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The Supreme Court ofthe United States and the Law of Libel: A Review of Decided Cases

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Article abstract

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Dans le présent article, l'auteur analyse les changements qui ont résulté de *New York Times Co. v. Sullivan* depuis que ce jugement a été rendu. Il montre comment la Cour suprême elle-même a, de temps à autre, changé son interprétation de ce jugement, explique que ce changement résulte du changement de personnel du tribunal lui-même et prédit qu'il y aura encore plus de changements dans le proche avenir.

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Edward G. HUDON *

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Introduction

For almost two hundred years, from the time the Constitution of the United States was brought forth from the Federal Convention of 1787 until 1964 when the Supreme Court of the United States decided *New York Times Co. v. Sullivan*[1], the prevailing view in the American constitutional system was that libelous utterances were not "within the area of constitutionally protected speech..."[2] At the time the Constitution was adopted, liability for defamation, both civil and criminal, was a part of the common law and there is no indication that the founding fathers intended to abolish that liability. Not even the protection given speech and press by the First Amendment as soon as the first Congress met changed this. In most of the jurisdictions of the United States, publishers continued to be civilly liable for defamatory publications regardless of intent[3]. Indeed, as late as 1909 no less an advocate of freedom of expression than Justice Holmes subscribed to the English view expressed by Lord Mansfield in *King v. Woodfall* that "Whatever a man publishes he publishes at his peril[4]." It is for that reason that *New York Times Co. v. Sullivan*[5] represents such a milestone in the American judicial system. It did not abolish libel actions, but it brought about a major change in the standards applicable to such actions. Together with its progeny, it

1. 376 U.S. 254 (1964).
2. *Herbert v. Lando*, 60 L Ed 2d,115,123 (1979, quoting from *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952), and citing other cases.
3. See Justice Byron WHITE's discussion of this in *Herbert v. Lando*, 60 L Ed 2d 115, 123, 124 (1979).
4. See Justice HOLMES' opinion in *Peck v. Chicago Tribune Co.*, 214 U.S. 185, 189 (1909) citing and quoting from Lord Mansfield's opinion in the *Trial Henry S. Woodfall*, 20 Howell's State Trials 895, 902 (1770).
5. 376 U.S. 254 (1964).

limited State power to award civil damages and to impose criminal sanctions in libel actions as it held that the common law of libel was, to a considerable extent, inconsistent with the First Amendment guarantees of speech and press. It is to the study of the origin and development of this major change in the American law of speech and press that has taken place in the short span of the last fifteen years that this paper is devoted. This will be done on a case by case approach to indicate the origin, development, and even the limitation of the *New York Times* doctrine, so-called.

1. *New York Times Co. v. Sullivan* and the Establishment of a Federal Rule

Prior to *New York Times v. Sullivan*[6], the law of libel was one of strict liability and a question of State law, with a libel considered harmful on its face[7]. This was substantially changed by the Warren Court[8] with the decision of this case which arose from a full page advertisement signed by 64 people, some prominent and others not, that was carried in the May 20, 1960, New York Times. The advertisement charged that the non-violent demonstrations of thousands of Southern Negro students in affirmation of the right to live in human dignity as guaranteed by the United States Constitution and the Bill of Rights was being met by a "wave of terror." Included in the advertisement were statements, some of which were false, about police action against the students who participated in the demonstrations[9].

Although Sullivan was not mentioned by name in the advertisement, he contended that the word *police* used in the third paragraph of the advertisement referred to him as the elected Commissioner of Montgomery, Alabama, who supervised the police department of that city. Accordingly, he brought a civil libel action against the newspaper and four Negro Alabama clergymen. At the trial court level he was awarded $500 000 in damages, the full amount claimed. Once the case reached the Supreme Court of the United States after it had been affirmed by the Supreme Court of Alabama[10], it was viewed as presenting for the first time the problem of "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct[11]."

6. 376 U.S. 254 (1964).
7. See footnote 4 to Justice WHITE's opinion in *Herbert v. Lando*, 60 L Ed 2d 115, 123 (1979).
8. 1953–1969.
9. See a copy of the advertisement reprinted as an appendix to the Court's opinion.
10. 273 Ala. 656, 144 So. 2d 25 (1962).
11. 376 U.S. 254, 256 (1964).

In an opinion written by Justice William Brennan, the Supreme Court easily disposed of arguments that the judgments of the Alabama courts were insulated from constitutional scrutiny because the Fourteenth Amendment is directed at State rather than at private action, and that the guarantees of speech and press were inapplicable, at least as to the New York Times, because the allegedly libelous statements were a part of a paid "commercial" advertisement. The first argument was brushed to one side with the simple statement that "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised [12]." The second argument was as easily brushed to one side with the assertion that the fact that the New York Times was paid for the advertisement was as immaterial "as is the fact that newspapers and books are sold [13]." For, the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern [14]."

The Alabama law that was applied in the case by the Alabama State courts made a publication "'libelous per se' if the words 'tend to injure a person... in his reputation' or 'to bring [him] into public contempt' [15]." As for public officials, the standard was met if the words used were such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust ... [16]" Or, as Justice Brennan noted, "where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge [17]." Thus, under Alabama law the privilege of "fair comment" depended on the truth of the facts upon which the comment was based. Unless the burden of proving the truth could be discharged, general damages were presumed and could be awarded without proof of pecuniary injury. Moreover, although a showing of actual malice was a prerequisite to the recovery of punitive damages, good motives and the belief in truth did

12. 376 U.S. 254, 265 (1964).
13. *Ibid.*, p. 266. Actually, this second argument relied on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which the Court had held that a city ordinance forbidding the street distribution of commercial and business advertising matter was not an abridgment of the First Amendment, even though a handbill to which the city ordinance was applied had a commercial message on one side and a protest against certain official action on the other. For the Court's discussion of the *Chrestensen* case see pages 265, 266 of Justice BRENNAN's opinion.
14. 376 U.S. 254, 266 (1964).
15. *Ibid.*, p. 267.
16. *Ibid.*
17. *Ibid.*

not negate an inference of malice although they could serve in mitigation of punitive damages.

After an exhaustive review of applicable case law, the Court came to the conclusion that the New York Times advertisement qualified for constitutional protection as an expression of grievance and protest on one of the "major public issues of our time... [18]" Then, after a further study of case law and other authority the Court came to the conclusion that neither factual error, defamatory content, nor a combination of the two sufficed to remove the constitutional shield from criticism of official conduct. With that out of the way, the Court then proceeded to fashion a "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not [19]."

Once this "federal rule" had been fashioned, it was applied to the proof presented in the case to show actual malice which was then found to lack "the convincing clarity which the constitutional standard demands... [20]" Hence, the judgment against the petitioners was said to be without constitutional support. This was found to be true even as to the New York Times which had not bothered to check the advertisement against news stories in its own files. At best, all that the evidence could support was a finding of negligence against the New York Times for having failed to discover the misstatements in the advertisement, and that was said to be "constitutionally insufficient to show the recklessness that is required for a finding of actual malice [21]."

Last, but not least, although the statements in the advertisement could be taken as referring to the police, on their face, the Court concluded, they did not make "even an oblique reference to respondent as an individual [22]." Moreover, none of the respondent's witnesses suggested any basis in their testimony for the belief that the respondent was personally attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department, and therefore bore official responsibility for police conduct. The Court found disquieting the very proposition that what it considered to be an impersonal attack on government operations should serve as the basis for a libel on the person responsible for those operations. As he rejected the very thought of such a proposition, Justice Brennan wrote for the Court: [23]

18. *Ibid.*, 271.
19. *Ibid.*, 279, 280.
20. *Ibid.*, 285, 286.
21. *Ibid.*, 288.
22. *Ibid.*, 289.
23. *Ibid.*, 292.

> Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.

2. The Extension of the *New York Times* Rule to Actions for Criminal Libel

New York Times Co. v. Sullivan[24] was decided on March 9, 1964. It had limited State power in a civil libel case. Slightly more than eight months later, on November 23, 1964, the Supreme Court extended the *New York Times* rule to limit State power to impose criminal sanctions for criticism of the official conduct of public officials as well. This happened in *Garrison v. Louisiana*[25] in which the Court overturned the conviction of a State District Attorney of violating the Louisiana Criminal Defamation statute. Not only did this statute include punishment for *false* statements made with ill-will or without the reasonable belief that they were true, but also included punishment for *true* statements made with "actual malice" in the sense of ill-will[26].

The case arose out of a controversy between the District Attorney and judges of the Criminal District Court of Orleans Parish during which the former accused the latter of causing a large backlog of pending criminal cases by their inefficiency, laziness, and excessive vacations. He also accused the judges of hampering his efforts to enforce vice laws by their refusal to authorize disbursements for the expenses of undercover investigations in the enforcement of vice laws in New Orleans.

At the outset, the Supreme Court saw no distinction between civil and criminal libel laws where criticism of public officials is concerned. In the instance of both, it found the interest in private reputation overborne by the larger public interest in the dissemination of the truth as secured by the Constitution of the United States. And even where an utterance is false, it held that "the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood[27]." The *New York Times* rule was held not to be rendered inapplicable merely because an official's private, as well as his public, reputation was harmed. As now extended to both civil and criminal libel actions, the test was said not to be keyed to ordinary care, but rather to the reckless disregard for the truth.

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24. 376 U.S. 254 (1964).
25. 379 U.S. 64 (1964).
26. *La. Rev. Stat.*, 1950, Tit. 14.
27. 379 U.S. 64, 73 (1964).

3. Who Is and Who Is Not a "Public Official"?

Since *New York Times Co. v. Sullivan* and *Garrison v. Louisiana* were decided, on numerous occasions in libel cases there has been the question of who is and who is not a "public official". Indeed, in the *New York Times Co.* case the Court had itself stated that it did not have there the occasion to determine "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included[28]." The Court attempted to provide an answer in *Rosenblatt v. Baer* decided in 1966[29].

In *Rosenblatt*, a former supervisor of a county recreation area employed by, and responsible to, three county Commissioners brought a civil action in a New Hampshire State court. The basis for the action in which damages were awarded was a newspaper column written by the petitioner. The column was critical of fiscal management under the respondent's regime and the question was asked: "What happened to all the money last year? and every other year?"[30] As the Court pondered the questions presented by the case it noted that the elected Commissioners would have been barred from suit under the *New York Times* rule, but in order to determine whether or not the former supervisor was a "public official" it considered another matter. It rejected the notion that who is or is not a "public official" is to be decided with reference to state law. To adopt that idea, it said, would mean "that 'the constitutional limits of free expression in the Nation would vary with state lines'[31]." Then, after commenting that "Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized[32]," it laid down the following broad principles:[33]

> It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

With the remark that it was for the trial judge to determine whether or not the proof showed the respondent to be a "public official", the case, was reversed and remanded. However, *Rosenblatt v. Baer* did not settle the matter. There was more to come.

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28. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283, footnote 23 (1964).
29. 383 U.S. 75 (1966).
30. See facts at pages 78, 79 of the Court's opinion.
31. *Ibid.*, p. 84, citing *Pennekamp v. Florida*, 238 U.S. 731, 735 (1964).
32. *Ibid.*, p. 85. The trial in the case had taken place before *New York Times Co. v. Sullivan* was decided. For that reason, the Supreme Court concluded that the respondent should be given an opportunity to adduce proofs to bring his claim outside the *New York Times* rule.
33. *Ibid.*, p. 85.

4. The *New York Times* Rule Further Extended: State Legislators, Understandable and Incidental Error, and "Public Figures"

During the October Term, 1966, three more significant cases were decided by the Supreme Court which both extended and explained the *New York Times* rule. In the first, *Bond v. Floyd*[34], among other things it was argued that the *New York Times* principle should not be extended to statements made by a state legislator "because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of the government[35]." However, the Court could not find support for such a distinction in *New York Times Co. v. Sullivan* or in any other of its decisions. Indeed, it found that the interest of the public in hearing all sides of a public issue "is hardly advanced by extending more protection to citizen-critics than to legislators[36]." Therefore, action by the Georgia House of Representatives to bar the appellant Bond from taking the seat to which he had been elected because of his anti-Vietnam War and anti-draft statements was found to violate his First Amendment rights.

In *Time, Inc. v. Hill*[37], the second October Term, 1966, case, the Supreme Court held, as it had in *New York Times Co. v. Sullivan*, that First Amendment guarantees "can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function[38]." But it also held:[39]

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

The basis for *Time, Inc. v. Hill* was an article published in Life Magazine about a play that portrayed an incident marked with violence during which an entire family was held hostage in its home and then released. The article related the play to an actual incident during which a family — the Hill family — was taken hostage and released unharmed and without violence. Not only was the article illustrated with scenes staged at the former Hill home from

34. 385 U.S. 116 (1966).
35. *Ibid.*, 136.
36. *Ibid.*, p. 136.
37. 385 U.S. 374 (1967).
38. *Ibid.*, 389.
39. *Ibid.*

which the family had moved to avoid further publicity that had caused extensive involuntary notariety, but it was entitled "True Crime Inspires Tense Play." The article carried the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours'[40]."

Alleging that the Life article gave a knowingly false impression of what had happened, the appellee Hill sought, and was awarded, damages under a New York statute that provided a cause of action to a person whose name or picture is used by another without consent for purposes of trade or advertising[41]. Time Inc.'s defense was that the article was about a subject of legitimate news interest — a subject of general interest and of value and concern to the public.

After restating the *New York Times* principle and adding to it, the conclusion reached by the Court was that "Life's conduct here was at most a mere understandable and incidental error of fact in reporting a newsworthy event[42]." Then it added:[43]

> One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is — and there always will be — doubt as to the complete accuracy of the newsworthy facts. Such a consummation hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society.

Time, Inc. v. Hill is also important because it definitely brought "public figures" within the ambit of the *New York Times* rule.

In the third October Term, 1966, case, *Curtis Publishing Co. v. Butts*[44], decided together with *Associated Press v. Walker*, the Court attacked directly the question of who is and who is not a "public figure" which it recognized had not been fully settled in the *Garrison*[45], *Rosenblatt*[46], and the *Time, Inc.*,[47] cases. In the *Curtis Publishing Co.* case compensatory and punitive damages were sought for an article that accused the respondent Butts, the athletic director of the University of Georgia, of trying to "fix" a football game by allegedly revealing the University of Georgia football team's plays, defensive plans, etc., to the coach of the opposing team. In *Associated Press v. Walker* compensatory and punitive damages were sought for a news dispatch which charged Walker with having personally taken control of a

40. See statement of facts at page 377 of the Court's opinion.
41. *New York Civil Rights Law*, §§ 50-51.
42. 385 U.S. 374, 400 (1967).
43. *Ibid.*, 400, 401.
44. 388 U.S. 130 (1967).
45. *Garrison v. Louisiana*, 379 U.S. 64 (1964).
46. *Rosenblatt v. Baer*, 383 U.S. 75 (1966).
47. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

violent crowd in a University of Mississippi riot, and with having led the crowd in a charge against federal marshals sent to effectuate a court decree ordering the enrollment of a negro. Neither Butts nor Walker were "Public Officials" at the time the events involved in the respective cases took place. Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State; Walker, a former Major General in the U.S. Army, was now a private citizen who had resigned from the Army after a long and distinguished career to enter politics.

Again, a majority could be found to decide the case but not to join in an opinion of the Court. In an opinion in which three other members of the Court joined[48], Justice Harlan wrote that Butts and Walker both commanded a substantial amount of public interest at the time of the publications and that both would have been labeled "public figures" under ordinary tort rules, but that "both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements[49]." Then Justice Harlan added:[50]

> These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Chief Justice Warren concurred in the result in an opinion in which he pointed out that the present case did not involve "public officials" as in *New York Times*, but "public figures" "whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of 'public officials' with respect to the same issues and events[51]." However, he disagreed with Justice Harlan's opinion which he thought departed from the standard of *New York Times* when, in the case of "public figures," it substituted a standard based on "highly unreasonable conduct[53]," To him, to differentiate between "public figures" and "public

48. Justices Clark, Stewart, and Fortas.
49. 388 U.S. 130, 155 (1967), quoting from Brandeis, J., dissenting in *Whitney v. California*, 274 U.S. 357, 377 (1927).
50. 388 U.S. 130, 155 (1967).
51. *Ibid.*, 162.
52. *Ibid.*, 163.

officials" and adopt separate standards of proof for each had no basis in law, logic, or First Amendment policy.

In final analysis, the award of damages against the Curtis Publishing Co. was upheld on the basis that the jury must have found that the magazine's investigation in the preparation of the story was grossly inadequate, and that the evidence supported such a finding. *Associated Press v. Walker* was reversed on the basis that the evidence could support no more than a finding of ordinary negligence which would not warrant an award of damages.

Perhaps Justice White provided the best summation of what the Court had accomplished to this point with its *New York Times* doctrine when he wrote as follows in *St. Amant v. Thompson*[53] with reference to the cases in which the doctrine had been applied:[54]

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

The Justice recognized that such a test "puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity[55]." However, he dismissed this as follows:[56]

> Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is

53. 390 U.S. 727 (1968). *St. Amant v. Thompson* involved a televised political speech in which answers put to a union official falsely charged a public official with criminal conduct. The Court concluded that the evidence in the case did not support the conclusion that the petitioner had acted in reckless disregard of whether the statements were false or not. See also, *Berkley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967), in which three newspaper editorials criticizing the official conduct of an elected court clerk were found not to reveal the high degree of awareness of probable falsity demanded by the *New York Times* doctrine.

54. 390 U.S. 727, 731 (1968).

55. *Ibid.*

56. *Ibid.*, 731, 732.

> essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

5. Justice Hugo Black and the *New York Times* Rule

St. Amant v. Thompson notwithstanding, how much the Warren Court accomplished in *Curtis Publishing Co. v. Butts*[57] — indeed, how much it accomplished with the rule announced in *New York Times Co. v. Sullivan*[58] — appears problematical if one reads what Justice Black had to say about it. Certainly, the doctrine had served to decide cases, but it still left open the question of whether it had developed a rule of decision that could consistently be applied in such cases, or whether it had done no more than suggest various experimental expedients that could be applied in one way or another on a case by case basis. This was vividly brought out in Justice Black's opinion in which he dissented in *Curtis Publishing Co. v. Butts*[59] while he concurred in the result in the companion case, *Associated Press v. Walker*[60].

At the outset, Justice Black stated that he agreed with Chief Justice Warren's opinion so that the Court could decide the case in accordance with the doctrine to which the majority adhered. However, he was careful to point out that in doing this he did not recede from the opinions that he had expressed earlier in *New York Times Co. v. Sullivan*[61] and in *Rosenblatt v. Baer*[62]. To him, the *Curtis Publishing Co.* and the *Walker* cases illustrated the accuracy of his earlier predictions that the *New York Times* constitutional rule concerning libel was "wholly inadequate to save the press from being destroyed by libel judgments[63]." Indeed, to him the apparent contradictory results in the *Curtis Publishing Co.* and the *Walker* cases seemed "a strange way to erect a constitutional standard for libel cases[64]." Moreover, he considered that what the Court was doing was to review factual questions in cases decided by juries, a review which he considered to be in flat violation of the Seventh Amendment which assures the right to trial by jury in civil cases. He summarized the situation as follows:[65]

> It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including

57. 388 U.S. 130 (1967).
58. 376 U.S. 254 (1964).
59. 388 U.S. 130, 170 (1967).
60. *Ibid.*
61. 376 U.S. 254, 293 (1964).
62. 383 U.S. 75, 94 (1966).
63. 388 U.S. 130, 171 (1967).
64. *Ibid.*
65. *Ibid.*, 171, 172.

> this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings. Today the Court will not give the First Amendment its natural and obvious meaning by holding that a law which seriously menaces the very life of press freedom violates the First Amendment. In fact, the Court is suggesting various experimental expedients in libel cases, all of which boil down to a determination of how offensive to this Court a particular libel judgment may be, either because of its immense size or because the Court does not like the way an alleged libelee was treated.

The only solution that the Justice saw to this dilemma was that the Court abandon *New York Times Co. v. Sullivan* and adopt a rule to the effect that the First Amendment was intended "to leave the press free from the harassment of libel judgments[66]." Perhaps so drastic a course is not called for and without a doubt there is merit to the *New York Times* rule, but fifteen years after it was announced the application of the rule does not appear to be consistent.

6. The *New York Times* Rule: A Quagmire or a Rule of Decision?

The wisdom of Justice Black's assertion in *Curtis Publishing Co. v. Butts*[67] that with respect to the law of libel the Court was getting itself into the same "quagmire" in which it was already struggling with respect to obscenity is well brought out by *Rosenbloom v. Metromedia*[68]. It that case it was not a "public official" or a "public figure" who was involved, but a private individual who claimed that he was defamed by a defamatory falsehood uttered in a radio news broadcast about his alleged involvement in an event of public or general interest. The broadcast took place after the individual's arrest for the possession and sale of "obscene" literature. The only precaution taken by the broadcaster was to rely on a telephone call made by a police Captain providing information about the arrest and the offense charged. In earlier broadcasts made after the arrest the individual was named, in later ones he was not. One of the broadcasts in which he was named started out by informing the public: "City Cracks Down on Smut Merchants[69]." This was followed by a description of the location of the raid and of what was seized.

After he had been acquitted of the criminal obscenity charge, the individual brought a diversity action in the United States District Court and sought damages under the Pennsylvania libel law. He recovered $25 000 in general damages and $750 000 in punitive damages, the latter of which was

66. *Ibid.*, 172.
67. 388 U.S. 130 (1968).
68. 403 U.S. 29 (1971).
69. *Ibid.*, 33.

reduced to $250 000 on *remittitur*. The United States Court of Appeals reversed [70] on the basis that the broadcasts involved "hot news" prepared under deadline pressure that concerned matters of public interest — that the fact that the person involved was not a public figure could not be accorded decisive importance if the importance of the guarantees of the First Amendment were to be adequately implemented. Once the case reached the Supreme Court, eight Justices participated in the decision which upheld the Court of Appeals. Again there was no majority opinion, only a plurality opinion, and it took five opinions to dispose of the case, none of which commanded more than three votes [71].

The gist of Justice Brennan's plurality opinion was that [72]

> It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest.

The Justice dismissed as a "legal fiction" the notion that public figures have voluntarily exposed their lives to public inspection, while private individuals have kept theirs carefully shrouded from public view.

Justice Black's view expressed in dissent was that "the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge that they are false [73]."

Justice White stated that he could not join any of the opinions in the case because each of them decided "broader constitutional issues and displace[d] more state libel law than [was] necessary for the decision in [the] case [74]."

Justice Harlan thought that the States should be able to allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault.

Justice Marshall, with whom Justice Stewart joined, thought that so long as there was not liability without fault, the States should be "essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the state's need [75]."

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70. 415 F. 2d 892, 895 (C.A. 3, 1969).
71. Justice Brennan wrote the plurality opinion, Justices Black and White wrote separate opinions in which they concurred with the judgment, Justices Harlan and Marshall wrote dissenting opinions.
72. 403 U.S. 29, 44 (1971).
73. *Ibid.*, 57.
74. *Ibid.*, 59.
75. *Ibid.*, 86.

7. Private Individuals and the *New York Times* Rule: The Effect of a Change in the Composition of the Court

Thus, *Rosenbloom v. Metromedia* did anything but clarify the law applicable in libel actions brought against the news media. If anything, it left this area of the law more confused than ever. But then, there is never a lack of speech and press cases and it was not very long before the Court had another chance to straighten things out. And in this next attempt which took place in *Gertz v. Robert Welch, Inc.*, decided in 1974[76], the situation was altered considerably by a change in the composition of the Court. Justices Black and Harlan, one a liberal and the other a conservative in matters of speech and press, had died and had been replaced by Justices Powell and Rehnquist, both conservatives. The outcome was that this time the Court was not only able to decide the case before it, but also to have a majority, though a slim one, to join in an opinion (five to four)[77].

Again in *Gertz* the issue was whether a newspaper or broadcaster that published a defamatory falsehood about an individual who was neither a "public official" nor a "public figure" could claim a constitutional privilege against liability. This time the individual was an attorney who represented the family of a murder victim in civil litigation against a Chicago policeman who had been convicted of the murder. The alleged defamatory material appeared in a John Birch Society magazine that warned against a nationwide conspiracy to discredit local law enforcement agencies. The article alleged that the policeman's trial was a "frame-up," implied that the attorney had a criminal record, and labeled him a "Communist-fronter[78]."

As spokesman for the majority of the Court, Justice Powell reviewed the significant applicable decisions of the Court from *New York Times Co. v. Sullivan* up to and including *Rosenbloom v. Metromedia.* Then he started off with what he termed to be "the common ground," i.e.,[79]

> 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 conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.

76. 418 U.S. 323 (1974).
77. Each of the four dissenters, Burger, C.J., Douglas, Brennan, and White, JJ., filed separate dissenting opinions.
78. See pp. 325, 326 of the Court's opinion.
79. Pp. 339, 340.

Then he continued: "Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate [80]." He added as others had before him: "The First Amendment requires that we protect some falsehood in order to protect speech that matters [81]." However, that is about as far as the so-called "common ground" extended. From that point on he appeared to adopt the views that Justice Harlan had expressed in dissent in *Rosenbloom v. Metromedia* [82], and made them the views of the Court. First, he drew a distinction between "public figures" and "private individuals." He pointed out that the latter are more vulnerable to injury since they do not have the access that "public officials" and "public figures" do to the media, and therefore do not have the same opportunity to counteract false statements. Therefore, it was his belief that the state interest in protecting private individuals is correspondingly greater. He concluded for the Court: [83]

> (...) the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.
>
> (...)
>
> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

New York Times Co. v. Sullivan was simply found not applicable to a situation such as the one presented by this case that did not involve a public personality. As for who is or is not a "public personality," he provided the following guideline: [84]

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of life.

8. The *New York Times* Rule and Those Drawn Into the Public Forum Against Their Will

In *Time, Inc. v. Firestone*, decided in 1976 [85], the Supreme Court repeated its repudiation of the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia* [86]. Again it rejected the idea that falsehoods

80. *Ibid.*, 340.
81. *Ibid.*, 341.
82. 403 U.S. 29, 62 (1971). See also, Justice Harlan's views for the majority in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).
83. 418 U.S. 323, 345-346, 347 (1974).
84. *Ibid.*, 352.
85. 424 U.S. 448 (1976).
86. 403 U.S. 29 (1971).

defamatory of private persons should have the benefit of the *New York Times* privilege whenever statements made concerned matters of general or public interest. The Court recognized that some participants in some litigation may be legitimate "public figures" generally or for the limited purposes of that litigation. Yet, it found little reason why the majority who, like the respondent, are drawn into the public forum largely against their will to obtain legal redress "should substantially forfeit that degree of the protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom[87]."

As it reached this conclusion the Court noted that the public interest in accurate reports of judicial proceedings was already adequately protected by its 1975 decision in *Cox Broadcasting Corp. v. Cohn*[88]. In that case the Court had held that the States are precluded from imposing civil liability based on the publication of truthful information found in official court records that are open to public inspection[89]. In the present case, the magazine had reported that the divorce granted on the respondent's husband's counterclaim to her divorce action had been granted "on grounds of extreme cruelty and adultery[90]." Actually, the divorce had been granted on the grounds that neither party to the divorce proceedings was "domesticated, within the meaning of that term as used by the Supreme Court of Florida..."[91]

The Court reaffirmed the position that it had taken in *Gertz v. Robert Welch, Inc.*[92], as it held:[93]

> Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony.

Recently, in *Hutchinson v. Proxmire*, decided June 26, 1979[94], the Court added to what it said in *Gertz v. Robert Welch, Inc.*[95] and *Time, Inc.*

87. 424 U.S. 448, 457 (1976).
88. 520 U.S. 469 (1925).
89. In the Cox *Broadcasting Corp.* case, the appellant had broadcast the name of a deceased rape victim in violation of a Georgia Statute which made it a misdemeanor to publish or broadcast the name or identity of a rape victim. Ga. Code Ann. §26-9901 (1972). The appellant, a reporter, had learned the name of the victim from the examination of indictments made available for inspection in the courtroom during court proceedings brought against those accused of the rape.
90. See the facts in the case, 424 U.S. 448, 452.
91. *Ibid.*, 451.
92. 418 U.S. 323 (1974).
93. 424 U.S. 448, 454 (1976).
94. 99 S. Ct. 2675 (1979).
95. 418 U.S. 323 (1974).

v. Firestone[96] concerning who is and who is not a "public figure" when it wrote:[97]

> Clearly those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.

The occasion was the publicity that attended Senator Proxmire's "Golden Fleece of the Month Award" given to federal agencies that funded the petitioner scientist's study of emotional behavior. The purpose of the Senator's monthly award is to publicize examples of wasteful government spending. In this particular instance, the Senator's speech intended for delivery to the United States Senate was incorporated into an advance press release which was sent to 275 members of the news media throughout the United States and abroad.

Had the Senator confined himself to delivering his speech in the Senate of the United States, he would have been protected by the Speech and Debate Clause of the United States Constitution[98]. However, in this particular instance the Senator was found to have gone beyond what is considered necessary to protect what is needed to preserve the legislative independence of Members of the Congress. Moreover, at no time had the petitioner thrust himself or his views into public controversy to influence others, nor had he assumed any role of public prominence. Therefore, the *New York Times* doctrine was found not to apply to protect the Senator.

9. The First Amendment and the Right to Publicity

Zacchini v. Scripps-Howard Broadcasting Co.[99] was a different type case. It involved the "right to publicity" rather than the "right to privacy." It appears that the petitioner's 15-second "human cannonball" act in which he is shot from a cannon into a net 200 feet away was videotaped in its entirety without his consent and shown on television. The petitioner then brought an action for damages alleging the unlawful appropriation of his professional property. Although the Supreme Court of Ohio recognized that the petitioner had a cause of action under the State law, relying on *Time, Inc. v. Hill*[100] it found for the respondent on the basis that the respondent had a right to include in its broadcasts matters of public interest otherwise protected by the right of publicity, "... unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual[101]."

96. 424 U.S. 448 (1976).
97. 99 S. Ct. 2675, 2688 (1979).
98. Article 1, Section 6, Clause 1.
99. 433 U.S. 562 (1977).
100. 385 U.S. 374 (1974).
101. See statement of facts, 433 U.S. 562, 565 (1977).

As the Supreme Court of the United States reversed, it noted that *Time, Inc. v. Hill* was a "right to privacy" case, not one that involved the "right to publicity." Moreover, it was "quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent [102]." Indeed, the broadcast of the petitioner's entire act posed a substantial threat to the economic value of his performance. It went to the very heart of the petitioner's ability to earn a living as an entertainer. The Court recognized that entertainment as well as news enjoy First Amendment protection, but it found it important to note "that neither the public nor respondent [would] be deprived of the benefit of petitioner's performance as long as his commercial stake in his act [was] appropriately recognized [103]." The petitioner did not seek to prevent the broadcast of his performance, he simply wanted to be paid for it.

10. The *New York Times* Rule and the State of Mind of the Defendant

Herbert v. Lando, decided April 18, 1979, presented yet another novel First Amendment question — whether "when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, the plaintiff is barred from inquiring into the editorial processes of those responsible for the publication, even though the inquiry would produce evidence material to the proof of a critical element of his cause of action [104]."

The controversy arose when the petitioner, a retired Army officer with extended war-time Vietnam service, brought suit against the respondent for having falsely and maliciously portrayed him in a television broadcast and a magazine article as a liar and as a person who had made cover-up charges to explain his relief from command. The petitioner had received widespread media attention when he had accused his superior officers of covering up reports of atrocities and other war crimes. Therefore he conceded that he was a "public figure" within the meaning of the *New York Times* rule, and therefore could not recover unless he could prove the publication of falsehood with the knowledge of the publication's falsity or with reckless disregard of whether or not it was false. As he prepared his case he sought answers to questions to which answers were refused on the basis that the First Amendment prohibits inquiry into the state of mind of those who edit, produce or publish, and into the editorial process [105].

102. 433 U.S. 562, 575.

103. *Ibid.*, 578.

104. 60 L Ed 2d 115, 121 (1979).

105. See Rule 26(b), Federal Rules of Civil Procedure, which permits discovery of any matter "relevant to the subject matter involved in the pending action" admissible in evidence or that "appears reasonably calculated to lead to the discovery of admissible evidence."

As the Supreme Court reversed the lower court's decision that the right to refuse to answer was absolute, it discussed the burden placed by *New York Times Co. v. Sullivan*[106] on any like the petitioner who seek damages for alleged libelous utterances. Not only did the Court point out that *New York Times* and its progeny had not suggested any First Amendment restrictions on sources from which the necessary evidence to prove the critical elements of such an action could be obtained, but also that these cases had made it essential in proving liability that such plaintiffs "focus on the conduct and state of mind of the defendant[107]."

The Court also pointed out that even before *New York Times* publishers enjoyed certain qualified privileges that protected them from liability for libel unless publication was done with malice. Then it added that, traditionally, Courts have admitted direct evidence relevant to the state of mind of a defendant and necessary to defeat a conditional privilege or enhance damages. Continued the Court: "The rules are applicable to the press and to other defendants alike..."[108] Concluded Justice White for the Court:[109]

> In sum, contrary to the views of the Court of Appeals, according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times, Butts* and similar cases.

Justice White's opinion for the Court in *Herbert v. Lando* was anything but well received by the press. Indeed, columnists and radio and television reporters had a field day attacking the Court for granting what was interpreted to be permission to rummage into the minds of newspaper people[110]. One columnist even went so far as to suggest that Justice White had the dubious honor of winning last year's Golden Zenger Award — a golden typewriter with an axe buried in the keys — an award given by a magazine to the person considered to have done the most to discredit the First Amendment[111]. But, whether one agrees with Justice White and the

106. 376 U.S. 254 (1964).

107. 60 L Ed 2d 115, 124 (1979).

108. *Ibid.*, 127.

109. *Ibid.*, 129.

110. See for instance, James RESTON, "The Courts and the Press," c. 1979 New York Times News Service, Tom WICKER, "A Chilling Court," c. 1979 New York Times News Service, both published on the same page by such a regional newspaper as *The Times Record*, Brunswick, Maine, April 25, 1979, p. 4. See also, Clayton FRITCHEY, "Byron White's Brief Against the Media," *The Washington Post*, April 28, 1979, p. A17. Compare with these, James J. KILPATRICK, "The Court and the Press," *The Washington Star*, p. A-13, in which, looking at Justice White's opinion, Mr KILPATRICT wrote: "I fail to see what all the hollering is about."

111. Clayton FRITCHEY, "Byron White's Brief Against the Media," *The Washington Post*, April 28, 1979, p. A17.

majority of the Court or with the criticism directed at the Court by the press, one should at least pause and reflect on a celebrated opinion expressed by an English judge over five hundred years ago: [112]

> It is common knowledge that the thought of man shall not be tried, for the devil himself knoweth not the thought of man.

Summary and Conclusion

During the past fifteen years there has been a dramatic change in the law applicable to civil and criminal liability for defamation. Indeed, during this period the common law applicable to libelous utterances that had prevailed in the United States since the country was founded was all but swept away. It all started with *New York Times Co. v. Sullivan*, decided in 1964, when the common law of libel was found not to give sufficient protection to the First Amendment guarantees of freedom of speech and press. At first, this was said to be true in a civil action for damages in a libel case, but soon, in *Garrison v. Louisiana*, also decided in 1964, the same was said to be true in criminal actions for seditious libel. In both instances, proof that false statements were made with actual malice, i.e., with the knowledge that they were false, or proof that such statements were made with reckless disregard of whether they were false or not was said to be essential.

At first, this new standard of proof which protects even the untrue if it is mere understandable and incidental error of fact, was applied only to "public officials." However, this standard of proof was soon applied to "public figures" as well. Moreover, there were those on the Court who would have applied the same standard to private individuals who suddenly find themselves unwillingly or unwittingly thrust upon the public scene. But before long, a distinction was drawn between "public officials" and "public figures" when, in *Curtis Publishing Co. v. Butts*, decided in 1967, a plurality opinion favored a different standard for the latter — a standard based on "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers [113]." Then, there was the protection given private individuals when, in *Gertz v. Robert Welch, Inc.*, decided in 1974, the Court held that as to these the *New York Times* rule does not apply and the States can decide for themselves the standard of liability for publishers and broadcasters of defamatory falsehood injurious to them. And finally, there is *Herbert v. Lando*, decided in 1979, which permits plaintiffs in libel actions to "focus on the conduct and state of mind of the defendant" [114] as he seeks to establish the critical elements of proof required by the *New York Times* rule.

112. BRIAN, J., Y.B., 17 Edw IV, Pasche, f. 2 (1477).
113. 385 U.S. 130, 155 (1967).
114. 60 L Ed 2d 115, 124 (1979).

Thus, in the short span of fifteen years the Supreme Court of the United States has traveled a considerable distance from the rigid rule that it announced in 1964 in *New York Times Co. v. Sullivan.* At first, the Court appeared to be inclined to extend the rule to greater and more far-reaching horizons, only to then shift its direction in what appears to be a more limited application of the rule. Of course, to a considerable extent this shift was due to a change in the composition of the Court. Actually, the shift was dictated by the departure from the Court of such men as Chief Justice Warren and Justices Black and Douglas who held liberal views in the area of speech and press, and the replacement of these three with Justices with more conservative views. But then, at a time when four of the nine Justices are eligible for retirement — five in January, 1980 — it is not unreasonable to expect further change in the composition of the Court and another shift of direction in such matters as speech and press. Whether a further shift will be to the right or to the left will depend on who the replacements are and, indeed, who sits in the White House when the replacements are named. There might even be a return to a more scholarly Court such as the one that Franklin D. Roosevelt put together during his years as President of the United States.