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The Right of Reply to the Media in the United States - Resistance and Resurgence

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The Right of Reply to the Media in the
United States—Resistance and Resurgence

by

JEROME A. BARRON*

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I

Reply and Access in the Newspaper Press

Why do we care about a right of reply? A right of reply permits a person who is attacked to respond in her own words. One way to understand a right of reply is by distinguishing it from a right of retraction. A retraction provides a remedy to a person who believes that something has been published concerning her that is false, or at least incorrect in some respect. If the publisher is willing to grant a retraction, the publisher then states in the same forum in which the falsehood or misstatement occurred that the publisher erred. The retraction is composed by the original publisher. The retraction, therefore, still leaves editorial responsibility with the publisher. The publisher is still in control.

A right of reply, on the other hand, depending on the conditions upon which the right may be invoked, leaves the formulation of the reply with the person attacked. Because the person attacked is the author of the reply, a right of reply more effectivly contributes to the creation of lively debate than does a retraction. To put it another way, retraction cleanses the information process. It purges it of error. But reply permits the introduction of new material and ideas into the discussion. For that reason, a right of reply stimulates debate.

A right of reply equips the public with an opportunity to participate in the media. Broadly speaking, this opportunity to participate includes the right of reply and the right of access, but each has a separate mission. The mission of the right of reply is to bring a measure of full disclosure as well as authenticity to debate. In the context of a right of reply, choice of the debate topic has been made by the publisher. The right of reply permits an individual to respond to something that a publisher has already made an issue. The mission of a right of access, however, is to allow, in some circumstances, individuals other than the publisher to set the agenda for debate.

A right of access, like a right of reply, is difficult to discuss in general terms because the conditions for its invocation would necessarily depend on the statutory provision that gives it life. A critical feature of a right of access, however, is that it is not triggered by a first espousal by the publisher. A right of access may recognize a right of entry for a particular viewpoint or idea whether or not there had been a first espousal of that idea within the forum. A right of access, by definition, tempers the editorial autonomy of the forum's editor. A right of access

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1. This article is the outgrowth of a speech by the author delivered at the annual convention of the Association for Education in Journalism and Mass Communication, Montreal, Canada. The paper was one of several that were delivered at a panel presentation on the topic "Right of Reply and the Press: A Comparative Perspective."
empowers members of the public with a measure of editorial choice. Both the right of reply and the right of access have been bitterly resisted by the media.

Reply and access have been resisted by the media on the ground that they fatally interfere with the autonomy and discretion of the editor. The media maintain that they alone should decide what should be disseminated to the public. This theory of absolute sovereignty has largely prevailed over the interests of the public in a right of reply.

In this article, I will discuss the current status of the rights of reply and access in the United States, in addition to the consequences of the successful resistance to the recognition of these rights. I shall suggest that there has been in recent years a resurgence of interest in the right of reply in the United States as well as a renewed expectation of direct public participation in the media.

If I were merely discussing the status of a right of reply to the newspaper press in the United States at the present time, this article would be brief. There is no right of reply; this was decided conclusively in 1973 by the United States Supreme Court in *Miami Herald Publishing Co. v. Tornillo.*

In 1972, Pat Tornillo, head of the Dade County, Florida, Classroom Teachers Association, ran as the Democratic candidate for the Florida legislature. The *Miami Herald* published two editorials attacking his candidacy. Tornillo submitted replies to the *Herald* that he asked it to publish, which the *Herald* refused to do. In most states, that would have been the end of the matter. When a newspaper refuses to publish the proffered reply even of someone it has attacked, such an action is not considered to be censorship but, instead, the exercise of editorial discretion. The Florida situation, however, was unusual. Florida actually had a right of reply law designed precisely for political candidates and for a situation like Tornillo's. A provision of the Florida Electoral Code dealt with the exact situation: if the publisher of a newspaper assailed the personal character of any candidate or charged him with malfeasance or misfeasance in office, then the newspaper, upon request of the candidate, must publish free of cost any reply the candidates submits. The reply, however, could take no more space in the paper than the original attack. The statute, passed by the Florida Legislature in 1913, had been largely dormant since its enactment.

Encouraged by the rise of a movement for access to the press, Pat Tornillo sought to avail himself of the Florida right of reply law.

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4. Id.
Tornillo sought a mandatory injunction to enforce the statute. The *Miami Herald* refused to comply with the law on the ground that the statute violated the First Amendment. The Florida Supreme Court disagreed and held, six to one, that the statute did not violate the First Amendment but, indeed, implemented it.\(^5\) The Supreme Court of the United States unanimously reversed the Florida Supreme Court and invalidated the Florida right of reply statute.\(^6\)

The *Tornillo* case was a First Amendment case of first impression. There was no United States Supreme Court case in existence that dealt with the question whether the editor of a newspaper could be compelled to give space to another even to respond to an attack. This was not a case of preventing the press from publishing or of punishing the press after it had published. *Tornillo* raised the issue of whether the government could compel a newspaper to publish that which the newspaper otherwise chose not to publish.

An arresting aspect of Chief Justice Burger's opinion for the Court in *Tornillo* was the attention and apparent sympathy given to the arguments for access to the press: "In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues."\(^7\) The Court set out the arguments for access in detail and with accuracy.\(^8\) These arguments, however, were just stated; they were not rebutted.

Instead, the Court enunciated some general propositions that could be read to apply to both the right of access and to the right of reply. The press could not be required to publish what it reasonably did not wish to publish.\(^9\) The Court saw no difference between government legislation that forbade the press to publish and legislation that compelled it to publish: "The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."\(^10\) Even more fundamentally, editorial autonomy, untrammeled by government, was seen by the Court as a core precept of the First Amendment:

> The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial pro-

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7. *Id.* at 250.
8. *Id.* at 247-57.
9. *Id.* at 256.
10. *Id.*
cess can be exercised consistent with First Amendment guarantees of a free press as they have evolved at this time.\(^\text{11}\)

The rationale of *Tornillo* may be interpreted to apply both to a right of access and to a right of reply; it is not clear. But it is clear that its rationale was intended to govern the specific right of reply statute and the facts that the case presented. In assessing the future of a right of reply, it is necessary to focus on the nature of the right of reply statute that was before the Court in *Tornillo*.

*Tornillo* did not deal with a private person’s right of reply to attacks in the press; it dealt with a state statute that afforded a right of reply to political candidates who were attacked prior to an election in which they were running. In *Tornillo*, the right of reply statute under consideration did not require that a reply be afforded only if defamation were proven.\(^\text{12}\) Certainly the statute could have been given that gloss. But we neither asked for that interpretation, nor did the Florida courts provide it.\(^\text{13}\)

Questions affecting a right of reply still exist—questions that the *Tornillo* decision did not settle. For example, *Tornillo* did not deal with the validity under the First Amendment of a right of reply statute directed at providing a remedy for defamatory attack.\(^\text{14}\) It also did not deal with whether a statute that provided a right of nondiscriminatory access to a newspaper’s advertising pages would be valid. Could a newspaper be required to open its pages to an advertiser whose message or product was not illegal? Where this question has been raised in the lower courts on a First Amendment basis, the answer has been in the negative.\(^\text{15}\)

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11. *Id.* at 258.
12. *Id.*
13. The author was co-counsel in the *Tornillo* case with the late Tobias Simon, Esq., for the respondent, Pat Tornillo.
14. *Tornillo*, 418 U.S. at 258 (Brennan, J., concurring). It should be noted particularly that Justice Brennan in *Tornillo* pointedly observed that the Court was not passing on the First Amendment validity of retraction statutes. This observation suggests that he at least did not reject as unconstitutional all mandatory publication legislation.
15. Only recently the West Virginia Supreme Court reversed a trial court’s order requiring a newspaper to publish a paid political advertisement submitted by a local PAC, or political action committee. *Citizen Awareness* v. Calhoun County Publishing, Inc., 406 S.E.2d 65 (W. Va. 1991). A weekly newspaper, the *Calhoun Chronicle*, of Calhoun County, West Virginia, had a policy of refusing to print political advertisements in the last issue before an election. *Id.* at 67. The PAC sought an injunction compelling the *Calhoun Chronicle* to publish its ad. *Id.* The injunction was granted. Apparently the trial judge agreed with the PAC counsel’s argument “based on decency and fair play and basic sense of constitutional law.” *Id.* However, the trial court was reversed on the ground that the case was governed by *Tornillo*, 418 U.S. at 241. Judge Neely’s opinion in *Citizen Awareness* reads as if the *Tornillo* case incontrovertibly governs the matter in controversy. But it does not, because *Tornillo* dealt with the editorial sections of the newspaper and not the open or advertising sections. *Tornillo*, 418 U.S. at 261 (White, J., concurring). However, Judge Neely noted that in the past the West Virginia Supreme Court had recognized a right of access for political advertising when a state
In short, important questions about reply and access remain open in our law. These include questions about the First Amendment validity of a right of reply to defamatory attack and a right of nondiscriminatory access to a newspaper's advertising pages. Nonetheless, the First Amendment winds, so to speak, have not blown in the direction of the rights of reply and access during the years since *Tornillo*.\(^{16}\)

### II

**Rights of Reply and Access in the Electronic Media**

What about the rights of reply and access within the electronic media? In the case of the electronic media, as far as the formal statement of the law goes, the Federal Communications Act recognizes some rights of reply and access. The two most important of these rights are the equal time rule\(^ {17}\) and the reasonable access provision\(^ {18}\).

Yet the rights afforded by these provisions are only available to political candidates. The equal time rule is available to all political candidates; the reasonable access provision of section 312 is only available to political candidates for federal office. The equal time rule is easily the most significant right of reply in the electronic media. A candidate, in deciding to exercise equal opportunities under section 315, can choose whether or not to reply to the first use by his opponent. But even these important rights are far from a recognition of a general right of reply to the broadcast media.

The personal attack rules, which permit a person whose character is attacked on a broadcast station to reply to the attack without cost, are hanging by a thread. Under these rules, the person attacked must be afforded a response if a broadcaster attacks the "honesty, character, or

controlled broadcast station was involved. *Citizen Awareness*, 406 S.E.2d at 68 (citing United Mine Workers of America v. Parsons, 305 S.E.2d 343, 354 (W. Va. 1983)).

What puzzles me is that access to the print media is sometimes won on other than First Amendment grounds. An interesting access-to-advertising case that was won not on First Amendment grounds but on antitrust grounds is *Home Placement Serv. v. Providence Journal*, 682 F.2d 274, 281 (1st Cir. 1982). There, a newspaper could not refuse to accept nondeceptive advertising from a rental referral business, consistent with the Sherman Act, when the newspaper's classified pages were competing with the business. *Id.* at 277. In another case, there was no such obligation on the part of a newspaper to accept such advertising where the ads were criticized by readers as deceptive. *Homefinders of America v. Providence Journal*, 621 F.2d 441, 444 (1st Cir. 1980).

16. *Pacific Gas and Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986). In the *Pacific Gas & Electric* case, the Court's hostility to government requirements promoting debate was apparent. The Court relied on *Tornillo* for a holding that a utility could not be required to include in its billing envelope the message of a citizen's group, *id.* at 11, even though the utility included its own newsletter in that billing envelope. *Id.* at 7.


integrity" of an identified person or group while discussing a controversial issue of public importance. The personal attack rules are a corollary to the Fairness Doctrine, which was abolished by the Federal Communications Commission (FCC) on August 4, 1987. The abandonment of the Fairness Doctrine was upheld by the United States Court of Appeals for the District of Columbia Circuit on February 10, 1989. However, the personal attack rules were not abolished, and complaints under the personal attack rules are still being brought—albeit without much success.

On November 7, 1991, the FCC dismissed a complaint by Professor David Berkman who alleged a violation of the personal attack rule by a radio station. During the Gulf war, a talk show host on the station had said that Professor Berkman would not "be happy until we see Iraqi soldiers jumping for joy." Professor Berkman felt this statement called him a traitor to the United States and constituted an attack on his character and integrity. The FCC decided that comments made by WISN concerning Professor Berkman's views on U.S. involvement in Kuwait did not constitute a personal attack upon his "honesty, character, integrity or like personal qualities." There is nothing in the FCC opinion, however, which indicates that a personal attack violation could not have been shown under a different set of facts.

On November 25, 1991, the FCC reviewed a complaint by an individual alleging that WFBQ-FM, Indianapolis, Indiana, had violated the personal attack rule by calling him a "Yankee Doodle Hitler" and comparing him to a Nazi. In its response to the complaint, WFBQ-FM argued that the personal attack rule was rendered invalid by the FCC's decision in Syracuse Peace Council to abolish the Fairness Doctrine.

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19. 47 C.F.R. § 73.1920 (1991). The broadcaster must contact the person or group attacked and provide a transcript or tape summarizing the attack and offer the person a reasonable opportunity to respond over the same station without cost.
24. Id.
The FCC responded to this contention by declining to reach a determination on the "continued validity of the personal attack rule."27 Nor did the FCC believe it necessary to decide whether the alleged personal attack occurred during a discussion of a controversial public issue, as the rule requires.28 Instead, the FCC believed it decisive that the radio station, WFBQ-FM, had offered the complainant reply time on two occasions. Therefore, since the station provided the complainant with an opportunity to respond, the rule's requirement was satisfied.29

In each case, it should be noted that the FCC declined either to reaffirm the personal attack rule or to declare it invalid. The implication from the FCC treatment of these complaints is that the FCC—however reluctantly—views the personal attack rule as still having the force of law. This means that a new Executive administration that espoused a philosophy of enforcing existing rights of reply and access in broadcast law could make the personal attack rule a meaningful mechanism for debate in broadcasting.

I have no doubt that if the equal time rule could have been characterized as an administrative policy, then that rule also would have been scuttled given the ascendant deregulatory philosophy at the FCC. However, the equal time rule is clearly established in a federal statute itself,30 so it was not possible for the FCC to fully implement its agenda of handing over every bit of air time to the industry. The only recent success in the electronic media for participatory rights is the rapid rise in the number of public access channels on cable. I discuss these developments, and their relevance to a right of reply, in Section VII.

III
Consequences of No Right of Reply for the Defamation Law

Despite the judicial rejection of a right of reply to the press, the common sense effort to provide individuals with an opportunity to reply when attacked by a newspaper endures. It endures in the proposal that a right of reply ought to be offered to the libel plaintiff by the media defendant as an option to damages in libel suits. It endures as well in the support that proposals for vindication statutes have received as well.

Perhaps the most recent and important statement emanating from the Supreme Court in this regard—at least in the defamation context—is the long concurrence of Justice White in *Dun & Bradstreet Inc. v. Green*.

28. Id.
29. Id.
Justice White believes that current case law has failed to protect the reputational interests of public officials in particular.32

Justice White pointed out the difficulties that confronted a public official who is a libel plaintiff and, therefore, subject to the rules of New York Times Co. v. Sullivan.33 Unless the public official can meet the difficult actual malice standard imposed by that case, no jury verdict or judgment can be won. This result will obtain even if the publisher admits that the publication complained of is false: "The lie will stand, and the public will continue to be misinformed about public matters."34

The public official libel plaintiff faces other difficulties: "Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice."35

In Justice White's view, the public official who is defamed today has little ability to correct a falsehood that is published about him. Because of the Times rules, the public official lacks an effective remedy to safeguard his reputation. Justice White said that there was no "justification for leaving a whole class of defamed individuals without redress or a realistic opportunity to clear their names."36 He went on to observe that two adverse consequences flowed from this development:

[B]y leaving the lie uncorrected, the New York Times rule plainly leaves the public official without a remedy for the damage to his reputation. . . . The New York Times rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.37

The libel law today, as many have observed, is being used to do more than just protect reputation.38 One of its new functions has been to

32. 472 U.S. at 772.
34. Dun & Bradstreet, 472 U.S. at 768.
35. Id.
36. Id. at 768 n.2.
37. Id. at 769.
serve as a means of media accountability. But the libel law is a clumsy vehicle for such a purpose, awkward and expensive for both the libel plaintiff and the media defendant. For the individual seeking a reply to a defamatory attack, it is, of course, better than nothing. But the libel law does not adequately meet the information needs of society at large.

The libel law has been used to make the media accountable only because more adequate remedies such as vindication and reply do not exist. Justice White's concurrence in *Dun & Bradstreet* cogently expresses the inadequacies of our contemporary libel law. Implicitly, the concurrence highlights the consequences that flow from refusal to recognize a right of reply.39

These inadequacies include the lack of redress or the inability to clear the names of "whole classes of defamed individuals."40 Such classes of individuals not only include public officials but also private plaintiffs who, unless they can at least prove negligence, can be "damaged by even the most outrageous falsehoods [and still be] remediless."41

In sum, Justice White believes that the Supreme Court in the name of the First Amendment has created barriers too high for defamation plaintiffs to hurdle. He suggests that it might be more sensible to limit damage recoveries in libel cases and dispense with the increased burdens of proof fashioned by the Court, respectively, in *New York Times*42 in the case of public libel plaintiffs,43 and in *Gertz v. Robert Welch, Inc.*44 as applied to private libel plaintiffs.45

The *Times-Gertz* rules have moved our law along a path where the absence of a right of reply is particularly noticeable.46 One of the major consequences of the rules is that a plaintiff may lose a defamation case because she cannot prove actual malice even though the communication that impelled her to sue is in fact false. These rules have greatly affected public official plaintiffs. Obviously, right of reply legislation would create the means for people to clear their names.

39. 472 U.S. at 801-02.
40. *Id.* at 768.
41. *Id.* at 770.
42. 376 U.S. 254 (1964).
43. *Dun & Bradstreet*, 472 U.S. at 765-70.
46. *Id.* at 765. There are a number of ways in which the *Times-Gertz* rules have diminished the usefulness of the libel law for plaintiffs who seek to clear their names through the defamation law. Justice White provided an example in his concurrence in *Dun & Bradstreet*. He observed that the prevailing common law rule before *New York Times* that nominal damages were to be awarded for any actionable defamatory publication per se performed a vindicatory function. But the requirement in *Gertz* effectively undercut this rule. *See id.* at 770.
Several years after New York Times v. Sullivan was announced I criticized the Times doctrine. I called it a lost opportunity. The Court's desire to promote debate by freeing newspapers from the intimidating effects of heavy damages made sense only if debate would result from that liberation. But the Court abdicated its task in protecting debate too soon; it did not require some right of reply or access. The Court simply assumed that debate would take place. The consequence of this assumption, I felt, would not be more debate but a new imbalance in the communications process. The pattern of concentration of control of the media stemmed from centrifugal forces with deep roots in technology and the economic system.

The irony of Times and its progeny, I argued, lay in the unexamined assumption that reducing newspaper exposure to libel litigation would remove restraints on expression and lead to an "informed society." But in fact, I believed, the decision would create a new imbalance in the communications process. Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision would be to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. Unless the Times doctrine were deepened to require opportunities for the public figure to reply to a defamatory attack, the Times decision that would merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate.

I regret to say that this forecast has proven correct. The press has provided some indirect opportunities for reply and access in op-ed pages that were not present in the newspaper press prior to the Tornillo case. The establishment by some newspapers of an ombudsman, while hardly a uniform practice among newspapers in this country, shows some concern for the rights of the public in the media that serves it. Nonetheless, unless a newspaper chooses voluntarily to provide a reply, there is still no opportunity for the public figure to reply to a defamatory attack by a daily newspaper in the United States today.

47. 376 U.S. 254 (1964).
49. Id.
50. Id.
51. Id.
52. Id.
54. For an interesting legislative proposal that would provide not for a right of reply statute but for a rapid retraction, see generally Dale M. Cendali, Note, Of Things to Come—The Actual Impact of Herbert v. Lando and a Proposed National Correction Statute, 22 HARV. J. ON LEGIS. 441, 500-02 (1985).
IV

The Vindication Remedy—A Reply of Sorts

The theory behind the Times standard is to free the press from the chilling effect of large damage awards. Justice White has asked—somewhat acidly—whether the press alone among American businesses should be immunized from the damage it causes.55 But assuming that it should, he argues that a vindication remedy is particularly appropriate: “Nothing in the central rationale behind New York Times demands an absolute immunity from suits to establish the falsity of a defamatory misstatement about a public figure where the plaintiff cannot make out a jury case of actual malice.”56

There is a connection between a vindication remedy and a right of reply. If vindication were accompanied by a duty on the part of the defamer to publish the reply, we would be on our way to a modified right of reply. In short, if it is desirable for the states to enact legislation to permit a defamation plaintiff a judgment of falsity even absent proof of actual malice, it is also desirable that the media defendant that published the false statement should be required to publish the vindication. One may argue that they would do so voluntarily, but then again, they might not.

Let me put the issue presented as directly as possible. If a court has determined that what was published or broadcast by a media defendant was false, should the defendant be required to publish in its paper (or broadcast on its television station) that a court has determined that its statement was false? In such circumstances, mandatory publication is only basic fairness. Most vindication proposals, however, do not go this far.57

A well-known proposal, Professor Marc Franklin’s “restoration” remedy, would allow vindication of a defamation plaintiff but would not require mandatory publication of the vindication.58 Professor Franklin would require the plaintiff to make a choice at the outset between pursuing damages or seeking a “restoration” of reputation remedy.59 If the “restoration” of reputation remedy is selected, the plaintiff must show that his request for a retraction was rejected. The plaintiff must also

55. Dun & Bradstreet, 472 U.S. at 772.
56. Id.
57. Despite Justice White’s sympathy for a vindication remedy for the falsely defamed public official in his Dun & Bradstreet concurrence, he did not suggest that the vindication must be published in the same forum where the original defamation took place, even though he observed that the retraction rarely catches up with the lie. Id. at 768-69.
59. Id.
prove by clear and convincing evidence that the defendant's statements concerning the plaintiff were deliberately or recklessly false. 60 Under the Franklin proposal, if the plaintiff meets the requisite standard of proof, the plaintiff can recover attorney's fees from the defendant. 61

Another proposed vindication statute would require mandatory publication. James H. Hulme proposed a two-step "vindication remedy" under which the plaintiff could secure from the defendant an acknowledgement that he has made false statements about the plaintiff. 62 First, a declaratory hearing would be held to determine whether the statements were true or false. 63 If the statements were found to be false, the court would require the defendant to publish that a declaratory judgment had been rendered in favor of the plaintiff on the issue of the falsity of the statement. 64 The scope and form of the defendant's publication would be within the court's discretion. 65 Furthermore, if the plaintiff were successful in proving that the challenged statements were false, the plaintiff would possibly be able to recover attorney's fees from the defendant. 66

V

Vindication Contrasted With Reply

A vindication remedy is better than no opportunity at all to clear one's name, but it is not a totally adequate remedy. Assume that a plaintiff has been attacked in a forum—in a newspaper or on radio or on television—in a manner that reaches an audience in the hundreds of thousands. A vindication judgment known only to the plaintiff's family hardly seems adequate recompense for the reputational interest involved in the First Amendment debate issue.

If we are interested in having the public hear both sides of the issue, then the attack and the judicial determination of its truth or falsity should reach the same audience. A right of reply is a fuller and more adequate remedy for defamatory attack than is the vindication remedy, unless the latter is accompanied by a requirement of mandatory publication.

Yet even advocates of the right of reply remedy do not always demand mandatory publication. The Annenberg Proposal, a recent libel
reform proposal that has attracted considerable discussion in media circles, provided for a right of reply as an alternative to defamation damage suits.\(^{67}\) The Annenberg Proposal makes a right of reply to defamation available to the plaintiff only upon the defendant's consent. It would require the libel plaintiff to seek a retraction or an opportunity to reply from the defendant before filing suit.\(^{68}\) If the defendant grants the plaintiff's request within thirty days, the plaintiff cannot bring a damage suit.\(^{69}\) If the plaintiff demands a retraction, the defendant can only avoid a damage suit by publishing "a good faith [statement] of the facts, withdrawing and repudiating the prior defamatory statements."\(^{70}\) If the plaintiff demands a reply, the defendant can avoid a damage suit by publishing a retraction or a reply written by the plaintiff.\(^{71}\) Both retractions and replies must be published in "substantially the same place and manner as the defamatory statements."\(^{72}\)

The Annenberg Proposal contains a vindication feature as well, which Professor Dienes has well summarized:

Under the proposed Libel Reform Act, if no satisfactory retraction or reply is published, we move to Stage Two. This is where the real controversy is centered. At Stage Two, either party may finally convert the claim into a no-fault, declaratory judgment action on the issue of truth or falsity. If either party elects the declaratory judgment route, that is conclusive—there can be no damages action. The prevailing party on the issue of truth or falsity gets attorney's fees from the loser.\(^{73}\)

There have been other proposals providing for a right of reply only where the media defendant consents to such a remedy,\(^{74}\) as well as proposals that require the defendant to publish a right of reply.\(^{75}\) A proposed "reply-retraction" statute requires any publisher of a false statement to publish a retraction within a reasonable time upon demand of the subject of the statement.\(^{76}\) In that proposal, a publisher of opinion concerning a person must publish the reply of that person within a rea-

\(^{68}\) Id. § 3(a)(1)-(2).
\(^{69}\) Id. § 3.
\(^{70}\) Id. § 3(b).
\(^{71}\) Id. § 3(c).
\(^{72}\) Id. § 3(d).
\(^{74}\) Indeed, I have made such a proposal in the belief that an optional right of reply remedy is preferable to none at all. The proposal is discussed in Barron, supra note 31, at 805-14.
\(^{75}\) On the question of whether a right of reply that is not a right enforceable by a plaintiff can even be called a "right," see John G. Fleming, Retraction and Reply: Alternative Remedies for Defamation, 12 U. Brit. Colum. L. Rev. 15, 24 (1978).
sonable time or publish a retraction. A reply cannot exceed the number of words in the original statement. If the publisher refuses the plaintiff’s request for publication of a reply or retraction, the plaintiff can obtain a court order directing publication of a reply or retraction. Such publication would in that event be the exclusive remedy for the injury to reputation—damages would not be available. In short, this proposal would allow the plaintiff to choose reply or retraction over damages as a remedy, whether the defendant consented to that choice or not.

What is the reason for the reluctance to require a mandatory publication of reply? What is the reason for the reluctance even to require publication of judgments vindicating the libel plaintiff? Does the Court’s reluctance arise from the respect for property deeply rooted in the common law tradition? In the oral argument in Tornillo, I suggested that the newspapers regarded their pages as their plantation and nothing to which they did not consent could be published there. I called this the plantation concept of the First Amendment. As I recall, Justice Rehnquist responded, “Is that such a naive conception?”

Now, nearly twenty years later, the idea that the media can be treated as the inviolate property of their owners has proven to be a naive conception. Damages can place in jeopardy the property of the publisher. Damages are a form of coercion and a more expensive and intimidating form of coercion than mandatory publication of reply. If damages in libel cases do not violate the First Amendment, then less onerous remedies such as vindication statutes and reply statutes surely should be considered to pass constitutional muster.

VI

The Quest for a Participatory Media

There is a relationship between the absence of a right of reply and the uses to which the law of libel is put. The new interest in vindication statutes and in affording a right of reply to the libel plaintiff illustrates that enactment of legislation to implement these new rights may yet occur.

77. Id. at 531.
78. Id.
79. Id. at 534.
80. Id. at 536.
81. Id.
The right of access and the right of reply have not died. In fact, they have proven more lively than anyone would have dreamed. The stubborn resistance of the establishment media to open up their doors to the public they presumably serve is as rigid as ever. The media have won victory after victory in the years from _Tornillo_ in 1974 to the demise of broadcasting's Fairness Doctrine in 1987.\(^3\) It is all proof of the adage—one more victory like this and we are undone.

The Ross Perot phenomenon, that of leaping over the establishment media—the pundits of _The New York Times_ and _The Washington Post_, and the Sam Donaldsons of commercial television and the Linda Wertheimers of public broadcasting—in order to try to reach the citizenry directly through radio talk shows demonstrates the public's hunger for participatory media.

Indeed, all the 1992 Presidential candidates—George Bush, Bill Clinton, and Ross Perot—have eagerly appeared on talk shows like _Donahue_ and CNN's _Larry King Live_ to submit themselves to questions from the audience. These shows vividly demonstrate the depth of the public's desire to speak with its own voice. The immense audience that was attracted to the Presidential debate format, where ABC television reporter Carol Simpson acted not as questioner of the candidates but as moderator for questions from the voters themselves, further illustrates this phenomenon. In short, the call-in radio and television talk show, like the public access cable channel, demonstrates not only an insistence by the public on a right of reply but also an insistence on a right to speak.

We are witnessing an insistence on creating a nation of speakers. Citizens are no longer willing to be talked at. The Perot phenomenon is more than a passing political nonevent. It is the coming of age of a pervasive mood sweeping through the electorate that a permanently passive role in the opinion process is unacceptable.

The networks and the daily newspapers have succeeded in making their forums their own preserve. No admission tickets are given out as of right. Indeed, any development which might open the process is legally resisted. No expense is spared to keep the viewer and the reader out. Only radio is different, due perhaps to its desperate economic situation. AM radio had been thoroughly routed by FM radio, by VHF television, and by cable television. As a last desperate effort to stay alive, radio sought out its audience and invited it in. Hungry to speak, the public responded. Radio achieved an importance that staggers those who did not even deign to think of it as a competitor.

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In short, the closed house the newspaper press has so successfully built for itself may all be for naught. It may be that the daily newspapers, so jealous of their absolute dominion over their pages, will fall to the telecommunications industry as that industry begins to provide its own information and video services. It remains to be seen whether the telecommunications industry will adhere to the common carrier model or instead will insist that they are publishers, like newspapers, with absolute dominion over their telephone lines.

When I speak of the common carrier model, I refer to a communications entity which is operated on the basis that it is open to all comers. The users of the carrier provide the content that the carrier will transmit. By definition, the users have access to the carrier. In the case of a common carrier like the telephone company, for example, the users provide the content that the carrier will transmit. In the case of a newspaper publisher, the content is not provided by users, but by the publisher and the journalists he employs. In the newspaper context, nondiscriminatory access with respect to the content to be transmitted is considered to be at war with the editorial function. Tornillo illustrates this principle. However, we have not thought of common carriers, such as telephone companies, as editors at all. The access principle of the common carrier is not in conflict with editorial autonomy. Indeed, the latter concept is a stranger to its regulatory tradition. In short, the common carrier model is a paradigm of the access principle. The publisher model, on the other hand, is in essence animated by the editorial principle.\footnote{See generally Ithiel de Sola Pool, Technologies of Freedom 106-07 (1983).}

A common carrier model would implement public access because it is comprised of new video and information services offered by the telephone companies on a nondiscriminatory open-to-all basis. The only requirement for entry would be payment of the rate. An alternative model would be to apply a publisher model to traditional common carriers such as telephone companies which for the first time would be in the business of originating information. In my view, the application of a publisher model to the point of letting telephone company common carriers engaged in disseminating information and video services entirely dictate the composition or content of the traffic would be extremely undesirable. Instead, it would seem wiser to retain the access principle that, after all, is native to the common carrier context.
VII

A Success for Public Participatory Rights in the Media: The Case of Public Access Cable

The public access channels on cable television have successfully implemented the idea of access and reply. Cable television is the one important communications medium where public access exists. In some measure, this is a consequence of the failure of our law to recognize a right of reply. Indeed, courts have recognized the validity of public access requirements in municipal franchise agreements despite First Amendment challenges. These challenges have stressed the absolute editorial dominion of cable operators over the majority of their channels. The ability of cable systems to exclude subject matter not to their liking is relied on as an argument for the recognition of the validity of public access channels on cable.

Those courts that have upheld public access channels against First Amendment challenge have emphasized the abundance of channels on cable as an argument for public access. Usually scarcity has been associated with regulation and obligation. But in cable, abundance has become an argument for obligation. Given the sheer abundance of channels and the editorial dominion that the cable operator has over most of them, the reservation of a few channels for public access purposes is no real editorial intrusion.

Thus, in *Erie Telecommunications, Inc. v. City of Erie*, the court held:

Although the record reveals that the number of cable channels in active use is less than the required minimum capacity, the Court finds it of critical importance that [the cable system] maintains complete editorial control over a substantial majority of its potential cable system.

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86. As one court has held:
Rhode Island requires cable operators only to set aside no more than seven of their 50 or more channels for public access. Cable operators retain complete editorial control over the remaining channels and can use any of these channels to express their own views. Mandatory access regulations thus result in only a minimal intrusion on cable operators' First Amendment activities.

*Berkshire Cablevision*, 571 F. Supp. at 988.

In *Erie Telecommunications*, 659 F. Supp. at 580, the court attributed similar significance to the abundance of channel capacity possessed by the cable operator challenging public access requirements. The court wrote, "[T]he franchise agreement provides that [the cable system] must make available thirteen channels for the public use. These thirteen access channels are to be part of a cable system comprising a minimum capacity of eighty-four downstream channels."

*Id.* at 600-01.

The instant mandatory access regulations produce only a minimal intru-
sion on [the cable system’s] exercise of first amendment rights.\(^8\)

Later the court stated again: “[The cable system] can claim no first
amendment injury as it possesses no editorial control over the dissemina-
tions broadcast on [the cable system’s] dedicated access channels.”\(^9\)

A right of public access to some cable channels has been specifically
justified on the ground that such access is less intrusive with respect to
the editorial function than mandatory response mechanisms like the
Fairness Doctrine. In *Berkshire Cablevision v. Burke*,\(^9\) the court sus-
tained a regulation of a Rhode Island administrative agency requiring
cable operators to designate and reserve at least seven public access cable
channels.\(^2\) These channels were to be reserved for educational and gov-
ernmental purposes. Furthermore, at least one of the channels had to be
dedicated “for use by members of the general public on a first-come, first-
served nondiscriminatory basis and without charge.”\(^3\) In *Berkshire
Cablevision*, the court contrasted access channels with the newspaper
right of reply statute struck down in *Tornillo*\(^4\) and broadcasting’s Fair-
ness Doctrine upheld in *Red Lion Broadcasting v. FCC*,\(^5\) and found that
access presented fewer problems, and fewer intrusions, than reply:\(^6\)

Mandatory access requirements are even less intrusive on First
Amendment freedoms than the fairness doctrine upheld by the
Supreme Court in *Red Lion*. Because the fairness doctrine requires
broadcasters to present both sides of every issue of public importance,
broadcasters may choose to avoid coverage of controversial issues
rather than be forced to devote considerable time to opposition spokes-
men. . . . Mandatory access requirements, by contrast, do not pose
such a threat; they require only that all individuals be given an oppor-
tunity to air their views on a first-come, first-served basis. Access re-
quirements, therefore, further, rather than inhibit, the presentation of
important, controversial issues.\(^7\)

Public access on cable furthers debate and yet is not perceived as a
threat to editorial autonomy. Why is a right of reply seen as more men-
acing? The aversion to a right of reply in our law appears to be based on
a policy to keep editorial autonomy as unrestrained as possible. Where
public access channels on cable have been challenged and the public ac-
cess requirements upheld, the courts have essentially responded to the

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8. Id. at 601.
9. Id.
90. Id.
92. Id. at 998.
93. Id. at 979.
97. Id.
First Amendment objections of the cable operators by saying, "Look, you have so much channel capacity, allowing the dedication of a few channels to the community will clearly further the First Amendment interest in debate, and yet such dedication in no way limits anything you might want to say."

In the case of a right of reply to the press or broadcasters, however, the argument appears to be that there is a real clash between editorial autonomy and public debate. Where mandatory reply has been sought, the media and the courts have chosen editorial autonomy over the public interest in promoting debate. In my view, this has been a misguided choice. It has not benefitted the established media. The newspaper and broadcasting industries are still important but no longer all-powerful. These media are not only threatened by the mighty new technology of cable, but also affected by the emerging technologies of satellite transmission, digital radio and television, and the foreseeable entry into video services of the regional telephone companies.98

The established media are also threatened by public mistrust. The expensive legal effort of the established media to be free of legal obligation in the years since the New York Times case has been pushed with relentless and undeviating absolutism. This has bred in the public a feeling that the established media are closed to them. It is not too late for the established media to take steps toward opening their houses to the public they serve. For example, when proposals are made for a right of a reply in lieu of damages, reflexive opposition should be abandoned in favor of thoughtful support.99

A right of reply is important. A right of access to public channels on cable cannot meet all the needs that an effective right of reply can serve. Public access meets different needs. It gives the members of the public the choice to speak to each other without an interpreter and without a mediator. A right of reply provides the opportunity to respond in the same forum and before the same audience where the attack was originally made. Such a requirement is elementary fair play. A right of reply is an indispensable condition for full, fair, and free debate.

98. For an account of the joint effort by the newspaper industry, the cable industry, and others to keep the Baby Bells—the regional telephone companies—out of the business of providing information services, see Stuart Taylor, Jr., Fight for the Future, AM. LAW., Apr. 1992, at 50.

99. Professor David Anderson suggests the media bar may also be an obstacle to the recognition of new remedies for libel. See Anderson, Is Libel Law Worth Reforming?, supra note 82, at 490-91.