, as well as the Restatement (Second) of Torts, have adopted the principle of "actual malice" as the standard by which abuse should be judged. Developed in the landmark case of New York Times, 117 actual malice applies only in situations where the person communicating knew that the communication was false or acted in reckless disregard as to its truth or falsity.

In short, before bringing or defending a state defamation action, one must first determine what standard or standards will be applied in the relevant jurisdiction concerning abuse of privilege and then determine what particular circumstances have been held to constitute sufficient evidence on the issue. 118

III. EMPLOYER-EMPLOYEE DEFAMATION CASES

Courts have long held that an employee can be held accountable for his own torts. In addition, an employer, as a separate legal entity, may also be liable for the tortious conduct of its employees

114. Duffy, supra note 8, at 448.
115. Id.
116. Id. at 447.
under the doctrine of *respondeat superior*. This agency doctrine imposes liability on the employer in four defamation-related situations: (1) where the employee, in making a defamatory statement, was carrying out the express orders or acting pursuant to express authority of the employer; (2) where the employee, in making a defamatory statement, was acting pursuant to the implied authority of the employer; (3) where the defamatory statement was subsequently ratified by the employer; or (4) where the employee, in making a defamatory statement, was acting within the scope of his employment. Respondeat superior has been applied uniformly to defamation actions in these situations, even where the employee communicated with malice.

Defamatory communication by an employer or his agent that may result in a defamation action by an employee generally takes one of three forms: intracorporate communication; extracorporate communication; or a hybrid of the two. For simplicity's sake, the use of the word “corporate” here includes all types of employers, whether incorporated or not.

A. Intracorporate communication

Before examining defamation that occurs inside a corporation, it must first be determined whether communication by one employee to another within the same corporation is a “publication” to a third person. As previously mentioned, publication is an essential requirement for defamation. There is a division of authority on the issue of whether communication among agents of the same principal meets the publication requirement.

1. Meeting the publication requirement

   a. No-publication rule

Initially developed in the late nineteenth and early twentieth centuries, the no-publication rule states that defamatory communications between a corporation's employees is not a publication supporting an action for defamation.

---

120. *Id.* at 653.
This concept was first advanced in Owen v. Ogilvie Publishing Co.,\textsuperscript{121} where a corporation was sued after its general manager, acting within the scope of his employment, dictated a letter to one of the corporation's stenographers expressing a suspicion that the plaintiff had taken money from a cashdrawer. Using what would later become known as "the single corporate entity theory,"\textsuperscript{122} the court held that since the communication was between employees of the same corporation engaged in the performance of a single corporate act, there was no third person to whom the defamatory communication had been published. In effect, the corporation was viewed by the court as "speaking to itself," and consequently, the publication requirement had not been met.

Prins v. Holland-North America Mortgage Co.\textsuperscript{123} extended the no-publication rule from a dictation-to-stenographer situation to all intracorporate communications. In Prins, an employee sued his corporate employer when an allegedly libelous letter was sent from corporate headquarters to a subordinate corporate office, where it was read by two fellow employees. The court held:

Agents and employees of this character are not third persons in their relations to the corporation ... [but] are a part and parcel of the corporation itself, so much so, indeed, that their acts within the limits of their employment are the acts of the corporation....[A] corporation, although it can act only through officers and agents, is not guilty of publishing a libel, when it writes a libelous letter at one of its branch offices and mails it to another.\textsuperscript{124}

With one exception, all intracorporate communication cases adopting the no-publication rule have relied directly or indirectly on Prins, including decisions in Alabama, Florida, Georgia, Louisiana, Missouri, South Carolina, and Wisconsin.\textsuperscript{125}

b. Intracorporate communication as defamation

A growing body of case law has rejected the no-publication rule in favor of the traditional view that a communication to anyone other than the person defamed satisfies the publication

\textsuperscript{121} 32 A.D. 465, 53 N.Y.S. 1033 (1898).
\textsuperscript{123} 107 Wash. 206, 181 P. 680 (1919).
\textsuperscript{124} Id. at 208, 181 P. at 680-81.
\textsuperscript{125} Lowhurst, supra note 84, at 659-60.
requirement in a defamation action.\textsuperscript{126} In \textit{Pullman v. Walter Hill Co.},\textsuperscript{127} an English case decided eight years before \textit{Owen}, the court held that a letter transcribed by a stenographer and copied by a clerk was sufficient publication to impose liability. Lord Judge Lopes, responding to the defendant's argument that the no-publication rule should apply to facilitate employers in conducting their business, said: "I have never heard that it is in the usual course of a merchant's business to write letters containing defamatory statements."\textsuperscript{128} This reasoning was later adopted in the American case of \textit{Gambrill v. Schooley},\textsuperscript{129} where the court dismissed four arguments brought by the defendant that the no-publication rule should apply.

The \textit{Pullman} doctrine has been subsequently expanded to cover all intracorporate communication and is the position taken by the Restatement (Second) of Torts.\textsuperscript{130} Recent case law, in accord with commentators on the subject, supports this approach, holding that the no-publication rule is inconsistent with the doctrine of \textit{respondeat superior} because "the rule yields an opposite conclusion where a defamatory communication is transmitted between corporate employees."\textsuperscript{131}

The fact that a corporation is an artificial entity, and therefore can act only through its agents, does not give it any added immunity for its torts. Corporate agents are just as much individual human beings as are the agents of natural persons. The same rules should apply to both.\textsuperscript{132}

To protect both the interests of the corporation and the defamed person, many courts, including those in Kentucky, Massachusetts, New York, California, and Kansas, have adopted the rule that even though communication among corporate employees is published, defamatory communication may be permitted under a qualified privilege.\textsuperscript{133}

\begin{thebibliography}{133}
\bibitem{126} \textit{Id.} at 662.
\bibitem{127} \textit{Id.} at 524 (1881).
\bibitem{128} \textit{Id.} at 530.
\bibitem{129} \textit{93 Md. 48, 48 A. 730 (1901)}.
\bibitem{130} \textit{RESTATEMENT (SECOND) OF TORTS} § 577 comment i (1977).
\bibitem{131} Lowhurst, supra note 84, at 674.
\bibitem{132} Mims v. Metropolitan Life Ins. Co., 200 F.2d 800 (5th Cir. 1952) (dissenting opinion), \textit{cert. denied}, 345 U.S. 940 (1952).
\end{thebibliography}
2. Intracorporate defamation cases

In those jurisdictions that hold intracorporate communication is publication for defamation purposes, terminated employees can sue their employers for libel or slander if the communication is indeed defamatory and published to third parties. Such communication may be made either to or from supervisors (or others with responsibility for employee performance) or to nonsupervisory employees.

a. Communication to and from supervisors (or others with responsibility for employee performance)

Information concerning employees is regularly exchanged between supervisors and their superiors or the personnel department—such as performance evaluations, disciplinary actions, and discharge notices. This information, even if defamatory in nature, is generally protected under qualified privilege as a communication made in the interest of the employer. After all, supervision of employee performance is a legitimate business interest of any employer. As with any conditional privilege, however, this privilege may be lost if abused.

Potential problems that may arise as a result of too much intracorporate communication were recently examined in Bratt v. International Business Machines Corp.134 In this case, the plaintiff, an IBM employee, used the company's "open door" grievance procedure on several occasions to resolve employment problems. Dissatisfied with the results of the grievance procedure, Bratt complained to his supervisor of "bad nerves," headaches, and an inability to sleep. The supervisor suggested that Bratt see Dr. Martha Nugent, a general practitioner retained by IBM. After examining Bratt, Dr. Nugent told Bratt's supervisor that Bratt was paranoid and should see a psychiatrist immediately. Bratt's supervisor disclosed this information to Wesley Liebtag, the director of the personnel grievance program, who in turn wrote a memo for his file summarizing the conversation.

Subsequently, after Bratt's latest grievance was denied, one of Bratt's supervisors telephoned Liebtag to relay Bratt's reactions. Liebtag summarized this conversation and his own reactions in a

memo that he forwarded to two IBM managerial supervisors. The memo stated that Bratt's supervisor had observed that Bratt was distraught and crying and that the supervisor had made an appointment for Bratt to see a psychiatrist. Liebtag also wrote that the latest episode indicated that Bratt appeared to suffer from a mental condition that "went beyond IBM."

Bratt filed suit against IBM, Dr. Nugent, and Liebtag, alleging libel and a violation of the Massachusetts right-of-privacy statute. He contended that Liebtag's memo concerning his mental condition was libelous and that approximately sixteen people within IBM had learned about his condition. The case was removed to the United States District Court of Massachusetts, which granted IBM's motion for summary judgment on all counts of Bratt's complaint. Bratt then appealed to the First Circuit Court of Appeals, which certified seven questions regarding Massachusetts law to the Massachusetts Supreme Judicial Court.

The supreme court concluded that "[a]n employer has a conditional privilege to disclose defamatory information concerning an employee when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job." The court held that this privilege extends to medical reports since an employer has a "substantial and valid interest in aspects of the employee's health that could affect the employee's ability effectively to perform job duties." However, such privilege may be lost if the disclosures "resulted from an expressly malicious motive, [were] recklessly disseminated, or involved a reckless disregard for the truth or falsity of the information." On remand to the federal district court, the libel claims were dismissed under this theory and the appeals court affirmed.

b. Communication to nonsupervisory employees

Defamation actions frequently are brought on the basis of communication to nonsupervisory employees, usually co-workers.
of the person defamed. A prime example of this type of communication occurs when an employer explains to a group of employees the reason for a fellow worker’s discharge. Many courts have extended qualified privilege to this form of communication, especially if it was made to boost morale or to instruct employees to refrain from similar conduct. This view, however, is not unanimously accepted.

The Michigan Court of Appeals, for example, in the 1964 case of Sias v. General Motors Corp., refused to find an employer privileged to communicate information to nonsupervisory employees. A company officer had called together several of Sias’ co-workers, alleging, with very little proof, that Sias was a thief. The officer claimed that the meeting with employees had been intended to improve morale. The court held this reason was not sufficient to confer a privilege, stating: “These men were not supervisors, personnel department representatives, or company officials. They were simply fellow employees in the identical work. No privilege extended to the communication to them.”

This reasoning was followed twelve years later in the Florida case of Drennan v. Westinghouse Elec. Corp.

On the other hand, as previously mentioned, many courts afford protection to an employer in this situation under the “common interest privilege.” An early case conferring this privilege was Brown v. Norfolk & W. R. Co., in which railroad workers were told that a fireman had been dismissed “for intimating that an officer of the company had cast reflections upon the ancestry of another officer.” This was not true, but the court found that the communication was privileged nonetheless. In Jones v. J.C. Penney Co., an employer was protected when he told employees about the misconduct of a terminated employee in order to inform the remaining employees that they had been exonerated. In Kroger Co. v. Young, the court held that a defamatory statement by the supermarket supervisor to a new employee that a cashier had been dismissed because she had stolen money was privileged. The

139. Duffy, supra note 8, at 452.
141. Id. at 548, 127 N.W.2d at 360.
142. 328 So. 2d 52 (Fla. App. 1976).
143. 100 Va. 619, 42 S.E. 664 (1902).
Kroger court based its decision on the fact that the plaintiff had been unable to show malice. Similarly, in *Knight v. Baker*,\(^{146}\) the employer issued a written statement that the plaintiff had been "discharged for misconduct with his work" as well as orally telling employees that he had cheated the employer by claiming to have done work actually completed by other employees. The *Knight* court found that both statements were communicated without malice, and therefore, were protected under qualified privilege.

In recent years, however, the courts have come to view such communication with suspicion and employers must exercise great care to avoid abusing the privilege. An example of this modern approach is seen in *Benassi v. Georgia-Pacific*.*\(^{147}\) Benassi, a general manager of a division of the defendant corporation, had been involved in two incidents on business trips with fellow workers. In both incidents, Benassi had been drinking—though apparently not drunk—and had been heard using considerable profanity in a loud voice. After the second such incident, Benassi was fired. A new general manager was appointed and he called a meeting of the division's employees where he stated:

I gathered you all here to tell you why Mr. Benassi is no longer with the company. The man was drunk and misbehaving in a bar. The man had a drinking problem. Georgia-Pacific looks unkindly on this kind of conduct. It was not the first time. He had been warned.\(^{148}\)

The Oregon Court of Appeals held that, while communication for such purposes was generally considered privileged, sufficient evidence supported a finding that the privilege was abused in this case. A qualified privilege may be lost, the court said, when an employer lacks "reasonable grounds for belief in the truth of the defamatory matter"\(^{149}\) or when the method of publication is not reasonably necessary to protect legitimate interests. The court added that the jury would have been justified in finding that the new general manager's lack of investigation into the truth of the matter as well as his publication to approximately 120 employees was abusive.\(^{150}\)

---

\(^{148}\) *Id.* at 702, 662 P.2d at 763.
\(^{149}\) *Id.* at 703, 662 P.2d at 763.
\(^{150}\) Other cases involving similar circumstances include Romano v. United Buckingham
B. Extracorporate communication

Unlike intracorporate communication, there is little difficulty in determining whether extracorporate communication has been published. In nearly all cases, communication made by a corporation to parties outside the corporation is "published" for purposes of defamation.

1. References

Studies on the use of letters of recommendation and similar evaluations have shown that anywhere between seventy-five to ninety percent of employers check the references of prospective employees.151 Addressing the importance of references, one commentator has stated:

The law recognizes that society may benefit from uninhibited discussion of business employees and that those benefits may outweigh an employee's reputation rights. Therefore, an employer or other defendant who defames an employee or prospective employee has the opportunity to demonstrate either that the communication is true or that it was privileged. Often, though, truth is difficult to prove or an error is made, and the defendant must argue that his communication was privileged.152

References given to prospective employers are probably the most common method of communicating employee information outside the corporation. References, particularly bad ones that prevent former employees from gaining employment, are also a fertile source of defamation lawsuits. Because of the devastating effect that adverse employment references can sometimes have on the unemployed, they have become the target of reform for some state legislatures and at least one state court.

A number of states153 have enacted statutes designed to protect workers from being blacklisted by their former employers. These

152. Id. at 2.
"blacklisting" statutes prohibit former employers from preventing their past employees from obtaining other work, although many of them allow employers to give a truthful statement of the reasons for the employee's discharge. New Mexico, for example, allows an employer to provide a truthful statement of the employee's qualifications and performance. California requires that, to be actionable, the employer's conduct in providing an adverse employment reference must amount to misrepresentation, while Virginia requires that such conduct must have been willful and malicious. The Montana and Nevada statutes require the employer to give the employee a statement of the reasons for his discharge, while Texas requires that the employee be given copies of all such communications to prospective employers.

Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, in appropriate circumstances, may also protect former employees from blacklisting and adverse references. For Title VII protection to extend to a former employee, the motivation for the employer's conduct actually must be discrimination on the basis of race, color, religion, sex, or national origin. In addition, blacklisting or disseminating adverse references must be an improper "employment practice" within the meaning or scope of the statute, that is, "the employer's actions are motivated by a prohibited animus." 

The communication of false and damaging references by a former employer to prospective employers has been found to violate the statute when discrimination on the basis of sex or national origin motivated the communication. On the other hand, no violation was found where there was no reasonable basis to infer that race was a cause-in-fact of alleged blacklisting that resulted in a former employee's discharge from two positions and rejection for a third.

A violation under 42 U.S.C. § 1981 can arise when a former employer gives an adverse reference with the intent to discriminate on racial grounds against a former employee and the reference in fact interferes with the former employee's right to enter into an employment contract.

156. 8 Empl. Coordinator (Research Inst. Am.) at 82, 931.
157. Id.
158. Id.
Probably the harshest judicial attack on employment references was made by a Michigan court in the 1969 case of *Harrison v. Arrow Metal Products Corp.* In *Harrison*, an appellate court completely withdrew the traditional privilege accorded employer references. The case involved a nine-year employee who had been falsely accused of theft and discharged (with some evidence indicating that the false accusation was made in retaliation for the employee's earlier worker's compensation claim). Responding to requests for references by other employers, Arrow Metals Products stated that Harrison had been discharged for "theft of company property." Instead of applying the traditional method of determining whether the company abused its qualified privilege, the court applied a balancing test, weighing the employer's interest in exchanging the information about the employee against the serious effect that the accusation had on the employee and the burden it placed upon him to prove his innocence. The court stated:

Contemplate the effect of an accusation, as here made, upon the future life of the employee. Any prospective employer generally requires an applicant to furnish the names of all prior employers. In one way or another, the prospective employer usually contacts prior employers. This one unproved accusation could then become the basis for permanently depriving a man of his dignity, good name, self-respect and right to earn for the support of himself and his family. Whether the employer publishes with malice or without it, the effect on the employee is exactly the same.

The rule of *Harrison*, however, has not been followed by any other court. Most courts continue to hold that employment references are conditionally privileged communications and that the privilege may be defeated only upon a showing of abuse. A typical employment reference case in which this defense and several others were asserted is *Frank B. Hall & Co. v. Buck.* Buck had been an insurance executive with the Hall company just less than a year before he was fired. After several unsuccessful attempts to secure employment with other insurance firms, Buck hired a private investigator to uncover Hall's true reasons for firing him. The private investigator contacted several Hall employees and

160. Id. at 614-15, 174 N.W.2d at 887.
told them he was investigating Buck for a position of trust and responsibility. In tape-recorded conversations with the investigator, one employee said Buck was untrustworthy, a liar, disruptive, paranoid, hostile and guilty of padding his expense account. Hall's office manager said Buck was irrational, ruthless, disliked by office personnel, "a classical sociopath," "a zero," and "a Jekyll and Hyde person" who was "lacking in compuncture [sic] or scruples."\(^{162}\)

On appeal to the Court of Appeals of Texas, Hall argued that Buck had consented to the defamation when he hired the private investigator to question Hall employees and that the employees had merely given their opinions. The court disagreed, finding that Buck did not know that the employees would defame him and that the statements "were not mere expressions of opinion but were false and derogatory statements of fact."\(^{163}\) Hall also argued that the investigator had been acting as Buck's agent and that he tricked the employees into making the derogatory remarks. Rejecting this argument, the court held that a communication to an agent is a publication unless it is invited by the principal. Finally, the court rejected Hall's argument that the statements were conditionally privileged, stating that the jury's finding of malice abrogated any such privilege. As a result, the appellate court upheld a jury award of $1,905,000 against the former employer.

A typical example of this type of defamation was seen in the recent case of \textit{True v. Ladner},\(^{164}\) where a school superintendent provided reference information about a former teacher to a prospective employer. The superintendent said the plaintiff was not a good teacher and was more concerned about living up to the terms of his contract than "going the extra mile." But written performance evaluations and testimony showed that these statements were false. The court found that the plaintiff had been defamed and stated that the superintendent, who had not checked any records when he made the statement, "acted in reckless disregard of the truth or falsity of the statements made to the prospective employer." Thus, the court found that the communication was not protected by qualified privilege.

\(^{162}\) \textit{Id.} at 617.
\(^{163}\) \textit{Id.}
\(^{164}\) 513 A.2d 257 (Me. 1986).
Many employers, aware of the increasing number of unfavorable decisions in this area, have adopted various strategies in an effort to avoid liability. Some of these strategies have proven successful while others have not.

Some employers have implemented company policies by which only authorized persons are permitted to provide limited reference information. In Seifert v. El Paso Natural Gas Co., an employee who was not authorized to provide reference information told a prospective employer that a former employee of the company was "untrustworthy, unethical, of very poor character," and that he "became so unreliable that El Paso Natural Gas Company fired him." Company policy mandated that only the director of personnel or someone under his direction could provide reference information. In addition, the policy required that only the dates of employment and the position held by the former employee were to be given to prospective employers. Because of this policy and the fact that the employee who provided the reference information was not authorized to do so, the court ruled that the employee was not acting within the scope of his employment and dismissed the claim against the company.

Some employers require prospective employees to sign statements releasing all parties, including former employers, from liability arising in conjunction with reference information. One court, however, has held that such a release, at least with respect to former employers, is not valid. In Kellums v. Freight Sales Centers, Inc., the plaintiff, who signed a release, later sued a former employer for defamation. The Florida appeals court held that the release did not bar a slander action against the former employer. To find otherwise, the court argued, would absolve the former employer from any obligation to disseminate pertinent information having a reasonable basis in fact about the former employee. On remand, however, the court stated that the former employer may still be protected under qualified privilege.

Some companies believe that they can avoid defamation suits by refusing to release negative information about fired employees. However, as an interesting case decided by the Minnesota Court of Appeals indicates, such a belief is not necessarily correct. In *Lewis v. The Equitable Life Assurance Soc'y of the United States*, four dental claims processors at Equitable submitted expense accounts that were returned to them as unacceptable. Equitable asked them to reduce the amounts they had claimed, which they refused to do, in part because they would have had to make up the discrepancy out of their own pockets. The four were later fired for "gross insubordination." Following their termination, the employees sought other employment and had to admit, in response to their prospective employers' questions, that they had been fired from their previous job for "gross insubordination." Subsequently, the employees brought suit in state court against Equitable for, among other things, defamation.

Among the questions addressed by the court was whether the "publication" of adverse information by former employees themselves could form the basis of a defamation suit against a former employer. Discussing this issue of "self-publication," Prosser has said:

Ordinarily, the defendant is not liable for any publication made to others by the plaintiff himself, even though it was to be expected that he might publish it. There are, however, a few cases in which, because of the plaintiff's blindness or immaturity, or because of some necessity he was under to communicate the matter to others, it was reasonably to be anticipated that he would do so, and the writer has been held to be responsible.\[169\]

Finding that the employees' communication to prospective employers fulfilled the necessity requirement within Prosser's exception, the *Lewis* court concluded that the employees could sue for defamation even though they actually had disseminated the fact they had been fired for "gross insubordination" themselves. The court reasoned that a defamation suit could be brought under these circumstances, provided the employees were "strongly compelled" to repeat the defamatory statements and the employer was aware that employees would be compelled to repeat it—such

---

as when applying for another job. "When an injured party operates under a strong compulsion to republish, and that compelled repetition is reasonably foreseeable, publication for defamation law purposes has occurred." The court further noted that Equitable’s "policy of refusing to discuss former employees with prospective employers makes even clearer the inevitable occurrence of publication by the employees." While the court recognized the impact its decision would have on employers, it noted that there was "peril only for employers whose communications demonstrate dishonesty and malice."

Two judges dissented in the case, finding that the court’s application of the doctrine of self-publication to employment reference defamation actions "greatly increases employer liability, fundamentally ignoring the principle of mitigation of damages and recognizing, in thin disguise, the tort of wrongful termination rejected by our supreme court."

This ruling clearly has implications for employers, particularly those located in jurisdictions that recognize compelled self-publication, whose policies of not answering reference requests seems to have previously insulated them from suits of this type. As the dissent noted, "Now the only way an employer can avoid litigation and the possible liability for substantial damages is to cease communicating the reason [for] the termination, not only to third persons, but even to the employee."

2. Other communication to outsiders

Employers sometimes release information about terminated employees to outsiders other than prospective employers. Such communication may be made to government or law enforcement agencies, which is frequently privileged, or to the news media, customers, or other sources, which generally is not privileged.

A number of defamation suits have arisen from information concerning employee misconduct that employers have communicated to unemployment agencies, but the courts have generally

170. Lewis, 361 N.W.2d at 881.
171. Id.
172. Id.
173. Id. at 884.
174. Id.
175. Id.
held that such communications are privileged. Some courts have found privilege based on common law, others on statute. Likewise, some consider the privilege absolute, while others consider it qualified.176

Employer communications to law enforcement agencies are also usually deemed privileged. As one court has stated: "There must be an open channel of communication by which citizens can call ... suspected wrongdoing [to the attention of police]. That channel would quickly close if its use subjected the user to a risk of liability for libel.... Thus, the absolute privilege is essential."177

However, communications by an employer to its customers or clients, especially if done in competition for business,178 is generally not privileged.179 For example, in Prudential Ins. Co. of America v. Watts,180 a former Prudential employee went to work for a competing insurance company, taking with him some of the customers to whom he had previously sold Prudential policies. Prudential employees contacted some of these customers and told them that Watts was "doing this for his own interest and not the interest of his clients and that he was doing this to collect first year commissions."181 After a jury awarded Watts $10,000 in compensatory and punitive damages, Prudential appealed, contending that the trial court should have granted its motion for summary judgment. The Alabama Court of Civil Appeals disagreed, holding that sufficient evidence was found in the record from which a jury could conclude that Prudential's employees knew their statements about Watts were false.

In addition, some courts have found that communications made by an employer via press releases182 or interviews with newspaper reporters183 may form a sufficient basis from which a terminated

178. See supra note 97 and accompanying text.
181. Id. at 312.
employee may bring a defamation action against a former employer.

C. Other corporate communication

In some situations, communication made by an employer cannot be neatly categorized as either intracorporate or extracorporate. For instance, communication made to a union can be extracorporate communication, if the union is independent of the business, or intracorporate, if it is an in-house union. In addition, communication made in the course of an investigation may be made to an internal security operation or to an outside agency, whether private or governmental.

1. Communication to union or employee representatives

Employer communication to a union or employee representative is another area in which many defamation lawsuits arise. Traditionally, courts have recognized that communications made during grievance hearings or those of a similar nature are privileged. The privilege extends not only to formal hearings, but also to informal meetings for purposes of resolving employer/employee problems. Depending on the circumstances, this privilege may be either absolute or qualified.

"Employers should not assume that any comment made about an employee to his or her union will be privileged.... Courts have refused to extend a privilege where the communication occurred in a casual or nonofficial context." In Agriss v. Roadway Express, Inc., for example, Agriss, a truck driver with Roadway, received a "warning letter" stating that he had violated company policy by opening company mail. Agriss denied the charge and wrote a formal protest. According to union grievance procedures, both the warning letter and protest were forwarded to the union business agent. Later, Agriss was asked about the letter by Roadway employees and said he heard the charge against him "bandied" over the citizens band radio. Agriss sued Roadway for defamation.

184. Duffy, supra note 8, at 450.
185. Id.
186. See supra note 80 and accompanying text.
187. Duffy, supra note 8, at 450.
but a trial court granted Roadway's motion for compulsory nonsuit. On appeal, the Superior Court of Pennsylvania found that while Roadway had an absolute privilege to publish the warning letter to the union business agent, sufficient evidence was elicited to indicate that the contents of the warning letter had been disseminated to people who were not authorized to receive it. The court noted that only a few possible sources of the unprivileged publication existed, and the jury could reasonably conclude that Roadway was responsible for disseminating the defamatory matter.

Another case in which a court held that communication to a union representative fell outside the privilege is *Neese v. Kantu*. As in *Agriss*, the *Neese* court held that while an employer letter written as part of a grievance procedure was absolutely privileged, an informal conversation in the company parking lot between an employee, his supervisor, and a union steward was not privileged. The court ruled the conversation was a preliminary investigation by the employer and could not be protected by an absolute privilege.

2. *Communication in the course of investigations*

Defamatory communications made by employers during the course of investigations are generally privileged. Again, depending on the circumstances, such communication may be absolute or qualified. As previously mentioned, communication made to governmental or law enforcement agencies for investigatory purposes will generally be absolutely qualified. Intracorporate communication made in the course of an internal investigation will generally be conditionally privileged. Such was the case in *Gaines v. CUNA Mutual Ins. Soc'y*, where the court held that defamatory allegations communicated between corporate officers and their secretaries during an investigation were privileged. The court found that a genuine business need for an investigation had arisen and that the communications made during the investigation were privileged because they protected the business interests of the company.

190. 681 F.2d 982 (5th Cir. 1982).
191. Id. at 988.
V. Conclusion

Litigation for defamation in the workplace, especially by terminated employees against their former employers, is on the rise in the United States. This phenomenon can be attributed to any number of factors: an increasingly litigious society; an erosion of the employer-employee relationship; retaliation for what the employee believes is an unjustifiable discharge under an employment-at-will contract; and pro-employee trends among state courts in an era of increased unemployment.

Regardless of the reasons for this increase, employers should be aware that what they say and do, particularly during and after the employee termination process, is coming under increased judicial scrutiny. While defamatory communication by employers is still protected in many instances under the common law concept of privilege, courts in recent years have shown a lower tolerance for abuse of this privilege.

To defend against defamation litigation, employers should be extremely cautious about what they say about employees—whether to prospective employers, fellow employees, or anyone else. When answering reference requests, an employer may avoid defamation suits by limiting the amount of information he provides. In addition, the reference information he does communicate should accurately reflect the circumstances surrounding an employee's discharge. The employer may also avoid liability by allowing the former employee to read the reference and have him decide whether or not it should be sent. If the former employee allows it to be sent (and this approval should be in writing), then the employer cannot be held liable because the employee consented to or "invited" any possible defamation. If the former employee does not allow it to be sent, then again the employer cannot be held liable because no publication occurs—unless the employee can successfully assert a claim of self-publication in those jurisdictions that recognize the doctrine.

In addition, employers may avoid litigation by helping dismissed employees find new jobs through outplacement counseling, because employees who find jobs are less likely to sue. And if companies are sued, they can aid their defense by establishing a "paper trail" of regular and comprehensive performance appraisals and exit interviews so as to leave no doubt as to why an employee was discharged.
COMMENT

The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware

I. INTRODUCTION

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.\(^1\)

The New York Times Co. v. Sullivan\(^2\) decision recognized the first and fourteenth amendments as providing constitutional protection to critics of public officials in the context of civil defamation actions.\(^3\) Garrison v. Louisiana\(^4\) made clear that the same protection was also available to such critics in criminal defamation prosecutions.\(^5\) The New York Times Court announced these safeguards of free speech as arising from “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.”\(^6\) In the same spirit, for the past four decades\(^7\) the Court has protected the right to

---

2. 376 U.S. 254 (1964). See also U.S. Const. amend. I, XIV.
3. Id. at 264. The Constitution protects such critics by prohibiting public officials from recovering damages in defamation actions that are based on false statements relating to their official conduct, unless the officials can prove the statements were made with "actual malice." Actual malice is defined as knowledge that the statements were false, or reckless disregard of whether they were false or not. Id. at 279-80.
4. 379 U.S. 64 (1964). Criminal defamation has not been found to be unconstitutional per se, but any statute proscribing the activity must be narrowly drawn to pass muster. Id. at 70. See also Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 & n.6 (1984).
5. Garrison, 379 U.S. at 74.
7. See Bridges, 314 U.S. at 252.

129
make critical statements about pending litigation unless such criticism presents a "clear and present danger"8 to the fair administration of justice.

Despite this proclaimed "profound national commitment to uninhibited debate," one group of uniquely qualified critics is left unprotected by the Constitution and thereby has been effectively silenced. This group is composed of attorneys who face disciplinary action for criticizing the conduct of judges.9 The Supreme Court has never expressly extended the same constitutional protection afforded in the civil and criminal arenas to the professional disciplinary proceedings of the bar.10 Most lower courts have rejected attorneys' first amendment arguments in such proceedings.11 However, some more enlightened courts have extended the New York Times protection12 or that provided by the "clear and present danger" standard of contempt cases to these proceedings.13

The language of the modern rules of the American Bar Association (ABA) suggests that the Association may be attempting to provide protection similar to,14 or perhaps greater than,15 the New York Times standard for attorneys who criticize judges outside the realm of pending litigation. For those attorneys facing discipline for criticism of judges during litigation, the

---

8. Id. at 263, 272-73.
9. The Garrison decision makes it clear that judges fall within the category of public officials. 379 U.S. passim. See generally Rosenblatt v. Baer, 383 U.S. 75 (1966). This text focuses on criticism obviously relating to judges in their official capacity. Further, although it discusses attorneys' comments relating to pending litigation, it does not address any comments actually made during courtroom proceedings.
10. It is interesting to note that Garrison, which is discussed in section IV of the text, infra, involved an attorney's critical statements about a group of judges. 379 U.S. at 64-66. Had this been an action before the Louisiana Bar rather than its criminal justice system, Jim Garrison's statements may have been found grounds for disbarment rather than constitutionally protected speech.
14. See Model Rules of Professional Conduct Rule 8.2(a) (1983) [hereinafter ABA Rules]. This rule is discussed in section II of the text, infra.
ABA rules seem to contemplate protection approaching that provided in contempt cases. However, the duty to refrain from such criticism that was imposed by the early ABA Canons and the more recent Ethical Considerations has made it difficult to ascertain what degree of protection is actually anticipated by the new ABA rules. Therefore, courts professing to accept the new ABA rules as authority have not uniformly provided the constitutional protection the language of the rules would suggest.

Rather than applying constitutional principles to shield attorneys, courts have professionally sanctioned them for criticism of a court's opinion, a judge's campaign activity, or even a judge's private activity. It has not mattered to these courts that the attorneys' statements were not made publicly, for even statements merely filed with a court have been found grounds for punishment. Further, the attorneys' good faith belief in the truth of the statements has generally been considered irrelevant.

What has resulted is essentially a disciplinary form of seditious libel. In the majority opinion of New York Times, Justice Brennan devoted considerable discussion to the unconstitutionality of the crime of seditious libel as set out in the Sedition Act of 1798. The statute made it a crime to make any false, scandalous, and malicious statements against the United States Government, the Congress, or the President. Justice Brennan cited the opinions

---

17. Canon 1 states:
   It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. . . .
   Canons of Professional Responsibility No. 1 (1908) [hereinafter cited as ABA Canons].
18. The Ethical Considerations of the Code provide that "[w]hile a lawyer as a citizen has a right to criticize [judges] publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system." ABA Code, supra note 15, EC 80-6 (1980).
20. Note, supra note 11, at 490 n.8.
22. Id. at 273-74.
of several of the founding fathers, toward the Sedition Act to conclude that they "reflect[ed] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amend-
ment."23 It is axiomatic that the substance of seditious libel is "[f]undamentally antidemocratic, [its] distinguishing feature ... is, as its nomenclature suggests, injury to the reputation of government or its functionaries."24

It is difficult to distinguish the substance of this crime from that of professional restrictions prohibiting attorneys from critic-
izing judges, the functionaries of the court system. Although the prosecutors and the penalties differ, the prohibited acts and the forum in which they are tried are the same.

This comment will trace the history of this restriction of attorneys’ first amendment rights, and will examine the state interests that courts have traditionally found to outweigh these rights. It will contrast the degree of constitutional protection provided in attorney disciplinary proceedings based on critical speech with the protection the courts have provided to similar critical speech in other judicial contexts. Finally, it will suggest the need for extension of the protection afforded in other con-
texts into the attorney disciplinary arena, for the benefit not only of attorneys, but of the legal system itself.

II. HISTORY OF THE REJECTION OF FIRST AMENDMENT PROTECTION IN ATTORNEY DISCIPLINARY PROCEEDINGS

In the 1871 case of Bradley v. Fisher,25 the Supreme Court announced that attorneys had a duty to refrain from impugning judges or the courts. This case is particularly illustrative of the extent to which the courts have traditionally silenced attorney criticism of judges.

Bradley was the defense counsel in the trial of John Suratt for the murder of Abraham Lincoln. Fisher was the presiding judge. Fisher charged that Bradley first accused him of making insulting remarks to Bradley from the bench throughout the

23. Id. at 276.
25. 80 U.S. (13 Wall.) 335 (1872). See Note, supra note 11, at 491.
proceedings, and then threatened Fisher with personal chastisement in retaliation. Following the trial, as a sanction for Bradley's behavior, Fisher barred Bradley from any further practice before the criminal branch of the court. Fisher's charges indicated that Bradley made the sanctionable statements to Fisher as the judge descended from the bench for a court recess. Bradley disputed this, as well as the judge's version of what had been said, and offered the testimony of a witness to support his position. The court, however, suppressed the witness' testimony and upheld the judge's sanction.

On appeal before the Supreme Court, Bradley attempted to recover damages from Fisher for having removed him from practice. He alleged that Fisher had exceeded his jurisdiction in ordering him barred from practice, and that he had acted with malice and corruption in doing so. The Court, however, held that Bradley could not recover damages.

After its holding, which afforded a nearly absolute immunity to judges, the Court announced severe restrictions on the right of attorneys to criticize them. The Court stated:

the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for

---

27. Id.
28. Id.
29. Id. at 336-41.
30. Id.
31. Id. at 354-57.
32. Id. at 354-55. The Court stated judges' immunity from civil actions in very broad terms: "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." Id. at 347. The Court further stated that allowing actions alleging malice or corruption would entirely destroy "the protection essential to judicial independence." Id. at 348. Note that two justices dissented, stating that judges should not have civil immunity in cases alleging they have exceeded jurisdiction and acted maliciously and corruptly. Id. at 357 (Davis, J., dissenting).
their judicial acts. 33

The Bradley opinion had a tremendous impact on the bar. Following the decision, states began to codify legal ethics. 34 And in 1908, the American Bar Association issued the Canons of Professional Responsibility. 35

The Canons set forth the lofty goals of improving the legal profession and maintaining its dignity. 36 Their language directed attorneys to show "respect" toward the courts, 37 act with "honor and propriety," 38 and uphold the "honor and dignity" 39 of the profession. Therefore, the Canons were generally viewed as restricting any criticism of the judiciary that could potentially harm the profession's public image. 40 While they formally recognized that just criticism of the judiciary would further their goals, they restricted the avenues available for voicing this criticism, 41 requiring all criticism to be directed to the "proper authorities," 42 and implicitly disallowing any critical statements to be directed outside the Bar. 43

It is not surprising that most judicial decisions under the Canons did not consider the actual effect of this criticism on the profession, but simply prohibited all criticism as potentially having adverse impact. 44 Most courts ignored the first amendment issue altogether. 45 Other courts expressly rejected it, apparently finding that attorneys' voluntary entrance to the Bar acts as a voluntary waiver of the right to criticize the judiciary, 46 at least the right to criticize outside the proper channels. Still other courts mentioned the first amendment, but found the state's interest in "maintaining respect for the courts" outweighed the

33. Id. at 355.
35. Id.
36. ABA Canons, supra note 17, No. 29 (1908).
37. Id. No. 1.
38. Id. No. 24.
39. Id. No. 29.
40. Note, supra note 11, at 491.
41. ABA Canons, supra note 17, No. 1; see also Note, supra note 11, at 491.
42. ABA Canons, supra note 17, No. 1.
43. See id. No. 1; No. 29.
44. Note, supra note 11, at 491-92.
46. Id. at 925-26.
individual right of free speech. The reasoning of Bradley prevailed in lower court opinions throughout this era.

The Supreme Court spoke again in the 1959 case of In Re Sawyer. In Sawyer, eight justices refused to accept the traditional restraints upon attorney criticism of the judiciary.

Harriet Sawyer was the defense counsel in a criminal conspiracy action brought under the Smith Act. While the trial was pending, she made out-of-court statements criticizing the nature of proceedings in Smith Act cases generally. Representative of her remarks was the statement that "[t]here's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the Government can't make a case."

The Sawyer Court issued three separate opinions. Only Justice Stewart followed the traditional approach of Bradley and the Canons. He expressly found lawyers' ethical responsibilities to outweigh their first amendment rights. He stated that "[o]bedience to ethical precepts may require abstention from what in other

47. Id. at 925. See Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321 (Ky. 1955). The opinion stated that "[f]reedom of speech is not a license. It is a right or privilege constitutionally guaranteed, but he who uses it as a license to degrade others does so at his peril." Id. at 326.
49. Id. passim; Note, supra note 34, at 926.
50. Sawyer, 360 U.S. at 62. The parallel of Harriet Sawyer's case with the Smith Act cases is ironic. The Smith Act, 18 U.S.C. §§ 10, 11 (1941), was designed to protect the United States Government from the communist threat of violent overthrow as it was perceived during the period during and after World War II. Dennis v. United States, 341 U.S. 494, 501 (1951). Although cases under the Act applied the "clear and present danger" standard to protect first amendment rights, they took much of the bite from the standard. Id. at 510. They lessened the standard to a mathematical formulation which measured the "gravity of the evil" sought to be inhibited minus the improbability of its happening, to determine whether an intrusion on first amendment rights was justified. Id. The Act allowed prosecution for mere advocacy of overthrow by speech. Id. at 496-98. It is interesting to note that just as Justice Frankfurter's dissent in Sawyer advocates extreme intrusion on attorneys' rights while they are associated with pending litigation, his concurrence in Dennis advocates a similar inhibition of these rights when Congress determines it is necessary to prevent overthrow of the government. Id. at 525-26 (Frankfurter, J., concurring).
51. Sawyer, 360 U.S. at 626-31.
52. Id. at 629. The Bar Association of Hawaii claimed that Ms. Sawyer's statements violated Canons 1 and 22 of the ABA Canons of Professional Ethics. Id. at 625. The Supreme Court found no grounds for the charges under Canon 22, and addressed only issues relating to the substance of Canon 1. The Court therefore limited its holding to a determination of whether the evidence supported a finding that the statements impugned the trial judge's integrity. Id. at 626.
53. Id. at 646-47 (Stewart, J., concurring).
circumstances might be constitutionally protected speech."54 Consistent with the Bradley rationale, he found that attorneys' membership in "a profession with inherited standards of propriety and honor"55 justified restricting their speech with respect to that profession.56

Justice Frankfurter spoke for four justices in dissent.57 His opinion recognized that attorneys had certain first amendment rights to criticize judges,58 but refused to extend those rights to attorneys who were actively involved in pending litigation.59 He stated that:

[of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer.60

Frankfurter's dissent focused on the potential rather than the actual effect of such statements, apparently seeking to ban all critical speech of attorneys relating to pending litigation.61

The dissenters regarded Harriet Sawyer as having intended her out-of-court remarks to color the outcome of the trial in which she was then involved.62 They implied that lawyers who have made such remarks must have realized their potential to prejudice, and may be assumed to have intended that prejudice to result.63 They concluded that such critical and prejudicial remarks violate these attorneys' duties as officers of the court, and are not constitutionally protected.64 Rather than allowing attorneys to speak openly, Justice Frankfurter suggested requiring them to voice their criticism of the courts to the courts during the pendency of trial.65 He stated that "[attorneys do] not lack a forum in which to make [their] charges of unfairness or

54. Id.
55. Id.
56. Id.
57. Id. at 647 (Frankfurter, J., dissenting).
58. Id. at 666.
59. Id.
60. Id.
61. Note, supra note 11, at 493-94.
62. Sawyer, 360 U.S. at 664-65 (Frankfurter, J., dissenting).
63. Id.
64. Id. at 668-69.
65. Id. at 668.
failure to adhere to principles of law; [they have] ample chance
to make such claims to the courts in which [they] litigate. . . .” 66
He emphasized that attorneys who attempt to try cases “on the
hustings and in the press,” 67 and who use language that has any
potential to prejudice their pending litigation, would not be
sheltered by the Constitution. 68

Justice Frankfurter’s opinion appears to have been based on
a balancing of attorneys’ first amendment rights against litigants’
rights to a fair trial. He tipped the scale in favor of litigants,
adopting a protective standard that would bar any speech having
even the potential to affect the outcome of a trial. Notably, in
this disciplinary proceeding, he did not adopt the same standard
of protection for attorneys’ remarks about pending litigation that
the Court had consistently adopted in contempt proceedings,
that being the “clear and present danger” standard. 69

Since the facts of Sawyer addressed a situation involving an
attorney’s criticism of a judge during the course of litigation, 70
the dissent addressed only speech that may affect pending liti-
gation. It referred briefly to attorneys’ broad first amendment
rights outside the realm of trial, but failed to suggest any
appropriate constitutional standard for reviewing such speech. 71

The greatest degree of protection for attorneys was provided
in the four-justice plurality opinion written by Justice Brennan. 72
This opinion suggested that attorneys’ rights to criticize judges
should be limited only where the criticism’s actual effect is to
obstruct justice. 73 Justice Brennan stated that “[w]e can conceive
no ground whereby the pendency of litigation might be thought
to make an attorney’s out-of-court remarks more censurable,
other than that they might tend to obstruct the administration

66. Id.
67. Id. at 649.
68. Id. at 669.
69. See discussion in section IV of the text, infra.
70. Sawyer, 360 U.S. at 647-69 (Frankfurter, J., dissenting).
71. Id. at 666.
72. Sawyer, 360 U.S. at 623.
73. Id. at 636. The opinion’s very narrow holding was limited to a finding that the
evidence was insufficient to prove that Ms. Sawyer’s remarks were directed at the
presiding judge in her trial. Justice Brennan saw her criticisms as relating to the law
and Smith Act cases in general. He specifically stated that the opinion would not address
constitutional issues. Id. at 626-27.
of justice."\textsuperscript{74} In contrast to Justice Frankfurter's emphasis on the potential effect of such criticism, Justice Brennan looked only to its actual effect,\textsuperscript{75} producing a standard close to that of the contempt cases.\textsuperscript{76}

The plurality's factual findings limited the opinion to a discussion of the rights of attorneys to publicly attribute "honest error to the judiciary."\textsuperscript{77} The opinion did not expressly address standards that would apply to false statements, or statements alleging that a judge is "corrupt or venal or stupid or incompetent."\textsuperscript{78} However, the dissent believed that throughout his opinion Justice Brennan had intimated that if such allegations had been made and had been supportable, they would have been constitutionally protected.\textsuperscript{79}

Subsequent case law in the lower courts was just as diverse as Sawyer's three opinions. Despite the recognition of at least some degree of first amendment protection by eight members of the Supreme Court, many lower courts continued to refuse to extend any such protection to attorneys in disciplinary proceedings.\textsuperscript{80}

In 1970, the ABA attempted to strike a better balance between attorneys' first amendment rights and their duty to "maintain the dignity" of the profession. Apparently realizing the Canons were no longer valid expressions of the rights and obligations of attorneys, the Association adopted a new set of standards,\textsuperscript{81} which are set out in the Code of Professional Responsibility.

The Code is divided into nine topical sections, each of which is divided into three subsections.\textsuperscript{82} Each topical section begins with a general statement of an expected standard of conduct with regard to a specific topic. The Association has retained the term "Canon" to describe each of these general statements.\textsuperscript{83}

\textsuperscript{74} Id. at 636.
\textsuperscript{75} Note, supra note 11, at 493-94.
\textsuperscript{76} See section IV of the text, infra.
\textsuperscript{77} Sawyer, 360 U.S. at 635.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 665 (Frankfurter, J., dissenting).
\textsuperscript{80} Note, supra note 11, at 494. See In re Glenn, 256 Iowa 1233, 130 N.W.2d 672 (1964); In re Raggio, 87 Nev. 369, 487 P.2d 499 (1971).
\textsuperscript{81} Note, supra note 34, at 931.
\textsuperscript{82} See ABA Code, supra note 15, passim.
\textsuperscript{83} Id. Preliminary Statement.
Each Canon is followed by several Ethical Considerations, which are “aspirational in character and represent the objectives toward which every member of the profession should strive.” Following the Ethical Considerations in each topical category are several Disciplinary Rules, which are mandatory statements of the lawyer’s duty. “The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”

While violation of the Disciplinary Rules is always cause for disciplinary action, a simple failure to live up to the “aspirations” of the Ethical Considerations is not. Such failure may be subject to discipline, however, if it consists of conduct that is prejudicial to the administration of justice, or if it reflects adversely on the actor’s fitness to practice law.

The Ethical Considerations of the Code contain remnants of the early Canons, such as provisions obliging attorneys to maintain respect for the courts, and uphold the integrity of the trial process. They warn attorneys who criticize judges to “be certain of the merit of [their] complaint[s], use appropriate language, and avoid petty criticisms.” Conversely, they encourage “appropriate” criticism by recognizing attorneys’ special knowledge of the legal system and the judiciary, and suggesting that attorneys use this knowledge to speak out for necessary reform and to expose judicial candidates who do not possess the integrity, competence, or temperament to be worthy of the bench.

Although the Ethical Considerations suggest limitations upon the type of criticism made, or the manner of its making, the Disciplinary Rules do not establish harsh boundaries for critical statements made outside the realm of pending litigation. Rather, their only provision expressly addressing criticism of the judi-

84. Id.
85. Id.
86. Id.
87. Id.
88. Id. DR 1-102(A)(5).
89. Id. DR 1-102(A)(6).
90. Note, supra note 34, at 932.
91. ABA Code, supra note 15, EC 8-6.
92. Id. EC 8-1.
93. Id. EC 8-1, EC 8-2.
94. Id. EC 8-6.
95. See id. DR 7-107.
ciary states that “[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.”96 On its face, this language gives greater protection to lawyers in disciplinary proceedings than does the New York Times’ "knowing or reckless disregard" standard in civil or criminal actions.97 Justice Brennan’s reasoning in Sawyer seems to be reflected in the breadth of this protection.

The disciplinary rules are more restrictive with regard to attorney criticism of judges during pending litigation.98 These rules prohibit any discussion by attorneys, implicitly including criticism of judges, that is “reasonably likely to interfere with a fair trial.”99 The rules emphasize potential rather than actual interference with judicial processes as a basis for discipline. In this area, the Code seems to have opted for Justice Frankfurter’s more traditional stance.

Many courts have not limited their disciplinary actions for criticism of judges to matters expressly meeting either the "knowingly false" or the "potential to interfere with a pending trial" requirements. Rather, they have looked to historical precedent, or to the Ethical Considerations combined with two catch-all disciplinary rules, to continue imposing sanctions for any criticism of the judiciary.100 These two catch-all rules prohibit: (1) attorney conduct which prejudices the administration of justice,101 and (2) conduct which indicates that the attorney is unfit to practice law.102 However, the Code provides no clear definition of the type of conduct proscribed by these rules.103 As a result, courts have exercised broad discretion in applying them.104 Professor Wolfram suggests that “[t]hose [court] opinions and their self-solicitude for the respect that lawyers owe judges entirely overlook the fact that there is no provision in the Code prohibiting lawyer disrespect for judges.”105

---

96. Id. DR 8-102.
97. See note 3, supra; see generally section IV of the text, infra.
98. See ABA Code, supra note 15, DR 7-106, DR 7-107.
99. Id. DR 7-107(D), DR 7-107(G)(5).
100. Note, supra note 34, at 932.
102. Id. DR 1-102(A)(6).
103. Id.
104. See generally Note, supra note 34, at 932. See also Kentucky Bar Ass’n Heleringer, 602 S.W.2d 165 (1980), cert. denied, 449 U.S. 1101 (1981); In re Lacey, 283 N.W.2d 250 (S.D. 1979).
In 1983, the ABA tried again. This time, the Association adopted a streamlined set of standards termed the Rules of Professional Conduct.\textsuperscript{106} The Association states that "[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."\textsuperscript{107} Some Rules are obligatory, some discretionary.\textsuperscript{108} Each is followed by a Comment that explains and illustrates the meaning of the Rule and its goal.\textsuperscript{109}

Only Rule 8.2 actually addresses attorneys' rights and obligations regarding criticism of judges. The Rule states:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.\textsuperscript{110}

By adopting the language of \textit{New York Times}, the Rule implicitly provides the same protection to attorneys in disciplinary proceedings as \textit{New York Times} provides in civil proceedings. Further, the Comment to the Rule recognizes that allowing lawyers to speak honestly and candidly "contributes to improving the administration of justice."\textsuperscript{111}

The Rules also contain provisions limiting attorneys' speech relating to pending litigation.\textsuperscript{112} However, the language has changed from the Disciplinary Rules' prohibition of speech that is "reasonably likely to interfere with a fair trial."\textsuperscript{113} The new Rule 3.6 prohibits only speech that the "lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding."\textsuperscript{114} The Comment to the Rule expressly notes that the Rule attempts to strike a balance protecting litigants' rights to a fair trial while safeguarding attorneys' rights of free expression.\textsuperscript{115} The newly

\begin{footnotesize}
106. ABA Rules, \textit{supra} note 14.
107. \textit{Id.} Preamble: A Lawyer's Responsibilities.
108. \textit{Id.}
109. \textit{Id.}
110. \textit{Id.} Rule 8.2.
111. \textit{Id.} Rule 8.2 Comment.
112. \textit{Id.} Rule 3.6.
113. ABA Code, \textit{supra} note 15, DR 7-107(D), DR 7-107(G)(5).
114. ABA Rules, \textit{supra} note 14, Rule 3.6.
115. \textit{Id.} Rule 3.6 Comment.
\end{footnotesize}
adopted standard sounds much like that adopted by Justice Brennan in Sawyer.

The Supreme Court faced the issue of attorney criticism of judges again in 1985 in the case of In Re Snyder. As before, the Court declined to address the constitutional issues because it found them to be unnecessary to the disposition of the case. The case was factually similar to Sawyer in that the attorney had criticized a particular Act and its administration, but had not criticized any particular judge. Snyder had repeatedly complained to the secretary of the judge who presided over his recently completed litigation about the great amount of paperwork necessary to apply for the very low attorney fees awarded under the Criminal Justice Act. At the secretary's suggestion, he wrote a letter formally expressing his frustration with these requirements. Although one of the judges who heard cases under the Act was in full agreement with Snyder, another judge from the same court saw Snyder as impudently overstepping his bounds. At the insistence of the second judge, disciplinary action was taken against Snyder. Snyder's remarks are distinguishable from Sawyer's, however, in that they were made to a court employee in an apparent effort to internally improve the system, rather than in public in an apparent effort to increase public awareness of the system's deficiencies.

The Supreme Court echoed the language of Sawyer's plurality, explaining that "[w]e do not consider a lawyer's criticism of the administration of the Act or criticism of inequities in assignments under the Act as cause for discipline or suspension.... Officers of the court may appropriately express criticism on such matters." The Court regarded the "harsh" tone of Snyder's letter as merely a "single incident of rudeness," which did not provide a basis for discipline. While this may indicate that the Court

117. Id. at 643.
118. Id. at 636-42.
119. Id.
120. Snyder's statements were made at public gatherings where members of the press were present. Sawyer, 360 U.S. passim.
121. Snyder, 472 U.S. at 646.
122. Id.
123. Id. at 647.
124. Id.
no longer adheres to rigid standards requiring "absolute respect" for the judiciary, it falls short of establishing a clear definition of the limitations that do exist.

Ultimately, this most recent failure of the Court to address the constitutional principles applicable to attorney disciplinary proceedings is likely to leave case law in the lower courts jumbled, despite the ABA's attempts to set a proper focus on the question.

III. THE STATE INTERESTS PROTECTED THROUGH RESTRICTION OF ATTORNEYS' SPEECH

Restrictions of attorneys' first amendment rights have been justified by claims that these individual rights are outweighed by the important state interests of protecting the right to a fair trial and maintaining public confidence in the legal system.125 Although the constitutional limits set out in New York Times and the contempt cases would provide reasonable protection to these interests, many states have rejected these analogies and have upheld absolute bans on attorney criticism. It seems ironic that the asserted state interests do not necessarily conflict with attorneys' right to criticize judges, but would often be promoted by an enhancement of that right rather than its restriction.

The first asserted state interest, the fundamental right to a fair trial, is guaranteed by the sixth126 and fourteenth127 amendments. Obviously, trial counsel stands in a particularly powerful position to prejudice that interest were counsel to have an unrestricted right to criticize the presiding judge or the proceedings. However, the Code and the Model Rules have not attempted to give attorneys license to obstruct justice. They, have weighed the countervailing interests and have adopted a balance that reasonably protects both.128 It is substantially the

126. U.S. CONST. amend. VI (guarantees the right to counsel, to a speedy and public trial, to confront opposing witnesses, and to an impartial jury).
127. Id. amend. XIV. The various rights guaranteed by the sixth amendment have been held applicable to the states in the following cases: Duncan v. Louisiana, 391 U.S. 145 (1968) (impartial jury); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confront witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel); In re Oliver, 333 U.S. 257 (1947) (public trial).
128. See section II of the text, supra.
The same balance that has been found adequate to protect both interests in non-disciplinary proceedings for contempt. Both the Code and the Rules proscribe any statements made knowingly by an attorney to prejudice a trial, thereby precluding the possibility that an attorney could turn the freedom to criticize into a trial tactic. Further, it is important to note that the remedies of mistrial and appeal exist to protect the right to a fair trial in case of actual prejudice.

The second asserted state interest, that of maintaining public confidence in the legal system, is necessary to ensure the public will continue to entrust its claims to the courts and respect their judgments. Public trust is viewed as essential in preventing the resort to extra-judicial forms of obtaining "justice," and the upset of the delicate system of checks and balances established by the Constitution. Although the goal is laudatory, the traditional means of achieving that goal through silencing all attorney criticism is as likely to generate suspicion as it is to promote confidence in the judicial system. Granted, the special qualifications of attorneys to make perceptive criticisms may tend to validate even their unjust criticism of judges in the public eye, but these qualifications also provide the best resource of just criticism. It is reasonable to assume the public is as likely to view a self-criticizing legal system as a self-improving one, as it is to view that type of system as untrustworthy.

Further, the public is entrusted with electing many judicial officers and is expected to live by the laws created by jurists. It therefore has a right to the knowledge that is necessary for a responsible exercise of the voting franchise, a knowledge which may also encourage its participation in improving the legal system. Such knowledge can serve as a vital check on judicial abuse. Silencing attorneys, who have the greatest exposure to the legal system, deprives the public of its right to know, possibly to the detriment of the entire legal system. To deny the public information concerning the deficiencies of the legal system will only perpetuate rather than cure the problems. In

---

129. See section IV of the text, infra.
130. See section II of the text, supra; notes 93, 94, 108, 109, supra.
132. Id.
133. Note, supra note 11, at 501-02.
134. Id. at 501-04.
the words of John Stuart Mill, "[a]ll silencing of discussion is an assumption of infallibility."\(^{135}\)

**IV. Recognized First Amendment Rights**

[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.  

Justice William J. Brennan, Jr.\(^{136}\)

Despite the breadth of Justice Brennan's statement, and although the Court has announced broad first amendment protections in civil and criminal actions against other critics whose speech may affect pending litigation,\(^{137}\) or which may reflect adversely on the legal system or individual judges,\(^{138}\) the Court has never expressly extended those same protections to attorneys facing disciplinary proceedings for their criticism of the judiciary. In other disciplinary proceedings based on violations of the prohibition against solicitation, the Court has strongly protected attorneys' first amendment rights of association\(^{139}\) and expression.\(^{140}\) It is difficult to understand why the Court has applied different standards in these two similar disciplinary proceedings. There is no clear distinction between the competing interests involved in an attorney disciplinary proceeding for solicitation and an attorney disciplinary proceeding for criticism of a judge.

In cases falling under the protective shield of *New York Times*,\(^{141}\) the state's interest in maintaining public confidence in the legal system may often be at stake. In fact, *Garrison v. Louisiana* involved the exact factual situation usually found to intrude on that state interest in disciplinary proceedings. In *Garrison*, a prosecuting attorney accused the Orleans Parish judges of laziness, inefficiency, and excessive vacationing which he contended caused a substantial backlog of cases in the Parish.

---

135. J. S. MILL, ON LIBERTY, IN THREE ESSAYS 24 (1975).
141. See note 3, supra.
courts.\textsuperscript{142} Had this been a traditional disciplinary proceeding, the state interest in maintaining public confidence in the legal system would have surely been found to outweigh Jim Garrison's right to express these views. This, however, was a criminal prosecution.\textsuperscript{143} Accordingly, the Court considered only that state interest traditionally\textsuperscript{144} protected in criminal libel prosecutions: preventing breaches of the peace.\textsuperscript{145} Maintaining public confidence in the legal system was considered relevant only to the extent that a failure of public confidence would result in a breach of peace. As a result, the state's interest in preserving public confidence in the legal system, the same interest that has been found to outweigh the right of attorneys to criticize judges when such criticism has been the basis for attorney disciplinary proceedings,\textsuperscript{146} was found in this criminal proceeding not to outweigh this attorney's right to criticize the Parish judges.

Implicit in this dichotomous treatment is the suggestion that members of the Bar voluntarily assume certain obligations that limit their constitutional rights within the boundaries of the Bar organization. However, this view completely ignores the reality of the Bar itself: that it is not merely a professional organization, but is part of a political institution governed by public officials. As such, criticism of its officials is political speech, the type of speech most profoundly protected by the Constitution.\textsuperscript{147} Further, this dichotomy is inconsistent with Supreme Court opinions that uphold the constitutional rights of attorneys in disciplinary proceedings based on other ethical violations that may also lessen public confidence in the legal system.

For example, in \textit{Konigsberg v. State Bar of California},\textsuperscript{148} the Supreme Court of the United States reversed a decision of the California Supreme Court that denied an applicant's admission to the Bar on the basis of his failure to prove he was of good moral character and that he would not advocate overthrow of the government. These allegations had been made against the attorney after he had refused to answer certain application

\textsuperscript{142} Garrison, 379 U.S. at 65-66.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 70.
\textsuperscript{145} Id.
\textsuperscript{146} Note, \textit{supra} note 11, at 499-500; Note, \textit{supra} note 34, at 933-35.
\textsuperscript{147} Garrison, 379 U.S. at 74-75.
\textsuperscript{148} 353 U.S. 252 (1957).
questions because of his political convictions. In language very protective of the applicant's constitutional rights, the Court announced:

We recognize the importance of leaving the States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be untrimitated - free to think, speak, and act as members of an Independent Bar.

Similarly, in NAACP v. Button, the Court provided the highest protection to NAACP attorneys' political expression that had been found to violate a statutory ban against solicitation. The Court refused to allow the state, under the guise of regulating professional conduct, to prohibit the attorneys from actively seeking clients. Finding for the NAACP, the Court acknowledged the paramount importance of both the first amendment right of expression and the right of association. Later, in Bates v. State Bar of Arizona, the Court went so far as to protect certain forms of attorneys' commercial speech from blanket suppression by the Bar.

Attorneys' critical statements relating to pending litigation may conflict with the state's interest in promoting the fair administration of justice, as well as its interest in maintaining public confidence in the legal system. Generally, such statements are sanctioned through the contempt powers of the courts. However, this type of speech has also been the basis of disciplinary action.

As early as 1941, the Supreme Court announced that speech relating to pending litigation was not actionable in contempt

---

149. Id. at 253-59.
150. Id. at 273 (emphasis added).
152. Id. at 417-19.
153. Id. at 438-39.
154. Id. at 417-45.
156. Id. at 363-84.
157. Note, supra note 34, at 935-36.
158. See Bridges, 314 U.S. 252.
unless it presented a "clear and present danger"\textsuperscript{159} of obstructing justice.\textsuperscript{160} In \textit{Bridges v. California}\textsuperscript{161} the state asserted that its interests in preserving the fair administration of justice and public confidence in the legal system outweighed the speaker's right to freedom of expression.\textsuperscript{162} However, the Court in this contempt proceeding found for the speaker.\textsuperscript{163} It adopted a protective standard that recognized the individual right of free speech as outweighing the asserted state interests in all but those cases in which the speech presented an imminent danger of prejudicing the proceedings.\textsuperscript{164}

A more recent case, \textit{Landmark Communications v. Virginia},\textsuperscript{165} presented similar state interests to be weighed against the individual right of expression. In \textit{Landmark}, the State of Virginia brought criminal charges against a newspaper company for having violated a statute that prohibited publication of the identity of judges who were under investigation for professional misconduct.\textsuperscript{166} Once again, the Court reviewed the facts under the "clear and present danger" standard.\textsuperscript{167} Finding the newspaper to be constitutionally protected in publishing the information prohibited by the Virginia statute, the Court stated:

\begin{quote}
[The Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason "for repressing speech that would otherwise be free. . . ." The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales.\textsuperscript{168}
\end{quote}

To date, the Supreme Court has not applied this language to a disciplinary proceeding based on an attorney's criticism of the

\textsuperscript{159} \textit{Id.} at 262-71. The exact meaning of "clear and present danger" seems to be a function of the time period in which a case is decided. Note \textsuperscript{50}, \textit{supra}, illustrates the effect of the times on this standard.

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} 314 U.S. 252.

\textsuperscript{162} \textit{Id.} at 268-71.

\textsuperscript{163} \textit{Id.} at 271-78.

\textsuperscript{164} \textit{Id. passim}.

\textsuperscript{165} 435 U.S. 829 (1978).

\textsuperscript{166} \textit{Id.} at 830-34.

\textsuperscript{167} \textit{Id.} at 842-46.

\textsuperscript{168} \textit{Id.} at 841-42.
judiciary. Rather, it has avoided holding on the constitutional issues, thereby leaving the lower courts with no clear direction. However, several lower courts have independently elected to extend the *New York Times* and *Bridges* protections to attorney disciplinary proceedings.

V. DISCIPLINARY CASES EXTENDING ATTORNEYS’ FIRST AMENDMENT RIGHTS

Some enlightened lower courts have extended the same first amendment protections to attorneys in disciplinary proceedings that are provided in other judicial proceedings. Confronted with the asserted state interests in maintaining public confidence in the legal system, and in promoting the fair administration of justice, these courts have found the attorneys' countervailing interest in freedom of expression to prevail.

*Polk v. State Bar of Texas* involved a scathing press release by an attorney that related to a pending criminal trial at which he was the defendant. Polk accused the trial judge of wrongly imprisoning him for his failure to appear at trial. He claimed that the trial had been rescheduled and that his failure to appear was therefore his only appropriate response. In describing the events to the media, Polk stated: “I consider this [to be] one more awkward attempt by ... [this] perverse judge to assure me an unfair trial.” The review court, however, rejected the Bar Association’s argument that the state had a vital interest in maintaining the “general esteem of the public [toward] the legal profession,” calling this an “elitist” conception, and clearly no justification for eradicating the constitutional rights of a group of citizens. Although the court’s holding was limited to Polk’s “unofficial” conduct, the court, in dicta, commented

---

169. Both the *Sawyer* and Snyder Courts expressly refused to rule on the constitutionality of this restriction of attorneys' speech. *Sawyer*, 360 U.S. at 626-27; *Snyder*, 472 U.S. at 642-45.
171. Id. at 786-87.
172. Id.
173. Id. at 786.
174. Id. at 788.
175. Id.
176. Id.
177. Id.
that "[w]here the protections of the Constitution conflict with the efficiency of a system to ensure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform." 178

Addressing the state's interest in assuring the fair administration of justice in State Bar v. Semann, 179 a Texas court looked to New York Times and Garrison for guidance in protecting an attorney in disciplinary proceedings. 180 The case arose when Fred Semann, an attorney, wrote a letter to the editor of the San Antonio Express criticizing a local judge's view of the law. 181 In the letter, he compared this judge with three other named judges in the local vicinity, concluding that "[s]tanding beside these men, [Judge] Benavides is a midget among giants." 182 The Bar grievance committee urged that Semann's statement had constituted conduct prejudicial to the administration of justice, 183 but the court concluded that Semann's rights of expression were weightier on the constitutional scale than this asserted state interest. 184 Recognizing that the first amendment rights of attorneys in disciplinary proceedings had never been authoritatively determined, 185 the court interpreted Garrison as extending to all proceedings. The court observed that, "It is apparent from the language of Garrison v. Louisiana, ... that any bridle upon a free flow of information to the people concerning the performance and qualifications of public officials will have little chance of gaining constitutional approval." 186

In Re Oliver 187 specifically addressed the state's interest in preserving the fair administration of justice in a case involving an attorney's extra-judicial comments during a pending litigation. 188 Here, the attorney made statements to the press about a pending court action in knowing violation of the court's pol-

178. Id.
179. 508 S.W.2d 429 (Tex. 1974).
180. Id. at 432-33.
181. Id. at 430-431.
182. Id. at 431.
183. Id. at 432.
184. Id. at 432-33.
185. Id. at 433.
186. Id.
187. 452 F.2d 111 (7th Cir. 1971).
188. Id. at 112.
icy. Balancing the state’s interest against the attorney’s, the court’s opinion traced and adopted the rationale of the contempt cases. The court concluded that even speech relating to pending litigation should be protected, in disciplinary proceedings as well as other tribunals, unless it presented a “serious and imminent threat to the administration of justice.” The court rejected the traditional disciplinary view that the presence of any remote potential to prejudice pending litigation could justify the banning of all attorneys’ speech relating to it.

VI. CONCLUSION

It is a well-established principle of American jurisprudence that the Constitution will protect critics of public officials from civil and criminal prosecution. No principle is more fundamental to a democratic system of government. The Supreme Court has determined that there is no irreconcilable conflict between this protection of free speech and furtherance of the important state interests in maintaining public respect for the legal system and ensuring the right to a fair trial. Yet, for the past century, these same state interests have been used to justify the denial of first amendment protection to attorneys in disciplinary proceedings based on their criticism of judges.

The courts in other contexts have consistently determined that these state interests can be adequately protected without inhibiting individual first amendment freedoms. Nothing remains to justify applying different standards in attorney disciplinary proceedings.

Political dialogue, disengaging the mind from orthodoxy, opposes the official monologue of power, which can triumph only by silencing other voices, as by censorship and seditious libel. The notion that human beings should be silenced rather than free to pursue their own consciences; licensed rather than free to write something that rattles the catechism of the day; bound up by paternalistic laws rather than free to investigate everything under the sun - such a notion reduces human beings to a brutish condition. It was just this “mutilation of the thinking process” that Alexander Meiklejohn, the leading first amendment theorist of

189. Id.
190. Id. at 114-15 (citing Craig v. Harney, 331 U.S. 367 (1947)).
191. Id. at 115.
our time, insisted that the Constitution outlawed...\textsuperscript{192}

Attorneys' criticism of the judiciary must finally be realistically characterized as political speech, and courts acting as disciplinary tribunals must constitutionally protect that speech as zealously as they do in civil and criminal actions. The members of the Bar must finally be free to exercise their fundamental right of expression without the chill of discipline before the courts.

Jeanne D. Dodd

\textsuperscript{192} Koffler and Gershman, \textit{supra} note 24, at 881-82.
NOTES

Ohio Provides Even Greater Protection For Its Press:
Scott v. News-Herald

I. INTRODUCTION

Since the United States Supreme Court's decision in New York Times Co. v. Sullivan,¹ the courts of this country have attempted to balance the conflicting interests of the media, public officials, and private persons. Much criticism has resulted from the New York Times Court's failure to set forth a bright-line rule for determining when a plaintiff is a "public official" for defamation purposes. As a result, lower courts have employed different and often highly imaginative criteria to bring various categories of government employees under its rule.² Further, the Supreme Court's failure to provide a guiding rule for determining whether a statement is constitutionally protected as opinion has produced inconsistent results.³

On August 8, 1986, the Ohio Supreme Court delivered its opinion in Scott v. News-Herald,⁴ establishing, under the Ohio Constitution, absolute immunity from liability in defamation for statements of opinion, and setting forth a comprehensive test for use in the fact/opinion determination.⁵ The court also found that the superintendent of a public school system is a "public official" for defamation purposes. Therefore, applying New York Times, the court held that in order to recover for a defamation of him in a local newspaper, a superintendent of schools must prove that the newspaper published the statements with actual malice.⁶

The language of the Scott opinion reveals strong differences of

5. Id. at 250, 496 N.E.2d at 706.
6. Id. at 248, 496 N.E.2d at 704.
opinion among the justices then serving on the court. Although all agreed that a local school superintendent was a public official, the dissenters vociferously expressed their disagreement with the court's adoption of a new "test" for determining that question since the precedent they had overruled had been decided only two years earlier.

This note will first examine United States Supreme Court decisions dealing with the defamation of public officials and public figures, as well as the Court's approach to the protection of statements of opinion. Next, the Scott case and its application of the law of defamation will be reviewed and examined for its future implications on the law of defamation in Ohio.

II. BACKGROUND

The first amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press ..."7 Unfortunately, the constitutional protection for free expression often conflicts with the protection of individual reputation at common law.8 As a result, while the courts have tried to allow compensation for those harmed by defamatory statements they have done so in a manner that has attempted to avoid media self-censorship with respect to matters of genuine public concern.9 Towards this end the courts have given less weight to the interests of injured plaintiffs who are involved in government and public affairs.10 The courts have found that any interest of government and public officials to be free from damaging public criticism is clearly subordinate to the freedom of the citizenry to openly debate on public issues.11 The United States Supreme Court has described this principle of the first amendment as one that assures "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."12

Accordingly, a different standard of liability has been imposed on those defaming private individuals than has been the case

7. U.S. CONST. amend. I.
8. Elder, supra note 2, at 579.
10. Id. at 342-346.
12. Id. at 269 (citing Roth v. United States, 354 U.S. 476, 484 (1957)).
when public officials are involved. In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that a stricter standard should be applied to defamations against private persons since ordinary citizens did not have the same “effective opportunities for rebuttal,” as did public officials, and, therefore, they were more vulnerable to injury. However, the Court declined to define exactly how strict the standard protecting private individuals should be, and left it up to the states to determine this—with the caveat that they could not impose liability without fault. The Court made clear that the states could not permit private persons to recover for presumed or punitive damages unless they were able to prove that the one defaming them had “knowledge of [the] falsity [of the material published] or reckless disregard for [its] truth.”

In its seminal decision in *New York Times*, the United States Supreme Court defined the standard to be applied when the object of defamation was a public official. The Court acknowledged that first amendment protection had historically been granted when erroneous statements were made in criticism of official conduct. It looked particularly closely at cases that had been prosecuted under the Sedition Act of 1798 as precedent for the proposition that protection should be afforded citizens who voice criticism of public officials. The Sedition Act had made it a crime to publish statements (oral or written) against the government (by way of its officials) with the intent to defame, but an earlier Court had stricken it down as an unconstitutional

---

14. *Id.* at 343-344.
15. *Id.* at 347.
16. *Id.* at 349. The Court felt if punitive damages could be awarded private persons absent a showing of knowledge or reckless disregard, the result would be the punishment of unpopular opinion rather than compensation for the injury. *Id.* The Court went on to say that the injury for which the plaintiff could recover was not limited to “out-of-pocket” loss. As long as juries were guided by appropriate instructions and the awards were supported by competent evidence, the Court said there did not need to be any evidence of an actual dollar amount. Listed in the “customary types of actual harm” were “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” *Id.* at 350.
18. *Id.* at 279-280, 283.
19. *Id.* at 271-273. The Court stated that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive’ ….” (citing N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).
20. *Id.* at 273-277.
21. 1 Stat. 596 (1798).
infringement upon the right of citizens to criticize in a country
where "[t]he people, not the government, possess the absolute
sovereignty."\textsuperscript{22}

The \textit{New York Times} Court explained that if a rule were to
be implemented requiring critics of official conduct to guarantee
the \textit{truth} of any assertions they made in this regard, the result
would be self-censorship.\textsuperscript{23} That is, public debate would be se-
verely "chilled" by the fear of liability or the fear of having to
disprove liability.\textsuperscript{24} Therefore, the Court concluded that the Con-
stitution required a public official to prove by clear and convinc-
ing evidence that allegedly defamatory statements made against
him had been made with "actual malice."\textsuperscript{25} Actual malice was
defined by the Court as "knowledge that [the defamatory state-
ment] was false or with reckless disregard of whether it was
false or not."\textsuperscript{26}

The Court analogized the protection afforded to a private
citizen by its new rule to the protection that had previously been
granted to a public official when sued for libel by a private
citizen.\textsuperscript{27} Since, in those cases, the private citizen had been
required to prove that the official had acted with actual malice,
it was only equitable, in the Court's view, that no lesser standard
should be imposed when the parties were reversed.\textsuperscript{28}

The actual malice standard as it applied to the defamatory
statements of public officials had been refined in subsequent
decisions to mean "false statements made with [a] high degree
of awareness of their probable falsity,"\textsuperscript{29} as well as statements
"deliberately falsified, or published recklessly despite the pub-

\textsuperscript{22.} \textit{New York Times Co.}, 376 U.S. at 273-274 (quoting James Madison's Report in support of the protest against the Act, 4 Elliot's Debates on the Federal Constitution (1876)).

\textsuperscript{23.} \textit{New York Times Co.}, 376 U.S. at 279.

\textsuperscript{24.} \textit{Id.} at 279-280.

\textsuperscript{25.} \textit{Id.}

\textsuperscript{26.} \textit{Id.} at 280.

\textsuperscript{27.} \textit{Id.} at 282-284.

\textsuperscript{28.} \textit{Id.} at 282. The Court said the reason for the actual malice standard where a private
citizen sues a public official was that such an official privilege was necessary so as not
to "inhibit the fearless, vigorous, and effective administration of policies of government"
and "dampen the ardor of all but the most resolute, or the most irresponsible, in the
unflinching discharge of their duties." \textit{Id.} (quoting Barr v. Matteo, 360 U.S. 564, 571
(1959)).

\textsuperscript{29.} Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (criticism of state court judges).
lisher’s awareness of probable falsity.” Actual malice had not been found where statements were made merely “with bad or corrupt motive” or “from personal spite, ill will or a desire to injure” the plaintiff.

In St. Amant v. Thompson, decided in the same year as New York Times, the United States Supreme Court examined the “reckless disregard” aspect of the actual malice test set forth in that decision. The Court observed that precedent cases clearly established that reckless was not to be determined by inquiring whether “a reasonably prudent man would have published, or would have investigated before publishing.” Rather, said the Court, the proper inquiry is whether the evidence presented is sufficient “to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” Accordingly, the Court held that whether “reckless disregard” was present in any particular instance could be fully determined only on a case-by-case basis.

The St. Amant Court further held that when addressing an action brought by a public official, the finder of fact must determine whether the publication had been made in good faith. The Court cautioned that a finding for the defendant solely on the basis of his testimony that he had believed the statements to be true could not be found, said the Court, where the defendant had fabricated the story or had based it solely upon an anonymous phone call and, neither could it be found in a situation in which the allegations were so improbable that only a reckless person would have published them. However, noted

---

33. Id. at 730-731.
35. St. Amant, 390 U.S. at 731 (emphasis added).
36. Id. at 730-731.
37. Id.
38. Id. at 732. Also, recklessness could be found where there were reasons to question
the Court, bad faith is not necessarily proven by the fact, without more, that a defendant had failed to investigate the facts he published.\(^{39}\)

Five years later, in *Herbert v. Lando*,\(^{40}\) the Supreme Court allowed a plaintiff in a defamation action to inquire into a defendant television station and magazine's editorial process in order to reveal their state of mind at the time.\(^{41}\) The Court said that *New York Times* required a plaintiff to focus on evidence of the defendant's conduct and state of mind to enable him to prove knowing or reckless falsehood.\(^{42}\) Because malice requires a showing that the defendant acted with an "improper motive," inquiry must be made into "the intent or purpose with which the publication was made, the belief of the defendant in the truth of his statement, or upon the ill will" the defendant bears toward the plaintiff.\(^{43}\) Hence, any direct or indirect evidence regarding the defendant's state of mind was deemed admissible to show malice.\(^{44}\)

The foregoing principles regarding proof of actual malice were applied by the Ohio Supreme Court in *Dupler v. Mansfield Journal*.\(^{45}\) The court then added that actual malice is to be determined at the time the defendant made the publication.\(^{46}\)

As mentioned above, the Court in *New York Times* did not determine "how far down into the ranks of government employees" the classification of "public official" would extend.\(^{47}\) However, it has provided some guidance in subsequent decisions. In *Rosenblatt v. Baer*,\(^{48}\) the Court said that standards set by state law could not be used in this determination.\(^{49}\) The Court said public

---

41. Id.
42. Id. at 160.
43. Id. at 164.
44. Id. at 165. Therein, the Court stated the rules regarding evidence of editorial processes are "applicable to the press and to other defendants alike."
46. *Dupler*, 64 Ohio St. 2d at 124, 413 N.E.2d at 1193 (citing Glover v. Herald Co., 549 S.W.2d 858, 861 (Mo. 1977)).
49. Id. at 84. The Court said the state characterizations were made for local administrative purposes and not for the "purposes of a national constitutional protection."
officials are “those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” 50 Persons who hold governmental positions of “such apparent importance” to cause the public to be interested in their qualifications and performance (beyond the public’s general interest in all governmental employees), the Court explained, were to be considered public officials subject to the standards of New York Times. 51

In Curtis Publishing Co. v. Butts,52 the Court recognized that a person who is a “public figure” even though not a “public official,” can also only recover for defamation “on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers” (i.e., actual malice).53 A “public figure” was described by the Curtis Court as one who “commanded sufficient continuing public interest” by virtue of his status alone or one who had purposefully inserted himself into the “vortex” of a controversy. 54 Thereafter, the actual malice standard was extended to private individuals involved in events of public interest, reducing the protection available to them. 55

Seven years later in Gertz,56 the Supreme Court distinguished between “public officials” and “public figures” for defamation purposes. 57 “Public figures” were defined as persons who had “assumed roles of special prominence in the affairs of society,” who “occup[ied] positions of ... persuasive power and influence,” or most commonly, who “[had] thrust themselves to the forefront of particular public controversies.” 58 The Court said the communications media had the right to act as though both public officials

50. Id. at 85.
51. Id. at 86.
53. Id. at 155.
54. Id. Chief Justice Warren believed there should be no separation for first amendment purposes between a “public official” and a “public figure,” and would apply the New York Times actual malice standard to both. Id. at 163-164. (Warren, C.J., concurring in result). See also, Associated Press v. Walker, 388 U.S. 130 (1967).
57. Id. at 345-347.
58. Id. at 345.
and public figures had "voluntarily exposed themselves to increased risk of injury from defamatory falsehood."

The *Gertz* Court, however, cautioned that a person is not a "public figure" merely because he was involved in community and professional activities. Such a definition would require every citizen involved in civic affairs, as a volunteer or otherwise, to prove actual malice in order to recover for any defamation against him. Instead, the determination was to be made by examining the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

Thus, whereas the 1964 *New York Times* decision had addressed only "public officials," that is to say, only government officials, and although *Curtis* had imposed a similar standard on "public figures," the *Gertz* Court emphasized that the two categories required different analysis. As a consequence, *Gertz* was much criticized on the basis that the Supreme Court had attempted in the case to distinguish "public officials" from "public figures" without first furnishing a clear-cut rule for determining who was a public official. What for example, is a crooked local police commissioner? Is he "important" enough as a public official? Is he notorious enough to be a public figure? Is he both or is he neither?

Moreover, further confusion in the application of defamation law has been caused by a Court-imposed fact/opinion inquiry. In *Gertz*, the Court indicated in dicta that only false statements of fact are actionable because opinions "depend for [their] correction not on the conscience of judges and juries but on the competition of other ideas ... there is no such thing as a false idea." As a

---

59. *Id.*


64. *Gertz*, 418 U.S. at 339-340. The Court stated:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statement of fact. *Id.* at 339-340 (footnote omitted).
result, if a statement is merely "opinion," it is protected by the common law privilege of "fair comment."65 Interestingly, since Gertz, federal courts of appeals and several state courts have interpreted this dicta to mean that opinion of any kind is granted absolute constitutional protection.66 The Supreme Court has cited this Gertz dictum with approval, as recently as 198467 but it has not to this day provided a test by which lower courts could make the fact/opinion distinction. The lower courts have been left to apply their own analysis and standards.68

Some of the lower courts have resolved the question by inquiring whether the statement at issue expressly includes factual content, as in the situation where the defamer charges another with a crime,69 or whether, although not expressly stated, the "specific linguistic context and its broader social setting" clearly indicates that a fact and not merely an opinion is being asserted.70 Other courts have concentrated on whether statements are verifiable,71 or else they have openly treated the fact/opinion distinction as a judgment call.72 Still another approach has been to employ a variety of factors to assess the "totality of the circumstances" in which allegedly defamatory statements appear.73 Regardless of what analysis they employ, however, all courts seem to agree that the fact/opinion distinction is a difficult one.74

III. THE CASE

On February 9, 1974, an interscholastic wrestling match was hosted by Maple Heights High School with its rival Mentor High

---

65. See Structuring Defamation Law, supra note 3, at 917-918.
66. See, e.g., Orr v. Argus Press Co., 586 F.2d 1108 (6th Cir. 1978); Structuring Defamation Law, supra note 3, at n.9-n.10.
68. See Structuring Defamation Law, supra note 3, at 918.
70. Letter Carriers v. Austin, 418 U.S. 264 (1974) (statement that plaintiff is a "scab").
74. Ollman, 750 F.2d at 978.
School. After officials made a controversial call against the home team, a fight broke out that ultimately involved both team members and spectators. Several persons were injured. Present at the match were H. Donald Scott, Superintendent of Maple Heights Public Schools, and Michael Milkovich, Sr., head wrestling coach of the home team.75

As a result of the altercation, the Ohio High School Athletic Association (OHSAA) held a hearing on February 28, 1974, at which both Scott and Milkovich testified.76 OHSAA decided to place the Maple Heights team on a one-year probation, making it ineligible for the 1975 state tournament.77

Shortly thereafter, several home team wrestlers and their parents filed an action for a restraining order in the Franklin County Court of Common Pleas alleging a denial of due process. Scott and Milkovich also testified in that proceeding, as well as Dr. Harold A. Meyer, the Commissioner of OHSAA. The court reversed the OHSAA ruling as a denial of due process and ordered removal of the suspension.78

The next day, J. Theodore Diadiun, a sports writer for the News-Herald, wrote and published a column entitled Maple beat the law with the “Big Lie.” The words “TD Says” appeared directly below the title. The article appeared on the sports page of the News-Herald and was continued on a carryover page with the caption Diadiun Says Maple Told a Lie. Diadiun stated in the article that he had been present at both the wrestling match and the OHSAA hearing, but not at the Franklin County court proceedings. He explained, however, that he had discussed the court proceedings with Dr. Meyer (the OHSAA Commissioner). The gist of his article was that Superintendent Scott and Coach Milkovich had misrepresented the events of February 9, 1974 to the Franklin County Court in an attempt to shift the blame for the fight to Mentor High School.79

As a result, Scott and Milkovich each filed suit for libel against the News-Herald, its parent company, the Lorain County Journal, and Diadiun.80 The allegedly defamatory passages asserted:

---

75. Scott, 25 Ohio St. 3d 243, 496 N.E.2d 700.
76. Id.
77. Id.
78. Id.
79. Id. at 243-244, 496 N.E.2d at 700-701.
80. Id. at 244, 496 N.E.2d at 701.
Maple beat the law with the "big lie," ...

*** [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

A lesson which, sadly, in view of the events of the past year, it is well they learned early.

IT IS SIMPLY THIS: IF YOU GET IN A JAM, LIE YOUR WAY OUT.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich and former superintendent of schools H. Donald Scott.

***

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not."81

The suits by the coach and the superintendent were tried separately. The trial court entered a directed verdict against Milkovich, while Scott's suit was dismissed by summary judgment. In the Scott case, the trial court reasoned that the Superintendent was a "public official" and had failed to prove actual malice as required by New York Times and its progeny.82 The court of appeals affirmed.83

In coach Milkovich's case, however, the court of appeals held that the directed verdict had constituted error and remanded,

81. Id. at 251, 496 N.E.2d at 706-707.
82. Id. at 244, 496 N.E.2d at 701. The court in Scott found Scott's retirement status at the time of the OHSAA hearing irrelevant since the allegedly defamatory remarks were made during the course of his employment as Superintendent. Id. at 247 n.2, 496 N.E.2d at 703. Further, the court stated that the Ohio Constitution did not provide for the diminishment in status of a public official or public figure merely because they subsequently retire. Id.
83. Id. at 244, 496 N.E.2d at 701.
on the ground that the jury could have found actual malice.\textsuperscript{84} The Ohio Supreme Court overruled the News-Herald's motion to certify the record\textsuperscript{85} and the United States Supreme Court denied certiorari over Justice Brennan's published dissent.\textsuperscript{86} On remand, the trial court granted summary judgment for the defendants and this time the court of appeals affirmed.\textsuperscript{87} On appeal to the Ohio Supreme Court in 1984, however, the court of appeals was reversed. The court held, \textit{inter alia}, that Milkovich was neither a public official nor a public figure\textsuperscript{88} and that the newspaper article had contained fact rather than constitutionally protected opinion.\textsuperscript{89} Accordingly, it concluded, the coach was not required to prove that the defamation of him had been published with actual malice.

On August 6, 1986, the Ohio Supreme Court of \textit{Scott}, affirmed the court of appeals decision in \textit{Scott}, but it reversed its own previous decision in \textit{Milkovich}.\textsuperscript{90} Each of the court's seven justices wrote an opinion.\textsuperscript{91}

Justice Locher, writing for the majority, stated that the case required the court to reformulate the test and standard for determining whether published comment is defamatory. Finding

\begin{flushleft}
\textsuperscript{86} Lorain Journal Co. v. Milkovich, 449 U.S. 966 (1980) (Brennan, J., dissenting). Justice Brennan's dissent was based upon his finding that the case raised an important question regarding the trial court's ability to grant summary judgments, directed verdicts, or judgments notwithstanding the verdict in favor of media defendants. Justice Brennan found it apparent that the appellate court had reversed the trial court because it found Diadiun's article conflicted with the judicial determination of the common pleas court. However, Brennan noted, no factual findings were made by the common pleas court as to the "truth" of what happened at the match.

Justice Brennan found a first amendment violation in the Ohio appellate court's holding. "It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations." \textit{Id.} at 969. Brennan would have granted certiorari since he believed the appellate court's interpretation would chill the freedom of Ohio newspapers to publish their views, an important constitutional law question. \textit{Id.} at 970.

\textsuperscript{87} Milkovich, 15 Ohio St. 3d at 293, 473 N.E.2d at 1191-1192 (1984). The trial court found the alleged libel was protected as opinion. The court of appeals affirmed, as to opinion and found Milkovich was a public figure and had failed to prove actual malice. \textit{Id.}

\textsuperscript{88} \textit{Id.} at 297, 473 N.E.2d at 1195.
\textsuperscript{89} \textit{Id.} at 299, 473 N.E.2d at 1196-97.
\textsuperscript{90} \textit{Scott}, 25 Ohio St. 3d at 243, 496 N.E.2d at 699.
\textsuperscript{91} \textit{Id.} It has been commented that the separate opinions "openly display the depth of personal hostility" on the Ohio Supreme Court. Herzer, \textit{New Ruling Further Protects Freedom Of The Press}, Ohio Lawyer 13 (S. McDonald ed. 1986).\end{flushleft}
that sports-writer Diadiun's comments were constitutionally protected opinion under Section II, Article I of the Ohio Constitution, the majority reversed its previous characterization of the article as a defamatory statement of fact. Accordingly, the court concluded that neither coach Milkovich nor the Superintendent had any constitutional basis for objecting to Diadiun's article.

The court nevertheless proceeded to discuss Scott's other contentions in detail. Scott's first proposition was that the superintendent of a school is not a public official for defamation purposes where he is defamed in an article unrelated to his official duties and where his position does not have or appear to involve any responsibility for government affairs. The court conceded that it is sometimes difficult to determine whether or not an individual is a public official under the *New York Times* rule. However, it applied the Supreme Court guidelines set forth in *Rosenblatt v. Baer* and concluded that the Superintendent's responsibilities qualified him as a public official. Accordingly, the court held that he was required to meet the *New York Times* actual malice standards. Under the *Rosenblatt* test, the position of superintendent was clearly one of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it...."

In arriving at this conclusion the court referred to an Ohio statute which set out the duties of a public school superintendent. Because the statute vested a superintendent with "substantial responsibilities" in the school system and since at least the local public had a "substantial interest" in a superintendent's qualifications and performance, the court found additional authority for deeming Scott a public official.

The court also found a basis for its characterization of Scott as a public official from the fact that the *News-Herald* was a local paper reporting local news. The court reasoned that controversies such as the one before it were major news and of great

92. Id. at 244, 496 N.E.2d at 701.
93. Id. at 245, 496 N.E.2d at 702.
94. Id. at 245-246, 496 N.E.2d at 702.
95. Id. at 246-248, 496 N.E.2d at 702-704.
96. Id. at 248, 496 N.E.2d at 702.
97. Id. at 246, 496 N.E.2d at 702-703.
98. Id.
99. Id. at 246, 496 N.E.2d at 703.
public interest in the local news arena. Scott was therefore, not just a "small fish in a big pond." The importance of his position, the court concluded, had to be assessed in the context of the newspaper's sphere of influence.\(^{100}\)

The court next addressed Scott's argument that the defamation of him did not relate to his official conduct as superintendent.\(^{101}\) However, the court rejected this argument on the basis that it was contrary to the very accusations Diadiun had included in the article.\(^{102}\) Diadiun's article had expressed the view that whenever a person took a job in a school, "whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of an educator."\(^{103}\) Because Diadiun claimed to have based his opinions upon Scott's conduct at the wrestling match and at the OHSAA hearing (and could reasonably connect that conduct to the court proceedings), the court found that Diadiun's commentary had been directed at events in which Scott was plainly involved in his official capacity.\(^{104}\)

Drawing from Justice Brennan's dissent to the United States Supreme Court's denial of certiorari in *Lorain Journal Co. v. Milkovich*,\(^{105}\) the court reasoned that since public school teachers play a substantial role in shaping the community and since any fight between two rival schools clearly affects that community, educators are clearly public officials\(^{106}\) to the extent they are involved in such an event. Hence, upon reconsideration, the court overruled the restrictive definition of a public official, it had applied in *Miklovich* and held that a local public school superintendent is, for defamation law purposes, a public official.\(^{107}\)

The court also addressed the burden of proof which must be met in such an instance.\(^{108}\) It reaffirmed the *New York Times* "actual malice" standard, that had been followed by the Ohio Supreme Court in *Dupler v. Mansfield Journal*,\(^{109}\) as the control-

---

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
106. *Scott*, 25 Ohio St. 3d at 247, 496 N.E.2d at 703.
107. *Id.* at 247-248, 496 N.E.2d at 704.
108. *Id.* at 248-249, 496 N.E.2d at 704.
ling standard in public official defamation cases, and emphasized
that actual malice was required to be proven by clear and
convincing evidence.\textsuperscript{110}

Scott had argued that he was a private citizen and not a public
official. Therefore, he had contended that he was only required
to prove ordinary negligence under the test set out in the Ohio
Supreme Court decision in \textit{Embers Supper Club, Inc. v. Scripps-
Howard Broadcasting Co.}\textsuperscript{111} However, since the court had already
resolved Scott's status, that argument was rejected.\textsuperscript{112} Accord-
ingly, the court concluded that, under the actual malice standard,
Scott had failed to prove "clearly and convincingly" that false
statements had been made "with a high degree of awareness of
probable falsity."\textsuperscript{113}

The court turned next to Scott's assertion that sports-writer
Diadiun's statements could not be constitutionally protected opin-
ion because they had asserted a fact — the commission of the
crime of perjury.\textsuperscript{114} Scott had further argued that the court was
bound under the doctrine of \textit{stare decisis} to follow its prior
determination in \textit{Milkovich} that the statements made by Diadiun
had been fact, rather than opinion.\textsuperscript{115}

The court reasoned, however, that the doctrine of \textit{stare decisis}
is important only insofar as it establishes principles that can be
relied upon to guide one's future conduct.\textsuperscript{116} The court noted that
the "underlying rationale for \textit{stare decisis} is ... constancy and
consistency in law."\textsuperscript{117} It found application of the doctrine to its
\textit{Milkovich} decision inappropriate since that decision had offered

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 248.
\item \textsuperscript{111} \textit{Scott}, 25 Ohio St. 3d at 248, 496 N.E.2d at 704; \textit{Embers Supper Club, Inc. v. Scripps-
Howard Broadcasting Co.}, 9 Ohio St. 3d 22, 457 N.E.2d 1164 (1984), \textit{cert. denied},
\item \textsuperscript{112} \textit{Scott}, 25 Ohio St. 3d at 248, 496 N.E.2d at 704-705 (citing \textit{New York Times Co.},
376 U.S. at 285-286 and \textit{Gertz}, 418 U.S. at 342). The court added the validity of \textit{Embers}
was not an issue in the case and that that issue "must await another day." \textit{Id.}
\item \textsuperscript{113} \textit{Scott}, 25 Ohio St. 3d at 248-249, 496 N.E.2d at 705.
\item \textsuperscript{114} \textit{Id.} at 249, 496 N.E.2d at 705. The court said the evidence showed that Diadiun
based his position on his observations and discussions and believed he was correct.
\item \textsuperscript{115} \textit{Id.}(citing \textit{Leavitt v. Morrow}, 6 Ohio St. 71, 78 (1856), the court quoted, "... A legal
principle [precedent], to be well settled, must be founded on sound reason, and tend
to the purposes of justice.... Otherwise, it could never be said that the law is the \textit{perfection
of reason}, and that it is the \textit{reason and justice} of the law which give to it its \textit{vitality}....").
(Emphasis original).
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.} at 249, 496 N.E.2d at 705.
\end{itemize}
no test, analysis or rule for determining whether a statement was fact or opinion.\footnote{118} The court suggested that the result would be utter confusion if it were to be insisted, under \textit{stare decisis} that \textit{Milkovich} be allowed to remain as controlling precedent in the area of defamation law.\footnote{119} Consequently, it looked elsewhere for a test or analysis to be applied.\footnote{120}

In its search for an appropriate precedent, the court reviewed the test used by the Ninth Circuit,\footnote{121} the view of the Restatement Second of Torts,\footnote{122} and others based on purely subjective criteria. It ultimately settled upon a “totality of the circumstances” test.\footnote{123} The court explained that its newly adopted test was only “a compass to show general direction and not a map to set rigid boundaries.”\footnote{124} The totality of the circumstances test involves at least four factors: 1) the specific language used in the allegedly defamatory statement; 2) whether the statement was “verifiable;” 3) the internal context of the statement itself; and 4) the “broader context” in which the statement appeared.\footnote{125}

In applying the first factor, the court looked at the common meaning of the words used in Diadiun’s article.\footnote{126} While acknowledging that certain allegations of criminal conduct were actionable, the court noted that it was not always easy to determine whether the words used “could reasonably be understood as imputing specific criminal or other wrongful acts.”\footnote{127} While any express statement that Scott had committed perjury was absent

\footnotesize{\begin{itemize}
\item \footnote{118} Id.
\item \footnote{119} Id.
\item \footnote{120} Id. at 250, 496 N.E.2d at 705-706.
\item \footnote{121} Id. at 250, 496 N.E.2d at 706. The Ninth Circuit uses a three-part test which would find as opinion statements which “... convey pertinent information to the public about a matter of public interest, ... are made in the course of public debate or similar circumstances, and ... are phrased in cautionary language.” (citing Murray v. Bailey, 613 F. Supp. 1276, 1282 (N.D. Cal. 1985); Information Control Corp. v. Genesis One Computer Corp. 611 F.2d 781 (9th Cir. 1980).
\item \footnote{122} Scott, Ohio St. 3d at 250, 496 N.E.2d at 706. \textit{RESTATEMENT (SECOND) OF TORTS §} 566 (1977). Justice Wright, in his concurring opinion, expressed the view that the Restatement 2d approach used a difficult standard to evaluate statements — reader reaction. Further, it requires a court to analyze the difference between a “pure” and “mixed” opinion. \textit{Scott}, 25 Ohio St. 3d at 262, 496 N.E.2d at 715 (Wright, J., concurring).
\item \footnote{123} Id. at 250, 496 N.E.2d at 706.
\item \footnote{124} Id.
\item \footnote{125} Id. \textit{See generally}, Ollman v. Evans, 750 F.2d 970, 979 (D.C. 1984), \textit{cert. denied}, 471 U.S. 1127 (1985).
\item \footnote{126} Scott, 25 Ohio St. 3d at 250, 496 N.E.2d at 706.
\item \footnote{127} Id. (citing Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980)).
\end{itemize}}
from the article, the court said that the "clear impact" of the statements was that Scott had lied under oath and, therefore, the statements were actionable. However, there were three other factors to consider.

As to the second factor, whether the statement was verifiable, the court again resolved the question in Scott's favor. Relying on the United States Supreme Court's decision in *Olman v. Evans*, the court said that if the statement could not be verified in some plausible manner, then readers would be less apt to believe the statement was based on fact. In contrast, in the present action, Diadiun's statements could be verified in a perjury action against Scott. In this situation hearing transcripts and testimony of witnesses would constitute plausible verification. Accordingly, the court concluded that Diadiun's statements had been as damaging as an assertion of fact.

The court next looked at the third factor — the internal context of the statement itself. It held that merely prefixing defamatory statements with terms such as "I think" or "In my opinion" did not automatically convert them into opinion. Such qualifying phrases would, however, said the court, be given weight in characterizing the statement in question. In the instant case, Diadiun's article had been captioned "TD Says" and the continuation page had read: "Diadiun says Maple told a lie." This was sufficient, the court reasoned, to cause any reader to believe that the article contained only Diadiun's opinion. In short, despite its earlier disclaimer, the court appeared to allow the presence of qualifying words to determine the question.

The court also found that Diadiun had clearly indicated the subjective basis of his article in other ways. First, he had expressed his belief that persons in authoritative positions, such

---

128. *Scott*, 25 Ohio St. 3d at 251, 496 N.E.2d at 707.
129. *Id.* at 251-252, 496 N.E.2d at 707.
131. *Scott*, 25 Ohio St. 3d at 252, 496 N.E.2d at 707.
132. *Id.*
133. *Id.*
134. *Id.* (citing Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980)).
135. *Scott*, 25 Ohio St. 3d at 252, 496 N.E.2d at 707. The court then criticised the majority opinion in *Milkovich* for having found there was nothing in the article to caution a reader that the statements were merely opinion.
136. *Id.* at 253, 496 N.E.2d at 708.
as Scott and Milkovich, had a responsibility to be truthful under oath.\textsuperscript{137} As a result, the court said that the issue was not that Scott had lied at a legal hearing.\textsuperscript{138} Rather, based on his observations, Diadiun felt that if Scott and Milkovich did not fully admit culpability, they had lied.\textsuperscript{139}

The court noted that Diadiun's quoting of Dr. Meyer, the OHSAA Commissioner concerning the character of Scott and Milkovich's actual testimony at trial, were "troubling additions" to the article since there was some question of whether Dr. Meyer had made the statements.\textsuperscript{140} However, the court resolved this in favor of Diadiun since he had based the article as a whole upon the two events he attended and he had made clear to readers that he had not attended the legal hearing.\textsuperscript{141} Further, the court noted that Diadiun had informed his readers that the proceedings had addressed procedural due process questions—questions they must have realized that Diadiun, as a sportswriter, was not competent to comment upon authoritatively.\textsuperscript{142} Although acknowledging that the average reader would not have known from Diadiun's brief reference that the hearing related only to the due process questions raised in the OSHAA hearing rather than any factual issues, the court found the "caveat" meaningful.\textsuperscript{143}

The court said the ultimate question of whether a lie was told was a subjective one; an average reader would be "hard pressed" to interpret Diadiun's article as an "impartial reporting of perjury."\textsuperscript{144} The article, in the court's view, was permeated with Diadiun's expressions of bias and partiality and left to the readers the factual question of whether Scott had committed perjury.\textsuperscript{145}

\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. Dr. Harold Meyer, Commissioner of OHSAA, was quoted as saying, "I can say that some of the stories told to the judge sounded pretty darned unfamiliar"...."It certainly sounded different from what they told us."
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. The court found the strongest statement in the article to be "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." (emphasis original).
Addressing the fourth factor of its totality of the circumstances test, the court examined the "broader context" in which the remarks had appeared. In doing so, it evaluated Diadiun's article by its type, its placement in the paper, and according to the way in which those factors might influence a reader's conclusion that it stated fact or opinion.

First, the court found it important that Diadiun's article had appeared on the sports page. Since the sports page was, as described by the court, the "traditional haven for cajoling, invective, and hyperbole," readers would be less inclined to believe that the contents of an article found there would be factual. The court admitted that there may be certain persons whose only contact with a newspaper is the sports page, and who might believe that all they read there was fact. However, on balance, even these, said the court, would certainly not expect a sports-writer to be an authority on due process or other legal issues.

Finally, the court, citing Gertz, disposed of the allegation that Scott and Milkovich had lied based upon the questionable quote from Meyer. Even this, the court noted, "would appear" to be protected since the law protects "some falsehood in order to protect speech that matters." Thus, the court, after applying and weighing all four factors of its newly adopted totality of the circumstances test, concluded that Diadiun's article was constitutionally protected as opinion.

Justices Holmes, Douglas and Wright each wrote a concurring opinion. Justice Holmes' brief opinion merely stated his belief that the overruling of Milkovich was in accord with the doctrine of stare decisis since that decision had clearly been wrong. Justice Douglas' concurrence expressed his wholehearted agreement that Diadiun's statements were opinion and that Milkovich was correctly overruled. He then went further and reviewed
the precedents addressing first amendment protection for criticism of public officials and the standards to be applied (i.e., actual malice). Although the majority had premised its decision on its threshold determination that Diadiun's statements had been opinion and not assertions of fact, Douglas pointed out that the decision would have been the same even if the article had been determined to have made factual assertions since Scott had failed to prove actual malice as required by *New York Times*.

In dicta, Justice Douglas proposed the adoption of a new standard for determining liability for defamation of private persons. Douglas would overrule the court's decision in *Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co.* that imposed an ordinary negligence standard, substituting and intermediate standard somewhere between actual malice and negligence. Douglas' proposed standard would require some showing of recklessness by the defendant or, as an alternative, a showing of negligence by a "greater quantum of proof" (i.e., gross negligence).

Justice Wright's concurrence indicated that he would go further than the court and would allow the media absolute protection whenever a defamation could be characterized as opinion. In Justice Wright's view, such a "bright-line" rule would provide more predictability and fairness to what he considered the complicated and confused state of defamation law.

Justice Wright also stated that the court's overruling of its *Milkovich* decision did not violate the doctrine of *stare decisis* since it had been "plainly mistaken and destructive of a constitutional imperative such as free speech."
Chief Justice Celebrezze concurred in the court's holding that Scott was a public official and that he had failed to prove that the article was published with actual malice.\textsuperscript{165} Hence, he concurred that the \textit{News-Herald} could not have been found liable for any defamation of Scott.\textsuperscript{166} In Justice Celebrezze's view, however, the court should have stopped with that determination rather than proceeding to needlessly overrule \textit{Milkovich} and to adopt an unworkable test.\textsuperscript{167}

Justice Celebrezze criticized the "verification" element of the majority's test on the ground that it contemplated that Scott might have to initiate a criminal prosecution for perjury against himself in order to show that Diadiun's statements had been "verifiable."\textsuperscript{168} Further, Celebrezze found it anomalous for the majority to have contended first that conditioning words such as "I think" or "in my opinion" were not dispositive of the fact/opinion question, yet later conclude that the article was opinion because it was captioned "TD Says."\textsuperscript{169}

With respect to the fourth factor of the totality of the circumstances test, the broader context in which the statement appeared, Justice Celebrezze found the majority's assertion that serious and factually based journalism could never be found on the sports page\textsuperscript{170} to be "inaccurate" and "condescending." He asked the majority whether it would follow that the statements were "probably" fact because they appeared on the front page of the newspaper.\textsuperscript{171} He illustrated his point with references to articles in newspapers dealing with recent drug proceedings involving athletes to show that sportswriters could be as informed about the details of legal proceedings, including procedural due process requirements, as other journalists.\textsuperscript{172}

Justice Celebrezze remained convinced that the court's initial determination in \textit{Milkovich} had been correct and that Diadiun's article had contained factual assertions, rather than merely op-

\textsuperscript{165} Id. at 263, 496 N.E.2d at 716. (Celebrezze, C.J., concurring in judgment only, and dissenting in part).
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 264, 496 N.E.2d at 716.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
nions. In his view, the article had contained some opinion but also factual assertions that Scott had committed perjury. However, because he believed that Diadiun’s statements concerning Scott and Milkovich’s alleged misrepresentations in court met the “verifiable” test, and that there was not other material in the article to caution readers that these statements were merely opinion, Justice Celebrezze would have found them to constitute assertions of fact. Since his own application of the majority’s test to the facts of the instant case had resulted in a finding at odds with the court’s, he was concerned that it was too elastic and when applied to other cases would result in statements being characterized as fact or opinion merely on the basis of a particular judge’s preference.

Finally, Justice Celebrezze questioned the majority’s unqualified grant of constitutional protection to the statements of opinion that included accusations of criminal activity. He reviewed precedent to show that accusations of crime on the part of a public official are not automatically protected, but receive protection only if actual malice is not shown by the plaintiff. Because he agreed that Diadiun had not proved actual malice, however, Justice Celebrezze concurred in the court’s judgment while dissenting in its finding of opinion.

Justice Sweeney also concurred with the majority that Scott was a public official and that actual malice had not been shown. He, like Justice Celebrezze believed, however, that the article had contained assertions of fact rather than mere opinion and he would not, therefore, have overruled Milkovich. Justice Sweeney criticized the totality of the circumstances test for basically the same reasons as the chief justice, finding it too unreliable and arbitrary in its application.

173. Id. at 264, 496 N.E.2d at 717.
174. Id.
175. Id. at 264-265, 496 N.E.2d at 719-720.
176. Id. at 265 n.8, 496 N.E.2d at 717.
177. Id. at 265, 496 N.E.2d at 717.
179. Scott, 25 Ohio St. 3d at 266, 496 N.E.2d at 718 (Celebrezze, C.J., concurring in judgment only, and dissenting in part).
180. Id. (Sweeney, J., concurring in judgment only, and dissenting in part).
181. Id.
182. Id. at 267, 496 N.E.2d at 719.
He was critical of Justice Wright's suggestion that an article be characterized as opinion solely on the basis of its "labels." He conceded that while such a rule would add consistency to the law of defamation, it was inappropriate to characterize an article on the basis of its caption rather than on its content.

Justice Sweeney found it "amusing" that the other justices felt they had to explain why the doctrine of stare decisis should not be applied to Milkovich. Further, he felt that some of the concurring majority had engaged in a "pompous discourse concerning the importance of freedom of the press" and had dispensed "platitudes" on the subject. While he too appreciated the importance of freedom of the press, he observed, the majority's view allowed the press to damage reputation without any constitutional checks at all.

Justice Clifford Brown also concurred with the court in holding that Scott was a public official and that he had not proven actual malice. Like the other dissenters, he felt that Milkovich had been wrongly overruled by an "overreaching" and "gratuitous" court. As an example of this he pointed to Justice Douglas' questioning of the continuing validity of the Embers' private person standard, an exercise he contended had been no more than an attempt to "curry further adulation by the news media — which [he bitingly asserted] it most assuredly will."

Justice Brown felt that the majority had done violence to the doctrine of stare decisis by means of its "distorted" reasoning that the doctrine did not apply to Milkovich because it failed to provide a workable test for discerning fact from opinion. He believed that the majority, in adopting this rule, had discounted the fact that the Milkovich court had declined to adopt a per se rule for fact/opinion determinations. Further, he pointed to the

183. Id. at 267, 496 N.E.2d at 718.
184. Id.
185. Id. at 268, 496 N.E.2d at 719.
186. Id.
187. Id.
188. Id. at 269-270, 496 N.E.2d at 721 (Brown, J., concurring in part and dissenting in part).
189. Id. at 270, 496 N.E.2d at 721.
190. Id. at n.9.
191. Id. at 270, 496 N.E.2d at 721-722.
192. Id.; Milkovich, 15 Ohio St. 3d at 298-299, 473 N.E.2d at 721.
two-part analysis employed by the *Milkovich* court, to show that the court had, indeed, supplied a precedential test, i.e., 1) that the article had not cautioned the readers that it was opinion and, 2) that the plain import of the language was that Scott had committed perjury.

Justice Brown, like the chief justice, was also persuaded that the proper application of the majority’s test should also result in a characterization of the article as one asserting statements of fact. First, he pointed out, the majority itself had conceded that the specific language used amounted to a factual assertion that superintendent Scott had committed perjury — a fact Justice Brown contended the majority simply and inexplicably discarded as unimportant. Secondly, he pointed out that the majority had also conceded that Diadiun’s statements were capable of verification, a fact to which it similarly relegated lesser weight. In his view, the majority’s attempt to determine the fact/opinion question on the basis of arbitrarily assigning more weight to the third and fourth factors only highlighted how subjective it actually was.

For example, with regard to the court’s application of its third factor, he found it plain that the caption “TD Says” merely identified the writer and did nothing to alert any reader to the intended subjective character of the article. He concluded that the test was so “malleable and spongy,” it could be applied to produce any interpretation desired. He would have simply

---

193. *Scott*, 25 Ohio St. 3d at 270, 496 N.E.2d at 721 (Brown, J., concurring in part and dissenting in part). Justice Brown reviewed the cases cited by the majority as precedent for its totality of the circumstances test, and concluded that the cases gave no support whatsoever for the new test. *Id.* at 271 n.11, 496 N.E.2d at 722.

194. *Milkovich*, 15 Ohio St. 3d at 299, 496 N.E.2d at 721.


196. *Id.*

197. *Id.*

198. *Id.* at 272, 496 N.E.2d at 723.

199. *Id.* at 272-273, 496 N.E.2d at 723. Brown felt the article contained both factual assertion and opinion — the facts being used to bolster the opinion.

200. *Id.* at 273, 496 N.E.2d at 723. Brown felt the article contained both factual assertion and opinion — the facts being used to bolster the opinion.

201. *Id.*
adhered to the court’s logic in Milkovich and foregone the “new” test. 202

As to the fourth factor, Justice Brown criticized it as adding nothing to the test and commented that it only “submerged further into the morass of Serbonian Bog those seeking to distinguish a statement of fact from one of opinion in any future case.” 203 He speculated that it might cause newspapers to position controversial material on their sportspages in order to avoid liability for defamation. 204

Justice Brown severely criticized Justice Holmes’ refusal to apply stare decisis presenting a “double-standard of justice” through “judicial hypocrisy.” 205 Citing prior decisions of the court where Holmes often “pontificated” the “sanctity of stare decisis,” 206 Brown opined that the reason Holmes had abandoned the doctrine in the present case was related to the fact that the court’s composition had changed and that the newly elected Justices Douglas and Wright were disposed to follow their political brethren Locher and Holmes in “smashing to smithereens” the precedent of the ideologically different earlier court. 207 He caustically charged that the majority had overruled Milkovich simply “to curry favor with the media at large in an election year, favor which is particularly beneficial to one of its majority.” 208

Summarizing, Justice Brown characterized the majority’s “so-called test” as one that simply established that in all future libel cases involving the fact/opinion issue, the trial judge need simply direct a defense verdict or routinely grant summary judgment

202. Id.
203. Id.
204. Id.
205. Id. Justice Brown said Justice Holmes would retreat from following stare decisis only in cases where he was in a majority “which is bound and determined to uphold the unabashed trammeling of the rights of individuals by big businesses such as the newspaper herein.” Id. at n.13.
207. Scott, 25 Ohio St. 3d at 274, 496 N.E.2d at 724.
208. Id. at 275, 496 N.E.2d at 725.
to the defense.\textsuperscript{209} Furthermore, he charged, in the event a case ever went to the jury, it would be impossible to give them instructions premised upon the majority's test that would not amount to pure nonsense.\textsuperscript{210} The four-part test, he concluded, made "every statement of fact a statement of opinion in every case" and was clearly a violation of both the United States and Ohio Constitutions.\textsuperscript{211}

\textbf{IV. CONCLUSION}

In \textit{Scott},\textsuperscript{212} the Ohio Supreme Court held that the superintendent of a local public school system is a public official within the meaning of \textit{New York Times}. The court relied in part on guidelines set forth in \textit{Rosenblatt v. Baer},\textsuperscript{213} as interpreted by reference to the description of the statutory duties of a superintendent under Ohio law.\textsuperscript{214} In this regard, \textit{Rosenblatt} had specifically cautioned that state standards were not to be used to determine whether an individual is a public official.\textsuperscript{215} This anomaly aside, however, the court's determination seems to be supported by its finding consistent with \textit{Rosenblatt}, that Scott held a position in which the public had more than a general interest.\textsuperscript{216}

The main dispute between the seven justices, who were split 4-3 on the question, was whether sportswriter Diadiun's article contained assertions of fact or merely constitutionally protected opinion. As the dissenters pointed out, it seems totally unnecessary for the court to have considered the question at all since it had already disposed of Scott's claim when it unanimously agreed that he qualified as a public official — and when it unanimously agreed that he had not proven actual malice under the \textit{New York Times} test.\textsuperscript{217}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id. at 276}, 496 N.E.2d at 725.
\item \textsuperscript{211} \textit{Id.} (citing \textit{Ohio Const.} art I, § 16).
\item \textsuperscript{212} 25 Ohio St. 3d 243, 496 N.E.2d 699.
\item \textsuperscript{213} 383 U.S. 75 (1966).
\item \textsuperscript{214} \textit{Scott}, 25 Ohio St. 3d at 247, 496 N.E. 2d at 702-703.
\item \textsuperscript{215} \textit{Rosenblatt}, 383 U.S. at 84.
\item \textsuperscript{216} \textit{Scott}, 25 Ohio St. 3d at 245-246, 496 N.E.2d at 702.
\item \textsuperscript{217} \textit{Id. at 263}, 496 N.E.2d at 717-718 (Celebrezze, C.J., concurring in judgment only, and dissenting in part); \textit{Id. at 266}, 496 N.E.2d at 721 (Sweeney, J., concurring in judgment only, and dissenting in part); and \textit{Id. at 270}, 496 N.E.2d at 721. (Brown, J., concurring in part and dissenting in part).
\end{itemize}
\end{footnotesize}
However, since only two years earlier this same court, albeit of different composition and ideological persuasion at the time, had in *Milkovich*\(^\text{218}\) deemed the same statements to be opinion, the new majority must have felt it was time to assert itself. Finding that its earlier *Milkovich* decision had provided no test qualifying as binding precedent for the fact/opinion determination, the *Scott* majority established a new totality of the circumstances test as the rule in Ohio.\(^\text{219}\) Indeed, as was pointed out by the dissenters, this was done despite the fact that the earlier court had relied upon other fact/opinion analyses and had elected to formulate a two-part test in arriving at its characterization. Thus, the *Scott* majority, in overruling the earlier court simply appears to have substituted its totality of the circumstances test for *Milkovich*'s much narrower test, despite the fact that the earlier test was consistent with authority from other jurisdictions and had been the law in Ohio for two years.\(^\text{220}\)

The precise elasticity of the totality of the circumstances test remains to be seen. However, if the four-factor analysis used in *Scott* is followed in future cases, there appears to be slender probability that any media attack upon the reputation of either public officials or private citizens will be held to be actionable in defamation. For whatever reason, the Ohio Supreme Court has opened the door for genuine media abuse. Under the *Scott* reasoning it is now possible for an unchecked media to falsely accuse an individual (whether public official or private individual) of a crime and then escape liability by positioning its defamations in a section of the paper claimed to typically contain “cajoling, invective, and hyperbole.”\(^\text{221}\)

KIMBERLY K. BASTON

---

220. *Milkovich*, 15 Ohio St. 3d at 298-299, 473 N.E.2d at 1196.
221. *Scott*, 25 Ohio St. 3d at 253, 496 N.E.2d at 708.
Meese v. Keene—Congress Can Side-step the First Amendment by Indirect Legislation

I. INTRODUCTION

Congress shall make no law ... abridging the freedom of speech...1

Throughout its history the Supreme Court has often attempted to define when and how the first amendment guarantee of free speech should be protected. The Court has defined the circumstances in which Congress and the states can regulate speech on the basis of its content or the time, place, or manner in which it is exercised. The Court has also determined the extent of protection to which various categories of speech, such as commercial, political, obscene, and defamatory, are entitled. However, in the 1987 case of Meese v. Keene,2 the Court failed to address the issue raised by the plaintiff within the framework of this traditional scheme.

Barry Keene, a California state legislator and member of the state Bar, obtained a permanent injunction prohibiting the enforcement of the federal Foreign Agents Registration Act (FARA or the Act)3 against three films that Keene intended to show in his theatre.4 Thereafter, the government appealed to the Supreme Court of the United States claiming that the injunction was improper.5 It was the government’s position that the films fell within the prohibition of FARA in that they clearly contained “political propaganda.” Keene countered that by using the phrase “political propaganda” to characterize the films in question, Congress had chosen a term that was inherently pejorative in nature. He objected that the natural consequence of this was to abridge his right to enter public debate on the issues covered by the films.

Keene argued that his rights were infringed because the term “political propaganda” would give the impression that he was

1. U.S. Const. amend. I.
3. 22 U.S.C. § 611(j) and § 614 (a),(b),(c) (1979).
displaying materials containing half-truths and lies — an impression that could result in damage to his reputation. Therefore, he asked the Court to determine "whether Congress may, consistent with the Constitution, apply a denigrating phrase to those materials thereby rendering [them] unavailable to American citizens who wish[ed] to use [them] as media for personal expression." The government argued that Keene had no standing to seek the injunction and asked the Court to find that the phrase "political propaganda" was a neutral one as defined by the Act and that as such it did not abridge Keene's first amendment rights.

Because the case was one of first impression for the Supreme Court, this note will be limited to the question of whether Congress may use a "neutral" definition to restrict otherwise protected activities, and will briefly develop the areas of case law within which the Majority and Dissent attempted to place their respective opinions. These areas include cases addressing content-based regulation, commercial speech and the Court's denial of a paternalistic attempt to protect the receiving public, as well as cases dealing with compelled disclosures as a prior restraint.

II. FACTS AND PROCEEDINGS BELOW

The Foreign Agents Registration Act of 1938, as amended in 1942 and 1966, uses the term "political propaganda" as defined

8. Concerning the issue of standing, the Court found that Keene did indeed have standing to seek the injunction. The Court determined that Keene was required to show (1) that the government action must have caused or must threaten to cause a direct and palpable injury (2) that the injury was traceable to the government’s allegedly unlawful conduct, and (3) that the injury was likely to be redressed by the relief requested. As to the injury, the Court concluded that the term "political propaganda" threatened to cause him cognizable injury and this injury went beyond a "subjective chill". Meese v. Keene ___ U.S. at ___, 107 S. Ct. at 1867. Finally, regarding the need to trace the injury and sufficiency of the relief sought, the Court believed an injunction would redress the reputational injury suffered by Keene as a result of the Department of Justice's enforcement of FARA. Id. at ___, 107 S. Ct. at 1869.
in the Act,\textsuperscript{10} to identify those expressive materials that must comply with the Act's registration, filing,\textsuperscript{11} and disclosure requirements.\textsuperscript{12}

\begin{enumerate}
\item \textsuperscript{10} 22 U.S.C. § 611(j):

The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interest, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious or social dissensions. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails.

\item \textsuperscript{11} 22 U.S.C. § 614(a):

Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmits or causes to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal.

\item \textsuperscript{12} 22 U.S.C. § 614(b):

It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit or cause to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons, unless such political propaganda is conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda; that the person transmitting such political propaganda or causing it to be transmitted is registered under this subchapter ... that, as required by this subchapter, his registration statement is available for inspection and copies of such political propaganda are being filed with the Department of Justice; and that registration of agents of foreign principals required by the subchapter does not indicate approval by the United States Government of the contents of their political propaganda. The Attorney General, having due regard for the national security and the public interest, may by regulation prescribe the language or languages and the manner and form in which such statement shall be...
The New York office of the National Film Board of Canada (NFBC) has been a registered agent of the NFBC, Ottawa, Canada since 1947. As a registered agent, the NFBC periodically submits to the Department of Justice a list of the film titles it distributes in the United States.\textsuperscript{13}

In 1983, the Registration Unit of the Internal Security Section of the Criminal Division of the United States Department of Justice informed the NFBC that three of its films — *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven* — had been determined to be "political propaganda" within the meaning of the Act and that the Board was therefore obliged to make the disclosure statement a part of each film.\textsuperscript{14} As a result of this ruling, an action was brought in the District Court for the Eastern District of California seeking a preliminary injunction against enforcement of the labelling requirement.\textsuperscript{15}

Keene desired to show the films as part of his participation in the public debate about appropriate governmental policy concerning nuclear weaponry and stationary source emissions.\textsuperscript{16} However, he alleged that he was "deterred from exhibiting the films by the statutory characterization of them as "political propaganda,"' and by the requirement that a label be attached to the films indicating their classification as such. Keene further alleged that if he were to exhibit the films while they were subject to such a characterization, his personal and professional reputation would suffer and his ability to obtain re-election and practice law would be impaired.

\textsuperscript{13} Note, supra note 7, at 445.
\textsuperscript{14} The standard form of disclosure to be used with films reads as follows:

\textquotedblleft This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.\textquotedblright  (cited in Meese v. Keene, ___ U.S. at __, 107 S. Ct. at 1866).

\textsuperscript{15} Keene v. Smith, 569 F. Supp. 1513 (E.D. Cal. 1983).
\textsuperscript{16} Keene v. Meese, 619 F. Supp. at 1116.
\textsuperscript{17} Id. at 1515.
Keene identified three ways in which these injuries could occur. First, by placing the required label on the film, Keene argued that he was forced to communicate the message of a third party—the United States Government—with which he disagrees and which disparages his own message reflected in the films.

Second, Keene stated that if his constituents were to find out that the films had been classified as "political propaganda" by the Department of Justice this information would have an adverse effect on his chances for re-election. Keene presented statements from an individual familiar with his state senate district stating:

[High unemployment in the district has created a clear and well-defined resentment to foreign competition, "that in past elections appellee has been attacked... for such otherwise mundane matters as the wearing of a beard and the driving of a foreign car, and that I have no doubt [that members of the press and political opponents] would openly seize upon the opportunity to utilize the government's reporting, dissemination and label requirements under FARA to their benefit by portraying [appellee] as a disseminator of 'foreign political propaganda.'"]

Keene also presented a declaration from a political expert on his district stating:

[Keene's] re-election chances "could be harmed substantially should a political opponent be able to associate [him] with 'foreign political propaganda,'" and that a last-minute campaign mailer making such a charge "would have a significant impact on the vote, particularly in Solano County, the home of large and important Naval and Air Force bases."

Finally, to show how his ability to practice law would be impaired, Keene presented the remarks of the managing partner of his former law firm that "he will not sacrifice the reputation of this firm or its clients' and therefore will bar Appellee from future employment with the firm unless Appellee 'forebear from exhibiting the subject films' while the federal government requires that they 'be registered and labelled as foreign propaganda.'"

Granting the preliminary injunction, the district court concluded as a matter of law that Congress did intend to denigrate

19. Id. at 16, 17 n.15.
20. Id. at 17 n.15.
the affected materials by use of the term "political propaganda."\textsuperscript{21} The court stated that, in defining "political propaganda," Congress was trying to describe, "clearly and comprehensively, that which it perceived to constitute a threat to the polity, and it used terms which it understood to convey that perception."\textsuperscript{22}

In rendering its decision, the district court expressed concern about the power of Congress to designate a definition such as "political propaganda" as a term of art having theoretically no negative connotation. "There are words that cannot be stripped of their nuance. The use of such a word as a term of art is, at least, troubling."\textsuperscript{23}

In August, 1984, this matter was again before the district court,\textsuperscript{24} which held a hearing on the motion of both parties for summary judgment. Keene asked the court to hold that the use of the phrase "political propaganda" to describe materials subject to FARA abridged his freedom of speech and was, therefore, unconstitutional.\textsuperscript{25}

Initially, the district court found it necessary to note that the plaintiff was not challenging the "power of Congress to require that materials produced by or under the aegis of a foreign government be labelled as to source."\textsuperscript{26} Rather, Keene questioned whether Congress could apply a denigrating phrase to the materials.\textsuperscript{27} The court decided that the phrase "political propaganda" was semantically slanted. It reached its conclusion based on the "uncontradicted declarations of distinguished experts on American usage and by reference to authoritative works on American usage."\textsuperscript{28} The court, however, also determined that the "statutory definition of 'political propaganda,' considered wholly apart from the conventions of ordinary usage, carry[ed] no negative connotation."\textsuperscript{29}

The defendant's argument concerning application of canons of statutory construction was deemed irrelevant\textsuperscript{30} since Keene did

\textsuperscript{21} Keene v. Smith, 569 F. Supp. at 1521.
\textsuperscript{22} Id. at 1522.
\textsuperscript{23} Id.
\textsuperscript{24} Keene v. Meese, 619 F. Supp. at 1111.
\textsuperscript{25} Id. at 1116.
\textsuperscript{26} Id. at 1120.
\textsuperscript{27} Id.
\textsuperscript{28} Id. at 1121.
\textsuperscript{29} Id. at 1122.
\textsuperscript{30} The Government argued that, because statutes are, whenever possible, to be
not claim that the statutory definition was unclear, nor did he challenge the application of FARA to the films at issue. "The plaintiff claims simply that the use by Congress of an inflammatory phrase to designate (or denigrate) clearly protected First Amendment materials abridges his speech." 31

The next issue the district court confronted was whether the first amendment, as a limitation on Congressional power, was intended to apply solely to the objects of enactment and not to the form of enactments. 32 The court reasoned that the first amendment's language swept broadly enough to prohibit indirect as well as direct abridgments of speech and that suppression was part of Congress' intent when it adopted sections 611(j) and 614 (a), (b), and (c) of the Foreign Agents Registration Act. As such, the sections at issue did abridge Keene's freedom of speech. 33

Finally, the district court attempted to find a compelling governmental interest to justify the use of the phrase in question; however, the defendants offered no interest, compelling or otherwise, in support of its argument. Therefore, the court permanently enjoined the defendants from enforcing any portion of FARA which incorporated the term "political propaganda" as defined in the Act. 34 The court later limited its injunction only to the three films in question, finding that its original order was too broadly phrased. 35

On October 11, 1985, the defendants appealed the order to the Supreme Court which noted probable jurisdiction in April 1986.

III. Background

A. Content-Based Regulations

"[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market ... I think that

construed as constitutional, and because the internal, statutory definition of "political propaganda" is neutral, the court must conclude that the statute is constitutional. The court decided that this rule was not applicable because of the nature of the plaintiff's argument. Id.

31. Id.
32. Id. at 1123 (emphasis added).
33. Id. at 1124.
34. Id. at 1126.
35. Id. at 1128.
we should be eternally vigilant against attempts to check the expression of opinions we loathe..." So wrote Justice Holmes in *Abrams v. United States* when the Court upheld the conviction of five Russians for conspiring to violate the Espionage Act during World War I. Since the Court's decision in *Abrams*, it has exercised the vigilance called for by Holmes in numerous cases in which various statutes or ordinances were alleged to abridge first amendment speech in an attempt to limit or penalize the speech as a result of its content.

Despite the varied and seemingly unconnected instances in which the Court reviewed and then struck down as unconstitutional content-based regulations, one thing remained true in each of the cases — the Court consistently held that the restrictions could stand only if "the government [could] show that the regulation is a precisely drawn means of serving a compelling state interest."[37]

In *Police Dept. of the City of Chicago v. Mosley*,[38] the Court applied the content-based test to a Chicago city ordinance that made it a criminal violation for anyone to picket or demonstrate on a public way within 150 feet of any primary or secondary school building. However, the ordinance exempted peaceful labor picketing from the restriction. The Court examined the City's justifications for the ordinance[39] and found that "Chicago's ordinance imposes a selective restriction on expressive conduct greater than is essential to the furtherance of [a substantial governmental] interest."[40] In conclusion, the Court stated that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[41]

---

38. 408 U.S. 92 (1972).
39. Chicago argued that the ordinance was not improper censorship, but rather a device for preventing disruption of the school. *Id.* at 100. The Court rejected this proposition since it could find no difference between peaceful labor picketing, which was exempted, and non-labor picketing. The Court also rejected Chicago's argument that non-labor picketing was more prone to produce violence than labor picketing. "Predictions about imminent disrupting from picketing involve judgments appropriately made on an individual basis, not by means of broad classifications, especially those based on subject matter." *Id.* at 101-102.
40. *Id.* at 102 (citations omitted).
Following its decision in Mosley, the Court recognized in Erznoznik v. City of Jacksonville that not all regulations or restrictions based on content were impermissible.

A state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the grounds that they are more offensive than others, the First Amendment strictly limits its power.

The Court noted that such selective restrictions had been upheld only when the speaker intruded on the privacy of the home or when the degree of captivity made it impractical for the unwilling viewer or listener to avoid exposure. However, the Court held that Jacksonville's interest in protecting the unwilling public from exposure and the city's desire to prevent youths from viewing such films were not sufficient to allow the ordinance to stand. The ordinance in question prohibited the showing of any film "in which the human male or female buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture[s] ... [are] visible from any public street or public place." It was stipulated by both parties that the film in question was a non-obscene motion picture, 'Class of 74,' which was rated "R" by the Motion Picture Rating System of 1968, and included pictures of uncovered female breasts and buttocks.

With its dislike of regulations of speech based on content firmly established, the Court turned to the issue of whether the source of the speech made a difference when examining a content-based
regulation. In the 1978 case of *First National Bank of Boston v. Bellotti*, the Court ruled that Massachusetts could not enforce a criminal statute that prohibited business corporations "from making contributions or expenditures for the purpose of ... influencing or affecting the vote on any question submitted to voters, other than one materially affecting any of the property, business or assets of the corporations." Finding the statute to be an abridgment of the businesses' first amendment rights, the Court noted that "[t]he inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

Two years later, the Supreme Court again examined a regulation aimed at a corporation's right to enter a public debate. In *Consolidated Edison*, the Court reviewed a Public Service Commission order which prohibited utility companies from using bill inserts to discuss political matters. The Court concluded that the order could not be enforced because "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."

**B. The Regulation of Commercial Speech—Limiting the Free Flow of Information**

One form of content-based regulation that the Supreme Court had been willing to allow was restriction of commercial speech. In *Valentine v. Chrestensen*, the Court upheld a New York statute that prohibited the distribution of handbills or other advertising materials in or upon any street. The Court's decision acknowledged that the first amendment would forbid the banning of all communication by handbill in the public streets, but it concluded that the first amendment imposed "no such restraint on government as respects purely commercial advertising."

However, in 1975, the Court reexamined its previous decisions which excepted commercial speech from first amendment protec-

---

51. Id. at 768.
52. Id. at 777.
53. 447 U.S. 530.
54. Id. at 538.
55. 316 U.S. 52 (1942).
56. Id. at 54.
tion. In *Bigelow v. Virginia*, the Court struck down a Virginia statute that made it a misdemeanor to sell or circulate any publication that encouraged or prompted the processing of an abortion. The Court noted that "[t]he existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." However, the Court recognized that advertising, like all public expression, could be subjected to reasonable regulation "that serves a legitimate public interest." In this case the Court was unable to find an interest sufficient to save the statute.

*Virginia Pharmacy Bd. v. Virginia Consumer Council* was decided one year after *Bigelow*. Again the Court was faced with the problem of how much protection the first amendment afforded commercial speech. At issue was a Virginia statute that prohibited pharmacists from publishing, advertising, or promoting "directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate, or credit terms . . . for any drugs which may be dispensed only by prescription."

The challenge to the statute was brought by a Virginia resident and two non-profit organizations, not by individual pharmacists. The plaintiffs claimed that the "First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs." Thus, the Court had to determine whether society's interest in the free flow of information was subordinate to some compelling state interest. This the Court was unable to do. It remarked that a "consumer's interest in the free flow of commercial information may be as keen, if not keener by far, than his interest in the day's most urgent political debate."

The Court examined each of the justifications for the restrictions offered by the state and concluded that these had to do with maintaining a high degree of professionalism on the part of

58. Id. at 818 (quoting Ginzburg v. United States, 383 U.S. 463, 474 (1966)).
59. Bigelow, 421 U.S. at 826 (citations omitted).
60. 425 U.S. 748 (1976).
61. Id. at 750.
62. Id. at 754.
63. Id. at 763.
pharmacists. However, the Court determined that the same level of professionalism could be maintained by the close regulation to which the pharmacists in Virginia were subjected.

Virginia was really attempting to keep certain information from its citizens and, after a closer inspection of the State's intent, the Court declared that:

[t]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.\textsuperscript{64}

The state's interest thus seemed simply to be to insure that a consumer's business did not follow the discounts offered by the various pharmacists who took advantage of advertising. If consumers were to follow better prices, rather than returning to the same pharmacy, the state feared that pharmacists would cut corners in order to save money and offer the cheapest price. Thus, the state believed that it was in the consumer's best interest to restrict advertisement about the various prices pharmacists were offering. The Supreme Court, however, was unwilling to accept such a "paternalistic"\textsuperscript{65} approach:

It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.\textsuperscript{66}

The Court decided that a state could not completely suppress the dissemination of truthful information about lawful activities simply because of the State's fear of the effect such information would have on its disseminators and recipients.

Two years after \textit{Virginia Pharmacy}, the Supreme Court again was presented with an ordinance that had been enacted out of fear of the effect the restricted information would have on the

\textsuperscript{64} Id. at 769.

\textsuperscript{65} Id. at 770.

\textsuperscript{66} Id. (citations omitted).
people receiving it. In *Linmark Associates, Inc. v. Willingboro*, a local city council had prohibited the placement of real estate "for sale" and "sold" signs in residential yards. The city council enacted the ordinance in response to a fear of panic selling by white residents who believed the township was becoming predominantly black.

Relying on its *Bigelow* and *Virginia Pharmacy* decisions the Court declared the ordinance was in violation of the first amendment. "If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients to act 'irrationally.'”

C. Inhibition — A Power Denied to Congress

Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.

Many cases that come before the Supreme Court appear on their face to involve legitimate governmental requirements. Applications for a permit or license, the disclosure of contributions to a particular fund or campaign, or lists identifying members of an association may be necessary for a state to inform itself or to prevent the misuse of campaign funds. However, when such requirements result in reprisal or hostility to members, they are perceived as requirements that suppress protected first amendment rights and may be upheld only upon a showing of a substantial relationship between the information sought and a compelling state interest.

In 1945, the Court reversed a Texas Supreme Court decision which had upheld the conviction of the president of the International Union U.A.W. for failing to request an organizer's card from the Secretary of State of Texas before he addressed a meeting of workers. Writing for the Court in *Thomas v. Collins*,

---

68. *Id.* at 96.
73. 323 U.S. 516 (1945).
Justice Rutledge noted "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its discretion, particularly when this right is exercised in conjunction with peaceable assembly."74

Keeping with the tradition, the Supreme Court has not been willing to strike down all disclosure requirements. In United States v. Harriss,75 the Court reversed a district court's dismissal of an information brought under the Federal Regulation of Lobbying Act. The disclosure requirement at issue requires reports to Congress from any person receiving or expending money in order to influence the passage or defeat of any federal legislation. The Court stated that, even if, as argued by the appellant, the requirement constituted a restraint, the restraint was "at most an indirect one resulting from self-censorship ..."76 and to deny Congress such a right "would be to deny Congress in large measure the power of self protection."77

The latitude the Court appeared willing to grant Congress was the exception rather than the rule. Just five years after its decision in Harriss, the Court struck down a number of state disclosure requirements as applied to various N.A.A.C.P. chapters. Each state advanced justifications for its particular disclosure requirement. For example, Alabama claimed that it was necessary for the N.A.A.C.P. office to register with the Secretary of State of Alabama and produce a list of its members in order to determine whether the N.A.A.C.P. was conducting intrastate business in violation of the Alabama foreign corporation registration requirement.78 In Bates v. City of Little Rock,79 the city argued that its request for a list disclosing the names of members of the local chapter of the N.A.A.C.P. was necessary to determine whether the chapter was entitled to a charitable organization exemption from a local tax. Finally, in Louisiana v. N.A.A.C.P.,80 the state sought a list of members from its chapter of the N.A.A.C.P. allegedly to ensure that no officer within the associ-

74. Id. at 530.
76. Id. at 626.
77. Id. at 625.
ation was a member of the Communist party, a communist front, or other subversive organization.

In each of these cases, the particular N.A.A.C.P. chapter refused to release the names of its members because previous compliance with the statutes had resulted in economic reprisals or hostilities directed towards its members. The states responded that this was not the result of the disclosure requirements themselves, but rather came from private community pressures. The Court, however, was unwilling to accept this argument. "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold." Thus, where it is shown that disclosure of membership results in reprisals and hostilities to the members, disclosure is not required.

Statutes and orders that require some type of registration or disclosure are not the only conditions which act as a restraint on first amendment rights. In *Lamont v. Postmaster General*, the Supreme Court decided that a federal statute requiring a written request as a prerequisite to the delivery of nonsealed mail from abroad containing communist propaganda material violated the addressee's right of free speech.

The Postal Service and Federal Employees Salary Act of 1962 required the post office to screen unsealed mail originating from designated foreign countries. The mail was examined by Customs authorities to determine if it was "communist political propaganda" as defined in the Foreign Agents Registration Act § 611(j). When printed material was ascertained to fall within the definition, the addressee was mailed a notice announcing the retention of the mail and informing the addressee that it would be destroyed unless delivery was requested within twenty days by returning a card which was enclosed in the notice. A list of persons manifesting a desire to receive such mail was maintained by the post office.

The constitutionality of the statute was challenged and the Supreme Court had little trouble ruling in favor of those who

---

81. N.A.A.C.P. v. Alabama, 357 U.S. at 463.
83. 381 U.S. 301 (1965).
received such mail. The Court's decision turned on the fact that the statute "require[d] an official act as a limitation on the unfettered exercise of the addressee's First Amendment rights." 85 The Court concluded that "this requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions." 86

Justice Brennan, joining in the Majority's decision, wrote "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." 87

IV. THE COURT'S REASONING IN MESEE V. KEENE

A. The Term "Political Propaganda" Has Two Meanings

The Supreme Court began its analysis of the first amendment question raised by Keene by noting that the phrase "political propaganda" has two different meanings. The first is a "form of slanted, misleading speech that does not merit serious attention and that proceeds from a concern for advancing the narrow interests of the speaker rather than from a devotion to the truth." 88 The Court compared this meaning to casualty reports of enemy beligerents and found that the definition in § 611(j) included misleading advocacy of this kind.

The second meaning includes "advocacy materials that are completely accurate and merit the closest attention and the highest respect." 89 The Court went on to note that standard reference works include both "broad, neutral definitions of the word 'propaganda' that are consistent with the way the word is defined in this statute and also the narrower pejorative definition." 90

B. Regulation Based on Content?

The Supreme Court indicated that the district court assumed that, because the term "political propaganda" is used in the text of

85. Lamont, 381 U.S. at 305.
86. Id. at 307.
87. Id. at 309 (Brennan, J., concurring).
89. Id.
90. Id.
the statute to define the regulated materials, the public will attach an "unsavory connotation to the term and thus the public would believe the materials had been officially censored by the government."91 Therefore, the district court concluded that Congress was attempting to "place a whole category of materials beyond the pale of legitimate discourse."92

Unlike the statute in Lamont, which required the return of a reply card before the mail in question could be returned, FARA does nothing to pose an obstacle to Keene's access to the films he wishes to exhibit. "Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit."93 Rather, Congress was simply requiring additional disclosure that would better enable the public to evaluate the materials.

The Court reasoned that the district court's injunction actually acted to withhold information from the public and the Court further noted that it had rejected a similar "paternalistic strategy of protecting the public from information"94 in Virginia Pharmacy. In comparison with the decision in Virginia Pharmacy, the Court believed that the district court's decision in Keene had gone too far, for a "zeal to protect the public from too much information could not withstand First Amendment scrutiny."95

Second, the Supreme Court stated that the district court's conclusions had been contradicted by history. Since the statutory definition of "political propaganda" had been on the books for over forty years, "it seems obvious that if fear of misunderstanding had actually interfered with the exhibition of a significant number of foreign made films, that effect would be disclosed in the record."96 Therefore, although the potential adverse consequences of showing the films were "sufficient to support [Keene's] standing, they fall short of proving that the public's perception of the word 'propaganda' had actually had any adverse impact...."97

91. Id. at 1870 (quoting Keene v. Meese, 619 F. Supp. at 1125).
92. Id. at 1870 (quoting Keene v. Meese, 619 F. Supp. at 1126).
93. Id. at 1871.
94. Id. at 1871.
95. Id. at 1872.
96. Id. at 1872-1873.
97. Id. at 1873.
Third, use of the term "political propaganda" does not "lead us to suspend the respect we normally owe to the legislature's power to define the terms that it uses in legislation." The Court did not consider this case appropriate to determine the scope of Congress' right to speak. "It is axiomatic that the statutory definition of the term excludes unstated meanings of that term." Therefore, the Majority concluded that the classification of certain materials as "political propaganda" did nothing to prevent their distribution or showing, and that taken alone, the phrase as defined in the statute did not abridge Keene's first amendment rights. Finally, the Majority did not see a need to consider the intent of Congress when it passed the legislation nor to question the ability of Congress to use such a definition.

C. Dissenting Opinion

Justice Blackmun, with whom Justices Brennan and Marshall joined in dissent, believed that the Majority had asked and answered the wrong question.

Appellee does not argue that his speech is deterred by the statutory definition of "propaganda". He argues, instead, that his speech is deterred by the common perception that material so classified is unreliable and not to be trusted, bolstered by the added weight and authority accorded any classification made by the all-pervasive Federal government. The Majority had concluded that because the Act did not pose any obstacle to access to the films, there was no abridgment. However, Blackmun noted that there need not be a "direct restriction of speech in order to have a First Amendment violation. . . . The fact that no direct restraint or punishment is imposed upon speech . . . does not determine the free speech question." Blackmun, quoting Lamont, recalled that the Court had said that "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."

98. Id. at 1873.
99. Id. (quoting Colautti v. Franklin, 439 U.S. 392 n.10 (1979)).
100. Id. at 1875-1879.
101. Id. at 1876 (quoting American Communication Assn. v. Douds, 339 U.S. 382, 402 (1950)).
102. Id. at 1876 (quoting Lamont v. Postmaster General, 381 U.S. at 309).
Finally, Blackmun questioned the Court’s failure to apply a compelling interest test as it had done in previous cases involving restrictions similar to those complained of by Keene. Applying the test himself, Blackmun determined that the appellant could not assert a compelling interest, and that even if he could, the “propaganda classification carries a derogatory meaning that is unnecessary to the asserted purpose of the Act.”

V. Analysis

The Majority’s decision in Meese v. Keene comes as quite a surprise in light of the Court’s previous decisions in cases involving content-based regulations and compelled disclosure. The fact that Justice Scalia had joined the Court may have made the outcome less surprising, except that Scalia took no part in the decision.

It appears that the Majority had decided to uphold the statute regardless of precedent and the arguments advanced by Keene. The decision, as was noted by the Dissent, seemed to ask and answer the wrong question. The Majority did not address whether

103. Id. at 1879.
104. In 1986, while still a member of the Court of Appeals for the District of Columbia, Justice Scalia delivered the opinion of the court in Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986). Block involved the same three films and the same issues as those in Meese. An appeal was granted when the district court dismissed the case for lack of standing.

Mitchell Block was President of Direct Cinema which was the sole distributor of the film If You Love This Planet. The other appellants included environmental groups, the State of New York, a library association, and a private theatre, all of whom wished to exhibit the films in question in Meese.

The Court reversed the district court’s denial of standing and addressed each of the asserted infringements of the appellant’s free speech. First, the court found that in labelling something “propaganda,” the government was not expressing its disapproval but merely identifying an objective category of speech. Id. at 1312. Even if such a classification were an official disapproval, the court noted that neither “precedent nor reason would justify us in finding such an expression in itself unlawful.” Id. Scalia concluded that to control government expression is no more practicable, than control of political expression by anyone else. Id. at 1314. Second, the court recognized the need to apply a balancing test where compelled disclosure is required. The interests claimed by the government included a need to ensure compliance by foreign agents with the Act and a need to monitor such agents activities. The court found both of these interests to outweigh any public interest asserted by the appellants since the disclosure requirement did not identify who was viewing the films only who was showing them. The court reasoned that the latter was public information anyway due to advance publicity and advertising.

The case was reversed and sent back to the district court with instruction to enter judgment for the defendant.
Congress has the power to declare a term used to classify certain material “neutral” despite the fact that the term is perceived by the public and many members of the legislature that passed the Act as a term of reproach. The Majority seemed intent on framing its own issue and answering it accordingly. How else can it be explained that in granting Keene standing the Court stated, “Appellee is not merely an undifferentiated bystander with claims indistinguishable from those of the general public ... he would have to take affirmative steps at each film showing to prevent public formation of an association between ‘political propaganda’ and his reputation.” 105

Yet, in rejecting Keene's first amendment argument, the Court appears to disregard its reference to affirmative steps when it concludes “the Act in this case ... does not pose any obstacle to appellee's access to the materials he wishes to exhibit.” 106 Not only is there an obvious contradiction in these two statements, but in applying the latter statement there are two obvious flaws to the Court's analysis.

First, while it may be true that the Act does not pose any obstacle to Keene's access to the films, this was not his objection. He was not concerned with his ability to acquire the films; he was worried about what he could do with the films once he had them. Second, Keene did not want to have to take the affirmative steps that the Majority recognized would be required in order to protect his reputation and public standing. Keene believed that the first amendment protected him from having to choose between exhibiting the films and possibly being associated with that which the term “propaganda” represents, and choosing not to show the films, thus sparing his reputation. Allowing a statute, which requires such a choice, to stand is an obvious example of inhibition.

This inhibition is exactly what the Court had deemed incompatible with first amendment rights in the cases involving compelled disclosure by the N.A.A.C.P. In those cases, the Court found an exception to disclosure requirements because there was a strong chance that to do otherwise would result in “reprisals and hostilities” 107 to those members whose names were turned

106. Id. at 1871.
over to the state. It is not outrageous to argue that Keene, as as a member of the state Bar and legislature, would also be subjected to some form of reprisal if he was associated with the phrase "political propaganda." However, the Majority did not view the case in that manner and decided simply to acknowledge that Keene was free to acquire the films and leave the matter at that, ignoring the possible effects such a label might have on Keene.

A second flaw in the Majority's decision involves the Court's recognition that Keene would be required to take steps to separate himself from the phrase "political propaganda." The Court distinguished Lamont from the present case on the fact that the appellee in Lamont was required to act affirmatively (by returning the reply card) whereas the Foreign Agents Registration Act, as applied, did nothing to "prohibit, edit, or restrain the distribution of the materials...."108 Again, the Court failed to answer the question presented by Keene.

The importance of the Lamont decision to Keene's argument is that in Lamont the Court realized that the classification of materials as "political propaganda" caused injury, by deterring the receipt of materials which the government determined to be unworthy of immediate delivery to the addressee. As the Lamont Court noted, "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'"109 The same is true in Keene's case. The films, as classified, appear to be condemned by the government. Keene cannot afford to be associated with such materials and thus must refrain from showing the films. He does not argue that he is required to take an affirmative action of any type. He recognizes that he will be able to purchase the films, but, as in the case of the addressee in Lamont, he is reluctant to do so because of the labelling of the films as required by FARA. However, the Majority decided that only a direct attack on the rights Keene wished to protect would be prohibited and they consequently ruled against him.

Besides Lamont, the Majority makes reference to only two other cases while rejecting the district court's decision. However,

each of these cases is aimed at the district court’s actions and not at FARA.

The Court refers to Virginia Pharmacy and Linmark Associates to show how it had rejected previous attempts to keep the public in ignorance just as the Court reasoned the district court was doing in granting the injunction in Keene. The Court remarked that in Virginia Pharmacy it held that “a zeal to protect the public from too much information could not withstand First Amendment scrutiny.” The Court believed that it was the injunction that was preventing the distribution of information and not the fact that Keene could not realistically display the films if the “political propaganda” label was attached. However, unlike Virginia Pharmacy, where the statute in question limited the information that could be distributed, the district court’s injunction did not impose a ban; rather, it lifted a disclosure requirement thus paving the way for more information to be made available to an interested public.

The practical effect of the labelling and disclosure requirements imposed by FARA is that they limit access to information by prohibiting the display of films, such as those in question, by persons who cannot risk the adverse publicity. As the Court wrote in First National Bank of Boston v. Bellotti, “[The commercial speech cases] illustrate that the First Amendment ... prohibit[s] government from limiting the stock of information from which members of the public may draw.” Consequently, the Meese dissenters objected to the Majority’s limitation of “its examination to the statutory definition of the term and ignoring the realities of public reaction to the designation.”

The Majority’s conclusion that the phrase “political propaganda” is neutral as defined also seems quite cursory. It is difficult to understand how a statutory categorization that includes communication that “instigates ... civil riot ... or the overthrow of government ... by any means involving the use of force or violence” can be regarded as wholly neutral. It is true that standard dictionaries list both a negative and neutral defi-

111. First National Bank, 435 U.S. at 783.
113. Id.
nition of the word "propaganda," but the Court pays little or no attention to the evidence produced by Keene that the public perception of the phrase is entirely in its pejorative sense.\textsuperscript{114}

Also, as the Dissent notes, the "Court's error on neutrality leads it to ignore the practical effects of the classification, which is to create an indirect burden on expression."\textsuperscript{115} This "oversight" by the Majority is suspect and supports the inference that the Court was intent on upholding the Act regardless of the arguments advanced by Keene.

Despite the obviousness of the fact that the FARA labelling requirement regulates based on content, the Majority neither applied nor attempted to apply the compelling interest test that it had previously required in cases where regulations were content-based. The Dissent, however, engages in the traditional analysis and concludes that no compelling interest is present.

The interest asserted by the appellant, that FARA enables the government and the people to identify persons disseminating the material and to allow the people to appraise statements and actions of those persons in light of their associations and activities,\textsuperscript{116} did not rise to the level required to pass constitutional muster. Even if the interest was compelling, the labelling requirement did not advance that interest because the label could be removed. FARA only required that the National Film Board of Canada affix the label to the film; thereafter, Keene was free to remove it.

What the majority failed to realize was that because Keene could remove the label, his concern centered on the perception the application of the label would leave with viewers who were aware that it had been required to be affixed to the film initially. The Dissent concluded that such a labelling requirement serves

\textsuperscript{114}. In dissent, Blackmun noted Appellee has submitted testimony of an expert in the study of propaganda, unrebutted by appellants. According to the declaration of Leonard W. Doob, Sterling Professor Emeritus of Psychology at Yale University, the "designation 'political propaganda' of a film or book by government is pejorative, denigrating to the material, and stigmatizing to those disseminating it ... . As the history of the last seventy years suggests, to call something propaganda is to assert that it communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods are being employed; that its dissemination is systematic and organized in some way." Id. at \textsuperscript{115}. Id.

\textsuperscript{116}. Id. at \textsuperscript{115}. 107 S. Ct. at 1878.
no interest whatsoever, and especially not a compelling interest. 117

VI. CONCLUSION

The Majority's decision in *Meese v. Keene* appears to skirt the issue presented by Keene on appeal. The Court failed to determine whether Congress could apply a denigrating phrase to materials and thereby inhibit their use by those who wish to use the materials for personal expression. The Majority simply accepted Congress's power to define the terms it uses in legislation without questioning the actual effect those terms have on protected speech.

Justice Blackmun, writing in dissent, was not willing to accord this power to Congress. Recognizing that Congress is not permitted to inhibit or prohibit first amendment exercises without question, Blackmun examined the labelling requirement and legislative definition in light of the Court's previous decisions concerning content-based regulations, prior restraints and compelled disclosures, and concluded that Congress had gone too far in regulating materials that the first amendment was designed to protect.

The Court's decision in *Meese* will probably have only limited effect on subsequent first amendment cases, given the fact that prior Supreme Court decisions have clearly demarcated the compelling interest standard as the appropriate scrutiny to be applied to content-based regulations. Consequently, *Meese* is likely to be of little precedential value. However, the Majority appears to have opened the door for Congress to do indirectly that which it is forbidden to do directly. Following the decision in *Meese v. Keene*, Congress may be able to side-step the first amendment by blanketing aspects of particular activities in "neutral" definitions and imposing whatever restrictions the legislature believes are necessary to limit dissemination of disfavored ideas rather than openly prohibiting or restraining protected activities.

WILLIAM KNOEBEL

117. *Id.*
I. INTRODUCTION

I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most of all, his belief in you, the students of Bethel is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds. Jeff is a man who will go to the very end — even the climax, for each and every one of you. So vote for Jeff for ASB vice-president — he'll never come between you and the best our high school can be.2

That was the campaign speech given in a high school assembly to 600 students by seventeen-year-old Matthew Fraser. The Supreme Court was later to call him a confused boy.3 Some of his fellow students responded to Matthew's speech with enthusiastic hoots and sexually suggestive gesturing. Some appeared bewildered. But the school officials were not bewildered; they were irritated. They suspended Matthew and he brought suit claiming a violation of his constitutional right to freedom of expression. The Supreme Court of the United States upheld the suspension but stopped short of characterizing Matthew's speech as legally "obscene."4 Instead, the Court characterized it as "vulgar," "indecent" and "offensively lewd." Such speech enjoyed no protection under the first amendment to the Constitution, said the Court, because it had occurred within the context of a high school assembly program.5

In ruling that Matthew's speech, although not legally obscene, was not protected in the high school as it may have been at another time or place, the Court extended a growing area of judicial censorship through what has become known as the "pig in the parlor" test.6 According to this test, speech that might

---

4. Id. at —, 106 S. Ct. at 3165-66.
5. Id. at —, 106 S. Ct. at 3166.
otherwise be protected is not protected if it occurs at an inappropriate time or place. The “parlor” in this case was a high school and the “pig” was vulgar, offensively lewd and indecent, albeit not obscene, expression. The problem with the test, of course, is that it runs counter to the long accepted constitutional principle that speech may not be curtailed on the basis of objectionable content, except when clearly defined criteria are present.\(^7\)

This note will examine the rationale behind the “pig in the parlor” exception. It will focus both on cases addressing students' first amendment rights in particular and those relating to offensive speech in general. Finally, it will attempt to demonstrate that the Court’s decision in *Bethel School District* impermissibly inhibits student rights and may affect the rights of others as well.

II. THE FIRST AMENDMENT RIGHT OF FREE SPEECH

The first amendment to the United States Constitution provides that Congress shall make no law abridging the freedom of speech.\(^8\) On its face, the provision leaves room for no exceptions. However, the Courts have proceeded to dissect the amendment and have defined what is “speech” and what is not. They have gone even further and have declared that even if an expression constitutes “speech,” it may, nevertheless, not merit first amendment protection.

Professor Tribe describes the analytical framework that has been employed by the Supreme Court for evaluating government intrusion into the first amendment right of free speech as a “two track” analysis.\(^9\) Track one is used to evaluate government regulations or restrictions “aimed at the communicative impact” of speech.\(^10\) Track two pertains to regulations or restrictions having a “noncommunicative impact, but nonetheless having adverse effects on communicative opportunity.”\(^11\) In a track two situation, the speech is only *incidentally* affected by some regulation or

---

7. Id.
8. U.S. CONST. amend. I.
10. Id.
11. Id.
restriction whose purpose is unrelated to the content of the speech.

A broad rule of first amendment analysis states that "whenever the harm feared [from speech] could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary." 12 However, the Supreme Court has identified several exceptions to this rule. Generally, these involve the categories of obscenity, 13 defamation, 14 false or misleading commercial speech, 15 advocacy of imminent lawless activity, 16 fighting words, 17 and child pornography. 18 Speech that falls within these narrowly defined categories is not protected by the first amendment at all. Therefore, for example, a regulation that directly prohibits obscenity or defamation is constitutional even though it attacks the content of the speech involved. In contrast, any regulation that attacks the content of speech falling outside these exceptions must be justified by proof that the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 19 That is, if the objectionable speech does not fall within one of the excepted categories, the government cannot justify its regulation merely by showing that the speaker could have made his point at some other time or place or in some other manner. 20

If the government's regulation, on the other hand, only indirectly affects speech, that is, it is not aimed at restricting its content, it is susceptible only to track two analysis and a different standard of scrutiny. In this situation, the Court merely balances the government's interest in regulating the speech against the speaker's freedom to express himself in the particular circumstances at issue. As long as the regulation of the speech is

12. Id.
20. L. Tribe, supra note 9, at 603.
content-neutral, the government may impose time, place or manner restrictions upon it.\textsuperscript{21}

Under track two analysis, the crucial determinant in cases involving the constitutionality of regulations affecting speech on public property is the \textit{forum}. In \textit{Perry Educ. Ass'n v. Perry Local Educ. Ass'n},\textsuperscript{22} the Supreme Court differentiated between three kinds of forums. In that case, a school denied a teachers' union access to its interschool mail system and teacher mailboxes for distributing its literature even though it had granted this privilege to a rival union. The Court held that the denial was not a violation of the union's right to free speech. The right of expression, said the Court, is affected by which of the three kinds of forums in which the one claiming the right attempted to exercise it.\textsuperscript{23}

The first kind of forum identified by the Court was termed \textit{public}, and included such places as public sidewalks or parks.\textsuperscript{24} The second was termed \textit{semi-public} and included places like school buildings that the state has opened for use by the public as a forum for expressive activity (but only in these circumstances).\textsuperscript{25} Any attempt to regulate the content of speech in either of these forums, said the Court, would invoke strict scrutiny, unless the speech fell within one of the nonprotected categories, such as obscenity or "fighting words." The third kind of forum was termed \textit{non-public} and included places like prisons\textsuperscript{26} (or, e.g., schools that have not been opened for use by the public as a forum for expressive activity). In these, said the Court, the government is free to impose even content-based restrictions as long as that regulation is \textit{viewpoint} neutral. As explained by the Court in \textit{Perry}:

\textsuperscript{21} Id.
\textsuperscript{22} 460 U.S. 37 (1983).
\textsuperscript{23} Id. at 46.
\textsuperscript{24} See, e.g., United States v. Grace, 461 U.S. 171 (1983) (invalidating a federal statute which prohibited picketing on the public sidewalks surrounding the United States Supreme Court building).
\textsuperscript{25} See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981) (school officials created an open forum for students and could not therefore exclude a religious group on the basis of the religious content of the speech).
\textsuperscript{26} See, e.g., Adderly v. Florida, 385 U.S. 39 (1966) (conviction of students for conducting protest on county jail grounds did not deprive them of their constitutional right of free speech).
At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expressions which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

A second category consists of public property which the state has opened for use by the public as a place for expressive activity. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so, it is bound by the same standards as apply in a traditional public forum.

Public property which is not by tradition or designation a forum for public communication is governed by different standards...In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.29

A. Regulation of Speech in Schools

In the school setting, problems arise when first amendment rights come into conflict with the strong public policy of using schools to transmit knowledge and values from one generation to the next. The handling of school matters has always been primarily a local concern and courts have been reluctant to intervene unless "basic constitutional values are directly and sharply implicated."26 However, the Supreme Court has intervened in several cases.29

27. Perry, 460 U.S. at 45-46 (emphasis added) (citations omitted). The Court in this case determined that the mailboxes were in the third (non-public) category.
29. See, e.g., Board of Educ. v. Barnette, 319 U.S. 624 (1943) (school students cannot be required to salute the flag); Meyer v. Nebraska, 262 U.S. 390 (1923) (state may not forbid teaching of foreign languages in public schools).
In *Board of Educ. v. Pico*\(^{30}\) the Court held that a local school board may not remove books from a school library simply because its members objected to the ideas contained in the books. The Court rejected the board's contention that it had unfettered discretion to "transmit community values" through the school system.\(^{31}\) The Court noted that the respondents had implicitly conceded that the school could have constitutionally removed the books had they been "pervasively vulgar,"\(^{32}\) but it declined to pursue this issue. Its holding addressed only the board's *motivation* for having removed the books, and not the appropriateness of the books themselves.

In *New Jersey v. T.L.O.*,\(^{33}\) the Court decided that the rights of school students are more limited than those of adults. In that case, a student's purse had been subjected to a warrantless search by school officials. The Court applied a balancing test that weighed the student's right of privacy against the school's responsibility to maintain security and order. It concluded that the school should not be limited in its reasonable searches and seizures of students to circumstances in which there was legal probable cause that the student had violated a law.\(^{34}\) The Court relied on precedent cases in which a "reasonable" basis for search and seizure (short of probable cause) had been recognized in other circumstances.\(^{35}\)

One non-school case that has impacted the first amendment rights of school age children is *Ginsberg v. New York*,\(^{36}\) in which the Supreme Court upheld the state's right to define obscenity in terms of the materials' interest to minors under the age of seventeen.\(^{37}\) The Court reasoned that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."\(^{38}\) The Court did not extend its holding beyond the obscenity question, however, stating "we have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the state."\(^{39}\) The Court merely recognized the possible

\(^{30}\) 457 U.S. 853 (1982).

\(^{31}\) Id. at 869.

\(^{32}\) Id. at 871.

\(^{33}\) 469 U.S. 325 (1986).

\(^{34}\) Id. at 340.

\(^{35}\) Id. at 337.

\(^{36}\) 390 U.S. 629 (1968).

\(^{37}\) Id. at 639.

\(^{38}\) Id. at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

\(^{39}\) Id. at 636.
harm to minors resulting from their exposure to sexually explicit ("girlie") magazines that were not considered constitutionally obscene for adults.

A case more closely related to the issue before the Court in Bethel School Dist. was Tinker v. Des Moines Independent Community School Dist. in which the Supreme Court stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In Tinker, the Des Moines school had prohibited the wearing of black arm bands by junior and senior high school students in protest against the Vietnam war. After hearing that such a protest was to be attempted, the school district, fearing that it would result in a disturbance, had prohibited the wearing of the armbands. Accordingly, it later suspended those students who showed up wearing them, despite the fact that they never actually caused a disturbance. Reversing the lower court's holding for the school district, the Supreme Court explained, "in our system, undifferentiated fear or apprehension of divergence is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble ... but our Constitution says we must take that risk."

The Court used the following test to balance the rights of the protesting students against the school's interest in maintaining order: "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."

The Court also specified that the principle was "not confined to the supervised and ordained discussion which takes place in the classroom."

B. Regulation of Offensive Language

In Chaplinsky v. New Hampshire, the United States Supreme Court upheld the conviction of an individual who had confronted
another person in a public place with offensive, derisive and annoying words in violation of a New Hampshire statute. 

Explaning its decision the Court stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Professor Tribe describes the Chaplinsky decision as divisible into two parts. The first is the Court's treatment of "fighting words," that is, words having a tendency to create a clear and present danger of inciting an immediate breach of the peace. The second, more subtle, part of the Court's decision addressed words "which by their very utterance inflict injury." Such a definition, of course, could be construed to refer to any offensive language, and to remove it from the protection of the first amendment. Tribe observes that this logic assumes that content and form are somehow separable. However, the implications of such an assumption were not lost on the Court either.

In Cohen v. California the Supreme Court specifically rejected the Chaplinsky dictum that all offensive language constitutes unprotected speech. The plaintiff was convicted of disturbing the peace because he had walked through a courthouse corridor wearing a jacket bearing the words "Fuck the Draft." The law he was convicted of violating prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person ... by ... offensive conduct[]." The court of appeals held that "offensive conduct" meant "behavior which has a tendency to

---

46. 315 U.S. 568. The 1942 Court found "damn racketeer" and "damn Fascist" constituted the type of words prohibited by the statute.
47. Id. at 569.
48. L. Tribe, supra note 9, at 605.
49. Id. at 606.
51. Id. at 16.
IS THE PIG IN THE PARLOR?

provoke others to acts of violence or, to in turn, disturb the peace” and affirmed Cohen’s conviction.\textsuperscript{52}

Disagreeing with the appellate court’s conclusions, the Supreme Court held that the words on Cohen’s jacket were not “obscene”\textsuperscript{53} and did not constitute “fighting words.”\textsuperscript{54} The state could not punish Cohen, said the Court, on the theory that the words on the jacket were “inherently likely to cause violent reaction or that the states may act as guardians of public morality.”\textsuperscript{55} The Court did not address the issue of whether or not any minors who may have had been present in the courthouse at the time had been harmed by viewing the jacket. However, addressing the state’s contention that it could legitimately “protect the sensitive from otherwise unavoidable exposure,”\textsuperscript{56} the Court stated:

[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense .... [W]e are often ‘captive’ outside the sanctuary of the home and subject to objectionable speech .... [T]o shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.\textsuperscript{57}

The three points made by the Court that are the most relevant to an evaluation of its later decision in \textit{Bethel} were: (1) there is no way to determine what is constitutionally “offensive;”\textsuperscript{58} (2) the emotive impact of words is as legitimate as the ideas conveyed;\textsuperscript{59}

\begin{itemize}
  \item \textsuperscript{52} \textit{Id.} at 17.
  \item \textsuperscript{53} \textit{Id.} at 20. According to the Court, to be obscene “such expression must be, in some significant way, erotic.”
  \item \textsuperscript{54} \textit{Id.} In determining that the words were not fighting words, the Court considered the fact that the words were not directed toward an individual and that no one expressed offense.
  \item \textsuperscript{55} \textit{Id.} at 22.
  \item \textsuperscript{56} \textit{Id.} at 21.
  \item \textsuperscript{57} \textit{Id.}
  \item \textsuperscript{58} \textit{Id.} at 25. “Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.... [O]ne man’s vulgarity is another man’s lyric.” \textit{Id.}
  \item \textsuperscript{59} \textit{Id.} at 26. “We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.” \textit{Id.}
\end{itemize}
and (3) a prohibition such as this chills other speech. The Court held that "so long as the means are peaceful, [a] communication need not meet standards of acceptability." Thus, it would appear that, in 1971, the Court recognized that "offensive language" is as deserving of first amendment protection as any other kind of speech. More recent cases, however, have eroded that position, at least with respect to speech that, while not legally obscene, has strong sexual orientation.

In Young v. American Mini Theaters, Inc., and City of Renton v. Playtime Theaters, Inc., the Court addressed cases dealing with the "appropriate" location of theaters that showed non-obscene "adult" movies. In Young, the Court upheld a zoning law that required such theaters to be geographically dispersed from each other and from adult book stores. The purpose of the zoning law was to reduce the number of concentrated "red light districts" characterized by high crime rates and low property values that tended to form around adult theaters and bookstores. The ordinance at issue in City of Renton prohibited the location of adult theaters within one thousand feet of a residential zone or dwelling, church, park or school. The Court upheld both ordinances employing track two analysis. It reasoned that the laws had been aimed at preventing the secondary impacts of the "adult" expression rather than at the content of the expression itself. However, it did intimate that sexually explicit, albeit non-obscene, speech was somehow less important than the kinds of politically oriented speech the first amendment had been primarily intended to protect. In Young, the Court emphasized the need for protection of political speech, but observed that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'specified sexual activities' exhibited in the theaters of our choice."

60. Id. "We cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." Id. at 25 (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).
61. Id. at 25.
64. Young, 427 U.S. at 71 n.34.
65. City of Renton, 475 U.S. at 43.
66. Young, 427 U.S. at 70.
Another significant case that dealt with the issue of the value of offensive language was *F.C.C. v. Pacifica Foundation*. In that case, the Supreme Court held that a radio broadcast of comedian George Carlin's "filthy word" monologue had been properly sanctioned by the Federal Communications Commission (F.C.C.). The monologue, broadcast during early afternoon hours, contained a variety of "words you couldn't say on the public airwaves," including "shit," "fuck," "piss" and others. A father who heard the broadcast while driving with his young son complained to the F.C.C.

The commission characterized the monologue as "patently offensive" and determined that it was prohibited by 18 U.S.C. § 1464 which states, "Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years or both." In its defense, Pacifica, the owner of the broadcasting station, argued that the definition of the word "obscene" as used in the F.C.C. regulation should be construed to be synonymous with the constitutional definition of that word. The Court, however, disagreed and allowed the F.C.C.'s definition to stand. The effect was to allow "non-conformance with accepted standards of morality" to suffice as a standard by which the content of broadcast speech could be evaluated and prohibited. The Court recognized that "the fact that society may find speech offensive is not [in itself] a sufficient reason for suppressing it," but went on to say that "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context." According

68. Id. at 729.
69. Id. at 751. The Appendix to the Opinion of the Court contains the verbatim transcript of the monologue.
70. Id. at 731.
71. Id. at 740. "Obscene" has been constitutionally defined in Miller v. California, 413 U.S. 15, as expression in which the trier of fact has determined (a) the average person, applying contemporary community standards would find that the work, taken as a whole appeals to the prurient interest ... (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law and (c) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.
72. Pacifica, 438 U.S. at 739-41.
73. Id. at 745.
74. Id. at 747.
to the Court, the words in Carlin's monologue "offend for the same reasons that obscenity offends," and "... such utterances are no essential part of any exposition[.]" Thus, the Chaplinsky standard of "less valuable" speech, rejected in Cohen, made a comeback in Pacifica.

In the other "less valuable speech" cases discussed above, the Court had used track two analysis and had justified its decisions upon the basis of the secondary impacts of the speech, rather than upon the content of the speech itself. In contrast, in Pacifica it was the content of the speech that was under attack. The speech did not fall into any category previously identified by the Court as unprotected. The Court reasoned, however, that the fact that it had been transmitted via radio broadcast had caused it to invade the the privacy of the listener's home (or in this case, his car) and had made it accessible to young children. The Court concluded that the content of such speech could permissibly be restricted on the basis of the circumstances in which it was communicated.

The approach of the Pacifica Court was to determine initially whether the speech at issue was valuable. Next it determined whether speech of that value was to be protected in the context of the time, place or manner in which it was communicated. The Court compared this form of analysis to that used in evaluating nuisances, in which the appropriateness of otherwise permitted conduct is evaluated in the context of circumstances surrounding its exercise. Justice Stevens, writing for the majority, summed up the Court's position as follows:

As Mr. Justice Sutherland wrote a, "nuisance may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard." We simply hold that when the commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

Describing the impact of Pacifica, and its "pig in the parlor test" Professor Nowak cautioned:

---

75. Id. at 746.
76. Id. at 749.
77. Id. at 750.
78. Id. (quoting City of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).
79. Id. at 750-51.
80. Nowak, supra note 6.
The three member plurality's willingness to allow government regulation of content, so long as the regulation appears to these justices to promote reasonable ends — in this case, the end of prohibiting "non-conformance" with accepted standards of morality — is a disquieting and a significant departure from traditional first amendment theory, which normally subjects any type of content regulation to very careful and principled judicial review. 81

III. BETHEL SCHOOL DIST. NO. 403 v. FRASER

The day after Matthew Fraser delivered his nominating speech in the school assembly, he was told that he was being charged with a violation of the school's disruptive conduct rule. 82 Fraser, a member of the Honor Society and the debate team, was suspended from school for three days and his name removed from the list of possible graduation speakers. 83 After exhausting administrative grievance remedies, joined by his parent 84 as guardian ad litem, he filed a civil rights action in the United States District Court for the Western District of Washington.

Fraser asserted that his first amendment right to free speech had been violated by the sanctions imposed upon him and that his procedural due process rights had also been violated because he had not been given fair notice that his speech would incur such sanctions. 85 The school district, in response, advanced three arguments in support of its disciplinary actions: (1) the district had a right to discipline Fraser because his nominating speech had disrupted the educational process of the school; (2) the dis-

81. Id. at 881.
82. Fraser v. Bethel School Dist. No. 403, 755 F.2d at 1357 n.1. The school's conduct rule stated: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." Id. gestures." Id.
83. Id. at 1357, 1366 n.13. Fraser returned to school after two days and was elected graduation speaker by his fellow students by write-in vote. He gave the graduation speech without incident.
84. Bethel School Dist. No. 403 v. Fraser, ___U.S.____, 106 S. Ct. 3159, 3161. The Court stated that Fraser was joined by his father as guardian ad litem, but according to one author who was in communication with Fraser, "both the Supreme Court and circuit court incorrectly assumed that E.L. Fraser was Mr. Fraser's father. The author has been informed by Mr. Fraser, however, that the "E" stands for Elizabeth, that is, Mr. Fraser's mother." Note, Constitutional Law: The First Amendment and Offensive Student Speech - Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986), 10 HARV. J.L. & PUB. POLY 259, 260 n.5 (1987).
district's interest in maintaining a level of civility at the school justified its disciplinary action against Fraser for using language that the school officials considered to be indecent; and (3) the district had a right to discipline Fraser for using language it considered objectionable because the speech was made at a school-sponsored program.\textsuperscript{86}

The district court held that the school district \textit{had} violated Fraser's rights under the first and fourteenth amendments of the Constitution and under the Civil Rights Act.\textsuperscript{87} The lower court enjoined the school district's action in barring Fraser from participation in Bethel High School's commencement exercises as a graduation speaker and awarded him damages and attorney's fees.\textsuperscript{88} Affirming the district court's holding,\textsuperscript{89} the Court of Appeals for the Ninth Circuit reasoned that, while the first amendment does not prohibit school officials from disciplining a student who, in fact, materially disrupts the educational process, the Bethel School District had failed to carry its burden to demonstrate that Fraser's use of sexual innuendo in the nominating speech had done that.\textsuperscript{90} In short, the appellate court held that "[a]s long as the speech [had] neither [been] obscene\textsuperscript{91} nor disruptive, the First Amendment protect[ed] him from punishment by school officials."\textsuperscript{92}

Reversing the court of appeals, the United States Supreme Court held that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms" must be balanced against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior," taking into account "the sensibilities of fellow students."\textsuperscript{93} According to the Court, an appropriate function of public school education is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{86} Fraser, 755 F.2d at 1358-59.
\item \textsuperscript{87} Id. at 1358.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id. at 1365.
\item \textsuperscript{90} Id. at 1359-60. The court cited \textit{Tinker} as its authority for requiring that speech "materially disrupt classwork or involve substantial disorder or invasion of the rights of others" before it can be constitutionally curbed by school officials. The court stated, "[g]iven the evidence before us, we fail to see how we can distinguish this case from \textit{Tinker} on the issue of disruption." Id.
\item \textsuperscript{91} Id. at 1361. The school district did not contend that the speech was obscene.
\item \textsuperscript{92} Id. at 1365.
\item \textsuperscript{93} Bethel, --- U.S. at ---, 106 S. Ct. at 3164.
\end{itemize}
\end{footnotesize}
to prohibit the use of "vulgar and offensive terms"\textsuperscript{94} in public discourse and the preservation of a democratic system disfavors the use of terms "highly offensive or highly threatening to others."\textsuperscript{95} Noting that "impertinent" speech is prohibited in Congress and that Senators had been censored for abusive language directed at their colleagues, the Court then asked, "[c]an it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?"\textsuperscript{96}

The Court found that the "pervasive sexual innuendo in Fraser's speech was [of a kind] plainly offensive to both teachers and students — indeed to any mature person." It characterized Fraser's speech as having "glorified] male sexuality" and as such had been "acutely insulting to teenage girl students." Additionally, it determined that the speech "could well [have been] seriously damaging to its less mature audience."\textsuperscript{97} The Court concluded that "[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."\textsuperscript{98} In its view, the school district had acted entirely within its permissible authority when it imposed sanctions upon Fraser, because "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."\textsuperscript{99}

The Court distinguished \textit{Tinker} on the basis that it had involved political speech that had not interfered with the educational process of the school.\textsuperscript{100} There is a "marked distinction between the political 'message' of the armbands in \textit{Tinker} and the sexual content of respondent's speech," said the Court.\textsuperscript{101} It chose, however, to ignore the lower court's factual findings that Fraser's speech had not, \textit{in fact}, disrupted the work of the school nor intruded upon other student's rights.\textsuperscript{102}

\textsuperscript{94.} Id. at 3165.
\textsuperscript{95.} Id.
\textsuperscript{96.} Id. at 3164.
\textsuperscript{97.} Id. at 3165.
\textsuperscript{98.} Id. at 3166.
\textsuperscript{99.} Id.
\textsuperscript{100.} Id. at 3163.
\textsuperscript{101.} Id.
\textsuperscript{102.} In Fraser, the court stated "[w]hile the students' reaction to Fraser's speech may fairly be characterized as boisterous, it was hardly disruptive of the educational process."
The Court cited *New Jersey v. T.L.O.* to support its position that a student's rights in school are not given the same protection as those of adults in other settings.\(^{103}\) It cited *Pacifica* and *Ginsberg* as illustrative of the Court's interest in protecting minors from sexually explicit and offensive speech, and it distinguished *Cohen* on the basis that the speech at issue in that case had been political and spoken by an adult.\(^{104}\) The Court also cited the dictum in *Pico* for the proposition that it had already been determined that school boards had authority to remove "vulgar" books from a school library.\(^{105}\) In the Court's view, these cases, taken together, laid the groundwork for its holding that a school had the authority to prohibit speech that was sexually offensive.

The text of Fraser's speech was first presented by Justice Brennan in his concurrence.\(^{106}\) However, while he agreed that the school officials had not violated Fraser's constitutional rights by disciplining him, Justice Brennan insisted that the Court's characterization of Fraser's speech as "obscene," "vulgar" and "offensively lewd" was exaggerated.\(^{107}\) "Having read the full text of respondent's remarks," he continued, "I find it difficult to believe that it is the same speech the Court describes."\(^{108}\)

Justice Marshall dissented on the ground that the school district had failed to demonstrate that Fraser's language was disruptive.\(^{109}\) He stated, "where speech is involved, we may not

755 F.2d at 1360. The court noted that Mr. McClutchon, the school counselor, testified that the students were "hoot-ing" and "applauding" and that he saw three students making sexually suggestive movements, but that the reaction of the student body was "not atypical to a high school auditorium assembly." *Id.* The only other evidence of disruption submitted was that a home economics teacher had devoted ten minutes of class time to a discussion of the speech because the students expressed so much interest in it. *Id.* The administration received four letters from teachers about the speech; three teachers determined that the speech was "inappropriate" for a high school assembly, while a fourth found nothing offensive about it. *Id.* at 1360-61. None of the teachers suggested the speech disrupted the assembly or otherwise interfered with school activities, nor did the record contain evidence that any students objected to the speech. *Id.* The principle and assistant principle testified that in their view "inappropriate" was synonymous with "disruptive." *Id.* at 1360.

104. *Id.* at 3164-65.
105. *Id.* at 3165.
106. *Id.* at 3167 (Brennan, J., concurring).
107. *Id.*
108. *Id.*
109. *Id.* at 3168 (Marshall, J., dissenting).
unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education."

Justice Stevens dissented on the basis that Fraser had not been afforded fair notice that his speech would result in the sanctions imposed upon him. Stevens also believed that Fraser "was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four letter word or sexual metaphor than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime."

IV. ANALYSIS

In concluding that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," the Supreme Court apparently accepted the school administration's assessment that "inappropriate is synonymous with disruptive." Thus, the Court dispensed with the Tinker standard of "material and substantial interference" to test whether student speech has gone beyond the bounds of first amendment protection. The Bethel Court merely found that the "pig was in the parlor" and, by that logic, it made no difference that the "pig" had not been specifically proved to be disruptive, offensive or harmful to its audience. A pig in the parlor is inherently disruptive.

The Court should have employed track one analysis to decide the Bethel case, rather than relying on value judgments that were "at least two generations and 3,000 miles away from the scene of the crime." It seems plain that the school's punishment of Fraser was aimed at the communicative impact of his speech and that its objection was to the content of the speech itself. The speech had occurred in what the Court had previously categorized

110. Id. at 3169.
111. Id. at 3169 and 3171 (Stevens, J., dissenting).
112. Id. at 3169.
113. Id. at 3165.
114. Fraser v. Bethel School Dist. No. 403, 755 F.2d at 1365. The lower court declared the school had created an open forum. "To their credit, the Bethel High School officials created an open forum for students to express their political views." Id. The fact that the school had created an open forum for its students was not disputed by the Supreme Court.
as a semi-public forum; therefore, to justify its sanctions, the school district should have been required to demonstrate that Fraser's speech either fell within an unprotected category or that the school had a compelling interest in restricting the speech that could not be adequately served by less restrictive means. However, in *Bethel*, there was neither a contention that the speech had been constitutionally obscene, nor a finding that it fell within any unprotected category.

The Bethel School District advanced two state interests that it contended were compelling, but, irrespective of whether they were controlling, the facts did not demonstrate that punishing Fraser for his speech had been the least restrictive means of furthering those interests. The first interest asserted as compelling was that of preserving the educational process, yet Fraser's speech would have failed to meet the test set out in *Tinker*. According to *Tinker*, student speech must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" before it threatens the educational process. But even if the Court chose not to apply *Tinker*, the school's own rules of student conduct set out the same standard of "material and substantial interference." Nothing in the findings of fact indicated that such an interference had occurred. Thus, the school district had no justification based on any constitutional precedent for having punished Fraser for his speech.

The second interest identified by the school district as compelling was the necessity of maintaining a level of civility in the school. Certainly this is an appropriate function of public schools. The problem, however, is that the school district failed to demonstrate that the "level of civility" had in any way been adversely affected by Fraser's speech. The school assembly had proceeded on schedule and had not been materially disrupted by the speech. There was no real evidence that any students had been offended or harmed by it. Fraser's speech contained innuendo, but not

---

116. See supra note 44 and accompanying text.
117. See supra note 82.
118. See supra note 102 and accompanying text.
119. *Id.*
the kind of vulgarity that the *Pacifica* Court had feared would "[enlarge] young children's vocabularies." Similarly, Matthew wore no jacket emblazoned with an "indecent" slogan as had the plaintiff in *Cohen*. In fact, no "foul" words at all were used in Fraser's speech. Words like "firm," "push," "point" or even "climax" are not inherently foul, vulgar, offensive, abusive, threatening, harmful, lewd, indecent or explicitly sexual. In the context of Fraser's speech, the words had taken on a sexual connotation, but even considered as a whole, the speech was a far cry from the kind of expression that the Court had addressed in *Cohen* or *Pacifica*. As Justice Brennan put it, "[the language respondent used does not even approach the sexually explicit speech regulated in *Ginsberg v. New York* or the indecent speech banned in *F.C.C. v. Pacifica Foundation* ... [Fraser's speech] was no more 'obscene,' 'lewd' or 'sexually explicit' than the bulk of programs currently appearing on prime time television or in the local cinema."

Because Fraser's speech would have been protected according to the tests it had previously enunciated, the Court appeared to resort to circular reasoning in order to conclude that the speech had disrupted the educational process and level of civility in the school. In the Court's reasoning, the speech had been disruptive because it had been offensive and it was offensive because it was disruptive. The Court accepted the school district's view that "inappropriate is synonymous with disruptive;" thus, Fraser's speech had been inappropriate because it was disruptive and it had been disruptive because it was inappropriate.

Given the merely suggestive nature of Fraser's speech and the lack of evidence that either the educational process or the level of civility had, in fact, been disrupted or that the students had in any way been harmed by it, the punishment of Fraser (and

---

120. In *Pacifica*, 438 U.S. at 749, the Court stated, "[a]lthough Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant."

121. In *Bethel School Dist.*, ___U.S. at ___, 106 S. Ct. at 3164, while discussing the point that students' rights are not automatically coextensive with the rights of adults in other settings, the Court quoted the statement "cogently expressed" by Justice Newman's concurring opinion in *Thomas v. Board of Education*, 607 F.2d 1043, 1057 (2nd Cir. 1979), that "[t]he First Amendment gives a high school student the classroom right to wear Tinker's armband but not Cohen's jacket."

the attendant chilling of the speech of other students) could not have been a "necessary" or "least restrictive" means of protecting youth, civility or the educational process. Although the Court attempted to distinguish Tinker on its facts, the Bethel decision seems to erase altogether the Tinker proclamation that students do not "shed their constitutional rights at the schoolhouse gate."123 Under the Bethel standards, a school may determine student rights according to what it considers to be "inappropriate."124

V. CONCLUSION

There are several relevant questions to be asked in the wake of the Bethel decision. Would the result in Tinker have been different had the school in that case declared the objectionable armbands to be "inappropriate?" According to the reasoning used in Bethel, the school district would have prevailed and the students would, indeed, have "shed their constitutional rights at the schoolhouse gate." It is likely that Bethel will have a widespread chilling effect on student speech that, like Fraser's, does not materially or substantially interfere with school operations, but rather is merely unpopular with school officials.

In a broader context, how would the Court have responded if someone had objected to the "appropriateness" of Cohen's jacket? Applying the Bethel "inappropriate equals disruptive" and the Chaplinsky "offensive equals less valuable"125 standards, Cohen might well have been prohibited from expressing the kind of speech valued above all others — expression of a political viewpoint. Moreover, who is to decide when the "pig is in the parlor?" According to Bethel, school officials are free to determine what constitutes a pig. Who else would be entitled to make such a determination? The mayor? The governor? How about the police chief? He also deals with juvenile offenders. Is a pig whatever any of these officials considers to be "inappropriate?"

The Supreme Court has now held that the constitutional rights of minors may be adjusted for their own protection, but surely such "adjustment" should not be allowed to be made without justification or without reference to an objective standard. By

123. See Tinker, 393 U.S. at 506.
125. Chaplinsky, 315 U.S. at 569.
applying the "pig in the parlor" test, the Bethel Court made an ad hoc determination as to what kinds of speech are "appropriate" for children — and even teenagers. That the parlor in this case was a high school does not change the fact that the Bethel Court permitted speech to be curtailed based on its content alone. In fact, the holding has already been interpreted to apply to adults speaking to college students.\(^{126}\)

Some may feel confident that Bethel should, and will be, limited to its facts, but if it is applied outside the context of a school, it may create a new category of unprotected speech — that which is deemed "inappropriate" from the standpoint of whoever happens to be in the parlor at the time.

NANCY TESSARO

\(^{126}\) In Martin v. Parish, 805 F.2d 583, 584-586 (5th Cir. 1986), a college professor was discharged for using profane language including "hell," "damn," and "bullshit" in class. Affirming the district court's judgement n.o.v. on the issue of free speech, the Court of Appeals for the Fifth Circuit held that Martin had no first amendment right to use profane language in the classroom and noted: "Ignoring that his audience consisted of students also led to Martin's undoing. Indecent language and profanity may be regulated in the schools [citing Bethel School Dist.] and over the airways [citing Pacifica]." Quoting a particularly disturbing statement from Bethel School Dist. that "nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanction," the Court in Martin stated, "...Martin's profanity... need not be tolerated by the college any more than Fraser's indecent speech was by the Bethel school assembly."
BOOK REVIEW

IN SEARCH OF TRUTH
A REVIEW OF RENATA ADLER'S
RECKLESS DISREGARD*

By Dale M. Cendali**

In 1983, two widely publicized libel suits went to trial in the United States District Court for the Southern District of New York. In both cases the defendants were news media, the plaintiff's were military, and the media defendants were represented by the same law firm—Cravath, Swaine & Moore of 1 Chase Manhattan Plaza, New York.

In the first of these, General William Westmoreland, Commander of United States forces in Vietnam from 1964 until 1968, sued CBS Broadcasting for having libelled him in a documentary film, The Uncounted Enemy: A Vietnam Deception, broadcast on January 23, 1982. The 90 minute documentary had accused Westmoreland of having conspired with "the highest levels of American Military Intelligence" to misrepresent the true strength of enemy forces deployed during the Vietnam War.¹

The second case dealt with a Time magazine cover story entitled The Verdict is Guilty, published February 21, 1983. The plaintiff was General Ariel Sharon, former Minister of Defense of the State of Israel. The article, which described the findings and recommendations of the Kahan Commission appointed by the state of Israel to investigate the killing of several hundred Palestinian refugees by Phalangist troops at the Sabra and Shatilla camps in West Beirut, Lebanon, accused General Sharon of having knowingly permitted and encouraged the massacres. Sharon's complaint focused on one paragraph in the Time article which reported that shortly

---

* (c) 1987 Dale M. Cendali


before the massacres, Sharon had discussed with the Phalangists the need for them "to take revenge for the Assassination of Bashir [Gemayel]." 2

In her book *Reckless Disregard* Renata Adler describes these two trials as having "brought together, in an almost astrological configuration, four immense and powerful constellations within the American system: the courts; the military; the lawyers; and the press ... [and as having] called into question certain fundamental assumptions about these institutions." 3

Neither trial raised any new substantive issue of libel law. 4 However, they served as a lightning rod for public comment both contemporaneously 5 and a year later when Adler's *New Yorker* articles and subsequent book, *Reckless Disregard* were published. 6 Adler's view of the trials is that:

Neither suit should ever have been brought. Once brought, neither suit should have been so aggressively defended. Because neither the ninety minutes [i.e., the CBS broadcast] nor the paragraph [i.e., the paragraph in the *Time* article reporting Sharon's alleged discussion with the Phalangists] should have been broadcast or published, either. 7

In addition to reaching the conclusion that neither the CBS nor the *Time* stories were supported by facts, Adler also levels scathing criticism at modern litigation tactics and the tough legal standard a public-figure libel plaintiff must meet in order to protect himself from unfounded or contrived media attacks.

As a result, *Reckless Disregard* was immediately immersed in intense controversy. Some reviewers called it the "best book about American journalism of our time." 8 Others accused Adler of engaging in the same slanted journalistic practices 9 she had criticized in her book, of "sloppy" reporting, and of indulging herself in

---

2. Id. at 20; see also Sharon v. Time Inc., 599 F. Supp. 538 (S.D.N.Y. 1984).
3. Id. at 15-16.
4. Adler recognizes this in RECKLESS DISREGARD, supra note 1, at 10.
7. Id. at 61.
various "absurd" theories.\(^{10}\) Not the least of the book's detractors were CBS, *Time* and the Cravath firm.\(^{11}\) For example, the latter presented her publisher, Alfred A. Knopf, with a lengthy list of misrepresentations allegedly contained in *Reckless Disregard*, a move which caused Knopf to delay its publication\(^{12}\) until fears of the libel suits were quashed.\(^{13}\)

Why the book generated so much hostile criticism is somewhat unclear. Those passages of the book that criticized the press for arrogant behavior or which called for libel reform had hardly broken any new ground.\(^{14}\) It is possible that the hostility stemmed from the fact that Adler, although writing in a dense literary style (resembling at times a stream of consciousness that could have resulted from dictation), was still able to synthesize the lengthy trials in an exciting fashion and thus reopen old wounds or, perhaps part of the response also could be explained as a reaction to

---


\(^{11}\) It was pointed out that several years earlier Alder had been sued by Cravath on behalf of the widow of one of the firm's partners. The woman wanted Adler to move out of an apartment. Adler countersued for $500,000, alleging emotional distress. The case was settled upon Adler's agreement to move to a later time. The incident was not mentioned by Adler in *Reckless Disregard*. Randolph, *Media Notes* Washington Post, July 22, 1986, at C1. Adler also did not mention that she was suing *Vanity Fair* and *The Washington Journalism Review* for libel (and this may have been predisposed in favor of libel plaintiffs) regarding a story that she had been fired as an adviser to *Vanity Fair*. Cockburn, supra note 8.


\(^{13}\) Two libel suits eventually were filed against Adler. Rushford v. The New Yorker Magazine, Inc., C/A 86-1382-A (E.D. Va. 1986); Adams v. Adler, C/A 87-553-A (E.D. Va. 1987). In the former, minor witness Gregory Rushford accused Adler of defaming him in her original article in *The New Yorker* by implying that Judge Leval had called him "far-out," when in fact Judge Leval was only asking whether it was plaintiff's position that Rushford was far-out. Adler clarified this distinction in the book version of *Reckless Disregard* in what was apparently one of the few substantive revisions between the articles and the book. See *Reckless Disregard* at 197, 230-31. Adler won a motion for summary judgment dismissing Rushford's suit on April 28, 1987. Samuel Adler's suit was voluntarily discontinued on July 5, 1987. Whether this was pursuant to settlement or for some other reason is unknown as of this writing.

criticism from such an unexpected source. While Adler had a history of ascribing to sometimes shocking views, she was, after all, a graduate of Yale Law School, and a member of the Eastern literary "intelligensia"—in short, not someone the offended would have expected to side with "right-wing media-bashers." Adler broke ranks and, in so doing, fueled libel debate.

Unfortunately for the book's enduring value, many of Adler's theories are easily rebutted. The issues she raises, however, about the truth and slant of the news reports, the role of the lawyers, and the structure of libel law itself are of such importance that they warrant a closer analysis than the initial strident criticisms of her book would indicate is merited. 16

I. THE EVIDENCE

The gist of the Time article was that General Ariel Sharon had "indirect responsibility" for the Phalangists' massacre of the Palestinian refugees. The disputed paragraph read:

Sharon reportedly told the Gemayels that the Israeli army would be moving into West Beirut and that he expected the Christian forces to go into the Palestinian refugee camps. Sharon also reportedly discussed with the Gemayels the need for the Phalangists to take revenge for the assassination of Bashir, but the details of the conversation are not known. 17

The correspondent responsible for the information in the paragraph was David Halevy of Time's Jerusalem bureau. Halevy claimed to have gathered it from various confidential sources. Additionally, Halevy contended that a secret, unpublished section of the Kahan report, referred to as Appendix B, revealed details about Sharon's visit to the Gamayel family shortly before the slaughter of the refugees. On December 6, 1982 Halevy telexed the story

15. See, e.g., Shaw, Reckless Disregard by Renata Adler, Los Angeles Times, Dec. 7, 1986, (Book Review), at 10 (noting that six years earlier Adler had "stunned" the New York literati" by proclaiming Pauline Kael's new collection of film criticism "piece by piece, line by line, without interruption, worthless.").

16. At this point, it may be useful to note that the structure of Reckless Disregard makes analysis difficult because Adler keeps switching back and forth between cases in her discussion. She also fails to provide an index or table of contents. While Adler may have styled the book this way to increase dramatic tension in the same way a film director cuts from scene to scene, it gives a false impression of the similarity between the two cases she discusses.

17. RECKLESS DISREGARD, supra note 1, at 8 (emphasis added).
to Time in New York for inclusion in that week's Worldwide Memo, an internal publication distributed only to Time journalists. On December 8, Time requested that he clear the "Memo Item" for wider publication. The next day, Halevy cleared the story without, however, having done any additional checking to confirm its reliability. Two months later, the paragraph was published as a Time cover story. A week after the magazine was published, General Sharon filed suit.

Adler is at her best when she describes Time, because of its dependence on Halvey and his undisclosed sources, as "poised, like an improbable ballerina, on a single toe, David Halevy."18 Adler then adeptly depicts that toe as being in dire need of further support. Most damning, in her opinion, is Halevy's inconsistency as to the number of his confidential sources,19 together with his evasiveness concerning whether he had ever personally seen notes of Sharon's meeting with the Gemayels.20 Adler argues that while it is possible that Halevy may have been deliberately evasive out of a genuine fear that his sources might have been comprised, she finds it difficult to imagine how the information elicited from his sources could have compromised anyone. She further attacks Halevy's credibility by pointing out a discrepancy in dates which she claims went unnoticed by all counsel.21 Halevy had claimed that he had not had time to re-contact his sources or to otherwise check out his story when Time asked for clearance on December 8 because he was then in the process of leaving Israel for a new assignment in Central America. In this regard, he had stated in his deposition that he had departed Israel on December 12. However, his passport clearly shows that he did not, in fact, leave the country until a month later, on January 12, 1983. The discrepancy is a critical one because Halevy's failure to reconfirm his story during that entire five week period seems inexplicable.

Adler also highlights Halevy's attempts to hide, or at least to avoid reference to, certain incidents of his past which, while perhaps perfectly innocent or irrelevant, take on sinister overtones because of his evasiveness. Most troubling, in that it is evidence of possible bias, was Halevy's testimony that he had "quit" all involve-

18. Id. at 22.
19. Id. at 22-23, 205-07.
20. Id. at 175-82.
21. Id. at 21-22.
ment with Israeli politics by 1969. This testimony conflicted with his statement in another, unrelated case that, in 1977, he had still been a member of Israel’s Labor Party—a liberal party ideologically at odds with Sharon. Halevy had also testified emphatically that in his 15 years as a reporter, all of his stories, cables, ideas and suggestions were accurate and exact. However, it was later revealed that just a few years earlier, *Time* had put Halevy on probation for submitting a story falsely reporting that Israeli Prime Minister Begin was gravely ill. Most damaging to *Time’s* case, however, was that after months of reference to the secret appendix to the Kahan Commission report supposedly containing details about Sharon’s visit to the Gamayels, the Israeli government allowed plaintiffs counsel access to the appendix in the presence of Justice Kahan himself. It turned out to have contained no such information and the jury was instructed accordingly.

The fact that Adler is persuasive in portraying *Time’s* story as of dubious accuracy is not surprising since the jury felt the same way, after it reviewed the evidence and found the story to be false. But, it is important, in this regard, to note the distinction between “unsupported by the evidence” and actually “false.” One of the problems inherent in libel law is that courts are not omniscient bodies capable of proving any fact absolutely. Even the toughest test in our legal system measures evidence against a “reasonable doubt” standard. In determining that the paragraph in *Time’s* article was false, the jury simply concluded that Sharon had “clearly and convincingly” proven by the evidence that it was untrue. Whether, beyond the evidence presented, the report was actually,

---

22. Id. at 153. Halevy stated that he “gave a bye-bye kiss to party affiliation” in 1969.
23. Id. at 154. Halevy in fact served as “editor-in-chief” of the Labor party and worked on Shimon Peres’ 1977 Campaign. *Time* had demanded in 1978 that he cease such activities. Id.
24. Id. at 42.
25. Id. at 62–64. Most curiously, when asked at his deposition, “Have you ever been involved as a defendant in any criminal proceeding?” Halevy responded, “No.” Moments later he admitted that, in fact, he had been charged with an illegal arrest for holding his maid at gunpoint. Id. at 153. While this story makes good reading and Adler makes much of it along with the fact that plaintiffs counsel did not bring it up at trial, this is not surprising in that the evidence is likely to have been inadmissible under FED. R. EVID. 609.
26. RECKLESS DISREGARD, supra note 1, at 217.
27. Id. at 218. Judge Sofaer used a special verdict form so that the jury could decide separately on issues of falsehood, defamatory meaning and actual malice and avoid confusion on appeal as to what the jury actually decided.
yet unprovably, true was not and could not be the issue in a courtroom. Adler's criticism of Time for standing by its story even after the jury verdict may stem from her failure to note this distinction. Time's explanation for the adverse verdict was that Israeli security had blocked it from obtaining and presenting certain evidence that would have convinced the jury in its favor. Adler characterizes this contention as arrogant and unfair—which it, indeed, may be—but Time's contention is not inconsistent with the jury verdict as she asserts. If Adler had sought to conclusively establish that the jury verdict was justified because the story was in fact absolutely false, she would have had to deal with the merits of Time's allegation that it had been blocked from presenting critical evidence. However, beyond her questioning of Time's credibility in resorting again to "secret" and (again) "unavailable" material to rationalize the adverse verdict, especially after the episode with the abortive Appendix B, Adler makes no attempt to inquire further into the basis of Time's allegation. Her omission detracts from the persuasiveness of her book.

The Westmoreland case was more difficult for Adler to encapsulate. In part, this was because the trial itself was much longer, lasting four months as compared to only 10 weeks for the Sharon case. Additionally, the subject matter of Westmoreland was more complicated. Contrasted with the single alleged conversation between Sharon and the Gemayel family reported in the one paragraph in Time, the Westmoreland trial dealt with a conspiracy of allegedly considerable scope and duration. The accusation of the documentary was that there had been:

a conspiracy at the highest levels of American military intelligence—specifically, within the command and upon the orders of General William C. Westmoreland—"to suppress and alter critical intelligence on the enemy," and to deceive the American people, Congress, the Joint Chiefs and the President of the United States about the strength, in numbers, of the North Vietnamese Army and the Vietcong.

Westmoreland argued that while it was true that estimates as to enemy troop strength made available to him at the time had, indeed, varied, his decision to accept lower-range estimates had

29. Reckless Disregard, supra note 1, at 5.
stemmed from his good faith preference for certain intelligence collection methodologies and not from any motive to deceive. Much of the testimony on this point, therefore, addressed details concerning the appropriate methodologies for counting enemy troop strength in a combat environment. Adler describes this aspect of the trial as approaching “an order of tedium characteristic . . . of antitrust cases—which do not seem to unfold in mortal time, and in which no recognizable human issue appears to be at stake.” Her description seems apt, and it is to her credit that she was able to condense 9,745 pages of this kind of detailed transcript into a meaningful narrative. Her ability to highlight pertinent testimony and to emphasize apparent contradictions demonstrates the kind of analytical skill lawyers are paid to undertake. However, it should be noted in this regard that there is always the possibility for abuse in such an editing process.

Adler is most convincing when she focuses on detail; unfortunately, her broader theses are less persuasive. For example, she directly attacks CBS’s contention in The Uncounted Enemy that Westmoreland had been engaged in a conspiracy to underestimate enemy troops, calling this contention “preposterous.” She argues that a general in the field is more likely to overestimate rather than underestimate the strength of enemy forces opposing him since, by overestimating, he could “sustain a demand for more troops” as well as make “whatever victories there were heroic and whatever defeats explicable.” Thus, in Adler’s view, Westmoreland would have had no practical motive for the alleged deception.

While Adler’s analysis of a general’s motives may be accurate for a World War II scenario in which both Congress and the American people were known to be committed to victory at virtually any price, it is less persuasive when applied to the Vietnam scenario in which the public will to pursue the war had seriously eroded. In this latter scenario, an overestimation of enemy strength might not lead to reinforcements at all, but rather to a decision to withdraw. This is exactly the point that CBS and its chief source for the documentary, former C.I.A. intelligence analyst Samuel Adams, were attempting to make in the case. In this view, Westmoreland may well have felt that, in order to avoid a deci-

30. Id. at 73. Similarly, Adler reviewed 4,180 pages of transcripts from the Sharon case. Id.
31. Id. at 26.
32. Id. at 27.
sion to withdraw from Vietnam, he could temporarily make-do with a relatively smaller number of men until such time as he could persuade the "powers that be" back home to escalate the war effort.

Adler also expresses the view that there was no political motive for Westmoreland to have deceived the public about the strength of enemy forces. She speculates that the worst that could have happened, had higher enemy troop strength been estimated, was that President Johnson would have lost the 1968 presidential election to Richard Nixon. Such a result would not have concerned Westmoreland, Adler reasons, because neither of these two candidates was viewed as opposing the war or, a fortiori, the military. However, although it does seem unlikely that any conspiracy would have been designed to ensure a Johnson victory over Nixon, Adler's analysis fails to take into account the popularity at the time of Democratic hopeful Robert Kennedy. Kennedy was known to have held a strong anti-war position. Therefore, he could have posed a threat to the candidacy of either Johnson or Nixon had their "light at the end of the tunnel" campaign themes been revealed as mirages or magician's tricks.

This possible political motive was recognized by one of Westmoreland's jurors, M. Patricia Roth, in her diary of the trial's events. Roth was struck with the many instances in which military witnesses seemed particularly preoccupied with press reaction to enemy strength estimates. Several key witnesses, whose testimony

34. Id. at 59, 107, 110. At one point, Roth paraphrases General Westmoreland during his direct examination, supplying his own explanation for why he might have wanted to reject higher estimates:

"The troops did a great job. I was proud of them. They were proud of themselves. It as a difficult job. They did it magnificently.
"But they never felt that they got a fair shake from the media. They were sensitive to that. They would get newspaper clippings from home—poor reporting was detrimental to their morale.
"There were five hundred reporters at my headquarters. There was great competition for lead stories. Most were good, but many were distorted. Of course I was sensitive to press reaction. (His voice rose with emotion as the speech went on.) "I felt an obligation to my troops.
"Suddenly I'm told to put a new figure of a hundred thousand people into an Order of Battle that were not fighters. They were old men and women, home guard, they were civilians. We didn't want to kill civilians. It would have been detrimental to my troops to add this figure.
"Yet, I was sensitive to press reaction. They would have drawn erroneous and gloomy conclusions." Id. at 110-11.
Adler excerpts, specifically stressed this theme. Such sensitivity could also reasonably be read to indicate that Westmoreland and others were well aware of the relationship between the enemy strength estimates and public support for the continuation of the war and that they adjusted the estimates accordingly. In sum, CBS' characterization of Westmoreland's motives may not have been as "preposterous" as Adler suggests.

Adler also points to the contradiction between former CIA intelligence analyst Adams' earlier statements concerning the significance of the alleged underestimations of enemy troop strength and the significance he attached to these underestimations in the later CBS documentary. According to Adler, Adams' original assessment had been that the underestimations had hid from the world the fact that an insurrection, i.e., a "popular uprising," against a despotic regime was occurring in Vietnam. However, Adler's points out, the documentary itself, although depending upon Adams as its chief authority, evaluated the underestimates as "the explanation [for] why the war was lost." Adler maintains that there is no "link" between these ideas and she concludes from this that Adams not only was inconsistent with facts but also in the professed motives he had for revealing them.

It is hard to understand why Adler sees these propositions as unrelated. One idea seems to be an easy-to-understand corollary to the other. Rather than to try to separate the propositions as Adler does, it makes more sense to read them together as: "The Vietnam War was, in actuality, an insurgency, therefore, the United States should not have been involved in it and could not have emerged victorious from it."

Adler also stresses that a major part of the difficulty experienced by intelligence officers in assessing enemy troop strength involved the decision as to whether or not to include untrained civilians in the enemy Order of Battle. These uncounted civilians were mostly women, children and old men who, despite their lack of military training, may have carried arms or set booby-traps for the Viet-

36. Id. at 199.
37. Id. at 200.
38. Id. at 199.
It was Adams' position that these people should have been included in the estimate of enemy strength in the field. Adler takes issue with this and reasons that if Adams' position were accepted:

the inescapable conclusion [would be] that these people were in fact army. And if they were army ... the [American] army is hardly to blame for trying to kill them before being killed by them. And the argument from My Lai, in all its ramifications, starts to dissolve. 40

Contrary to the insinuation of some of her critics, 41 it does not follow from this passage that Adler is defending or advocating the killing of civilians in battle. To the contrary, she appears to be attempting to provide Westmoreland with a moral basis for having had rejected Adams' urgings to include these civilians in enemy troop estimates. Such an argument might, indeed, have been useful for Westmoreland's counsel during his cross-examination of Adams. It is not clear, however, that this rationale was actually used at trial. Had it been used it could have been counter argued by plaintiff that if children, the aged, and other noncombatant civilians were actively assisting enemy forces, there was an alternative to killing them as part of the enemy. The alternative was to recognize the nature of the conflict as a civil war, and to withdraw. On the other hand, of course, it is recognized that withdrawal, and the characterization of the conflict as a civil war, are political and not military alternatives, which may not have been available to Westmoreland the soldier.

Adler makes a variety of points regarding the Order of Battle issue. For example, she stresses that an Order of Battle is merely a collection of estimates, and that the estimators could not and did not purport to know the exact strength of the enemy. 42 From this, Adler would like us to draw the conclusion that, since there was, in fact, no "correct answer," the trial was somehow pointless. This is deceptive reasoning. The issue at trial was not whether the number of enemy troops was correctly estimated; the issue was

39. These were divided in two groups for the purpose of estimates. The self-defense ("SD") were the townspeople where the battle was taking place. The secret self-defense ("SSD") may have moved from locale to locale. JUROR at 31-32.
40. RECKLESS DISREGARD, supra note 1, at 36.
41. See, e.g., Hess, NATION, Nov. 29, 1986 (Book Review), at 611 ("... in a terrible passage, Adler writes ... ").
42. RECKLESS DISREGARD, supra note 1, at 36.
whether these estimates, *however approximate*, were intentionally reduced by Westmoreland to serve political ends.

An aspect of the Order of Battle argument that Adler might have stressed instead, was one that she raises briefly but never develops—namely, that the whole issue as to whether or not the civilians were counted in the formal Order of Battle estimates was *unimportant*. She indicates that the inclusion or noninclusion of civilians in enemy troop estimates was merely “a technical matter . . . since when they were not included they were simply [accounted for separately].” 43

The estimates may have also been unimportant in another aspect. Juror Roth’s diary points out that Westmoreland had testified that, given the guerilla character of Vietcong forces, Order of Battle estimates were simply not as important to him as they might have been, for example, in a European armored-warfare scenario where the relative combat power of engaging forces might be decisive. In fact, Westmoreland admitted that he gave little attention to the estimates and generally considered them to be “old news.” 44

Finally, Adler takes the position that Westmoreland could not have succeeded in deceiving President Johnson because key battlefield information, that would have revealed actual enemy troop strengths, was directly monitored electronically from Washington and that this information reached the Pentagon and the White House *even before it reached Westmoreland in Saigon*.

Together, these arguments attempt to establish that there was no motive and no opportunity for Westmoreland to have reduced enemy strength estimates because the estimates themselves were regarded as unimportant, and because decision-makers in Washington would have known the truth regardless of what Saigon included in the Order of Battle. Such proof of lack of motive and opportunity led the jury to infer that the estimates had not been, in fact, reduced. 45 The character of this proof, however, must be

---

43. *Id.* at 35.

44. *Juror*, *supra* note 33, at 105. Roth also notes that Westmoreland had requested in April 1967 an optimum force of 200,000 men in order to bring the war to a conclusion within five years. *Id.* Westmoreland’s request for so many men argues against the idea that he tried to deceive Washington about what it would take to win the war.

45. Adler points out that Judge Leval ruled that what Johnson knew was not the issue; the issue was whether Westmoreland had intended, no matter how unsuccessfully, to deceive. This ruling seems anomalous, however, as the impossibility or unlikelihood of deception, as noted above, surely goes to whether Westmoreland actually intended to deceive. Moreover,
recognized as circumstantial. Whether Westmoreland’s counsel attempted to argue this is unclear from Alder’s account.

Adler is on better footing when she deals with hard facts and actual testimony. Her conclusion that CBS:

- took a thesis; found witnesses more or less to support it; interviewed those witnesses, and cut those parts of the interviews which did not support the thesis; found the arch-villain, according to the thesis (and cut to those moments when he looked angry, shifty, ill at ease)
- ... rehearsed and re-interviewed some friendly witnesses; found reasons not to interview other witnesses, who had information that would undermine the thesis; composed a script for Mike Wallace, in his adversarial style, to grill some witnesses and coddle others.
- In short, they were acting not as press but as producers and directors casting for a piece of theatre; and that theatre was a court

seems well supported by uncontroverted facts. These facts show that the producer of the documentary, George Crile, actually did, among other things, edit the documentary so as to splice an answer to one question onto a different question. He also decided not to use Walter Rostow’s interview which took issue with CBS’s thesis; he deleted a portion of an interview where the witness had stated, “I understand perfectly well what you are trying to say... I don’t agree with it;” and finally, he wrote to CBS anchorman Mike Wallace during production of the documentary, “Now all you have to do is break General Westmoreland and we’ll have the whole thing aced.”

All of this had been well documented in TV Guide’s exposé of the CBS documentary, Anatomy of a Smear, and by CBS in its own internal investigation, called the “Benjamin Report.” Accordingly, by rehashing these facts, Adler did not break any new ground, nor did she deal with the problematic question of the relevance of these facts. This is unfortunate, as Judge Leval’s decision to severely limit the admissibility of the Benjamin Report is

---

a key aspect of CBS’s thesis was that Westmoreland was attempting to deceive the President. To some minds the most serious charge levelled at him was that he was deceiving his Commander-in-Chief. Adler, however, does not examine the merits of Judge Leval’s ruling.

RECKLESS DISREGARD, supra note 1, at 36.

46. Id. at 185-6.

47. Id. at 186-87. Adler also notes that Crile had been “censured” by the National News Council for editing applause into a soundtrack of a predominantly gay audience listening to a speech by San Francisco mayor, Diane Feinstein. Id. at 188.

48. Id. at 57.
worthy of closer analysis. It seems strange that Adler did not pursue this inquiry because Crile’s machinations tend to provide strong support for one of her central themes—that the *New York Times v. Sullivan* standard affords inadequate protection to plaintiffs against such misbehavior.

Briefly, the Benjamin Report principally addressed whether the CBS broadcast had been “fair and balanced” and, in particular, whether Westmoreland’s supporters had been given a fair opportunity to respond in the documentary, as required by internal CBS rules. Judge Leval, however, admitted only portions of the Benjamin Report, ruling that the *overall fairness of the broadcast was not an issue of the libel suit.* The court said:

Publishers and reporters do not commit a libel in a public figure case by publishing unfair one-sided attacks. The issue in the libel suit is whether the publisher *recklessly or knowingly* published false material... The libel law does not require the publisher to grant his accused equal time or fair reply. It requires only that the publisher does not slander by known falsehoods (or reckless ones). Judge Leval then expressly prohibited the jury from considering whether CBS had acted fairly or unfairly and limited its consideration to whether the network had acted in reckless or knowing disregard for the truth.

While Judge Leval’s ruling was a correct statement of the law, it could be criticized for insensitivity to the view that the very fact that a program is put together in a fashion so as to deliberately omit reference to competing views might be *evidence* that it was knowingly or recklessly intended to publish a falsehood. Evidence of the fact that the CBS staff had *disregarded* and *precluded presentation of contradictory evidence* could lead a jury to find that either the *reckless or knowing* test for actual malice was met.

Beyond mentioning Judge Leval’s ruling in passing, however, Adler does not explore the fairness/falsehood distinction made by the court. This, coupled with her constant references to Crile’s unfair editing and her contention, noted above, that CBS started

---

51. *Id.* at 68. (emphasis added).
52. *Id.*
53. *Reckless Disregard*, *supra* note 1, at 60.
with a conclusion and then found people to support it, gives the casual reader a false impression of the strength of Westmoreland's legal position. Legally, many of the themes she stresses are, for better or worse, irrelevant, as they do not address knowing or reckless falsehood. The bottom line is that there is simply nothing legally wrong with the CBS documentary having taken a one-sided position.

Underlying Adler's concern about fairness is her fascinating notion that television news bestows an imprimatur of truth and fairness upon facts reported. In attacking CBS for finding and broadcasting only those facts that supported its thesis, Adler writes, "the broadcast was created and advertised by CBS News, and claimed all the authority and authenticity that 'news' (particularly television news) implies." She stresses that, in Europe, people are more aware than are Americans that their newspapers are slanted towards a particular political ideology. From this premise, she argues that although it is true that, even in America, essayists, (for example, those writing, at the time the Constitution was drafted), once commonly wrote from a decidedly slanted political viewpoint, times have changed. In modern America, Adler argues, Americans have developed a legitimate expectation that what they see or hear in a newscast, as opposed to what they may read in magazines such as The Nation or the National Review, is unslanted and true:

given the technology of newsgathering and dissemination, given also the scale, [the expectation is that] the news is going to be, honestly and within human limits, factual. Whether it is a tabloid reporting a sensational murder or a network reporting a political coup somewhere, there is a trust that what is being reported ... is factually true.

While Adler may be correct in asserting that such an expectation exists, she appears to be attempting to extend this fact to a proposition that would require media to report news without any discernible slant. This seems to be at the heart of her dissatisfaction with CBS and Crile. But it cannot be overemphasized, as was alluded to by Judge Leval, that there is no legal prohibition against a broadcasting network presenting a biased point of view.

54. Id. at 186.
55. Id. at 16-17.
Moreover, to impose such a prohibition would clearly violate the first amendment.66 Ironically, in this case, it was precisely because of CBS's concern to be fair and unbiased, and to insure fairness through internal review procedures, that Adler is enabled to argue for the imposition of liability on the basis that these self-imposed standards were not met.

Despite the problems inherent in Adler's argument, she nonetheless raises an intriguing issue that news organizations may want to consider when deciding how to structure their operations. The media benefits from a public expectation of fairness in its reports, and may want to devise procedures to ensure that these benefits are preserved.

Philosophical arguments aside, most of Adler's attention in her review of the Westmoreland trial is centered around the merits of the testimony of three key witnesses, Samuel Adams, General Joseph McChristian and Colonel Gains Hawkins. Adams was an important witness because, like Time's David Halevy, he was the main source for CBS and the "hero" of the broadcast.67 In contrast, the testimony of McChristian and Hawkins was significant principally because it allowed Adler to directly address the "lore" of the trial. As Adler explains it, the "lore," or popular perception, of the Sharon and Westmoreland cases was different. Sharon was popularly perceived as having won a moral victory because he had been able to prove that the Time article was false and defamatory, even though he had failed to prove that it had been published with actual malice. In contrast, the popular perception of the Westmoreland case was that the general had been defeated. The "lore" had it that he had been so discouraged by the testimony of fellow soldiers McChristian and Hawkins that he simply abandoned what he had come to realize was a hopeless attempt to vindicate himself.68 Adler concludes that while the "lore" in both cases was correct, contemporary accounts of the Westmoreland case were mistaken about the causes, meaning, and terms of his defeat.69

66. Adler, in effect, would require the Fairness Doctrine, already on shaky constitutional grounds, to be expanded greatly. The Fairness Doctrine is a regulation promulgated by the Federal Communications Commission. It requires broadcasters to air controversial news and public affairs programming and to give air time to individuals or organizations with competing views. See Donahue, The Fairness Doctrine is Shackling Broadcasting, TECH. REV., (Nov./Dec. 1986).
67. RECKLESS DISREGARD, supra note 1, at 200.
68. Id. at 73.
69. Id. at 75.
Adler makes two strong points in her analysis of Adams' testimony. First, she points out that Adams' estimate that more than 100,000 North Vietnamese had infiltrated South Vietnam in the five months before the February 1968 Tet offensive had never been mentioned by Adams in any of his notes, articles or statements until just before he began working on the broadcast. Accordingly, she is of the view that Westmoreland's counsel was setting the stage for a recent fabrication argument. Second, she highlights the apparent contradictions between Adams' testimony in the Daniel Ellsberg case and his position in The Uncounted Enemy. The CBS documentary had stressed the idea that Adams' methodology in counting enemy field strength had been correct and that Westmoreland could have had no reason to ignore it, apart from his allegedly base political motives. Yet, in the Ellsberg case, Adams had testified that:

The problem always was in Vietnam to sort out who was a soldier and who wasn't. A person that lays a grenade on a path with a trip wire ... Now, whether you consider this man a military man or a civilian, I couldn't say ... It is very difficult to decide who to count. Westmoreland's "difference of opinion" explanation for having had rejected Adams' order of Battle estimates is, of course, entirely consistent with Adams' Ellsberg testimony.

While these points are important, however, they address only two minor aspects of Adams' lengthy testimony and it is hard to ascertain whether or not they made any impact on the jury. It seems clear that they had no impact on juror Roth. In her account of the trial, it is evident that she had been impressed by the mention of the Ellsberg case, but she did not refer at all in her diary to the contradictions stressed by Adler. In fact, what seemed to have impressed her most was Adams' contention that "the documentary [had been] valuable because it told the story for the first time"—a contention that Adler, viewing Adams' testimony as fabrication, promptly labelled "preposterous." While it may be true, however, that Adler's analysis of what the verdict in Westmoreland should have been is valid, the jury's reaction to the testimony should also be weighed in assessing the credibility and relative importance of

60. Id. at 197, 198 and 232.
61. Id. at 1095 [emphasis added].
62. JUROR, supra note 33, at 218-219. Roth seemed to find Adams a very credible witness. See, e.g., Id. at 198-99.
63. Compare JUROR, supra note 33, at 219 with RECKLESS DISREGARD, supra note 1, at 198-99.
that analysis (assuming, of course, that juror Roth’s reaction was typical).

Adler raises other strong points in favor of General Westmoreland in her analysis of the testimony of General McChristian. Unfortunately for Westmoreland, most of these points also appeared to pass unnoticed, at least by juror Roth.

The core of Adler’s discussion of McChristian’s testimony addresses a conversation between Westmoreland and McChristian which McChristian alleges took place in Vietnam on the subject of whether or not to send a cable to Washington which would have revised upwards the command estimate of enemy troop strength. According to McChristian, Westmoreland refused to send the cable stating, “If I send that cable to Washington, it will create a political bombshell.” McChristian testified that he was sure Westmoreland had used the term “political bombshell” because, he said, he had been so surprised by Westmoreland’s statement that the words had “burned themselves right into [his] memory.”

Adler notes that on cross-examination, however, Westmoreland’s counsel, David Dorsen, had elicited that McChristian, when previously interviewed by George Crile, had stated that he “didn’t recall the precise words that General Westmoreland used.” While this may be a telling discrepancy, Adler again tries to take the point too far, claiming that it “effectively disposed of the matter.” It is hard to see, even on the evidence Adler presents, how this discrepancy destroyed the rest of McChristian’s detailed testimony. While McChristian’s alleged recollection of Westmoreland’s exact words may have been impeached, McChristian never waivered in his claim that Westmoreland had blocked the cable for political reasons. While the discrepancy could have had major significance had it led the jury to completely discount McChristian’s testimony, from what we can tell the jurors respected McChristian. Patricia Roth did not even mention the inconsistency in McChristian’s testimony in her trial diaries. However, Alder points out that this may have been because the inconsistency was not really pressed by Westmoreland’s counsel during the trial.

64. RECKLESS DISREGARD, supra note 1, at 79.
65. Id. at 79.
66. Id. at 86 (emphasis added).
67. Id. at 87.
68. JUROR, supra note 33, at 266.
69. RECKLESS DISREGARD, supra note 1, at 87.
The Westmoreland case was settled at a point in time when the jury had heard only a portion of the testimony of the other key defense witness, Colonel Gains Hawkins. It is in connection with the Hawkins testimony that Adler's review of the trial transcripts yields the richest and least contestable information presented in Reckless Disregard.

Hawkins had been the Order of Battle Chief on Westmoreland's staff during the relevant period in Vietnam. He was an elderly man at the time of trial and his memory sometimes seemed to fail him. Counsel on both sides appear to have had considerable difficulty in conducting their direct and cross-examinations of him. The substance of Hawkins' testimony was that there had been a "command-directed" artificial ceiling of 300,000 placed on estimates of enemy troop strength (Adams had estimated the actual strength to have been as high as 600,000) and that he, Hawkins, had personally ordered men under him to falsely reduce actual troop estimates to meet this ceiling. This was devastating testimony except for the fact, as Adler painstakingly points out, that Hawkins never established any link between his admitted actions in reducing the estimates and any orders to him from General Westmoreland. As a consequence, Westmoreland's counsel properly objected, and moved to strike Hawkins' testimony for lack of foundation.

The ruling on this motion, however, was deferred by the court, allowing CBS' chief counsel, David Boies, to close his direct examination of Colonel Hawkins with this exchange:

Q: Do you have any animus or ill will toward General Westmoreland?
A: No, sir, none whatsoever.
Q: Do you have any animus or ill will to the United States Army?
A: No, sir. I carried out these orders as a loyal officer in the United States Army.71

This exchange, of course, as Adler duly notes, was allowed despite the fact that there had been no foundation established for the proposition that any command-directed orders to underestimate enemy

70. The lore seems supported by juror Roth's account that McChristian and Hawkins were the witnesses "they had all been waiting for." JUROR, supra note 33, at 266, 282. Even Adler alludes to the importance of these witnesses. She refers to Judge Leval's remark to the jury before Hawkins testified that, "You have waited a long time for this and you're now going to get to hear..." RECKLESS DISREGARD, supra note 1, at 96.
71. RECKLESS DISREGARD, supra note 1, at 115 (emphasis added).
troop strength had existed or that Westmoreland had anything to do with them. Nonetheless, this last exchange apparently moved the jury and was prominently featured in the press.72 How did this occur?

It occurred only because, as Adler notes, transcripts of side-bar conferences are rarely reviewed by the press covering a trial day-to-day.73 Thus, plaintiff's arguments before Judge Leval regarding the lack of foundation for Hawkins' testimony were simply overlooked. According to Adler, plaintiff's counsel, Dorsen, asked in his motion that the jury be instructed to disregard that entire portion of Hawkins' testimony regarding the command-directed ceiling of 300,000. Moreover, the court was strongly inclined at the time to grant plaintiff's motion and to give those instructions. The transcript of the side-bar conference contains these comments by Judge Leval:

It's not a matter of amount of foundation.... Nowhere in his testimony has he [Hawkins] said anything to the effect that he received an order or a suggestion that it was a command position that 300,000 was the limit.74

However, Judge Leval declined to give the requested instruction immediately. He decided that the correct procedure would be to give it at the end of cross-examination. Consequently, it was never given because General Westmoreland and CBS agreed to a joint statement settling the case before Dorsen's cross-examination of Hawkins was complete.

Adler correctly characterizes the settlement as a defeat for Westmoreland since, in the agreed-to joint statement, CBS merely acknowledged that Westmoreland was "patriotic" and had "carried out his duties [in Vietnam] as he saw them."75 Yet, she persists in the view that the side-bar conference with Judge Leval proves that the Westmoreland's decision to settle did not result from Colonel Hawkins' testimony. Her position is that while the press and the jury may not have known about Judge Leval's limiting instruction, Westmoreland's counsel did know about it. She concludes from this that it is, therefore, unlikely that Westmoreland settled as a result of Hawkins' testimony since that testimony would have

72. Id. at 116. See also JUROR, supra note 33, at 288.
73. RECKLESS DISREGARD, supra note 1, at 120-21.
74. Id. at 120.
75. Id. at 76.
been later discredited by the court’s instruction. This view is buttressed by a fact not mentioned by Adler but which supports her argument nonetheless—namely, that Westmoreland’s chief counsel, Daniel Burt, had first contacted CBS regarding settlement several weeks before the trial.\textsuperscript{78} In other words, Westmoreland and/or his counsel had considered settling before Hawkins testified.\textsuperscript{77}

Adler’s argument is persuasive, but falls short of establishing her primary conclusion. That primary conclusion is that \textit{The Uncounted Enemy} should never have been broadcast in the first place because it was “preposterously false.” The only proposition that Adler is able to establish convincingly is that the timing of the settlement had little to do with the testimony of Colonel Hawkins in particular. In contrast, her various contentions as to why the documentary was “preposterous” are, as noted above, susceptible to challenge. Moreover, since Hawkins’ testimony was presented just prior to the time the jury was to deliberate, it still seems to be the case that the timing of the settlement probably resulted from Westmoreland’s assessment of the cumulative weight of all the testimony presented to that point and his resulting determination to settle quickly before an adverse jury verdict could be announced.\textsuperscript{78}

Perhaps in recognition of the vulnerability of her “preposterously false” contention, Adler chooses to emphasize Westmoreland’s relationship with his lawyers as the key to his decision to settle. Her point seems to be that the general might have won had he not been abandoned by his counsel. She portrays Westmoreland as a man who had no choice but to settle because his lawyer was emotionally and physically unable to continue.\textsuperscript{79} While the relationship among Westmoreland’s lawyers does seem, as discussed below, to


\textsuperscript{77} Although it is also true that counsel would have known in advance what the witnesses were likely to testify to because their depositions had already been taken.

\textsuperscript{78} In addition, Adler hardly deals with the actual malice test except in a confused discussion of “fairness,” discussed infra. Westmoreland’s claim that the discrepancy in estimates was the result of good faith differences of opinion may have made it more difficult for him to prove CBS’s actual malice.

\textsuperscript{79} Strangely, Adler omits reference to possible financial burdens upon Burt. Burt’s organization, the Capitol Legal Foundation, had offered to bring the suit at no cost to Westmoreland. Over $3.25 million had been expended by the time of settlement, and, despite extensive fund-raising, the Foundation was still $500,000 in the hole. Moreover, payment of legal fees and court costs were big issues during settlement negotiations. Farber, \textit{supra}, note 76.
have been unusual, and while Westmoreland's cause might possibly have been better served by more experienced lawyers or a more direct presentation, it is simply too much to believe that attorney Daniel Burt's alleged exhaustion was the sole reason for the settlement. The posture of the case undoubtedly also had something to do with it.80

II. THE LAWYERS

Alder's argument concerning Westmoreland's lawyer's attempts to establish that, had Westmoreland been represented by more competent counsel, the outcome of his trial may have been different. However, she does not offer any analysis that would mandate such a conclusion. She merely provides instances of the inexperience and apparent ineptitude of the General's lawyers during the course of trial.

It is impossible, however, to evaluate a trial's probable outcome in these terms. The truth that is determined at any trial is a function of the evidence presented to the jury and the weight and credibility the jury gives to that evidence. Our trial system assumes that each party is represented by competent and diligent counsel.81 The sides, however, are not always evenly matched. When that happens, it is possible for the "truth" of a given case to be skewed in favor of the better lawyer. Whether in fact the outcome of the Westmoreland case would have been different had Westmoreland been represented by different lawyers is impossible to determine. No one, including Adler, has come forward with any "smoking gun" or new analysis that would mandate such a conclusion. Having said this, however, it does seem clear that had Westmoreland been represented by more experienced counsel, at least some of the problems that occurred during his trial, and with which Alder is concerned, might have been avoided.

Westmoreland's lawyers, or at least most of them, were, indeed, inexperienced. His chief counsel, Daniel Burt, had never before tried a case before a jury. Of the lawyers assisting Burt, only David

80. Adler also makes no reference to a theme that was mentioned again and again in Roth's account, namely, that those who felt that the estimates should have been higher were dismissed or transferred despite Westmoreland's professed "open door" policy. JUROR, supra note 33, at 274, 298.
Dorsen, whose credentials included service as assistant chief counsel to the Ervin Committee during the Watergate hearings, had any more trial experience than he did.

According to juror Patricia Roth’s diary, both Burt and CBS’ chief counsel, David Boies, initially seemed inexperienced to her. She observed, however, that Boies appeared to gain confidence and capability as the trial proceeded but that Burt did not.\(^82\)

Alder zeroes in on Burt’s mistakes. She is particularly critical of his conduct of the direct examination of then Defense Secretary Robert McNamara. In her opinion, it was a tactical blunder for Burt to have expanded his questioning of McNamara into matters beyond Westmoreland’s reputation and integrity, and particularly into substantive issues concerning enemy troop strength estimates. This opened the door for CBS counsel Boies to cross-examine the Secretary regarding his personal evaluation of those estimates, an examination which, in Alder’s view, only served to impeach McNamara’s credibility as a witness.\(^83\)

Some of Alder’s other criticisms of trial events also indirectly comment on the competence of Westmoreland’s lawyers. For example, she points to the behavior on the stand of CBS witnesses George Crile and Sam Adams. Both witnesses, in her view, persisted in answering simple questions put to them by Westmoreland’s counsel with lengthy and complicated explanations or justifications for their actions. In support of this view she points out an instance during the trial when Judge Leval interrupted witness Adams and instructed him to answer questions directly rather than launching in every case into a long-winded rebuttal of the propositions suggested by the questions put to him.\(^84\) While Alder cites this as evidence of CBS’ arrogance and its determination to evade effective cross-examination of its actions and motives for broadcasting its documentary, it might equally well have been the case that CBS’ lawyers, realizing the inexperience of Westmoreland’s lawyers, simply instructed their witnesses to employ this tactic. The tactic, if successful, has the advantage of insuring that a witness is able to have his full explanation heard by the jury and it avoids the risk of compliant and often damaging

---

82. JUROR, supra note 33, at 36, 55.
83. RECKLESS DISREGARD, supra note 1, at 55.
84. Id. at 196. Leval gave a similar instruction to George Crile. Id. at 58.
short responses. Of course, the use of the tactic can backfire if it annoys the court (by delaying the progress of the litigation) or if it leads the jury to believe that the witness is being evasive. 5

What Adler fails to mention is that the witness' opportunity to launch into long-winded explanations was primarily the fault of Westmoreland's attorneys who were conducting the examinations. A good trial lawyer is taught from day-one to control witnesses. This means making sure that a witness responds to questions put to him, and that he does not digress into a speech. Though there are strong indications that Judge Leval was concerned about the "free-form" responses, and would have been inclined to support plaintiff's counsel in attempting to better control the witnesses, there is little indication that Westmoreland's counsel made any such efforts, or certainly any effective efforts, to do so. This seems inexcusable, especially during Burt or Dorsen's questioning of hostile witnesses.

Under Federal Rule of Evidence 611(c), counsel is entitled to ask a hostile witnesses leading questions. The preferred technique for asking these is to avoid open-ended questions, and to phrase all questions so that the witness must respond "yes" or "no." When used effectively, this technique is an extremely powerful tool for the attorney to both argue his case to the jury and to insure that the witness is narrowly proscribed. If the witness attempts to give a long, discursive answer in response, there are a variety of ways the lawyer could deal with the problem, including interrupting the witness, appealing to the court on the basis that the witness is being nonresponsive, or simply repeating the question until the witness answers it directly, Westmoreland's attorneys' failure to employ these techniques was undoubtedly a detriment to his case. 86

Many non-lawyers also overlook the fact that a lawyer's skill can be measured by the success enjoyed by his adversary in questioning the lawyer's own witnesses. Before a key witness testifies, a competent lawyer should prepare him thoroughly, and make sure that he will not be flustered or surprised by any of the questions the opposing counsel might ask.

85. Roth reported that, in fact, some of her fellow jurors thought that some of CBS's witnesses were purposely giving plaintiff's counsel a hard time. JUROR, supra note 33, at 211.

86. Roth referred to an egregious example where Burt asked Crile if he had done any research in preparation for the documentary and Crile went on at length and in detail regarding his research. Burt never interrupted him. Instead he belatedly moved that the response be stricken from the record. Leval denied the motion as untimely. That type of open-ended question should never have been asked. Id. at 141-42.
Adler spends comparatively little time in *Reckless Disregard* examining the testimony of General Westmoreland himself. This is unfortunate because it would be interesting to compare juror Roth and Adler's perceptions of the General's performance. Roth's diary indicated that Westmoreland was a poorly-prepared witness. She noted repeated instances where defense counsel Boies asked Westmoreland questions which Westmoreland categorically denied, only to be later discredited by Boies' production of some document or report that indicated Westmoreland was mistaken. Roth reported that, as this question and discrediting pattern was repeated, she actually became impatient with Westmoreland and wondered when he would catch on to what Boies was doing. 87 Westmoreland's counsel, surely should have recognized this and instructed Westmoreland on how to deal with it. For example, he could have been instructed to ask the lawyer examining him to rephrase or repeat a question he did not understand. Similarly, if his memory was a little unclear on a point, he should have felt comfortable in simply saying he didn't remember. No jury expects a witness to remember every conversation he may have engaged in over a twenty year period. At the very least, Westmoreland's counsel should have collected any public statements made by the General which might have been pertinent to the issues in dispute in the case and carefully prepared him to be confronted by these statements during cross-examination.

As Section I to this review notes, many of the points Adler raises in support of Westmoreland's position do not appear to have been picked up by either the jury or the press. This may be attributable to the fact that her analysis is largely based upon transcripts instead of day-to-day attendance at trial. While her inquiry based solely on the record allows her to review the evidence in a manner unprejudiced by the style of presentation, and to consider the sidebar conferences that unfortunately went undetected by both the jury and most reporters, there is a danger that such a methodology yielded her an incomplete picture of the proceedings. This is particularly true with regard to the performance of the lawyers and their impact on the case. Although a jury is instructed to consider only the evidence and not the skill of the attorneys, it is difficult for most jurors to make such a distinction. In practice, the skill of the lawyer often has an important impact on the

87. *Id.* at 134.
evidence, as a skilled lawyer is better able to develop and argue nuances affecting the admissibility of oral and written evidence.

In other words, there is a fine overlay on one's ability to prove a fact absolutely at trial. Not only is proof dependent on the evidence presented, it also is dependent upon the lawyer's ability to make the point evident to the trier of fact. For example, while Adler agrees with juror Roth that Burt was generally ineffective, at times she champions the abilities of his associate, David Dorsen. Dorsen clearly was able to elicit important testimony. However, juror Roth's descriptions of Dorsen's courtroom technique in her trial diary highlight the shortcomings of Alder's heavy reliance on transcripts. Roth notes, for example, that Dorsen frequently read entire documents aloud. In the transcript, such a presentation might have appeared thorough, but in the courtroom, it may have induced yawns. While Adler does report that Dorsen had a nervous style (that may or may not have appealed to the jury), in general she fails to adequately consider the impact of the lawyers. In fact, she specifically criticizes certain of the lawyers' histrionic techniques as being irrelevant. She is technically correct, but a good trial lawyer never forgets his audience. Therefore, Dorsen's decision to wait until summation to highlight certain discrepancies and to refrain from "reducing the other side's star witness to [a] too obvious[ly] self-serving and less than honest fool," a decision referred to by Adler with approval may have been ill-advised in this lengthy trial. Saving certain responses for summation is only appropriate in a short trial, if, indeed, it is appropriate in any case. In a lengthy trial the court, the jury, and the attorneys are apt to have forgotten the point's significance by the time of summation or their minds may be set by then. Moreover, Judge Leval's rules allowed each side an amount of time to make mini-

88. Id. at 42.
89. Id. at 55.
90. Roth described him as the "epitome of nerves." Id. at 137.
91. RECKLESS DISREGARD, supra note 1, at 115.
92. Although it is often impossible to tell what audience it is focusing on, Roth's book is replete with references to the jurors' concern that Burt's suits were too garish and that Boies appeared to wear the same two suits for the entire four months. JUROR, supra note 33, at 43, 44, 83, 85, 299.
93. RECKLESS DISREGARD, supra note 1, at 90.
94. Id. at 80, 90.
summations to the jury after each major segment of the case. He clearly was concerned that the jury might otherwise be lost in the meandering evidence. Adler completely disregards this point.

Finally, Alder's analysis of the trial through transcripts could not possibly take into account the subtle credibility questions that are the historic province of the jury. Juror Roth's book refers several times to statements made by Westmoreland, or to statements made in his behalf, which were particularly damaging to CBS' case. Roth discounted these statements, however, because it has been clear to her from the looks on the faces of Crile and Adams at the time that the statements were false. Roth, of course, could have been wrong, but it was her prerogative as a juror to assess credibility. Adler's analysis taken entirely from transcripts, must, therefore, be evaluated with some reservation.

Adler may have chosen not to belabor the problems with the trial techniques of Westmoreland's lawyers, either out of respect for the fact that they had done the best they could with substantially fewer resources than Cravath had at its disposal, or because their inexperience was already common knowledge. Other of her comments, which seem to overlook the importance of rudimentary trial techniques, can be explained by the fact that Adler herself has probably never practiced law. Many of her observations as to the actions of the lawyers in the Westmoreland case exhibit a certain naiveté because of her unfamiliarity with the realities of practice. At one point, for example, she criticizes the Cravath firm for having filed lengthy summary judgment briefs. She states that since the purpose of a summary judgment motion is simply to establish that there is "no genuine issue of material fact," the briefs submitted in support of such a motion are usually quite short. As any lawyer who has ever written a summary judgment motion knows, however, it sometimes takes many pages to explain to the court why there is no genuine factual issue. It often takes several

95. Judge Leval allowed attorneys for each side to use "mini-summations" to help the jurors understand the complex trial. The judge allotted a total of two hours to each side for this purpose and required only that the mini-summations not be used to interfere unduly with the opposing side's presentation of evidence. Attorneys for each side could use their two hours in blocks as large or as small as they saw fit, and for any purpose that they desired. Legal Times, Feb. 25, 1985, at 1, col. 2.
96. JUROR, supra note 33, at 56, 95.
97. RECKLESS DISREGARD, supra note 1, at 13.
hundred pages just to explain what the uncontroverted facts are.

Similarly, Adler also attempts to impute some darker meaning to the Cravath law firm's original attempt to defend on the theory that the documentary was not "of and concerning" Westmoreland. 98 She seems to imply that, in offering this defense, the firm was somehow conceding that the documentary was defamatory and that CBS was simply trying to avoid prosecution on a "technicality." However, the pleading system is clearly designed to allow parties to plead in the alternative if they so desire. 99 Moreover, it would have been irresponsible of Boies not to have at least considered the possibility that he could have the case dismissed because it was not "of and concerning" Westmoreland. If successful, he could have quickly disposed of a $120,000,000 lawsuit against his client.

The disadvantages Alder suffers from due to her unfamiliarity with law practice are, however, offset by her layman's perspective of certain aspects of the trial that may well have been overlooked or underplayed by a practicing attorney.

For example, she gives much attention to details of the deposition process and other pretrial maneuvering by the attorneys in both the Westmoreland and Sharon cases. Her uninitiated readers must have been alarmed and entertained by her descriptions of the shenanigans during discovery in the Sharon case. Moreover, her commentary probably sent a strong warning to practicing lawyers to consider carefully how legal maneuvers or statements uttered in the heat of litigation will look when reported later in cold print.

For example, Adler depicts Cravath attorneys Thomas Barr and Stuart Gold as relentlessly obstreperous in taking and defending depositions. She reports their disposition to use tactics aimed at disparaging opposing lawyers—tactics such as calling the opposing counsel "sonny" or dismissing his questions or argument as "baloney." 100 She further reports that Barr and Gold repeatedly ignored Judge Abraham Sofaer's instruction to confine themselves to the use of the word "objection." She points out that both of these attorneys persisted in making long speeches, which she

98. Id. at 28.
99. Moreover, claiming the documentary was not "of and concerning" Westmoreland was not inconsistent with the argument that the story was true, nondefamatory, and not broadcast with actual malice.
100. RECKLESS DISREGARD, supra note 1, at 47-52, 157-59. At one point Barr went so far as to tell General Sharon to "shut up." Id. at 49.
RECKLESS DISREGARD

believes were designed to coach the witnesses into proper responses. Documenting her perceptions, she points to the fact that, at times, the proceedings broke down to such a point that the depositions had to be resumed in the presence of Judge Sofaer—a highly unusual procedure, especially for prestigious and well-known firms such as Cravath and Shea & Gould. In sum, Adler characterizes their behavior as boorish and representative of Cravath’s general practice of “mindless aggression” in its litigation practices. She quotes one Cravath client as claiming that employing Cravath lawyers was “like having a pack of Dobermans” that he could “unleash” when needed.

Accepting Adler’s descriptions as accurate, the key question is: what is wrong with this form of conduct? Does this behavior reveal only bad manners, or is there something more? The Cravath firm’s behavior cannot meaningfully be analyzed against a standard of etiquette. It must be measured against the purposes sought to be achieved and the general ethical concerns and requirements of the bar. For example, if Adler is correct in her charge that Cravath’s “mindless aggression” had led Israel to come to the aid of General Sharon by allowing Appendix B to be reviewed, then that aggression may have hurt Cravath’s client, Time, in that instance. In the Sharon case, however, the Cravath firm was apparently not so aggressive as to preclude it from counseling settlement. As Adler notes, Time rejected various early settlement offers that the firm apparently advised it to accept. Time’s professional reputation may, indeed, have been better served had it accepted those offers before the jury had the opportunity to find the paragraph false and defamatory, and to criticize Time and Halevy for careless journalism. Accordingly, in this case at least, it seems clear that the firm tempered its aggression in consideration of its clients best interests. It apparently recognized that a lawyer’s fervor to emerge a victor must always be subordinated to longer-term client interest, such as public image. As Adler emphasizes, despite the Sharon

101. See Id. at 158-59, 160.
102. Id. at 163. Adler does acknowledge that other firms may also pride themselves on the “unremitting combativeness” of their attorneys.
103. Id.
104. Id.
105. Id. at 145.
106. As Professor Hazard noted as well, “the trial lawyer can become completely immersed in his lawsuits, to the point where they become his identity and their outcome
jury's findings of falsehood and defamatory content, and despite its additional statement chastising *Time* for its negligence, Cravath attorney Tom Barr was still widely quoted as claiming that *Time* "won, flat-out and going away." While Barr's statement was really no different from *Time's* own statement and reaction to the verdict, the firm might better have counseled its client to consider adopting a tone that would have been more favorable received by *Time's* readers and colleagues.

Adler also stresses the danger of a lawyer becoming too personally involved in the case. At one point, Barr got into a heated argument with General Sharon after Sharon told Barr that he was "defending a lie." Adler questions of why Barr, a lawyer defending a libel suit, a situation where two of the key issues are whether the allegedly libelous statement was false and whether it was made with actual malice, would take offense to Sharon's remark. Lawyers often defend murderers, rapists, tax evaders, and all manner of criminals and tortfeasors. Only Perry Mason has the luxury of blameless clients. Every client is entitled to a defense and every lawyer is entitled to feel that his client should prevail. However, no lawyer should be surprised that his adversary feels that he is completely in the right.

Adler offers the interesting observation that the type of aggressive behavior she criticizes is more likely to come from male attorneys. She notes that when depositions were taken and defended by female attorneys, reason seemed to rule. Putting this dubious proposition aside, however, the more substantive issue she touches upon is why lawyers (of either sex) feel they must adopt an aggressive stance at depositions. Part of the reason may be that the adversary system of litigation is largely patterned after military

the sole criterion of his professional stature. Indeed, it is often only with difficulty that a modern trial specialist can maintain distance between himself and his craft. The whole tendency of his work leaves him to hold, with Vince Lombardi, that winning is not the most important thing but the only thing. And the result can be that he becomes incapacitated to give his client detached advice about the prospects of ultimate victory and the advisability of settling through compromise." HAZARD, supra note 81, at 133.

107. RECKLESS DISREGARD at 221.

108. See, e.g., Newsweek's description of *Time's* reaction to the verdict. NEWSWEEK, Feb. 4, 1985 at 52-58.

109. It should also be noted that evidently Shea & Gould was not blameless in this regard either. Another argument ensued when a Shea & Gould lawyer became outraged that one of Cravath's lawyers was accusing him of "tricks." RECKLESS DISREGARD, supra note 1.

110. Id. at 163.
conflict.' As Tom Barr's comments following the jury verdict reveal, the popular rhetoric of litigation characterizes a courtroom confrontation in terms of war. Is this the only successful model to adopt or are there alternatives? Does it yield better results for the client or is there another motive? Will the "war" paradigm change as greater numbers of women rise to prominence; or as Adler suggests, will women also have to learn to "play war" in order to succeed? Adler raises enough questions to merit a second book.

The lawyer's canon of ethics says that he should represent his client "zealously," but this same canon also adds the qualification "within the bounds of the law." In addition to avoiding the possibility that he might harm, through his zeal, the overall interests of his client, the lawyer should also meticulously avoid any temptation to violate the ethical rules of either the legal profession or of society in general. The ethical considerations to which a lawyer is instructed to adhere, for example, clearly state that "the duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." This goes far beyond considerations of courtesy. Becoming too obsessed with victory could lead to violations as dramatic as suborning perjury.

In this regard, Adler strongly suggests that some of Cravath's attorneys went beyond bounds in their tactics to inhibit depositions or in coaching witnesses to respond as directed. She also implies that Cravath may have intentionally failed to produce key documents such as Halevy's personnel files, which contained in-

111. HAZARD, supra note 81, at 120-21.
112. Barr was quoted as saying, "A lawsuit is very much like a war, who wins the battles is not particularly important, who wins the war is terribly important. The war is over, and we won." NEWSWEEK, Feb. 4, 1985 at 52.
115. On the most basic level, a truly overly aggressive litigation posture could be a violation of the disciplinary rule prohibiting lawyers from engaging in undignified or discourteous conduct degrading to a tribunal. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(6). Similarly, such a posture could violate DR 7-106(C)(7)'s prohibition of intentional or habitual violation of established rules of procedure or evidence.
formation that he had been on probation. These charges address matters far more serious than simple bad-manners. While a lawyer fighting to defend his client should be permitted wide latitude, there is a limit.

Although, according to Adler, the depositions in Westmoreland proceeded more "decorously" than those in the Sharon case, the possible ethical problems arising from the Westmoreland case are significantly more troublesome. First, as she discusses at length in her coda to Reckless Disregard, the Court of Appeals for the District of Columbia found that the Cravath firm improperly moved for sanctions when former C.I.A. director Richard Helms, fearing that CBS would broadcast his deposition, refused to have the proceeding videotaped. Adler emphasizes that there was clearly no justification for Cravath's motion, because the simple requirements of Federal Rule of Civil Procedure 30(b)(4) had not been met—i.e., Cravath had neither the permission of the other party nor a court order authorizing the deposition to be videotaped. Cravath, of course, was sanctioned by the court for making this frivolous motion, a fact that has been widely disseminated. There seems little need to further debate the matter. However, Adler highlights another issue regarding the Westmoreland trial that, as far as I am aware, has never been raised or adequately explained. That issue is the relationship between Westmoreland's chief counsel, Dan Burt, and CBS's chief counsel, David Boies.

As Adler describes the situation, Burt became increasingly defensive and seemed on the verge of panicking as the trial progressed. Whenever he raised an objection or made a motion, he did not look to Judge Leval, but to Boies for approval or confirmation. He actually began to ask Boies for critiques of his cross-examination. According to Adler, this escalated to the point where Boies began giving affirmative advice to Burt. Specifically, Adler alleges that Boies advised Burt to fire Dorsen—the attorney she characterizes

116. Reckless Disregard, supra note 1, at 63-64.
117. Id. at 183. See also Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985). Why this is so Adler does not state. It may be because Shea & Gould was perceived by Cravath as a tougher adversary. Or, the Sharon case may have been seen as the more difficult to defend (so that every "battle" was important). It may simply have been a product of the personalities involved.
118. Id. at 227-230.
119. Id. at 224.
120. Id. at 224.
as the most capable lawyer on Westmoreland’s team. The significance of this, in her view, is that ultimately, it was Burt who, without consulting Dorsen or any of the other lawyers assisting him, made the decision to settle the case on such poor terms. She points out that on the night of the settlement, Burt attended a celebration dinner with the Cravath lawyers.\footnote{121}

Before discussing the implications of this relationship, I must emphasize that Adler gives no source for these statements other than occasional references to one of Burt’s young associates.\footnote{122} The sole evidence she offers is a reference to the transcript itself wherein it is recorded that during argument by Burt, Dorsen and Boies before Judge Leval regarding the foundation for Colonel Hawkins’ testimony, Boies apparently tried to split the opposition (as is not uncommon or unethical) by stating at one point that “even Mr. Burt” agreed with him.\footnote{123}

While no ethical rule appears to deal directly with the issue of how much, and what kind of influence a lawyer may have upon his adversary, some of the ethical considerations under Canon 5 do mandate that “a lawyer should exercise independent professional judgment on behalf of a client.”\footnote{124} For example, the first ethical consideration set forth under Canon 5 provides:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.\footnote{125}

Case law is similarly clear that “[a]ttorneys must not allow their private interests to conflict with those of their clients. They owe their entire devotion to the interests of their clients.”\footnote{126} The Code of Professional Responsibility further provides that:

\begin{footnotes}
\footnote{121. \textit{Id.} at 222.}
\footnote{122. \textit{Id.} at 224.}
\footnote{123. \textit{Id.} at 117.}
\footnote{124. \textsc{Model Code of Professional Responsibility} Canon 5.}
\footnote{125. \textsc{Model Code of Professional Responsibility} EC 5-1.}
\footnote{126. United States v. Anonymous, 215 F. Supp. 113 (E.D. Tenn. 1963). \textit{See also} Grievance Committee v. Rattner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964) (“When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion.”).}
\end{footnotes}
The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and the lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.\footnote{127. \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-21.}}

By seeking the advice and approval of Boies, if, in fact, he did so, Burt ran the risk of compromising his client's interests to the interests of the adversary, CBS. Expressed another way, it is, of course, conceivable that Boies exerted subtle social pressure on Burt which may have affected his behavior.\footnote{128. Another ethical problem to consider is Burt's statement reported by Adler in \textit{Reckless Disregard} that he was exhausted at the end of trial and that had he been as fit as he was at the beginning of trial, he would not have settled but would instead "have killed them." \textit{RECKLESS DISREGARD}, supra note 1, at 225. DR 2-110(C)(4), which provides that a lawyer may withdraw if his mental or physical condition renders it difficult for him to carry out his employment effectively, would seem to be something Burt may have wanted to consider.} If so, Burt should have considered taking steps to avoid this influence or possibly should have withdrawn from the case.\footnote{129. Moreover, EC 5-12 may be relevant in that it requires co-counsel who are unable to agree on a vital matter regarding the representation of their client to submit that disagreement to the client for resolution. While Burt was clearly the chief counsel and Dorsen and company subordinates, Burt's failure to consult these other lawyers about the settlement came perilously close to violating this ethical concern.}

Despite the troubling implications of this issue, it is difficult to judge Burt too harshly; after all, he has already been labeled the loser in many other ways. On the other hand, while Boies cannot be faulted for trying to foster a split in the opposition so as to improve the chances of victory for his client, he went a step further, according to Alder, and began to give Burt advice on issues such as whether he should fire Dorsen. Obviously, there was no identity of interest between the concerns of CBS and Westmoreland, and Boies thus may have put himself in a true conflict of interest situation. If Boies was purposely giving Burt bad advice, he may have acted to achieve beneficial results for CBS at, arguably a moral price. Such a relationship between attorneys who should be adver-
saries throws the entire adversary system into jeopardy. It seems ironic that Adler, who spends much of her book attacking the lawyers for being needlessly adversarial, chooses to highlight an instance where the needs of both the client and the judicial system may have been ill-served by their failure to be adversarial.

All of this leads to a reassessment of the evidence Adler presents in support of her primary conclusion that the lawsuits should "not have been so aggressively defended."130 It seems clear that she is concerned mainly with Cravath's "rudeness" and with CBS' refusal to admit its errors. Although she discusses some of the ethical considerations mentioned above, she does not tie this discussion into her thesis of "mindless aggression." Her assessment of etiquette may be correct, but unless Cravath's clients were harmed by it, there is nothing technically wrong with such behavior.

The refusal of CBS and Time to admit that they were wrong is a more complex issue. A key problem at the heart of libel-reform discussions is that parties tend to believe that they are wholly in the right. Truth in this situation can be a murky concept. Both Time and CBS apparently believed their reports were true and decided to go to the ramparts to defend their veracity once that decision was made, the lawsuit had to be defended wholeheartedly.

It must be remembered that part of the reason why the media defendants reacted aggressively was because so much was at stake. Adler glosses over the fact that Westmoreland and Sharon were suing for $120,000,000 and $50,000,000 respectively.131 Also of concern was the severe damage the suits could have done to the media defendants' professional reputations. Early in the proceedings, Dan Burt was quoted as saying, (although he has since denied it), that the Westmoreland case was going to cause the "dismantling of a major news network."132 Such an attack understandably requires a strong defense.

III. THE LAW

Adler's chief complaint about the current state of defamation law is that it imposes too great a burden upon plaintiffs who are public figures.133 She does not address the burdens on the media,

130. RECKLESS DISREGARD, supra note 1, at 61.
131. Id. at 14.
132. Id.
133. Adler overstates some of those burdens. She states that "in the unlikely event
apparently because she feels that arrogant media defendants have been treated with too much deference by the courts. Her frustration with *Time* and CBS for failing to admit what she perceives to be their mistakes is a dominant theme of *Reckless Disregard*. While many commentators agree that the current state of the law could use improvement and refinement, Adler provides little constructive advice to guide courts and legislatures toward a better system. This is unfortunate, as Adler is obviously a creative thinker whose special background might have enabled her to bring insight into the problem. When examined closely, Adler's comments about libel law are seen to amount only to a series of random, bold statements that are often incoherent or contradictory. Part of the problem may be the fact that while, on the one hand, the book purports to be merely a journalist's account of the trials, on the other hand, it is an attempt at serious criticism. This hybrid is ultimately unfulfilling.

Adler attacks the constitutional framework of defamation law and those forms of state legislation that she believes unduly interfere with libel plaintiffs' ability to prove their cases. First, consider Adler's comments on the impact of state legislation.

Plaintiffs have argued that one way to prove actual malice is to show that the defendant had no source for his assertion or that the source was unreliable. 1 To do this, many plaintiffs have sought and obtained disclosure of the defendant's confidential sources. 2

This is not possible, however, in states with strong reporter's shield laws. 3 Typically, the shield laws protect reporters from having...
to disclose confidential sources, and they prohibit courts from citing reporters for contempt if they refuse to make such disclosures. The principle that underlies shield laws is that "to the extent a state authorizes a claim for defamation, it may also limit a party's ability to prove the claim in order to promote other social purposes." Because the courts and legislatures try to balance the competing interests of individual rights as against an unfettered press, many differ on how the balance should be struck. Adler seems to be concerned that the balance is tipping too much in favor of media defendants.

Use of shield laws can create esoteric hair-splitting, the best example of which is from the Sharon case itself. Adler alludes to, but does not discuss, Judge Sofaer's opinion on the subject of whether Halevy could be compelled to reveal information which might lead to the identity of his sources. In his opinion, Judge Sofaer ruled that Halevy's refusal to disclose information identifying his sources would not altogether preclude him from testifying that he had obtained information from what he considered to be trustworthy sources. The court indicated, however, that Halevy could not insulate his state of mind from scrutiny simply by asserting that the information he obtained was from confidential sources. Specifically, it ruled that Sharon had the "right to probe, without infringing on Halevy's right to withhold identifying details, whether Halevy had any source for the statement he made, whether and


to what extent any source he had gave him information that supports the statement and whether he had an adequate basis for believing in the reliability of this source or the accuracy of the information.

This ruling led to the confusing and unhelpful testimony that Adler criticizes, as the attorneys attempted to walk the fine line between the rights of the libel plaintiffs and the free press guarantees of the first amendment.

It appears that Adler is arguing that shield laws should be inapplicable in libel cases. There is, of course, a tension between the right of a plaintiff to bring a defamation suit and a reporter's ability to maintain confidential sources. But prohibiting shield laws from being used in libel cases would only encourage a new set of problems. For example, a person who sought to discover a reporter's source might be tempted to initiate a libel suit solely for the purpose of uncovering that information through the discovery process. This would result in a classic "chilling" of first amendment rights.

Adler appropriately begins her criticism of the constitutional framework of libel law with the leading case of New York Times v. Sullivan. This is not a new approach. The Sullivan rule has been hotly debated since its inception. The current spate of promi-

140. Id. at 583.
142. 376 U.S. 254 (1964). The subject of the dispute in New York Times v. Sullivan was an advertisement that ran in The New York Times entitled "Heed Their Rising Voices." The advertisement described conditions in the South and sought contributions for the civil rights movement. Sullivan was the police commissioner of Montgomery, Alabama. Although the advertisement did not mention plaintiff Sullivan by name, he brought a libel suit in an Alabama State court against The New York Times for $500,000 and received a jury award for that amount which was affirmed by the Alabama Supreme Court. At the time, this was the largest judgment in Alabama history. See Lawhorne, Defamation and Public Officials 216 (1971). The New York Times had a circulation of roughly 650,000. Approximately 394 copies of the edition carrying the advertisement reached Alabama, and only 35 were distributed in Montgomery County. New York Times Co. v. Sullivan, 273 Ala. 656, 144 S.2d 125 & 1962), rev'd, 376 U.S. 254 (1964). Circulation data was obtained from Sullivan, 376 U.S. at 260 n.3.
nent libel suits and verdicts has only intensified the debate. Adler, however, is unclear as to why she disagrees with Sullivan. She simply labels Justice Brennan’s majority opinion in that case as "not well reasoned." This bald statement has been widely disseminated because of Reckless Disregard’s popularity, therefore, it deserves to be considered on its merits.

In Sullivan, Justice Brennan wrote eloquently about the nature of the first amendment as a constitutional safeguard that “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” Thus, Brennan noted, “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that ‘they need to survive.’” The Court discussed the Sedition Act of 1798 at length in the context of James Madison’s argument that, under the United States Constitution “the people, not the government, possess the absolute sovereignty.” In this view, the United States is “altogether different” from the British system under which the Crown is sovereign and the people are subject. Therefore, a greater degree of freedom of the press inheres to the American system. While Justice Brennan noted that the Sedition Act had never been tested in the Supreme Court, he stressed that the attack upon its validity “carried the day in the court of history.” He concluded, therefore, that if a state cannot constitutionally regulate speech by means of a criminal statute, it is also prohibited from such regulation by means of its civil libel law. Consequently, he decided to adopt the formulation used in a number of state courts, namely, that a public official may only recover damages for a defamatory falsehood


144. Sullivan, 376 U.S. at 269 (citing Roth v. United States, 354 U.S. 476, 484).
146. The Sedition Act made it a crime, punishable by a $5,000 fine and five years in prison, “if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States or either House of Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.” Id. at 273-274.
147. Id. at 274-275.
148. Id. at 276.
149. Id. at 254.
relating to his official conduct if he proves that the statement was made with actual malice—i.e., with knowledge that it was false or with reckless disregard of its veracity. 150

The Court in Sullivan attempted to balance the important freedoms of the first amendment, which are critical to a democracy, with the concerns of individuals who justifiably seek to protect their reputations. 151 It must, therefore, be regarded as a well-reasoned and fair expression of many of the ideals we hold important.

Aside from her "not well reasoned" comment, the focus of Adler's criticism of Sullivan appears to be upon subsequent interpretations of its "actual malice rule." What concerns her most is the formulation set out by the Supreme Court in St. Amant v. Thompson. 152 The Court held that actual malice may be found if the defendant "in fact entertained serious doubts as to the truth of his publication." 153 The test is not an objective one requiring that the publisher must have entertained the serious doubts of a reasonable man before publishing, rather it is a subjective test that considers the actual thoughts of the publisher. It is with respect to this aspect of the test that Adler is most critical, asserting that it encourages publishers and broadcasters not to investigate a story's accuracy. Her reasoning is that, since such investigation could uncover facts that might suggest doubt as to the truth of the information proposed to be published, the publisher would be in a position to avoid liability simply by avoiding investigation. Other commentators share this concern. 154

Adler does not mention, however, that the Supreme Court explicitly recognized this danger in St. Amant:

It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the

151. Sullivan can thus be seen as, in effect, a compromise between those who favored absolute immunity from libel suits and those who wanted to retain the common law rule. See Cendali, Of Things To Come, supra, note 14, at 472-74.
153. Id. at 731 (emphasis added).
154. See, e.g., Wade, The Tort Liability & Investigative Reporters, 307 VAND. L. REV. 301, 304-07 (1984). Wade noted that in the popular movie Absence of Malice, a newspaper attorney advised the newspaper not to investigate in order to avoid potential liability. Id. at 305 n.17.
issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly, the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But the *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self censorship and thus adequately implement First Amendment policies.\(^{155}\)

The *St. Amant* Court then recommended steps for the lower courts to take to insure that a publisher cannot obtain a favorable verdict merely by asserting that he published with the subjective belief that the published contents were true.\(^{156}\) The Court suggested that the finder of fact determine whether the publication was also made in good faith.

[Mere] professions of good faith will be unlikely to prove persuasive, for example, where the story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.\(^{157}\)

Thus, the lack of any investigation can cast doubt on a publisher's profession of good faith,\(^{158}\) or may be relevant when there is no specified source for the information published.\(^{159}\) This is particularly true when the news item in question is not "hot news," that is, news of an urgency demanding immediate publication in a situation affording little or no time for verification.\(^{160}\)

Adler, however, clearly finds it repugnant that the law could operate in any way to reduce a publisher's incentive to investigate

\(^{155}\) *St. Amant*, 390 U.S. at 731-732.

\(^{156}\) *Id.* at 732.

\(^{157}\) *Id.* at 732.


and correct the record. The current state of the law, despite St. Amant, does in some respects still operate as a disincentive. Adler, however, does not suggest any ways to correct this. One possibility she could have offered might have been to eliminate the subjective "serious doubt" test in favor of an objective reasonable-man standard. It may also be possible for the courts to adopt a hybrid objective test based on the reckless man formulation explained in St. Amant. Either formulation, indeed, might be more advantageous to both prospective plaintiffs and the media in limiting state of mind discovery.161

Adler also insists that the current "monolithic nature" and power of the press was something unforeseen at the time of New York Times v. Sullivan. Accordingly, she argues that the media-protection rationale underlying New York Times v. Sullivan is no longer justified, and that the courts should now be primarily concerned with protecting the rights of the relatively more vulnerable plaintiffs who are damaged by media abuse. This contention is curious since less than a decade has passed since Sullivan. The situation of the media was relatively the same then as it is now.162 There was, also at that time, widespread concern about decreasing competition in the newspaper business. Most towns were served by only a single newspaper.163 Moreover, the influence of the media on public events was as well recognized then as now. The role of television in President Kennedy's defeat of Richard Nixon in the 1960 presidential election, and the effect on Senator McCarthy's career after the broadcasting of the Army/McCarthy hearings, were widely publicized examples of the influence of the media upon public figures and public issues.164


162. Wilbur Schramm in his book Responsibility In Mass Communications, noted in 1957, seven years before Sullivan, that there were few publishing houses, only four radio networks, and only three television networks. Id. at page 5.

163. A.J. Leibling noted a recent trade publication's statement that as of approximately 1961, of 1,461 American cities with daily newspapers, all but 61 were one ownership towns or as he termed them, "monopolies." A. Leibling, The Press 2 (1961). Congress, in fact, had hearings to address the problem. For the newspapers' point of view, see the presentation by the American Newspaper Publishers Association before the Antitrust Subcommittee of the House Judiciary Committee (1963).

164. Leibling went so far as to note that "the almost monolithic press had Kennedy well screened from public gaze... then T.V exhibited Nixon." Leibling, supra note 165, at
addition, well-known commentators such as A.J. Leibling had remarked as early as 1961 that:

...The United States is much farther advanced toward a monovocal, monopolistic, monocular press than Britain. With the decline in the number and variety of voices, there is a decline in the number and variety of reporting eyes, which is at least as malign. 165

Even earlier, in 1957, Wilbur Schramm had remarked in his book Responsibility and Mass Communications, 166 that the twentieth century had seen the growth of the "great media," or, as he put it, the fact that "bigness and fewness [had] come to mass communication:" 167

Centralization of the information media has tended to change the old relationship of media, government, and people. The small, numerous media, as we knew them in the eighteenth and nineteenth centuries, were representative of the people and their checking on governments; in fact were the people. But the larger and more centralized media have to some extent withdrawn from the people and become separate set of institutions, parallel and comparable with other power centers such as business and government. 168

Concern about regulation of mass communication was also apparently widespread at the time. Schramm noted:

---

9 (emphasis added). This may be an appropriate place to note that Adler's criticism of the press sometimes seems pointedly unfair. At one point, she accuses the press of flocking to winners and shying away from losers, citing in particular Senator Joseph McCarthy. An argument could be made that it was the press that caused Senator McCarthy to fall (become a loser) through television coverage of the Army/McCarthy hearings. Modern times are replete with other examples of the press' influence upon events. Gary Hart's liaison with Donna Rice is a recent example.

165. Id. at 1-2.
166. SCHRAMM, RESPONSIBILITY AND MASS COMMUNICATIONS (1957).
167. Id. at 4.
168. Id. (emphasis added). The Commission on Freedom of the Press in 1947 similarly described the power of the mass media:

The modern press itself is a new phenomenon. Its typical unit is the great agency of mass communication. These agencies can facilitate thought and discussion. They can stifle it. They can advance the progress of civilization or they can thwart it. They can debase or vulgarize mankind. They can endanger the peace of the world; they can do so accidentally, in the fit of absence of mind. They can play up or down the news and its significance, foster and feed emotions, create complacency, fictions and blind spots, misuse the great words, and uphold empty slogans. The scope and powers are increasing every day as new instruments become available to them. These instruments can spread lies faster and farther than our forefathers dreamed when they enshrined the freedom of the press in the First Amendment to our constitution. Id. at 3.
There has been an impressive amount of questioning and soul searching by editors, publishers, broadcasters, and filmmakers, and by associates and working groups made up of these men. There has been an increased governmental interest, indicated by congressional committees, certain decisions of the Supreme Court, and the Federal Communications Commission—and in Great Britain by the Royal Commission. There has also been a considerable increase in public interest and concern regarding the social responsibility of the broadcasting industry, the film industry, and some branches of the printed media.\textsuperscript{169}

Finally, the fact that the Supreme Court was as mindful of the strength of the press at the time of \textit{Sullivan} as it is now is demonstrated by a Gallup poll dated June 14, 1961 which asked the question: "Would you approve or disapprove of placing greater curbs, or controls, on what newspapers print?" Thirty-one percent of those surveyed approved, fifty-five percent disapproved, and fourteen percent had no opinion. When asked whether there should be additional controls on television and radio broadcasters, forty-nine percent of those surveyed agreed, thirty-nine percent disagreed, and twelve percent had no opinion.

Adler's insistence that the press is monolithic is also troubling in that it fails to recognize that not all media fit this mold. It is the small publishers and broadcasters who bear the brunt of the current increased incidence of libel suits. Libel attorneys claim that the prime consideration in deciding whether to publish is no longer "Will we win?" but "Will he sue?"\textsuperscript{170} Publishers must take into account not only the possibility of a high punitive damages award, but also the prohibitive expense of defending such suits.\textsuperscript{171} This economic impact can drive a publisher out of business,\textsuperscript{172} or cause him to modify his behavior. Thus, these costs themselves tend to chill freedom of the press.

Part of this is due to the role of libel insurance. In the past few years, libel premiums have skyrocketed. Examples abound where

\textsuperscript{169} Id. at 3.
\textsuperscript{172} See Massing, \textit{Libel Insurance: Scrambling for Coverage}, Colum. Journalism Rev. Jan./Feb., 1986, 35 at 38 for discussion of litigation expenses causing a small publisher of an Oregon weekly to decide to cease publishing.
premiums have more than tripled in a single year, and where the
deductible was increased correspondingly. In addition, some in-
surance carriers are now requiring publishers to pay twenty percent
of litigation costs. This reflects the grim fact that seventy-five
to eighty percent of all payments made by insurance companies
in libel cases are for defense costs. The premiums are even higher
for publications that engage in investigative reporting, or for those
which have previously been sued for libel (often regardless of the
outcome of the case). In some states, such as New York and
California, insurance protection against punitive damages is barred
as contrary to public policy. Such statutes only compound the
problem.

Any condemnation of the actual malice standard must take
smaller, obviously "non-monolithic," publishers into account. Adler
mentions, in passing, the obvious solution of creating a different
libel standard for small publishers. However, she offers no sug-
gestion as to how such a standard should be drawn. One possibility,
which is consistent with her concern about the subjectivity of the
"serious doubt" test, would be to require "monolithic media" to
meet an objective test, while allowing smaller media organizations
the comparatively greater latitude of the subjective test. However,
while, superficially, such a distinction may make sense, it may
simply further confuse an already overly-complicated doctrine.

There are a number of problems with creating a different stan-
dard for large and small publishers. First, what would be the basis
for such a distinction? Is it sufficient justification that a large
publisher has more resources with which to defend itself than a
small publisher? Or, should the problem be looked at inversely,
from a point of view recognizing that larger media organizations
("monolithic" ones, at least) which, because of their favored position,
have added responsibilities and burdens justifying a higher
standard? While this sounds plausible, it could also be argued that
these larger organizations are the ones that especially need pro-
tection. They are, for most people, the prime source of news and
commentary. To chill their efforts, particularly the efforts of those

173. See generally Id.
174. Id. at 36.
175. MEDIA INSURANCE at 373 (J. Lankenau ed. 1983).
176. Massing, supra note 172, at 37.
177. MEDIA INSURANCE, supra note 175, at 27.
with the resources and initiative to take the risk of writing hard-hitting stories, may do more harm than good.

Second, even if a rationale for providing a lesser degree of protection to "monolithic," as distinct from merely "large" organizations, can be worked out, there would remain a definitional problem in determining which institutions are "monolithic." Is the distinction to be simply one of economics. Or, is it to be related to monopoly position in particular? If it were made to relate to monopoly position, plaintiffs could contend that in virtually any town served by a single newspaper, the newspaper would, in some sense, be monolithic. Insofar as most towns in America today are served by only one newspaper, the exception would defeat the rule.

Third, from a practical point of view, making a distinction between "monolithic" and other publishers (presumably smaller ones) would only create another round of motion practice. Currently, many trials begin with motions addressing whether the alleged libel was "of and concerning" the defamed person (as in the Westmoreland case) and whether or not the plaintiff is a "public figure." If the plaintiff is a public figure the actual malice standard would apply. The "monolithic" determination would be another subject for briefs and appeals, delaying the ultimate resolution of the case and adding expenses to the detriment of all parties.

Despite Adler's criticism of the Sullivan actual malice standard, she offers no suggestions for an alternative doctrine. Part of her rationale for this omission seems to be that "with the composition of the new Court ... the likelihood is that any change in Sullivan would be only, and radically, for the worst."178 This is a surprising proposition coming from Alder, in that "the new composition" to which she refers is that resulting from the appointments of Antonin Scalia as Supreme Court Justice and William Rehnquist as Chief Justice. Although many may disagree with the viewpoints of these men, few consider them fools. The chief criticism of them is merely that they have a conservative political agenda which infuses their legal thinking. This conservative legal thinking, however, includes a disposition to cut back on media defendants' protections in favor of the rights of damaged plaintiffs. This would seem to be in keeping with Adler's views.

Adler makes one suggestion that is novel, dramatic and unworkable. She states that libel law "cannot be held to license wholesale

178. RECKLESS DISREGARD, supra note 1, at 243.
violations of the Ninth Commandment."179 In this statement Adler references a law older than the Constitution, in effect giving the "original intent" argument a new dimension. To the extent that she is asking us to reexamine the structure of libel law in light of the basic values of western civilization her argument is a fair one. However, what would she ask lawyers and judges to do after they reflect upon the Ninth Commandment?

Alder suggests no standard other than this call to a "higher authority." And, "higher authority" can itself have its ambiguities. For example, what does the Ninth Commandment, which states "thou shall not bear false witness against thy neighbor," mean legally? Is it a test of strict liability? Does it require that the accused intentionally lie? It is more difficult to meet the standard for proof of intent than it is to meet the standard for proof of actual malice, or its component—reckless disregard. Moreover, while the Ten Commandments are very much a part of the fabric of our lives, modern civilization has devised structures for enforcing them on earth. For example, the Commandments also state that "thou shall not kill," "thou shall not steal," and "thou shall not commit adultery." But the law has devised gradations of punishment and liability for each of these depending upon the nature of the act and the intent of the actor. Other Commandments are not enforced through secular institutions at all. The Commandments that require one to observe the Sabbath and to honor his father and mother are good moral guides, but not laws. The task of the law is to decide in which areas to legislate and in what manner. *New York Times v. Sullivan* was an attempt to do exactly that. One can argue that it is the legal embodiment of the Ninth Commandment.

Even accepting Alder's argument that the Supreme Court is likely to adopt an even less satisfactory standard than *Sullivan* if it tampers with libel doctrine, she should have at least mentioned the possibility of legislative solutions to the problems with which she is so concerned. Particularly at the time of the *Sharon* and *Westmoreland* trials, there was a great deal of discussion about legislative alternatives.180 Professor Marc A. Franklin of Stanford

179. Id. at 144.


Proposals for reform are hardly new either. For example, in 1947 the Commission on Freedom of the Press proposed a system whereby the injured party might obtain a retrac-
University, the preeminent authority on libel reform, proposed in 1983 the creation of a "Restoration Action." He has since refined his proposal to offer a "Declaratory Judgment Alternative" to libel law. His approach would allow any person who is the subject of any defamation to elect to bring a traditional damages action, with all the trappings of actual malice and pretrial discovery that Alder describes in Reckless Disregard, or, alternatively, to bring an action for a declaratory judgment that the publication was false or defamatory. No damages would be awarded except that the prevailing party generally would be entitled to attorneys' fees. This approach would also eliminate pre-trial discovery. Insofar as actual malice need not be proved, there would be no need for discovery. Compare this to the current state of the law under Sullivan where the burden of proof is on the plaintiff to prove falsity and defamation by clear and convincing evidence—evidence available only through discovery.

Franklin's proposal is similar in many respects to one made by Representative Charles Schumer. Congressman Schumer introduced H.R. 2846 in 1985 and hearings have already been held on it. In his book Declaratory Judgment, Professor Franklin notes the similarities of the Schumer bill to his proposal including, most notably, its provisions for a plaintiff's option to select the declaratory judgment procedure, its placing of the the burden of


183. Id. at 813. For example, a prevailing defendant will not be awarded attorneys' fees if the plaintiff sustained special damages and the action is found to be brought and maintained with a reasonable chance of success. Id. In addition, the proposal would prohibit the awarding of punitive damages in a damages action. Id. at 813.

184. Id. at 812.

185. H.R. 2846, 99th Congress, 1st Session 1985. It is interesting to note that the first hearings on possible libel reform were held on July 15, 1985—not long after the close of the Sharon and Westmoreland trials.
proof, and its allowance for the possibility of fee shifting.\footnote{186} Other features, however, differ dramatically. Professor Franklin's version provides that publishing a retraction serves as a complete defense to the declaratory judgment action, while Schumer's bill would only allow evidence of the retraction to prevent an award of attorneys' fees against the defendant.\footnote{187} In addition, Franklin's proposal prohibits discovery where Schumer's bill is silent on the subject. Presumably the silence means that discovery and all the time and expense that it entails will be permitted. The chief difference between the proposals, however, is that Schumer's bill also allows the defendant to convert the suit into one for a non-monetary declaratory judgment. Franklin rightly criticizes this as effectively insulating media defendants from financial liability.\footnote{188} Irresponsible publishers could wreak havoc with such a system.

I would propose instead, a national "Correction Statute," designed to provide a public remedy for a public injury. The statute would limit a plaintiff's recovery in a damages suit against a media defendant\footnote{189} to special damages unless the plaintiff can allege and prove that he made a sufficient request for correction and that the media organization failed to make conspicuous and timely publication of the correction.\footnote{190} Significantly, the statute would create a privilege against discovery into the investigative and editorial processes of the media defendant during the period in which the defendant determines whether or not to publish the demanded correction. It would, thus, encourage the press to investigate plaintiff's allegations without fear that such an investigation could be later used against it to prove actual malice. Like the Declaratory Judgment approach, the "Correction Statute" is based on the recognition that most libel plaintiffs are more concerned about restoring their reputation than actually receiving a monetary windfall.\footnote{191} Ideally, it would provide defendants with an even greater incentive to print a correction in accordance with

\begin{itemize}
\item \textsuperscript{186} Franklin, \textit{Declaratory Judgment}, \textit{supra} note 182, at 836.
\item \textsuperscript{187} \textit{Id.} at 835.
\item \textsuperscript{188} \textit{Id.} at 836.
\item \textsuperscript{189} One of the drawbacks to the Correction Statute is that the correction provision is necessarily geared toward media defendants. Professor Franklin’s revised declaratory judgment approach is available to both media and non-media defendants.
\item \textsuperscript{190} \textit{Cendali, Of Things to Come, supra} note 14, at 490-502. The media defendant can also give the plaintiff space to reply.
\item \textsuperscript{191} Similarly, both approaches would blunt plaintiffs' ability to "punish" the defendant by an economically ruinous consent.
\end{itemize}
their professional standards. Instead of merely being evidence of mitigation of damages or lack of bad faith, the correction would serve as an absolute bar to plaintiff's ability to bring a general damages action—and, of course, any action claiming punitive damages.

What frustrates Alder particularly about defamation law, is her perception that media defendants will not admit their mistakes. She attributes this to arrogance. She goes so far as to state that *Time* may have acted blamelessly in its investigation and initial publishing of the Sharon story. In her view, it was *Time*'s refusal to re-investigate or to admit that it may have been in error that created the principal problem.

This view is flawed insofar as it fails to take into account the fact that, while we may disagree with them and feel that their belief is unreasonable, people are allowed to hold views contrary to our own. *Time* may have been as uncomfortable as an "improbable ballerina balanced on a single toe," concerning the reliability of its article on General Sharon, nevertheless how shaky (or arrogant) it may have been while poised upon that toe, is a question of perception. Even Alder's admonition that media should consider the Ninth Commandment is not helpful if the media is convinced that it is telling the truth. Thus, most libel law must deal with both situations; the situation where it is clear who is

192. See, e.g., Franklin, *Good Names and Bad Law*, supra note 181, at 31 n.38, n.138, citing J. HULTENG, PLAYING IT STRAIGHT 77-86 app. (1981). Examples of standards adopted by professional organizations include:

1. Associate Press Managing Editors, Code of Ethics (newspaper "should admit all substantive errors and correct them promptly and prominently");
2. United Press International—A Policy Statement ("correct all errors swiftly and fully, showing what is being corrected and why");
3. The Society of Professional Journalists, Sigma Delta Chi, Code of Ethics (it is "the duty of news media to make prompt and complete corrections of their errors");
4. American Society of Newspapers Editors, Statement of Principles ("significant errors of fact, as well as errors of omission, should be corrected promptly and prominently").

193. This is in keeping with Prof. Franklin's notion that publishing an adequate retraction will serve as a complete bar to any type of damages action.

194. *RECKLESS DISREGARD*, supra note 1, at 142.

195. In fact, *Time*'s managing editor Ray Cave said, "I'd be much happier if we'd had great reservations about this story, because then we would never be in the position we are now of attempting to defend it and seem arrogant in the process." *NEWSWEEK*, Feb. 4, 1985, at 56.
right or wrong, and with the situation, such as that in the Sharon and Westmoreland cases, where doubts still linger and the debate goes on. It is this area of "disputed truth" which should always be at the center of analysis in viewing proposals for libel reform and in assessing problems with the current system.196

The proposals described in this review each attempt to deal with the notion of truth in different ways. The declaratory judgment approach strives for a judicial resolution of truth that would be accepted by society. The retraction/correction approach seeks to encourage publication of the truth through enlightened self-interest or by allowing a defamed person an opportunity to reply so that his competing view of the truth can be known. All the proposals share the same goals of reducing costs for both plaintiffs and defendants and resolving disputes in a socially acceptable way.197

Reckless Disregard gives the reader the impression that Alder is convinced that she knows the truth about the Sharon and Westmoreland cases. And, superficially at least, her arguments are powerful. But it is her undaunted confidence in her own view of the truth that ultimately defeats her ability to understand the forces at work in the trials and to offer remedies. Perhaps the real reason Alder has not suggested any reform alternatives is her conviction that the only reform necessary is for people to admit their mistakes more freely. This is easier said than done. The story she tells about General Sharon's earlier brush with libel law is the key to understanding her entire approach to the subject and is ultimately why Reckless Disregard, while still a useful addition to the debate, has fallen short of its potential. Alder explains that some years earlier, before Time had ever published the offen-

196. Professor Marc Franklin discussed at length this concept of disputed truth at a conference entitled "The Cost of Libel: Economic and Policy Implications" at the Gannett Center for Media Studies at Columbia University on June 13, 1986.

197. These three proposals are merely the tip of the iceberg. Various other proposals include a "Vindication Action" which would require media organizations that published falsities to later publish the truth. See Hulme, Vindicating Reputation: An Alternative of Damage, 30 Am. U.L. Rev. 375 (1981); "Right to Reply" statutes, which, not surprisingly, give the defamed party a right to reply, see, e.g., 1913 Fla. Laws 274 (1953); and, more recently, a "Space Fine" idea whereby the publisher would have to pay the defamed party three times the cost of a full-page advertisement or two-minute commercial, see Wilson, Libel & the Media, COMMENTARY, March, 1987, at 72 (discussing proposal of Steven Brill, publisher of The American Lawyer).

Note, however, that both the "Vindication Action" and most "Right of Reply" statutes would probably be unconstitutional under Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), as they require publishers to publish.
ding paragraph, General Sharon had been defamed by an Israeli newspaper which had reported that he had used government funds to erect an enormously expensive fence around his farm in Israel. Sharon had demanded a retraction but the newspaper stood by the story. He then had approached the Israeli press council, asking that it check to verify that there was, in fact, no fence around his property. The press council had reluctantly verified Sharon's contention, however, at the same time denounced him as, "in effect, a brute" and as someone "not fit to appear before it." 198 The last line of the council's statement simply said, "There is no fence." 199

Analogizing from this incident, Alder concludes that there were "no fences" in the CBS and Time stories. In her coda to Reckless Disregard, in which she discusses the largely unsuccessful efforts of Cravath, she concludes triumphantly "there is still no fence." 200 What Alder fails to consider altogether, however, are those situations, including perhaps those present in the Westmoreland and Sharon cases, where it may well be impossible to determine whether the fence exists.

198. RECKLESS DISREGARD, supra note 1, at 225-6.
199. Id.
200. Id. at 243.