Defamation:
Corrupting the First Amendment

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INTRODUCTION

On March 9, 1942, a unanimous United States Supreme Court announced that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Among those classes, the Court observed was "the libelous." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942).

This was not the first time that the Court had excluded state libel laws from First and Fourteenth Amendment protection. In 1931, Chief Justice Charles Evans Hughes, a faithful guardian of the freedom of speech and the press, wrote:

> *... [W]hatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws ... [I]t is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeller to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitution. The law of criminal libel rests upon that secure foundation. Near v. Minnesota,* 283 U.S. 697, 715 (1931).

The "secure foundation," about which the Chief Justice was so certain, continued to hold as late as 1952 when Justice Felix Frankfurter wrote that "the adoption of the Constitution" did not mean that "the crime of libel ... [had been] abolished":

> *Libellous utterances, not being within the area of constitutionally protected speech, it is unnecessary to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class. Beauharnais v. Illinois,* 343 U.S. 250, 254-55, 266 (1952).

Twelve years later, Justice William J. Brennan, on behalf of six of his colleagues - only one of whom had sat on the Court in 1952, boldly rejected these precedents:

> *Respondent relies heavily. .. on statements of this Court to the effect that the Constitution does not protect libelous publications ... In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law .... [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment. New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964).

With these words, Justice Brennan ushered in a revolution constitutionalizing state defamation laws, both criminal and civil, prompting Justice Byron White to protest in 1974:

> *For some 200 years - from the very founding of the Nation - the law of defamation ... [has] been almost exclusively the business of state courts and legislatures. The law governing ... defamation remained untouched by the First Amendment because until ... recently, the consistent view of the Court was that libelous words constitute a class of speech unprotected by the First Amendment ....*

> *But now, using the Amendment as its chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 states. Gertz v. Welch,* 418 U.S. 323, 369-70 (1974) (dissenting opinion).

What prompted this revolution? Without question, the Court reversed its direction in order to protect its rulings, since *Brown v. Board of Education,* 347 U.S. 483 (1954), that racial segregation was unconstitutional.

The seminal case, *New York Times Co. v. Sullivan, supra,* arose in Alabama, at the height of the desegregation resistance movement. The *Times* had run an advertisement critical of the Montgomery police activities against the non-violent demonstrations taking place in the state's capital. An all-white jury returned a $500,000 judgment in favor of L.B. Sullivan, one of three of the city's commissioners.

Sullivan won this verdict by suing the *Times* for libel, claiming that the criticism of the "police" was "of and concerning" him. Under Alabama law, as was true of libel law throughout the United States, a statement defamatory on its face was presumed to be false and unprivileged and presumed to cause the one defamed to be damaged.

Under these traditional rules, the *Times* found itself defenseless. Several statements of fact in the ad proved to be false, so there was no defense of truth. Nor could the *Times* claim any privilege, such as "fair comment," since the misstatements in the ad were not just "opinions." *Id.,* 376 U.S. at 258-59, 267.

And Commissioner Sullivan was not the only one who had sued. By the time his case had come before the Supreme Court, four more libel suits had been filed, three by others who had served as Montgomery City Commissioners and one by the Governor of Alabama. One case had already gone to trial, yielding another $500,000 judgment against the *Times.* Damages sought in the other three totaled another $2,000,000. *Id.,* 376 U.S. at 278, n. 18.

If the Sullivan's judgment against the *Times* stood, additional damage awards loomed on the horizon, posing a new threat to the Court's efforts to enforce its desegregation decisions. If the Court followed its long-standing precedents excluding defamation from First Amendment protection, it seemed that there was nothing that the Court could do. On the other hand, if the Court overruled those precedents, then it would face another avalanche of protest against its liberal, activist ways.

Justice Brennan charted a middle course, eschewing the language of revolution, yet launching one of the most radical reinterpretations of the First Amendment in the history of American constitutional law.

PRAGMATIC REVOLUTION

Justice Brennan began with a restatement of First Amendment principle, claiming longevity for a proposition that had initially been stated only seven years before:

> *The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we had said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change by the people." Roth v. United States*, 354 U.S. 476, 484 ... [1957]. *Id.*, 376 U.S. at 269 (Emphasis added).

Remarkably, Justice Brennan quoted this statement from the *Roth* case, which had *sub rosa* overruled over one and one-half centuries of precedent in the obscenity area. He did so because *Roth* rested upon a pragmatic theory of free speech that had been developed by the nineteenth century philosopher, John Stuart Mill. See Titus, *The Freedom of Expression and Obscenity*.

Mill approached free speech on the assumption that ideas must be allowed free play in the marketplace unfettered by any rule unless necessary to protect the society from a demonstrably greater evil:

> *... [O]pinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor ... ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer ....* Mill, *On Liberty* 67-68 (Liberal Arts Press: 1956).

Harvard law professor, Zechariah Chafee, endorsed Mill's views as the latest expression of free speech and promoted them as the basis for First Amendment law in America:

> *...[T]he meaning of the First Amendment did not crystallize in 1791 .... Into the making of the constitutional conception of free speech have gone, not only men's bitter experience of the censorship and sedition prosecutions before 1791, but also the subsequent development of the law of fair comment in civil defamation, and the philosophical speculations of John Stuart Mill.* Chafee, *Freedom of Speech* 32 (1920).

Because Mill's views were grounded ultimately in "utility," Chafee recast "the true meaning of freedom of speech" on an entirely utilitarian foundation:

> *One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion. ... Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. Id.* at 34.

Under the Mill/Chafee pragmatic approach, there could be no absolute rule. Rather, the question of lawfulness or unlawfulness involved "the balancing against each other of two very important social interests, in public safety and in the search for truth":

> *Every reasonable attempt should be made to maintain both interests unimpaired, and the*

> *great interest in free speech should be sacrificed only when the interest in public safety is really impaired.... Id.* at 38.

Prior to the *Roth* and *New York Times* cases, the Court had approved a pragmatic approach to the First Amendment through the development of the "clear and present danger" test first formulated by Justice Oliver Wendell Holmes, Jr. *Schenck v. United States,* 249 U.S. 47 (1919). But it had done so at great sacrifice to the original First Amendment principle protecting the right of the people to confront a tyrannical government. See Titus, *The Freedom of Speech: An Introduction*.

What Justice Brennan accomplished in *New York Times* was to take this same pragmatic approach and turn it against the government in favor of the people. He did it by dispensing with any notion that the First Amendment contains any absolute rule excluding libel from its ambit of protection. Then, he set about reconstructing a novel constitutional rationale based upon practical realities, rather than upon enduring principle.

For example, the issue of truth, Justice Brennan wrote, was not within the jurisdiction of judge or *jury* because the "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." *Id.,* 376 U.S. at 271-72.

Likewise, Justice Brennan continued, "injury to official reputation" is inevitable when a person criticizes "official conduct;" and, therefore, "defamatory content" must be protected lest "criticism of official conduct" be deterred by fear of liability for libel or slander. *Id.,* 376 U.S. at 272-73.

By reinterpreting the First Amendment through a prism of pragmatism, Justice Brennan set the Court free from the historical context of the freedom of speech. He was now at liberty to fashion his own view of that phrase, unhindered by precedent and by the constitutional text.

So Justice Brennan cast his net into the sea of tort law, including some court opinions, treatises and law review articles, and pulled out a brand new "constitutional guarantee":

> *... [A] federal rule ... prohibit[ing] a public official from recovering damages for a defamatory falsehood relating to this official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Id.,* 376 U.S. at 279-80, n. 20.

PRAGMATIC RELATIVISM

Under Justice Brennan's formulation, a person's right to criticize a public official depends upon a question of fact: Did that person know that the statement made was false or did he make it in reckless disregard of the truth or falsity of the statement? Thus, the right that Brennan forged under the First Amendment was relative to the circumstances.

Justices Hugo Black, William O. Douglas, and Arthur Goldberg refused to go along with this relativistic solution, claiming that the First Amendment absolutely protected such statements. Justice Black noted that "malice" as defined by the Court "is an elusive, abstract concept, hard to prove and hard to disprove." Hence, he thought that the protection afforded by the Court's novel rule was "at

best ... evanescent." *Id.,* 376 U.S. at 293. The right to criticize the government, he continued, should not "depend upon a probing by the jury of the motivation of the citizen or press." *Id.,* 376 U.S. at 298.

Undeterred by this criticism, the Court quickly extended the *New York Times* rule to cases involving "public figures." In *Curtis Publishing Co. v. Butts* and its companion case, *Associated Press v. Walker,* 388 U.S. 130 (1967), the plaintiffs were Wally Butts, a University of Georgia football coach and Edwin Walker, a former Major General of the United States Army. Butts had been accused by the Saturday Evening Post of conspiring to fix a football game between his team and "Bear" Bryant's Alabama squad. Walker had been placed by the Associated Press as one of the leaders of a riot on the campus of the University of Mississippi.

A majority of the justices agreed with Chief Justice Earl Warren that persons who "are ... intimately involved in the resolution of important public questions, or by reason of their fame, shape events in areas of concern to society at large" ought not recover for any defamatory statement about them unless the publisher knew what he said was false or recklessly disregarded its truth or falsity. *Id.,* 388 U.S. at 164.

Four years later, the Court splintered over whether this rule should also apply to persons who are neither public officials nor public figures. Writing for two other justices, Justice Brennan said yes - if that person is the subject of a defamatory statement that concerned matters of general or public interest. *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 43 (1971).

Three other justices disagreed, contending that states should have more flexibility in fashioning rules designed to protect "private persons." *Id.,* 403 U.S. at 78-79. Justice John Marshall Harlan was especially critical, calling for a different rule governing defamation of a private person who has less likelihood "of securing access to channels of communication sufficient to rebut falsehoods concerning him" than do public officials and public figures. *Id.,* 403 U.S. at 70.

This impasse was resolved three years later in *Gertz v. Welch,* 418 U.S. 323 (1974). In an opinion expressing the views of a majority of five, Justice Lewis Powell came up with another new rule. A person who is not a public official or a public figure may recover for a defamatory statement, when that statement concerns a matter of public interest, but he must prove that the statement was at least made negligently. If, however, that is all that he can show, then his damages will be limited to those arising from "actual injury." Presumed damage may only be recovered if the person proves actual malice - that is, knowing falsehood or reckless disregard of truth or falsity as required by the *New York Times* case. *Id.,* 418 U.S. at 347-50.

Justice Powell fashioned these relativistic rules because he, like Justice Harlan before him, found that private persons generally are not in as good a position to defend themselves as public officials and public figures. *Id.,* 418 U.S. at 344. Moreover, he found such persons more deserving of recovery because they, unlike public officials and public figures, have not thrust themselves into the public arena, but have been pulled into it by circumstances beyond their control. *Id.,* 418 U.S. at 344-45.

Nevertheless, Justice Powell found that the common law rule of strict liability was an "intolerable"

threat to free speech even in the case of a private person and that the common law rule of presumed damages was not necessary to compensate such a person for his loss of reputation. *Id.,* 418 U.S. at 340-42, 349-50.

So Justice Powell reshaped the tort rules more to the liking of him and his colleagues, balancing the "competing concerns" in "free speech" and in "reputation" as if he and his colleagues had the authority of an elected state legislature. Grounding his decision in neither precedent nor reason, Justice Powell simply declared the new rule as if the Court had fiat power to make whatever "accommodation of the competing values" that it wished, notwithstanding centuries of experience to the contrary in the development of the common law.

In dissent, Justice Byron White chided the majority for "yielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, ... discard[ing] history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices." *Id.,* 418 U.S. at 380.

PRAGMATIC MISTAKE

Justice White criticized the majority's decision as an "ill-considered exercise of power" resting on "wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves." *Id.,* 418 U.S. at 370. He pointed out that the court's decision "cut deeply" into traditional tort law, paying no attention to the realities of defamation and the interests that the law condemning libel and slander is designed to vindicate. *Id.,* 418 U.S. at 371-75.

With regard to the "presumed damage" rule, Justice White reminded the Court that it performed a "vindicatory function ... , enabling the plaintiff to brand the defamatory statement as false" and, in some instances, to "expose the groundless character of a defamatory rumor before harm to the reputation" has occurred." *Id.,* 418 U.S. at 372.

In addition, he defended the rule as necessary "because the judgment of history was that the content of the publication itself was so likely to cause injury." Lastly, he defended the rule because "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." *Id.,* 418 U.S. at 373.

He returned to this point later in his opinion, citing the preeminent tort authority - William Prosser who wrote in his celebrated treatise on Torts "that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Id.,* 418 U.S. at 394.

Justice White also defended the rule of strict liability because "the judgment of experience [has proved] that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim." *Id.,* 418 U.S. at 376.

Finally, Justice White came to the defense of libel and slander laws generally, emphasizing the importance of civil protection of a person's reputation as reflecting "'the essential dignity and worth

of every human being - a concept at the root of any decent system of ordered liberty.'" *Id.,* 418 U.S. at 402.

As Justice White ticked off these practical benefits of the common law of libel and slander, he was led to reconsider the pragmatic philosophy of free speech underpinning the *New York Times* rule. He retraced the historical relation between the First Amendment and the common law, concluding that original design of "the freedom of speech" guarantee did not ban or limit ordinary civil claims for libel and slander. *Id.,* 418 U.S. at 380-86.

This caused him to rethink "the central meaning of *New York Times* and ... the First Amendment," concluding that both the case and the constitutional text only placed "seditious libel - criticism of government and public officials ... beyond the police power of the state." *Id.,* 418 at 387.

HISTORICAL CONTEXT

At common law defamation was both a private and a public wrong. In his *Commentaries,* Blackstone identified the private injury as "a man's reputation or good name." III Blackstone, *Commentaries on the Laws of England* 123-26 (1768). As for the public injury, Blackstone stated that it was "the breach of the public peace" that was likely to occur because the defamed person would seek "revenge" against his adversary. IV Blackstone's *Commentaries* 150 (1769).

When the defamatory statement was spoken of "a magistrate, or other public person," Sir Edward Coke reported in the *Case de Libellis Famosis,* "it is a greater offense; for it concerns not only the breach of the peace, but also the scandal of government." 5 Coke's Rep. 125 (1605).

Thus, an action for libel or slander brought by a public official was designed to vindicate not only the wrong done to his person, but the wrong done to the government. The latter wrong was considered to be a separate and independent offense and came to be known as seditious libel. Burdick, *The Law of the American Constitution* 347 (1922).

SEDITIOUS LIBEL: ENGLAND

While the rules governing seditious libel were similar to those of ordinary libel and slander, the two areas of law rested upon quite different rationales. The law of ordinary libel and slander protected the uncontested right of a man "by reason and natural justice" to enjoy "the security of his reputation or good name ... since without these it is impossible to have the perfect enjoyment of any other advantage or right." I Blackstone's *Commentaries* 130 (1765).

On the other hand, seditious libel protected the nation's safety by ensuring that the people had a good opinion of the existing government and its officials. Siebert, *Freedom of the Press in England, 1476- 1776*, 271 (1952). This claim, in turn, was a product of the political philosophy that the civil sovereignty of a nation was embodied in the current government.

Under this view of civil sovereignty, the government was not the "agent of the people," but was "set above the people" as lord or benefactor. The early English kings held to this view, as did the monarchs of the Tudor and early Stuart dynasties from 1485 through 1688. Burdick, *The Law of the American Constitution* at 347.

Because seditious libel was an offense against the government, it was a crime, not a private wrong. In its early history, the prevailing political philosophy placed the sovereignty of the nation in the person of the king. Hence, the King's Council, "infamously known as the Star Chamber," developed the crime in all its rigor, as evidenced in the Trial of William Prynn. Prynn had published a book critical of acting and actors, "which was viewed as an attack on the queen, who had recently appeared in a play." The attack was construed by the Star Chamber as seditious libel of the government. Prynn was convicted and fined 10,000 pounds, sentenced to life in prison and had his nose slit and his ears cut off. II O'Brien, *Constitutional Law and Politics* 337 (1991).

Even after the Star Chamber was abolished in 1641, and even after the English Parliament came to embody civil sovereignty in England, the crime of seditious libel continued to be enforced:

> *The whole crime consisted of the saying or writing and publishing of words critical of the sovereign, constitution, laws or men in public office, because this tended to bring the government into disrepute and weaken its authority. The truth of the words was no defense. It was not a defense to show that there was no intention to stir up disorder, or to induce a breach of law, or that the words in question had no such tendency. Nor was it a defense to show that the words were spoken or written for the purpose of bringing about orderly reforms in government, or to point out to the government the danger of popular odium which was occurring.* Burdick, *The Law of the American Constitution supra,* at 348.

In a seditious libel prosecution, the jury played a very limited role:

> *... [I]t was not their function to look to the truth of the statements, or to the purpose with which they were made - their only function was to determine whether the statements alleged had been made, whether, in case of a writing, the defendant when he published it knew of its contents, and whether the innuendoes set forth in the indictment were correct. Id.*

By the eighteenth century, however, juries began to rebel and return not guilty verdicts in favor of the government's critics. *Id.* at 351-54. In 1792, this popular rebellion culminated in the passage of Fox's Libel Act. That act authorized a jury to render a general verdict in a seditious libel prosecution, thereby permitting the jury to consider the issues of truth and motive in ascertaining the guilt of the defendant. *Id.* at 354.

Fox's Libel Act did not, on its face, change the substantive law of seditious libel, but "it was interpreted as giving the jury the right to pass upon the intent of the defendant in actions for seditious libel, and the tendency of his words, and to exonerate the defendant for criticism of public institutions, laws and men, unless such criticisms were made with illegal intention." *Id.*

SEDITIOUS LIBEL: AMERICA

Prior to American independence, the English law against seditious libel was enforced on American soil. By the eighteenth century, however, there was popular resistance to such prosecutions. *Id.* at 358. During the colonial period, the most notable case was the prosecution of John Peter Zenger

for having printed articles in his newspaper critical of the colonial government of New York. Zenger was acquitted of the charge by a jury that disregarded the judge's instructions. *Sources of Our Liberties* 306-07 (Perry, ed. 1972).

As the colonies moved inexorably to independence, there came with it a profound change in the understanding of civil sovereignty that ultimately undermined the very foundation of the law of seditious libel.

Virginia led the way with its June 12, 1776 Constitution, Section 2 of which read:

> *That all power is vested in, and consequently derived, from the people; that magistrates are their trustees and servants, and at all times amenable to them.* Quoted in *Sources, supra,* at 311.

Having proclaimed that civil sovereignty resides in the people, the Virginia Constitution further provided:

> *That government is ... instituted for the common benefit, protection, and security of the people, nation, or community ... and that, when any government shall be found to be inadequate or contrary to ... [this purpose], a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal. Id.*

The Continental Congress followed suit with the Declaration of Independence, affirming the right of the people "to alter or to abolish" a government that has become destructive of its fundamental purpose and "to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them [the people] shall seem most likely to effect their safety and happiness." Quoted in *Sources, supra,* at 319.

From the date of Independence until the adoption of the United States Constitution, the remaining twelve of the original states adopted state constitutions affirming the civil sovereignty of the people. *See, e.g.*, the Constitutions of Pennsylvania, Delaware, Maryland, North Carolina, Massachusetts, and New Hampshire quoted in *Sources, supra,* at 329, 338, 346, 355, 375, and 382.

At the same time, none of the original thirteen states included in their constitutions any specific prohibition against seditious libel prosecutions against ordinary people. See Titus, *The Freedom of Speech: An Introduction*. It was not until the adoption of the Bill of Rights of the United States Constitution that protection against criminal prosecutions for seditious libel was extended to the people. And that protection did not come without a fight.

Seven years after ratification of the first Ten Amendments, the United States Congress enacted the Sedition Act of 1798. Included in that Act was a criminal prohibition against seditious libel. Included also were all the jury safeguards of Fox's Libel Act. The battle in Congress over the constitutionality of this legislation was fierce. II O'Brien, *Constitutional Law and Politics, supra,* at 342-43.

Federal courts upheld the Act as constitutional. Under the leadership of Thomas Jefferson and

James Madison, however, the Virginia and Kentucky legislatures, in the famous 1798 Virginia and Kentucky Resolutions, condemned the act as unconstitutional. In 1801, the Sedition Act expired by its own terms. President Jefferson pardoned all those who had been convicted under the Act, again condemning the act as an unconstitutional usurpation of power by the federal government. *Id.*

This history led Justice William J. Brennan to conclude, in 1964, that laws against seditious libel had been forbidden by the First Amendment. More significantly, he accepted James Madison's statement of the principle that undergirded the repudiation of a law when the purpose of that law was to protect the nation's sovereignty by protecting the existing government's reputation. *New York Times v. Sullivan,* 376 U.S. 254, 273-76 (1964).

SEDITIOUS LIBEL: TODAY

In *New York Times,* Justice Brennan quoted Madison's Report supporting the Virginia and Kentucky Resolutions. Written in 1800, Madison explained that there could be no law against seditious libel because "[t]he people, not the government, possess the absolute sovereignty." *Id.,* 376 U.S. at 274. This, Madison asserted, differentiated the American form of government from that of the British Commonwealth where "the Crown was sovereign and the people were subjects." *Id.*

From this Report and earlier statements made by Madison on the floor of the United States House of Representatives, Justice Brennan concluded:

> *The right of free public discussion of the stewardship of public officials was thus ... a fundamental principle of the American form of Government. Id.,* 376 U.S. at 275.

Having so concluded, one would have expected Justice Brennan to analyze the case before him in light of this founding principle. But he did not. He exchanged the original principle for a more pragmatic one guaranteeing First Amendment protection unless it can be proved that the speaker or writer knew what he said or wrote was false or recklessly disregarded its truth or falsity. *Id.*, 376 U.S. at 279.

Justice Brennan's pragmatic rule, if followed in all cases of criticism of a public official, actually provided less protection to criticism of the government than would a rule based upon the original textual principle. As the dissenting Justice Arthur Goldberg pointed out, "the Constitution afford[s] to the citizen and the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from the excesses and the abuse." *Id.,* 376 U.S. at 298.

In support of this principle and its application in the case before him, Justice Goldberg reasoned:

> *In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily "of and concerning" the governors and any statement critical of the governors' official conduct is necessarily "of and concerning" the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution. Id.,* 376 U.S. at 299.

But Justice Goldberg did not end there. He further stated that the First Amendment principle denouncing laws designed to protect the government's reputation did not touch upon laws designed to protect individual reputation:

> *This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or of a private citizen. Freedom of the press and of speech insures that government will respond to the will of the people .... Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment. Id.,* 376 U.S. at 301.

Justice Goldberg's admonition went unheeded by the Court, as it extended the "actual malice" rule of the *New York Times* case to defamatory statements having nothing to do with the reputation of the government. In so doing, the Court has corrupted the First Amendment by undermining the civil sovereignty of the people, the very principle that undergirds the four freedoms of speech, press, assembly, and petition.

LIBEL: REVISED

Just two years after *New York Times,* Justice Potter Stewart delimited the holding of that case:

> *The Constitution does not tolerate actions for libel on government. State defamation laws, therefore, whether civil or criminal, cannot constitutionally be converted into laws against seditious libel. Our decisian in ... New York Times ... turned upon that fundamental proposition. Rosenblatt v. Baer,* 383 U.S. 75, 91-92 (1966).

In sharp contrast with seditious libel, the purpose of which is to protect the government's reputation, Justice Stewart noted that ordinary libel protected "a man['s] ... reputation from unjustified invasion and wrongful hurt ...." He further found this right to be fundamental:

> *The right of a man to the protection of his own reputation ... reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. Id.,* 383 U.S. at 92.

This right in "the protection of personality," Justice Stewart reasoned, was "like the protection of life itself" and should not be sacrificed upon a constitutional altar of "misleading euphemisms," such as, "'uninhibited, robust, and wide-open' debate or 'vehement, caustic, and sometimes unpleasantly sharp' criticism." *Id.*

Having rejected the "free marketplace of ideas" rationale of *New York Times,* Justice Stewart concluded that its "rule ... should not be applied except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel." *Id.,* 383 U.S. at 92-93.

Finally, he warned the Court that should it extend First Amendment protection beyond seditious libel, it would undermine a law that not only protects individual reputation, but the social order:

> *For the rights and values of private personality far transcend mere personal interests.*

> *Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society. Id.,* 383 U.S. at 93-94.

But the Court did not heed Justice Stewart's warning. It did not limit the *New York Times* rule to seditious libel, extending it to attacks on the personal reputations of public officials and public figures. *Gertz v. Welch,* 418 U.S. 323, 334-37, 342-45 (1974). It also extended a modified *New York Times* rule to private individuals when defamatory statements are made of them in connection with a matter of public interest. *Id.,* 418 U.S. at 347-50.

In support of this constitutional revision of the common law of ordinary libel and slander, the Court explicitly embraced the marketplace of ideas rationale of *New York Times:*

> *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 on its correction not on the conscience of judges and juries but on the competition of other ideas. Id.,* 418 U.S. at 339-40.

Under this view of the First Amendment the common law rules that had governed ordinary libel and slander had to give way. And as Justice White has pointed out so well, those rules were modified at the expense of ordinary people who have little access to the 20th century marketplace, thereby conferring upon the mass media and other powerful communicators power to defame ordinary people without restraint. *Id.*, 418 U.S. at 399-400.

This not only has had a negative impact on individual reputation, but upon the marketplace itself. For, as Justice White observed, the lack of a meaningful legal remedy for defamatory remarks may very well discourage "private citizens ... from speaking out and concerning themselves with social problems." This, he concluded, "would turn the First Amendment on its head." *Id.*, 418 U.S. at 400.

CONCLUSION

Indeed, the Court has turned the First Amendment on its head. The freedoms of speech, press, assembly, and petition were designed to protect the people so that they might have an effective voice in the public affairs of the nation. By extending the First Amendment to undermine the traditional common law protection of the reputation of the people, the Court has robbed the people of one of their most effective tools to combat statements that hold them up to contempt and ridicule.

In 1952, Justice Felix Frankfurter observed the "free, ordered life in a metropolitan, polyglot community" requires the continued protection of the people's reputation from those who wilfully defame. *Beauharnais v. Illinois,* 343 U.S. 250,259 (1952). Sadly, the Court has not followed Justice Frankfurter's counsel.

As a result, the worst elements of society are emboldened to attack their enemies with impunity as Hustler Magazine did in 1983 when it portrayed Jerry Falwell as having had "sex for the first time" with his mother in an outhouse. To avoid liability, the attack contained the disclaimer, "ad parody - not to be taken seriously."

A unanimous High Court, including Justice White(!), dignified this unprovoked attack by cloaking it in First Amendment protection, claiming that the "free flow of ideas and opinions on matters of public interest and concern" dictated a verdict in favor of Hustler magazine. *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988).

At no point in its opinion did the Court demonstrate how the Hustler parody contributed positively to the public debate. Nor could it. For the marketplace of ideas, so highly touted by it, and over which it now reigns, has corrupted the First Amendment's original design to protect the people from tyranny, unleashing a new lawlessness that undermines civil discourse and that discourages effective criticism of the civil governing authorities.

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