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2) they might construe the language of the Code to fit as many cases as possible into the "excepted" classification of section 2-318, by loosely interpreting "buyer," thereby achieving simply a more confused version of the first alternative; or 3) they might work to revise the Code to bring it into line with the national trend. Pennsylvania, it would appear, has taken the second of these alternatives.

Quintin Sanhamel

CONSTITUTIONAL LAW—FREEDOM OF PRESS—MISSTATEMENT OF FACT HELD PRIVILEGED IN LIBEL ACTION BY PUBLIC OFFICIAL

The petitioner, "New York Times," published a paid political advertisement attacking segregationist activity in the South and requesting contributions to fight segregation. It is uncontroverted that some of the statements contained in the advertisement were false. No one was specifically mentioned, but the respondent, police commissioner, charged libel by innuendo and sued the "New York Times." The trial judge instructed the jury that the statements made were libelous per se.¹ The question of whether the innuendos were strong enough to implicate the police commissioner in the minds of the reading public was left to the jury. A verdict of \$500,000 was returned against the defendants. The Supreme Court of Alabama affirmed the judgment.² The United States Supreme Court held that the first and fourteenth amendments require that a public official, in order to recover for a defamatory falsehood, must prove that the statement was made with actual malice. There being no evidence of actual malice present in the case, the Supreme Court reversed. The two concurring opinions³ argued in favor of an absolute privilege of free press, and thus would extend the protection of the press even beyond that which the majority opinion had conditioned on the lack of actual malice. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964).

Prior to this case, the guarantee of the first amendment had never immunized the press from subsequent liability for false and damaging statements.⁴ Previously, the extent of the liability of the press depended upon

¹ ALA. CODE tit. 7, §§ 908 & 914 (1940). Libel per se signifies either that the words are defamatory on their face or that they are actionable without proof of damage. PROSSER, TORTS § 93, p. 588 (2d ed. 1955).

² *New York Times Company v. Sullivan*, 273 Ala. 565, 144 So. 2d 25 (1962).

³ Black, J., joined by Douglas, J. and Goldberg, J., joined by Douglas, J., concurred in the result in separate opinions.

⁴ The right of the press to invoke privilege where the publication in question contains a misstatement of fact has been a controversial subject, the decisions of the various

balancing the right of an individual to an unblemished reputation and the need for frank discussion of important topics.⁵ In the instant case, it is alarming that there is a total absence of balancing in regard to the conflicting rights present.⁶

No one would question the importance of an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁷ But as important as freedom of speech is, it should not be allowed to encroach upon rights which are as fully and equally enshrined in the Constitution.⁸ The problem is ably expressed by Judge

jurisdictions not being in accord. See, e.g., *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 61 So. 345 (1913). *Contra*, *Coleman v. MacLennon*, 78 Kan. 711, 98 P. 281 (1908). But the majority of the courts defined freedom of the press as a "freedom to tell the truth and comment fairly on facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination." *Sweeney v. Schenectady Union Publishing Co.*, 122 F.2d 288, 291 (C.A. 2, 1941). See also Note, *Libel Actions Brought by Public Officials*, 51 *YALE L.J.* 693 (1942).

⁵ *Pennekamp v. State of Florida*, 328 U.S. 331 (1946).

The best illustration of the balancing concept in operation is the clear and present danger rule. According to this rule, the government is only allowed to take corrective action against the press if, under the circumstances, the words create a "clear and present danger that they (the words) will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919). By use of the clear and present danger rule, freedom of the press has been curbed if its exercise would do serious political, economic or moral injury to the government, *Whitney v. California*, 274 U.S. 357 (1927); would impede it in the performance of its governmental duties, *Gitlow v. New York*, 268 U.S. 652 (1925); or would endanger the foundations of organized government, *Whitney v. California*, *supra*. The rule has been applied most consistently in cases where the press was charged with obstructing an individual's right to a fair trial by an impartial jury. *Wood v. Georgia*, 370 U.S. 375 (1962).

⁶ The Supreme Court saw the problem purely in terms of the free press, stating that if newspapers are liable for misstatements of fact, they "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Company v. Sullivan*, 376 U.S. 254, 279 (1964).

⁷ *Roth v. United States*, 354 U.S. 476, 484 (1957); quoted with approval by the Court in *New York Times*, *supra* note 6, at 269.

⁸ "A free press is vital to a democratic society because its freedom gives power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. . . . In plain English, freedom carries responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. . . . That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law. The First Amendment safeguarded the right." *Pennekamp v. Florida*, *supra* note 5, at 355-56.

For practical application of the first amendment, it is interesting to note that while the Massachusetts Constitution of 1780 guaranteed free speech, there are records of at least three convictions of political libels. *DUNWAY, FREEDOM OF THE PRESS, (MASSACHUSETTS)* 144-46, referred to by Justice Frankfurter in *Dennis v. United States*, 341 U.S. 494, 521 (1951) (dissenting opinion).

Hubert L. Will of the United States District Court for the Northern District of Illinois.

There is an inevitable overlapping of and competition between protected rights, out of which some accommodation in reason and policy must be reached in order that one not be largely sacrificed for the sake of preserving another.⁹

In *New York Times*, the Court was presented with various privileges guaranteed by the Bill of Rights, none of which was entirely unlimited, unqualified or unrelated, that is, the right of the press to freedom, the right of an individual to his reputation and the right of the public to secure accurate news. In order to give each of these rights its due and yet not adversely affect the other, a process of balancing should have been employed.¹⁰

A newspaper's privilege in a political libel suit is justified because a public official has ready access to the press, and, as the Court points out,¹¹ special immunity from liability for his own utterances.¹² In the past, the principal limitations on the privilege accorded the newspapers were that the statements be within the bounds of fair comment¹³ and not motivated by actual malice.¹⁴ The Court, in the instant case, enlarged the privilege of the press by giving it immunity as to misstatements of fact in regard to public officials. In so doing, the Court is according freedom of the press an unnecessary position of dominance over other rights equally secured by the Bill of Rights.¹⁵

⁹ WILL, *Free Press vs. Fair Trial*, 12 DE PAUL L. REV. 197, 200 (1963).

¹⁰ "It is imperative that, when the effective exercise of these rights (freedom of the press) is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940).

¹¹ *New York Times Company v. Sullivan*, 376 U.S. 254, 282 (1964).

¹² The purpose of the official's immunity was expressed by Learned Hand, J., "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A. 2, 1949). *Accord*, *Spalding v. Vilas*, 161 U.S. 483 (1896).

It is interesting to note that Justice Douglas, who now concurs with the absolutist view of the concurring opinions, joined in a strong dissent against the absolute privilege as applied to a public official, stating that the privilege "has not given even the slightest consideration to the interest of the individual who is defamed. It is a complete annihilation of his interest." *Barr v. Matteo*, 360 U.S. 564, 578 (1959).

¹³ The defense of fair comment was designed to permit freedom of criticism and opinion rather than misstatements of fact. RESTATEMENT, TORTS § 606 (1938). See generally, YANKWICH, *Protection of Newspaper Comment*, 11 LA. L. REV. 327 (1951).

¹⁴ That is to say the court will look to the primary motive or purpose by which the defendant apparently is inspired. If the defendant acts chiefly from motives of ill will, he is given no immunity. PROSSER, TORTS § 95 (2d ed. 1955).

¹⁵ For an examination of the danger of giving a non-essential privilege to the press, see NADELMANN, *The Newspaper Privilege and Extortion by Abuse of Legal Process*, 54 COLUM. L. REV. 359 (1954).

The dilemma into which the public official is placed by this decision is very aptly expressed by the Chief Justice, then Judge Taft, when he wrote:

If the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of everyone who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.¹⁶

That the public official will sustain serious harm from the Court's ruling is evident. The press, because it will not now have to respond in damages for misstatement of fact, is discharged from responsibility. But, this extension of privilege does not advance the spirit of the first amendment, namely, that of fostering freedom of discussion. When based upon inaccurate facts, a discussion confuses rather than enlightens—this can hardly be what the framers of the Bill of Rights envisioned in formulating the first amendment.¹⁷ It appears, therefore, that the only reason for imposing this hardship on public officials is to save newspapers from the necessity of having to "check the facts" before printing.¹⁸ For the Court to hold a public official's reputation in less esteem than the press' freedom from "checking the facts" indicates a failure to properly weigh the rights involved.

Freedom of the press is designed primarily to encourage the democratic

¹⁶ *Post Publishing Company v. Hallam*, 59 F. 530, 540 (C.A. 6, 1893).

Courts have considered publications libelous even if they were not believed in the community. See, e.g., *Reynolds v. Pegler*, 123 F. Supp. 36, 37 (S.D.N.Y. 1954); *aff'd*, 223 F.2d 429 (C.A. 2, 1955); *cert. denied*, *Pegler v. Reynolds*, 350 U.S. 846 (1955): "A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages." See also the dissent of Justices Frankfurter, Harlan, Whittaker and Stewart which criticizes the unfairness of depriving a defamed individual recovery against the press—the agency by which the defamatory communication was magnified. *Farmers Educational & Co-op Union v. W.D.A.Y. Inc.*, 360 U.S. 525 (1959) (dissenting opinion).

¹⁷ "Freedom of discussion and freedom of the press under the guidance and sanction of truth, are essential to the liberties of our country, and to enable the people to select their rulers with discretion, and to judge correctly of their merits." *People v. Crosswell*, 1 N.Y. (3 Johns) 717, 719 (1804). Discussion serves as a corrective force to political, economic and other influences which are inevitably present in matters of public concern. See *Wood v. Georgia*, 370 U.S. 375 (1962).

¹⁸ Zechariah Chaffee, Jr., a devoted exponent of free speech and press, quoted with approval "Newspaper slips are usually the result of reprehensible conduct of members of the defendant's organization . . . the tendency towards flamboyance and haste in modern journalism should be checked rather than countenanced." CHAFFEE, *Possible New Remedies for Errors in the Press*, 60 HARV. L. REV. 1, 23 (1946), quoting MORRIS, *Inadvertent Newspaper Libel and Retraction*, 32 ILL. L. REV. 36, 44-45, n. 25 (1937).

process by allowing the public access to information about their government and their governmental officials, thus ensuring an informed voting public.¹⁹ Freedom of the press, therefore, is of paramount concern to the public as it has a vested interest in being certain that it is not deceived or misled by the press on which it relies. It is difficult to see how the public interest is being served by sanctioning the press in its printing of misstatements of fact about a public official. If a news item concerning a public official had to be delayed until an afternoon or evening edition because the newspapers had to "check the facts" to see that there were no misstatements, it certainly would not harm the public. Quite the contrary, it would more adequately promote the spirit of the first amendment in that it would foster truth, thus giving the public accurate facts upon which to base valid judgments. Justice, then Judge Holmes, in upholding a trial court's charge to the jury that a newspaper's statements of fact, if false, were not privileged, stated the public's viewpoint succinctly:

But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. . . .

If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the paper itself stands no better than the writer.²⁰

Nowhere does the Court mention this conflict between the prerogative of the press to disseminate news and the interest of the public in securing the truth. Balancing of rights, if used in this instance, would have given the public its proper protection.

The concurring opinions take a completely absolutist view of the first amendment, stating that a public official should not be able to sue

¹⁹ See CONOVER, *Free Speech and the Common Good*, 46 MARQ. L. REV. 79 (1962).

"Punitive or exemplary damages are intended to act as a deterrent upon the libeler so that he will not repeat the offense, and to serve as a warning to others. . . . They are intended as punishment for gross misbehavior for the good of the public and have been referred to as 'a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine.' . . . Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit. . . . The damages may be considered expressive of the community attitude toward one who wilfully and wantonly causes hurt or injury to another." *Reynolds v. Pegler*, 123 F. Supp 36, 38 (1954); *aff'd*, 223 F.2d 429 (C.A. 2, 1955); *cert. denied*, *Pegler v. Reynolds*, 350 U.S. 846 (1955).

²⁰ *Burt v. Advertiser Newspaper Company*, 154 Mass. 238, 243, 28 N.E. 1, 4 (1891). See also, *Near v. Minnesota*, 283 U.S. 697 (1931): "But it 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 libeler to responsibility for the public offense, as well as for private injury, are not abolished by the protection extended in our constitutions." *Id.* at 715.

the press even for malicious misstatement of fact. Thus, even the marginal protection afforded by the majority opinion would be eliminated. By this interpretation, free speech would take precedence over all other rights. The sole reason for this pre-eminence seemingly is that the first amendment contains the words "no abridgement." Both Justice Black's²¹ and Justice Goldberg's opinions emphasize the fact that the first amendment affords citizens an unconditional right to criticize public officials,²² but both Justices refuse to delineate between criticism and defamatory falsehood.²³ The admonition of Mr. Justice Jackson seems more than apropos:

There is a danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.²⁴

The press must be kept by definite law, regulation or judicial decisions within the confines of decency, honesty and justice. This can only be accomplished by balancing various overlapping rights. Should one right categorically outweigh another, both could eventually be lost.²⁵ The

²¹ Recent history proves that freedom of the press has been seen, by the Court itself, through a prism reflecting a variety of meanings. Justice Black, who now believes in a completely absolutist position, agreed with the majority opinion of the court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), when it stated that the right of free speech is not an absolute at all times and under all circumstances but that there are well defined and narrowly limited classes of speech which can be prevented.

²² *New York Times Company v. Sullivan*, 376 U.S. 254, 295, 298 (1964) (concurring opinions).

²³ That is, comment or criticism as distinct from false aspersions cast on the characters of officers. See GLEISSER, *Newspaper Libel*, 5 CLEV.-MAR. L. REV. 132 (1956) and CAMPBELL, *Libel as a Limitation on Newspaper Publications*, 25 ROCKY MT. L. REV. 279 (1953).

²⁴ *Terminello v. Chicago*, 337 U.S. 1, 37 (1949) (dissenting opinion).

"Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society." *Bridges v. California*, 314 U.S. 252, 293 (1941) (dissenting opinion of Justices Frankfurter, Roberts and Byrnes).

²⁵ This would be especially true if the future application of the Court's ruling is broader than the terms in which it was expressed. The possibility of this is very real, for the Court cited, with apparent approval, the language of *Coleman v. MacLennon*, 78 Kan. 711, 98 P. 281 (1908). *New York Times Company v. Sullivan*, 376 U.S. 254, 280 (1964). The Kansas court also required proof of actual malice before a public official could sue a newspaper for libel. However, it added: "This privilege extends to a great variety of subjects and includes matters of public concern, public men and candidates for office." *Id.* at 723; Note, 9 VILL. L. REV. 534, 537 n.28 (1964). Newspapers, before requesting still greater privilege should take heed of Tom Paine's words: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates his duty he establishes a precedent that will reach himself." BROOKS, *THE WORLD OF WASHINGTON IRVING* 73, quoted in *Cramer v. United States*, 325 U.S. 1, 48 (1945).

principal commendation of open balancing is that it "compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them—more particularized and more rational at least than the familiar parade of hallowed abstractions, elastic absolutes, and selective history."²⁰ Open balancing would ensure the protection to the press and at the same time provide a safeguard against the danger of allowing the press an inordinate amount of freedom. Essential protection would thus be afforded all rights embodied in the Constitution. Therefore, it is hoped, that in deciding future free speech cases, the Court will return to the use of the balancing concept.

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²⁰ MENDELSON, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 828 (1962). *Contra*, FRANTZ, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963).

CONSTITUTIONAL LAW—RIGHT TO COUNSEL— WHEN DOES IT ACCRUE?

Danny Escobedo, a twenty-two-year-old resident of Chicago, was arrested without a warrant about 8:00 P.M. on January 30, 1960, and taken to a police station for interrogation about the murder of his brother-in-law without formal charges being placed against him. The police told him about an incriminating statement made by another suspect, and urged him to admit the crime. Escobedo repeatedly requested to consult with his attorney. The police answered that the lawyer did not want to see him. About 11:00 P.M., Escobedo's lawyer, who had been trying to meet with his client since 9:30 P.M., caught a glimpse of him, and they exchanged waves before the lawyer was escorted away. Escobedo interpreted the wave as an instruction to keep quiet. Nevertheless, by midnight, he made a statement incriminating himself in the crime.

At the trial, the state introduced the confession. A defense motion to suppress it was overruled and Escobedo was convicted of murder. On appeal to the Illinois Supreme Court, the judgment was reversed on the ground that certain evidence tended to show that the statement had been the result of a promise of immunity from prosecution by the state.¹ On rehearing, the judgment was affirmed.² The United States Supreme Court granted certiorari and in a 5 to 4 opinion held that Escobedo's right to

¹ *People v. Escobedo*, No. 36707, Ill., Feb. 1, 1963 (copy on file in the library of the Chicago Bar Association).

² *People v. Escobedo*, 28 Ill. 2d 41, 190 N.E.2d 825 (1963).