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Defamation—A Standard of Review for Constitutional Facts

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NOTES

DEFAMATION—A STANDARD OF REVIEW FOR "CONSTITUTIONAL FACTS." *Bose Corp. v. Consumer Union of United States, Inc.*, 104 S. Ct. 1949 (1984).

A review and evaluation of the Bose 901 loudspeaker system was published in the May 1970 issue of *Consumer Reports*. Bose Corporation, the company manufacturing the speaker, found that article so objectionable that it demanded a retraction. Denied that avenue of recourse, the speaker manufacturer brought suit in the United States District Court for the District of Massachusetts for product disparagement. Of the numerous statements in the article that were contested, Bose Corporation prevailed on a single phrase in one sentence that characterized the sound as wandering "about the room." The district court found this phrase was disparaging and held the statement was false because it inaccurately described the lateral movement the reviewers heard. After determining that the plaintiff was a public figure, the district court applied the *New York Times Co. v. Sullivan*[1] standard of actual malice. According to the district court's reasoning, the reviewer's testimony that he believed the statement to be correct was not credible, because, as an intelligent person, he could not possibly have interpreted the phrase to signify anything other than its actual meaning. The district court based a finding of actual malice on this analysis, and held that Bose had sustained its burden of proof.[2]

The United States Court of Appeals for the First Circuit reversed, holding that its review was not limited by Federal Rule of Civil Procedure 52(a),[3] which applies a "clearly erroneous" standard of review to findings of fact. The First Circuit proceeded to perform a de novo review and found that actual knowledge of falsity or a reckless disregard

1. 376 U.S. 254 (1964).

2. Bose Corp. v. Consumers Union of U.S., Inc., 508 F. Supp. 1249 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984).

3. "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a).

of the truth had not been shown by clear and convincing evidence.[4] The United States Supreme Court granted certiorari to determine whether the court of appeals should have applied the clearly erroneous standard to the district court's finding of actual malice. The Supreme Court affirmed the decision of the First Circuit, and ruled that both the standard of independent review and that of Rule 52(a) must be followed, and that Rule 52(a) did not proscribe an independent review. Accepting the district court's actual findings of fact, the Supreme Court held that the discredited testimony did not in itself constitute clear and convincing evidence of actual malice. *Bose Corp. v. Consumer Union of United States, Inc.*, 104 S. Ct. 1949 (1984).

Bose is the Court's latest foray into the area of defamation. The particular statement in that case was written, but defamation may include any communication, written or oral, that causes harm to a person's reputation.[5] Slander was originally the oral form of defamation, while libel was printed or written.[6] Historically, the ecclesiastical court of England had jurisdiction over slander actions, resulting in a carry-over requirement of proof of "temporal" damages[7] when the common-law courts assumed control in the sixteenth century.[8] This requirement that there be earthly damages before a non-religious court could have jurisdiction accounts for the primary legal distinction between slander and libel; with certain limited exceptions,[9] libel is actionable without pleading or proof of actual damage suffered, but slander is not.[10]

Libel, unlike slander, had its origins in criminal actions by the Star Chamber to suppress seditious publications.[11] Criminal libel was

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4. Bose Corp. v. Consumers Union of the U.S., Inc., 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984).

5. *See* RESTATEMENT OF TORTS § 559 (1938).

6. This distinction has become somewhat blurred by modern forms of communication such as radio and television, but is still generally applicable. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 785-88 (W. Keeton 5th ed. 1984) [hereinafter cited as KEETON].

7. The damages proved had to be actual or "worldly" in order to usurp the authority of the church-controlled ecclesiastical courts.

8. KEETON, *supra* note 6, § 111, at 772.

9. Libel *per quod* requires extrinsic facts to prove its defamatory nature and is treated like slander in requiring proof of special damages. *See* Ellsworth v. Martindale-Hubbell Law Directory, Inc., 66 N.D. 578, 268 N.W. 400, 406 (1936). Libel or slander per se does not require proof of special damages; recovery is permitted on a showing of general damages. It is recognized in cases imputing crime, Fowler v. Aston, 78 Eng. Rep. 523 (K.B. 1592); loathsome disease, Davis v. Taylor, 78 Eng. Rep. 887 (K.B. 1599); unchastity, Cooper v. Seaverns, 81 Kan. 267, 105 P. 509 (1909); and in cases defaming a person's competence or solvency in his trade or profession, Lumby v. Allday, 148 Eng. Rep. 1434 (Ex. 1831).

10. Thorley v. Lord Kerry, 128 Eng. Rep. 367 (C.P. 1812).

11. The court of the Star Chamber was an infamous court, made up of judges and privy councillors, that grew out of the king's council. During Henry VIII's reign, it managed to enforce

not subject to the defense of truth.[12] When civil actions began to be allowed, possibly to prevent duels,[13] truth was recognized as a defense for libel actions, as it had been for slander.[14] In 1641, when the Star Chamber was abolished and libel joined slander in the common-law courts, the defense was applied to both forms of defamation.[15]

The criminal history of libel may have been responsible for an element of malicious intent that at one point was required to be pled and proved in defamation actions.[16] However, this malice, used in the common sense of ill will or spite, came to be implied by law from the intentional publication of defamatory material.[17] By 1910, this requirement was extended to a standard of strict liability, with the defendant held liable regardless of whether there was any negligence on his part.[18] There remained a requirement of negligence or intent in the transmission of the communication to a third party, that is, publication, but the statement could be accidentally defamatory without barring recovery.[19]

Once a plaintiff established a prima facie case of defamation by proving publication of a statement of the type to damage reputation,[20] the defendant could raise the defense of a privilege. If the defense was qualified, it might be overcome upon a showing of malice.[21] Among the qualified privileges at common law was one for fair comment. It allowed the defense in cases involving a critic's opinion that was allegedly defamatory.[22]

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the law when other courts were unable to do so. It took its support from the king's prerogative and was not bound by the common law. Its methods lacked the safeguards for the individual's liberty the common-law procedures provided. *See* 9 THE NEW ENCYCLOPEDIA BRITANNICA MICROPAEDIA 529 (H. Benton 15th ed. 1974); *see also* 1 A. HANSON, LIBEL AND RELATED TORTS ¶ 9, at 6 (1969).

12. "[I]t is immaterial with respect to the essence of libel, whether the matter of it be true or false." 4 W. BLACKSTONE, COMMENTARIES *150.

13. KEETON. *supra* note 6, § 111, at 772.

14. *See* W. BLACKSTONE, *supra* note 12.

15. A. HANSON, *supra* note 11, ¶ 7, at 4.

16. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 772 (4th ed. 1971).

17. Bromage v. Prosser, 107 Eng. Rep. 1051 (K.B. 1825).

18. E. Hulton & Jones, 1910 A.C. 20.

19. Cassidy v. Daily Mirror Newspapers, Ltd., 2 K.B. 331 (1929) (newspaper printed that Mr. Cassidy was engaged, and Mrs. Cassidy sued for libel).

20. *See* RESTATEMENT OF TORTS § 613 (1938).

21. The circumstances under which a qualified privilege arises are varied, but have included attorney-client confidences and credit reports. *See generally* KEETON, *supra* note 5, § 115, at 824. Absolute privileges also exist that are not subject to defeat upon a showing of actual malice. These include the judge, jurors, witnesses, counsel and parties in a judicial proceeding, legislators and certain executive officers, and where the plaintiff has given consent. *See* KEETON, *supra* note 6, § 114, at 815.

22. Cherry v. Des Moines Leader, 114 Iowa 289, 86 N.W. 323 (1901) (qualified privilege

This common law was adopted by the United States and continued to develop without complications attributable to privileges raised by the first amendment[23] until 1964.[24] When the Bill of Rights was adopted in 1791, the meaning of that amendment as we now commonly understand it had not been formulated.[25] Freedom of speech and of the press was probably included as a reaction to the history of repression of the press.[26] At this time, the guarantee of freedom of the press was seen by some as merely the Blackstonian idea of freedom from prior restraint.[27] Under that view, there was a sound basis for the enactment of the Sedition Law of 1798,[28] and the Federalists used that argument in defending the Act during legislative debate.[29] The American sedition law did attempt to defer to first amendment rights by permitting truth to be an absolute defense.[30] Even so, that law is now considered by some to have been unconstitutional, despite never having been reviewed by

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given a newspaper editor who published an article on the plaintiff's public stage performance).

23. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

24. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), discussed *infra* p. 746-47. Prior to *Sullivan*, "libelous speech was long regarded as a form of personal assault, and it was accordingly assumed that government could vindicate the individual's right to enjoyment of his good name, no less than his bodily integrity, without running afoul of the Constitution." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 631 (1978).

25. J. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 426 (1956).

26. A. HANSON, *supra* note 11, ¶ 9, at 9.

27. *See* J. SMITH, *supra* note 25 at 427. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." 4 W. BLACKSTONE, COMMENTARIES *151-52 (emphasis in original).

28. *See* J. SMITH, *supra* note 25 at 427. The Sedition Act, Ch. 74, § 2, 1 Stat. 596 (1798) (expired) states, "That if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States or to excite any unlawful combination therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of such law, . . . or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."

29. J. SMITH, *supra* note 25 at *x*.

30. "And be it further enacted and declared, that if any person shall be prosecuted under this act, . . . it shall be lawful for the defendant . . . to give in evidence in his defense, the truth of the matter contained in the publication charged as a libel." Sedition Act, Ch. 74 § 3, 1 Stat. 596, 596-97 (1798).

the Supreme Court.[31]

The first case the Supreme Court heard that questioned the constitutionality of a libel law was *Near v. Minnesota*.[32] In *Near*, the Minnesota Attorney General had attempted to enjoin publication of a periodical that had charged law enforcement officials with neglect of their duties under a state statute that forbade printing of "malicious and scandalous libels." The Court struck down the statute as a prior restraint on the press and reversed the appellant's conviction.[33] Civil liability was left untouched by that decision. However, *Chaplinsky v. New Hampshire*,[34] which involved a Jehovah's Witness who cursed a city marshall in violation of a statute after being arrested for distributing religious literature, did deal with civil defamation in dictum. There, the Court affirmed the conviction, indicating that there were two levels of speech, and that false statements, like libel, fell into an area that was unworthy of first amendment protection.[35] *Beauharnais v. Illinois*[36] reaffirmed that idea, and extended it to include defamation of groups of persons.[37] Civil liability was to be left to the individual state's control, with a forbiddance of prior restraint the only abridgment on their discretionary power.[38]

In 1964, it became apparent that the states' concern in enforcing their libel laws was not the only interest to be considered. The Supreme Court, as Professor Prosser put it, dropped "something of a bombshell"[39] when it held in *New York Times Co. v. Sullivan*[40] that the first amendment required that the defendant in a defamation case, brought by a public official, be given a privilege.[41] The idea of such a privilege was not entirely new,[42] but the common-law doctrine of fair comment did not generally extend to misstatements of fact,[43] and injection by the

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31. The Act expired in 1801 under its own terms. Sedition Act, Ch. 74 § 4, 1 Stat. 596, 597 (1798). *See* C. LAWHORNE, THE SUPREME COURT AND LIBEL 3 (1981). For another good discussion, *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

32. 283 U.S. 697 (1931).

33. *Id.* at 716-23.

34. 315 U.S. 568 (1942).

35. *Id.* at 571-72.

36. 343 U.S. 250 (1952) (statute prohibiting defamation of a class of citizens of any race, color, creed, or religion was upheld).

37. *Id.* at 256-57. Beauharnais had distributed anti-Negro leaflets. *Id.* at 261-64.

38. *Id.* at 266.

39. W. PROSSER, *supra* note 15, § 118, at 819.

40. 376 U.S. 254 (1964).

41. *Id.* at 282-83.

42. *See* Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908) (extended the doctrine of fair comment to facts as well as opinions).

43. W. PROSSER, *supra* note 16, § 118, at 819-20. The doctrine may have also been altered

Court of constitutional issues into defamation cases was unexpected.

This privilege, which the Court found necessary to protect "uninhibited, robust, and wide-open" debate of public issues,[44] was held to be qualified, despite spirited concurring opinions by Justices Black and Goldberg, who were in favor of granting an absolute privilege.[45] The majority, however, rejected the traditional requirement of malice to overcome the privilege. The burden of proof on the issue of falsity was shifted to the plaintiff. Rather than defeating the privilege with proof of malice in the sense of ill will or spite on the part of the defendant, the plaintiff could only overcome the privilege by showing that the defendant had actual knowledge of the falsity of the statement, or acted in reckless disregard for the truth. The Court's term for this requirement was "actual malice."[46] In order to be certain that the principles involved were constitutionally applied, the Court ruled that an appellate court dealing with the privilege should perform an independent review of the evidence to determine whether the plaintiff's burden had been met.[47] Here, the Court remanded since no evidence had been submitted that showed that those in charge of publishing the defamation might have had knowledge that the statements were false.[48]

Sullivan engendered much debate from the beginning,[49] and the uncertainty over its application, and the confusion that surfaced anew as each of its progeny appeared, has produced a steady stream of controversy.[50] Undaunted, the Court has maintained its conviction that a

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somewhat by *Sullivan*, 376 U.S. 254, 292, n.30 (1964). There was an indication that opinion might also be subject to defeasement if actual malice were shown. *See* KEETON, *supra* note 6, § 113A, at 813, and § 115, at 831.

44. *Sullivan*, 376 U.S. at 270.

45. *See Id.* at 293 (Black, J., concurring) and at 297 (Goldberg, J., concurring).

46. *Id.* at 280. The elusiveness of this new concept caused Justice Black to advocate stronger protection of the first amendment through an absolute privilege so that a more definite line might be drawn. *Id.* at 293 (Black, J., concurring). Justice Goldberg also favored this approach because he believed the public was entitled to a privilege equal to that the public official could invoke for comments made in his official capacity. *Id.* at 297 (Goldberg, J., concurring).

47. *Id.* at 284-85.

48. *Id.* at 285-88.

49. Justice Black expressed a justified concern that actual malice would be an "elusive, abstract concept, hard to prove and hard to disprove." *Id.* at 293 (Black, J., concurring).

50. *See, e.g.*, Comment, *Constitutional Law—Proof of Actual Malice Required in Libel Action for Defamatory Falsehood Relating to Official Conduct*, 16 SYRACUSE L. REV. 132 (1964); Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Comment, *Libel of the Public Figure: An Unsettled Controversy*, 12 ST. LOUIS U.L.J. 103 (1967); Note, *The N.Y. Times Rule and Society's Interest in Providing a Redress for Defamatory Statements*, 36 GEO. WASH. L. REV. 424 (1967); Comment, *Constitutional Law—Defamation Under the First Amendment—The Actual Malice Test and "Public Figures"*, 46 N.C.L. REV. 392 (1968); Comment, *Further Limits on Libel Actions—Extension of the New*

balance must be struck between the individual's interest in redress for injury to his reputation and protection of the guarantees of the first amendment.

For the first ten years after *Sullivan*, the scales seemed to weigh quite heavily in favor of freedom of the press. The first expansion of the actual malice rule came in *Garrison v. Louisiana*.[51] *Garrison* concerned a district attorney who, in a press conference, made unflattering remarks about eight judges. The Supreme Court reversed his conviction, stating that proof of actual malice was necessary to convict a defendant in a criminal libel case who had criticized a public official. The Court held that the privilege was applicable to any statement that might touch on the public official's fitness for office.[52] Government employees, even those in minor supervisory positions, were brought under the public official rubric by *Rosenblatt v. Baer*.[53] In *Rosenblatt*, the Court applied the actual malice standard to an action by the supervisor of a county-owned recreational facility.

In 1967, further expansion of *Sullivan* was heralded by a case based on right to privacy rather than defamation. In *Time, Inc. v. Hill*,[54] *Life* magazine had published an account of a play that depicted a family's ordeal when held hostage by escaped convicts. The magazine described the play as a re-enactment of an incident involving the Hill family. Hill sued, basing his action on a New York statute that neither mentioned right to privacy, nor allowed truth as a defense, although it had been interpreted as including both by the New York courts.[55] The Supreme Court held that the statute could not be applied unless the

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York Times Rule to Libels Arising from the Discussion of "Public Issues", 16 VILL. L. REV. 955 (1971); *Libel—Constitutional Privilege—Why Not an Absolute Privilege?—Rosenbloom Doctrine in Washington*, 7 GONZ. L. REV. 344 (1972); Comment, *Losing the Struggle to Define the Proper Balance Between the Law of Defamation and the First Amendment—Gertz v. Robert Welch, Inc.: One Step Forward, Two Steps Back*, 2 PEPPERDINE L. REV. 383 (1975); Comment, *Libel Law: A Confused and Meandering State of Affairs*, 6 CUM. L. REV. 667 (1976); Comment, *Persistence of Illogic: Further Constitutional Aspects of the Law of Defamation*, 5 HOFSTRA L. REV. 635 (1977); Lewis, *N.Y. Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603 (1983); Von Baur, *The License to Defame Government Officials; N.Y. Times v. Sullivan Should Be Overruled*, 30 FED. B. NEWS & J. 501 (1983).

51. 379 U.S. 64 (1964).

52. *Id.* at 77.

53. 383 U.S. 75 (1966).

54. 385 U.S. 374 (1967).

55. *Id.* at 376-78. "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of a misdemeanor." N.Y. Civ. Rights Law § 50 (McKinney 1976). *See also Hill*, 385 U.S. at 381-84.

actual malice standard was followed.[56] The cause of action was invasion of privacy rather than libel in *Hill*, but the Court still chose to require actual malice in a suit brought by a private individual who had not voluntarily thrust himself into the public eye.[57] The original reasoning in *Sullivan* had focused on the freedom of the governed to criticize those in power,[58] but *Hill* was more concerned with allowing free exercise of first amendment rights by the press for the benefit of society.[59]

Soon after *Hill*, the Court again expanded the categories of plaintiffs which would have to show actual malice to recover in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[60] The single decision for the two cases, however, did not result in a majority opinion, and the new ground broken by the plurality did not receive complete support. *Butts* concerned an article published in the *Saturday Evening Post* that accused the University of Georgia football coach of leaking information to Alabama's Paul "Bear" Bryant.[61] In the other case, Walker was a former army officer who contested an account of his role in a riot on the campus of the University of Mississippi.[62] Justice Harlan's opinion extended the *Sullivan* rule to "public figures," but applied a negligence standard to defeat the privilege rather than the actual malice test. The plaintiff could prevail upon proof of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[63] Only three other justices agreed with Justice Harlan that a fault standard was proper.[64]

This discord was absent less than a year later when the Court delivered its opinion in *Saint Amant v. Thompson*.[65] Here, in a suit brought by a Louisiana deputy sheriff against a political candidate over a statement read from an interview transcript during a televised speech, the Court presented its clearest definition of reckless disregard. The opinion by Justice White rejected any theory that negligence was an element in that category of actual malice. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published,

56. *Hill*, 385 U.S. at 390.
57. *Id.* at 378.
58. *Sullivan*, 376 U.S. at 282.
59. *Hill*, 385 U.S. at 389.
60. 388 U.S. 130 (1967).
61. *Id.* at 135.
62. *Id.* at 140.
63. *Id.* at 155.
64. Justices Clark, Stewart, and Fortas concurred in Harlan's opinion. *Id.* at 163.
65. 390 U.S. 727 (1968).

or would have investigated before publishing."[66] Instead, the Court adopted a subjective test dependent on the *mens rea* of the defendant. The evidence had to support a finding that "the defendant in fact entertained serious doubts as to the truth of his publication."[67]

In *Saint Amant*, the Court had recognized a problem inherent in that test; it would place a "premium on ignorance."[68] Nevertheless, the Court adhered to the standard in 1971, in *Time, Inc. v. Pape*.[69] The issue in *Pape* revolved around the omission of the word "alleged" from an article describing incidents of police brutality. The article quoted from a summary of a complaint contained in a Civil Rights Commission report. The article presented the charges, but did not indicate that they had been made by a plaintiff in a suit against Pape. Pape claimed this gave the false impression that the charges were findings made by the Commission.[70] Application of the subjective test was particularly difficult because what was reported was what a third party, the Commission, *said* rather than *did*. The Court considered that the defendant interpreted a document "[bristling] with ambiguities."[71] In the majority opinion, Justice Stewart was disturbed over allowing the jury to make findings of fact concerning the defendant's state of mind. Such a subjective determination would put the defendant "at the mercy of [the jury's] unguided discretion."[72] Unless there was evidence that the meaning of the document was distorted, the question should not be submitted to the jury.[73] Errors in judgement, such as omission of the word "alleged," were found to be within the first and fourteenth amendments' protection.[74] The Court cautioned, however, that its holding on reckless disregard was to be narrowly confined to the facts of the case.[75]

Disharmony among the justices returned when the Court again attempted to expand *Sullivan* in *Rosenbloom v. Metromedia, Inc.*[76] For the first time since *Time, Inc. v. Hill*,[77] the Court had to deal with a private individual as plaintiff in a defamation action. Rosenbloom was

66. *Id.* at 731.
67. *Id.*
68. *Id.*
69. 401 U.S. 279 (1971).
70. *Id.* at 282.
71. *Id.* at 291.
72. *Id.*
73. *Id.* at 290.
74. *Id.* at 292.
75. *Id.*
76. 403 U.S. 29 (1971).
77. 385 U.S. 374 (1967).

a magazine distributor involved in a dispute over obscenity charges stemming from his trade. The defendant's news broadcasts included stories of his arrest on those charges.[78] After balancing the individual's interest in protecting his reputation against the public's need to be informed, Justice Brennan found that the plaintiff would have to show actual malice in order to prevail.[79] The difficulty of accurately determining the defendant's state of mind in cases like *Pape* may have added to the unwillingness of some members of the Court to extend the *Sullivan* rule any farther. In any event, only two justices joined with Justice Brennan in the plurality. Of the other four opinions written, three held this went too far in protecting the first amendment at the expense of state libel laws.[80] The dissenting opinions, representing the views of three justices, argued that a fault standard should be applied where private individuals are the plaintiffs.[81]

Those who felt that the rule in *Sullivan* should not be expanded began to prevail, beginning with *Gertz v. Robert Welch, Inc.*[82] There was still no agreement on a single course of action, but *Gertz* was the fountainhead of a line of cases favoring plaintiffs that would continue over the next ten years.[83]

The plaintiff in *Gertz* was a lawyer who represented the family of a murder victim in a civil action against a convicted murderer, a Chicago policeman named Nuccio. The defendant's publication, *American Opinion*, published an article implicating Gertz in an alleged frame-up of Nuccio.[84] On appeal, a judgment notwithstanding the verdict in favor of the defendant was affirmed, based on lack of evidence to support a finding of actual malice.[85] The Supreme Court reversed, holding that the *Sullivan* standard did not apply to private individuals, and that the states were free to formulate their own rules, provided that liability was not imposed without fault nor recovery allowed of punitive or presumed damages without a showing of actual malice.[86] To this extent, *Rosenbloom*[87] was overruled.

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78. *Rosenbloom*, 403 U.S. at 32-35.

79. *Id.* at 52.

80. *Id.* at 58 (White, J., concurring).

81. *Id.* at 62 (Harlan, J., dissenting) and 78 (Marshall, J., dissenting).

82. 418 U.S. 323 (1974).

83. *See* Abrams, *Tort Law: The Supreme Court Turns a New Page in Libel*, A.B.A. J. Aug. 1984, at 89.

84. *Gertz*, 418 U.S. 325-26.

85. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972).

86. *Gertz*, 418 U.S. at 347-49.

87. 403 U.S. 29 (1971).

The Court continued to chip away at earlier decisions expanding *Sullivan* in *Time, Inc. v. Firestone*.[88] Here, the plaintiff had been married to the scion of a wealthy industrial family, and had become embroiled in a rather messy divorce proceeding. *Time* printed an item that inaccurately stated the grounds for the divorce. Mrs. Firestone's jury verdict was affirmed by the Florida Supreme Court.[89] The United States Supreme Court refused to recognize the plaintiff as a public figure because she had not thrust herself into a "public controversy."[90] A divorce could not be a public controversy, according to the Court, since the plaintiff was compelled to go to court to obtain dissolution of her marriage.[91] Apparently, the basis for determining whether a public controversy exists depends on the extent to which the plaintiff has acted voluntarily to attract public attention. The Court also rejected another argument by *Time* that the *Sullivan* privilege should be extended to all reports of judicial proceedings,[92] and it remanded for compliance with *Gertz*.[93]

The next blow to libel defendants was struck in 1979 by *Herbert v. Lando*.[94] Herbert was a retired army officer, whose accusations of wartime coverup operations by his superiors were the subject of a CBS report produced and edited by Lando. Herbert sued Lando, Mike Wallace, CBS, and *Atlantic Monthly*, which printed a related article by Lando, alleging false portrayal.[95] The United States Court of Appeals for the Second Circuit granted Lando an absolute privilege concerning the editorial process and remanded the case.[96] The Supreme Court did not find any precedent for such a privilege[97] and was unwilling to increase the burden on the plaintiff trying to prove actual malice.[98] The Court reversed, admitting, however, the possibility of a chilling effect on free discussion during the editorial process.[99] Now, in addition to restricting the number of people to whom the *Sullivan* rule would ap-

88. 424 U.S. 448 (1976).
89. Time, Inc. v. Firestone, 305 So. 2d 172 (1974).
90. *Firestone*, 424 U.S. at 455.
91. *Id.* at 454.
92. *Id.*
93. *Id.*
94. 441 U.S. 153 (1979).
95. *Id.* at 155-56.
96. Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977).
97. *Herbert*, 441 U.S. at 169.
98. *Id.* at 170.
99. *Id.* at 171. For more on *Herbert* and its effect, *compare* Franklin, *Reflections on Herbert v. Lando*, 31 STAN L. REV. 1035 (1979) *with* Note, *Herbert v. Lando: The Supreme Court's Infidelity to N.Y. Times Co. v. Sullivan*, 13 U.C.D. L. REV. 374 (1980).

ply, it appeared the Court wished to make certain that the privilege remained qualified, not approaching the protection that would have been provided by Justice Black's absolute privilege.

The next punch was delivered in *Hutchinson v. Proxmire*.[100] Hutchinson was a research director whose studies were funded by federal agencies, which became the recipients of Senator William Proxmire's Golden Fleece award for wasteful government spending.[101] Hutchinson sued Proxmire for statements he made in press releases and newsletters. The district court granted summary judgment for Proxmire, and the United States Court of Appeals for the Seventh Circuit affirmed.[102] The Supreme Court first found that the speech and debate clause[103] did not protect the press releases and newsletters since neither was essential to, or part of, the deliberation process of the Senate.[104] Then the Court held that Hutchinson was not a public figure, in spite of the public's general concern with federal spending, since the issue had not focused on Hutchinson until after the award.[105] This is a more strict application of the *Sullivan* holding than *Rosenblatt*,[106] *Butts*,[107] and *Rosenbloom*[108] would have indicated. The Court also favored a narrower view of the granting of summary judgment than that of the district court.[109]

In addition to the restrictions the Court imposed in *Lando* and *Proxmire*, the Court handed down two jurisdiction cases, prior to *Bose*, that also greatly enhanced the plaintiff's odds. *Keeton v. Hustler Magazine, Inc.*,[110] and *Calder v. Jones*[111] gave the plaintiff a wider choice of forums.[112] In *Calder* the Supreme Court explictly declined special

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100. 443 U.S. 111 (1979).

101. *Id.* at 114.

102. Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978).

103. "The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

104. *Hutchinson*, 443 U.S. at 130.

105. *Id.* at 135.

106. 383 U.S. 75 (1966).

107. 388 U.S. 130 (1967).

108. 403 U.S. 29 (1971).

109. *Hutchinson*, 443 U.S. at 120, n.9.

110. 104 S. Ct. 1473 (1984) (allowing suit in a forum with which the plaintiff had little contact).

111. 104 S. Ct. 1482 (1984) (the intentional act of writing the article at issue was sufficient contact with the state to allow jurisdiction over the defendant).

112. *Keeton* overturned a finding that jurisdiction would violate due process since the single publication rule would allow recovery in a state with a longer statute of limitations for injuries incurred in other states where suit was barred. The single publication rule provides that for each

procedural protection for defendants in libel cases.[113] Rejecting the lower court's concern over the chilling effect the decision might have on first amendment activities, the Court considered the substantive safeguards adequate.[114]

The Court's hard line on procedural help for libel defendants appeared to soften a bit in *Bose*.[115] While Justice Stevens, writing for the majority, observed that Rule 52(a) of the Federal Rules of Civil Procedure and its clearly erroneous standard must be followed, so too, must the *Sullivan* rule of independent review on the issue of actual malice.[116] The Court found that the conflict was "more apparent than real"[117] and that Rule 52(a) did not proscribe an examination of the entire record. Indeed, previous decisions had required an examination of the record to determine whether the findings of fact were clearly erroneous.[118] Here, since the rule of independent review had already been applied in cases originating in federal courts, application of a different standard to cases that arose in a state court "would pervert the concept of federalism."[119]

In addition to the clearly erroneous standard, Rule 52(a) requires that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[119] [A] The Supreme Court believed this indicates that "the presumption of correctness that attaches to factual findings is stronger in some cases than in others."[120] To determine how strong the presumption was in this case, the Court decided that it was particularly important that the reviewing judges who perform an independent review under the *Sullivan* rule had "a constitu-

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publication, only one action can be brought, but that action will allow recovery for damages suffered in all other jurisdictions on the same cause of action, and will bar any other action between the same parties on that cause of action in another jurisdiction. *See* RESTATEMENT (SECOND) OF TORTS § 577A(4) (1977). Under the Supreme Court's holding, magazines with national distribution are subject to suit in whichever jurisdiction most favors the plaintiff, since the magazine continuously exploits state markets and should be able to anticipate being brought into suit in those states. *Keeton*, 104 S. Ct. at 1481.

113. *Calder*, 104 S. Ct. at 1488.

114. *Id.*

115. 104 S. Ct. 1949 (1984).

116. *Id.* at 1959.

117. *Id.*

118. *Id.* The Court cited United States v. Gypsum Co., 333 U.S. 364 (1948) (involving a conspiracy to restrain trade). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gypsum*, 333 U.S. at 395.

119. *Bose*, 104 S. Ct. at 1959.

119A. Fed. R. Civ. P. 52(a).

120. *Bose*, 104 S. Ct. at 1959.

tional responsibility that cannot be delegated to the trier of fact."[121]

The majority noted that "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."[122] The Court looked at three characteristics of the *Sullivan* rule to determine whether the issue of actual malice should be treated as one of fact or law: (1) the common law heritage of the rule, (2) the necessity of case-by-case adjudication to define the rule, and (3) the constitutional values that were protected, making it imperative that judges oversee the rule's correct application.[123]

The Court examined the first characteristic, the common law heritage, and found that historically judges were given maximum leeway to determine motivation in related cases such as early actions for deceit. "Moreover, the exercise of this power is the process through which the rule itself evolves and its integrity is maintained."[124] The judge-made law was found necessary to define this type of rule.

The case-by-case adjudication was considered particularly appropriate where the standard to be set out is from the Constitution. "This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech."[125] The Court looked at these other areas of unprotected speech, and found "judicial evaluation of special facts . . . deemed to have constitutional significance."[126] Justice Stevens cited cases from the areas of "fighting words," obscenity, and child pornography in which the Court had shown a willingness to examine what were essentially questions of fact. The line dividing the unprotected and protected areas was so important that the examination was required, in each case, to prevent intrusions into the constitutionally protected areas.

Other cases involving "constitutional fact" also required independent review, "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to

121. *Id.*
122. *Id.* at 1960.
123. *Id.*
124. *Id.* at 1960-61.
125. *Id.* at 1961.
126. *Id.* at 1962.

ensure that protected expression will not be inhibited."[127] The Court did not feel that merely providing the triers of fact with a general description of speech which was not protected would serve these purposes, or "eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas."[128]

Having satisfied itself that independent review of the actual malice issue was necessary, the Court concluded that the appellate court should be upheld. The First Circuit's determination that there was no clear and convincing evidence of actual malice was in accord with the Supreme Court's findings on review. Justice Stevens found that use of the district court's analysis would mean that "any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context; even though he did not realize his folly at the time."[129] Accepting "all of the purely factual findings"[130] made by the trial court, the Supreme Court held, as a matter of law, that there was no actual malice.

Justice Rehnquist's dissent left clear his disenchantment with the majority's elevation of the defendant's state of mind from a mere subjective fact, to "something more than a fact—a so-called 'constitutional fact.' "[131] His position was that it was inappropriate for an appellate court to make a finding of fact, such as the subjective finding on the *mens rea* of an author. He reached this conclusion despite the special significance the majority placed on such facts, in cases where a constitutional right was at stake. According to Justice Rehnquist, the determination of reckless disregard would be better left to the factfinder. He feared that the result of the holding would be "lessened confidence in the judgments of lower courts and more entirely factbound appeals."[132] In addition, Justice Rehnquist was satisfied that the *Sullivan* rule "adequately addresses the need to shield protected speech from the risk of erroneous fact-finding by placing the burden of proving 'actual malice' on the party seeking to penalize expression."[132A]

Justice Rehnquist's concerns over the Court's acceptance of fact finding duties are certainly justified. Looking at *Bose* in a broader sense, the Supreme Court's eagerness to review facts is disturbing because it will add to the appellate courts' burden. The majority must

127. *Id.*
128. *Id.*
129. *Id.* at 1966.
130. *Id.*
131. *Id.* at 1968 (Rehnquist, J., dissenting).
132. *Id.* at 1970.
132A. *Id.*

have believed the result was worth the price, since it explicitly noted that other means to the end were available. "It may well be that in this case, the finding of the District Court on the actual malice question could have been set aside under the clearly erroneous standard of review."[133]

Perhaps the Court was attempting to reaffirm a concept that had come under sharp criticism,[134] and had been repeatedly restricted by recent decisions.[135] If the press could raise a hurrah over *Bose*, it might not be quite as enthusiastic a cheer as some may have expected. *Bose* was a decision that favored the defendants in libel cases by upholding the rule of independent review, but anyone who anticipated that the narrowed application of *Sullivan* in recent years might lead to an absolute privilege will now have to put those hopes aside. Even though protection of the press would not be lessened by a lower standard, neither will Justice Black's opinion be adopted by the Court.

Some may fear that the concept of actual malice could become even more elusive if open to review at the appellate level, but a different result in *Bose* would have been the death knell for the privilege. Jurors seem quite willing to disregard the actual malice requirement when they cannot understand it. While *Bose* does not set out to perfectly define reckless disregard, it does clarify the concept tremendously. It is obvious that the Court does not consider it to be a modified version of the negligence standard applied in *Gertz*. While *Gertz* cast a shadow on the cases preceding it, the Court has removed the cloud, at least insofar as it covered the definition of reckless disregard in *Saint Amant*. It should now be clear that actual doubt on the part of the defendant is a necessary element in a finding of reckless disregard.

The pruning the Court performed on the rule's expansion may have been necessary, and those cases that cut back on *Sullivan's* expansion will probably continue to be good law for some time. Certainly, the Court has found it difficult to balance the conflicting requirements of protection for both individual reputation and freedom of the press, but *Bose* has shown that the core of *Sullivan*, and the guarantees of the first amendment, are still a vital concern in the country's highest court.

Susan Stevens

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133. *Id.* at 1967 (majority opinion).

134. *See supra* note 49 and accompanying text.

135. *See Gertz*, 418 U.S. 323 (1974); *Firestone*, 424 U.S. 448 (1976); *Lando*, 441 U.S. 153 (1979); *Proxmire*, 443 U.S. 111 (1979); *Keeton*, 104 S. Ct. 1473 (1984); and *Calder*, 104 S. Ct. 1482 (1984).