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The New York Times Rule--The Awakening Giant of First Amendment Protections

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THE NEW YORK TIMES RULE—THE AWAKENING GIANT OF FIRST AMENDMENT PROTECTIONS

Historical Background

The founders of our country believed that freedom of the press was one of the cornerstones upon which our democratic form of government should be based. Few principles have been defended with such ardor and prosaic vigor, as evidenced by one particularly articulate statement of Chief Justice John Marshall:

> Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverance and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented, but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied. . . .[1]

Recent United States Supreme Court decisions reveal that the principle has not only remained steadfast, but has also grown stronger, perhaps stronger than its proponents anticipated. This expansion may be attributed not so much to a conscious extension of the freedom as to a redefining of its scope to conform to the practical realities of a changing society.

A defamatory statement is usually defined as one which tends to hold a party up to hatred, contempt or ridicule, or to cause him to be avoided by others.[2] The forerunners of the modern tort of defamation were based upon the premise that one's good name and reputation are of sufficient value to be afforded legal protection.[3] At first, injuries of this nature were under the jurisdiction of the seignorial or local manor court, but as this court fell into disrepute, the claim

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[1] AMERICAN STATE PAPERS, 2 FOREIGN RELATIONS 196 (U.S. Cong. 1832). This was Chief Justice Marshall's reply to Tallyrand's complaints concerning American newspapers. This same statement was quoted with approval by James Madison, 6 WRITINGS OF JAMES MADISON, 1790-1802, at 336 (G. Hunt ed. 1906).

[2] W. PROSSER, LAW OF TORTS § 111, at 739 (4th ed. 1971) [hereinafter cited as PROSSER]. *See generally* Kemmerle v. New York Evening Journal, 186 N.E. 287 (N.Y. 1933); Lewis v. Williams, 89 S.E. 647 (S.C. 1916).

[3] *See* 1 ENGLISH HISTORICAL DOCUMENTS 378 (Whitebook ed. 1955), citing to a forerunner of defamation in the Laws of Alfred the Great, Law No. 32 (circa 880 A.D.).

came within the purview of the ecclesiastical courts,[4] which regarded such defamatory actions as a sin and imposed a penance upon the defaming sinner. With the decline of the ecclesiastical courts the claim for defamation drifted into the common law courts[5] where it was received with disfavor by many judges, who considered defamation to be merely a violation of moral ethics. However, as English civilization advanced, this common law cause of action developed into a peaceful alternative to the self-help remedies of dueling and revenge which were often resorted to by certain classes of society.[6] This development was further strengthened by the emergence of a mercantile class whose members had little inclination to resort to arms to defend their good names and reputations.[7] During the early seventeenth century, the infamous Court of Star Chamber was instrumental in punishing the crime of seditious libel;[8] however, when this court was abolished, jurisdiction over defamation actions became vested absolutely in the common law courts.[9]

With the settlement of the American colonies the English tort of defamation became implanted in our legal system. Although this tort in many instances appears to directly affront the constitutional guarantees of freedom of speech and press, it has survived for over two hundred years. Attempts to reconcile these seemingly conflicting principles have been frought with difficulties and often have been the subject of tempestuous dispute.[10] The resolution of this conflict can be achieved only by counterbalancing the belief that freedom of speech and press is a basic tenet of a well informed democracy with the realization that truly defamatory statements can so injure a person as to require legal redress.

The validity of the common law tort of defamation has been chal-

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[4] For extensive treatment of the historical development of the law of defamation see Donnelly, *History of Defamation*, 1949 WISC. L. REV. 99; Lovell, *The Reception of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

[5] Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 550 (1903).

[6] Even though this remedy at law existed, the rich and powerful often favored direct action by resorting to arms. Lovell, *The Reception of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1052 (1962).

[7] The invention of the printing press and the development of the mercantile class have been suggested as the major reasons for the increased popularity of defamation actions. *Id.* at 1058.

[8] During this period the absolute monarchy began to realize the potential of the printing press, and these prosecutions flourished.

[9] Veeder, *supra* note 5, at 547.

[10] *See generally* Green, *Slander and Libel*, 6 AM. L. REV. 592 (1872); Leflar, *The Free-ness of Free Speech*, 15 VAND. L. REV. 1073 (1962); Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

lenged on numerous occasions, but the United States Supreme Court has specifically upheld its constitutionality.[11] One rationale adopted by the Court was that the first amendment was intended only to prohibit future abridgement of the freedoms of speech and press while impliedly sanctioning the then existing common law actions as exceptions to the constitutional proscription.[12]

Until 1964 the tort of defamation was, with some exceptions, within the realm of state law.[13] During this period a majority of the states held that misstatements based upon erroneous facts submitted the conveyor of these statements to liability;[14] the minority view imposed no liability if the person making the erroneous statement had acted in good faith.[15] Under either rule, actions for defamation were subject to the defenses of truth, absolute privilege and conditional privilege. Absolute privilege was applicable to statements made in judicial and legislative proceedings, executive communications, statements made with the consent of the party asserting defamation, and communications between husband and wife. Conditional privilege extended to statements protecting one's own interest or the interests of others, communications to those acting in the public interest, and fair comment upon matters of public concern.[16] The last of these areas of conditional privilege, fair comment on matters of public concern, is of particular importance and will be dealt with extensively in the discussion that follows.

With the advent of *New York Times Co. v. Sullivan*,[17] the legal concept of freedom of the press in juxtaposition with the tort of defamation changed substantially.[18] The purpose of this note is to

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[11] Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

[12] *See* Robertson v. Baldwin, 165 U.S. 275, 281 (1897). Justice Brown, in delivering the opinion of the court, discussed this principle of constitutional interpretation.

[13] *See, e.g.*, Espionage Act of 1917, ch. 75, 40 Stat. 553 (May 16, 1918); Sedition Act of 1798, ch. IXXIV, 1 Stat. 596 (July 14, 1798). Although these acts were only temporarily in force, they did have certain prohibitions against what resembled national libel.

[14] Burt v. Advertiser Co., 28 N.E. 1 (Mass. 1891) is an early case typifying this approach. *See* Annot., 110 A.L.R. 412 (1937) and Annot., 150 A.L.R. 358 (1944), listing 27 states which follow this majority view and 13 which follow the minority view. *See also* Noel, *Defamation of Public Officials and Candidates*, 49 COLUM. L. REV. 875, 896 (1949).

[15] The leading decision articulating this view is Coleman v. MacLellan, 98 P. 281 (Kan. 1908). *See also* Phoenix Newspapers v. Choisser, 312 P.2d 150, 154 (Ariz. 1957); Lawrence v. Fox, 97 N.W.2d 719, 725 (Mich. 1959); Ponder v. Cobb, 126 S.E.2d 67, 80 (N.C. 1962).

[16] *See generally* PROSSER, §§ 114-16; RESTATEMENT OF TORTS §§ 592, 613 (1938).

[17] 376 U.S. 254 (1964).

[18] Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267. In this article the author expresses the view that *New York Times* has greatly changed the first amendment area. *Id.* at 269.

analyze the scope of the change, the reasons for it, and the results stemming therefrom.

The Break with Traditional Notions

When the Supreme Court handed down its decision in *New York Times Co. v. Sullivan*,[19] the legal world was stunned. This holding imposed a federal rule which greatly limited liability under certain circumstances upon an area of law which had been under state jurisdiction since the beginnings of this country. The decision was likened to a "bombshell"[20] and called a "happy revolution of free speech doctrine."[21] One legal writer hailed it as "the greatest victory for tort defendants in the history of modern law."[22] Before dealing with subsequent extensions of the *New York Times* rule, it is necessary to analyze the case in depth to isolate some of the reasons for the Court's startling departure from tradition. Once these reasons can be discerned, later cases which extended the rule can be properly analyzed.[23]

The suit was brought against the *New York Times* and others for defamation by the publication of a full page advertisement entitled "Heed Their Rising Voices,"[24] the purpose of which was to raise funds for the defense of Dr. Martin Luther King. Most of the advertisement was editorial in nature and documented the mistreatment which Dr. King and others had suffered at the hands of police during a protest in Montgomery, Alabama. The Police Commissioner of Montgomery brought suit for libel against the *New York Times* and four sponsors of the advertisement who were amenable to service in Alabama.[25] Alabama followed the majority rule which allowed defamatory opinions as fair comment only if these opinions were based upon true facts.[26] Since at least eight statements in the advertisement

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[19] 376 U.S. 254 (1964).

[20] PROSSER § 118 at 819.

[21] Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 205.

[22] PROSSER, § 118 at 819.

[23] For other analysis see Barney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191; Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1967); Comment, *Defamation of Public Officials—Coleman v. MacLellan Revisited*, 13 KAN. L. REV. 399 (1965); Comment, *New York Times Co. v. Sullivan—The Scope of a Privilege*, 51 VA. L. REV. 106 (1965); Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18 VAND. L. REV. 1429 (1967).

[24] A reproduction of this advertisement is found in 376 U.S. 254, appendix I, at 292.

[25] Facts are taken from the Court's Opinion. New York Times Co. v. Sullivan, 376 U.S. 254, 256-64 (1964).

[26] *See* notes 14-15 and accompanying text, *supra.*

were untrue or at least highly inaccurate,[27] the trial court held that the article was defamatory as a matter of law. The jury returned a verdict for the plaintiff in the amount of $500,000, and the Alabama Supreme Court affirmed.[28] The United States Supreme Court unanimously reversed with the majority opinion of six justices holding that the Alabama law was constitutionally deficient in failing to protect first amendment rights as applied to the states through the fourteenth amendment. Specifically, the law failed to provide a qualified privilege for honest misstatements of facts concerning public officials where no actual malice could be shown.[29] The Court defined actual malice as "knowledge that it was false or with reckless disregard of whether it was false or not."[30] This essentially was the test which had been applied by the minority of the states prior to *New York Times*.[31]

Given only the bare facts in the case it is difficult to understand why the Supreme Court departed from accepted traditions to hold the first amendment protections were applicable to defamation. Decisions with such broad impact are not made without compelling reasons,[32] but to identify these reasons it is necessary to analyze not only the facts of the case but also the social issues that surrounded it.

One important peripheral consideration is that the case was intimately connected with the civil rights movement, arising at a time when our country was embroiled in bitter controversy. If the Alabama judgment had been allowed to stand, it requires little imagination to predict its ramifications upon the civil rights movement.[33] Editorials and paid advertisements which contained slight inaccuracies or innocent misstatements could have been construed to be outside the privilege of fair comment, thereby subjecting publishers and contributors to a libel action. This would have been disastrous during a

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[27] At least one author has asserted that although these eight statements were "inaccurate," there was at least a core of truth to them and that such errors were merely those common to hastily drafted advertisements. Kalven, *supra* note 21, at 199.

[28] New York Times Co. v. Sullivan, 144 So. 2d 25 (Ala. 1962), rev'd 376 U.S. 254 (1964).

[29] 376 U.S. at 279-83.

[30] *Id.* t 280.

[31] *See supra* note 15.

[32] It has been suggested that this constitutes a direct departure from past Constitutional development, surmounting rather than interpreting the Constitution. The Court could have used other judicial tools to overturn this verdict, by holding that such a huge judgment was a "patent miscarriage of justice" or that relationship between the verdict and the evidence was so nebulous as to constitute denial of due process. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 587 (1964).

[33] The Court recognizes this when stating that the advertisement is "an expression of grievance and protest on one of the major public issues of our time." New York Time Co. v. Sullivan, 376 U.S. 254, 271 (1964).

critical period when the country needed more open debate and less violence.

The size of the damage award in this case is another factor which may have influenced the Court's decision. Although the $500,000 judgment was large, it would not have economically jeopardized the *New York Times*. However, the sub-issue in this case was whether the newspaper could survive a series of such judgments,[34] since lawsuits relating to the same advertisement had been filed by four other Alabama officials. One of these lawsuits had resulted in an identical $500,000 verdict, and the remaining three were seeking a total of $2,000,000 in damages. Thus, the defendant newspaper could have been liable for three million dollars, a very oppressive amount in light of the fact that only 394 copies of the relevant edition were circulated in Alabama only 35 of which were disseminated in and around the Montgomery area.[35]

At common law, freedom of the press meant the absence of restraints prior to publication and had no application to liability arising after publication.[36] The Court specifically rejected this view in *New York Times* by recognizing the inhibiting effect of damage awards which can be so formidable as to be "a form of regulation that creates hazards to protected freedoms, markedly greater than those that attend reliance upon the criminal law."[37] The verdict seemed odious to the Court not only because of its amount and potential inhibiting effect but also because under the common law of libel, unlike other torts, general damages are presumed and need not be proven.[38]

The third issue of concern for the Court was the fact that while truth is a defense in libel actions, the burden of proving truth is upon the defendant. The Court reasoned that placing such a burden upon one who criticizes a public official could result in a significant amount of self-censorship:

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits of the variety of public debate.[39]

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[34] *Id.* at 278, n.18.
[35] *Id.* at 260 n.3.
[36] *See* 4 BLACKSTONE, COMMENTARIES, *151-53.
[37] 376 U.S. at 278.
[38] PROSSER, § 112, at 754.
[39] 376 U.S. at 279.

In considering these dangers of self-censorship the Court exhibited special commitment to the first amendment freedoms by piercing legal theory and scrutinizing the practical ramifications of defamation actions. The Court, in an apparent attempt to soothe any who might be uneasy about its holding, bolstered its decision by stating that the case was analogous to *Barr v. Matteo*,[40] wherein it had held that a federal official was absolutely privileged with respect to any statement made "within the outer perimeter" of his duties.[41] Therefore, reasoned the Court, the holding in *New York Times* merely gives the private citizen a reciprocal privilege when criticizing public officials.[42]

The Supreme Court reached its decision in *New York Times*[43] only after considering all of the above factors: the inhibiting effect of large money judgments; the burden put upon the defendant of having to prove the truth of factual allegations; the inherent danger of self-censorship; and the connection of the case to the civil rights movement. In enunciating the rule that public officials could not recover for defamatory comments about their official conduct absent a showing of actual malice, it was necessary for the Court to break with the past in order to protect first amendment rights and the spirit of robust debate. However, in the aftermath of the case there were many unanswered questions,[44] the most crucial of which was: Did the *New York Times* rule define the outer limits within which the Court would protect first amendment freedoms, or did it merely establish a starting point for further expansion?

Times Keeps on Ticking

An examination of the major defamation cases reviewed by the Supreme Court since *New York Times* reveals that the rule has not been limited to a particular fact pattern. It is vitally alive and has been substantially expanded; indeed, the *New York Times* rule may become a cornerstone of our modern first amendment freedoms.

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[40] 360 U.S. 564 (1959).

[41] *Id.* at 575.

[42] It should be noted that although the Court says reciprocal privilege, the privilege in *Barr* is much greater because it is not subject to "actual malice." The Court in a later case states that this dicta was in no way intended to link the *New York Times* rule with that of official privilege. Rosenblatt v. Baer, 383 U.S. 75, 85 n.10 (1966).

[43] The Court clearly states that it has considered this case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[44] One glaring omission was the Court's failure to define "public official." *Id.* at 283 n.23. In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court states that public officials refers to: "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85.

Whether the Supreme Court anticipated this extension is unclear, but it is interesting to note that in the *New York Times* opinion the Court stated that first amendment freedoms must have sufficient "breathing space" if they are to survive.[45] Perhaps this term reflects what the Court in later opinions articulated: that as our society changes, our perceptions of certain freedoms and the protections which they afford us must also change to prevent the attrition of those freedoms. In a society such as ours, which daily grows more complex, a real risk exists that certain traditional aspects of the law of defamation might extinguish freedom of the press.[46] This is especially true if we do not continually reexamine the freedom with regard to our society, the size and scope of the communication media, and the methods used for dissemination of information.

In tracing the expansion of the *New York Times* rule, the first case to be considered is *Time, Inc. v. Hill,*[47] which raises some analytical problems because it involved a right of privacy claim under a New York statute rather than a libel action. Although the Court did not directly equate the two cases, *New York Times* undeniably influenced the decision in *Hill.* The defendant, *Life* magazine, published an account of a play, giving the impression that it depicted the real life experiences of the Hill family. The plaintiff brought suit under a New York statute which provided a cause of action to one whose name was used for purposes of trade or advertising without his consent.[48] *Life* countered that the article was of general interest and published in good faith. At the original trial Hill was awarded both compensatory and punitive damages; liability was sustained on appeal, but a new trial was ordered on the issue of damages. At the second trial, the plaintiff was awarded only compensatory damages, and the New York Court of Appeals affirmed.

In reversing the New York Court, the United States Supreme Court first held that when there is sufficient public interest or newsworthiness in the subject matter of a publication, it may be removed from exclusive state scrutiny and first amendment protections are applied.[49] Based upon this rationale, the Court held that in this case constitutional protections prohibited the application of the New York statute and that redress for false reports of a matter of public

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[45] 376 U.S. at 272.

[46] *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-64 (1967) (Warren, C. J., concurring).

[47] 385 U.S. 374 (1966).

[48] N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1948). For the New York interpretation of this law see Spahn v. Julian Messner, Inc., 260 N.Y.S.2d 451 (1965); *aff'd* 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966).

[49] Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1966).

interest can only be obtained upon a showing of knowing falsity or reckless disregard of the truth.[50] In *Hill* the focus was not on the status of the individual, as in *New York Times,* because the decisive factor seems to have been the news value of the subject matter of the publication. Once again the Court showed great concern for protecting first amendment freedoms:

> [S]anctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees.[51]

In *Hill* the Court arrived at a *New York Times* result without specifically relying on that case as precedent.[52] As previously mentioned, this case does not fit easily into the pattern established by *New York Times* and the later defamation cases. It is clearly within the chain of development, but it will not fit into an analytical niche. The most plausible suggestion for this result is that the case involved a right of privacy action brought by a plaintiff who was not within the public domain. There would seem to have been many hurdles for the Supreme Court to overcome in order to hold *New York Times* applicable to these facts.[53]

The fact situations in the next defamation cases before the Court, *Curtis Publishing Company v. Butts* and *Associated Press v. Walker,*[54] more closely conformed to the *New York Times* context. In *Butts,* the athletic director of the University of Georgia brought suit against the *Saturday Evening Post* for an article which stated that he had conspired with Paul Bryant of the University of Alabama to fix a football game between the two schools. The story was based upon an alleged telephone conversation during which Butts purportedly gave play secrets to Bryant.[55] Butts brought suit and was awarded $60,000 compensatory damages and $3,000,000 punitive damages; however, on remittur the punitive damages were reduced to $400,000.[56] This judgment was upheld by the United States Supreme Court.[57] In *Walker,* retired General Edwin Walker sued the Associated Press over a wire release which stated that during a disruption on the University of Mississippi campus, General Walker had assumed command of a

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[50] *Id.* at 390.
[51] *Id.* at 389.
[52] The Court specifically states that its holding is not a blind application of *New York Times. Id.* at 390.
[53] Kalven, *supra* note 18, at 280.
[54] Decided together, 388 U.S. 130 (1967).
[55] Facts are taken from the Court's opinion. *Id.* at 135-40.
[56] The judgment was affirmed on appeal. Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965).
[57] 388 U.S. at 161.

crowd and personally led a charge against federal marshals. General Walker received a verdict of $500,000 compensatory damages and $300,000 punitive damages, but the trial judge struck the punitive damages on the grounds that there was no evidence of malice. The Texas Supreme Court affirmed the judgment,[58] but the United States Supreme Court reversed and ordered a judgment for the defendant.[59]

Clearly, in these cases the Court could not classify either plaintiff as a public official within the doctrine of *New York Times*. Butts was paid not by the University but by a private organization, and General Walker had retired from the service. For this reason the trial courts in these cases had refused to find *New York Times* applicable. The Supreme Court did find that both parties were *public figures*, stating that Butts may have acquired "the status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy."[60] Once this shifting of status characterization is made, it would seem logical for the Court to apply the *New York Times* test. However, in Butts, Justice Harlan, who delivered the Court's opinion, compromised for a type of "reasonable man" test for liability. Apparently believing that the facts of this case did not warrant application of the stringent *New York Times* standard, he proposed a test which was more lenient toward plaintiffs seeking recovery:

> [T]hat a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[61]

This new test is somewhat misleading because Justice Harlan spoke for only a plurality of the Court: Justices Clark, Stewart, Fortas and himself. Chief Justice Warren and Justices Brennan and White believed that if any test was to be utilized, it should be the "actual malice" test of *New York Times*, while Justices Black and Douglas saw no valid reason for evolving another constitutional rule.[62] Chief

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[58] Associated Press v. Walker, 393 S.W.2d 671 (Tex. 1965).
[59] 388 U.S. at 162.
[60] *Id.* at 155.
[61] *Id.*
[62] It should be noted that Justices Black and Douglas, concurring in *Walker* and dissenting in *Butts*, still maintain that the first amendment protects the press absolutely from libel prosecution. Admittedly if the majority of the Court is going to evolve a test, these Justices would prefer the more stringent requirements of *New York Times*. *See infra* note 112.
Justice Black berates his brethren when he states that the Court is making a

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Justice Warren, concurring in Butts, used the "actual malice" test to give the needed majority. In *Walker,* all nine Justices voted to reverse, believing that the facts of this case failed to meet either the "actual malice" test or the "reasonable man" test.

One may reasonably wonder why opposite results were reached in cases with analogous fact patterns involving gross factual errors which resulted in injury to the plaintiffs' reputation. From the opinions of the Justices affirming *Butts,* it is obvious that to them there was a crucial distinction. In *Butts,* although the article had been prepared over a long period of time, little effort was made to authenticate the facts upon which it was based. Moreover, the Court recognized that the *Saturday Evening Post* was seeking to increase sales by embarking upon a policy of "sophisticated muckraking."[63] In view of these facts, a finding of unreasonable conduct could be supported. The facts in *Walker* militated toward an opposite finding. The reporter who filed the story was supposedly competent and trustworthy, and the nature of the report was "hot news;"[64] so there was little time to check its veracity before release. Since the primary function of a wire service such as the Associated Press is rapid dissemination of news events, the facts of *Walker* did not represent an unreasonable departure from good reporting practices.

At least one writer after *Butts* and *Walker* has commented that the Court did not find *Time, Inc. v. Hill* controlling in those cases.[65] *Hill,* a right of privacy action, had focused upon the subject matter of the suit and its newsworthiness, declaring that liability should be imposed only when "actual malice" could be shown. Clearly an analogy could have been made to *Hill* although *Butts* and *Walker* were libel suits,[66] since the key issue in all three cases was the extent to which the Court will extend first amendment protections to safeguard the press from liability based upon factually erroneous reporting. Perhaps the broad scope of the newsworthiness test announced in *Hill* was difficult for the Court to apply, which necessitated a return to classifying the privilege in light of the status of the injured plaintiff, rather than according to the subject matter of the publication. Regardless of the reason for the Court's shift, it is apparent from the

(Footnote continued from preceding page)
quagmire of libel law just as it has obscenity law. "No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's ruling." 388 U.S. at 171 (Black, J. concurring in *Walker* and dissenting in *Butts*).

[63] 388 U.S. at 158.

[64] *Id.*

[65] Kalven, *supra* note 18, at 286.

[66] *See* text accompanying notes 45-52 *supra.*

rationale of the opinion expressed in *Butts* and *Walker* that the underlying reasons for the *New York Times* decision were considered by a majority of the Court.

The foregoing cases evidence the gradual development of an expanded protection for the press under the first amendment and a concomitant increase in restrictions upon the application of traditional libel concepts. In *Butts*, both the plurality "reasonable man" test and the concurring Justice's adherance to the *New York Times* rule were attempts to ease the tension between first amendment freedoms and individual rights by giving sufficient "breathing space" to the press.[67] The lengths to which the Court has been willing to go to accomplish this goal can only be ascertained by analyzing subsequent case holdings.

The Supreme Court during the 1971 term again considered the conflict between common law libel and first amendment freedoms. In three cases handed down together—*Monitor Patriot Co. v. Roy*,[68] *Ocala Star-Banner v. Damron*,[69] and *Time, Inc. v. Pape*[70]—the Court extended the *New York Times* doctrine as a bulwark between these two competing forces. The extension of the doctrine was not surprising, since all three plaintiffs were clearly public officials, but the holdings of the Court were of sufficient breadth to be of significant importance.

In *Monitor Patriot Co. v. Roy*,[71] the plaintiff was a candidate in a primary election for the United States Senate. Several days before the election, the defendant newspaper carried a syndicated column in which plaintiff was referred to as a "former small-time bootlegger."[72] Plaintiff lost in his bid for the primary nomination and subsequently brought suit. The information complained of had been given to columnist Drew Pearson by one of his sources. Investigation proved that the report was totally false and that it actually referred to the alleged activities of plaintiff's brother during prohibition. The trial court correctly instructed the jury that the plaintiff was a public official within the definition established by the United States Supreme Court. However, the court further instructed the jury that if they found the libel to concern the private sector of plaintiff's life, then the "actual malice" test of *New York Times* was not applicable and only the traditional defenses of truth or conditional privilege would protect

[67] 388 U.S. at 151.
[68] 401 U.S. 265 (1971).
[69] 401 U.S. 295 (1971).
[70] 401 U.S. 279 (1971).
[71] 401 U.S. 265 (1971).
[72] Facts are taken from Court's opinion. *Id.* at 266-70.

the defendant from liability. The jury determined that the libel related not to official conduct but to the plaintiff's private affairs and found the defendant liable. The New Hampshire Supreme Court upheld the trial judge's instructions and affirmed the judgment.[73] The United States Supreme Court unanimously voted to reverse and remand, stating that the jury instructions were improper. The Court held *New York Times* applicable to candidates seeking public office and declared that the privilege delineated therein encompassed anything pertaining to the candidate's fitness to hold that office.[74] Regarding the specific allegation of libel then before it, the Court held that

> as a matter of constitutional law . . . a charge of criminal conduct no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the . . . rule of *New York Times Co. v. Sullivan.*[75]

This is a considerable expansion of the concept of "official conduct" as enunciated in *New York Times*[76] and clearly indicates the Court's determination that the ordinary definition of those terms is insufficient to protect first amendment guarantees.[77] Moreover, the Court concluded that adherence to traditional tort concepts in a political campaign might severely threaten freedom of speech and freedom of the press.[78] The direct consequence of this decision is that one who enters the political arena must be prepared to endure severe and possibly erroneous attacks[79] which will give rise to liability only upon a showing of actual malice.

The second case, *Ocala Star-Banner v. Damron,*[80] presented a situation remarkably similar to *Monitor Patriot Co.* Plaintff, a city mayor seeking election to another public office, was both a public official and a candidate for public office. Defendant newspaper published an article which stated that plaintiff was then under indictment for perjury in federal court, when in fact it was his brother who was so charged. The newspaper printed retractions, but the plaintiff lost

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[73] Roy v. Monitor Patriot Co., 254 A.2d 832 (N.H. 1969).

[74] Monitor Patriot Co. v. Roy, 401 U.S. 265, 276 (1971); Cf. Smith v. California, 361 U.S. 147 (1959); Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

[75] 401 U.S. at 277.

[76] This broad principle could have some very shocking results, in light of many state laws which have fallen into disuse but are still technically crimes, *e.g.*, statutes prohibiting certain consensual acts between husband and wife. *See* Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis,* 70 MICH. L. REV. 1547, 1552 (1970).

[77] 401 U.S. at 274-75.

[78] *Id.*

[79] *See* Noel, *Defamation of Public Officers and Candidates,* 49 COLUM. L. REV. 875 (1949).

[80] 401 U.S. 295 (1971).

the election and subsequently brought suit.[81] The trial court ruled that the publication was libelous *per se* and instructed the jury to determine damages. It further ruled that *New York Times* was not applicable because the erroneous publication was not related to plaintiff's status as a public official or to his official conduct. The jury awarded damages, and the Florida Supreme Court refused to review the judgment.[82] On appeal, the United States Supreme Court unanimously reversed and remanded, the majority holding that the *New York Times* test was applicable.[83] The Court made it clear that a plaintiff comes under this rule whether he is characterized as a public official or as a candidate for public office and that a criminal charge of perjury is always relevant under the broad definition of official conduct enunciated in *Monitor Patriot Co.*[84]

The third case of this trilogy, *Time, Inc. v. Pape,*[85] involved slanting of facts in a second-hand report rather than a blatant case of reporting erroneous facts. The original report, issued by the United States Commission on Civil Rights, had cited a Chicago case of police brutality as involving a typical description of alleged police misconduct.[86] The description contained in the report was given by the party alleging misconduct and was not the finding of the Commission. The defendant, *Time* magazine, restated these allegations of brutality as actual fact in an article based upon the Commission's report. Deputy Chief of Detectives Pape, one of the original defendants in a civil rights suit[87] stemming from the alleged misconduct, filed a libel suit against *Time,*[88] which arrived at the Supreme Court only after having been reversed three times by the Seventh Circuit Court of Appeals. At the first trial the district court granted a motion for dismissal on the grounds that the "fair comment" privilege of Illinois governed and precluded liability. The Court of Appeals for the Seventh Circuit reversed.[89] During this period *New York Times* was decided, so at the second trial the district court granted summary judgment based upon *New York Times,* but the Court of Appeals again reversed, holding that there must be a trial to determine whether defendant's conduct constituted "actual malice."[90] On remand, plaintiff presented his case, which included testimony by a *Time*

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81 Facts are taken from Court's opinion. *Id.* at 295-99.
82 Ocala Star-Banner v. Damron, 231 So. 2d 822 (Fla. 1970).
83 401 U.S. at 300.
84 *Id.*
85 401 U.S. 279 (1971).
86 *Justice; Search, Seizure and Violence: Chicago, 1958* in 5 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 20-21 (1961).
87 Monroe v. Pape, 365 U.S. 167 (1961).
88 Facts are taken from Court's opinion. *Id.* at 280-83.
89 Pape v. Time, Inc., 318 F.2d 652 (7th Cir. 1963).

researcher that she was conscious of the omission of the word "alleged" at the time of publication but nonetheless believed the article presented the truth. At close of plaintiff's case the district court ordered a directed verdict for the defendant,[91] but again the Seventh Circuit reversed, stating that actual malice was a jury issue.[92] The United States Supreme Court held that defendant's conduct in failing to state that the facts set forth in the article were mere allegations was not sufficient falsification to constitute a jury issue.[93]

The issue in *Pape,* unlike its two companions, was not whether plaintiff was a public official or whether the publication concerned official conduct. Plaintiff's sole contention was that defendant's knowing ommission of the word "alleged" constituted an issue as to actual malice—that is, "knowing falsity or reckless disregard of the truth."[94] The Court, although careful to recognize the problems that can arise in this type of second-hand reporting, especially when the original report relied upon may be a combination of facts, beliefs, and attitudes,[95] rejected the plaintiff's argument and concluded that: "Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities."[96] The Court cautioned that nothing in its opinion was intended to mean that the word "alleged" had become superfluous,[97] although the validity of this statement is questionable in light of the result of the case. Perhaps the Court was contemplating the conscious omission of that adjective when commenting that a less ambiguous report might give rise to a question of actual malice.

It is interesting to note that in none of the above three cases did the Court refer to whether the publications attacked as libelous were "hot news" or whether the misstatements were such that the errors could easily have been detected by reasonable investigation incident to normal standards of publication. In all three instances the plaintiffs were public officials or candidates and thus within the scope of *New York Times;* either the Court was adhering to a delineation between public figures and public officials or else this demonstrates the weakness of the plurality test in *Butts* and *Walker* discussed above.

As a result of these cases, libel actions are available to public

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[90] Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965).
[91] Pape v. Time, Inc. 294 F. Supp. 1087 (N.D. Ill. 1969).
[92] Pape v. Time, Inc., 419 F.2d 980 (7th Cir. 1969).
[93] Time, Inc. v. Pape, 401 U.S. 279 (1971).
[94] *Id.* at 283-84.
[95] *Id.* at 286.
[96] *Id.* at 290.
[97] *Id.* at 292.

officials or candidates for public office only when erroneous publications are blatant and malicious, or, as in *Butts*, are so heedless of care as to convey a reckless disregard for the truth. This restriction of libel has been molded by the Court to protect those who seek to exercise first amendment freedoms from prosecution for non-intentional error.

Although the cases expanded the *New York Times* rule, they do not resolve a crucial question: What influence does freedom of the press have on the rights of a private individual who holds no public office, who is not seeking election and who has not achieved any substantial degree of notoriety? This question was considered by the Supreme Court in *Rosenbloom v. Metromedia, Inc.*[98] wherein the spectrum of *New York Times* was enlarged to cover the private individual. In *Rosenbloom,* plaintiff, a distributor of nudist magazines, was arrested on obscenity charges while making delivery to a newsstand. Three days after plaintiff's arrest his home and warehouse were searched pursuant to a valid search warrant, and additional magazines were seized. After he was arrested a second time, he sought injunctive relief in federal court to stop further police interference with his business.

Rosenbloom was eventually acquitted of all obscenity charges and brought suit in federal court under Pennsylvania libel law[99] against a radio station owned by Metromedia, Inc. He sought relief on two grounds: (1) that the radio station, in reporting his second arrest and the confiscation of his books, had said that the books were obscene rather than "allegedly or reportedly" obscene; and (2) that in commenting on his federal injunctive suit, the station, though not mentioning plaintiff by name, had stated that the action was brought to get police to lay off "the smut literature racket" and had referred to those bringing the suit as "girlie book peddlers."[100] He was awarded $25,000 general damages and $750,000 punitive damages; however, the punitive damages were reduced on remittur to $250,000.[101] The Court of Appeals reversed on the grounds that *New York Times* was applicable and that plaintiff failed to meet the prescribed standard of showing actual malice.[102] Rosenbloom appealed the decision on the narrow grounds that he was not a public official or public figure and that therefore the *New York Times* standard did not apply to his case.[103] He argued that there must be a distinction between private

[98] 403 U.S. 29 (1971).
[99] PA. STAT. ANN. tit. 12, § 1584a (Supp. 1971).
[100] Facts are taken from Court's opinion. 403 U.S. at 36-42.
[101] Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737 (E.D. Pa. 1968).
[102] Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3rd Cir. 1969).
[103] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 40-41 (1971).

and public figures because private individuals do not have the ready access to the media necessary to refute libelous statements made about them.[104] The Court rejected this argument on the grounds that the chance to reply hinges not upon the status of the individual, but upon the "unpredictable event of the media's continuing interest."[105] Petitioner next argued that this public/private distinction was necessary to give full protection to the underlying values of libel law—the desire for privacy and the protection of one's good name and reputation.[106] The Court, though recognizing the importance of protecting these values, stated that even such protected interests must sometimes yield to other important social goals.[107] First amendment rights, reasoned the Court, are sufficiently important to outweigh the underlying values of traditional libel laws. The Court further concluded that the reasonable care standard advanced by the petitioner would be too elusive in the hands of a jury to give requisite "breathing space" to first amendment freedoms.[108] Thus, the stringent "actual malice" test was recognized as the only sufficient method of protecting these freedoms. Therefore the determinative factor in applying *New York Times* is not the status of the plaintiff as a public official, public candidate, public figure, or private citizen, but rather whether the defamatory utterances related to the complaining party's involvement in an event of public or general concern.[109]

This shifting of emphasis from the status of a plaintiff under a *New York Times* disability to the series of events which create the disability is a functionally sound approach. Conceivably, the Court could have held that Rosenbloom was a public figure because he was in the news, but this would have made anyone in the news a public figure and would have rendered the whole classification system meaningless.[110] In adopting the new approach the Court seems to have relied on two basic premises. First, in our complex modern society and age of mass media there is seldom a distinct delineation between the public and private sectors. On the contrary, there is an expanding gray area in that whenever a person becomes involved in a truly

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[104] *Id.* at 45.
[105] *Id.* at 46.
[106] *Id.* at 45.
[107] *Id.* at 50.
[108] *Id.*
[109] *Id.* at 44. The test is in essence that which the Court had announced in Time, Inc. v. Hill, 385 U.S. 374 (1966), a right of privacy action, but had refused to apply in libel cases until the instant case.
[110] *See* Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968), *cert. denied*, 393 U.S. 840 (1968), where Judge Madden stated that logically a public figure is "anyone who is famous or infamous because of who he is or what he has done." *Id.* at 419.

newsworthy matter he becomes a pseudo-public figure for a time.[111] This sometimes narrow distinction between public and private is therefore too nebulous a basis to support a constitutional principle designed to protect first amendment freedoms.

To properly comprehend the future ramifications of *Rosenbloom*, it is essential to note the divergence of opinion among the Justices of the Court. These separate opinions are important indicators of possible avenues of change should the Court ever shift or redefine its decision. The main opinion discussed above represented the views of Chief Justice Burger and Justices Brennan and Blackmun; the five man majority was obtained by the concurrance in the result of Justices Black and White. Justice Black, enunciating the view that he had maintained since before *New York Times*, declared that "the First Amendment does not permit recovery of libel judgments against the news media even when these statements are broadcast with the knowledge that they are false."[112]

Justice White was concerned that the main opinion was too sweeping in its effect upon state libel law, but concurred on the grounds that absent "actual malice" the media may comment fully upon any official action of public officials in the performance of their duties.[113] He found this test applicable to *Rosenbloom*, since defendant's reports concerned an arrest and a confiscation by public officials. Further, he found no requirement that an individual's reputation or right of privacy be spared when official action is involved, a rather broad statement if pursued to the extreme.[114]

The dissent of Justices Stewart and Marshall was based on their desire to maintain for the private citizen some type of remedy when he has suffered actual harm resulting from libelous conduct. They argued that the "concept of a citizenry informed by a free and unfettered press" is not an imperative when in conflict with the "concept of the essential dignity and worth of every human being."[115] Their solution, to restrict the plaintiff to recovery for actual damages, was based upon the assumption that the fear of punitive damages raises the real threat of self-censorship. By eliminating punitive damages and destroying the spectre of self-censorship, these Justices believed that the right of a private individual to demand reasonable

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[111] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971).

[112] *Id.* at 57. (Black, J., concurring). It should be noted that Justice Douglas took no part in the discision; if he had, he would have quite possibly adhered to this same rationale as he had in all prior cases.

[113] *Id.* at 62 (White, J., concurring).

[114] Would this test mean that a person who is arrested forfeits all rights of privacy as to other matters totally unrelated to the subject matter of his arrest?

[115] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971) (Marshall, J., dissenting).

care by the press outweighs any remaining threat to first amendment freedoms.[116]

Justice Harlan's dissent was based upon the premise that the states have a legitimate interest in imposing a standard of reasonable care upon the press in cases involving private individuals. He too contended that recovery should ordinarily be restricted to compensatory damages, but, unlike Justices Stewart and Marshall, he was not opposed to punitive damages in cases wherein "actual malice" could be shown.[117] Although Justice Harlan agreed with the *New York Times* rule, he disagreed with its application in this case because in his judgment a standard of reasonable care in private defamation cases does not threaten first amendment freedoms. Thus his chief dispute is not with the basic tenets underlying the *New York Times* doctrine, but with the extent of the breathing space required by that doctrine to protect constitutionally guaranteed freedoms.

The foregoing analysis of the opinions in *Rosenbloom* demonstrates that the latest word in defamation may not be the last word especially since the composition of the Court has changed appreciably since that decision was rendered. However, it is unlikely that any startling new test will be developed since opinions in *Rosenbloom* appear to define the probable avenues of change. At one extreme is the absolute privilege espoused by Justices Black and Douglas;[118] at the other is the reasonable care standard of Justices Stewart, Marshall and Harlan.[119] In the middle is the plurality view announced in *Rosenbloom;* only "actual malice" will give rise to liability for the publication of matters of public concern. It is improbable that a majority of the Court will support the extreme view of Justices Black and Douglas. In light of the prominence of the *New York Times* doctrine in all of the Court's major decisions in this area since 1964, subsequent decisions probably will follow the test set forth in *Rosenbloom.* This test affords the Court a sound standard for the protection of first amendment freedoms, yet it is restrictive enough to deter the press from blatant or malicious libel. By balancing the desired goals of protecting publishers from prosecution for honest mistake, thereby maintaining a free press and an informed populace, and protecting individuals from licentious journalism the Court has produced an admirable aplication of the *New York Times* rule.

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[116] *Id.* at 83. This rationale is in sharp contrast to Justice Brennan's statement in the main opinion that the "very possibility of litigation may be a threat." *Id.* at 52-53.

[117] *Id.* at 72. (Harlan, J., dissenting).

[118] *See* notes 62 and 112 *supra* and accompanying text.

[119] *See* notes 115 and 117 *supra* and accompanying text.

Conclusion

This note has examined the present state of common law libel as enunciated by the Supreme Court in *New York Times Co. v. Sullivan*[120] through *Rosenbloom v. Metromedia, Inc.*[121] *Rosenbloom* is the culmination of a step by step extension of freedom of the press at the expense of state libel laws which the Court considers necessary if first amendment freedoms are to remain viable in our society. The Court has sought to find the proper balancing test which will be dispositive of conflict between libel law and first amendment freedoms. The divergence of opinions by the Justices of the Court makes predictions of future developments difficult. However, a critical analysis of the key cases discloses the predominant theme that our democracy is based upon a knowledgeable populace informed by a free and unrestrained press. The *Rosenbloom* test is a highly functional tool for the protection of constitutionally guaranteed freedoms from infringment by state libel laws.

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ADDENDUM

The United States Supreme Court, on June 25, 1974,[122] handed down a most significant decision in *Gertz v. Robert Welch, Inc.*[123] In this opinion Mr. Justice Powell, speaking for the Court, redefined the liability of a publisher or broadcaster of defamatory falsehoods about a private individual. In the process of promulgating its new rule, the Court, placing considerable emphasis on the fact that *Rosenbloom v. Metromedia, Inc.*[124] was only a plurality opinion, rejected the *Rosenbloom* test of "public or general interest" which necessitated invoking the *New York Times* rule.

While emphasizing its adherence to the *New York Times* rule where public officials and public figures are involved, the Court struck a delicate balance between the competing interests of an uninhibited press and a private individual injured by defamatory falsehoods. The Court chose to come down on the side of the individual. Noting that public officials and public figures enjoy a greater access to means of communication and assume the risk of defamatory falsehoods, the Court found that neither of these factors is present regarding a private individual. Hence, recognizing the need for greater protection of private individuals, the Court held that

> so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injuries to a private individual.[125]

At the same time that it chose to redefine the law in this area, the Court strove to soften the blow with regard to damages. Where the "knowledge of falsity or reckless disregard of the truth"[126] standard is not utilized in a suit by a private individual, the Court held that neither presumed nor exemplary damages are recoverable. Hereafter, a plaintiff's damages are restricted to actual injury.

Inevitably, there will be those who decry this sudden shift from a test of "knowledge of falsity or reckless disregard of the truth" to a standard of negligence. It is, of course, too early to predict what effects the *Gertz* test will have on journalistic endeavors. But perhaps those critical of this opinion may find some solace in Mr. Justice Blackmun's judgment that *Gertz* "will have little, if any, practical effect on the functioning of responsible journalism."[127]

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[120] 376 U.S. 254 (1964). [121] 403 U.S. 29 (1971).

[122] The decision analyzed in this addendum had not been delivered at the time the foregoing note had been completed. A study of the law of libel, however, would be deficient without any reference to this case.

[123] 94 S. Ct. 2997 (1974).

[124] 403 U.S. 29 (1971). [125] 94 S. Ct. at 3010 (footnote omitted).

[126] *Id.* at 3011. [127] *Id.* at 3014 (Blackmun, J., concurring).