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In this issue of the *Vanderbilt Law Review* we honor an extraordinary scholar, teacher, and Dean. It is a happy circumstance that the editors have offered us this opportunity at a time when we can confidently predict that Dean Wade will continue to serve us with great distinction in years ahead. The present article concerns some pending problems in the law of defamation that have already attracted Dean Wade's active interest. This seems a particularly fitting subject for inclusion in a symposium celebrating not only his distinguished past service but also a commencement incident to his release from decanal responsibility.

I. THE ALI CONTROVERSY OVER LIBEL PER SE

When the controversy over libel per se and libel per quod[1] was before the American Law Institute (ALI) for the second successive year in 1966, Laurence Eldredge of Pennsylvania moved[2] that the black letter of section 569 of the *Restatement (Second) of Torts* be identical with that of the original *Restatement,* which provides: "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom."[3]

In the Tentative Draft prepared for the annual meeting of 1966,

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1. *See* Eldredge, *The Spurious Rule of Libel Per Quod,* 79 HARV. L. REV. 733 (1966); Prosser, *Libel Per Quod,* 46 VA. L. REV. 839 (1960); Prosser, *More Libel Per Quod,* 79 HARV. L. REV. 1629 (1966).

2. 1966 ALI PROCEEDINGS 434.

3. RESTATEMENT OF TORTS § 569 (1938).

Dean Prosser, then Reporter for the *Restatement (Second)*, recommended that section 569 be revised to read as follows:

> (1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is
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> (a) libel whose defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement, or
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> (b) libel or slander which imputes to another
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> (i) a criminal offense, as stated in § 571,
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> (ii) a loathsome disease, as stated in § 572,
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> (iii) matter incompatible with his business, trade, profession or office, as stated in § 573, or
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> (iv) unchastity on the part of a woman plaintiff, as stated in § 574.
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> (2) One who publishes any other defamation is subject to liability only upon proof of special harm, as stated in § 575.[4]

During the deliberations of the Institute, Dean Wade moved an amendment under which section 569 might read in substance: "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is not liable to the other in the absence of proof of special harm or loss of reputation unless he knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo."[5] Although subjected to the charge that amongst all the conflicting, ambiguous, and suggestive precedents none could be found to support this proposed amendment, Dean Wade's position prevailed.[6]

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4. RESTATEMENT (SECOND) OF TORTS § 569 (Tent. Draft No. 12, 1966).

5. 1966 ALI PROCEEDINGS 448. Dean Wade moved "an amendment to Mr. Eldredge's motion to the effect that the old Section 569 be retained with the addition at the end [of a phrase such as] 'unless he knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo.'" *Id.* If the suggested phrase were appended without any other modification of old § 569, it would make the defamed person's rights less secure and give the defendant more protection when he knew or should have known of the extrinsic facts. As those present during the proceedings surely understood, however, the purpose was to make the defamed person's rights more secure and to give the defendant less protection. Although Dean Prosser, Dean Wade, Mr. Eldredge, and others were aware of the drafting problem during the Institute meeting, the Institute left it to future resolution with the understanding that the Reporter would, at a subsequent annual meeting, present a revised draft reflecting the sense of the Institute's action. Among the drafting options would be the following: (1) If the new phrase is introduced by "unless," change "is liable to the other although" in the original text to "is not liable to the other when"; (2) introduce the new phrase with "only if" rather than "unless"; (3) introduce the new phrase with "if, but only if" rather than "unless." In the accompanying text I have followed the first option, with an editorial variation. As thus drafted, the section might be interpreted as stating only a rule of nonliability. On the other hand, it may also be interpreted as at least implying a rule of liability—that is, liability without proof of special harm—when the terms of the "unless" clause are fulfilled. A similar ambiguity would exist if the second option were followed. The third option avoids the ambiguity and expressly states both a rule of liability and a rule of nonliability. Was this a prophetic ambiguity? *See* text accompanying note 48 *infra.*

6. 1966 ALI PROCEEDINGS 460-65.

Even as the vote was taken, a sense of uneasiness existed, among the principals in this controversy and Institute members generally, about potential incompatibility of the *Restatement's* rules on defamation—particularly those classified under the rubric of privilege—and the Supreme Court's decision in *New York Times Co. v. Sullivan.*[7] While preparations for the next annual meeting were being made, the Institute decided to postpone final consideration of the defamation sections until a time near completion of all work on the *Restatement (Second) of Torts,* so that the Institute's final deliberations on defamation could take account of intervening development of the *New York Times* doctrine. Events have proved the wisdom of that course. The most recent decision affects not only matters ordinarily considered under the rubric of privilege but also the requirement of proof of special harm that gave rise to the controversy over libel per se and libel per quod.

II. ROSENBLOOM V. METROMEDIA, INC.

At the time of this writing, the latest Supreme Court decision in the line initiated by *New York Times* is *Rosenbloom v. Metromedia, Inc.*[8] It is also the most stunning sequel in several ways. As had happened twice before in this series of cases,[9] no opinion was able to achieve support from a majority of Justices. In fact, no more than three Justices joined in any single opinion. Mr. Justice White, writing for himself alone, summarized the tally this way:

> [I]t would seem that at least five members of the Court would support each of the following rules:
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> For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited.[10]

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7. 376 U.S. 254 (1964).

8. 403 U.S. 29 (1971). In *Rosenbloom* the Supreme Court held that a constitutional privilege applied to a radio station's report of the arrest of a private individual for possession of obscene literature. The initial report described materials seized by the police as obscene, and subsequent reports about plaintiff's lawsuit seeking injunctive relief against police interference with his business used the terms "smut literature racket" and "girlie book peddlers." After obtaining an acquittal on the criminal obscenity charges under an instruction of the trial judge that the literature involved was not obscene, plaintiff instituted a diversity action in federal court seeking damages against the radio station under Pennsylvania's libel law. The trial court rejected defendant's defense of constitutional privilege and awarded damages on a jury verdict. The Court of Appeals reversed, 415 F.2d 892 (3d Cir. 1964), and on writ of certiorari, the Supreme Court affirmed this decision.

9. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); *cf.* Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U.C.L.A.L. REV. 371, 378 n.39 (1970).

10. 403 U.S. at 59.

One among the many implications of *Rosenbloom* is that in the absence of proof of actual damage, it would no longer have been possible, as the Court was constituted on the date of this decision, to gather a majority of the Justices for a judgment in favor of a public official or a public figure who had been defamed by a statement that the publisher knew to be false when he made it. Thus it appears that insofar as *New York Times* said that a public official could recover damages under these circumstances, it is no longer authoritative. Similarly, although the Supreme Court in *Curtis Publishing Co. v. Butts*[11] approved an award of damages to a public figure based upon a magazine's publication of defamatory charges with either knowledge of their falsity or reckless disregard for their truth or falsity,[12] it appears that when *Rosenbloom* was decided, such an award would not have won the support of a majority of the Court without proof of actual damage.[13]

Mr. Justice White's summary of the decision in *Rosenbloom* is interesting not only because of what it says but also because of what it omits. The quoted passage lacks any qualification limiting the stated rules to actions against media, unless this qualification is to be inferred from the context. Nor does his summary expressly limit in any way the

11. 388 U.S. 130 (1967).

12. The Court's opinion, written by Mr. Justice Harlan—in which Justices Clark, Stewart, and Fortas joined—approved the award on the less demanding ground of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. The fifth vote for affirming the award—that of Chief Justice Warren—was founded, however, on application of the *New York Times* standard of knowing falsehood or reckless disregard for truth or falsity. *Id.* at 162-70.

13. Although the standard of *New York Times* could not, on the day *Rosenbloom* was decided, command a majority of the Court in support of a judgment for a public official who had not proved actual damage, one might say *New York Times* has not been overruled because no case presenting this question has yet reached the Court. One might also assert that since there was no proof of knowing or reckless disregard of the truth in *New York Times*, everything said or implied about the right of recovery in the event of such proof was obiter dictum. Similarly, one might say that, because the issue of requiring actual damage has not yet been squarely presented, even *Curtis Publishing*, in which approval of an award was holding and not mere dictum, has not been overruled. Yet, the argument that there has been no overruling seems technical and tenuous. The fact remains that 5 members of the Court—Justices Black, Douglas, Harlan, Marshall, and Stewart—could be identified as supporting the requirement of actual damage. *See* text accompanying notes 40-45 *infra*. It might be suggested that Justice Harlan's position on this point was not clearly indicated in view of the statement in his opinion, "I would not overrule *New York Times* or *Curtis Publishing*." 403 U.S. at 69. As observed in note 30 *infra*, however, he was saying that he would adhere to the requirement that the defamatory statement be made either with knowledge that it was false or with reckless disregard of its truth or falsity. He could consistently adhere to that view while adding still another requirement—proof of actual damage—that was not considered in *New York Times* or *Curtis Publishing*. It is submitted that his opinion as a whole indicates that this was his view.

types of cases to which the stated requirements of actual damage and fault—negligent falsehood, at a minimum—would be applied.

As an aid to understanding possible implications of *Rosenbloom,* it may be useful to identify some propositions that one can derive from an analysis of key passages in the several opinions and to indicate the probable support for each proposition. For convenient reference, each proposition is referred to by a number in brackets immediately preceding it, and those propositions to which five or more Justices appear to have committed themselves are italicized. Names of the individual Justices who seem committed to a proposition are stated in parentheses immediately after that proposition, even though the explanation for inclusion of some of the names may appear at a later point in this article. The votes of Mr. Justice Douglas have been inferred from his opinions in earlier cases, since he did not participate in *Rosenbloom.*

Before we consider the propositions in detail, two advance cautions are in order. First, there are inconsistencies among them; indeed, some of the propositions are in direct conflict with others. Secondly, in light of the departures from the Court after *Rosenbloom* was decided, the extent of support for each of these propositions is now even more speculative than at the moment of that decision.[14]

The judgment of the Court in *Rosenbloom* was announced by Mr. Justice Brennan. Chief Justice Burger and Mr. Justice Blackmun joined in the Brennan opinion, which will be referred to as the plurality opinion. This opinion rejects any standard that would limit the availability of constitutional protection against private defamation actions solely to those based upon reports about "public officials" or "public figures." Instead, it says more broadly that [Proposition One] *at least in the context of defamation actions against media, constitutional protection extends to reports concerning events of public or general interest* (Black, Blackmun, Brennan, Burger, Douglas, Harlan, Marshall, and Stewart). Also there is support in the plurality opinion for extending this protection beyond newspaper, magazine, radio, and television reporting. One might interpret the plurality opinion as saying that [Proposition Two] *constitutional protection extends to all reporting of events of public or general interest, not just media reporting* (Blackmun, Brennan, Burger, Harlan, Marshall, and Stewart; probably Black and Douglas).

14. The retirement of Mr. Justice Black and Mr. Justice Harlan has added to the confusion concerning the Supreme Court's position. The views of these 2 justices are discussed in this article, however, to give an accurate picture of the uncertain state of the law immediately after *Rosenbloom.* Mr. Justice Powell and Mr. Justice Rehnquist, successors to Justices Black and Harlan, have not yet had occasion to state their views on these issues.

Both Proposition One and Proposition Two are forecast in the following excerpt from the opening paragraph of the plurality opinion: "The several cases considered since *New York Times* involved actions of 'public officials' or 'public figures,' usually, but not always, against newspapers or magazines. Common to all the cases was a defamatory falsehood in the report of an event of 'public or general interest.' "[15] Moreover, at least Proposition One, if not also Proposition Two, is explicitly stated in the following passage, appearing at the conclusion of the fourth section of the opinion:

> It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, The System of Freedom of Expression 531-532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases. As our Brother WHITE observes, that is not a problem in this case, since police arrest of a person for distributing allegedly obscene magazines clearly constitutes an issue of public or general interest.[16]

Some further elaboration of Proposition One and, perhaps, Proposition Two appears elsewhere in the plurality opinion:

> Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Proeess and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation neeessarily encompass far more than politics in a narrow sense. "The guarantees for speech and prcss are not the preserve of political expression or comment upon public affairs." . . . "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[17]

In further explanation of the reason for extending constitutional protection to reports concerning events of public or general interest, even

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15. 403 U.S. at 30-31 (citations omitted). The cases cited in one of the footnotes to this passage include: St. Amant v. Thompson, 390 U.S. 727 (1968) (action by deputy sheriff *against defeated candidate* for the United States Senate); Rosenblatt v. Baer, 383 U.S. 75 (1966) (action by former county recreation area supervisor *against a newspaper columnist*); Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) (action by an official of an employer *against a labor union*).

16. 403 U.S. at 44-45, (citations omitted). An omitted footnote, n. 12, is quoted in the text accompanying note 19 *infra*.

17. *Id.* at 41 (citations omitted).

if they do not concern public officials or public figures, the plurality opinion adds:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[18]

This passage leaves the way open for developing, and perhaps implies a preference for developing, a rule that [Proposition Three] some of a person's activities are not within the area of public or general interest (Blackmun, Brennan, and Burger). Yet these activities are not necessarily beyond the scope of constitutionally protected expression. This point was made in the potentially significant footnote that was appended at the conclusion of the foregoing passage:

> We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest.
>
> We also intimate no view on the extent of constitutional protection, if any, for purely commercial communications made in the course of business.[19]

Observe also that the above quoted footnote indicates that the three Justices in the plurality hold open the possibility that there is some area of defamation to which no constitutional protection applies—a proposition inconsistent with a uniformly applicable constitutional requirement of actual damage, such as is stated in Mr. Justice White's summary. Whom, then, does Mr. Justice White count as the minimum of five supporters if the stated requirement of actual damage is not meant to be limited to cases against news media or in some other way?

Proposition Three—some of a person's activities are not of public or general interest—is given further support in another footnote to the

18. *Id.* at 43-44 (citations omitted).
19. *Id.* at 44 n.12.

plurality opinion, but only in reference to the private individual who becomes involved in some official action:

> Our Brother WHITE states in his opinion "[T]he First Amendment gives . . . a privilege to report . . . the official actions of public servants in full detail, with no requirement that . . . the privacy of an individual involved in . . . the official action be spared from public view." . . . This seems very broad. It implies a privilege to report, for example, such confidential records as those of juvenile court proceedings.[20]

Elsewhere, however, the plurality opinion makes clear its support for applying Proposition Three to public officials as well:

> Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. . . . Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" that are not in the area of public or general concern.[21]

The plurality's recognition that there may be utterances beyond the protection provided by constitutional privileges of speech and press is founded not only upon potential limitation of those privileges but also upon their clash with the interest in privacy, which may be constitutionally protected. Thus, in another pregnant footnote, the opinion declares:

> Our Brothers HARLAN and MARSHALL would not limit the application of the First Amendment to private libels involving issues of general or public interest. They would hold that the amendment covers all private libels at least where state law permits the defense of truth. The Court has not yet had occasion to consider the impact of the First Amendment on the application of state libel laws to libels where no issue of general or public interest is involved . . . . However, Griswold v. Connecticut, 381 U.S. 479 (1965), recognized a constitutional right to privacy and at least one commentator has discussed the relation of that right to the First Amendment. T. Emerson, *[The System of Freedom of Expression]*, at 544-562. Since all agree that this case involves an issue of public or general interest, we have no occasion to discuss that relationship . . . . We do not, however, share the doubts of our Brothers HARLAN and MARSHALL that courts would be unable to identify interests in privacy and dignity. The task may be difficult but not more so than other tasks in this field.[22]

This passage suggests that the plurality might favor a rule that [Proposition Four] actions by an individual for invasion of his right of privacy by means other than reporting on matters of public or general

20. *Id.* at 45 n. 13 (citations omitted).
21. *Id.* at 48 (citations omitted).
22. *Id.* at 48-49 n. 17 (citations omitted).

interest are constitutionally protected (Blackmun, Brennan, and Burger). This rule would impose a constitutional barrier in privacy actions to recognizing a privilege as broad as the *New York Times* formulation of the constitutional privilege in defamation actions. That is, it would weigh against extending, to actions for invading privacy, a *New York Times*-type privilege that would defeat a claim unless the complaining public official proved that the defendant published a false report with knowledge of its falsity or with reckless disregard of whether it was false or not.[23] Such a privilege would swallow up a public official's right of privacy except in "malicious false-light" cases. This recognition of constitutional protection for whatever right of privacy is salvaged after full scope is given to the privilege of reporting on matters of public or general interest underscores the irony, which Professor Kalven has highlighted,[24] that the original proponents of the right of privacy exposed it to an ill-starred fate when they acknowledged a privilege to report on matters of public or general interest.

To complete our sketch of the plurality position, we must also mention the underlying rule, carried forward from the *New York Times* decision, that, [Proposition Five] *to sustain an action for defamation when the public-or-general-interest privilege applies, the complainant must offer "clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not"*[25] (Black, Blackmun, Brennan, Burger, and Douglas).

Broad as the plurality's doctrine of constitutional privilege may be, the quoted passages indicate: first, that the public-or-general-interest standard probably will not swallow up the whole field of defamation; secondly, that other standards of constitutional protection for free expression may occupy some part or all of the remaining field; thirdly, that constitutional protection for an individual's right of privacy may clash with free expression; and fourthly, that state law may still apply if there is some part of the field beyond the scope of all constitutional standards.

23. Of course, it is not certain now that as many as 5 members of the Court would support the *New York Times* formulation of privilege even in defamation cases, although the support of at least 5 would have been assured, at the time *Rosenbloom* was decided, if the formulation were qualified to require either that the report concern matters of public or general interest or that the public official did not prove that the report caused him actual damage. *See* text accompanying notes 13-14 *supra* and text accompanying notes 40-42 *infra*.

24. *See* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966).

25. 403 U.S. at 52.

Moreover, it seems to be assumed that the constitutional standard or standards protecting free expression supplant only state law that is less protective of publication and not, for example, state law supporting an even broader privilege. Thus, if we follow the plurality position, simplification of the whole law of defamation is not to be an immediate consequence of the evolving constitutional privilege. For the present, at least, we are left with the possibility of an occasional application of all or most of the old and complex common law of defamation.

Mr. Justice Black concurred in the Court's judgment in *Rosenbloom,* but on a basis indicating his preference for a rule that [Proposition Six] "the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false"[26] (Black and Douglas). He added "the First Amendment was intended to leave the press free from the harassment of libel judgments."[27] Although Mr. Justice Douglas did not participate in *Rosenbloom,* his opinions both in *New York Times* and in its other sequels indicate that he would join Black in supporting Proposition Six. Mr. Justice Black's opinion does not speak to the question whether, in addition to this all-embracing constitutional immunity for news media, he would have recognized any constitutional immunity or privilege for others. Even before *Rosenbloom,* however, it seemed very likely that both Black and Douglas would have recognized, at the least, some form of a constitutional privilege both for nonmedia communication about public officials or public figures and for nonmedia communication about matters of public or general interest.

Mr. Justice White cast the fifth vote in support of the judgment in *Rosenbloom* but not on the same grounds as either the plurality opinion or Mr. Justice Black's concurrence. Instead, he would have preferred a rule that [Proposition Seven] "absent actual malice as defined in *New York Times Co. v. Sullivan* the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view"[28] (Black, Douglas, and White). Since he preferred not to "adjudicate cases not now before the Court,"[29] he did not indicate how he would have answered many other

26. *Id.* at 57.
27. *Id.*
28. *Id.* at 62.
29. *Id.*

questions discussed in other opinions—among them, whether he would have extended the constitutional privilege beyond media cases.

As already noted, Mr. Justice White stated in his summary that at least five members of the Court would have supported a rule that [Proposition Eight] a public officer or public figure will not be allowed to recover for damage to reputation from libelous falsehood if he does not prove either knowledge of falsity or reckless disregard of the truth (White; probably Black, Douglas, and Harlan). It is not clear whether Mr. Justice White intended some unstated qualifications of this rule or, if not, which other Justices he was counting. In cases against media, it seems that Mr. Justice Harlan would have supported this proposition,[30] as would have Justices Black and Douglas. On the other hand, it seems doubtful that either the three Justices in the plurality—Blackman, Brennan, and Burger—or Justices Marshall and Stewart would have supported this proposition without qualification, even as to cases against media. Therefore, it appears that the following questions cannot be answered with assurance: (1) Might Justices Blackmun, Brennan, and Burger disagree with Proposition Eight if the defamation concerned only private affairs of a public officer? (2) Might Justices Marshall and Stewart reject it if the defamed officer proved actual damage? (3) Might some or even all support from other members of the Court be lost if Mr. Justice White meant the proposition to apply to nonmedia publications?

In his concurring opinion Mr. Justice White observed that each of the other opinions filed in *Rosenbloom* "decides broader constitutional issues and displaces more state libel law than is necessary for the decision in this case."[31] As an example, he criticized the plurality opinion because it would "extend the constitutional protection to false and damaging, but non-malicious, publications about such matters as the health and environmental hazards of widely used manufactured products, the mental and emotional stability of executives of business establishments, and the racial and religious prejudices of many groups and individuals."[32] He also disapproved the position of the three dissenting Jus-

30. In his dissent, Mr. Justice Harlan said: "*New York Times* . . . and *Curtis Publishing* . . . established that where the injured party is a 'public figure' or a 'public official,' the interest in freedom of speech dictates that the States forego their interest in compensating for actual harm, even upon a basis generally applicable to all members of society, unless the plaintiff can show that the injurious publication was false and was made 'with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' . . . I would not overrule *New York Times* or *Curtis Publishing* . . . ." *Id.* at 69.

31. *Id.* at 59.

32. *Id.*

tices—Harlan, Marshall, and Stewart: "They would make more sweeping incursions into state tort law but purportedly with less destructive weapons. They would permit suit by some plaintiffs barred under Mr. Justice BRENNAN's opinion, but would require all plaintiffs to prove at least negligence before any recovery would be allowed."[33]

In his separate dissenting opinion, Mr. Justice Harlan expressed agreement with the view, which he found implicitly recognized in the plurality opinion, that [Proposition Nine] *the constitutional protection of the New York Times rule does not extend in full force to all purely private libels*[34] (Blackmun, Brennan, Burger, Harlan, Marshall, Stewart, and White). Justices Marshall and Stewart would concur in this proposition since they at least would permit the application of a different standard of fault in some cases, if not complete abandonment of the *New York Times* rule. Furthermore, it would seem that Proposition Nine also is recognized in Mr. Justice White's opinion.

Justices Harlan,[35] Marshall, and Stewart[36] apparently would have held that another constitutional rule applies to all libel cases: the Constitution will not permit the imposition of liability without fault in libel cases. Surely Justices Black and Douglas would have supported this principle in media cases, if not in others. Thus, at the time *Rosenbloom* was decided, at least five members of the Court would have supported a rule that [Proposition Ten] *in libel cases against media at least, the Constitution will not permit the imposition of liability without fault; all plaintiffs in such cases must prove at least negligent falsehood* (Black, Douglas, Harlan, Marshall, and Stewart).

In addition, although Justices Harlan, Marshall, and Stewart would have rejected the standard stated in Proposition Five—knowledge of falsity or reckless disregard for truth or falsity—it seems they, nevertheless, would have joined the plurality in supporting Proposition One—constitutional protection for *media* reports concerning events of public or general interest—and Proposition Two—constitutional protection for *all* such reports—since those propositions, narrower because limited to public-or-general-interest cases, are embraced within their broader position.

Mr. Justice Harlan's dissent pointed up other constitutional distinctions. It indicated that the states should be free to define the standard

33. *Id.* at 59-60.
34. *Id.* at 62.
35. *Id.*
36. *Id.* at 78.

of care applicable to private libel actions, so long as they do not impose liability without fault.[37] Elaborating on this point, Harlan expressed the view that [Proposition Eleven] there is a difference between public and private plaintiffs, and when the plaintiff is an ordinary citizen, the Federal Constitution does not require that the states adhere to a standard other than reasonable care[38] (Harlan, Marshall, and Stewart). This position also is found in the opinion of Mr. Justice Marshall,[39] in which Mr. Justice Stewart joined. Moreover, Harlan concurred with the recognition by Marshall and Stewart that [Proposition Twelve] *at least in actions against media,*[40] *a showing of actual damage is a constitutional requisite to recovery for libel, even if private*[41] *(that is, the Constitution prohibits awards for presumed damage)*[42] (Black, Douglas, Harlan, Marshall, and Stewart). Also Harlan supported the view of Marshall and Stewart that [Proposition Thirteen] jury verdicts in actions based on libel, even if private, are subject to judicial confinement to protect the substantial constitutional values involved[43] (Harlan, Marshall, and Stewart). On the matter of punitive damages, however, Harlan parted company with Marshall and Stewart. He would have held that [Proposition Fourteen] an award of punitive damages in a private libel action, if it bears a reasonable and purposeful relationship to actual harm done and is assessed only when the publication was made with actual malice, is not prohibited by the Constitution[44] (Harlan). On the other hand, Marshall and Stewart argue that [Proposition Fifteen] the Constitution prohibits all awards of punitive damages for libel[45] (Marshall and Stewart; as to cases against media, at least, Black and Douglas).

Despite differences in other respects, there is a common element running through Propositions Fourteen and Fifteen, as well as Mr. Jus-

37. *Id.* at 64.

38. *Id.* at 69.

39. *Id.* at 79.

40. This qulalification, not stated in the Harlan and Marshall opinions, would seem to bring this proposition within both Black's stated view in *Rosenbloom* and that expressed by Douglas in other cases.

41. 403 U.S. at 64.

42. *Id.* at 66. With respect to proved actual damage, Harlan would apply some particular criteria of causal connection, *id.*, but it is not clear whether Marshall and Stewart also would adopt these criteria. Furthermore, Harlan would deny recovery to public officers and public figures in actions against media if there were proof of actual damage but no proof of either knowledge of falsity or reckless disregard of truth. *Id.* at 69; *see* note 30 *supra.*

43. 403 U.S. at 77.

44. *Id.* at 73.

45. *Id.* at 87.

tice Black's opinion. Mr. Justice White stated this common ground as one of the propositions supported by at least five members of the Court. Qualified as to application beyond media cases, the proposition is as follows: [Proposition Sixteen] *As a matter of constitutional imperative, "awards of punitive damages will be strictly limited"*[46] *at least in libel actions against media* (Black, Douglas, Harlan, Marshall, and Stewart).

Among these sixteen propositions extracted from the opinions in *Rosenbloom* are some that may have significant impact on the ALI controversy over *Restatement* section 569 and on the law of defamation more generally. The remaining portion of this article considers briefly these potential consequences of *Rosenbloom*.

III. ROSENBLOOM'S IMPACT ON RESTATEMENT SECTION 569

Proposition Twelve—at least in media cases; actual damage is a constitutional requisite to recovery for libel—bears directly on the controversy over section 569 of the *Restatement (Second) of Torts*. In some respects it goes even further than Dean Prosser's proposal and the precedents he adduced. It denies liability in all cases against media not involving proof of "actual damage," including cases in which the defamatory innuendo is apparent and those in which the innuendo falls within one of the four special categories derived from the law of slander per se. Whether it is more or less protective than Dean Prosser's proposal in another respect—on the ground that requiring the plaintiff to prove "actual damage" gives the defendant more or less protection than requiring the plaintiff to prove "special harm or loss of reputation"—is open to question.[47] If less protective, it would not preclude application

46. *See* text accompanying note 10 *supra*.

47. One may infer that the opinions of Justices Harlan and Marshall, repeatedly referring to "actual damage," reflect a studied avoidance of the phrase "special harm," which is commonly used in the law of both libel and slander in relation to the requirement of proof of damage. Harlan also uses the following descriptive phrases: "actual, measurable injury," 403 U.S. at 64; "actual, measurable harm," *id.* at 66; "actual and measurable injury," *id.*; and "measurable adverse consequences," *id.* at 67. Marshall uses still other phrases: "proof that there was in fact financial loss, physical or emotional suffering, or that the plaintiff's standing in the community was diminished," *id.* at 83 (saying that state defamation law does not require this proof); "proven, actual injuries," *id.* at 84; "award . . . based on essentially objective, discernible factors," *id.*; "actual losses," *id.* at 86; and "damages can be awarded for more than direct pecuniary loss but they must be related to some proven harm," *id.* *Compare* the quotations above *with* the following description of required proof in Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 65 (1966) (defamation action of employer official against labor union): "We therefore hold that a complainant may not recover except upon proof of [resulting] harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law."

of the more protective rule of state law, since this constitutional rule defines only the minimum protection that the Constitution compels and not the maximum it permits.

The constitutional requirement in cases against defendants other than news media is more doubtful. Would the three Justices who favored the proof-of-actual-damage rule—Harlan, Marshall and Stewart—have applied it in all cases, or does their expressed concern about self-censorship imply that they were fashioning a rule only for media and, perhaps, participants in public discussion? Likewise, did Justices Black and Douglas favor eliminating defamation actions entirely, or were they speaking only about a general freedom for the media plus, perhaps, a freedom for others at least with regard to discussion of issues of public or general interest?

Proposition Twelve can be reconciled with the black letter of section 569 of the original *Restatement of Torts*. In the first place, the phrase "without a privilege to do so" appeared in that black letter. If Proposition Twelve is treated as stating a constitutional privilege, it is, in effect, incorporated by reference. On similar grounds, also, Proposition Twelve can be reconciled with the Prosser and Wade proposals for revision of section 569. In each of the three cases, however, both the scope and the practical significance of section 569 would be substantially reduced by the newly recognized constitutional "privilege." The impact would be greatest on the original text of section 569, least on the Prosser proposal, and somewhere in between on the Wade amendment.

Reconciliation of section 569 with constitutional protections becomes more difficult when we take into account Proposition Ten—at least in media cases, all plaintiffs must prove negligent falsehood. This proposition clashes directly with both the original version and the Prosser version of section 569. The Wade amendment to section 569, as it was phrased above, says one is not liable "in the absence of proof of special harm or loss of reputation unless he knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo."[48] If read as stating only a rule of nonliability, the Wade version is literally consistent with Proposition Ten, and in this sense it has emerged with the best chance of the three for survival after *Rosenbloom*. But it, too, is open to a charge of inconsistency in spirit, if not in letter. The "unless" clause may be interpreted as implying liability when its terms are met, even though there has been no proof of special harm or loss of reputation. Moreover, in order to establish "neg-

48. *See* note 5 *supra* concerning the choice of phrasing.

ligent falsehood" one would need to prove that the defendant knew or should have known of the defamatory innuendo and its falsity, and not merely that he "knew or should have known of the extrinsic facts." Certainly, many if not all the ALI supporters of the Wade version assumed, when voting, that liability could be imposed without proof of special harm or loss of reputation when the plaintiff proved that the defendant knew or should have known of the extrinsic facts. This unstated assumption clashes directly with Proposition Ten.

If some area of the law of defamation remains unaffected by constitutional doctrine, and *Restatement* section 569 is to speak to that residue of libel law, modification of the Wade version might be the simplest means of accomplishing this objective. A draft that would eliminate the constitutional objections which could be raised under Propositions Ten and Twelve might read as follows: "One who falsely, and without a privilege to do so, publishes matter defamatory to another [in such a manner as to make the publication a libel] is liable to the other if, but only if, (i) he knew or should have known of the defamatory innuendo and its falsity and (ii) the other proves actual damage." Because of its use of the qualifying phrase "without a privilege to do so," this revision of section 569 also would be consistent with Proposition One—protection of constitutional privilege for reports of public or general interest. And there is no doubt about its consistency with each of the other propositions extracted from *Rosenbloom* for which there were at least five committed supporters on the Court when that case was decided.

The proposed draft is inconsistent, however, with common law precedents concerning libel per se and, in those jurisdictions following the original version of section 569, libel generally. With the bracketed phrase excluded, it is also inconsistent with common law precedents concerning slander and slander per se. These departures from common law are required for consistency with the newly recognized constitutional imperatives, at least in media cases, against liability without both fault—Proposition Ten—and proof of actual damage—Proposition Twelve.

It is possible, of course, that the Supreme Court will abandon Propositions Ten and Twelve before the ALI acts on section 569. On the other hand, by that time the Court may have extended these propositions to defamation actions generally. Even if the scope of constitutional protection remains in its present state of uncertainty, an Institute con-

cerned with promoting clarity and uniformity in the law might favor the promulgation of a set of rules more explicitly interpreting the constitutional requirements. Indeed, if this choice does not commend itself to the ALI membership, the argument for postponing or abandoning any effort to restate the law of libel in the present circumstances might seem a more appealing alternative than adopting an elaborate set of rules for the residue of defamation actions thought to fall outside the area of constitutional protection, while only vaguely stating the terms of the constitutional protection itself.

Resolution of the controversy over seciton 569 in the manner suggested may contribute very little to clarification or improvement of the complex state and federal law of defamation that is our current heritage. The controversy over section 569 is, in a sense, beside the main stream of problems opened up by the series of Supreme Court decisions initiated with *New York Times*. These decisions have begun to work out a new accommodation among the fundamental interests in freedom of expression, security of good name, and the right to privacy. Therefore, our primary concern should be directed toward the major unfinished business of developing a wise and orderly accommodation among the basic social interests whose conflicting claims to recognition have led to the current chaos in the law of defamation.

IV. THE BROAD IMPACT OF REVISED CONSTITUTIONAL PRINCIPLES

The desire to attain evenhanded justice exerts a pressure toward complexity of law because it encourages sensitively refined distinctions—detailed evaluations of all the competing factors that seem relevant to judging. Moreover, unrestrained pursuit of all the refinements for which reasoned support can be marshalled sacrifices other values[49] and is, in the end, self-defeating. Regardless of the criticisms that might be leveled against particular rules, the law of defamation, even within any single state, is probably too complex now to serve the public interest well. This problem is exacerbated by the fact that today most substantial intrusions on security of good name are associated with interstate publication. Consequently, a single case often involves constitutional, statutory, and decisional doctrines of numerous states as well as overriding

49. *Cf.* J. FRANK, AMERICAN LAW—THE CASE FOR RADICAL REFORM 85-110 (1969) (calling attention to the disadvantages of multiplying decision points in a legal system). *See also* R. KEETON, INSURANCE LAW § 1.6 at 24-25 (1971) and R. KEETON, VENTURING TO DO JUSTICE 65-74 (1969) (both discussing the added disadvantages when the criteria for decision require case-by-case findings that are evaluative rather than merely factual in character).

federal law. Although this potential for inordinate complexity in the law of defamation has been present in our federal system from the outset, the problem has become both more apparent and more immediate because of the Supreme Court's recent interpretations of federal constitutional imperatives. Further changes in the law of defamation are inevitable, and the aim of simplification should be a significant factor in shaping them.

Although a plea for simplification of the law bearing on such issues as freedom of expression, security of good name, and privacy may seem to undervalue the fundamental interests at stake, we can safeguard those interests through wisely chosen methods of simplification. The uncertainty and difficulty of comprehension inherent in relatively complex rules tend to discourage free expression by inducing publishers to steer a course well clear of the treacherous limits of privilege. Thus, the operational rule represents an accommodation among conflicting interests that is less protective of free expression than the stated rule. In view of both this fact and the increased scope of the constitutional privilege to defame under recent Supreme Court decisions, a revised body of state law confining privilege in defamation cases to the minimum constitutional requirement might serve the interests of free expression about as well as a combination of the constitutional privilege with varied state-law privileges, some purportedly broader than constitutionally required. Moreover, since the federal law is now so unsettled, perhaps it is timely to suggest that we might more easily achieve a chosen degree of protection for free expression and a corresponding limitation of protection for security of good name by eliminating all state-law rules of privilege and broadening the federal-law privileges as needed to accomplish the chosen accommodation. Some further changes in the scope of the federal-law privilege will be effected as decisions of the Supreme Court answer currently unsettled questions. If these changes do not broaden privilege to the optimum degree, Congress might accomplish the further expansion directly, by statutory prescription,[50] or indirectly by a mandate declaring that a uniform rule fashioned by federal judicial decisions shall supplant the varied state rules previously applied.[51]

50. *Cf.* Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEXAS L. REV. 630, 643-48 (1968).

51. Although statutes have rarely been drafted to declare explicitly such a judicial power and responsibility for fashioning new rules of law, allocation to the courts of some degree of power and responsibility for completing the task of lawmaking initiated by the legislature is implicit in every statute. *Cf.* Leflar, *Comment on Maki v. Frelk*, 21 VAND. L. REV. 918 (1968). *See also* R. KEETON, VENTURING TO DO JUSTICE 78-97 (1969).

If simplification is accomplished in the near future by developing a single system of federal defamation law in lieu of the current multiplicity of systems, efforts expended in a revised Restatement of state law, even though indirectly useful, will have been somewhat misdirected. On the other hand, a revised Restatement might serve a significant role if simplification is to be achieved through uniformity in state decisional doctrines concerning those aspects of the law of defamation not controlled by constitutional imperatives. In the revision of the Restatement, it will be appropriate to reconsider any rules of privilege that have been rendered obsolete either by Supreme Court decisions or otherwise. For example, if a constitutional imperative against liability without proof of "actual damage" is established, then a state court that has preserved historical distinctions between libel and slander and between slander and slander per se may well find it appropriate to consider whether these distinctions still serve a useful purpose. Even if constitutionally permissible, would it be in the public interest to maintain for some cases, but not others, a more rigorous requirement of "special harm," narrower in scope than "actual damage"? Although this is an issue no state court has yet examined, it should not be foreclosed from consideration in the drafting of a revised Restatement. Thus, a revised Restatement, if it is to make the optimum contribution, must be somewhat less confined by the contours of previous state court decisions than is customary in Restatement drafting. This necessity arises from the fact that nearly all of the pertinent state decisions have been rendered in a context of assumptions about federal constitutional principles that have been overturned recently. Inevitably, these changed assumptions will have far-reaching impact on the entire law of defamation and privacy.