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THE RIGHT TO SPEAK FROM *TIMES* TO *TIME*: FIRST AMENDMENT THEORY APPLIED TO LIBEL AND MISAPPLIED TO PRIVACY

*Melville B. Nimmer**

I

THE SEARCH FOR A VIABLE THEORY

The extent to which men are free to speak without restraint from government is the principal measure of the degree of reality which lies beneath the rhetoric that tells us we are a free people living under a free government. But the very phrase "free government" contains a paradox, since a government which is not prepared in some circumstances to apply restraints and thus lessen freedom is no government at all. Democratic theory supposedly resolves this seeming contradiction by legitimizing state power in its restraint on conduct while immunizing from the reach of the state speech and other forms of expression. Every civics student knows that by virtue of the first amendment "Congress shall make no law. . . abridging the freedom of speech, or of the press," and that by reason of the fourteenth amendment the same restraints are imposed upon state governments. The only thing wrong with this conventional view of the role of the first amendment in our society is that it is untrue. To be sure, it contains an important element of truth, but it neither is nor can be wholly and literally true.

Some have thought that the first amendment must be interpreted and applied with absolute literalness. Justice Black, who is usually

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regarded as the foremost exponent of such a position, has said that the first amendment command that Congress shall make "no law" abridging freedom of speech literally "means no law,"[1] and that this is true "without any ifs, buts, or whereases."[2] To one sympathetic to the values of free expression this at first glance states an attractive view, supported as it is by the clear, unequivocal language of the Constitution. Nevertheless, it will not wash. Everyone, including Justice Black, will concede that there are circumstances when the act of speaking or otherwise expressing oneself may be subject to governmental restraint.

Even the holders of an absolutist view read the first amendment guarantee of free speech as subject to the qualification that speech may be abridged if the time, place, or manner of its expression makes an abridgement reasonable. It was Justice Black who wrote the recent opinion for the Court in *Adderley v. Florida*[3] which upheld the arrest of university students for staging a nonviolent civil rights demonstration outside a Florida county jail. In that opinion he expressly rejected "the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."[4] And the dissenting opinion of Justice Douglas, which argued that the right of free speech should have been upheld on the particular facts presented in *Adderley*, conceded the same qualification:

> "There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put."[5]

Lest the reference to "noisy" and "vociferous" be thought to beg the question, can anyone doubt that if during a session of the Supreme Court a spectator were to rise and proceed to make a speech, loud enough to be heard by those present, but in no way raucous or noisy, he might properly be restrained?

Time, place, and manner considerations are not the only qualifications of the first amendment which most people, probably including

[1]Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 553 (1962).

[2]*Id.* at 559. The same phrase is to be found in Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

[3]385 U.S. 39 (1966).

[4]*Id.* at 47-48. *Accord*, Cahn, *supra* note 1, at 558.

[5]385 U.S. at 54.

those who hold an absolutist position, would accept as inherently necessary and impliedly contained in the freedom of speech guarantee. Agreements in restraint of trade are a form of expression, but does anyone believe that the first amendment invalidates our antitrust laws? Would anyone argue that perjury in a judicial proceeding could not be made a crime because it is a form of speech? Can it be maintained that one who passes "top secret" material to unauthorized persons is immunized from prosecution because he is engaging in a form of expression? Are our copyright laws unconstitutional because they abridge an infringer's freedom of expression? Many other examples might be added,[6] but these perhaps will suffice to indicate that no one can responsibly hold the position that the first amendment is an absolute in the sense that it literally protects all speech.

Justice Black and others have sometimes sought to find absolute boundaries for the scope of the first amendment by invoking the distinction between "speech" and "action."[7] But this is no more than a metaphorical device for rationalizing a line already drawn. If I cry "Fire!" in a crowded theater, I am speaking no less than when I engage in a political debate. The consequences of the former may differ markedly from

[6]"Federal securities regulation, mail fraud statues, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional.' " Opinion of Mr. Justice Harlan, joined by Justices Clark, Stewart, and Fortas, in Curtis Pub. Co. v. Butts, 388 U.S. 130, 150 (1967).

[7]For example, Justice Black in his dissenting opinion in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 168 (1961), stated: "The Founders drew a distinction in our Constitution which we would be wise to follow. They gave the Government the fullest power to prosecute overt actions in violation of valid laws but withheld any power to punish people for nothing more than advocacy of their views." Likewise, Mr. Justice Douglas in a concurring opinion in Garrison v. Louisiana, 379 U.S. 64, 82 (1964) stated categorically: "I think it is time to face the fact that the only line drawn by the Constitution is between 'speech' on the one side and conduct or overt acts on the other."

Justice Douglas goes on to acknowledge, however, that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." (Justice Douglas originally expressed this view in Roth v. United States, 354 U.S. 476, 514 (1957)). This concession surely obliterates the usefulness of an absolutist distinction between speech and conduct. It requires balancing, see text at note 9 *infra*, to determine whether the speech is "so closely brigaded with illegal action" as to warrant its suppression. Justice Black (with Justice Douglas and Chief Justice Warren concurring) conceded in Barenblatt v. United States, 360 U.S. 109, 141-42 (1959), that balancing is required in determining the validity of a law "which primarily regulates conduct but which might also indirectly affect speech." Consider also Justice Black's dissent in Konigsberg v. State Bar, 366 U.S. 36, 68-70 (1961), where he expressly acknowledged the need for such balancing only in those cases involving the right of a city to control the use of its streets, but mentioned such cases by way of example and not as an exhaustive category.

The distinction between speech and conduct has also been invoked by those members of the Court who are unsympathetic to an absolutist interpretation of the first amendment. For example, Mr. Justice Harlan, in Curtis Pub. Co. v. Butts, 388 U.S. 130, 152-53 (1967), stated that ". . . neither the interests of the publisher nor those of socicty neeessarily preclude a damage award based on

that of the latter, but it is a fiction which beclouds rather than clarifies to say that the former is not speech. Whether a cry of "Fire!" is the type of speech which should find protection under the first amendment may validly be questioned, but the answer must be sought elsewhere than in the speech-action dichotomy.[8]

But if the first amendment does not protect all speech, how is the Court to determine which speech is subject to abridgment, and which immunized by the first amendment? Here those concerned with the preservation of the values which underlie the first amendment become properly alarmed. If we may not cling to the anchor of an absolute, unqualified rule, is not the alternative no rule at all? If the judges are not required to protect all speech, doesn't this mean that the only speech which will be protected is that which, on an ad hoc basis, the judges may from time to time approve? That this fear is not fanciful is all too clearly illustrated by a line of cases in which the Court engaged in what has been called ad hoc balancing.[9]

The first of these was *American Communications Association v. Douds*,[10] where Mr. Chief Justice Vinson, on behalf of the Court, rejected an "absolutist test" of first amendment rights, and concluded that as between the claims of free speech and the claims of public order "the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."[11] Similarly, Mr. Justice Frankfurter, concurring in *Dennis v. United States*,[12] stated that: "The demands of free speech in a democratic society as well as the interests in national security are better served by

improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press." If the reference to a principal "focus" is intended to suggest that only conduct and not speech is being suppressed, it is surely misleading. Conduct may be a necessary element in a libel action, but there can be no libel without libelous speech.

[8]This distinction breaks down not only because some verbal expressions do not and should not command first amendment protection, see text at note 6 *supra*, but also because some action which does not consist of verbal expression properly belongs within the sphere of first amendment protection. As Mr. Justice Harlan, concurring in the sit-in case Garner v. Louisiana, 368 U.S. 157, 201-02 (1961) observed: "Such a demonstration in the circumstances . . . is as much a part of the 'free trade in ideas' . . . as is verbal expression, more commonly thought of as 'speech.' It, like speech, appeals to good sense and to the 'power of reason as applied through public discussion' . . . just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment . . . to mere verbal expression."

[9]*See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-14 (1963); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[10]339 U.S. 382 (1950).

[11]*Id.* at 399.

[12]341 U.S. 494, 524-25 (1951).

candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved." And Mr. Justice Harlan for the Court in *Barenblatt v. United States*[13] asserted that: "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[14]

But what is wrong with the rational weighting of competing interests that occurs under the ad hoc balancing approach? Such an approach may well be desirable with respect to nonconstitutional issues—in fact, it appears to be basic to the common law system. It may even be the most sensible technique in some constitutional areas.[15] But those who subscribe to ad hoc balancing would be untrue to their philosophy if they were unprepared to balance the merits and faults of the very system of balancing against those of a different system in particular contexts. I would assert that in the sensitive and vital area of freedom of expression, constitutional protection must not be predicated on ad hoc balancing.

There are at least three serious objections to the use of ad hoc balancing in resolving free speech issues. First, ad hoc balancing by hypothesis means that there is no rule to be applied, but only interests to be weighed. In advance of a final adjudication by the highest court a given speaker has no standard by which he can measure whether his interest in speaking will be held of greater or lesser weight than the competing interest which opposes his speech. Without pretending that there can ever be complete certainty as to how a given rule will be applied in a new situation, if there is no rule at all then there is no certainty at all. The absence of certainty in the law is always unfortunate, but it is particularly pernicious where speech is concerned because it tends to deter all but the most courageous (not necessarily the most rational) from entering the market place of ideas. From this we all suffer through being cut off from exposure to ideas which could be valuable or even vital to our national well-being.

The second objection to ad hoc balancing in speech cases relates to the results likely to be reached. I think it is more than mere coincidence

[13]360 U.S. 109, 126 (1959).

[14]For other examples of ad hoc balancing see NAACP v. Alabama, 357 U.S. 449, 463-64 (1958) and Konigsberg v. State Bar, 366 U.S. 36, 51 (1961). It should be noted that the Court has recently indicated its rejection of the balancing approach. *See* United States v. Robel, 389 U.S. 258, 268 n.20 (1967).

[15]See the persuasive argument for ad hoc balancing on a constitutional level in Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUPREME COURT REV. 75.

that in the overwhelming majority of the major free speech cases in which the ad hoc balancing approach has been applied, the weighing of interests has come out on the side which opposes freedom of speech.[16] It can be conceded that such an outcome is not a necessary result of ad hoc balancing, but it is the result that is likely to occur. This is because the free speech issue will never be tested in court unless a law has in some way been violated, and unless further the authorities determine to prosecute. Given the assumption inherent in our national heritage that most speech is to be tolerated, it is only those who espouse the most unpopular ideas, those against whom feelings run the highest, that are likely to be the subject of repressive laws, and only they are likely to be prosecuted. It is too much to expect that our judges will be entirely untouched, consciously or otherwise, by such strong popular feelings—feelings that have more than once reached the point of national hysteria—when they come to engage in the "delicate and difficult task"[17] of weighing competing interests. Thus at the very time when the right of freedom of speech becomes crucial, the scales may become unbalanced. Yet the fact that passionate national feelings oppose a given speaker's right to be heard does not properly go to the question of whether the interest which opposes the speech rationally outweighs the interest which supports the speech. Otherwise, the mere fact that a popularly elected legislature passed a law repressing speech and a popularly elected executive brought the prosecution would automatically condemn the speech, and no constitutional issue would remain.

The third major objection to ad hoc balancing also relates to the likely results. In weighing the particular interests involved in a given case, the court must balance the interest in speech against the compelling force of a particular legislative judgment as molded in the law which has been violated. This might present no special problem if the law in question were enacted some time in the 19th century. But if, as is usually the case, most of the legislators that enacted the law still hold office, the court is likely to be swayed by their judgment in the weighing of interests. Certainly on a nonconstitutional level this is as it should be, and even in

[16]*See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950). The "speech" side prevailed in NAACP v. Alabama, 357 U.S. 449 (1958), but the precise interest protected was the right of association as derived from the right of free speech, and not speech itself. *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957), where, although the balancing approach was not employed by the majority, Justices Frankfurter and Harlan in a concurring opinion balanced in favor of the interest in speech.

[17]American Communications Ass'n v. Douds, 339 U.S. 382, 400 (1950), quoting Schnieder v. State (Town of Irvington), 308 U.S. 147, 161 (1939).

constitutional adjudication the legislative view is not entirely irrelevant. But the ingrained judicial deference to the legislative branch can and has in ad hoc balancing tended toward judicial abdication in the weighing process. This is evident in Mr. Justice Frankfurter's opinion in *Dennis*:

> [H]ow are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
>
> Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. . . . We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.[18]

Judge Learned Hand went even further, apparently not even requiring reasonableness upon the part of the legislature, but only good faith. "The standard set should prevail," he wrote, "unless the court is satisfied that it was not the product of an effort impartially to balance the conflicting values."[19] I do not know how to avoid the logical conclusion from this that there is no constitutional guarantee of freedom of expression. If the legislative judgment is to prevail absent a showing of bad faith, or possibly in the absence of any reasonable ground upon which the enactment could have been predicated, then in the real world no legislative abridgment of speech will ever be violative of the first amendment, and for all practical purposes it becomes a dead letter.[20]

Are we, then, left with a dilemma? The absolutist interpretation of the first amendment whereby literally all speech is protected is both unrealistic and undesirable for reasons indicated above. But if anything less than all speech is to be protected, then some selection must be made between that speech which is protected and that which is not. If such selection is to turn on rational rather than arbitrary considerations, it is obvious that the selection process requires a balancing of competing

[18]341 U.S. 494, 525 (1951) (concurring opinion). It should be noted that a majority of the Court has never adopted this rather extreme position.

[19]L. HAND, THE BILL OF RIGHTS 61 (1962).

[20]There might be some residual significance in that such judicial restraint would not necesarily apply as to encroachments by the executive branch.

interests, and this returns us to the equally unacceptable alternative of ad hoc balancing.[21]

Or does it? The Supreme Court decision in *New York Times Company* v. *Sullivan*[22] indicates a third approach which avoids the all or nothing implications of absolutism versus ad hoc balancing. *Times* points the way to the employment of the balancing process on the definitional rather than the litigation or ad hoc level. That is, the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as "speech" within the meaning of the first amendment.[23] This at first blush may appear to be only a verbal distinction. Analysis suggests, however, that a good deal more is involved.[24]

In *Times* the Court for the first time ruled on the question of whether libel laws constitute an abridgment of speech in violation of the first amendment.[25] The New York Times had published an advertisement on behalf of the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.[26] The advertisement admittedly contained some false statements.[27] In a subsequent libel action brought by L. B. Sullivan,[28] a Montgomery city commissioner,

[21]Until recent years civil libertarians put much reliance in the so-called clear and present danger test, first suggested by Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919), and fully articulated by Mr. Justice Brandeis in a concurring opinion in Whitney v. California, 274 U.S. 357, 372 (1927). But, as became clear in Dennis v. United States, 341 U.S. 494 (1951), the test represents only a particular form of ad hoc balancing, and is subject to all of the infirmities described above.

[22]376 U.S. 255 (1964).

[23]*See* Mr. Justice Harlan's reference to "the 'real problem' of defining or delimiting the right" of free speech. Curtis Pub. Co. v. Butts, 388 U.S. 130, 149 (1967).

[24]For various pre-*Times* formulations of the doctrine of definitional balancing see C. BLACK, *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, in THE OCCASIONS OF JUSTICE 89 (1963); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 916-18 (1963); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[25]But in Beaubarnais v. Illinois, 343 U.S. 250 (1952), the Court upheld a so-called group libel law and in that case, as well as in a number of others, indicated in dicta that libel is outside the protection of the first amendment. *See* Konigsberg v. State Bar, 366 U.S. 36, 49 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961); Roth v. United States, 354 U.S. 476, 486-87 (1957); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931); Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

[26]N.Y. Times, March 29, 1960, at 25.

[27]376 U.S. at 258.

[28]The advertisement did not refer to the plaintiff Sullivan by name, but the jury concluded that the defamatory reference to "police" in fact referred to him since he was the Montgomery commissioner who supervised the police department. This raised an important additional issue in the Times case, though not one under scrutiny in this article. The Court held that "an otherwise

against the Times and certain other defendants, an Alabama jury had awarded one-half million dollars in damages.[29] In reversing the judgement and holding for the defendants, the Court in effect defined the kind of defamatory speech which is protected by the first amendment. The Court held that, at least where the defamatory speech is directed against a "public official," such speech is protected by the first amendment unless the speech is made "with knowledge that it was false or with reckless disregard of whether it was false or not."[30]

Before considering whether the particular balance struck by the Court was correct, it should be made clear that there *was* balancing in *Times*,[31] but that it was not ad hoc balancing. There was balancing in the sense that not all defamatory speech was held to be protected by the first amendment. The Court could not determine which segment of defamatory speech lies outside the umbrella of the first amendment purely on logical grounds, and no pretense of logical inexorability was made. By in effect holding that knowingly and recklessly false speech was not "speech" within the meaning of the first amendment, the Court must have implicitly (since no explicit explanation was offered) referred to certain competing policy considerations.[32] This is surely a kind of balancing, but it is just as surely not ad hoc balancing.

If the Court had followed the ad hoc approach, it would have inquired whether "under the particular circumstances presented"[33] the interest of the defendants in publishing their particular advertisement outweighed the interest of the plaintiff in the protection of his reputation. This in turn would have led to such imponderable issues as: How important was it to the defendants (or possibly to the public at large) that this particular advertisement be published? How "serious" was the injury to the plaintiff's reputation caused by the advertisement? Apart from the difficulty of weighing these imponderables in the particular case, such an approach carries with it some of the previously discussed

impersonal attack on governmental operations" could not constitutionally be regarded as a libel on an official responsible for those operations since this would in effect amount to a constitutionally forbidden action for seditious libel. 376 U.S. at 292.

[29]The jury did not differentiate between general and punitive damages. No special damages were awarded. *Id.* at 279-80.

[30]*Id.* at 279. The Court speaks of this formulation as (for these purposes) a definition of "actual malice." Hatred or ill will does not constitute malice as here used. *See* Garrison v. Louisiana, 379 U.S. 64, 73-74 (1964).

[31]The opinion in *Times* does not acknowledge that the rule there articulated is based upon balancing. But note that Chief Justice Warren, concurring in Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967), refers to "the New York Times standard" as one which "balances to a proper degree the legitimate interests traditionally protected by the law of defamation."

[32]What these may have been is explored in section 11 *infra*.

[33]American Communications Ass'n. v. Douds, 339 U.S. 382, 399 (1950).

difficulties inherent in the ad hoc approach. If *Times* had been decided on the ground that in the circumstances presented the importance of the publication of the particular advertisement outweighed the seriousness of the particular resulting injury to the plaintiff's reputation, what would that tell potential future advertisers and public officials as to their respective rights in connection with future advertisements? Not only would it tell them nothing; it might well serve as a serious deterrent to anyone who intends to criticize public officials, since it can hardly be predicted which way the scales will fall in the particular circumstances of a new case. The absence of a rule to which judges can turn could also result in decisions unduly influenced by prevailing public emotions. Suppose in the next case defamatory statements are made about a public official by reason of his conduct in connection with the Vietnam war. If the only referent available to the judges is the weight of the competing interests in speech and reputation, can anyone doubt that the speech is likely to have rough sledding, or at the very least, that a decision finding that speech outweighs reputation will require unusual judicial courage?

It has been argued that any objections which may be stated against ad hoc balancing are equally applicable to definitional balancing, since the same competing interests which are considered in the former will have to be considered in the latter.[34] I would disagree with this for several reasons. First, it is not necessarily true that the same considerations are weighed in both definitional and ad hoc balancing. In the latter it is the interests presented in the particular circumstances of the case before the court which are weighed. For example, in a defamation case the court would weigh not the interest in speech generally but rather the interest (and hence the importance) of the particular speech which is the subject of the litigation. On the other side it would weigh not the interest in reputation generally, but the extent of the particular injury to reputation in the case before it. It may be argued that this would permit a more precise weighing of issues in ad hoc balancing than is possible at the definitional stage, and that, therefore, justice would more likely be done by ad hoc balancing. I shall deal with that argument presently. For the moment I would simply make the point that the weighing of interests is not precisely the same regardless of whether it is done by definitional or ad hoc balancing.

A more profound difference between the ad hoc and definitional lies in the fact that a rule emerges from definitional balancing which can be employed in future cases without the occasion for further weighing of

[34]*See* A. BICKEL, THE LEAST DANGEROUS BRANCH 96 (1962); *cf.* C. BLACK, *supra* note 24, at 94-97.

interests. Moreover, such a rule should continue to be applicable notwithstanding the subsequent enactment of new legislation which in some different manner attempts to protect an interest inimical to speech. It is the first amendment which is being defined, not any particular legislation. Thus the *Times* rule which immunizes reputation—injuring speech other than that which is knowingly or recklessly false would presumably be equally applicable to new legislation which seeks to protect official reputations through novel means. The very existence of the rule makes it more likely that the balance originally struck will continue to be observed despite new and perhaps otherwise irresistible pressures. This in turn offers some measure of certainty, and minimizes speech deterrence.

Two concessions must be made, but neither constitutes a refutation of the thesis here offered. First, I would concede that neither definitional balancing nor any other technique can offer absolute assurance that a given court under sufficient internal or external pressure in some "hard" case will not depart from a definitional rule. Nevertheless, definitional balancing can insulate a judge from legally irrelevant pressures to a considerable degree if the judge wishes such insulation. How much easier it would be for a conscientious judge in a Southern community to explain to the members of the Lions Club that he found as he did because that was "the rule," rather than because upon a weighing of the interests involved he found weightier the side that public opinion opposed.

Second, I would make the concession that, *in vacuo*, ad hoc balancing is more likely to consider fine nuances and therefore produce a more just result. Like every line, the line drawn in definitional balancing has two edges, and speech which might be protected if the particular interests involved in a particular case were subject to the precision of the ad hoc scalpel might well lose protection by the cutting of the blunter definitional knife. But this likelihood may be offset by the fact that in ad hoc balancing weight is likely to be given only to the particular speech involved and not to "speech" generally, so that the speech side of the balance may be underweighed when compared with the immediate impact of a particular injury to a particular reputation. Equally, the ad hoc balance may be distorted by a failure to recognize the interest in reputations generally and not only in that immediately before the court. Furthermore, such a likelihood would be present only in an ideal world where ad hoc balancing would not be subject to distortion from public and legislative pressures. We deal here only with speech cases; they in particular are not a part of such an ideal world. And even if the ideal could be achieved, the lack of a predictable line would still result in speech deterrence.

The point here is perhaps best illustrated in a nonspeech context but where pressures analogous to those found in speech cases might exist. Consider the unhappy history of the mythical state of Autophobia. The inhabitants of that state regarded the hazards of modern automotive travel as far more dangerous than any threat that might be posed by domestic or foreign communism. In some quarters hysteria ran rampant so that any driver of an automobile was suspect as probably a reckless driver, and even automobile passengers were regarded as fellow travellers. The more stable citizens, while recognizing the danger of reckless driving, also acknowledged the "competing interest" in expeditious transportation. When it came time for the state legislature to enact a speed law the more fearful members of the legislature argued that it would be dangerous to specify any specific maximum speed since this would constitute a green light for insidious drivers to proceed recklessly at just under the specified maximum. Their argument carried the day, and a law was enacted outlawing "excessive speeding," leaving it to the courts to determine in each case whether the driver's speed was in fact excessive.

The courts were thus required to engage in ad hoc balancing, weighing in each case the interest in safe driving against the interest in expeditious travel. This meant that drivers who wished to be sure of avoiding a brush with the law were deterred from driving at speeds which anyone might arguably contend were excessive. The absence of a rule as to what constituted excessive speed resulted in a traffic flow far slower than the interests of safety required. Still the law might have been found acceptable but for the further fact that whenever the courts were called upon to decide a case in which the defendant was charged with violating the speed law, they invariably found the defendant guilty. The popular hysteria against speeding made it very difficult for a judge in any given case to find that the defendant's interest in expeditious travel outweighed the community's interest in safe driving. The dissatisfaction of the more enlightened citizenry finally resulted in the enactment of a new speed law which specified given maximum rates in various areas with an overall maximum of 65 miles per hour. This maximum rate was determined by a kind of balancing of the interest in safety against the interest in expeditious travel, but the balancing occurred not on the ad hoc litigational level, but rather on the definitional level. The law now defined excessive speed and the courts were no longer called upon to weigh competing interests as presented by the facts in a given case. This was not without its disadvantages since, at least in theory, it meant that a particular driver who was preceeding at 67 miles per hour would be precluded from proving that in the given circumstances his speed was not

excessive. But it was soon found that this lost privilege was more than compensated for by the fact that drivers who previously would have been deterred from safely driving at 55 miles per hour now were able to do so without fear of prosecution. It further meant that in speed case trials the courts were immunized from the pressures of the more hysterical or dogmatic segments of the community, since the rule to be applied required no further balancing, and hence no exercise of discretion which might be regarded as an undue coddling of subversive speeders.

The argument that ad hoc balancing is preferable to definitional balancing because the former permits a more sensitive appreciation of the equities in each particular case may be more easily made in non-speech areas where public passions do not generally ride as high. But even this may prove too much. It may be that if there were no legal rules but only beneficent judges, justice would be done more often. But if the ideal of a system of laws rather than men is not wholly attainable, that does not mean we should be ready to trade it for a system of men rather than laws.

One further objection might be advanced against definitional balancing of the first amendment. There is obviously nothing improper about a legislature engaging in definitional balancing in writing a law, as in the Autophobia example. But for a court to do this in applying the first amendment may be criticized as a form of judicial lawmaking, and as such a usurpation of the legislative function. The short answer to this argument lies in Marshall's overquoted but nevertheless pregnant maxim: ". . . we must never forget that it is a *constitution* we are expounding."[35] Students of the Constitution, activists and passivists alike, agree that not all speech can be regarded as "speech" protected by the first amendement. It follows, then, that if the first amendment is not to be regarded as incapable of application, someone must differentiate between that speech which is to be given constitutional protection and that which is not. And who may that "someone" be? Notwithstanding the recent erosion of the "political question" doctrine,[36] it remains true that some questions of constitutional interpretation and application remain in the exclusive domain of the legislative and executive branches. But where the question itself is a limitation on congressional power, as in the case of the first amendment, to conclude that such a question is for Congress and not for the Court to determine is to convert freedom of speech, "the matrix, the indispensable condition, of nearly every other

[35] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
[36] *See* Baker v. Carr, 369 U.S. 186 (1962), and its progeny.

form of freedom"[37] into a legally meaningless exhortation. Chief Justice Marshall made the point in his most famous opinion:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.[38]

Who, then, *but* the Court can undertake the task of giving reasonable meaning to the first amendment prohibition against congressional abridgment of "the freedom of speech"? If the Court is bound to enforce the first amendment and if such enforcement is possible in a reasonable manner only if protected speech is differentiated from unprotected speech, then it is not only proper but necessary for the Court to formulate a rule which accomplishes such differentiation. Moreover, ad hoc balancing by the Court (at least if there is not an uncritical deference to the legislative judgment) involves no less judicial legislation than does definitional balancing. It is true that the first amendment does not explicitly provide that defamatory statements are not to be protected if knowingly false or recklessly made. But neither does the first amendment by its terms exclude from protection that speech which upon balancing is found to weigh less than the demands of competing interests.

II

APPLICATION OF THE THEORY TO LIBEL

Even if definitional balancing is an approach which commends itself, it carries no assurance that the balance reached in connection with any particular aspect of speech will be properly drawn.[39] This brings into focus the precise balance drawn by the Court in *Times*. The Court might have gone along with the Black and Douglas concurrence, holding that all defamatory statements are protected by the first amendment. This is the absolutist position, and while I have argued above that no one can or should take the position that all speech under all circumstances is

[37] Palko v. Connecticut, 302 U.S. 319, 327 (1937).

[38] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

[39] The Court's decision in Roth v. United States, 354 U.S. 476 (1957), was in effect an exercise in definitional balancing. One may agree with the method and still believe that the Court was wrong in drawing that definitional line in such manner as to completely exclude the "obscene" from first amendment protection. *See* Nimmer, *The Constitutionality of Official Censorship of Motion Pictures*, 25 U. CHI. L. REV. 625, 652-55 (1958).

immunized, it is certainly tenable to take the absolutist position with respect to abridgments based on the defamatory content of speech. At the other extreme, the Court might have taken the position, suggested in the dicta of earlier cases,[40] that defamation is entirely outside the protection of the first amendment. Instead the Court held that all defamatory speech directed at public officials is within the orbit of first amendment protection except that speech which is knowingly false or which is made with reckless disregard of its truth or falsity. Why did the Court strike this particular balance? Since the *Times* decision was not explicitly based upon a balancing of interests, the Court's opinion is not very helpful in articulating the precise basis for the balance reached. But from portions of the opinion in *Times*, as well as the opinions in later cases applying the doctrine,[41] enough can be gleaned to permit an extrapolation of the Court's rationale. Such a rationale does, I submit, justify the definitional balance adopted by the Court.

In weighing the competing interests of speech and reputation, it is well to recall first some of the reasons why freedom of speech is important. Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*[42] suggested three separate reasons: First, free speech is a necessary concomitant of a democratic society. We cannot intelligently make the decisions required of a self-governing people unless we are permitted to hear all possible views bearing upon such decisions.[43] Second, quite apart from its utility in the democratic process, freedom of expression is an end in itself. Self-expression is a part of self-fulfillment, or as Justice Brandeis suggested, liberty is "the secret of happiness."[44] Third, freedom of speech is a necessary safety valve. Those who are not permitted to express themselves in words are more likely to seek expression in violent deeds.[45] There may be other justifications for freedom of expression, but these are sufficient for our purposes.

Competing with these speech values is society's interest in protecting reputations from injury by false statements. Though it is intangible, this injury can be no less real than the injury from physical attack. The evil of defamation is self-evident, and tort protection here requires no greater theoretical justification than does tort protection against assault and battery, and other attacks upon the person.[46]

[40] *See* cases cited note 25 *supra*.

[41] Garrison v. Louisiana, 379 U.S. 64 (1964); Rosenblatt v. Baer, 383 U.S. 75 (1966); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).

[42] 274 U.S. 357, 372-80 (1927).

[43] *See id.* at 375-76.

[44] *See id.* at 375.

[45] *See id.*

[46] "The right of a man to the protection of his own reputation from unjustified invasion and

With these two competing interests in view, the threshold question must be whether the speech values justify the Court in sweeping away most of the law of defamation where the statement is made against a public figure. The injury to reputation which results from defamation is no less by reason of the speaker's belief in the truth of the false statements uttered. Yet, *Times* holds that defamatory statements are protected speech notwithstanding the resulting injury. I submit that the Court was correct in according greater weight to the interest in protecting good faith but erroneous speech than it did to the interest in protecting reputations.

The particular balancing can be defended on several grounds: First, the content of the public dialogue on issues vital to the democratic process should not be limited by what a jury decides is true. Ordinarily we are content to rely upon a jury's findings of fact for the purpose of determining rights as between immediate litigants. But when the "fact" to be determined relates to the truth or falsity of speech, it is not only the immediate litigants that are concerned. All of society has an interest in hearing and evaluating the speech. What twelve men believe to be false, millions of others may believe to be true, and they should not be precluded by the twelve from making their own independent evaluation of truth. Second, speech which society may vitally need to hear may be deterred by the fear that a jury will find it to be false even though in fact the fear may be ungrounded and the jury, if given the opportunity, would find it to be true. Third, assuming that the statement is objectively false, if the speaker in good faith believes it to be true, then at least two of the three speech values suggested above nevertheless remain applicable. These are the interest in self-expression and the safety valve factor. Fourth, the cure for good faith reputation injury, like the cure for other evils arising from erroneous speech, should be found not in repressing the speech, but in answering it. As Mr. Justice Brandeis concluded in *Whitney*: "[T]he remedy to be applied is more speech, not enforced silence."[47] It is true that the refutation of infamy at times may not have the same impact as the charge of infamy, but isn't that merely a special application of the general risk we are willing to assume when we put our faith in the free and unfettered exchange of ideas? Is it less true here than elsewhere that "the best test of truth is the power of the thought to get itself accepted in the competition of the market?"[48] This is

wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." Mr. Justice Stewart, concurring in Rosenblatt v. Baer, 383 U.S. 75, 92 (1966).

[47]Whitney v. California, 274 U.S. 357, 377 (1927) (concurring opinion).

[48]Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion of Holmes, J.).

not to say that a real injury to reputation may not occur, but only that the evil, serious as it may be, is less than the injury to society generally from the suppression of good faith speech.

But if this reasoning is acceptable, it may be argued that no defamatory utterance should be held outside the protection of the first amendment. The Court in *Times* did not go this far. It found the balance of interests to weigh in favor of reputation and against speech when the speech is knowingly false, or made with reckless disregard of truth. Can this further balancing in the opposite direction also be defended? I believe that it can. In striking this new balance consider first the evil of injury to reputation. That evil at least remains constant; it is no less serious when balanced against speech which is held to be knowingly false than it is when balanced against speech held to have been made in good faith. But does the other side of the balance, the interest in free speech, continue to have a greater weight? It seems clear that the speech values suggested above are inapplicable to speech which the speaker knows to be false. A knowing lie hardly contributes to the democratic dialogue.[49] Quite the contrary, it distorts the collective search for truth. It is also hard to regard it as a necessary function of self-fulfillment. When I express ideas which I do not believe to be true, I am not in any real sense expressing my *self*, and abridgment of such expression is not an abridgment of self-fulfillment. Finally, the safety valve which is necessary for honestly believed, even though erroneous doctrine, is hardly necessary for that which is not truly believed. Men are not likely to resort to violence because they cannot express that which they do not believe.

But this does not answer the crucial objection made by the dissenters to the Court's exclusion of first amendment protection for the knowing and recklessly false. Their fear is that even if one speaks with a good faith belief in the truth of his speech, a jury may find that the statement was made with knowledge of its falsity or with reckless disregard of its truth or falsity, and more importantly, that many persons will be deterred from expressing themselves in good faith from the fear that a jury *might* make such a finding.

These are cogent objections which certainly bear weight, but, I would suggest, considerably lesser weight than the same concerns in connection with our original ad hoc balancing of speech against reputation. It is certainly possible that a jury will incorrectly find that a

[49]"For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." Garrison v. Louisiana, 379 U.S. 64, 75 (1964). *But see* New York Times Co. v. Sullivan,

statement was made without belief in its truth, or in reckless disregard of truth when in fact the speaker acted in a good faith belief. But the issue before the jury will not be the broad question of the truth or falsity of the defamatory statement, but rather the narrow question of the speaker's good faith. A jury will probably not go wrong on this narrow question of fact in view of the Court's statement in *Times* that the Constitution demands a standard of "convincing clarity"[50] in the proof of knowing or reckless falsity. Moreover, the burden of proof on this narrow issue makes it increasingly likely that an appellate court will reverse jury determinations against the speaker when the standard of convincing clarity has not been met. Such appellate reversal will be far easier to obtain than if the only question were whether there was evidence by which the jury might have reasonably concluded that the statement itself was false. Finally, the deterrent effect of the risk that a jury might find that the speaker acted without an honest belief in what he said is probably not great. Remember that the issue is not whether the speaker had a reasonable belief, but only whether he had an honest, good faith belief. It seems likely that most people who do in good faith believe what they say would be willing to risk the possibility of an adverse court determination on the narrow issue of their good faith even if they would not be willing to risk a legal determination of the truth of their statement. Confirmation of this may be found in other related fields. In copyright, for example, it is my experience that one who believes that another has infringed his copyright does not hesitate to openly accuse the other of infringement even though there is some risk of liability for slander of title or disparagement if the court finds both that there was no infringement *and* that the accusation of infringement was made in bad faith.[51]

The foregoing considerations suggest that the injury to the interest in freedom of speech is measurably reduced when there is abridgment only of defamatory speech which is knowingly false or recklessly made rather than abridgment of all defamatory speech.

For me the conclusive demonstration that in this more limited context the interest in reputation outweighs the interest in speech is the weakness of the alternative. It is true that some impairment of speech values remains even if we abridge only knowingly false or reckless

376 U.S. 254, 279 n.19 (1964), where the Court quotes John Stuart Mill: "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error,'" J. MILL, ON LIBERTY 15 (Oxford ed. 1947).

[50]376 U.S. at 285-86.

[51]*See* M. NIMMER, COPYRIGHT § 110.6 (1968).

defamation. But consider the consequences of adopting the Black-Douglas view[52] that all defamation is protected under the first amendment. Under such a rule it is obvious that the interest in reputation would suffer greatly, if not be completely obliterated. But would we at least have a concomitant increase in the protection of speech values? Is it not clear that the contrary would be the case? Not only would the interest in reputation suffer, but the interest in speech itself would also suffer grave impairment. Remember that one of the chief reasons we value free speech is because of its central position in maintaining a democratic dialogue so necessary to an enlightened electorate.[53] Under a rule which immunized *all* defamation, reputation assassins could make with impunity and with utter disregard of the consequences completely irresponsible and monstrous accusations against anyone unfortunate enough to cross their path. Apart from the havoc this would wreak to reputations, what would it do to the democratic dialogue, one of the prime reasons for maintaining free speech? If there were no limits as to what might be said against a candidate for office, if accusations no matter how reckless and unfounded could be made with impunity, could we hope to preserve any rationality in our electoral processes? We might still hope that speech would answer speech; but if the basic values of free speech are inapplicable at this point, as indicated above, was not the Court wise to draw the line to save us from a blood bath of character assassination?

A final aspect of the Court's balancing in *Times* that must be considered is the limitation of first amendment immunity to defamatory statements concerning "public officials." Recently, in *Curtis Publishing Company v. Butts*,[54] the Court has gone further and extended such immunity to statements concerning "public figures" regardless of whether such persons are governmental officals.[55] Although admittedly something of a departure from the rationale relied upon the Court in *Times*,[56] the *Curtis* extension to persons who are public figures but not public of-

[52]*See* New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring opinion).

[53]For general discussion of the purpose of the first amendment see A. MEIKELJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-86 (1963); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REV. 191 (1964).

[54]388 U.S. 130 (1967). This opinion combined the decisions in *Curtis* and in *Associated Press v. Walker*.

[55]Four members of the Court (Justices Harlan, Clark, Stewart, and Fortas) would have applied a different rule as to a public figure who is not a public official, under which such persons could recover in a libel action only upon a showing that the defendant had engaged in "highly unreasonable conduct constituting an extreme departure from the standards of investigation and

ficials is certainly consonant with the fundamental objectives of the first amendment. Those objectives require full and free discussion of public issues. Since discussion of public issues cannot be meaningful without reference to the men involved on both sides of such issues, and since such men will not necessarily be public officials,[57] one cannot but agree that the Court was right in *Curtis* to extend the *Times* rule to all public figures. Here again the Court has engaged in implicit balancing.

It may be argued that the Court did not go far enough in that apparently it would not invoke the first amendment to immunize defamatory statements concerning nonpublic figures in the context of a discussion of issues of legitimate public interest.[58] If the touchstone of first amendment rights is the promotion of uninhibited discussion of public issues, then shouldn't such discussion be protected even if the persons involved are in no sense public figures?[59] I would suggest that the Court was correct in implying that at this point the reputation interest

reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Chief Justice Warren in a concurring opinion applied the *Times* standard without modification to public figures who are not public officials, expressing doubt that the standard suggested by Justice Harlan, "based on such an unusual and uncertain formulation could either guide a jury of laymen or afford protection for speech and debate . . . ." *Id.* at 163. Justices Brennan and White joined in this portion of the Warren opinion, and Justices Black and Douglas concurred in the "grounds and reason stated" in this portion of the Chief's opinion, but only "in order for the Court to be able at this time to agree on [an opinion]. . . ." Id. at 170. This appears to mean that five of the Justices would, insofar as they would apply the *Times* standard at all, apply it without distinction between public officials and public figures who are not public officials.

[56]The *Times* opinion rested at least in part upon an analogy to the doctrine in Barr v. Matteo, 360 U.S. 564, 575 (1959), where statements of a federal official were found to be absolutely priviledged if made "within the outer perimeter of his duties." *See* New York Times Co. v. Sullivan, 376 U.S. at 282 (1964). This rationale was also used in Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966).

[57]*See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967) (concurring opinion of Warren, C.J.): ". . . many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."

[58]As to the converse situation, i.e., a defamatory statement directed against the private conduct of a public official, Mr. Justice Douglas would apparently part company from Mr. Justice Black, and hold the first amendment does not prohibit liability in a libel action in such circumstances. *See* the concurring opinion of Mr. Justice Goldberg joined by Mr. Justice Douglas in *Times*, 376 U.S. at 301. The *Times* decision has been so understood by lower courts. *See, e.g.*, People v. Mager, 25 App. Div. 2d 363, 269 N.Y.S.2d 848 (1966). It is possible that the Supreme Court might not go this far in limiting first amendment protection since it was deemed appropriate in Garrison v. Louisiana, 379 U.S. 64, 72 n.8 (1964) to state that as to "purely private libels" involving presumably both private issues and nonpublic figures, "nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees . . . ." *But see* authority cited note 56 *infra*.

[59]"Yet if free discussion of public issues is the guide, I see no way to draw lines that exclude . . . anyone on the public payroll. . . . And [how about] industrialists who raise the price of a basic commodity? . . . And the labor leader who combines trade unionism with bribery and racketering? . . . The question is whether a public *issue*, not a public official is involved." Rosenblatt v. Baer, 383 U.S. 89, 91 (1966) (concurring opinion of Douglas, J.).

outweighs the speech interest. To take a rigidly libertarian position and fault the Court for not extending defamation immunity to all discussion of public issues would be to overlook a fundamental ingredient of first amendment theory. The Brandeis prescription for meeting error with "more speech," and Justice Holmes "best test of truth" are grounded upon the presupposition of a free market place of ideas. If and to the extent speech cannot be answered with speech, the theory breaks down. Because " ' public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities"[60] the Court was justified in extending first amendment immunity to all public figures. But persons who have not achieved the celebrity of a public figure may not have access to the mass media to answer defamatory statements made against them. For this reason the speech interest at this point bears a lesser weight and may properly be subordinated to the reputation interest.[61]

It is important, however, not to use this reasoning to prove too much. Some would argue that in the present semimonopolistic posture of the news and information media, the presupposition of a free market place of ideas has become totally obsolete. One can agree that only if the monopolistic controls presently extant in newspapers and broadcasting are countered by devices for insuring the dissemination of minority views will the full values which underlie the first amendment be realized,[62] but this does not justify the withdrawal of first amendment immunity from public discussion because such devices are absent. Nevertheless, where the absence of the ability to mount an effective reply coincides with a strong antispeech interest, such as the interest in reputation, the resulting balance of interests may properly be weighed against the right to speak. It is to be hoped that the *Curtis* extension of *Times* will not be followed by a further extension of first amendment immunity to defamatory statements concerning "private" persons involved in public issues.

[60]Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967) (concurring opinion of Warren, C.J.).

[61]In Rosenblatt v. Baer, 383 U.S. 75, 86 n.13 (1966), the Court denied that the *Times* rule would be applicable to a night watchman accused of stealing state secrets since this "would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." Can this statement be reconciled with the immediately preceding footnote where the Court stated: "We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern?" *Id.* at 86 n.12. Did the hypothetical night watchman "thrust himself into the vortex" by being present at a time when state secrets were stolen?

[62]*See* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

III

MISAPPLICATION OF THE THEORY TO PRIVACY

In *Time, Incorporated v. Hill*[63] the Supreme Court for the first time explored the conflicting demands of the first amendment and the right of privacy. James Hill and his family had been held captive in their own home by escaped convicts. Subsequently one Joseph Hayes wrote a novel based upon such a situation. He later adapted the novel to play and motion picture form. Neither the novel, the play, nor the motion picture identified the Hill family as the participants in the harrowing incident. Dependant Time's *Life* magazine did, however, identify the Hill family as the real life counterparts of the Hayes characters. Hill sued for invasion of his right of privacy under New York statute.[64] He alleged *inter alia* that some of the facts contained in the Hayes play were untrue. The jury awarded Hill $50,000 compensatory and $25,000 punitive damages.[65] The appellate division of the New York supreme court sustained the jury verdict of liability but ordered a new trial as to damages.[66] In the second trial Hill was awarded $30,000 compensatory damages without punitive damages. The New York Court of Appeals affirmed,[67] and the U. S. Supreme Court noted probable jurisdiction[68] "to consider the important constitutional questions of freedom of speech and press involved."[69] The Supreme Court ultimately reversed and remanded on the ground that the jury instructions were erroneous in that they did not require that liability be predicated on a finding that the statements at issue were made with knowledge of their falsity or in reckless disregard of the truth.[70] Thus to resolve the first confrontation between privacy and free speech the Court chose to apply what is essentially[71] the *New York Times* doctrine to invasions of privacy.[72]

Was the Court right in drawing the definitional balance line for privacy in approximately the same place that it drew the line for

[63]385 U.S. 374 (1967).

[64]N.Y. CIV. RIGHTS §§ 50-51 (McKinney 1948).

[65]385 U.S. at 379.

[66]Hill v. Hayes, 18 App. Div. 2d 485, 240 N.Y.S.2d 286 (1963).

[67]Hill v. Hayes, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965).

[68]Time, Inc. v. Hill, 382 U.S. 936 (1965).

[69]385 U.S. at 380.

[70]*Id.* at 395-96.

[71]But first amendment immunity for privacy-invading statements under *Time* is more extensive than such immunity for defamatory statements under *Times* since the former applies regardless of whether the subject of such statements is a public figure. See note 50 *supra* and accompanying text.

[72]The Court in *Time* carefully explained that it there applied "the standard of knowing or reckless falsehood not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the

defamation? I think the Court was in error, and that the error derives from the superficial similarity between defamation and the particular form of privacy invasion presented by the *Time* case.

It is necessary to recall first Dean Prosser's recent but already classic categorization of the four types of privacy cases. He lists these as:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrasing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[73]

We may put to one side those forms of privacy invasion which Dean Prosser labels as "intrusion" and "appropriation." Intrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression. It occurs by virtue of the physical or mechanical observation of the private affairs of another,[74] and not by the publication[75] of such observations. The appropriation form of privacy invasion probably also does not raise first amendment problems, although here speech and other expression is involved. This right, sometimes called the right of publicity,[76] involves the commercial appropriation of values which, whether or not labeled as "property,"[77]

particular context of the application of the New York statute in cases involving private individuals . . . . [A]lthough the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context." 385 U.S. at 390-91.

[73]Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Essentially the same categorization is to be found in W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 832-44 (3d ed. 1964), and in RESTATEMENT (SECOND) OF TORTS § 652A (Tent. Draft No. 13, 1967), for which Dean Prosser was the Reporter. The considerable number of cases which have adopted the Prosser categorization are collected in Bloustein, *Privacy as An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 964 n.10 (1964), and in Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1095 n.13 (1962).

This is not the place to explore the substantive differences between the right of privacy as developed at common law and under the New York statute. Such differences, however, are not as great as is sometimes assumed. *See* Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 234, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded*, 387 U.S. 239 (1967). For the purpose of delineating the line between the interest in privacy and that in free speech it is not necessary to dwell upon such substantive differences as exist.

[74]*See* RESTATEMENT (SECOND) OF TORTS, § 652B, comment *b* at 103 (Tent. Draft No. 13, 1967).

[75]*Id.* comment *a*.

[76]*See* Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954). The Restatement refers to this form of invasion of privacy as a right of publicity when claimed by a third party assignee of the person depicted. *See* RESTATEMENT (SECOND) OF TORTS 652C, comment *a* at 108 (Tent. Draft No. 13, 1967).

[77]*See* Nimmer, *supra* note 69, at 216; RESTATEMENT (SECOND) OF TORTS, § 652C, comment *a* at 108 (Tent. Draft No. 13, 1967).

may not be freely plundered under the banner of the first amendment.[78] The difficult first amendment questions in the privacy area are found only when a publication comes under either the "public disclosure of embarrassing private facts" or "false light" labels.

The Court in *Time* emphasized that it was dealing only with a false light type case, and that it was not deciding the question of constitutional sanction for truthful publication of matters " 'so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.' "[79] But the first amendment implications of the false light privacy cases cannot be understood standing alone. There must first be an understanding of the proper weight to be accorded the right of free speech as applied to the type of privacy case with which the Court said it was not dealing, that which involves questions of the public disclosure of embarrassing private facts. It is necessary to understand the manner in which the interest to be protected in such cases differs from the interest to be protected by the defamation torts.

The crucial distinction between privacy and defamation when private facts are disclosed relates to the markedly different interests that are to be protected by the right of privacy on the one hand, and defamation on the other. No defamation action would lie by reason of the publication of embarrassing private facts in view of the defense of truth. Defamation protects a man's interest in his reputation. Reputation is by definition a matter of public knowledge. Injury in a defamation action arises not by the act of bringing an alleged fact to public knowledge, but by the effect on a person's reputation which results from the disclosure of such fact. The right of privacy protects not reputation, but the interest in maintaining the privacy of certain facts. Public disclosure of such facts can create injury regardless of whether such disclosure affects the subject's reputation. The injury is to man's interest in maintaining a haven from society's searching eye.[80] Professor

[78]*See* Valentine v. Chrestensen, 316 U.S. 52 (1942), and the Court's statements distinguishing *Valentine* in New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) and in Time, Inc. v. Hill, 385 U.S. 374, 405 (1967). *See also* RESTATEMENT (SECOND) OF TORTS, § 652F, comments *a* and *k* at 127, 134 (Tent. Draft No. 13, 1967).

[79]385 U.S. at 383 n.7 *quoting* Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940).

[80]This concept has been a recurring one. Judge Cooley spoke of the right "to be left alone," T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888). Consider, however, the explication of the Cooley phrase in Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROB. 272, 279 (1966). Warren and Brandeis in their seminal article found that a necessary concomitant of the interest in an "inviolate personality" was the right of an individual to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890). Some years later Mr. Justice Brandeis in his dissent to Olmstead v. United States, 277 U.S. 438, 478 (1928) returned to the same

Bloustein in a thoughtful article has stated the distinction well: "The gravamen of a defamation action is engendering a false opinion about a person, whether in the mind of one other person or many people. The gravamen in the public disclosure [privacy] cases is degrading a person by laying his life open to public view."[81]

Granting this distinction, how does it bear upon whether the first amendment definitional balance applied in defamation actions should be found applicable in privacy actions?[82] Prima facie it might be argued that greater first amendment protection should be afforded to privacy-invading publications than to defamatory publications, since the right of privacy (at least when dealing with the public disclosure of private facts) deals with matters admittedly true while defamation involves matters found to be false. Truth, it may be argued, deserves greater freedom than falsity. But this overly facile approach will not bear analysis. For the reasons set forth below, I would suggest that the privacy definitional balance should give a lesser scope to the first amendment privilege than is recognized under the *Times* definitional balance for defamation.

theme: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." A variation of the theme recently reached fruition in Griswold v. Connecticut, 381 U.S. 479 (1965), although in the context of a constitutional shield essentially unrelated to the tort action sword here under scrutiny.

[81] Bloustein, *supra* note 67, at 981. *See also* Warren and Brandeis, *supra* note 73, at 197: "The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published . . . must, in order to be actionable, have a direct tendency to injure him in his intercourse with others . . . the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action."

A number of cases have recognized the distinction between the interests to be protected by the right of privacy and the tort of defamation. *See, e.g.*, Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 57, 27 N.E.2d 753, 755 (1940): "The fundamental difference between a right of privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation . . . ." *Accord*, Reed v. Real Detective Pub. Co., 63 Ariz. 294, 306, 162 P.2d 133, 139 (1945); Kelly v. Johnson Pub. Co., 160 Cal. App. 2d 718, 721, 325 P.2d 659, 661 (1958); Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 86, 291 P.2d 194, 197 (1955); Continental Optical Co. v. Reed, 119 Ind. App. 643, 647-48, 86 N.E.2d 306, 308 (1949); Brink v. Griffith, 65 Wash. 2d 253, 255, 396 P.2d 793, 796 (1964).

[82] For reasons previously stated, see text following note 15 *supra*, it is desirable that some form of definitional balance be applied in privacy actions rather than the ad hoc balancing approach suggested in some privacy cases, *e.g.*, Barber v. Time, Inc., 348 Mo. 1199, 1206-07, 159 S.W.2d 291, 295 (1942): "Thus, establishing conditions of liability for invasion of the right of privacy is a matter of harmonizing individual rights with community and social interest. . . . It is for the court to say first whether the occasion or incident is one of proper public interest."

Indeed, with some diffidence, and subject to qualifications set forth below, I would go so far as to deny completely the application of the first amendment privilege to the public disclosure of embarrassing private facts.

I make two important qualifications to the foregoing thesis. First, I intend to deal here only with the public disclosure of embarrassing *private* facts, that is, with facts which but for the defendant's disclosure would not have been known to members of the public. Some privacy cases go beyond this limitation in that the defendant incurs liability by disclosing to a larger segment of the public that which was already known to some smaller public segment.[83] For our present purposes it is irrelevant whether as a matter of tort law this is or is not a desirable extension of the tort right of privacy. The point here is that the suggested exclusion of the first amendment from privacy cases goes only to those cases in which truly private matters are revealed. If a particular speech does not deal with private matters, then however one might characterize the interest which competes with the right of free speech, it seems obvious that it is not an interest in privacy.[84]

The second important qualification I make is that the public disclosure of an *embarrassing* private fact should be without first amendment protection only if the disclosure is embarrassing but not defamatory. If a disclosure adversely affects the subject's reputation, then the policy reasons which support the right of speech when reputations are attacked[85] outweigh the privacy considerations.

Notwithstanding these qualifications, there remains a significant privacy area having to do with truly private facts,[86] the disclosure of which, although noninjurious to the subject's reputation, is nevertheless

[83] *E.g.*, Strickler v. National Broadcasting Co., 167 F. Supp. 68 (S.D. Cal. 1958); Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964); Cason v. Baskin, 159 Fla. 31, 30 So. 2d 635 (1947); Gautier v. Pro-Football, Inc., 304 N.Y. 354, 360, 107 N.E.2d 485, 489 (1952): "So, one attending a public event such as a professional football game . . . . may be [televised] as part of the general audience, but may not be picked out of a crowd alone, thrust upon the screen and unduly featured for public view." But Prosser states that a privacy action will not lie unless the facts disclosed to the public are private, not theretofore publicly known nor matters of public record. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 836 (3d ed. 1964). *See also* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 333 (1966).

[84] One may speak of a protectible interest in personality, or in human dignity, or in individuality, but though such phrases may have some utility in shaping tort law, they are not capable of constituting well-defined interests which can usefully counter the interest in free speech in striking a definitional balance.

[85] See Section II *supra* and text accompanying notes 90-92 *infra*.

[86] "Private facts" are not necessarily facts known only to the subject himself. They are facts which, though known to the immediate participants, are unknown to any substantial number of casual observers, *i.e.*, to the "public."

highly embarrassing or otherwise offensive to the subject.[87] The thesis here suggested is that there are greater speech values in a reputation-injuring statement than in a nondefamatory (or "pure") privacy-invading statement; consequently the definitional balance should more severely restrict speech in the case of the pure privacy-invading statement than in the case of defamation.

Where the injury is to reputation, the important consideration is the underlying rationale that the cure for injury due to speech should not be abridgment of that speech but rather "more speech."[88] Reputations which can be injured by false statements can be rehabilitated by further speech which establishes the truth.[89] But this rationale does not apply to invasions of privacy; when publication invades privacy the injury arises from the mere fact of publication, and further speech cannot remedy the injury. Suppose that a nude photograph of a young lady is surreptitiously obtained and published in a newspaper or magazine.[90] Assume further that the publication in no way imputes the cooperation of the young lady in making or publishing the photograph, so that no element of defamation exists. The young lady's privacy injury arises from the mere fact of publication. No amount of further speech can cure the injury—the indignity and humiliation which arose from the initial publication. The fact is that unlike injury arising from defamation, "more speech" is irrelevant in mitigating the injury due to an invasion of privacy.

Moreover, while it has been argued above that the basic rationale for speech justifies first amendment immunity for defamatory

[87]Plaintiff recovered, or the cause of action was recognized, in the following privacy cases: *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939) (plaintiff, an innocent victim of robbery and shooting, depicted on a radio program which reenacted the events); *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930) (publication of nude photographs of plaintiff's malformed child taken in defendant's hospital); *McAndrews v. Roy*, 131 So.2d 256 (La. Ct. App. 1961) (plaintiff undertook treatment at defendant's health studio, and defendant thereafter published "before and after" photographs of plaintiff); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (publication of photograph of plaintiff in bed while under hospital treatment for a rare noncontagious ailment, together with an accompanying article identifying plaintiff by name); *Griffin v. Medical Soc.*, 11 N.Y.S.2d 109 (Sup. Ct. 1939) (publication of plaintiff's photographs made by his physicians before and after treatment); *see Feeney v. Young*, 191 App. Div. 510, 181 N.Y.S. 481 (1920) (plaintiff permitted motion picture film to be made of her giving birth under a cesarean section operation, but only for the purpose of exhibiting the film to medical societies. Upon public exhibition of the film, held that testimony as to the content of the film should have been admissible, contrary to the ruling below.)

[88]See note 47 *supra* and accompanying text.

[89]See, however, text at notes 54-57 *supra*.

[90]For similar but not identical facts, see Meyers v. U.S. Camera Pub. Corp., 9 Misc. 2d 765, 167 N.Y.S.2d 771 (City Ct. 1957); Myers v. Afro-American Pub. Co., 168 Misc. 429, 5 N.Y.S.2d 223 (Sup. Ct. 1938), *aff'd mem.*, 225 App. Div. 838, 7 N.Y.S.2d 662 (1938) (libel action). The two nude plaintiffs Myers were not the same person.

statements,[91] this same rationale does not justify immunizing privacy-invading speech. First, speech necessary for an effective and meaningful democratic dialogue by and large does not require references to the intimate activities of named individuals.[92] This is to be contrasted with defamation where a fruitful dialogue may often require references to named individuals that reflect adversely upon the reputations of such individuals. Second, to a society that values privacy, it is difficult to conclude that the right to invade another man's privacy is a necessary function of self-expression or fulfillment. Again this is to be contrasted with defamation where the right to attack another man's reputation may properly be thought of as a valid exercise of self-expression. Finally, the "safety-valve" function does not operate here as it does in the realm of defamation. To permit an attack on a man's reputation may forestall the resort to physical violence. It is to be doubted, however, that the ability to publicly expose intimate activities serves as a sublimation for physical force. This is admittedly a rough-hewn guess as to the psychological forces at work, but I think most readers will agree with the conclusion.

Now return to the *Time* decision in which the Court limited its holding to the false light privacy cases. Since these, like defamation and unlike the private facts disclosures, deal with false statements, was the Court justified in this context in reaching a definitional balance which approximates the defamation balance? The Court fell into error by reason of its failure to pierce the superficial similarity between false light invasion of privacy and defamation, and by its failure to formulate a doctrine which rationally relates the false light cases to the underlying interest in privacy. The heart of the problem of finding a conceptual base for the false light privacy cases lies in the erroneous assumption that the untrue representations in a false light case are necessarily defamatory (or reputation-injuring) in nature.

It is true that this assertion can be supported by some of the authorities. Dean Prosser has expressed the view that in the false light cases "[t]he interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation,"[93] and Professor Kalven, in denying any rational conceptual base for the false light cases, has

[91]See section II *supra*.

[92]Remember that we do not here speak of reputation-injuring speech.

[93]Prosser, *Privacy*, 48 CALIF. L. REV. 383, 400 (1960). Dean Prosser does state earlier that the false light "need not neeessarily be a defamatory one," *id.*, but in view of the statement quoted in the text, this must be understood as meaning that the false statement may be actionable although it does not meet all of the technical requirements for liability under the law of defamation. He later enlarges upon this point in expressing concern that the false light cases may be "capable of swallowing up and engulfing the whole law of public defamation . . . . If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about

rhetorically asked: "If the statement is not offensive enough to the reasonable man to be defamatory, how does it become offensive enough to the reasonable man to be an invasion of privacy?"[94] If Dean Prosser and Professor Kalven are correct in concluding that the untrue statements in false light privacy cases are necessarily reputation injuring, then the *Time* decision was correct in finding the definitional balance for false light privacy actions to be essentially the same as that for defamation. If a false statement will not constitute a cause of action for libel, why should a plaintiff be able to circumvent the limitations built into the law of defamation by labeling his action one for invasion of privacy?[95]

But the underlying premise is wrong. An untrue statement may in the same way as a public disclosure of embarrassing private facts constitute an invasion of privacy without in any manner constituting an injury to the subject's reputation. Once the false light cases are understood as a logical, even a necessary, extension of the private facts cases, the fallacy of equating the false light cases to defamation actions becomes apparent. The injury to the plaintiff's peace of mind which results from the public disclosure of private facts may be just as real where that which is disclosed is not true. It would be absurd to hold that the publication of an intimate fact creates liability, but that the defendant is immunized from liability (though the injury to plaintiff's peace of mind is no less) if the intimate "fact" publicly disclosed turns out not to be true, thus putting a premium on falsehood. The sensibilities of the young lady whose nude photo is published would be no less offended if it turned out that her face were superimposed upon someone else's nude body. The resulting humiliation would have nothing to do with truth or falsity. The unwarranted disclosure of intimate "facts" is no less offensive and hence no less deserving of protection merely because such "facts" are not true.

It should follow, then, that those false light cases which if true would fall into the public disclosure of embarrassing private facts branch of privacy should be regarded as conceptually indistinguishable from the latter category. If, as argued above, first amendment immunity is not properly applicable to the latter, it likewise should not be applied to the

for many years, in the interest of freedom of the press and discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?" *Id.* at 401. *See also* RESTATEMENT (SECOND) OF TORTS § 652E, special note at 122 (Tent. Draft No. 13, 1967).

[94]Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROB. 326, 340 (1966).

[95]See note 85 *supra.*

former. This conclusion must be subject to qualifications similar to those expressed with reference to the public disclosure of embarrassing private facts. If the untrue statements in a false light case are not as to matters which *if true* would be private, then the interest in privacy is by hypothesis nonexistent and therefore cannot counterbalance any opposing interest in free speech. Such a publication may nevertheless be offensive, and tortious under the law of privacy,[96] but the tort defense of newsworthiness may carry with it the force of first amendment privilege without being met by the countervailing force of the interest in privacy.[97]

Moreover, if a particular statement not only constitutes an invasion of privacy but also injures the subject's reputation and is therefore prima facie defamatory (subject to the defense of truth), then the *Times* definitional balance for defamation should be applicable. If the first amendment protects such defamatory statements, the right to make them may not be abridged under state law even if the state law gives a "privacy" rather than a "defamation" label to such abridgment. As

[96]*E.g.*, Strickler v. National Broadcasting Co., 167 F. Supp 68 (S.D. Cal. 1958) (plaintiff alleging false depiction on a television program of his conduct on a commercial airliner in praying, wearing a Hawaiian shirt rather than his Naval uniform, smoking, and failing to assist in an emergency landing, held to state a cause of action); Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955) (plaintiff's name listed among "thousands of leading law firms" that use defendant's machines, when in fact the plaintiff had found the machine unsatisfactory and had returned it); Battaglia v. Adams, 164 So. 2d 195 (Fla. 1964) (Richard Nixon held to have a right to privacy to prevent unauthorized use of his name on the Florida presidential primary ballot); Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 234, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded*, 387 U.S. 239 (1967) ("embarrassing distortion" of the plaintiff's war record so as to make him out to be a wartime hero); Goldberg v. Ideal Pub. Corp., 210 N.Y.S.2d 938 (Sup. Ct. 1960) (views on sexual freedom falsely ascribed to the plaintiff, a rabbi).

[97]It is possible to argue that false light cases which do not deal with matters which if true would be private should have the same exemption from the first amendment as should false light cases where the statement if true would relate to private areas of conduct. If a nude photograph which is false in the sense that the plaintiff's face has been superimposed upon the nude body of another will constitute an invasion of privacy not subject to a first amendment privilege if the setting purports to be the privacy of the plaintiff's bedroom, should the defendant's liability be any less if the setting is falsely depicted as a busy downtown thoroughfare? Despite this seemingly arbitrary distinction, I would submit that the definitional balance should shift when that which is depicted purports to deal in matters open to the public, and that in such circumstances the rule adopted in *Times* as restated in *Time* may properly be applied. As with any definitional balance, this rule will produce certain fringe absurdities, such as that suggested above, but it is nevertheless necessary in order to preserve the necessary breathing space for press and speech. If a publication purports to relate to a private aspect of conduct, then regardless of whether it is true or false, the publisher is on notice that he is invading the privacy of another. But if the conduct allegedly occurred in public, then to make the publisher's liability under the law of *privacy* turn absolutely on whether the statement is true or false would be to inhibit publication of that which the publisher may in good faith believe to be both true and nonprivate, and thus to stifle much that may be of legitimate public interest. At this point, on balance it seems preferable to adopt the rule which vitiates the first amendment privilege only in the event of knowing falsity or reckless conduct.

"libel can claim no talismanic immunity from constitutional limitations,"[98] neither can the talisman of "privacy" vitiate the constitutional protection for speech values contained in defamatory speech, even if that same speech also invades privacy.[99] This may seem to lead to an odd result. That is, one may obtain judicial redress if a statement merely invades one's privacy, but if it goes farther and both invades privacy and is detrimental to reputation, then (at least if one is a public figure) he may be precluded by the first amendement from a judicial remedy. But such a result is not so odd as might at first appear. If a reputation-injuring statement contains speech values not to be found in a privacy-invading statement, those values remain even if the statement combines reputation injuring and privacy-invading elements. The defense of such values justifies weighing the definitional balance so as to afford first amendment protection where the speech combines both such elements.

The foregoing qualifications would not require first amendment protection for all false light privacy cases. Dean Prosser and Professor Kalven to the contrary, there are many false light cases in which there is no reputation interest to be protected, but only the interest in protecting against embarrassment and humiliation which results from the public disclosure of factually untrue, but purportedly private facts.[100] Indeed, *Time, Inc. v. Hill* is itself a case in point. The defendant falsely reported that in a private setting—within their own home—the son of the Hill family was " 'roughed up' by one of the convicts . . . the daughter [bit] the hand of a convict to make him drop a gun . . . and . . . the father [threw] his gun through the door after a 'brave try' to save his family [and was] foiled."[101] In fact the convicts had treated the Hill family courteously, had not molested them, and there had been no violence. The Hill family was indeed depicted in a false light, and in such a manner

[98]New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

[99]This is roughly analogous to the decisions in Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) wherein the Court held that if a design may be freely appropriated under the federal patent and copyright laws, such appropriation may not be rendered actionable under the state law of unfair competition. *See generally* M. NIMMER, COPYRIGHT § 35 (1968).

[100]For example, in Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 234, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded*, 387 U.S. 239 (1967), the plaintiff complained *inter alia* of the false depiction of the following: An alleged conversation between the plaintiff and his father's physician in which the latter tries to persuade the plaintiff that he bears no guilt for his father's illness; a fictitious scene depicting plaintiff's reunion with his fiancee upon his surprise return from Europe; other scenes depicting the plaintiff's deeply personal relationship with members of his immediate family and his introspective thoughts. *See* cases cited note 88 *supra* for other instances of false light cases in which the offensively false statements do not disparage reputation.

[101]385 U.S. at 377-78.

that a trier of fact might well find it to be offensive to persons of "ordinary sensibilities."[102] But, surely, nothing in such depiction was injurious to the reputation of any of the Hill family. A report of brutal treatment at the hand of criminals and a brave attempt to resist the criminals is hardly calculated to hold the victims up to public contempt, ridicule, and obloquy. It is submitted, then, that the Court in *Time* was wrong in applying to false light privacy cases in general, and to the particular case before it, a rule which can be justified only when the particular false light case contains defamatory elements, or does not purport to relate to public matters.

The fact that what allegedly happened to the Hill family was news should not in the name of the first amendment justify an obliteration of society's commitment to the values of privacy.[103] The reporting of intimate private matters, whether or not they are true, may pander to the public curiosity, but if the report does not reflect on the subject's reputation it cannot be said that the public interest, or that the factors which form the underlying rationale for freedom of speech, requires reporting the name or other identification of the subject of such private matters.[104] In such circumstances the public's interest in news reporting

[102]RESTATEMENT OF TORTS § 867, comment *d* at 400-01 (1939) provides that "liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities." The tentative draft of the second Restatement uses the phrase "unreasonable publicity, of a kind highly offensive to the ordinary reasonable man." RESTATEMENT (SECOND) OF TORTS § 652D, comment *d* at 115-16 (Tent. Draft No. 13, 1967).

[103]The earlier newspaper reports should not detract from the private nature of the matters reported unless such newspaper accounts were made with the plaintiff's cooperation. A related and overlapping defense in privacy cases is based upon the plaintiff's status as a "public figure." *See* RESTATEMENT (SECOND) OF TORTS § 652F, comments *c* and *d* at 128-29 (Tent. Draft No. 13, 1967), which suggests that "to some reasonable extent" the privilege to report activities of public figures extends even as to "facts about the individual which would otherwise be purely private." Some decisions have seemed to regard this as an absolute privilege to report the private aspects of a celebrated figure's private life. *See* Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940); Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948); Reed v. Real Detective Pub. Co., 61 Ariz. 511, 162 P.2d 133 (1945). Note that Warren and Brandeis qualified the right of privacy, so that "to whatever degree and in whatever connection a man's life has ceased to be private . . . to that extent the protection is to be withdrawn." Warren and Brandeis, *supra* note 73, at 215. If the thesis of this article is accepted then the plaintiff's status as a public figure should not affect his claim of a right of privacy as to nondefamatory matters which are truly private. The justification for the "public figure" limitation under the *Times* rule in limiting his right of action for defamation—*i.e.*, the fact that a public figure is in a position to invoke the self-help of "more speech," see text accompanying note 55 *supra*, is not applicable to privacy where more speech is irrelevant.

[104]This may be subject to a further qualification. If a news story is reputation-injuring (and therefore privileged) as to one individual, such privilege should not be negated by the fact that recounting the reputation-injuring events (whether true or false, but subject to the *Times* doctrine if false) will necessarily identify an innocent participant in the events reported. Thus, reporting that a named individual raped his sister will, if he has only one sister, necessarily identify and therefore

is sufficiently served by an account of the event itself without identification of persons innocently involved.[105]

CONCLUSION

Definitional balancing of interests is defensible as a judicial function. More than that, it is essential that the judiciary exercise this function in the interpretation and application of the first amendment if freedom of speech is to be meaningful as constitutional doctrine. The Supreme Court's decision in *New York Times v. Sullivan* implicitly recognized the need for definitional balancing and drew a definitional line which on the whole establishes a felicitous equilibrium between antithetical interests in speech and reputation. The Court's subsequent decision in *Time, Inc. v. Hill* is unfortunate in that it assumes that the definitional balance appropriate to the speech and reputation context is equally applicable in balancing competing interests in speech and privacy. A recognition of the manner in which the privacy interest differs from the reputation interest requires a markedly different definitional balance in determining the constitutional limits of the right of privacy.

invade the privacy of the sister. *See* Hubbard v. Journal Pub. Co., 69 N.M. 473, 368 P.2d 147 (1962); Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 117, 134 (1963).

[105]This principle has received limited recognition on a statutory level in those states which by law prohibit the naming of a female victim of a sexual offense. *See* FLA. STAT. § 794.03 (1965); GA. CODE ANN. § 26-2105 (1953); S.C. CODE ANN. § 16-81 (1962); WIS. STAT. ANN. § 942.02 (1958); Franklin, *supra* note 95, at 121-28. *See also* Barber v. Time, Inc., 348 Mo. 1199, 1206, 159 S.W.2d 291, 295 (1942): "It was not necessary to state plaintiff's name in order to give medical information to the public as to the symptoms, nature, causes or results of her ailment."