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## NOTES

### CHALLENGING A CONSERVATIVE STEREOTYPE: THE REHNQUIST COURT'S TREATMENT OF THE PRINT MEDIA AS LIBEL DEFENDANTS

Nearly fifty years ago, Judge Learned Hand declared that the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”<sup>1</sup> Defamation law developed as a common law response to protect individuals whose reputations are injured when those “right conclusions” are not gathered.<sup>2</sup> As Justice Stewart stated in the 1966 United States Supreme Court case of *Rosenblatt v. Baer*, the individual’s right to protect his or her reputation is a reflection of the fundamental dignity of human beings.<sup>3</sup> Since 1964, when the United States Supreme Court decided the landmark case of *New York Times Co. v. Sullivan*,<sup>4</sup> the Court has struggled over the proper balance between a free press and the individual’s right to be free from wrongful injury to his or her reputation.<sup>5</sup> This Note addresses the development of this struggle through coalitions of Justices and the willingness of the modern conservative Supreme Court to uphold the First Amendment protections given to the press.

In *New York Times*, the United States Supreme Court held that public officials are required to prove actual malice in order to win libel cases.<sup>6</sup> That is, public officials must prove that a publisher acted with knowledge of the statement’s falsity or with reckless

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<sup>1</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

<sup>2</sup> See BRUCE W. SANFORD, *LIBEL AND PRIVACY* 95 (2d ed. 1991).

<sup>3</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

<sup>4</sup> 376 U.S. 254, 254 (1964).

<sup>5</sup> See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

<sup>6</sup> 376 U.S. at 279–80.

disregard for the truth.<sup>7</sup> Three years later, in *Curtis Publishing Co. v. Butts*, the Court extended the *New York Times* rationale to include public figures—defining the term to include people who are involved in affairs of interest to the general public.<sup>8</sup> In the 1974 case of *Gertz v. Robert Welch, Inc.*, however, the Supreme Court took a different turn and began to lessen constitutional protection of speech when it refused to extend to private figures the *New York Times* rule requiring proof of actual malice.<sup>9</sup> The *Gertz* case, with its six separate opinions, shows a fragmented Court trying to find the proper balance of constitutionality.<sup>10</sup> By 1984, the Supreme Court once again changed directions as it began to adopt procedural protections for the press in libel actions.<sup>11</sup>

This Note examines how, after six terms, the Rehnquist Court has decided libel cases brought against the print media. Some commentators argue that the Rehnquist Court's strategy has been to chip slowly away at the foundation of *New York Times*.<sup>12</sup> This Note will explore that argument and demonstrate that the modern Court has in fact reaffirmed its commitment to *New York Times*,<sup>13</sup> although perhaps at the expense of lessened press protection in cases involving private plaintiffs.<sup>14</sup>

Section I of this Note traces the development of libel law in cases involving the print media since the 1964 *New York Times* decision.<sup>15</sup> It first reviews the cases decided in the decade immediately following *New York Times*,<sup>16</sup> and then surveys the decisions from

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<sup>7</sup> *Id.* at 280.

<sup>8</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967).

<sup>9</sup> 418 U.S. 323, 347 (1974).

<sup>10</sup> *Id.* at 353 (Blackmun, J., concurring); *id.* at 354 (Burger, C.J., dissenting); *id.* at 355 (Douglas, J., dissenting); *id.* at 361 (Brennan, J., dissenting); *id.* at 369 (White, J., dissenting). Justice Powell delivered the opinion of the Court. *Id.* at 325.

In discussing the Court's decision three years earlier in *Rosenbloom v. Metromedia, Inc.*, Justice Powell in *Gertz* stated that the views of the eight Justices who wrote five separate opinions in *Rosenbloom* reflected the differences in traditional thought about the problem of reconciling libel with the First Amendment. *Id.* at 333. The same can be said of the six opinions in *Gertz*. See generally Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 284 (1990).

<sup>11</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Philadelphia Newsp., Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984).

<sup>12</sup> Martin Garbus, *Courting Libel: Milkovich v. Lorain Journal Co. and Other Libel Suits*, NATION, Nov. 12, 1990, at 548.

<sup>13</sup> See, e.g., *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988).

<sup>14</sup> See, e.g., *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990).

<sup>15</sup> See *infra* notes 24-243 and accompanying text.

<sup>16</sup> See *infra* notes 24-109 and accompanying text.

1974 to 1976, beginning with *Gertz*, which changed the direction of the law.<sup>17</sup> Section I also examines the emerging procedural protections for the press that developed from 1984 to 1986.<sup>18</sup> Section II presents the lower court opinions of the newer Justices on the Supreme Court in order to have a stronger basis from which to determine their views on libel actions against the print media.<sup>19</sup> Section III explores the victories and losses for the press under the Rehnquist Court.<sup>20</sup> Section IV evaluates how the formation of coalitions has directed the course of libel law.<sup>21</sup> Finally, section V examines the main concerns of each Justice in the area of libel law and identifies the principle that guides him or her.<sup>22</sup> In examining the Rehnquist Court's decisions, this Note will argue that, contrary to critics' expectations that a conservative Court would stereotypically weaken First Amendment protections, the Rehnquist Court has continued the tradition of previous Courts by forming coalitions that have generally upheld press freedoms in print media libel cases.<sup>23</sup>

## I. DEVELOPMENT OF LIBEL LAW IN PRINT MEDIA CASES SINCE 1964

### A. 1964-74: *The Roots of a Constitutional Doctrine*

The United States Supreme Court first established constitutional protection for speech concerning public officials in the 1964 case of *New York Times Co. v. Sullivan*.<sup>24</sup> The Supreme Court held that the First Amendment serves as a limit on a state's authority to award damages to public officials in libel suits.<sup>25</sup> As such, the Court ruled that proof of actual malice, defined as knowledge of falsity or reckless disregard for the truth, was required in order for public officials to prevail in libel cases against those who had criticized their official actions.<sup>26</sup>

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<sup>17</sup> See *infra* notes 110-78 and accompanying text.

<sup>18</sup> See *infra* notes 179-243 and accompanying text.

<sup>19</sup> See *infra* notes 244-355 and accompanying text.

<sup>20</sup> See *infra* notes 356-452 and accompanying text.

<sup>21</sup> See *infra* notes 453-97 and accompanying text.

<sup>22</sup> See *infra* notes 498-553 and accompanying text.

<sup>23</sup> See *infra* notes 453-97 and accompanying text. *But see also* Garbus, *supra* note 12, at 548; Howard Kurtz, *Spate of Libel Judgments May Alter News Practices; Editors See a More Hostile Supreme Court*, WASH. POST, Nov. 24, 1990, at A4 (Supreme Court has been more hospitable to libel plaintiffs by allowing multimillion-dollar libel judgments to stand).

<sup>24</sup> 376 U.S. 254, 283 (1964).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 279-80.

In *New York Times*, L.B. Sullivan, the Commissioner of Public Affairs of Montgomery, Alabama, brought a libel action against the New York Times Company.<sup>27</sup> Sullivan alleged that he had been libeled by a full-page advertisement entitled "Heed Their Rising Voices," which appeared in the *New York Times*.<sup>28</sup> Although the ad did not mention Sullivan by name, he claimed that the language accusing the police of using violence against civil rights protesters in Montgomery libeled him because he was the commissioner who supervised the police department.<sup>29</sup> A jury awarded Sullivan \$500,000 and the Alabama Supreme Court affirmed the judgment.<sup>30</sup>

The United States Supreme Court reversed the judgment of the Alabama court,<sup>31</sup> holding that public officials must prove actual malice in libel cases.<sup>32</sup> Writing for the Court, Justice Brennan began by acknowledging that it was the first time the Court would determine how far the Constitution extended to limit a state's libel laws.<sup>33</sup> The Court in *New York Times* emphasized that the standards used to measure libel must satisfy the First Amendment.<sup>34</sup> Justice Brennan stressed the nation's deep commitment to robust debate on public issues, which sometimes included stinging attacks on public officials.<sup>35</sup> The Court explained that erroneous statements are inevitable in open debate, and that such statements demanded protection in order to accord free expression its necessary "breathing space."<sup>36</sup> The Court compared *New York Times* to an historical case of seditious libel, a concept that violated the First Amendment.<sup>37</sup>

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<sup>27</sup> *Id.* at 256.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 258.

<sup>30</sup> *Id.* at 256.

<sup>31</sup> *Id.* at 264.

<sup>32</sup> *Id.* at 283.

<sup>33</sup> *Id.* at 256.

<sup>34</sup> *Id.* at 269.

<sup>35</sup> *Id.* at 270.

<sup>36</sup> *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

<sup>37</sup> *Id.* at 273; Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 606 (1983). Seditious libel is a statement written "with the intent to incite the people to change the government otherwise than by lawful means, or to advocate the overthrow of the government by force or violence." BLACK'S LAW DICTIONARY 1351 (6th ed. 1990).

The Court's opinion rested largely on the analogy to seditious libel. *New York Times*, 376 U.S. at 273. The Court explained that because neither error nor defamation alone was enough to destroy the mantle of First Amendment protection given to political expression, then the two combined could do no more. *Id.* Justice Brennan reasoned that this was the lesson learned from the Sedition Act of 1798. *Id.* The Court explained that "the great

The Supreme Court reasoned that truth alone could not be an adequate defense because it could not guarantee that only false speech would be discouraged.<sup>38</sup> The Court explained that the allowance of truth as the only defense would lead to self-censorship because publishers would not print their criticisms of public officials unless they were certain they could prove the truth of their assertions.<sup>39</sup> The Supreme Court thus concluded that the Constitution dictated the need for a national standard.<sup>40</sup> This constitutional rule would allow a public official to recover for defamation relating to his or her official conduct only if he or she can prove that the statement was made with actual malice, meaning with knowledge of its falsity or with reckless disregard for the truth.<sup>41</sup>

While the judgment in *New York Times* was unanimous, the Court's reasoning did not convince all of the Justices.<sup>42</sup> In his concurrence, Justice Black, joined by Justice Douglas, argued that the First Amendment provided absolute immunity for criticism of public officials.<sup>43</sup> Justice Black expressed his concern that libel laws would threaten the existence of a free and uninhibited press.<sup>44</sup> In a separate concurrence, Justice Goldberg, also joined by Justice Douglas, agreed that the First Amendment provided the press with an unconditional privilege.<sup>45</sup> Justice Goldberg, however, argued that the real issue in the case was whether freedom of speech as protected by the Constitution could be properly secured by the actual malice rule, which hinged its determination of liability on a jury's determination as to the state of mind of the speaker.<sup>46</sup> Because he did not believe such a rule could protect a free press, Justice Goldberg thus concluded that under the First Amendment the press was immune from libel suits.<sup>47</sup>

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controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment." *Id.* Justice Brennan traced the history of the Sedition Act, noting that while no one had ever challenged the Act before the Supreme Court, history had invalidated it. *Id.* at 276. The Court stated that the Act had been inconsistent with the constitutional protection of free expression. *Id.*

<sup>38</sup> *New York Times*, 376 U.S. at 279.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 279-80.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 293 (Black, J., concurring); *id.* at 297 (Goldberg, J., concurring).

<sup>43</sup> *Id.* at 295. Justice Black asserted that the minimum guarantee of the First Amendment is "an unconditional right to say what one pleases about public affairs." *Id.* at 297.

<sup>44</sup> *Id.* at 294.

<sup>45</sup> *Id.* at 298.

<sup>46</sup> *Id.* at 300.

<sup>47</sup> *Id.* at 298.

The context of *New York Times*—the political struggle of the civil rights era—made the case unique.<sup>48</sup> At least one commentator has written that what makes *New York Times* a great opinion is its subsequent use as the linchpin of defamation law.<sup>49</sup> Because the press played such an important role in showing the racial tensions existing in the South, commentators believe that the libel suit was used as a weapon, to which Justice Brennan responded with his analogy to seditious libel.<sup>50</sup> *New York Times* had an instant impact on libel law.<sup>51</sup> The same year, the Supreme Court extended the actual malice rule to criminal libel.<sup>52</sup> Furthermore, public officials rarely won libel cases for years after the Court ruled in *New York Times*.<sup>53</sup>

The United States Supreme Court continued the expansion of constitutional protection for print media in the 1967 case of *Curtis Publishing Co. v. Butts*, and its companion case, *Associated Press v. Walker*, by holding that public figures, like public officials, were required to comply with the *New York Times* rule by proving actual malice.<sup>54</sup> The Court defined public figures as persons who are involved in resolving or shaping important public issues.<sup>55</sup> All of the Justices agreed that public figures should be held to proving a standard of fault, but the Justices differed as to which standard should be applied.<sup>56</sup>

The *Curtis* plaintiff, a former athletic director of the University of Georgia, sued Curtis Publishing alleging that an article appearing in the *Saturday Evening Post* had libeled him.<sup>57</sup> The article stated that he fixed a football game with the head coach of the University of Alabama.<sup>58</sup> In its defense, Curtis Publishing argued that the

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<sup>48</sup> Lewis, *supra* note 37, at 605.

<sup>49</sup> See Halpern, *supra* note 10, at 275.

<sup>50</sup> Lewis, *supra* note 37, at 605. Lewis stated that "what was at stake . . . was more than the fate of one newspaper. It was the ability, or the willingness, of the American press to go on covering the racial conflict in the South as it had been doing." *Id.*

<sup>51</sup> *Id.* at 608.

<sup>52</sup> *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (actual malice rule limits states in imposing criminal sanctions for criticism of public officials).

<sup>53</sup> Lewis, *supra* note 37, at 608.

<sup>54</sup> 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

<sup>55</sup> *Id.* Chief Justice Warren gave this definition in his concurring opinion, which drew a majority of votes. *Id.*

<sup>56</sup> *Id.* at 162, 164 (Warren, C.J., concurring); *id.* at 170, 171 (Black, J., dissenting in *Curtis*, concurring in *Walker*); *id.* at 172, 172-73 (Brennan, J., dissenting in *Curtis*, concurring in *Walker*). Justice Harlan delivered the opinion of the Court. *Id.* at 133.

<sup>57</sup> *Id.* at 135.

<sup>58</sup> *Id.*

information contained in the article was true.<sup>59</sup> The jury found in favor of the plaintiff.<sup>60</sup> Both the United States Court of Appeals for the Fifth Circuit<sup>61</sup> and the United States Supreme Court affirmed the judgment.<sup>62</sup>

In *Walker*, the companion case to *Curtis*, a retired Army General alleged that he was libeled by an Associated Press dispatch that stated, incorrectly, that he had encouraged and incited rioting at the University of Mississippi campus.<sup>63</sup> The jury returned a verdict in favor of the plaintiff.<sup>64</sup> The Texas Court of Civil Appeals affirmed the trial court's decision,<sup>65</sup> but the United States Supreme Court reversed.<sup>66</sup>

In both cases, the Supreme Court held that the plaintiffs were public figures,<sup>67</sup> and that the *New York Times* standard of actual malice would be extended to include public figures.<sup>68</sup> The *Curtis* decision elicited four separate opinions, showing the first signs of the split in the Court.<sup>69</sup> Justice Harlan wrote a plurality opinion, joined by Justices Clark, Stewart and Fortas.<sup>70</sup> Justice Harlan advocated a standard allowing recovery by a public figure upon a

<sup>59</sup> 388 U.S. at 137. The *New York Times* decision did not come down until after the trial. *Id.*

<sup>60</sup> *Id.* at 138. The jury awarded Curtis \$60,000 in general damages and \$3,000,000 in punitive damages. *Id.* The trial court, however, reduced the total amount of damages to \$460,000 by remittitur. *Id.*

<sup>61</sup> *Id.* at 139.

<sup>62</sup> *Id.* at 161.

<sup>63</sup> *Id.* at 140.

<sup>64</sup> *Id.* at 141. The jury awarded Curtis \$500,000 in compensatory damages and \$300,000 in punitive damages. *Id.* The trial court refused to enter the punitive award, finding that there was no evidence presented to support a conclusion that there was actual malice. *Id.* at 141-42.

<sup>65</sup> *Id.* at 142.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 155.

<sup>68</sup> 388 U.S. at 164 (Warren, C.J., concurring).

The Supreme Court also faced the question of whether punitive damages should be limited to cases of actual malice. *Id.* at 160. The Court rejected this argument, asserting that precedent did not suggest that there are different constitutional standards for compensatory and punitive damages. *Id.* The Court thus held that conduct that is enough to justify compensatory damages also justifies punitive damages. *Id.* at 161.

<sup>69</sup> *Id.* at 162 (Warren, C.J., concurring); *id.* at 170 (Black, J., dissenting in *Curtis*, concurring in *Walker*); *id.* at 172 (Brennan, J., dissenting in *Curtis*, concurring in *Walker*). Justice Harlan delivered the opinion of the Court. *Id.* at 133; see also Halpern, *supra* note 10, at 280-81; Harry Kalven Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 Sup. Ct. Rev. 267, 275. Kalven stated that "you can't tell the players without a score card." *Id.*

<sup>70</sup> *Curtis*, 388 U.S. at 133.



showing that the press had engaged in "highly unreasonable conduct" amounting to a grave departure from responsible journalism.<sup>71</sup> Justice Harlan explained that factors that had been present in the *New York Times* case, such as the analogy to seditious libel, were not present in *Curtis* because the statements made in the latter case did not arise from political expression.<sup>72</sup> Thus, Justice Harlan reasoned that public figures should be required to prove a standard based on the press's highly unreasonable conduct rather than actual malice.<sup>73</sup>

Chief Justice Warren wrote a concurrence in which Justices Black, Douglas, Brennan and White joined, thus providing a majority for the Court.<sup>74</sup> The Chief Justice argued that neither logic nor the First Amendment justified the application of separate standards for public officials and public figures.<sup>75</sup> He further explained that Justice Harlan's "highly unreasonable conduct" standard was too uncertain and could not adequately protect free speech.<sup>76</sup> Chief Justice Warren argued that the "blending of positions and power" in modern society resulted in individuals who, though not elected to public office, were nonetheless influential in deciding important public issues.<sup>77</sup> Therefore, he argued that the actual malice standard articulated in *New York Times* was applicable to both public figures and public officials.<sup>78</sup>

Justice Black, joined by Justice Douglas, adhered to his position in *New York Times*, arguing that the press is absolutely immune from defamation actions.<sup>79</sup> Both Justices, however, joined the opinion of Chief Justice Warren in order to decide the case based on the *New York Times* precedent in the belief that if a line was going to be drawn, at least it should be that of actual malice.<sup>80</sup> Justice Black claimed that even the *New York Times* standard was incapable of saving the media from being ruined by libel judgments.<sup>81</sup> Justice

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<sup>71</sup> *Id.* at 155.

<sup>72</sup> *Id.* at 154.

<sup>73</sup> *Id.* at 155.

<sup>74</sup> *Id.* at 162.

<sup>75</sup> *Id.* at 163.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 163-64.

<sup>78</sup> *Id.* at 164.

<sup>79</sup> *Id.* at 171-72.

<sup>80</sup> *Id.* at 170.

<sup>81</sup> *Id.* at 171.

Brennan, joined by Justice White, concurred with the Chief Justice's extension of *New York Times*.<sup>82</sup>

In 1970, when the United States Supreme Court in *Rosenbloom v. Metromedia, Inc.* considered a libel action by a private figure, it shifted the application of the *New York Times* standard from the status of the plaintiff to whether the nature of the speech was of public or general interest.<sup>83</sup> Five separate opinions emerged from *Rosenbloom*, with no one opinion commanding more than three votes.<sup>84</sup> At least five Justices, however, held that the *New York Times* actual malice standard should be required of private figures when the statements published were of legitimate and general concern.<sup>85</sup>

In *Rosenbloom*, police arrested a distributor of nudist magazines for selling allegedly obscene material.<sup>86</sup> He then sued city and police officials, claiming that the magazines were not obscene.<sup>87</sup> Radio broadcasts of the arrests and trial, however, had labeled the magazines obscene and characterized Rosenbloom as a "smut merchant" and a "girlie-book peddler."<sup>88</sup> Rosenbloom filed a lawsuit alleging that the broadcasts libeled him.<sup>89</sup> The jury found in favor of Rosenbloom.<sup>90</sup> The United States Court of Appeals for the Third Circuit reversed the judgment, holding that the *New York Times* standard applied, and that the fact that Rosenbloom was not a public figure had no definitive significance.<sup>91</sup> The United States Supreme Court affirmed the court of appeals decision.<sup>92</sup>

In a plurality opinion by Justice Brennan, the author of *New York Times*, the Supreme Court expressed its continued commitment to open and robust debate on public issues by expanding constitutional protection to all discussion of matters of public or general

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<sup>82</sup> 388 U.S. at 172. Justice Brennan wrote separately because he preferred to remand *Curtis* for a new trial so that the jury could receive proper instructions to comply with the *New York Times* standard. *Id.*

<sup>83</sup> 403 U.S. 29, 43-44 (1971).

<sup>84</sup> *Id.* at 57 (Black, J., concurring); *id.* (White, J., concurring); *id.* at 62 (Harlan, J., dissenting); *id.* at 78 (Marshall, J., dissenting). Justice Brennan announced the Court's judgment. *Id.* at 30.

<sup>85</sup> *Id.* at 43-44; *id.* at 59 (White, J., concurring).

<sup>86</sup> *Id.* at 32.

<sup>87</sup> *Id.* at 34.

<sup>88</sup> *Id.* at 33-34.

<sup>89</sup> *Id.* at 36.

<sup>90</sup> *Id.* at 40. The jury awarded Rosenbloom \$25,000 in general damages and \$725,000 in punitive damages. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 57.

concern, regardless of whether the persons involved are "famous or anonymous."<sup>93</sup> The Court reasoned that the significance of a public event does not diminish because a private person is involved.<sup>94</sup> The Court noted that a distinction between public and private figures did not comport well with the First Amendment.<sup>95</sup> The Court explained that the *New York Times* actual malice standard applied to both a public official and public figure in order to encourage the discussion of public issues, not because a public official's interest in his or her reputation is any less important than that of a private person.<sup>96</sup> The Court maintained that the individual's interest in privacy is not present in a case such as this because the individual is involved in issues of concern to the public.<sup>97</sup> Justice Brennan stated that the reach of the phrase "issue of public or general concern" would be left to future cases.<sup>98</sup>

*Rosenbloom* resulted in four other opinions—two concurrences and two dissents.<sup>99</sup> In a concurring opinion, Justice Black maintained his absolutist position that the First Amendment does not permit libel judgments against the press.<sup>100</sup> In a separate opinion, Justice White concurred in the judgment on a narrow ground.<sup>101</sup> He emphasized that the press has a First Amendment privilege to report on official actions of public servants such as the police with no need to spare the reputation of the persons involved from the public.<sup>102</sup> Justice White thus held it unnecessary to reach broader questions under the facts before the Court.<sup>103</sup> Justice Harlan dissented on the grounds that private individuals do not have the same access to the media that public officials and public figures have, and that they have not voluntarily placed themselves in public view.<sup>104</sup> Justice Marshall, joined by Justice Stewart, dissented, arguing that a standard of "matters of public concern" would mean that courts

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<sup>93</sup> *Id.* at 43–44.

<sup>94</sup> *Id.* at 43.

<sup>95</sup> 403 U.S. at 45–46.

<sup>96</sup> *Id.* at 46.

<sup>97</sup> *Id.* at 48.

<sup>98</sup> *Id.* at 44–45.

<sup>99</sup> *Id.* at 57 (Black, J., concurring); *id.* (White, J., concurring); *id.* at 62 (Harlan, J., dissenting); *id.* at 78 (Marshall, J., dissenting).

<sup>100</sup> *Id.* at 57.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 62.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 70.

would be left with the decision of what information is important to self-government.<sup>105</sup>

The extension of the *New York Times* actual malice rule in *Curtis* and *Rosenbloom*, while beneficial to the press, created confusion and further complexity in defamation law.<sup>106</sup> *Curtis* produced a curious decision, in which Justice Harlan wrote for the Court, but where the majority aligned—for differing reasons—with Chief Justice Warren in holding that a public figure must prove actual malice to prevail in a libel action.<sup>107</sup> After *Curtis*, the Court in *Rosenbloom* attempted to resolve the remaining problem of whether constitutional protection would be based on the nature of the speech or on the status of the plaintiff by focusing on whether the statements were about issues of general concern.<sup>108</sup> The resolution of *Rosenbloom* proved both unclear and short-lived.<sup>109</sup>

#### B. 1974–76: Limiting Constitutional Protection

Four years later, the Supreme Court took a step back from *New York Times* and *Rosenbloom* in the 1974 case of *Gertz v. Robert Welch, Inc.*<sup>110</sup> The Court in *Gertz* rejected the *Rosenbloom* plurality's focus on the nature of the speech and returned to a standard based on the status of the plaintiff.<sup>111</sup> The Supreme Court in *Gertz* held that because the plaintiff was a private figure, there was no constitutional requirement that the plaintiff show actual malice on the part of the press.<sup>112</sup> The Court further held that states could define their own standard in defamation cases involving private individuals, as long as they did not impose liability without fault.<sup>113</sup>

The *Gertz* case arose after a Chicago police officer was convicted of murder for killing a youth.<sup>114</sup> The victim's family hired Gertz, an attorney, to represent them in civil litigation against the officer.<sup>115</sup> While representing the family, Gertz was the subject of an article

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<sup>105</sup> 403 U.S. at 79.

<sup>106</sup> See Halpern, *supra* note 10, at 280, 283.

<sup>107</sup> *Id.* at 280–81.

<sup>108</sup> *Rosenbloom*, 403 U.S. at 43–44; *id.* at 59 (White, J., concurring).

<sup>109</sup> See Halpern, *supra* note 10, at 283.

<sup>110</sup> 418 U.S. 323, 347 (1974).

<sup>111</sup> *Id.* at 346–47.

<sup>112</sup> *Id.* at 347.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 325.

<sup>115</sup> *Id.*

by *American Opinion*, a magazine published by Robert Welch, Inc. that expressed the views of the John Birch Society.<sup>116</sup> The article alerted readers of a national Communist conspiracy to discredit local law enforcement agencies.<sup>117</sup> Although Gertz was not involved in the criminal prosecution of the officer, the magazine implied that he was behind the frame-up, that he had a criminal record and that he was a "Communist-fronter."<sup>118</sup> Although the jury found for Gertz, the court entered judgment for Robert Welch notwithstanding the verdict, holding that *New York Times* governed the case.<sup>119</sup> The United States Court of Appeals for the Seventh Circuit affirmed the judgment, holding that although Gertz was not a public figure, he was involved in an issue of public interest, and thus under *Rosenbloom*, the actual malice standard was indeed applicable.<sup>120</sup>

The Supreme Court, parting with *Rosenbloom*, reversed the Seventh Circuit's judgment.<sup>121</sup> This time, the members of the Court wrote six separate opinions.<sup>122</sup> Justice Powell, who delivered the opinion of the Court, began with the often-cited dictum that there can be no false ideas under the First Amendment, regardless of how damaging an opinion may appear.<sup>123</sup> Justice Powell stated, however, that there was no constitutional protection per se for false factual statements.<sup>124</sup> Nonetheless, the Court explained that because such false statements of fact were unavoidable in unrestricted debate, the First Amendment thus required protection of some falsity in order to properly protect "speech that matters."<sup>125</sup>

The Supreme Court emphasized that the state interest in compensating private individuals for injury to reputation called for a different rule to apply to them as opposed to public figures.<sup>126</sup> The Court based its opinion on two main rationales, the first of which

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 326.

<sup>119</sup> *Id.* at 329.

<sup>120</sup> *Id.* at 330-31, 332.

<sup>121</sup> *Id.* at 332.

<sup>122</sup> 418 U.S. at 353 (Blackmun, J., concurring); *id.* at 354 (Burger, C.J., dissenting); *id.* at 355 (Douglas, J., dissenting); *id.* at 361 (Brennan, J., dissenting); *id.* at 369 (White, J., dissenting). Justice Powell delivered the opinion of the Court. *Id.* at 325.

<sup>123</sup> *Id.* at 339. The Supreme Court in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990), later rejected the argument that the *Gertz* Court intended to create an opinion exemption to libel. *Id.* at 2705. Instead, the *Milkovich* Court recharacterized Justice Powell's phrase as dictum. *Id.*

<sup>124</sup> *Gertz*, 418 U.S. at 340.

<sup>125</sup> *Id.* at 340-41.

<sup>126</sup> *Id.* at 343.

is the extent of an individual's capacity to resort to self-help, such as making public corrections, after being defamed.<sup>127</sup> The Court pointed out that public officials and public figures have greater access to the media and therefore possess more opportunities to rebut false statements than do private individuals.<sup>128</sup> Because private individuals are thus more vulnerable to injury due to their inability to redress the injury through the media, the state has a greater interest in protecting them.<sup>129</sup>

The second rationale on which the Court based its public/private distinction is that of the individual's willingness and efforts to cast him or herself in the spotlight.<sup>130</sup> The Court first made a distinction between two kinds of public figures.<sup>131</sup> According to the Court, the first type are those public figures who occupy such important positions in society that they are classified as public figures for all purposes.<sup>132</sup> The second type, which the Court noted are more common, are those public figures who are in the spotlight in regard to a particular issue.<sup>133</sup> In both situations, however, the Court said these individuals attract attention.<sup>134</sup> The Court further explained that both public officials and public figures have voluntarily exposed themselves to greater risk by assuming their positions.<sup>135</sup> The Court reasoned, however, that private individuals do not deliberately subject themselves to any risk.<sup>136</sup> The Court thus concluded that the Constitution does not require private individuals to prove actual malice in libel cases.<sup>137</sup> The Court then held that states themselves could determine a standard of liability as long as they did not impose liability without fault.<sup>138</sup>

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<sup>127</sup> *Id.* at 344.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 345.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> 418 U.S. at 345.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 347.

<sup>138</sup> *Id.* The *Gertz* Court further held that states could not allow recovery of punitive damages if liability was not based on actual malice. *Id.* at 349. The Supreme Court reasoned that the state interest in redressing the wrongs done to private individuals did not extend further than compensation for actual injury. *Id.* at 348-49. Moreover, the Court explained that because punitive damages allow juries full discretion to award damages where there has been no injury, they can interfere with the First Amendment and lure juries into punishing the media for unpopular opinion even where the plaintiff has not suffered any injury. *Id.* at 349.

In a concurring opinion, Justice Blackmun stated that the pre-*Rosenbloom* doctrine focusing on the status of the plaintiff greatly limited *New York Times* by allowing states to define their own standards of liability in a greater number of cases.<sup>139</sup> Justice Blackmun noted that although he preferred the view of the *Rosenbloom* plurality, which extended the *New York Times* actual malice to cases in which the speech was on matters of general concern, he joined the Court's opinion to form a majority.<sup>140</sup> Justice Blackmun explained that he thought the area of defamation needed a clearly defined majority instead of the uncertainty that followed *Rosenbloom*.<sup>141</sup>

The four dissenters in *Gertz*—Chief Justice Burger and Justices Douglas, Brennan and White—each offered a separate rationale for his decision.<sup>142</sup> Justice Douglas held fast to his absolutist position that state libel suits for the discussion of public issues did not comport with the guarantees of the First Amendment.<sup>143</sup> Justice Brennan reiterated his position in *Rosenbloom*, stating his belief that the *New York Times* standard was applicable in all matters of general interest.<sup>144</sup> Chief Justice Burger, on the other hand, recommended the use of caution and preferred to let the area of law continue to evolve as it had with respect to private citizens.<sup>145</sup> Finally, Justice White stated his disagreement with the Court's interference in the states' interest in protecting individuals from defamation.<sup>146</sup> He stressed that *New York Times* created only limited exceptions to the general rule that libelous statements are not protected by the First Amendment.<sup>147</sup> Justice White argued that by using the First Amendment as a tool, the Court nevertheless had nationalized libel law and declared unconstitutional the laws in most states.<sup>148</sup>

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<sup>139</sup> *Id.* at 353. Justice Blackmun also stressed his agreement with the removal of punitive damages in cases with a lower standard than actual malice. *Id.* at 354. Justice Blackmun stated that "[b]y removing the specters of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action." *Id.* Thus he stated that the removal of presumed damages allows for the existence of a free press. *Id.*

<sup>140</sup> 418 U.S. at 354.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 354 (Burger, C.J., dissenting); *id.* at 355 (Douglas, J., dissenting); *id.* at 361 (Brennan, J., dissenting); *id.* at 369 (White, J., dissenting).

<sup>143</sup> *Id.* at 358.

<sup>144</sup> *Id.* at 361.

<sup>145</sup> *Id.* at 355.

<sup>146</sup> *Id.* at 370.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Although most constitutional scholars characterize *Gertz* as a press defeat, the decision has also been defended.<sup>149</sup> One commentator suggests that the problem is not with the *Gertz* holding as to private plaintiffs, but rather with determining how to treat public figures.<sup>150</sup> Although a definitive answer to the problem of public figures may not exist, this commentator argues that an examination of the nature of the speech—which *Gertz* eliminated from its test—is essential to determine whether or not speech is constitutionally protected.<sup>151</sup>

The United States Supreme Court continued to refine its distinction between public and private figures in the 1976 case of *Time, Inc. v. Firestone*.<sup>152</sup> In *Time*, the Court held that the plaintiff, a prominent Palm Beach socialite involved in a well-publicized divorce, was not a public figure.<sup>153</sup> The Supreme Court stated that a divorce was not the type of public controversy, as defined in *Gertz*, which transforms a private person into a public figure.<sup>154</sup>

The *Time* case arose from the divorce of Mary Alice Firestone from her wealthy husband.<sup>155</sup> After Firestone filed a separation complaint, her husband filed a counterclaim for divorce on the grounds of adultery and extreme cruelty.<sup>156</sup> A judge granted the divorce in a broadly-worded decree.<sup>157</sup> *Time* magazine ran an article reporting the divorce and stating that the reasons for it had been adultery and extreme cruelty.<sup>158</sup> At trial, Firestone prevailed in her libel action against *Time, Inc.*<sup>159</sup>

<sup>149</sup> For criticism of *Gertz*, see, e.g., David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 441 (1975) (decision promotes self-censorship); Gerald G. Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 661 (1977) (treatment given to private plaintiffs unjustifiable and protection to press illusive); George C. Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811, 821 (Court should adopt uniform standards in defamation). In defense of *Gertz*, see, e.g., David N. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 200-01 (1976) (sensible compromise between First Amendment and privacy interests); Lewis, *supra* note 37, at 622 (balance of interests in *Gertz* correct but Court should have kept subject matter in test).

<sup>150</sup> Lewis, *supra* note 37, at 622.

<sup>151</sup> *Id.* at 624.

<sup>152</sup> 424 U.S. 448, 455 (1976).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 454.

<sup>155</sup> *Id.* at 450.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 450-51.

<sup>158</sup> *Id.* at 451-52.

<sup>159</sup> *Id.* at 452. A jury awarded Firestone \$100,000. *Id.* The judgment was affirmed by both the Florida District Court of Appeal and the Supreme Court of Florida. *Id.*



In an opinion authored by then-Associate Justice Rehnquist, the Supreme Court stated that Firestone was not a public figure because she did not accept any prominent role in society or launch herself to the vanguard of a public debate.<sup>160</sup> The Court explained that making Firestone a public figure only because her divorce was of public interest would mean a return to the *Rosenbloom* doctrine of extending *New York Times* to any matters of general concern.<sup>161</sup> The Court reasoned that the subject-matter test of *Rosenbloom* did not strike a proper balance in the area of libel.<sup>162</sup> The Court explained that the *Gertz* Court had discarded the *Rosenbloom* doctrine because it severely restricted a state's legitimate interest in compensating individuals who are injured by defamatory statements.<sup>163</sup>

Once again, the Supreme Court did not stand behind a unanimous opinion.<sup>164</sup> Justice Powell's concurrence argued that there was no evidence that the lower court ever applied a fault standard, which he stated was contrary to *Gertz's* holding that states must use some degree of fault in order to impose liability.<sup>165</sup> In his dissent, Justice Brennan acknowledged that although *Gertz* had meant a step back from *Rosenbloom*, it had not overruled the latter decision.<sup>166</sup> Justice Brennan argued that *Gertz* did not change *Rosenbloom's* essential holding that when there are errors in reporting on actions of public officials the *New York Times* malice standard must be met to impose liability.<sup>167</sup> He argued that because *Time* involved the reporting of judicial affairs, the plaintiff was required to prove actual malice to recover.<sup>168</sup>

Justice White, on the other hand, dissented because he would have affirmed the decision of the trial court.<sup>169</sup> Justice White reasoned that using the fault standards in either *Gertz* or *Rosenbloom* in Firestone's case would not further First Amendment values.<sup>170</sup> He

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<sup>160</sup> *Id.* at 453.

<sup>161</sup> *Id.* at 454.

<sup>162</sup> 424 U.S. at 456.

<sup>163</sup> *Id.* The Supreme Court remanded the case because there was not a finding of fault in the record, which the Court stated was necessary under *Gertz* for awarding compensatory damages. *Id.* at 464.

<sup>164</sup> *Id.* (Powell, J., concurring); *id.* at 471 (Brennan, J., dissenting); *id.* at 481 (White, J., dissenting); *id.* at 484 (Marshall, J., dissenting).

<sup>165</sup> *Id.* at 464-65 (Powell, J., concurring).

<sup>166</sup> *Id.* at 474, 476 (Brennan, J., dissenting).

<sup>167</sup> *Id.* at 476.

<sup>168</sup> *Id.* at 476, 481.

<sup>169</sup> *Id.* at 481 (White, J., dissenting).

<sup>170</sup> *Id.* at 481-82.

explained that because the publication of the *Time* article predated both *Gertz* and *Rosenbloom*, requiring fault in this case only interfered with the state's interest in redressing the wrong to a victim of defamation.<sup>171</sup> Moreover, Justice White concluded that, in any event, the trial court properly determined fault.<sup>172</sup> Justice Marshall's dissent concentrated on the meaning of public figure.<sup>173</sup> He pointed out that Firestone was prominent among the "400" of Palm Beach society, was a member of the "sporting set," and had held press conferences during her trial.<sup>174</sup> Justice Marshall concluded that Firestone was a public figure and thus that an application of the *New York Times* standard of actual malice was warranted in this case.<sup>175</sup>

After *Time*, the Supreme Court had taken two steps away from the constitutional protection established just two years before in *Rosenbloom*.<sup>176</sup> The Court—in *Gertz* and *Time*—held that both a prominent lawyer and a Palm Beach socialite were private plaintiffs.<sup>177</sup> The Supreme Court had returned to a constitutional standard based on the status of the plaintiff rather than one based on the nature of the speech.<sup>178</sup>

### C. Emerging Procedural Protections

Twenty years after *New York Times*, the United States Supreme Court began to deal with a series of libel cases that presented the press with an opportunity to argue for increased procedural safeguards.<sup>179</sup> In 1984, the Court was faced with a procedural question of first impression in *Bose Corp. v. Consumers Union of United States, Inc.*<sup>180</sup> In *Bose*, the Court had to decide whether the "clearly erroneous" standard of review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure is applicable in reviewing a determination

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<sup>171</sup> *Id.* at 483.

<sup>172</sup> 424 U.S. at 482.

<sup>173</sup> *Id.* at 484 (Marshall, J., dissenting).

<sup>174</sup> *Id.* at 484–85.

<sup>175</sup> *Id.* at 485.

<sup>176</sup> See *supra* notes 83–109 and accompanying text for a discussion of *Rosenbloom*.

<sup>177</sup> *Time*, 424 U.S. 448, 455 (1976); *Gertz*, 418 U.S. 323, 347 (1974).

<sup>178</sup> See *Time*, 424 U.S. at 455 (plaintiff is not a public figure although her divorce may be of interest to the public); *Gertz*, 418 U.S. at 352 (lawyer who represented private client and never spoke to press is not a public figure).

<sup>179</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Philadelphia Newsp., Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984).

<sup>180</sup> 466 U.S. at 487.

of actual malice as defined in *New York Times*.<sup>181</sup> The Supreme Court held that an appellate court must conduct an independent review to determine whether the evidence establishes actual malice with clear and convincing evidence in a case governed by *New York Times*.<sup>182</sup>

The controversy in *Bose* arose after *Consumer Reports* magazine, published by Consumers Union, evaluated a loudspeaker manufactured by Bose in a feature article on different brands of speakers.<sup>183</sup> Bose was unhappy with the article and brought a product disparagement lawsuit.<sup>184</sup> The lower court found that Bose was a public figure as defined by *Gertz*, and that Bose had met its burden of proving actual malice.<sup>185</sup> The United States Court of Appeals for the First Circuit reversed the lower court judgment.<sup>186</sup> The court of appeals stated that Rule 52(a)'s "clearly erroneous" standard of review was not a limitation to its review of the actual malice finding.<sup>187</sup> Furthermore, the court of appeals held that it was required to undertake a de novo review of the record to safeguard the lower court's application of the constitutional standard.<sup>188</sup> The United States Supreme Court affirmed the court of appeals decision.<sup>189</sup>

Writing for a majority of the Court, Justice Stevens noted in *Bose* that Rule 52(a) applies to the review of findings of fact and not to findings of law or mixed questions of law and fact.<sup>190</sup> The Court also pointed out that in *New York Times*, it had acknowledged the necessity of an independent review for determinations of constitutional issues.<sup>191</sup> Thus, the Court held that in a case governed by *New York Times*, an appellate court must conduct an independent review to determine whether the evidence establishes actual malice with convincing clarity.<sup>192</sup>

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<sup>181</sup> *Id.* Federal Rule of Civil Procedure 52(a) provides: "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).

<sup>182</sup> 466 U.S. at 514.

<sup>183</sup> *Id.* at 487.

<sup>184</sup> *Id.* at 488.

<sup>185</sup> *Id.* at 489-90, 491.

<sup>186</sup> *Id.* at 491.

<sup>187</sup> *Id.* at 492.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 514.

<sup>190</sup> *Id.* at 501.

<sup>191</sup> 466 U.S. at 508 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). In *New York Times*, the Supreme Court stated, "We must 'make an independent examination of the whole record' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. 254, 285 (1964).

<sup>192</sup> *Bose*, 466 U.S. at 514.

In a one-paragraph dissent, Justice White argued that the actual knowledge of falsity component of the *New York Times* standard, which was decisive in this case, is a question of historical fact not entitled to de novo review.<sup>193</sup> Justice Rehnquist, joined by Justice O'Connor, elaborated on this distinction in his dissent.<sup>194</sup> Justice Rehnquist explained that the lower court relied on the writer's credibility in deciding that the defamatory statement was written with actual knowledge of its falsity.<sup>195</sup> The writer's credibility, according to Justice Rehnquist, was a question of fact upon which an appellate court should not make a determination.<sup>196</sup> Moreover, Justice Rehnquist analogized to other areas where appellate courts have conducted only deferential review, such as in criminal cases, where the burden of proof is greater than under *New York Times*.<sup>197</sup>

Two years later, in the 1986 case of *Philadelphia Newspapers, Inc. v. Hepps*, a divided Court decided yet another procedural question—this time involving the burden of proof for libel plaintiffs.<sup>198</sup> The Supreme Court in *Hepps* held that in suing a newspaper for libel regarding “speech of public concern,” a private figure must prove the falsity of the statement.<sup>199</sup> The Court ruled that the constitutional requirements in libel cases supplant the common law's presumption of falsity.<sup>200</sup>

In *Hepps*, the *Philadelphia Inquirer*, owned by Philadelphia Newspapers, ran a series of five articles alleging that the plaintiff, the principal stockholder of a large franchise corporation, was connected to organized crime and had used those connections to influence the state's governmental processes.<sup>201</sup> Hepps brought a defamation suit against the newspaper company.<sup>202</sup> The jury ruled against Hepps, finding that he had not proved the falsity of the statements.<sup>203</sup> The Pennsylvania Supreme Court reversed, holding

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<sup>193</sup> *Id.* at 515.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 516.

<sup>196</sup> *Id.* at 519.

<sup>197</sup> *Id.* at 517.

<sup>198</sup> 475 U.S. 767, 768–69 (1986).

<sup>199</sup> *Id.* at 768–69. Commentators have noted that the Supreme Court's decision departed from the structure set out in *Gertz* and left open the burden of proof required for private plaintiffs suing for libel for speech of private concern. See Halpern, *supra* note 10, at 290; Rodney A. Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation, 75 GEO. L.J. 1519, 1525 (1987).

<sup>200</sup> *Hepps*, 475 U.S. at 775.

<sup>201</sup> *Id.* at 769.

<sup>202</sup> *Id.* at 770.

<sup>203</sup> *Id.* at 770–71.

that falsity was not part of a plaintiff's burden of proof.<sup>204</sup> The United States Supreme Court reversed the Pennsylvania Supreme Court judgment.<sup>205</sup>

The United States Supreme Court explained that under the common law, the defendant has the burden of proving the truth of the defamatory statement because its falsity is presumed.<sup>206</sup> Under *New York Times*, however, the Court noted that a public figure or public official must prove falsity to meet the actual malice standard.<sup>207</sup> Writing for the Court, Justice O'Connor explained that when the plaintiff is a private figure, but the speech is of public concern, constitutional requirements, though less demanding in such a situation, do replace the common law.<sup>208</sup> The Court once again declared that its ruling was necessary to give the First Amendment its needed "breathing space."<sup>209</sup> The Court explained that the speech was related to the effectiveness of the political process and, as such, the First Amendment required protection of the speech.<sup>210</sup> Moreover, the Court noted that the decision did not add much to the plaintiff's actual burden because in most cases, proof of fault will encompass proof of falsity.<sup>211</sup>

Justice Stevens, joined by Chief Justice Burger, Justice White and Justice Rehnquist, dissented from the Court's opinion.<sup>212</sup> Justice Stevens argued that the ruling did little to help the First Amendment.<sup>213</sup> Justice Stevens stated that his major point of disagreement was that the Court had given too little weight to the state's interest in protecting private persons from injury to their reputations.<sup>214</sup> Furthermore, Justice Stevens contended that the Court's decision only protected publishers who act negligently or recklessly by printing statements that cannot objectively be proven true.<sup>215</sup>

Just two months after *Hepps*, the Supreme Court faced another procedural dilemma in deciding the appropriate standard to be

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<sup>204</sup> *Id.* at 771.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 770.

<sup>207</sup> *Id.* at 775.

<sup>208</sup> *Id.* The Supreme Court did not make clear what the burden of proof would be if the speech involved an issue of public concern. See Smolla, *supra* note 199, at 1526.

<sup>209</sup> *Hepps*, 475 U.S. at 778 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 780 (Stevens, J., dissenting).

<sup>213</sup> *Id.* at 782.

<sup>214</sup> *Id.* at 781.

<sup>215</sup> *Id.* at 785.

used at the summary judgment phase in libel cases in *Anderson v. Liberty Lobby, Inc.*<sup>216</sup> The Court remained divided, but the lines were redrawn.<sup>217</sup> The Court in *Anderson* held that a court must apply the "clear and convincing" standard used in cases governed by *New York Times* when ruling on a motion for summary judgment in order to determine whether actual malice exists.<sup>218</sup>

In *Anderson*, Liberty Lobby, a self-proclaimed citizens' lobby, filed a libel action against publisher Jack Anderson in response to two articles that appeared in *The Investigator* magazine, which portrayed the group as racist, anti-Semitic and fascist.<sup>219</sup> The lower court granted Anderson's motion for summary judgment.<sup>220</sup> The United States Court of Appeals for the District of Columbia affirmed the district court judgment as to most of the defamatory statements and held that, at the summary judgment stage, the requirement of clear and convincing evidence to prove actual malice was not relevant.<sup>221</sup> The court of appeals stated that it would not impose a higher burden than the usual preponderance of the evidence at summary judgment.<sup>222</sup>

The United States Supreme Court reversed the lower court decision,<sup>223</sup> holding that the clear and convincing evidentiary burden must be used in ruling on a motion for summary judgment.<sup>224</sup> The Supreme Court explained that at the summary judgment phase, a judge should not weigh the evidence to determine truth, but rather to determine whether there is a genuine issue for trial under Rule 56 of the Federal Rules of Civil Procedure.<sup>225</sup> In an opinion written by Justice White, the Court stated that ruling on a summary judgment motion must involve the same evidentiary standard of proof that is applicable at trial.<sup>226</sup> Justice White explained that a judge must determine whether there is evidence to support a jury's finding for the plaintiff.<sup>227</sup> The Court reasoned that if the

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<sup>216</sup> 477 U.S. 242, 244 (1986).

<sup>217</sup> *Id.* at 257 (Brennan, J., dissenting); *id.* at 268 (Rehnquist, J., dissenting). Justice White delivered the opinion of the Court. *Id.* at 244.

<sup>218</sup> *Id.* at 257.

<sup>219</sup> *Id.* at 244-45.

<sup>220</sup> *Id.* at 246.

<sup>221</sup> *Id.* at 246-47.

<sup>222</sup> *Id.* at 247.

<sup>223</sup> *Id.* at 244.

<sup>224</sup> 477 U.S. at 257.

<sup>225</sup> *Id.* at 249.

<sup>226</sup> *Id.* at 252.

<sup>227</sup> *Id.*

clear and convincing standard is required by the First Amendment, then the judge must determine whether the evidence proves actual malice with convincing clarity.<sup>228</sup> The Court thus concluded that for a judge to determine whether a jury could find for the plaintiff required an examination of the criteria by which the jury would make that decision.<sup>229</sup>

The *Anderson* case elicited two dissents: one by Justice Brennan and the other by Justice Rehnquist.<sup>230</sup> Justice Brennan noted that he was primarily disturbed by the Court's "deeply flawed" analysis.<sup>231</sup> He argued that the decision changed the summary judgment ruling for all cases, including those outside of libel, and that the Court had not explained how a trial court should consider evidentiary standards in ruling on a motion for summary judgment.<sup>232</sup> In a separate dissent, Justice Rehnquist explained the Court's opinion as motivated by "concerns for intellectual tidiness."<sup>233</sup> Justice Rehnquist argued that the Court's decision was contrary to a prior case in which the Court had declined to give libel defendants any "special procedural protections."<sup>234</sup> Justice Rehnquist again turned to criminal law for an example to show the inconsistency in the Court's ruling.<sup>235</sup> He pointed out that although the standard for guilt in criminal trials is that of "clear beyond a reasonable doubt," the standard for deciding whether a case should go to trial is only that of "probable cause."<sup>236</sup> Justice Rehnquist thus disagreed with the creation of a different standard for ruling on summary judgment in libel cases.<sup>237</sup>

Of these three procedural cases decided between 1984 and 1986, the greatest victory for the press—and one that caught many by surprise—came with the Supreme Court's decision in *Hepps*.<sup>238</sup>

<sup>228</sup> *Id.* The Court stated that a judge "must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 254.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 257 (Brennan, J., dissenting); *id.* at 268 (Rehnquist, J., dissenting).

<sup>231</sup> *Id.* at 257.

<sup>232</sup> *Id.* at 257-58 n.1.

<sup>233</sup> *Id.* at 268 (Rehnquist, J., dissenting). Justice Rehnquist criticized the Court's opinion for sounding like a "treatise about cooking by someone who has never cooked before and has no intention of starting now." *Id.* at 269.

<sup>234</sup> *Id.* (quoting *Calder v. Jones*, 465 U.S. 783, 790-91 (1984)).

<sup>235</sup> *Id.* at 272.

<sup>236</sup> *Id.* at 271-72.

<sup>237</sup> *Id.* at 273.

<sup>238</sup> *John V.R. Bull, Philadelphia Newspapers, Inc. v. Hepps: New Hope for Preserving Freedom of the Press*, 38 MERCER L. REV. 785, 787 (1987); Smolla, *supra* note 199, at 1525.

One writer states that *Hepps* marked a "major consolidation of past gains for the press."

One journalist asserts that *Hepps* could reverse the chilling effect produced by libel suits.<sup>239</sup> On the other hand, one commentator, Rodney Smolla, concedes that while *Hepps* and *Anderson* are both significant press victories, the possibility that the cases can be read narrowly throws libel law into a state of uncertainty.<sup>240</sup> Smolla contends that *Hepps's* holding was narrow on two grounds: first, because the Court declined to decide the extent of the burden of falsity a private plaintiff must present; and second, because the Court, pointing out that the *Philadelphia Inquirer* was a media defendant, did not decide whether the same rule applied to nonmedia defendants.<sup>241</sup> Smolla further argued that while *Anderson* was also a press victory, the Court decided it on procedural grounds and gave limited attention to the First Amendment.<sup>242</sup> According to Smolla, after *Anderson*, the prediction of future outcomes in libel cases is nearly impossible.<sup>243</sup>

## II. LOWER COURT LIBEL OPINIONS OF NEWER JUSTICES

Three of the most recently appointed Justices to the Supreme Court—Justices Scalia, Kennedy and Souter<sup>244</sup>—all appointed within the past six years, have not extensively participated or written opinions in libel cases. While on the Supreme Court, Justice Scalia has voted in four print media libel cases, but has written only one concurrence during that time.<sup>245</sup> Justice Kennedy has voted in three such cases, authoring one majority opinion.<sup>246</sup> Finally, Justice Souter, who voted in one libel case, has not authored any print media

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Richard Tofel, *Reagan's Appointees Offer Some Surprises in Their Libel Views*, LEGAL TIMES, May 18, 1987, at 18.

<sup>239</sup> Bull, *supra* note 238, at 785.

<sup>240</sup> Smolla, *supra* note 199, at 1522.

<sup>241</sup> *Id.* at 1525. The previous year, the Court decided *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), a defamation suit between two private parties. The Court continued its media/nonmedia distinction and held that speech not involving matters of public concern had lessened constitutional protection. Thus, a state could award both presumed and punitive damages without a showing of actual malice. *Id.* at 761.

<sup>242</sup> Smolla, *supra* note 199, at 1532.

<sup>243</sup> *Id.* at 1523.

<sup>244</sup> Justice Clarence Thomas is omitted from this discussion. Although it would be helpful to know his proclivity in libel cases, he did not author any libel opinions during his tenure on the United States Court of Appeals for the District of Columbia.

<sup>245</sup> See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 696 (1989) (Scalia, J., concurring).

<sup>246</sup> See *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419 (1991). Justice Kennedy also wrote a one-sentence concurrence in *Harte-Hanks*. 491 U.S. at 696.



opinions since his appointment.<sup>247</sup> Because relatively less is known about the libel law views of these newer Justices, this Note will examine the opinions that each wrote before their appointments to the Supreme Court.

Justice Scalia took his oath as an Associate Justice of the United States Supreme Court on September 26, 1986.<sup>248</sup> He had served for four years as a circuit judge on the United States Circuit Court of Appeals for the District of Columbia.<sup>249</sup> In that time, he authored two opinions—a majority and a dissent—in the area of libel law.<sup>250</sup>

Then-Judge Scalia first expressed his views on libel in the 1984 case of *Liberty Lobby, Inc. v. Anderson*.<sup>251</sup> Judge Scalia rejected the theory of the libel-proof plaintiff that an allegation is not actionable if it has been repeated before.<sup>252</sup> Judge Scalia also concluded that the “clear and convincing” evidentiary burden of proof required in libel cases is not relevant in a determination of summary judgment.<sup>253</sup> Furthermore, Judge Scalia reversed the summary judgment granted to defendants in regard to nine of the thirty allegations in dispute.<sup>254</sup>

Judge Scalia first declined to adopt the theory that the plaintiff was libel-proof.<sup>255</sup> The defendant argued that the plaintiff’s reputation had been irreparably harmed by the prior publication of similar articles, and thus a libel judgment could not provide compensation for injury to reputation when there was no injury.<sup>256</sup> Judge Scalia asserted that the repetition of a statement does not make it true.<sup>257</sup> He explained that First Amendment values would not be served because if someone has been libeled by other sources, the defendant’s good faith reliance on those sources is a complete defense.<sup>258</sup>

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<sup>247</sup> Justice Souter voted with the majority in *Massion*. See 111 S. Ct. at 2419.

<sup>248</sup> Stuart Taylor, Jr., *Rehnquist and Scalia Take Their Places on Court*, N.Y. TIMES, Sept. 27, 1986, at 8.

<sup>249</sup> *Id.*

<sup>250</sup> *Ollman v. Evans*, 750 F.2d 970, 1036 (D.C. Cir. 1984) (Scalia, J., dissenting); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986).

<sup>251</sup> *Liberty Lobby*, 746 F.2d at 1565. See *supra* notes 216–37 and accompanying text for a discussion of the Supreme Court decision.

<sup>252</sup> *Liberty Lobby*, 746 F.2d at 1568.

<sup>253</sup> *Id.* at 1570.

<sup>254</sup> *Id.* at 1577. Judge Scalia affirmed the granting of summary judgment for the remaining twenty-one allegations. *Id.* For a discussion of the facts, see also *supra* note 219 and accompanying text.

<sup>255</sup> *Id.* at 1568.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

Judge Scalia then faced the question of the appropriate burden of proof at the summary judgment phase of a libel action.<sup>259</sup> He reasoned that the imposition of the convincing clarity standard would change the summary judgment process from one that determines whether there are minimum facts to support a plaintiff's case to one where those facts are evaluated.<sup>260</sup> Judge Scalia made the analogy to criminal cases where although "beyond a reasonable doubt" is the standard at trial, "probable cause" is sufficient to proceed to trial.<sup>261</sup> Thus, he held that the standard of convincing clarity was applicable only after the plaintiff presented his or her evidence.<sup>262</sup>

Judge Scalia then turned to a discussion of the merits.<sup>263</sup> First, he determined that some of the allegations were not defamatory because they were simply charges of "journalistic inaccuracy."<sup>264</sup> Next, Judge Scalia held that other allegations were constitutionally protected opinion under *Gertz*.<sup>265</sup> He relied largely on the context in which the statements were made to determine that these were opinion.<sup>266</sup> Furthermore, Judge Scalia held that those statements that the defendant made in reliance on published reports in reputable sources and interviews could not have been made with actual malice.<sup>267</sup>

The nine statements for which Judge Scalia reversed the grant of summary judgment had originated from a previous magazine article.<sup>268</sup> That article, however, had been the subject of a libel action by Liberty Lobby that was eventually settled out of court.<sup>269</sup> Judge Scalia explained that it was likely that either the writer or one of

<sup>259</sup> *Id.* at 1570.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 1570-71. Judge Scalia used the same analogy to criminal law that Justice Rehnquist later used when *Liberty Lobby* reached the Supreme Court. See *supra* notes 235-37 and accompanying text.

<sup>262</sup> *Liberty Lobby*, 746 F.2d at 1571.

<sup>263</sup> *Id.* at 1572.

<sup>264</sup> *Id.* These included statements such as that Liberty Lobby's magazine "boasts 335,000 readers," when in fact it had a *paid circulation* of 335,000. *Id.*

<sup>265</sup> *Id.* He also quoted the dictum from *Gertz* that there is no such thing as a false idea. *Liberty Lobby*, 746 F.2d at 1572 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)). In determining whether the statements were opinion, Judge Scalia closely examined them and concluded that all the terms used could have different meanings to different people. *Id.* at 1573.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1575-77.

<sup>268</sup> *Id.* at 1578.

<sup>269</sup> *Id.*

the editors would have been aware of this prior action.<sup>270</sup> Thus, Judge Scalia concluded that a reasonable jury could find that those nine statements were made with actual malice.<sup>271</sup>

The only other print media libel case before the District of Columbia Circuit in which Judge Scalia authored an opinion—this time a dissent—was the 1984 case of *Ollman v. Evans*.<sup>272</sup> The majority held that the statements in dispute were opinion protected by the First Amendment.<sup>273</sup> Judge Scalia, in dissent, argued that past cases already provided sufficient protection to political statements without the need to create a distinction between fact and opinion.<sup>274</sup>

*Ollman* arose after Rowland Evans and Robert Novak, two syndicated columnists, published an article about a New York University political science professor, Bertell Ollman, entitled "The Marxist Professor's Intentions."<sup>275</sup> Ollman alleged that the article was false and defamatory.<sup>276</sup> The lower court granted the defendants' motion for summary judgment.<sup>277</sup>

The *Ollman* majority explained that the totality of the circumstances had to be examined in order to determine whether statements were entitled to constitutional protection as opinion.<sup>278</sup> In order to do this, the court articulated four factors that required examination:<sup>279</sup> the common usage of the language of the statement; the verifiability of the statement; the context in which the statement was made; and the broader context in which the statement arose.<sup>280</sup> In applying this test to the facts, the majority concluded that the statements were protected opinion.<sup>281</sup>

Judge Scalia disagreed with the affirmance of summary judgment as to only one statement that discussed Ollman's professional reputation.<sup>282</sup> He first argued that existing doctrine already pro-

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> 750 F.2d 970, 1036 (D.C. Cir. 1984) (Scalia, J., dissenting).

<sup>273</sup> *Id.* at 971.

<sup>274</sup> *Id.* at 1036.

<sup>275</sup> *Id.* at 971.

<sup>276</sup> *Id.* at 973 n.1.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 979.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 971.

<sup>282</sup> 750 F.2d at 1036. The columnists had quoted another professor as saying, "Ollman has no status within the profession but is a pure and simple activist." *Id.* at 989.

tected political hyperbole, which the statement was not.<sup>283</sup> Second, he explained that the *New York Times* requirement of actual malice already accounted for the fact that those who enter the public arena would be subject to "public bumping."<sup>284</sup> Next, Judge Scalia countered that the problem of the tendency of juries to find for plaintiffs is resolved by the requirement that appellate courts independently review the entire record as required by *Bose*.<sup>285</sup> Thus, Judge Scalia concluded that all valid concerns had been addressed by First Amendment jurisprudence.<sup>286</sup>

Judge Scalia argued that the statement in question could not be regarded as the opinion of the columnists because it stated that Ollman's colleagues found him to be incompetent.<sup>287</sup> He stated that the court's approach was one of "judicial subjectivity."<sup>288</sup> Moreover, he asserted that if libel suits are becoming too much of a "modern problem," then it is for the legislature, not the courts, to resolve.<sup>289</sup>

The second of the newer appointees, Justice Kennedy, took his seat on the Supreme Court on February 18, 1988.<sup>290</sup> Since 1976, he had been a circuit judge on the United States Circuit Court of Appeals for the Ninth Circuit.<sup>291</sup> During this time, he only authored one libel opinion.<sup>292</sup>

Then-Judge Kennedy wrote the majority opinion in the 1978 case of *Church of Scientology of California v. Adams*.<sup>293</sup> Judge Kennedy affirmed the lower court's dismissal of the case for lack of personal jurisdiction.<sup>294</sup> The case arose after two writers published five articles about Scientology in the *St. Louis Post-Dispatch*.<sup>295</sup> The articles,

<sup>283</sup> *Id.* at 1036. Judge Scalia stated that the statement would have been hyperbole if the columnists called Ollman a "traitor to our nation." *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 1037 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984)).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 1038.

<sup>289</sup> *Id.* He criticized the court's alteration of doctrine by stating, "The principle that the first amendment does not protect the deliberate impugning of character or reputation . . . is to be revised to permit 'bumping' . . . because we perceive that libel suits are now too common and too successful." *Id.* at n.2.

<sup>290</sup> *Kennedy Begins Work as Supreme Court Justice*, UPI, Feb. 19, 1988, available in LEXIS, Nexis Library, UPI File.

<sup>291</sup> *Id.*

<sup>292</sup> *Church of Scientology of Cal. v. Adams*, 584 F.2d 893, 895 (9th Cir. 1978).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

which centered on the Missouri Church of Scientology, were written in St. Louis and made no mention of the California church.<sup>296</sup> Nevertheless, the California church filed a libel action in a California court.<sup>297</sup>

Judge Kennedy concluded that California did not have jurisdiction over the defendants.<sup>298</sup> He first explained that neither the newspaper's revenues from California advertisers—2.91 percent of its total revenues—nor its ownership of stock in a California company could be an adequate basis for jurisdiction because both were unrelated to the libel action.<sup>299</sup> Thus, Judge Kennedy reasoned that the only contact between the defendants and California was the distribution of about 150 copies of the articles in dispute.<sup>300</sup>

Judge Kennedy explained that the standard applied in other cases to determine jurisdiction, that of the likelihood of the product entering the forum, was not a fair standard in libel actions.<sup>301</sup> He stated that due to the press's nature, it is likely that copies of its publications will be located throughout the world.<sup>302</sup> Judge Kennedy reasoned that it would be unfair to submit publishers to personal jurisdiction simply because a few of their publications entered the forum state.<sup>303</sup> Judge Kennedy held that the appropriate standard in defamation cases was whether or not a risk of injury by libel could foreseeably arise in the forum state.<sup>304</sup> He concluded that it was not reasonably foreseeable in the present case that a risk of injury by defamation would arise from the minimal circulation in California.<sup>305</sup>

The third of the more recent appointees, Justice Souter, took his oath as Associate Justice of the Supreme Court on October 9, 1990.<sup>306</sup> In April of 1990, President George Bush had appointed Souter, a former New Hampshire Attorney General and New

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 899.

<sup>299</sup> *Id.* at 896-97.

<sup>300</sup> *Id.* at 897.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 897-98.

<sup>305</sup> *Id.* at 898. Judge Kennedy also stated that although the court did not need to reach the merits of the case, it was doubtful that the California church had established a proper claim because there was a difficult question as to whether the articles were "of and concerning" the California church. *Id.*

<sup>306</sup> Greg Henderson, *Souter Takes Seat on High Court*, UPI, Oct. 10, 1990, available in LEXIS, Nexis Library, UPI File.

Hampshire Supreme Court justice, to the United States Court of Appeals for the First Circuit.<sup>307</sup> Although Souter did not write any libel opinions during his short tenure on the First Circuit, he did author three such opinions while serving on the New Hampshire Supreme Court.<sup>308</sup>

Justice Souter's first libel opinion came in the 1984 case of *Duchesnaye v. Munro Enterprises, Inc.*<sup>309</sup> Justice Souter affirmed a verdict for the plaintiff for an allegedly libelous editorial.<sup>310</sup> The lawsuit arose after the *Berlin Reporter* published a news article and an editorial on harassing phone calls.<sup>311</sup> The basis of the front-page news story was the plaintiff's conviction for making annoying phone calls.<sup>312</sup> The article writer learned from the police that the plaintiff never spoke during his phone calls.<sup>313</sup> The editorial, written by a different author, discussed both obscene and harassing phone calls.<sup>314</sup> The editorial writer then described the plaintiff as being the kind of "unstable person" who made such calls.<sup>315</sup> The plaintiff then brought the libel action.<sup>316</sup> The lower court granted summary judgment for the defendants based on the news story.<sup>317</sup> At trial, the court returned a verdict for the plaintiff based on the defamatory content of the editorial.<sup>318</sup>

Justice Souter first determined that a statement of opinion can be read to imply defamatory facts and, if so, it is actionable.<sup>319</sup> Although Justice Souter stated that there was no evidence in the record to indicate that anyone had read the editorial to imply defamatory facts, he determined that the court had based liability on other grounds.<sup>320</sup> Justice Souter stated that the trial court had found the defendants liable because the editorial could be understood to identify the plaintiff as an obscene caller.<sup>321</sup>

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<sup>307</sup> *Id.*

<sup>308</sup> *Keeton v. Hustler Mag., Inc.*, 549 A.2d 1187, 1197 (N.H. 1988) (Souter, J., dissenting); *Nash v. Keene Publishing Corp.*, 498 A.2d 348, 349 (N.H. 1985); *Duchesnaye v. Munro Enters., Inc.*, 480 A.2d 123, 124 (N.H. 1984).

<sup>309</sup> 480 A.2d at 124.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> 480 A.2d at 125.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

After reiterating the evolution of the fault standards in libel actions in the United States Supreme Court decisions of *New York Times*, *Curtis* and *Gertz*, Justice Souter explained that New Hampshire had adopted a standard of negligence for private plaintiffs to prove in libel actions.<sup>322</sup> He asserted that there was sufficient evidence in the record to show that the defendant had not exercised reasonable care.<sup>323</sup> Justice Souter further reasoned that the evidence supported a finding that the statements actually defamed the plaintiff.<sup>324</sup>

Justice Souter's second libel opinion was in the 1985 case of *Nash v. Keene Publishing Corp.*<sup>325</sup> Justice Souter, writing for the New Hampshire Supreme Court, reversed the grant of summary judgment in favor of the defendants.<sup>326</sup> In *Nash*, the plaintiff, a police officer, had arrested Renauld Desmarais after a car chase and charged him with driving under the influence.<sup>327</sup> The *Keene Sentinel* printed an account of the arrest, although it failed to mention that Desmarais had been charged with driving under the influence.<sup>328</sup> Desmarais went to the newspaper with a handwritten letter, which the defendant published, alleging that the officer enjoyed assaulting citizens and that the city had received many complaints about him.<sup>329</sup> The police officer brought suit, and the court granted the defendant's motion for summary judgment.<sup>330</sup>

Justice Souter began, as he had in *Munro*, by stating that an opinion is not actionable unless it can be understood to imply defamatory facts.<sup>331</sup> He explained that if an average reader could understand that the statement implied defamatory facts, then it was a question for the jury to answer.<sup>332</sup> Justice Souter indicated that although the letter appeared on the same page as the newspaper's

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<sup>322</sup> *Id.* at 126. The *Gertz* Court allowed states to determine their own standards of fault in private plaintiff libel cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

<sup>323</sup> *Munro*, 480 A.2d at 126. Justice Souter noted that the editorial writer knew that the plaintiff had not made any statements during his annoying phone calls. *Id.*

<sup>324</sup> *See id.* at 127.

<sup>325</sup> 498 A.2d 348, 349 (N.H. 1985).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 350.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* The letter did not mention that Desmarais had been charged with driving under the influence. *Id.*

<sup>330</sup> *Id.* at 351.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 352.

"Letter's Policy," which stated that all letters were the opinions of their authors, this particular letter could be read as stating facts.<sup>333</sup>

Furthermore, Justice Souter held that whether the plaintiff was a public official was also a jury question in New Hampshire.<sup>334</sup> He explained that a police officer should not be a public official for purposes of *New York Times* because he or she does not have responsibility for the control of governmental affairs.<sup>335</sup> Justice Souter concluded that if the jury found the officer to be a public official, then the officer would be required to prove actual malice.<sup>336</sup>

Justice Souter further determined that there was a genuine dispute as to whether the newspaper acted with reckless disregard for the truth, one of the two components of actual malice.<sup>337</sup> He explained that while failure to investigate was not sufficient to find reckless disregard, there was some evidence of actual malice in the record.<sup>338</sup> Justice Souter held that a plaintiff need not show clear and convincing evidence of malice in order to survive a summary judgment motion.<sup>339</sup> Justice Souter explained that a court must find that there is a genuine issue of material fact as to actual malice if there is some circumstantial evidence from which to infer malice.<sup>340</sup>

The third libel case in which Justice Souter wrote an opinion—this time a dissent—was in the 1988 case of *Keeton v. Hustler Magazine, Inc.*<sup>341</sup> The New Hampshire Supreme Court held that New Hampshire would adopt the single publication rule in libel cases,

<sup>333</sup> *Id.* Justice Souter pointed out that Desmarais had printed "Specific facts" above the letter and then began it with "As for specific facts." *Id.*

<sup>334</sup> *Id.* at 353.

<sup>335</sup> *Id.* Although he never addressed the issue explicitly, Justice Souter made brief mention of the standard of public figure, implying that the officer was not a public figure. *Id.*

<sup>336</sup> *Id.* at 353-54.

<sup>337</sup> *Id.* at 354. The other component of actual malice is knowledge of falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). A plaintiff need only prove one or the other. *See id.*

<sup>338</sup> *Keene*, 498 A.2d at 354.

<sup>339</sup> *Id.* at 354-55. Justice Souter concluded that it was enough that the writer had verified the statement as to the complaints against the officer and found it to be false to show that he should have doubted the truth of the assertions. *Id.* at 355.

*Keene* was decided before the Supreme Court announced in *Anderson v. Liberty Lobby, Inc.* that the plaintiff must have clear and convincing evidence in order to survive a summary judgment motion. 477 U.S. 242, 255 (1986). *See supra* notes 216-37 and accompanying text for a discussion of *Anderson*.

<sup>340</sup> *Keene*, 498 A.2d at 354.

<sup>341</sup> 549 A.2d 1187, 1197 (N.H. 1988) (Souter, J., dissenting). Kathy Keeton, a former associate publisher of *Penthouse* magazine, alleged that articles in five issues of *Hustler* magazine libeled her. *Id.* at 1188.



which gives the plaintiff only one cause of action for the publication of allegedly libelous statements.<sup>342</sup> The *Keeton* majority further held that it would apply New Hampshire's statute of limitations to allow the plaintiff to recover even though her suit was barred in all other states and the magazine's distribution in the state amounted to less than one percent.<sup>343</sup>

In his dissenting opinion, Justice Souter agreed with the majority's adoption of the single publication rule.<sup>344</sup> He disagreed, however, with the application of New Hampshire's statute of limitations.<sup>345</sup> Justice Souter characterized the suit as an extreme example of forum shopping.<sup>346</sup> He did not agree that a statute of limitations could be so easily classified as procedural because it has such a decisive effect on a case.<sup>347</sup> Justice Souter explained that New Hampshire had no interest in the suit, and that allowing it would only bring to life a defamation action that was dead everywhere else in the country.<sup>348</sup> Furthermore, Justice Souter concluded that there was a strong interest in requiring defamation claims to be proven more quickly because the wrong is proven with less certainty than many other torts.<sup>349</sup>

The foregoing opinions, written by Justices Scalia, Kennedy and Souter, show the emerging views of these Justices in the area of libel. Justice Scalia faced two issues that the Supreme Court subsequently addressed: the applicability of the clear and convincing burden of proof to a summary judgment motion and whether opinion is entitled to absolute protection.<sup>350</sup> In *Liberty Lobby*, Justice Scalia held that trial courts should not use the clear and convincing

<sup>342</sup> *Id.* at 1190. At common law, the multiple publication rule afforded plaintiffs one cause of action for *each* sale or delivery of the allegedly libelous publication. *Id.* at 1189 (emphasis added). This rule became extremely burdensome for defendants who, due to the development of mass distribution, could potentially face scores of libel suits throughout the country. *Id.* In response, many courts adopted the single publication rule. *Id.*

<sup>343</sup> *Id.* at 1197. An Ohio court dismissed *Keeton's* original suit because it was barred by Ohio's one-year statute of limitations. *Id.* at 1188. By that time, every state except New Hampshire, with its six-year statute of limitations, barred *Keeton's* suit. *Id.*

<sup>344</sup> *Id.* at 1197 (Souter, J., dissenting).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 1198. Justice Souter first pointed to the borrowing statutes in about 35 states, which eliminated the rule that the forum apply its own statute of limitations. *Id.* at 1199. He further cited a long list of commentators who argue against a formalistic application of statutes of limitations as procedural. *See id.* at 1199-200.

<sup>348</sup> *Id.* at 1204.

<sup>349</sup> *Id.*

<sup>350</sup> *Ollman v. Evans*, 750 F.2d 970, 1036 (D.C. Cir. 1984) (Scalia, J., dissenting); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1565 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986).

evidentiary standard for purposes of summary judgment.<sup>351</sup> In a dissent in *Ollman*, he argued that opinion was adequately protected by existing precedent.<sup>352</sup> Justice Kennedy's only libel opinion came in a procedural case in which he stated that, due to the nature of the press, a different jurisdictional analysis applied in defamation cases.<sup>353</sup> Justice Souter, like Justice Scalia, addressed the constitutional protection given to statements of opinion in two separate cases.<sup>354</sup> In *Keene*, he concluded that the statements implied defamatory facts and were thus not opinion.<sup>355</sup> Although some of these cases were procedural in nature, others gave the would-be Justices an opportunity to develop their views on libel before their appointments to the Supreme Court.

### III. VICTORIES AND LOSSES FOR THE PRESS UNDER THE REHNQUIST COURT

On September 26, 1986, President Ronald Reagan elevated Associate Justice Rehnquist to the position of Chief Justice.<sup>356</sup> Nearly two years later, in the 1988 case of *Hustler Magazine, Inc. v. Falwell*, Chief Justice Rehnquist wrote for a unanimous Court in his first print media libel case since becoming Chief Justice.<sup>357</sup> The Supreme Court held in *Hustler* that public figures and public officials must prove actual malice in order to recover for intentional infliction of emotional distress.<sup>358</sup>

In *Hustler*, Jerry Falwell, a nationally recognized minister and commentator, sued *Hustler* magazine for publishing an advertisement that was a parody depicting Falwell and his mother in a "drunken incestuous rendezvous."<sup>359</sup> Underneath the ad appeared a disclaimer, "ad parody—not to be taken seriously."<sup>360</sup> Falwell brought a suit for invasion of privacy, libel and intentional infliction

<sup>351</sup> *Liberty Lobby*, 746 F.2d at 1570.

<sup>352</sup> *Ollman*, 750 F.2d at 1036.

<sup>353</sup> *Church of Scientology of Cal. v. Adams*, 584 F.2d 893, 897 (9th Cir. 1978).

<sup>354</sup> *Nash v. Keene Publishing Corp.*, 498 A.2d 348, 351-52 (N.H. 1985); *Duchesnaye v. Munro Enters., Inc.*, 480 A.2d 123, 124 (N.H. 1984).

<sup>355</sup> *Keene*, 498 A.2d at 352; see also *Munro*, 480 A.2d at 125 (statement must be read in context to be defamatory).

<sup>356</sup> See Taylor, *supra* note 248, at 8. On the same day, Chief Justice Rehnquist administered the oath for Associate Justice Antonin Scalia. *Id.*

<sup>357</sup> 485 U.S. 46, 47 (1988).

<sup>358</sup> *Id.* at 56.

<sup>359</sup> *Id.* at 47-48.

<sup>360</sup> *Id.* at 48.

of emotional distress.<sup>361</sup> At trial, Falwell won only the claim of intentional infliction of emotional distress.<sup>362</sup> The United States Court of Appeals for the Fourth Circuit rejected *Hustler's* argument that Falwell was required to meet the *New York Times* standard of actual malice to recover for emotional distress.<sup>363</sup> Consequently, the court of appeals affirmed the judgment.<sup>364</sup> The United States Supreme Court reversed the court of appeals decision.<sup>365</sup>

The Supreme Court began by declaring that the "free flow of ideas" was at the heart of the First Amendment.<sup>366</sup> Moreover, the Court emphasized the dictum from *Gertz* that there is no such thing as a false idea under the First Amendment.<sup>367</sup> Robust debate, the Court continued, is bound to produce criticism of public figures and public officials.<sup>368</sup> Chief Justice Rehnquist explained that the *New York Times* standard of actual malice for public figures and officials ensures that the First Amendment will have its necessary "breathing space."<sup>369</sup> The Court reasoned that requiring proof of actual malice to recover for emotional distress was necessary to protect the work of political cartoonists and satirists.<sup>370</sup> Although the Court implied that the ad parody in question was more outrageous than traditional political cartoons, it nevertheless deserved the protection of the First Amendment.<sup>371</sup> Justice White wrote a one-paragraph concurrence in which he stated that although *New York Times* had "little to do with this case," because the ad did not contain any assertions of fact, he agreed that under the First Amendment, *Hustler* could not be punished for publishing the ad.<sup>372</sup>

The following year, the Supreme Court once again faced a procedural question in the 1989 case of *Harte-Hanks Communications, Inc. v. Connaughton*.<sup>373</sup> The Court held that an appellate court must

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<sup>361</sup> *Id.* at 47-48.

<sup>362</sup> *Id.* at 49. The jury awarded Falwell \$100,000 in compensatory damages and \$50,000 punitive damages from both *Hustler* and its publisher, Larry Flynt. *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 57.

<sup>366</sup> *Id.* at 50.

<sup>367</sup> 485 U.S. at 51.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 52.

<sup>370</sup> *Id.* at 53.

<sup>371</sup> *Id.* at 55. Chief Justice Rehnquist referred to a prior case in which the Supreme Court had declared that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *Id.* at 55 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).

<sup>372</sup> *Id.* at 57.

<sup>373</sup> 491 U.S. 657, 659 (1989).

review the entire factual record to determine whether the plaintiff had proved actual malice.<sup>374</sup> The Supreme Court concluded that an examination of the record should be based on those facts the jury did find and not on those facts that the jury might have found.<sup>375</sup>

The *Harte-Hanks* case arose after the plaintiff, Daniel Connaughton, ran unsuccessfully for Municipal Judge of Hamilton, Ohio.<sup>376</sup> A month before the election, the incumbent judge's Director of Court Services resigned and was arrested on bribery charges.<sup>377</sup> A grand jury investigation ensued, and the *Journal News*, published by Harte-Hanks, ran a front page story about two women who claimed that Connaughton had used "dirty tricks" and had offered them a trip to Florida "in appreciation" for their assistance in the investigation.<sup>378</sup> In response to these allegations, Connaughton filed a libel action.<sup>379</sup> The jury found in favor of Connaughton.<sup>380</sup> The United States Court of Appeals for the Sixth Circuit affirmed the jury's decision.<sup>381</sup>

Writing for the Supreme Court in *Harte-Hanks*, Justice Stevens stated that determining whether the evidence is enough to support a finding of actual malice is a question of law.<sup>382</sup> Although the Court acknowledged that reporting on political campaigns is essential to our democracy, it stated that the press does not enjoy complete immunity.<sup>383</sup> In affirming the judgment, the Supreme Court disagreed with the rationale of the Sixth Circuit.<sup>384</sup> While the court of appeals based its review of actual malice on what a jury could have found, the Supreme Court thought it better to review the record based only on what the jury did find, as stated in its answers to the special interrogatories.<sup>385</sup> After reviewing the record in great detail, the Supreme Court held that there was enough evidence to support a decision against Harte-Hanks.<sup>386</sup>

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<sup>374</sup> *Id.* at 688-89.

<sup>375</sup> *Id.* at 690.

<sup>376</sup> *Id.* at 660.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 661. The jury awarded him \$5,000 in compensatory damages and \$195,000 in punitive damages. *Id.*

<sup>381</sup> *Id.* at 662.

<sup>382</sup> 491 U.S. at 685.

<sup>383</sup> *Id.* at 687-88.

<sup>384</sup> *Id.* at 689.

<sup>385</sup> *Id.* at 689-90.

<sup>386</sup> *Id.* at 693.

Although there were no dissents to the Court's opinion in *Harte-Hanks*, four Justices wrote separate concurrences.<sup>387</sup> First, Justice White, a dissenter in *Bose*, was joined by Chief Justice Rehnquist.<sup>388</sup> Justice White maintained his position in *Bose* that deciding knowledge of falsity for actual malice was a historical fact subject to review only under the clearly erroneous standard of Rule 52(a).<sup>389</sup> Nevertheless, Justice White believed that *Harte-Hanks* hinged on the "reckless disregard" component of actual malice, something that is not a historical fact and thus can be subject to an independent review.<sup>390</sup>

Justice Blackmun's concurrence stressed that he read the Court's opinion as having taken into account the form and content of the story in deciding actual malice.<sup>391</sup> In other words, Justice Blackmun argued that if the newspaper had presented the allegations as confirmed facts, this would have shown reckless disregard for the truth.<sup>392</sup> Nevertheless, Justice Blackmun reasoned that even taking the article's content and form into account, which he believed the majority did, there was sufficient evidence to support a finding of actual malice.<sup>393</sup>

In a separate concurrence, Justice Scalia stated that he agreed with the rationale of the court of appeals.<sup>394</sup> Justice Scalia reasoned that a better analysis than the majority's was to consider all the findings that a jury could have made instead of limiting the focus to only those findings that the jury did make.<sup>395</sup> Justice Kennedy's one-sentence concurrence stated that because the analysis of the majority and that of Justice Scalia was consistent, he joined the Court's opinion.<sup>396</sup>

In 1990, the Supreme Court once again split in the case of *Milkovich v. Lorain Journal Co.*<sup>397</sup> In an opinion written by Chief Justice Rehnquist, the Supreme Court held that the First Amendment does not require a separate privilege for statements categorized as opinion.<sup>398</sup> Furthermore, the Court explained that a rea-

<sup>387</sup> *Id.* at 694 (White, J., concurring); *id.* (Blackmun, J., concurring); *id.* at 696 (Kennedy, J., concurring); *id.* (Scalia, J., concurring).

<sup>388</sup> *Id.* at 694 (White, J., concurring).

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 695 (Blackmun, J., concurring).

<sup>392</sup> 491 U.S. at 695.

<sup>393</sup> *Id.* at 696.

<sup>394</sup> *Id.* (Scalia, J., concurring).

<sup>395</sup> *Id.* at 697.

<sup>396</sup> *Id.* at 696 (Kennedy, J., concurring).

<sup>397</sup> 110 S. Ct. 2695, 2697 (1990); *id.* at 2708 (Brennan, J., dissenting).

<sup>398</sup> *Id.* at 2698, 2706.

sonable juror could conclude that the article in dispute implied an assertion of fact that could be proven true or false and could thus be actionable.<sup>399</sup>

In *Milkovich*, the plaintiff was a high school wrestling coach in Ohio whose team was involved in a fight with members of an opposing team.<sup>400</sup> The Ohio High School Athletic Association (OHSAA) held a disciplinary hearing in which Milkovich and Scott, the school superintendent, testified.<sup>401</sup> After OHSAA placed Milkovich's team on probation for one year and declared the team ineligible for the state tournament, team members and their parents brought suit against OHSAA for denial of due process.<sup>402</sup> Milkovich and Scott testified once more.<sup>403</sup> The court of common pleas reversed the OHSAA decision.<sup>404</sup> The following day, the *News-Herald*, a local newspaper owned by the Lorain-Journal Company, printed an article on both hearings alleging that both Milkovich and Scott had lied in their testimony.<sup>405</sup> Milkovich and Scott filed separate defamation suits.<sup>406</sup> Both lost their cases in the state system after the Ohio Supreme Court held that the article was constitutionally protected opinion.<sup>407</sup>

The United States Supreme Court began by tracing its past decisions from *New York Times* through *Hepps*.<sup>408</sup> The Court recognized as dictum the *Gertz* statement that there is no such thing as a false idea.<sup>409</sup> The Supreme Court explained that if read in context,

<sup>399</sup> *Id.* at 2707.

<sup>400</sup> *Id.* at 2698.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> 110 S. Ct. at 2698. Part of the article told of a lesson that the students had learned as a result of the controversy:

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible [for this lesson] were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools, H. Donald Scott.

*Id.*

<sup>406</sup> *Id.* at 2699-700.

<sup>407</sup> *Id.* at 2700.

<sup>408</sup> *Id.* at 2703-04.

<sup>409</sup> *Id.* at 2705 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)). The *Gertz* dictum the Court quoted is as follows:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the

the statement equated the words "opinion" and "idea."<sup>410</sup> The Court further reasoned that the *Gertz* dictum was not intended to create a defamation exemption for opinion.<sup>411</sup> The Court pointed out that statements of opinion often imply assertions of fact.<sup>412</sup> The Supreme Court concluded that *Hepps* gave constitutional protection to opinions relating to matters of public concern that do not contain a "provably false factual connotation."<sup>413</sup>

The Court thus rejected the argument that a separate constitutional privilege for opinion had to be created.<sup>414</sup> The Court wrote that the standards developed in past cases protected the First Amendment's guarantee of free and robust debate on public matters.<sup>415</sup> The Court explained that statements that could not be reasonably interpreted as conveying actual facts are already protected to ensure that there will not be a lack of "imaginative expression" or "rhetorical hyperbole" in public debate.<sup>416</sup> Moreover, the Court recognized that its decision would provide the proper balance between the First Amendment and an individual's interest in reputation.<sup>417</sup> The Chief Justice explained that the allegation that Milkovich perjured himself was capable of being proven true or false by a jury and was thus actionable.<sup>418</sup> Further, the language was not figurative or hyperbolic, which would run counter to the understanding that the article claimed that Milkovich had committed perjury.<sup>419</sup> In sum, the Court held that the First Amendment does not require

conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

*Milkovich*, 110 S. Ct. at 2705 (quoting *Gertz*, 418 U.S. at 339-40).

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 2706. Chief Justice Rehnquist stated as an example, "[i]n my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," is not actionable because it cannot be provable as false. *Id.*

<sup>414</sup> *Id.* Chief Justice Rehnquist stated that the First Amendment's breathing space is sufficiently secured "by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." *Id.*

<sup>415</sup> *Id.* The Court specifically cited to the requirements of *New York Times*, *Curtis* and *Gertz*. *Milkovich*, 110 S. Ct. at 2706.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 2707-08. As it has in many past libel cases, the Supreme Court once again quoted Justice Stewart's concurring opinion in *Rosenblatt v. Baer*: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Milkovich*, 110 S. Ct. at 2708 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)).

<sup>418</sup> *Id.* at 2707.

<sup>419</sup> *Id.*

the creation of a separate privilege for speech categorized as opinion.<sup>420</sup>

In his dissent, Justice Brennan, joined by Justice Marshall, agreed with the Court's rationale that only those defamatory statements that are provably false can be the basis for liability.<sup>421</sup> He objected primarily to the application of the law to the specific facts of the case.<sup>422</sup> Justice Brennan believed that a reasonable reader would not interpret the article as fact that Milkovich had perjured himself, because of the writer's use of words such as "seemed," "probably" and "apparently."<sup>423</sup> Moreover, Justice Brennan pointed out that the article was a signed editorial, which alerted readers that the contents of the column were the writer's opinion.<sup>424</sup>

In 1991, the Supreme Court considered the question of defamation resulting from quotes attributed to the plaintiff in the case of *Masson v. New Yorker Magazine, Inc.*<sup>425</sup> In *Masson*, the Court held that the deliberate alteration of quotations does not meet the requisite knowledge of falsity under *New York Times* unless it results in a "material change" in its meaning.<sup>426</sup> The Supreme Court further stated that while the use of quotes is relevant in determining the change in meaning, it is not always dispositive.<sup>427</sup>

In *Masson*, the Sigmund Freud Archives fired the plaintiff, Jeffrey M. Masson, from his position as Projects Director after he publicly departed from Freud's theories.<sup>428</sup> Janet Malcolm, a writer and contributor to the *New Yorker*, later conducted a series of interviews with Masson.<sup>429</sup> The resulting articles, later published as a book, portrayed the plaintiff negatively.<sup>430</sup> For example, the article included quotes by Masson referring to himself as an "intellectual gigolo"<sup>431</sup> and "the greatest analyst who ever lived."<sup>432</sup> The plaintiff then brought a libel action against the *New Yorker*.<sup>433</sup> The district

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 2708 (Brennan, J., dissenting). Justice Brennan stated that the majority analyzed the issue "cogently and almost entirely correctly." *Id.*

<sup>422</sup> *Id.* at 2709 (Brennan, J., dissenting).

<sup>423</sup> *Id.* at 2711.

<sup>424</sup> *Id.* at 2713.

<sup>425</sup> 111 S. Ct. 2419, 2424 (1991).

<sup>426</sup> *Id.* at 2433.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 2424.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 2425.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* at 2427.

<sup>433</sup> *Id.* at 2425.



court granted the *New Yorker's* motion for summary judgment, finding that the quotes that the plaintiff alleged to be fabricated were either substantially true, or were one of many rational interpretations of an ambiguous interview.<sup>434</sup> The United States Court of Appeals for the Ninth Circuit affirmed the judgment,<sup>435</sup> but the United States Supreme Court reversed.<sup>436</sup>

In an opinion written by Justice Kennedy, the Supreme Court in *Masson* began by noting that the plaintiff was a public figure as defined by *Gertz* and was thus required to prove actual malice under the *New York Times* rule.<sup>437</sup> The Court pointed out that the use of quotations adds "authority to the statement and credibility to the author's work."<sup>438</sup> Thus, the Court reasoned that quotations injure an individual's reputation because either the statement is untrue or because the attribution casts the individual in a negative light.<sup>439</sup> The Court explained that in this case, because the article was presented as nonfiction and appeared in a reputable magazine, readers would likely take the quotes at face value and assume they were true.<sup>440</sup>

The Supreme Court maintained that writers always change quotes, even if it is for the purpose of correcting grammar.<sup>441</sup> The Court explained, however, that alteration beyond changing grammar does not alone prove falsity to establish actual malice.<sup>442</sup> Thus, the Court concluded that deliberately altering quotations does not meet the requisite knowledge of falsity under *New York Times* unless it results in a "material change" in meaning.<sup>443</sup> In analyzing the alleged defamatory statements, the Court determined that five of the six tape-recorded statements in dispute differed materially from the quoted statements.<sup>444</sup>

Furthermore, the Supreme Court disagreed with the court of appeals' test of "substantial truth."<sup>445</sup> The court of appeals indicated

<sup>434</sup> *Id.* at 2428.

<sup>435</sup> *Id.* at 2429.

<sup>436</sup> *Id.*

<sup>437</sup> 111 S. Ct. at 2429. The Court stated, "[w]e have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation and we continue to do so here." *Id.* at 2430.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.* The Court reasoned that "a self-condemnatory quotation may carry more force than criticism by another." *Id.*

<sup>440</sup> *Id.* at 2431.

<sup>441</sup> *Id.* at 2432.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* at 2433.

<sup>444</sup> *Id.* at 2435-37.

<sup>445</sup> *Id.* at 2433.

that it had drawn this test—that speech is protected as long as it is a rational interpretation of the statement actually made—from two prior Supreme Court decisions, *Bose Corp. v. Consumers Union of United States, Inc.* and *Time, Inc. v. Pape*.<sup>446</sup> The Supreme Court explained that rational interpretation is not applicable when a writer uses quotes because the individual is presumably speaking for him or herself.<sup>447</sup> The Court reasoned that allowing writers to put quotes around statements without liability does not serve First Amendment values.<sup>448</sup> The Supreme Court found, using its own test, sufficient evidence to support a jury finding for the plaintiff and thus reversed the grant of summary judgment in favor of the defendants.<sup>449</sup>

Justice White, joined by Justice Scalia, agreed with the reversal of summary judgment, but dissented from the Court's adoption of the "material alteration" rule.<sup>450</sup> He argued that under *New York Times*, writing what is known to be false is ample proof of actual malice.<sup>451</sup> Justice White maintained that the issue was for the jury to decide, and thus the *New Yorker* was not entitled to summary judgment with regard to any of the six quotations.<sup>452</sup>

#### IV. THE FORMATION OF COALITIONS IN PRINT MEDIA LIBEL CASES

In general, the law of defamation has had a chaotic development.<sup>453</sup> This is evidenced by the fact that no one opinion in any

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<sup>446</sup> 111 S. Ct. at 2433 (citing *Bose*, 466 U.S. 485, 512 (1984); *Pape*, 401 U.S. 279, 290 (1971)). The *Pape* case was based on a *Time* magazine article about police brutality taken from a report published by the United States Commission on Civil Rights. 401 U.S. at 280. The magazine quoted at length from the report without knowing that it was based on a civil complaint and not on findings of the Commission. *Id.* at 282. Moreover, the article did not contain the word "alleged" to describe the events. *Id.* at 283. The Supreme Court wrote that *Time's* "omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities." *Id.* at 290. The Court stated that to prove actual malice, there must be sufficient evidence to show that the defendant "in fact entertained serious doubts as to the truth of his publication." *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). The Supreme Court therefore concluded that to allow the issue to go to the jury would impose a "stricter standard of liability on errors of interpretation or judgment than on errors of historic fact." *Id.*

<sup>447</sup> *Id.* at 2434.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* at 2437.

<sup>450</sup> *Id.* (White, J., dissenting).

<sup>451</sup> *Id.* at 2437-38.

<sup>452</sup> *Id.* at 2438.

<sup>453</sup> One scholar states that the "law of defamation is dripping with contradictions and confusion and is vivid testimony to the sometimes perverse ingenuity of the legal mind. From its inception, the law of defamation has been singularly bent on establishing its reputation for quirky terminology and byzantine doctrine." Smolla, *supra* note 199, at 1519.

major case has commanded all nine votes of the Justices.<sup>454</sup> The development of libel law thus seems to be one that has come about through coalitions. Even when the Supreme Court agrees on an outcome, the rationale of the Justices may differ widely, sometimes creating unusual divisions.<sup>455</sup>

In the earlier cases, the emerging coalitions were more polarized than those in the present Supreme Court. For instance, Justices Black and Douglas concurred in *New York Times* because they did not believe that the First Amendment allowed states to enact libel laws.<sup>456</sup> Although *New York Times* is lauded as a victory for the press, Justices Black and Douglas would have wanted a stronger triumph. Both Justices maintained this absolutist position in later cases as well.<sup>457</sup> No other Justice since then has advocated for a standard of absolute immunity for the press.

The importance of the state interest in protecting the reputation of its citizens became the grounds for a second type of coalition on the Court.<sup>458</sup> In *Hepps*, Chief Justice Burger and Justices White and Rehnquist joined Justice Stevens's dissent to admonish the majority for placing too little weight on the state's interest in redressing defamation.<sup>459</sup> Chief Justice Burger had previously articulated a similar stance in *Gertz* when he argued that the Court should not interfere with existing state libel laws regarding private citizens.<sup>460</sup> Furthermore, Justice White's opinions in *Time* and *Bose* suggest his deferential attitude toward the findings of lower courts.<sup>461</sup>

Justice Brennan's opinion in *Rosenbloom* extending constitutional protection to all issues of public or general concern created a third type of coalition.<sup>462</sup> Three years later, in *Gertz*, both Justices

<sup>454</sup> See *supra* notes 24–243, 356–452 and accompanying text for a discussion of the major libel cases decided since *New York Times*.

<sup>455</sup> Cf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (Brennan, J., dissenting); *id.* at 268 (Rehnquist, J., dissenting) with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 354 (1974) (Burger, C.J., dissenting); *id.* at 355 (Douglas, J., dissenting); *id.* at 361 (Brennan, J., dissenting); *id.* at 369 (White, J., dissenting).

<sup>456</sup> 376 U.S. 254, 293 (1964) (Black, J., concurring).

<sup>457</sup> See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 57 (1971) (Black, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (Black and Douglas, J.J., concurring).

<sup>458</sup> See, e.g., *Philadelphia Newsp., Inc. v. Hepps*, 475 U.S. 767, 780 (1986) (Stevens, J., dissenting).

<sup>459</sup> *Id.* at 781.

<sup>460</sup> 418 U.S. 323, 354 (1974) (Burger, C.J., dissenting).

<sup>461</sup> *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 515 (1984) (White, J., dissenting) (de novo review not appropriate on knowledge of falsity); *Time, Inc. v. Firestone*, 424 U.S. 448, 481 (1976) (White, J., dissenting) (ample evidence that lower court found fault).

<sup>462</sup> *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971).

Brennan and Blackmun, although writing separately, agreed that *Rosenbloom* was a more logical extension of libel law.<sup>463</sup> Justice Brennan stated his belief that the *Rosenbloom* standard focusing on issues of general concern extended from *New York Times's* commitment to the importance of debate on public issues.<sup>464</sup> In *Hepps*, Justices Brennan and Blackmun returned to the idea of constitutional protection for speech of public concern.<sup>465</sup> The *Hepps* majority, led by Justice O'Connor, also echoed the notion of issues of general concern.<sup>466</sup> In fact, *Hepps* seems very much like *Rosenbloom* in procedural clothing.<sup>467</sup>

The Rehnquist Court has become more consolidated than past Courts in libel cases, yet the coalitions, though perhaps blurred, have continued. The *Hustler* case, where the Court held that public officials and public figures must prove actual malice to recover for intentional infliction of emotional distress, came the closest to gaining the votes of the entire Court.<sup>468</sup> The *Hustler* decision, probably the strongest press victory under the Rehnquist Court, stopped the threat to *New York Times* posed by emotional harm cases brought by plaintiffs in an attempt to get around the actual malice requirement.<sup>469</sup> One plaintiffs' attorney claims that *Hustler* illustrates the willingness of conservative judges to greatly increase the First Amendment protections given to the press.<sup>470</sup> *Hustler's* reaffirmance of *New York Times* does exemplify the type of strong coalition likely to develop even among the more conservative Justices when either a prominent figure sues the media or when the statements at issue involve political expression. Such a case would go to the core of *New York Times*.

The three other cases decided by the Rehnquist Court—*Harte-Hanks*, *Milkovich* and *Masson*—are not as easily categorized as victories or defeats.<sup>471</sup> In *Harte-Hanks*, for example, the press lost

<sup>463</sup> 418 U.S. at 353 (Blackmun, J., concurring); *id.* at 362 (Brennan, J., dissenting).

<sup>464</sup> 403 U.S. at 43-44; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 361-62 (1974) (quoting *Rosenbloom*, 403 U.S. at 43-44).

<sup>465</sup> 466 U.S. at 779-80.

<sup>466</sup> *Id.* at 775.

<sup>467</sup> *See id.*

<sup>468</sup> 485 U.S. 46, 56 (1988). Only Justice White wrote separately, because he disagreed with the application of *New York Times* to the case. *Id.* at 57 (White, J., concurring).

<sup>469</sup> *See* Michael P. McDonald, *Libel Law Lives! Reports of Demise False*, LEGAL TIMES, May 28, 1990, at 23.

<sup>470</sup> *Id.*

<sup>471</sup> *See* *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419, 2433 (1991); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2698, 2706 (1990); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 689-90 (1989).

because the Supreme Court reversed a lower court's grant of summary judgment in favor of the press, yet the Court was merely upholding the standard of independent appellate review so important in both *New York Times* and *Bose*.<sup>472</sup> Justice White, joined by Chief Justice Rehnquist, adhered to his past view that historical facts are only reviewable under the clearly erroneous standard.<sup>473</sup> Thus, it is possible that Justice White could persuade other Justices in later cases to form a coalition in order to give a high degree of deference to lower court judgments.

While some argue that the Supreme Court was "nibbling at the edges of *New York Times*,"<sup>474</sup> one commentator suggests that *Harte-Hanks* was in some ways a press victory because it proved how forcefully the Court will impose the requirement of an independent review, evidenced by Justice Stevens's lengthy review of the record.<sup>475</sup> Other commentators support that claim by asserting that the *Harte-Hanks* decision did not weaken the press's protection against libel suits because the Supreme Court adhered to *Bose*.<sup>476</sup> In fact, the Court stated that appellate courts must second-guess juries ruling in favor of public figures and officials.<sup>477</sup>

The *Milkovich* case, with only Justices Brennan and Marshall in dissent, seems more typical of the growing conservative wave of decisions. Yet, it is possible to see the formation of the same coalition in both *Milkovich* and *Masson*.<sup>478</sup> The Justices in both cases wanted to protect a free press yet did not want to allow the media to defame private persons. In *Milkovich*, the Supreme Court refused to create

<sup>472</sup> *Harte-Hanks*, 491 U.S. at 693; see also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) ("The *New York Times* rule emphasizes the need . . . to make an independent examination of the entire record."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) ("We must make an independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.")

<sup>473</sup> *Harte-Hanks*, 491 U.S. at 694 (White, J., concurring).

<sup>474</sup> Martin Garbus, *Supreme Court's Recent Libel Law Rulings Impairing Media's Rights Under Sullivan*, N.Y. L.J., Sept. 5, 1989, at 1. Garbus argues that the Court, instead of focusing solely on what was printed, found liability because the newspaper did not include information to make the story more balanced. *Id.*

<sup>475</sup> Bruce W. Sanford & Anne R. Noble, *For the Press, Privacy Ruling Not Good News*, NAT'L L.J., Aug. 21, 1989, at 57.

<sup>476</sup> *Supreme Court Review*, NAT'L L.J., Aug. 21, 1989, at S25.

<sup>477</sup> *Id.*

<sup>478</sup> *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419, 2424 (1991) (Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Marshall, Blackmun, Stevens, O'Connor, and Souter, J.J., joined); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2697 (1990) (Rehnquist, C.J., delivered the opinion of the Court, in which White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy, J.J., joined).

a separate privilege for opinion, yet its rationale was that opinion was already protected under existing constitutional doctrine.<sup>479</sup> While the press and many scholars have characterized it a defeat,<sup>480</sup> some media attorneys argue that *Milkovich* only changes the way in which the constitutional protection issue is framed without altering the types of speech that are protected.<sup>481</sup> The key determination, according to these attorneys, is still whether there is a statement of fact that can be proven false, an essential element of a plaintiff's prima facie case.<sup>482</sup> Even Justice Brennan's dissent in *Milkovich* agreed with the basic reasoning of the Court's opinion and further argued that the Court was not really changing the law.<sup>483</sup> Another commentator believes that *Milkovich* simply traded the absolute privilege that was emerging in the lower courts for the *New York Times* actual malice test.<sup>484</sup> The decision, which applies to opinion that implicates facts, rules that such opinion is the same as a fact.<sup>485</sup>

One defender of *Milkovich* argues that its greatest danger to the media is that of the self-fulfilling prophecy, where emphasis on a press defeat provides the public with a false perception that libel cases are easily won and thus a greater incentive to sue, thereby leading to more litigation.<sup>486</sup> Another commentator foresees two negative repercussions for the press.<sup>487</sup> One is that dismissals of libel suits will be postponed until after pre-trial discovery has been conducted in order to find out what the writer knew as to the underlying facts.<sup>488</sup> The second consequence is that there may be an increase in litigation cost to differentiate between those opinions based on factual statements and those that are not.<sup>489</sup> Although the possibility of increased litigation costs always lurks in the background, *Milkovich* nevertheless seems to be a healthy check on the

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<sup>479</sup> *Milkovich*, 110 S. Ct. at 2706.

<sup>480</sup> Richard C. Reuben, *Justices Limit Protection for Written Opinion*, L.A. DAILY J., June 22, 1990, at 1.

<sup>481</sup> Robert S. Warren et al., *Not as Bad as It Looks*, NAT'L L.J., July 30, 1990, at 13.

<sup>482</sup> *Id.* Warren argues that there has never been a wholesale exemption for opinion because the media could not escape liability by adding "I think" before a statement and converting it to opinion. *Id.*

<sup>483</sup> *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2708-09 (1990) (Brennan, J., dissenting).

<sup>484</sup> James C. Goodale, *Milkovich: A Modest Loss for the Press*, N.Y. L.J., June 27, 1990, at 1.

<sup>485</sup> *Milkovich*, 110 S. Ct. at 2706.

<sup>486</sup> Warren, *supra* note 481, at 13.

<sup>487</sup> Goodale, *supra* note 484, at 1.

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

press. The Court's decision will likely make print reporters more careful about examining what constitutes opinion. In the end, the *Milkovich* decision may have been one that turned on the facts. Perhaps the Court believed that accusing someone of committing perjury was too weak a basis to make a finding of opinion.

In *Masson*, the press lost again because the Court reversed the prior grant of summary judgment in favor of the magazine,<sup>490</sup> but although the press may have lost the battle, it won the war. The Supreme Court in *Masson* created a rule allowing print journalists much greater freedom in their use of quotations by holding that deliberately altering quotations does not amount to actual malice unless there is a material change in meaning.<sup>491</sup> The majority coalition very likely saw *Masson* as an opportunity to uphold press protections by allowing the media to have some breathing room. Before *Masson* was even decided, some of the press distanced themselves from the case, considering it to be an example of unethical journalism.<sup>492</sup> It seems that not even the press was sure about rooting for a victory in this case,<sup>493</sup> yet one was delivered by the Court. It would have been egregious to allow the summary judgment motion to stand. Malcolm's use of a tape recorder should have provided her with the exact quotes she needed, yet the printed statements were only somewhat similar to those that appeared on the tape. This type of unethical journalism should not be what the Court seeks to protect, and may explain why although Justices White and Scalia joined with the majority in *Milkovich*, both dissented from the Court's ruling in *Masson*.<sup>494</sup> Both Justices disagreed with a rule that allowed journalists to put words in the mouths of their subjects.<sup>495</sup> The decision thus allows the press flexibility,<sup>496</sup> yet alerts them that actual malice is still a relevant factor in libel actions.

In sum, it is fair to characterize the Rehnquist Court decisions in *Harte-Hanks* and *Milkovich* as press defeats, and those in *Hustler* and *Masson*, on principle, as press victories. Chief Justice Rehnquist's sweeping reaffirmation of *New York Times* in *Hustler* may have

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<sup>490</sup> *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419, 2437 (1991).

<sup>491</sup> *Id.* at 2433.

<sup>492</sup> *Newsweek* called Malcolm a "journalistic pariah" who had been abandoned by the press. David A. Kaplan & Bob Cohn, *When Is a Quote Not a Quote?*, *NEWSWEEK*, Jan. 21, 1991, at 49.

<sup>493</sup> *See id.*

<sup>494</sup> *Masson*, 111 S. Ct. at 2437 (White, J., dissenting); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2697 (1990).

<sup>495</sup> *Masson*, 111 S. Ct. at 2438-39.

<sup>496</sup> Ruth Marcus and Howard Kurtz, *Libel Suit Against Reporter Reinstated; Writers May Be Sued for Fabricating, Altering Quotes, High Court Rules*, *WASH. POST*, June 21, 1991, at A10.

been due to a modification of his earlier views in order to build a coalition.<sup>497</sup> There were fewer coalitions in the Rehnquist Court, and cases such as *Hustler* are only helpful in predicting the future outcome of certain types of cases. Against this background, this Note will now examine the voting patterns of the current Justices and explore the underlying principles that seem to guide each one.

### V. THE GUIDING PRINCIPLES OF EACH JUSTICE

Since being appointed to the Supreme Court in 1971 as an Associate Justice, Chief Justice Rehnquist has voted with the majority in the press triumphs of *Hustler* and *Masson*.<sup>498</sup> He dissented in the three procedural victories of the press—*Bose*, *Hepps* and *Anderson*.<sup>499</sup> Furthermore, Chief Justice Rehnquist voted with the majority in the press defeats of *Gertz*, *Time* and *Milkovich*.<sup>500</sup> From his voting pattern, there seems to be three underlying rationales to explain the Chief Justice's press decisions.

The first of these is that the Chief Justice seems unwilling to extend procedural protections to the press. This is evidenced by his dissent in *Anderson*, where he stated that applying a higher standard to summary judgment motions in libel cases grants special protections to defendants that are not available in other contexts.<sup>501</sup> The second reasoning apparent from Chief Justice Rehnquist's opinions is his unwillingness to allow the press to intrude into the lives of private people. This is particularly evident from his votes in *Gertz* and *Time*—both cases where the plaintiff was perceived by the Chief Justice to be a private person.<sup>502</sup> In *Time*, for example, he stressed that although the plaintiff's divorce had received media attention, she did not accept any prominent role or thrust herself into the public eye.<sup>503</sup> His third principle is his support of the press's discussion of issues about public figures and public officials. Chief Justice Rehnquist's sweeping opinion in *Hustler*, in which he showed

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<sup>497</sup> Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 128 (1991).

<sup>498</sup> *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419, 2424 (1991); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 47 (1989).

<sup>499</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 268 (1986) (Rehnquist, J., dissenting); *Philadelphia Newsp., Inc. v. Hepps*, 475 U.S. 767, 780 (1986); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 515 (1984) (Rehnquist, J., dissenting).

<sup>500</sup> *Milkovich v. Lorain Journal*, 110 S. Ct. 2695, 2697 (1990); *Time, Inc. v. Firestone*, 424 U.S. 448, 449 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974).

<sup>501</sup> *Anderson*, 477 U.S. at 269 (Rehnquist, J., dissenting) (quoting *Calder v. Jones*, 465 U.S. 783, 790–91 (1984)).

<sup>502</sup> See *Time*, 424 U.S. at 453; *Gertz*, 418 U.S. at 352.

<sup>503</sup> *Time*, 424 U.S. at 453.



strong support for *New York Times* and seemed to go beyond what the case before the Court required, showed that his vision is of a free and uninhibited press in the context of public affairs.<sup>504</sup>

Justice White, as the senior Associate Justice, has been present since the *New York Times* decision and thus has the longest paper trail. He has voted with the majority in many of the press's victories since then, including *Anderson*, *Curtis*, *Rosenbloom* and *Hustler*.<sup>505</sup> From his voting pattern, there seems to be two principles to which he subscribes.

The first is his willingness to extend protections to the press when it reports about public officials, public figures or what he describes as public servants. This view is best articulated in Justice White's concurrence in *Rosenbloom*.<sup>506</sup> Justice White voted with the majority because he believed that the press has a First Amendment privilege to report on official actions of public servants without regard for the private citizens involved.<sup>507</sup> Yet, while he agreed with *Rosenbloom*, he believed that *Gertz* was an unwarranted intrusion into the states' domain.<sup>508</sup> His dissents in *Gertz* and *Time* reflect his concern for the rights of ordinary citizens, which are protected by defamation law.<sup>509</sup> Thus, Justice White will seemingly vote against the press when purely private plaintiffs are suing, unless the statements involve the actions of public servants such as the police.

Justice White's second rationale is grounded in procedure. His dissent in *Bose* and his majority vote in *Harte-Hanks* are at least partly based on his belief that an appellate court should not second-guess historical facts.<sup>510</sup> Justice White believes that the "knowledge of falsity" aspect of actual malice is a question best left to the jury.<sup>511</sup>

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<sup>504</sup> See generally *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50-53 (1988). One commentator states that "what surprised—and gratified—many commentators . . . was that Chief Justice Rehnquist elected both to author the Court's unanimous opinion and to uphold, in emphatic terms, the petitioner's right to publish." Nat Stern, *State Action, Establishment Clause, and Defamation: Blueprints for Civil Liberties in the Rehnquist Court*, 57 U. CIN. L. REV. 1175, 1175-76 (1989).

<sup>505</sup> See *Hustler*, 485 U.S. at 57 (White, J., concurring); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 57 (1971) (White, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 172 (1967).

<sup>506</sup> 403 U.S. at 62 (White, J., concurring).

<sup>507</sup> *Id.*

<sup>508</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting).

<sup>509</sup> *Time, Inc. v. Firestone*, 424 U.S. 448, 483 (1976) (White, J., dissenting); *Gertz*, 418 U.S. at 369-70 (White, J., dissenting).

<sup>510</sup> *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 694 (1989) (White, J., dissenting); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 515 (1984) (White, J., dissenting).

<sup>511</sup> *Harte-Hanks*, 491 U.S. at 694.

Although Justice Blackmun is second in seniority to Justice White, he has written relatively little in the area of libel, authoring only two concurrences. The curious fact is that he has not dissented in any of the ten cases in which he has voted. Generally, Justice Blackmun seems to be an ally of the press, as is evidenced by his votes for the press in *Rosenbloom*, *Bose*, *Hepps*, *Anderson*, *Hustler* and *Masson*.<sup>512</sup> He did vote with the majority, however, in the press losses of *Gertz*, *Time*, *Harte-Hanks* and *Milkovich*.<sup>513</sup>

Blackmun's two concurrences reveal very little about the Justice's views on libel. In the past, he sided with Justice Brennan to form a coalition based on the *Rosenbloom* doctrine of issues of public concern.<sup>514</sup> His two-page concurrence in *Gertz* emphasized his preference for the approach in *Rosenbloom*.<sup>515</sup> He concurred in order for the Court to have a clearly established majority, because he feared that the area of libel would become too uncertain without a definitive ruling.<sup>516</sup> His later concurrence in *Harte-Hanks* stressed the importance of taking the form and content of an article into account in making a determination of actual malice.<sup>517</sup> It seems this proposition, however, is a double-edged sword. While an examination of the form and content of an article can be used to rebut actual malice when statements appear as allegations rather than truth, it can also be used to bolster a finding of actual malice in cases where a court may find the form objectionable. In future cases, Justice Blackmun would likely form a coalition with Justice O'Connor, and perhaps Justice White, to vote for the press if a private figure is suing about speech of public concern.

Justice Stevens, perceived as part of the more liberal wing of the Court, does tend to vote for the press in many cases, although perhaps not as consistently as could be expected. He voted with the majority in *Bose*, *Anderson*, *Hustler* and *Masson*.<sup>518</sup> Nevertheless, Jus-

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<sup>512</sup> *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419, 2424 (1991); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 47 (1989); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986); *Philadelphia Newsp., Inc. v. Hepps*, 475 U.S. 767, 768 (1986); *Bose*, 466 U.S. at 487; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971).

<sup>513</sup> *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2697 (1990); *Harte-Hanks*, 491 U.S. at 694 (Blackmun, J., concurring); *Time*, 424 U.S. at 449; *Gertz*, 418 U.S. at 353 (Blackmun, J., concurring).

<sup>514</sup> See *Gertz*, 418 U.S. at 353; *Rosenbloom*, 403 U.S. at 30.

<sup>515</sup> *Gertz*, 418 U.S. at 353.

<sup>516</sup> *Id.* at 354.

<sup>517</sup> 491 U.S. at 695.

<sup>518</sup> See *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419, 2424 (1991); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 47 (1989); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 487 (1984).

tice Stevens's dissent in *Hepps* emphasizes his concern for the individual's right to protect his or her reputation. He criticized the Court's opinion, written by Justice O'Connor, for not giving more weight to this important interest.<sup>519</sup> In fact, Justice Stevens refers to the press several times in his dissent as character assassins.<sup>520</sup> One commentator finds Justice Stevens's dissent in *Hepps* rather troubling.<sup>521</sup>

Justice Stevens also voted with the majority in the press defeats of *Harte-Hanks* and *Milkovich*.<sup>522</sup> Although *Harte-Hanks* upheld the principle of independent appellate review, it gave the press its first loss in the Supreme Court in many years.<sup>523</sup> Despite its defenders, one commentator argues that *Harte-Hanks* was a blow to the press because the Court found liability based on the newspaper's failure to include information to make the story more balanced.<sup>524</sup>

Justice O'Connor, the author of the *Hepps* opinion, surprised many commentators with her decision.<sup>525</sup> One commentator stated that after *Hepps*, the media sighed with relief because Justice O'Connor's opinion "went for the jugular."<sup>526</sup> The curious observation is that her record is almost exactly the same as Justice Stevens's record. The only difference is that while Justice Stevens dissented in *Hepps* and voted with the majority in *Bose*, Justice O'Connor wrote the *Hepps* majority opinion and dissented in *Bose*. Justice O'Connor's dissent in *Bose*, where she joined the Chief Justice's opinion, may be based on her belief that an appellate court should not look at issues of credibility. The two cases where she went against the press—*Milkovich* and *Harte-Hanks*—may have been based on the weak facts of those particular cases. One commentator suggests that Justice O'Connor's previous political experience in the Arizona legislature explains her greater sympathy toward the press.<sup>527</sup> Justice O'Connor has been characterized as being the center of the Court,

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<sup>519</sup> See 475 U.S. at 781 (Stevens, J., dissenting).

<sup>520</sup> *Id.* at 785.

<sup>521</sup> Bull, *supra* note 238, at 791. Bull's concern stems from his belief that Stevens has "traditionally brought an intelligent approach to First Amendment concerns." *Id.*

<sup>522</sup> *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2697 (1990); *Harte-Hanks*, 491 U.S. at 659.

<sup>523</sup> *News Media's Wins and Losses*, NAT'L L.J., Dec. 22, 1990, at 3088.

<sup>524</sup> See Garbus, *supra* note 474, at 1.

<sup>525</sup> *Philadelphia Newsp., Inc. v. Hepps*, 475 U.S. 767, 768 (1986); Bull, *supra* note 238, at 787. This journalist states that *Hepps* was an unexpected opinion from a Justice who "has not been particularly sensitive to press concerns." *Id.*

<sup>526</sup> Smolla, *supra* note 199, at 1527.

<sup>527</sup> Tofel, *supra* note 238, at 18.

willing to part with "conservatives" in libel cases.<sup>528</sup> As evidenced by her opinion in *Hepps*, O'Connor may be one of the Justices who is most similar to Justice Brennan in the area of libel.

Justice Scalia's only opinion in the area of libel while on the Supreme Court is a concurrence in *Harte-Hanks*.<sup>529</sup> Although he voted against the press in *Harte-Hanks*, *Milkovich* and *Masson*, he voted with the majority in *Hustler*.<sup>530</sup> Of the conservative Justices, Justice Scalia seems to be the least receptive to the press in libel actions.<sup>531</sup> Both of his lower court libel opinions were press defeats. In *Liberty Lobby, Inc. v. Anderson*, he reversed summary judgment and held that the convincing clarity evidentiary standard was not relevant in deciding on the motion.<sup>532</sup> Just two years later, the Supreme Court overturned the decision.<sup>533</sup> Furthermore, in *Ollman v. Evans*, Justice Scalia dissented from the majority's ruling that the statements in dispute were protected opinion.<sup>534</sup> This latter case explains his vote with the majority in *Milkovich*.<sup>535</sup>

First, it seems that Justice Scalia, much like Chief Justice Rehnquist in this respect, is against the extension of procedural protections for the press. His opinion in *Liberty Lobby* shows that he would have likely voted against the press in its other procedural victories on the Supreme Court.<sup>536</sup> Second, Justice Scalia does not like to permit the press to publish what he perceives to be defamatory statements by labeling it opinion. This is evident from his dissent in *Ollman*.<sup>537</sup> Furthermore, his continued belief in judicial restraint extends to libel because his preference, as he stated in *Ollman*, is to see the area dealt with by the legislature.<sup>538</sup>

Justice Kennedy wrote the majority opinion in *Masson* and voted with the majorities in *Harte-Hanks* and *Milkovich*.<sup>539</sup> His opin-

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<sup>528</sup> Stuart Taylor, Jr., *Swing Vote on the Constitution*, AM. LAW., June 1989, at 66.

<sup>529</sup> 491 U.S. 657, 696 (1989) (Scalia, J., concurring).

<sup>530</sup> *Id.*; *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419, 2437 (1991); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2697 (1990); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 47 (1989).

<sup>531</sup> See, e.g., *Scalia Decisions in Court of Appeals Show That New Justice is No Friend of News Media*, NEWS MEDIA & L., Fall 1986, at 3.

<sup>532</sup> 746 F.2d 1563, 1570 (D.C. Cir. 1984), *vacated*, 477 U.S. 242, 252 (1986).

<sup>533</sup> *Anderson*, 477 U.S. at 252.

<sup>534</sup> 750 F.2d 970, 1036 (D.C. Cir. 1984) (Scalia, J., dissenting).

<sup>535</sup> See 110 S. Ct. at 2697.

<sup>536</sup> See 746 F.2d at 1570.

<sup>537</sup> See 750 F.2d at 1036 (Scalia, J., dissenting).

<sup>538</sup> *Id.* at 1038.

<sup>539</sup> *Masson v. New Yorker Mag., Inc.*, 111 S. Ct. 2419, 2424 (1991); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2697 (1990); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 696 (1989) (Kennedy, J., concurring).

ion in *Masson* gave the press great latitude in its use of quotations.<sup>540</sup> Perhaps he also decided against the press in *Harte-Hanks* and *Milkovich* based on the facts.

Although Justice Kennedy is usually seen as a consistent member of the conservative bloc, it seems difficult to predict, based on what little information is available, what he is likely to do in libel cases. His Ninth Circuit opinion in *Church of Scientology v. Adams* provides little direction because it was based on a jurisdictional analysis.<sup>541</sup> Justice Kennedy in *Adams* did alter the analysis in libel cases, because he believed the traditional jurisdictional analysis was unfair to the press.<sup>542</sup>

The *Masson* case, however, is the one that shows Justice Kennedy's sensitivity to the press.<sup>543</sup> The importance of the case was not its decision regarding the *New Yorker's* summary judgment motion, but the Court's rule that deliberate alteration of quotations does not amount to actual malice unless there is a material change in meaning. The rule Justice Kennedy articulated prevents an overflow of libel actions by public figures who disagree with the way they are portrayed.<sup>544</sup> The press received Justice Kennedy well when he joined the Supreme Court, and it seems that thus far, he has provided no reason to disappoint them.<sup>545</sup>

Since his appointment in 1990, Justice Souter has participated in only one libel case—*Masson*, in which he voted with the majority.<sup>546</sup> His three opinions while on the New Hampshire Supreme Court—two majority opinions and one dissent—show a cautious judge who examines the facts closely.<sup>547</sup> Although Justice Souter's dissent in *Keeton v. Hustler Magazine, Inc.* was based on a statute of limitations analysis, his result would not have allowed a libel suit that was barred everywhere else in the nation.<sup>548</sup>

Justice Souter's opinions in *Duchesnaye v. Munro Enterprises, Inc.* and *Nash v. Keene Publishing Corp.* show his concern, and his antic-

<sup>540</sup> 111 S. Ct. at 2433.

<sup>541</sup> See 584 F.2d 893, 897, 899 (9th Cir. 1978).

<sup>542</sup> *Id.* at 897.

<sup>543</sup> Linda Greenhouse, *Justices Refuse to Open a Gate for Libel Cases*, N.Y. TIMES, June 21, 1991, at 1.

<sup>544</sup> *Id.*

<sup>545</sup> John Hanrahan, *Press Has Ally in Court Nominee*, P.A. L.J.-REP., Dec. 7, 1987, at 12.

<sup>546</sup> 111 S. Ct. 2419, 2424 (1991).

<sup>547</sup> See generally *Keeton v. Hustler Mag., Inc.*, 549 A.2d 1187, 1197 (N.H. 1988) (Souter, J., dissenting); *Nash v. Keene Publishing Corp.*, 498 A.2d 348, 349 (N.H. 1985); *Duchesnaye v. Munro Enters., Inc.*, 480 A.2d 123, 124 (N.H. 1984).

<sup>548</sup> 549 A.2d at 1204 (Souter, J., dissenting).

ipation of the Supreme Court's direction, with the distinction between fact and opinion.<sup>549</sup> The facts of *Munro* can alone justify his affirmance of a verdict in favor of the plaintiff. There was sufficient evidence to show the writer of the allegedly libelous editorial knew the falsity of what he was writing.<sup>550</sup> In *Keene*, Justice Souter held that the statements that claimed to be opinions implied defamatory facts.<sup>551</sup>

Based on these three opinions, it is difficult to predict Justice Souter's future course in libel cases. The press seemed hesitant at his appointment.<sup>552</sup> Nevertheless, his dissenting opinion in a non-libel media case in 1991 may give the press some hope for the future.<sup>553</sup>

Thus, it seems that while the Justices may have guiding principles of their own, libel law in print media cases will likely continue to develop in coalitions as it has since 1964. Although the precise course may be unpredictable, the boundaries do seem to be established. If a public figure or public official sues the press over political speech or criticism of his or her official conduct, it is almost certain that a majority of the Supreme Court will find in favor of the press. In fact, it is likely that Chief Justice Rehnquist will author the opinion, as he did in *Hustler*, even though political speech was not involved in that case. If instead a private figure is suing about public speech, a coalition headed by either Justice White or Justice O'Connor will likely emerge to protect the press. Justice White would be adhering to his preferred position in *Rosenbloom*, holding that the press has a First Amendment privilege to report on actions of public servants without concern for the private citizens involved; while

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<sup>549</sup> See *Keene*, 498 A.2d at 351; *Munro*, 480 A.2d at 125.

<sup>550</sup> *Munro*, 480 A.2d at 124.

<sup>551</sup> *Id.*; *Keene*, 498 A.2d at 352.

<sup>552</sup> See Thomas Collins, *Souter Hasn't Declared War on the Press*, NEWSDAY, Sept. 23, 1990, at 11.

<sup>553</sup> Justice Souter dissented, along with Justices Brennan and Marshall, in the 1991 case of *Cohen v. Cowles Media*, 111 S. Ct. 2513 (1991). The Supreme Court held in *Cohen* that a plaintiff can recover damages under state promissory estoppel law for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. 111 S. Ct. at 2516. In dissent, Justice Souter argued that there was a need to balance the competing interests involved to determine "the legitimacy of burdening constitutional interests." *Id.* at 2522 (Souter, J., dissenting).

At a constitutional law conference, Harvard Law School Professor Kathleen M. Sullivan stated that Souter's dissent in *Cohen* reminded her of something Justice Brennan would have written. *Constitutional Law Conference*, 60 U.S.L.W. 2253, 2266 (Oct. 22, 1991). Professor Sullivan stated that Souter maintained that holding the press liable under a theory of promissory estoppel will cause systemic damage to the press as an institution. *Id.*

Justice O'Connor would be following her view in *Hepps* that if speech is of public concern then the First Amendment requires its protection even if the plaintiff is a private figure. Depending on the precise nature of the speech, a dissent may be expected from either the Chief Justice, Justice Scalia or Justice Stevens.

## VI. CONCLUSION

Based on the checkered history of libel law, it may be difficult to predict where the United States Supreme Court is headed. It seems that a majority of the conservative Rehnquist Court is willing to afford First Amendment protections for the press when it is sued by public officials or public figures. Libel suits brought by private plaintiffs are a different matter, as many of the Justices are concerned with the individual's right to protect his or her reputation. It seems the Court will defend the press against attacks by prominent people, but will balance First Amendment interests against reputational interests when private plaintiffs are involved. It is very likely that the Supreme Court will continue to decide libel cases in coalitions, as it has from the beginning, although the lines between these groups may be more difficult to draw. At worst, it appears that the Rehnquist Court has done no more to limit *New York Times* than the Warren or Burger Courts. At best, it has upheld *New York Times*, contrary to the expectations of critics.

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