

Readings

Unit 10

- Introduction—Understanding Media: The Inside Story
- Tocqueville, *Democracy in America*: “Liberty of the Press in the United States”
- Milton, *Areopagitica*
- Hume, “On the Liberty of the Press”
- *New York Times v. Sullivan*

Questions

1. According to Tocqueville, why was the press in the United States so violent?
2. Does false teaching present any advantages according to Milton?
3. Why, according to Hume, did Great Britain enjoy great liberty of the press?
4. What are some limitations on the freedom of speech according to *New York Times v. Sullivan*?

Introduction—Understanding Media: The Inside Story

Television appears in virtually every room. With the increasing power of computers and the Internet, media is never further away than a click of a mouse; questions about the freedom and power of the media deserve equally close attention. “Newspapers,” Tocqueville wrote of an earlier era, “therefore become more necessary in proportion as men become more equal and individualism more to be feared. To suppose that they only serve to protect freedom would be to diminish their importance: they maintain civilization. ... If there were no newspapers there would be no common activity.” Tocqueville reminds us that media connects and constructs people and societies as much as it informs and educates them.

The history of the freedom of the press begins with, actually before, Gutenberg’s printing press. The printing press, by creating regional newspapers and novels, is often referenced as one of the important material contributors to the development of the nation with its broad feelings of connectedness. The printing press also contributed to the possibility of reading and thinking about the world in brand new and highly individual ways. In 1501, Pope Alexander VI issued a papal bull ordering all printers to submit a copy of any potentially publishable material to church authorities before publishing at the risk of fines and excommunication, to ensure that people did not think about things in ways that were too original or individual. In England, the power of this review passed almost entirely to the king after the Reformation; a 1534 proclamation made the requirement of a prepublication license routine.

Criticism of the government during the Tudor and Stuart reigns became a felony, which led to John Milton’s advocacy of the freedom to publish. In *Areopagitica*, Milton objected to prior restraint—that the government could prohibit publication—but not to the later punishment by Parliament for offensive publications. Milton published *Areopagitica* in 1644, but the licensing laws remained in force until 1694. Even after this loosening of censorship, some publications were still off limits—the publishing of parliamentary debates could easily result in libel suits. In order to avoid these suits, many publishers resorted to parody and disguise; they would, for example, suggest that the debates were from the town of Lilliput (*Gentlemen’s Magazine*) or by Marc Anthony or Cicero, a strategy employed by early colonials as well. These prosecutions were stopped in the 1770s.

In his *Commentaries*, one of the most important texts to the early American revolutionaries, William Blackstone advocated a free but responsible press as an important check on government power. Not until 1868, however, did truth become admissible as defense in English libel cases. The stamp tax on British newspapers that so provoked the colonists would not be rescinded until more than 100 years after the colonists had seceded from the Empire (1885). At the time of the revolution, the Americans did away with both of these elements of the state control and regulation of the press. The Virginia Bill of Rights (1776) declared with Blackstone “that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.” This idea would later be made national law in the First Amendment to the Constitution (1791) though not until the 1920s would the First Amendment, through the Fourteenth Amendment, be incorporated to apply to states.

State regulation is one threat to the freedom of the press—particularly in its role as a check against government and as a stimulant to broader thinking; of similar danger is the threat of the concentration of media in the hands of a few huge corporations. We live in a world with hundreds of satellite and cable channels, but virtually all of those channels are owned by one of seven giant companies: Tele-Communications Inc. (T.C.I.), AOL-Time Warner, Disney, General Electric, CBS, Rupert Murdoch’s News Corporation, and Viacom. These seven giants, furthermore, produce most of the material they distribute. Jerry Isenberg estimates that 90 percent of the prime time material shown on all six networks belongs to G.E., Disney, Time Warner, News Corporation, CBS, Viacom, Sony, and Universal. Cable numbers are also daunting; more than half of all U.S. cable companies are owned by four companies—including T.C.I. and Time Warner. Information is so important, citizens need to be guarded in the same way we used to protect ourselves from monopolies in steel production.

Introduction—Understanding Media: The Inside Story, cont'd.

The media is not just a source of information. It also, as Tocqueville suggested, makes us who we are. Citizens need to concern themselves with the connections between the media and intellectual accounts of citizenship that conceive of citizens less as the source of governmental power and more as consumers. The pervasive drive of American consumer culture in the media cannot help but affect our own conceptions of ourselves and our understandings of our connections to others. If nothing else, we increasingly act on the proposition that the missing happiness of our lives can be recovered through product purchases, not through social participation or political action. We live in a time in which the government does not really have much need for regulation of the media since large corporations are so highly regulated by their owners in favor of the wall of advertisements promising happiness and sexiness.

The readings in this chapter begin with a focus on historical accounts that contributed to contemporary notions of the freedom of the press and the importance of communication media—John Milton's *Areopagitica* and David Hume's "On the Liberty of the Press." While these two readings were written far from the madding and crowded media we live with today, they reveal the historical background from which we built our relationship to the media world. These readings are coupled with a Supreme Court case that reveals the limits of a free American press.

Alexis de Tocqueville, *Democracy in America*: “Liberty of the Press in the United States”

(Volume I, Chapter XXI)

DIFFICULTY of restraining the liberty of the press—Particular reasons that some nations have for cherishing this liberty—The liberty of the press a necessary consequence of the sovereignty of the people as it is understood in America—Violent language of the periodical press in the United States—The periodical press has some peculiar instincts, proved by the example of the United States—Opinion of the Americans upon the judicial repression of the abuses of the press—Why the press is less powerful in America than in France.

The influence of the liberty of the press does not affect political opinions alone, but extends to all the opinions of men and modifies customs as well as laws. In another part of this work I shall attempt to determine the degree of influence that the liberty of the press has exercised upon civil society in the United States and to point out the direction which it has given to the ideas as well as the tone which it has imparted to the character and the feelings of the Anglo-Americans. At present I propose only to examine the effects produced by the liberty of the press in the political world.

I confess that I do not entertain that firm and complete attachment to the liberty of the press which is wont to be excited by things that are supremely good in their very nature. I approve of it from a consideration more of the evils it prevents than of the advantages it ensures.

If anyone could point out an intermediate and yet a tenable position between the complete independence and the entire servitude of opinion, I should perhaps be inclined to adopt it, but the difficulty is to discover this intermediate position. Intending to correct the licentiousness of the press and to restore the use of orderly language, you first try the offender by a jury; but if the jury acquits him, the opinion which was that of a single individual becomes the opinion of the whole country. Too much and too little has therefore been done; go farther, then. You bring the delinquent before permanent magistrates; but even here the cause must be heard before it can be decided; and the very principles which no book would have ventured to avow are blazoned forth in the pleadings, and what was obscurely hinted at in a single composition is thus repeated in a multitude of other publications. The language is only the expression and, if I may so speak, the body of the thought, but it is not the thought itself. Tribunals may condemn the body, but the sense, the spirit of the work is too subtle for their authority. Too much has still been done to recede, too little to attain your end; you must go still farther. Establish a censorship of the press. But the tongue of the public speaker will still make itself heard, and your purpose is not yet accomplished; you have only increased the mischief. Thought is not, like physical strength, dependent upon the number of its agents; nor can authors be counted like the troops that compose an army. On the contrary, the authority of a principle is often increased by the small number of men by whom it is expressed. The words of one strong-minded man addressed to the passions of a listening assembly have more power than the vociferations of a thousand orators; and if it be allowed to speak freely in any one public place, the consequence is the same as if free speaking was allowed in every village. The liberty of speech must therefore be destroyed as well as the liberty of the press. And now you have succeeded, everybody is reduced to silence. But your object was to repress the abuses of liberty, and you are brought to the feet of a despot. You have been led from the extreme of independence to the extreme of servitude without finding a single tenable position on the way at which you could stop.

There are certain nations which have peculiar reasons for cherishing the liberty of the press, independently of the general motives that I have just pointed out. For in certain countries which profess to be free, every individual agent of the government may violate the laws with impunity, since the constitution does not give to those who are injured a right of complaint before the courts of justice. In this case the liberty of the press is not merely one of the guarantees, but it is the only guarantee of their liberty and security that the citizens possess. If the rulers of these nations proposed to abolish the independence of the press, the whole people might answer: Give us the right of prosecuting your offenses before the ordinary tribunals, and perhaps we may then waive our right of appeal to the tribunal of public opinion.

In countries where the doctrine of the sovereignty of the people ostensibly prevails, the censorship of the press is not only dangerous, but absurd. When the right of every citizen to a share in the government of society is acknowledged, everyone must be presumed to be able to choose between the various opinions of his contem-

Liberty of the Press in the United States, cont'd.

poraries and to appreciate the different facts from which inferences may be drawn. The sovereignty of the people and the liberty of the press may therefore be regarded as correlative, just as the censorship of the press and universal suffrage are two things which are irreconcilably opposed and which cannot long be retained among the institutions of the same people. Not a single individual of the millions who inhabit the United States has as yet dared to propose any restrictions on the liberty of the press. The first newspaper over which I cast my eyes, upon my arrival in America, contained the following article:

In all this affair, the language of Jackson [the President] has been that of a heartless despot, solely occupied with the preservation of his own authority. Ambition is his crime, and it will be his punishment, too: intrigue is his native element, and intrigue will confound his tricks, and deprive him of his power. He governs by means of corruption, and his immoral practices will redound to his shame and confusion. His conduct in the political arena has been that of a shameless and lawless gamester. He succeeded at the time; but the hour of retribution approaches, and he will be obliged to disgorge his winnings, to throw aside his false dice, and to end his days in some retirement, where he may curse his madness at his leisure; for repentance is a virtue with which his heart is likely to remain forever unacquainted. (Vincenne's Gazette.)

Many persons in France think that the violence of the press originates in the instability of the social state, in our political passions and the general feeling of uneasiness that consequently prevails; and it is therefore supposed that as soon as society has resumed a certain degree of composure, the press will abandon its present vehemence. For my own part, I would willingly attribute to these causes the extraordinary ascendancy which the press has acquired over the nation; but I do not think that they exercise much influence on its language. The periodical press appears to me to have passions and instincts of its own, independent of the circumstances in which it is placed; and the present condition of America corroborates this opinion.

America is perhaps, at this moment, the country of the whole world that contains the fewest germs of revolution; but the press is not less destructive in its principles there than in France, and it displays the same violence without the same reasons for indignation. In America as in France it constitutes a singular power, so strangely composed of mingled good and evil that liberty could not live without it, and public order can hardly be maintained against it. Its power is certainly much greater in France than in the United States, though nothing is more rare in the latter country than to hear of a prosecution being instituted against it. The reason for this is perfectly simple: the Americans, having once admitted the doctrine of the sovereignty of the people, apply it with perfect sincerity. It was never their intention out of elements which are changing every day to create institutions that should last forever; and there is consequently nothing criminal in an attack upon the existing laws, provided a violent infraction of them is not intended. They are also of the opinion that court, of justice are powerless to check the abuses of the press, and that, as the subtlety of human language perpetually eludes judicial analysis, offenses of this nature somehow escape the hand which attempts to seize them. They hold that to act with efficacy upon the press it would be necessary to find a tribunal not only devoted to the existing order of things, but capable of surmounting the influence of public opinion; a tribunal which should conduct its proceedings without publicity, which should pronounce its decrees without assigning its motives, and punish the intentions even more than the language of a writer. Whoever should be able to create and maintain a tribunal of this kind would waste his time in prosecuting the liberty of the press; for he would be the absolute master of the whole community and would be as free to rid himself of the authors as of their writings. In this question, therefore, there is no medium between servitude and license; in order to enjoy the inestimable benefits that the liberty of the press ensures, it is necessary to submit to the inevitable evils that it creates. To expect to acquire the former and to escape the latter is to cherish one of those illusions which commonly mislead nations in their times of sickness when, tired with faction and exhausted by effort, they attempt to make hostile opinions and contrary principles coexist upon the same soil.

The small influence of the American journals is attributable to several reasons, among which are the following:

The liberty of writing, like all other liberty, is most formidable when it is a novelty, for a people who have never been accustomed to hear state affairs discussed before them place implicit confidence in the first tribune who presents himself. The Anglo-Americans have enjoyed this liberty ever since the foundation of the colonies; moreover, the press cannot create human passions, however skillfully it may kindle them where they exist. In America political life is active, varied, even agitated, but is rarely affected by those deep passions which are excited only when material interests are impaired; and in the United States these interests are prosperous. A glance at a French and an American newspaper is sufficient to show the difference that exists in this respect between the two nations. In France the space allotted to commercial advertisements is very limited, and the news intelligence is not considerable, but the essential part of the journal is the discussion of the politics of the day. In America three

Liberty of the Press in the United States, cont'd.

quarters of the enormous sheet are filled with advertisements, and the remainder is frequently occupied by political intelligence or trivial anecdotes; it is only from time to time that one finds a corner devoted to passionate discussions like those which the journalists of France every day give to their readers.

It has been demonstrated by observation, and discovered by the sure instinct even of the pettiest despots, that the influence of a power is increased in proportion as its direction is centralized. In France the press combines a twofold centralization; almost all its power is centered in the same spot and, so to speak, in the same hands, for its organs are far from numerous. The influence upon a skeptical nation of a public press thus constituted must be almost unbounded. It is an enemy with whom a government may sign an occasional truce, but which it is difficult to resist for any length of time.

Neither of these kinds of centralization exists in America. The United States has no metropolis; the intelligence and the power of the people are disseminated through all the parts of this vast country, and instead of radiating from a common point they cross each other in every direction; the Americans have nowhere established any central direction of opinion, any more than of the conduct of affairs. This difference arises from local circumstances and not from human power; but it is owing to the laws of the Union that there are no licenses to be granted to printers, no securities demanded from editors, as in France, and no stamp duty, as in France and England. The consequence is that nothing is easier than to set up a newspaper, as a small number of subscribers suffices to defray the expenses.

Hence the number of periodical and semi-periodical publications in the United States is almost incredibly large. The most enlightened Americans attribute the little influence of the press to this excessive dissemination of its power; and it is an axiom of political science in that country that the only way to neutralize the effect of the public journals is to multiply their number. I cannot see how a truth which is so self-evident should not already have been more generally admitted in Europe. I can see why the persons who hope to bring about revolutions by means of the press should be desirous of confining it to a few powerful organs, but it is inconceivable that the official partisans of the existing state of things and the natural supporters of the laws should attempt to diminish the influence of the press by concentrating its power. The governments of Europe seem to treat the press with the courtesy which the knights of old showed to their opponents; having found from their own experience that centralization is a powerful weapon, they have furnished their enemies with it in order doubtless to have more glory for overcoming them.

In America there is scarcely a hamlet that has not its newspaper. It may readily be imagined that neither discipline nor unity of action can be established among so many combatants, and each one consequently fights under his own standard. All the political journals of the United States are, indeed, arrayed on the side of the administration or against it; but they attack and defend it in a thousand different ways. They cannot form those great currents of opinion which sweep away the strongest dikes. This division of the influence of the press produces other consequences scarcely less remarkable. The facility with which newspapers can be established produces a multitude of them; but as the competition prevents any considerable profit, persons of much capacity are rarely led to engage in these undertakings. Such is the number of the public prints that even if they were a source of wealth, writers of ability could not be found to direct them all. The journalists of the United States are generally in a very humble position, with a scanty education and a vulgar turn of mind. The will of the majority is the most general of laws, and it establishes certain habits to which everyone must then conform; the aggregate of these common habits is what is called the class spirit (*esprit de corps*) of each profession; thus there is the class spirit of the bar, of the court, etc. The class spirit of the French journalists consists in a violent but frequently an eloquent and lofty manner of discussing the great interests of the state, and the exceptions to this mode of writing are only occasional. The characteristics of the American journalist consist in an open and coarse appeal to the passions of his readers; he abandons principles to assail the characters of individuals, to track them into private life and disclose all their weaknesses and vices.

Nothing can be more deplorable than this abuse of the powers of thought. I shall have occasion to point out hereafter the influence of the newspapers upon the taste and the morality of the American people, but my present subject exclusively concerns the political world. It cannot be denied that the political effects of this extreme license of the press tend indirectly to the maintenance of public order. Individuals who already stand high in the esteem of their fellow citizens are afraid to write in the newspapers, and they are thus deprived of the most powerful instrument that they can use to excite the passions of the multitude to their own advantage.¹

Liberty of the Press in the United States, cont'd.

The personal opinions of the editors have no weight in the eyes of the public. What they seek in a newspaper is a knowledge of facts, and it is only by altering or distorting those facts that a journalist can contribute to the support of his own views.

But although the press is limited to these resources, its influence in America is immense. It causes political life to circulate through all the parts of that vast territory. Its eye is constantly open to detect the secret springs of political designs and to summon the leaders of all parties in turn to the bar of public opinion.

It rallies the interests of the community round certain principles and draws up the creed of every party; for it affords a means of intercourse between those who hear and address each other without ever coming into immediate contact. When many organs of the press adopt the same line of conduct, their influence in the long run becomes irresistible, and public opinion, perpetually assailed from the same side, eventually yields to the attack. In the United States each separate journal exercises but little authority; but the power of the periodical press is second only to that of the people.² *THE OPINIONS established in the United States under the influence of the liberty of the press are frequently more firmly rooted than those which are formed elsewhere under the sanction of a censor.*

IN the United States democracy perpetually brings new men to the conduct of public affairs, and the administration consequently seldom preserves consistency or order in its measures. But the general principles of the government are more stable and the chief opinions which regulate society are more durable there than in many other countries. When once the Americans have taken up an idea, whether it be well or ill founded, nothing is more difficult than to eradicate it from their minds. The same tenacity of opinion has been observed in England, where for the last century greater freedom of thought and more invincible prejudices have existed than in any other country of Europe. I attribute this to a cause that may at first sight appear to have an opposite tendency: namely, to the liberty of the press. The nations among whom this liberty exists cling to their opinions as much from pride as from conviction. They cherish them because they hold them to be just and because they chose them of their own free will; and they adhere to them, not only because they are true, but because they are their own. Several other reasons conduce to the same end.

It was remarked by a man of genius that "ignorance lies at the two ends of knowledge." Perhaps it would have been more correct to say that strong convictions are found only at the two ends, and that doubt lies in the middle. The human intellect, in truth, may be considered in three distinct states, which frequently succeed one another.

A man believes firmly because he adopts a proposition without inquiry. He doubts as soon as objections present themselves. But he frequently succeeds in satisfying these doubts, and then he begins again to believe. This time he has not a dim and casual glimpse of the truth, but sees it clearly before him and advances by the light it gives.³

When the liberty of the press acts upon men who are in the first of these three states, it does not immediately disturb their habit of believing implicitly without investigation, but it changes every day the objects of their unreflecting convictions. The human mind continues to discern but one point at a time upon the whole intellectual horizon, and that point is constantly changing. This is the period of sudden revolutions. Woe to the generations which first abruptly adopt the freedom of the press.

The circle of novel ideas, however, is soon traveled over. Experience comes to undeceive men and plunges them into doubt and general mistrust. We may rest assured that the majority or mankind will always remain in one of these two states, will either believe they know not wherefore, or will not know what to believe. Few are those who can ever attain to that other state of rational and independent conviction which true knowledge can produce out of the midst of doubt.

It has been remarked that in times of great religious fervor men sometimes change their religious opinions; whereas in times of general skepticism everyone clings to his old persuasion. The same thing takes place in politics under the liberty of the press. In countries where all the theories of social science have been contested in their turn, men who have adopted one of them stick to it, not so much because they are sure of its truth as because they are not sure that there is any better to be had. In the present age men are not very ready to die for their opinions, but they are rarely inclined to change them; there are few martyrs as well as few apostates.

Another still more valid reason may be adduced: when no opinions are looked upon as certain, men cling to the mere instincts and material interests of their position, which are naturally more tangible, definite, and permanent than any opinions in the world.

Liberty of the Press in the United States, cont'd.

It is a very difficult question to decide whether an aristocracy or a democracy governs the best. But it is certain that democracy annoys one part of the community and that aristocracy oppresses another. It is a truth which is self-established, and one which it is needless to discuss, that "you are rich and I am poor."

Footnotes

1. They write in the papers only when they choose to address the people in their own name; as, for instance, when they are called upon to repel calumnious imputations or to correct a misstatement of facts.
2. See Appendix P [of Tocqueville's *Democracy in America*].
3. It may be doubted, however, whether this rational and self-guiding conviction arouses as much fervor or enthusiastic devotion in men as does their first dogmatical belief.

John Milton, *Areopagitica*

The English poet John Milton (1608-74) was the son of a wealthy scrivener who encouraged his son's interests in literature, language, and music. He attended Cambridge University with an interest in going into the Church of England, but, he later explained, he grew to dislike the growing ritualism of the Church. After leaving Cambridge, he retired to his father's estate and devoted himself to poetry; he wrote many important works of English poetry. Areopagitica is perhaps his most famous pamphlet and is one of the great arguments in favor of the freedom of the press. It grew out of his dissatisfaction with the strict censorship of the press exercised by Parliament.

Areopagitica.

A Speech for the Liberty of Unlicensed Printing to the Parliament of England

by John Milton, 1644

This is true liberty, when free-born men, Having to advise the public, may speak free, Which he who can, and will, deserves high praise; Who neither can, nor will, may hold his peace: What can be juster in a state than this?

Euripid. Hicetid.

They, who to states and governors of the Commonwealth direct their speech, High Court of Parliament, or, wanting such access in a private condition, write that which they foresee may advance the public good; I suppose them, as at the beginning of no mean endeavour, not a little altered and moved inwardly in their minds: some with doubt of what will be the success, others with fear of what will be the censure; some with hope, others with confidence of what they have to speak. And me perhaps each of these dispositions, as the subject was whereon I entered, may have at other times variously affected; and likely might in these foremost expressions now also disclose which of them swayed most, but that the very attempt of this address thus made, and the thought of whom it hath recourse to, hath got the power within me to a passion, far more welcome than incidental to a preface.

Which though I stay not to confess ere any ask, I shall be blameless, if it be no other than the joy and gratulation which it brings to all who wish and promote their country's liberty; whereof this whole discourse proposed will be a certain testimony, if not a trophy. For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth—that let no man in this world expect; but when complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for. To which if I now manifest by the very sound of this which I shall utter, that we are already in good part arrived, and yet from such a steep disadvantage of tyranny and superstition grounded into our principles as was beyond the manhood of a Roman recovery, it will be attributed first, as is most due, to the strong assistance of God our deliverer, next to your faithful guidance and undaunted wisdom, Lords and Commons of England. Neither is it in God's esteem the diminution of his glory, when honourable things are spoken of good men and worthy magistrates; which if I now first should begin to do, after so fair a progress of your laudable deeds, and such a long obligation upon the whole realm to your indefatigable virtues, I might be justly reckoned among the tardiest, and the unwillingest of them that praise ye.

Nevertheless there being three principal things, without which all praising is but courtship and flattery: First, when that only is praised which is solidly worth praise: next, when greatest likelihoods are brought that such things are truly and really in those persons to whom they are ascribed: the other, when he who praises, by showing that such his actual persuasion is of whom he writes, can demonstrate that he flatters not; the former two of these I have heretofore endeavoured, rescuing the employment from him who went about to impair your merits with a trivial and malignant encomium; the latter as belonging chiefly to mine own acquittal, that whom I so extolled I did not flatter, hath been reserved opportunely to this occasion.

For he who freely magnifies what hath been nobly done, and fears not to declare as freely what might be done better, gives ye the best covenant of his fidelity; and that his loyalest affection and his hope waits on your proceedings. His highest praising is not flattery, and his plainest advice is a kind of praising. For though I should affirm and hold by argument, that it would fare better with truth, with learning and the Commonwealth, if one of your published Orders, which I should name, were called in; yet at the same time it could not but much redound to the lustre of your mild and equal government, when as private persons are hereby animated to think ye better pleased with public advice, than other statistes have been delighted heretofore with public flattery. And men will

Areopagitica, cont'd.

then see what difference there is between the magnanimity of a triennial Parliament, and that jealous haughtiness of prelates and cabin counsellors that usurped of late, when as they shall observe ye in the midst of your victories and successes more gently brooking written exceptions against a voted Order than other courts, which had produced nothing worth memory but the weak ostentation of wealth, would have endured the least signified dislike at any sudden proclamation.

If I should thus far presume upon the meek demeanour of your civil and gentle greatness, Lords and Commons, as what your published Order hath directly said, that to gainsay, I might defend myself with ease, if any should accuse me of being new or insolent, did they but know how much better I find ye esteem it to imitate the old and elegant humanity of Greece, than the barbaric pride of a Hunnish and Norwegian stateliness. And out of those ages, to whose polite wisdom and letters we owe that we are not yet Goths and Jutlanders, I could name him who from his private house wrote that discourse to the Parliament of Athens, that persuades them to change the form of democracy which was then established. Such honour was done in those days to men who professed the study of wisdom and eloquence, not only in their own country, but in other lands, that cities and signories heard them gladly, and with great respect, if they had aught in public to admonish the state. Thus did Dion Prusaesus, a stranger and a private orator, counsel the Rhodians against a former edict; and I abound with other like examples, which to set here would be superfluous.

For when God shakes a kingdom with strong and healthful commotions to a general reforming, 'tis not untrue that many sectaries and false teachers are then busiest in seducing; but yet more true it is, that God then raises to his own work men of rare abilities, and more than common industry, not only to look back and revise what hath been taught heretofore, but to gain further and go on some new enlightened steps in the discovery of truth. For such is the order of God's enlightening his Church, to dispense and deal out by degrees his beam, so as our earthly eyes may best sustain it.

Neither is God appointed and confined, where and out of what place these his chosen shall be first heard to speak; for he sees not as man sees, chooses not as man chooses, lest we should devote ourselves again to set places, and assemblies, and outward callings of men; planting our faith one while in the old Convocation house, and another while in the Chapel at Westminster; when all the faith and religion that shall be there canonized is not sufficient without plain convincement, and the charity of patient instruction to supple the least bruise of conscience, to edify the meanest Christian, who desires to walk in the Spirit, and not in the letter of human trust, for all the number of voices that can be there made; no, though Harry VII himself there, with all his liege toms about him, should lend them voices from the dead, to swell their number.

And if the men be erroneous who appear to be the leading schismatics, what withholds us but our sloth, our self-will, and distrust in the right cause, that we do not give them gentle meetings and gentle dismissions, that we debate not and examine the matter thoroughly with liberal and frequent audience; if not for their sakes, yet for our own? seeing no man who hath tasted learning, but will confess the many ways of profiting by those who, not contented with stale receipts, are able to manage and set forth new positions to the world. And were they but as the dust and cinders of our feet, so long as in that notion they may yet serve to polish and brighten the armoury of Truth, even for that respect they were not utterly to be cast away. But if they be of those whom God hath fitted for the special use of these times with eminent and ample gifts, and those perhaps neither among the priests nor among the Pharisees, and we in the haste of a precipitant zeal shall make no distinction, but resolve to stop their mouths, because we fear they come with new and dangerous opinions, as we commonly forejudge them ere we understand them; no less than woe to us, while, thinking thus to defend the Gospel, we are found the persecutors.

There have been not a few since the beginning of this Parliament, both of the presbytery and others, who by their unlicensed books, to the contempt of an Imprimatur, first broke that triple ice clung about our hearts, and taught the people to see day: I hope that none of those were the persuaders to renew upon us this bondage which they themselves have wrought so much good by contemning. But if neither the check that Moses gave to young Joshua, nor the countermand which our Saviour gave to young John, who was so ready to prohibit those whom he thought unlicensed, be not enough to admonish our elders how unacceptable to God their testy mood of prohibiting is; if neither their own remembrance what evil hath abounded in the Church by this set of licensing, and

Areopagitica, cont'd.

what good they themselves have begun by transgressing it, be not enough, but that they will persuade and execute the most Dominican part of the Inquisition over us, and are already with one foot in the stirrup so active at suppressing, it would be no unequal distribution in the first place to suppress the suppressors themselves: whom the change of their condition hath puffed up, more than their late experience of harder times hath made wise.

And as for regulating the press, let no man think to have the honour of advising ye better than yourselves have done in that Order published next before this, "that no book be printed, unless the printer's and the author's name, or at least the printer's, be registered." Those which otherwise come forth, if they be found mischievous and libellous, the fire and the executioner will be the timeliest and the most effectual remedy that man's prevention can use. For this authentic Spanish policy of licensing books, if I have said aught, will prove the most unlicensed book itself within a short while; and was the immediate image of a Star Chamber decree to that purpose made in those very times when that Court did the rest of those her pious works, for which she is now fallen from the stars with Lucifer. Whereby ye may guess what kind of state prudence, what love of the people, what care of religion or good manners there was at the contriving, although with singular hypocrisy it pretended to bind books to their good behaviour. And how it got the upper hand of your precedent Order so well constituted before, if we may believe those men whose profession gives them cause to inquire most, it may be doubted there was in it the fraud of some old patentees and monopolizers in the trade of bookselling; who under pretence of the poor in their Company not to be defrauded, and the just retaining of each man his several copy, which God forbid should be gain-said, brought divers glossing colours to the House, which were indeed but colours, and serving to no end except it be to exercise a superiority over their neighbours; men who do not therefore labour in an honest profession to which learning is indebted, that they should be made other men's vassals. Another end is thought was aimed at by some of them in procuring by petition this Order, that, having power in their hands, malignant books might the easier scape abroad, as the event shows.

But of these sophisms and elenchs of merchandise I skill not. This I know, that errors in a good government and in a bad are equally almost incident; for what magistrate may not be misinformed, and much the sooner, if liberty of printing be reduced into the power of a few? But to redress willingly and speedily what hath been erred, and in highest authority to esteem a plain advertisement more than others have done a sumptuous bride, is a virtue (honoured Lords and Commons) answerable to your highest actions, and whereof none can participate but greatest and wisest men.

David Hume, “On the Liberty of the Press”

from *Essays, Moral and Political*, first published in 1748, and republished in 1777

NOTHING is more apt to surprize a foreigner, than the extreme liberty, which we enjoy in this country, of communicating whatever we please to the public, and of openly censuring every measure, entered into by the king or his ministers. If the administration resolve upon war, it is affirmed, that, either wilfully or ignorantly, they mistake the interests of the nation, and that peace, in the present situation of affairs, is infinitely preferable. If the passion of the ministers lie towards peace, our political writers breathe nothing but war and devastation, and represent the pacific conduct of the government as mean and pusillanimous. As this liberty is not indulged in any other government, either republican or monarchical;[1] in HOLLAND and VENICE, more than in FRANCE or SPAIN; it may very naturally give occasion to a question, How it happens that GREAT BRITAIN alone enjoys this peculiar privilege?

The reason, why the laws indulge us in such a liberty seems to be derived from our mixed form of government, which is neither wholly monarchical, nor wholly republican. It will be found, if I mistake not, a true observation in politics, that the two extremes in government, liberty and slavery, commonly approach nearest to each other; and that, as you depart from the extremes, and mix a little of monarchy with liberty, the government becomes always the more free; and on the other hand, when you mix a little of liberty with monarchy, the yoke becomes always the more grievous and intolerable. In a government, such as that of FRANCE, which is absolute, and where law, custom, and religion concur, all of them, to make the people fully satisfied with their condition, the monarch cannot entertain any jealousy against his subjects, and therefore is apt to indulge them in great liberties both of speech and action. In a government altogether republican, such as that of HOLLAND, where there is no magistrate so eminent as to give jealousy to the state, there is no danger in intrusting the magistrates with large discretionary powers; and though many advantages result from such powers, in preserving peace and order, yet they lay a considerable restraint on men’s actions, and make every private citizen pay a great respect to the government. Thus it seems evident, that the two extremes of absolute monarchy and of a republic, approach near to each other in some material circumstances. In the first, the magistrate has no jealousy of the people: in the second, the people have none of the magistrate: Which want of jealousy begets a mutual confidence and trust in both cases, and produces a species of liberty in monarchies, and of arbitrary power in republics.

To justify the other part of the foregoing observation, that, in every government, the means are most wide of each other, and that the mixtures of monarchy and liberty render the yoke either more easy or more grievous; I must take notice of a remark in TACITUS with regard to the ROMANS under the emperors, that they neither could bear total slavery nor total liberty, *Nec totam servitutem, nec totam libertatem pati possunt.*[2] This remark a celebrated poet has translated and applied to the ENGLISH, in his lively description of queen ELIZABETH’S policy and government, *Et fit aimer son joug a l’Anglois indompt Qui ne peut ni servir, ni vivre en libert* HENRIADE, liv. I.[3]

According to these remarks, we are to consider the ROMAN government under the emperors as a mixture of despotism and liberty, where the despotism prevailed; and the ENGLISH government as a mixture of the same kind, where the liberty predominates. The consequences are conformable to the foregoing observation; and such as may be expected from those mixed forms of government, which beget a mutual watchfulness and jealousy. The ROMAN emperors were, many of them, the most frightful tyrants that ever disgraced human nature; and it is evident, that their cruelty was chiefly excited by their jealousy, and by their observing that all the great men of ROME bore with impatience the dominion of a family, which, but a little before, was no wise superior to their own. On the other hand, as the republican part of the government prevails in ENGLAND, though with a great mixture of monarchy, it is obliged, for its own preservation, to maintain a watchful jealousy over the magistrates, to remove all discretionary powers, and to secure every one’s life and fortune by general and inflexible laws. No action must be deemed a crime but what the law has plainly determined to be such: No crime must be imputed to a man but from a legal proof before his judges; and even these judges must be his fellow-subjects, who are obliged, by their own interest, to have a watchful eye over the encroachments and violence of the ministers. From these causes it proceeds, that there is as much liberty, and even, perhaps, licentiousness in GREAT BRITAIN, as there were formerly slavery and tyranny in ROME.

These principles account for the great liberty of the press in these kingdoms, beyond what is indulged in any other government. It is apprehended, that arbitrary power would steal in upon us, were we not careful to prevent its progress, and were there not an easy method of conveying the alarm from one end of the kingdom to the

On the Liberty of the Press, cont'd.

other. The spirit of the people must frequently be roused, in order to curb the ambition of the court; and the dread of rousing this spirit must be employed to prevent that ambition. Nothing so effectual to this purpose as the liberty of the press, by which all the learning, wit, and genius of the nation may be employed on the side of freedom, and every one be animated to its defence. As long, therefore, as the republican part of our government can maintain itself against the monarchical, it will naturally be careful to keep the press open, as of importance to its own preservation.

It must however be allowed, that the unbounded liberty of the press, though it be difficult, perhaps impossible, to propose a suitable remedy for it, is one of the evils, attending those mixt forms of government.

1. Hume nowhere discusses thematically the important question of how the various forms of government should be classified, but he touches on the question in many places. This essay suggests that governments are to be classified as republics, monarchies, or, as in the case of Great Britain, a mixture of republican and monarchical elements. Aristocracy and "pure" democracy would, in this classification, be types of republican government, as would the representative system that Hume describes in "Idea of a Perfect Commonwealth." The distinction in the present essay between liberty and despotism or slavery is not equivalent or even parallel to that between republics and monarchies. Hume maintains that freedom can prevail in monarchical government, just as despotism can prevail in republics.

2. Tacitus (A.D. 55?-120?) *The Histories* 1.16.28. The quotation comes at the end of a speech by Emperor Galba to Piso, upon adopting Piso as his successor: "For with us there is not, as among peoples where there are kings, a fixed house of rulers while all the rest are slaves, but you are going to rule over men who can endure neither complete slavery nor complete liberty" (Loeb translation by Clifford H. Moore).

3. Frans Marie Arouet (1694-1778), who wrote under the name Voltaire, first published *La Henriade* in 1723 under a different title and republished it, with alterations, under the present title in 1728. Its hero is Henry of Navarre, who became King Henry IV of France. The passage praising Elizabeth reads: "And she made her yoke dear to the unconquered English, who can neither serve nor live in liberty."

New York Times v. Sullivan

Can a public official bring libel charges against a critic of their official conduct? For the first time, in New York Times Co. v. Sullivan (376 U.S. 254 [1964]), the Supreme Court considered the extent to which the statements of critics against public officials are speech protected by the constitutional guarantee of freedom of speech and the press. Four black clergymen took out a full page add in the New York Times supporting the civil rights movement in the South. The advertisement proclaimed that on the Alabama State Capital students protesting segregation had gathered and sang "My Country 'Tis of Thee," when they had actually sang, "The Star-Spangled Banner"; additionally, it claimed that several students were expelled from school for leading the protest, when in reality these students had been expelled for demanding service at a lunch counter in the Montgomery County Courthouse; furthermore, the advertisement claimed that the "entire" student body of Alabama State College protested the expulsions when, in fact, only "most" students had protested for the students. Sullivan, an elected commissioner of the city of Montgomery, Alabama sued the clergymen and the Times. The Supreme Court, in the opinion by Justice Brennan, decided that public officials may not recover damages for defamatory falsehood relating to their official conduct unless they can prove actual malice—"that the statement was made with ... knowledge that it was false or with reckless disregard of whether it was false or not," since to allow such a recovery of damages would chill the vigor and variety of public debate necessary for a lively trade in free speech.

New York Times Co. v. Sullivan

No. 39, SUPREME COURT OF THE UNITED STATES, 376 U.S. 254

Argued January 6, 1964; Decided March 9, 1964

Together with No. 40, *Abernathy et al. v. Sullivan*, also on certiorari to the same court, argued January 7, 1964.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protection for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L.B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So.2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that, "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread nonviolent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that, "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom...." Succeeding [257] paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right to vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

New York Times v. Sullivan, cont'd.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to reregister, their dining hall was padlocked in an attempt to starve them into submission.

Sixth paragraph:

Again and again, the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home, almost killing his wife and child. They have [258] assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years....

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that, since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My [259] Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four, and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had, in fact, been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had, in fact, been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment. [260]

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. One of his witnesses, a former employer, testified that, if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not reemploy respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent. The cost of the advertisement was approximately \$4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory

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Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and, in accepting the letter as sufficient proof of authorization, it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south ... warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability [261] Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement, and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we ... are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with "grave misconduct and ... improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama." When asked to explain why there has been a retraction for the Governor but not for respondent, the Secretary of the Times testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama, and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State, and, furthermore, we had by that time learned more of the actual facts which the and purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education, presumably of which the Governor is the ex-officio chairman...." On the other hand, he testified that he did not think that "any of the language in there referred to Mr. Sullivan."

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se," and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous per se, "the law ... implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved, but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages—as distinguished from "general" damages, which are compensatory in nature—apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention [263] that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So.2d 25. It held that, "where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff," and that it was actionable without "proof of pecuniary injury.... such injury being implied." *Id.* at 673, 676, 144 So.2d at 37, 41. It approved the trial

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court's ruling that the jury could find the statements to have been made "of and concerning" respondent, stating: "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and, more particularly, under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." *Id.* at 674-675, 144 So.2d at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' "irresponsibility" in printing the advertisement while "the Times, in its own files, had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and "the matter contained in the advertisement was equally false as to both parties"; and from the testimony of the Times' Secretary that, [264] apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." *Id.* at 686-687, 144 So.2d at 50-51. The court reaffirmed a statement in an earlier opinion that "There is no legal measure of damages in cases of this character." *Id.* at 686, 144 So.2d at 50. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U.S. Constitution does not protect libelous publications," and "The Fourteenth Amendment is directed against State action, and not private action." *Id.* at 676, 144 So.2d at 40.

Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U.S. 946. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We [265] further hold that, under the proper safeguards, the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that "The Fourteenth Amendment is directed against State action, and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g., Alabama Code, Tit. 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has, in fact, been exercised. See *Ex parte Virginia*, 100 U.S. 339, 346-347; *American Federation of Labor v. Swing*, 312 U.S. 321.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on *Valentine v. Chrestensen*, 316 U.S. 52, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action, on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for "the freedom of communicating [266] information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. 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. See *NAACP v. Button*, 371 U.S. 415, 435. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith v. California*, 361 U.S. 147, 150; cf. *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 64, n. 6. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell v. Griffin*, 303 U.S. 444, 452; *Schneider v. State*, 308 U.S. 147, 164. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20. To avoid placing such a handicap upon the freedoms of expression, we hold that, if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement. [267]

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* * * *

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare *Barr v. Matteo*, 360 U.S. 564. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about “malice,” “truth,” “good motives,” “justifiable ends,” or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States. This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United [296] States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since. Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798, which made it a crime—“seditious libel”—to criticize federal officials or the Federal Government. As the Court’s opinion correctly points out, however, *ante*, pp. 273-276, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as “obscenity,” *Roth v. United States*, 354 U.S. 476, and “fighting words,” *Chaplinsky v. New Hampshire*, 315 U.S. 568, are not expression within the protection of the First Amendment, freedom to discuss public affairs and public officials [297] is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. “For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.” An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.