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Public Figures and Malice: Recent Supreme Court Decisions Restricting the Constitutional Privilege

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NOTE

PUBLIC FIGURES AND MALICE: RECENT SUPREME COURT DECISIONS RESTRICTING THE CONSTITUTIONAL PRIVILEGE

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PUBLIC FIGURES AND MALICE: RECENT SUPREME COURT DECISIONS RESTRICTING THE CONSTITUTIONAL PRIVILEGE

I. INTRODUCTION*

Historically, Americans have placed great importance on both their good name and their right to free speech.¹ "As ingrained as both of these ideals are in the very fabric of our society, they sometimes run counter to

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1. 10 CREIGHTON L. REV. 351 (1976).

each other."² The Supreme Court has tried to balance these conflicting ideals in libel cases involving the first amendment's protection of freedom of the press. In the 1964 case of *New York Times Co. v. Sullivan*,³ the Court held that the first amendment's constitutional privilege extends to those publishing defamatory statements concerning official conduct, and that a plaintiff in such a case could not recover absent a showing of "actual malice." In the ten years following the *New York Times* decision, the Court continued to expand the constitutional protection afforded the press. However, lower courts were besieged by a multitude of defamation cases, which has apparently caused the Supreme Court, in recent cases, to limit the constitutional protection afforded the press, resulting in greater protection for the individual.

In the 1978 term the Court in *Hutchinson v. Proxmire*⁴ and *Wolston v. Reader's Digest Association*⁵ appears to have narrowed the class of figures to which the actual malice standard applies. Furthermore, in *Herbert v. Lando*,⁶ decided in the same term, the Court has insured that those plaintiffs who are classified as public figures will have a broad range of discovery tools to aid them in meeting their burden of proof.

II. HISTORICAL BACKGROUND

There was a general recognition in the common law of a qualified privilege in defamation actions of what was called "fair comment" upon the conduct and qualifications of public officers and employees.⁷ This privilege extended to encompass publication of matters of general concern to the public.⁸ Matters which have been held to be of general concern to the

2. *Id.*

3. 376 U.S. 254 (1964).

4. 443 U.S. 111 (1979).

5. 443 U.S. 157 (1979).

6. 441 U.S. 153 (1979).

7. W. PROSSER, *THE LAW OF TORTS* 819 (4th ed. 1971) [hereinafter PROSSER]. See *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (Black, J., concurring). Mr. Justice Black observed that

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or criticize the way public employees do their jobs, from the least to the most important.

See also *Everett v. Cal. Teacher's Assn.*, 208 Cal. App.2d 291, 25 Cal. Rptr. 120 (1962); *Knapp v. Post Printing & Pub. Co.*, 111 Colo. 492, 144 P.2d 981 (1943); *White v. Fletcher*, 90 So.2d 129 (Fla. 1956); *Morgan v. Bulletin Co.*, 369 Pa. 349, 85 A.2d 869 (1952); *Cartwright v. Herald Pub. Co.*, 220 S.C. 492, 68 S.E.2d 415 (1951).

8. PROSSER, *supra* note 7, at 819.

public include such items as the management of public institutions, the conduct of private enterprise affecting the general community, and the performance of those who submit their talents to the public for approval.⁹

While the existence of this privilege was undisputed, there was disagreement as to whether it was restricted to statements expressing only "comment" or opinion, as distinguished from misstatements of fact.¹⁰ A majority of courts required the defendant who raised the defense of fair comment in a libel or slander case to prove that the statements he made were "honest expressions of *opinion* on matters of legitimate public interest where based upon a *true* or privileged statement of fact."¹¹ The reason usually given was, that while men in public life must expect to be subjected to public comment, opinion, and criticism, they were not to be made the victims of misrepresentations of fact so as to deter desirable candidates from seeking office and thereby injuring the public interest.¹² A small number of courts have extended the defense of fair comment to all of the statements made by the defendant regarding the public activities of the plaintiff.¹³ In those jurisdictions, the defendant need only prove that he honestly believed what he said was true, that he was not motivated by malice, and that he met certain standards of fairness.¹⁴ Under the fair comment privilege courts have long had to determine whether a remark was of a public or private concern, and statements which enjoy the protection of the defense of fair comment are privileged even though they are defamatory.¹⁵

9. Note, *The Scope of First Amendment Protection For Good-Faith Defamatory Error*, 75 YALE L.J. 642, 645 (1966) [hereinafter YALE L.J.].

10. PROSSER, *supra* note 7, at 819.

11. Titus, *Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962) [hereinafter Titus]. See also *A.S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340 (1961); *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947); *Murphy v. Farmers Educ. & Coop. Union of Am.*, 72 N.W.2d 636 (N.D. 1955); *Westropp v. E.W. Scripps Co.*, 148 Ohio St. 365, 74 N.E.2d 340 (1947); *Owens v. Scott Pub. Co.*, 46 Wash.2d 666, 284 P.2d 296 (1955), *cert. denied*, 350 U.S. 968 (1956).

12. PROSSER, *supra* note 7, at 819-20.

13. Titus, *supra* note 11, at 1204. See also *Snively v. Record Pub. Co.*, 185 Cal. 565, 198 P. 1 (1921); *Salinger v. Cowles*, 195 Iowa 873, 191 N.W. 167 (1922); *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908); *Clancey v. Daily News Corp.*, 202 Minn. 1, 277 N.W. 264 (1938); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962).

14. Titus, *supra* note 11, at 1204.

15. *Id.*; YALE L.J., *supra* note 9, at 645. The Restatement (Second) of Torts § 559 (1977) states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." See *Sheridan v. Davies*, 139 Kan. 256, 31 P.2d 51, 54 (1934); *Seested v. Post Printing & Pub. Co.*, 326 Mo. 559, 31 S.W.2d 1045, 1052 (1930).

In *Thornhill v. Alabama*,¹⁶ decided almost three decades ago, the Supreme Court stated that:

The safeguarding of [freedom of speech and of the press] to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the process of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas¹⁷

The Court went on to say that in order for freedom of discussion to "fulfill its historic function in this nation, [it] must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period"¹⁸ "[T]he freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."¹⁹

While freedom of speech and of the press in defamation cases was often mentioned as an argument in support of a decision at common law holding that the particular conduct of the defendant was privileged, it was not until 1964 in *New York Times*²⁰ that the Supreme Court held that the first amendment itself required the privilege.²¹ The Court considered the case against what it referred to as "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."²² The Court held that a public official could not recover damages for defamation relating to his official conduct unless he proved that the statement was made with "actual malice."²³ Actual malice was defined as a statement made with knowledge of its falsity or with "reckless disregard of whether it was false or not."²⁴

In *New York Times*, the Court adopted the common law minority posi-

16. 310 U.S. 88 (1940).

17. *Id.* at 95.

18. *Id.* at 102.

19. *Id.* at 101-02.

20. 376 U.S. 254 (1964). Sullivan, the Public Safety Commissioner in Montgomery, Alabama sued the *New York Times* for defamatory publication of a paid advertisement that falsely described police treatment of civil rights protestors. Even though the advertisement did not mention Sullivan by name, he claimed the advertisement referred to him because his responsibilities as commissioner included supervision of the police department.

21. PROSSER, *supra* note 7, at 819.

22. 376 U.S. at 270.

23. *Id.* at 279.

24. *Id.* at 280.

tion, as stated in *Coleman v. MacLennan*, that the occasion gave rise to a privilege, that the plaintiff must show actual malice to recover damages, and that the "privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office."²⁵

In a concurring opinion, Justice Goldberg stated that one of the main purposes of the first amendment is to afford people an opportunity to "determine and resolve public issues," and that whenever "public matters are involved, [any] doubts should be resolved in favor of freedom of expression rather than against it."²⁶

The process of expanding the application of the constitutional privilege began in the lower courts by transformation of the "public official concept" into a "government affiliation test."²⁷ In *Rosenblatt v. Baer*, the Supreme Court held that the former supervisor of a county recreation area could be a public official within the meaning of *New York Times*.²⁸ Justice Brennan, writing for the majority, defined "public official" as applying 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."²⁹ The *New York Times* "actual malice" test applies whenever the public has an independent interest in the qualifications and performance of the person, beyond that which the general public has in the qualifications of all government employees based on the apparent or actual importance of the position.³⁰

25. 78 Kan. 711, 723, 98 P. 281, 285 (1908) cited in *New York Times Co. v. Sullivan*, 376 U.S. at 281-82.

26. 376 U.S. at 302 (Goldberg, J., concurring)(citation omitted).

27. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1377 (1975) [hereinafter Eaton]. See also *Eadie v. Pole*, 91 N.J. Super. 504, 221 A.2d 547 (1966) (tax assessor held public official); *Schnepf v. New York Post Corp.*, 16 N.Y.2d 1009, 265 N.Y.S.2d 897 (1965) (municipal service attorney held public official); *Gilligan v. King*, 48 Misc.2d 212, 264 N.Y.S.2d 309 (1965) (off-duty police lieutenant held public official).

28. 383 U.S. 75 (1966). Justice Brennan noted that in *New York Times* "we had no 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 specify categories of persons who would or would not be included.'" *Id.* at 85, quoting *New York Times Co. v. Sullivan*, 376 U.S. at 283, n.23.

29. 383 U.S. at 85.

30. *Id.* at 86. The article did not refer to Baer by name. "Thus to prove [that] the article referred to him he showed the importance of his role; the same showing, at the least, raises a substantial argument that he was a 'public official.'" *Id.* at 87.

III. PUBLIC FIGURES

A. *Expansion and Refinement of the Public Figure Doctrine*

In 1967, the Supreme Court in the companion cases of *Curtis Publishing Company v. Butts* and *Associated Press v. Walker*³¹ extended the "actual malice" test to apply to what was called "public figures" as well as public officials. Butts, the coach of the University of Georgia football team, had been accused by the *Saturday Evening Post* of fixing a football game with the coach at the University of Alabama. Walker, a retired United States Army General was reported in an Associated Press news dispatch as having taken command of a crowd and having lead a charge against federal marshalls during riots at the University of Mississippi. All seven Justices who decided the case held that Butts and Walker were public figures for first amendment purposes.³² "The present cases involve not 'public officials,' but 'public figures' whose views . . . 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."³³ The Court did not actually define what a public figure was but stated that both Butts and Walker attained that status by the substantial amount of independent public interest they commanded at the time.³⁴ Butts may have obtained the status of a public figure by his position alone, and Walker by his "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy," but both commanded sufficient continuing public interest and had sufficient access to the media to enable them to "expose through discussion the falsehood and fallacies' of the defamatory statements."³⁵

Four years later, in *Rosenbloom v. Metromedia, Inc.*³⁶ a plurality of the

31. 388 U.S. 130 (1967).

32. *Id.* at 162 (Warren, C.J., concurring).

33. *Id.*

In many situations, policy determinations which . . . were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large . . . "[P]ublic figures," like "public officials," often play an influential role in ordering society.

Id. at 163-64.

34. *Id.* at 154.

35. *Id.* at 155.

36. 403 U.S. 29 (1971).

Court further extended the constitutional privilege to include all matters of general or public interest. The Court stated that if a matter is of general interest to the public it is not less so because a private individual may have become involuntarily involved.³⁷ Rosenbloom, a magazine distributor in the Philadelphia area, was labeled by a local radio station as a smut merchant. Rosenbloom had been arrested for distributing obscene literature but was later acquitted of the charge. The plurality held that "[w]e honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."³⁸ The legal effect of *Rosenbloom*, therefore, was to equate any private individual involved in an event of public interest with public officials and public figures.

By 1974, hundreds of post-*New York Times* defamation cases had been before the courts.³⁹ "The [result] of this avalanche of litigation was a continuing struggle to find the appropriate balance between the rights of free speech and the press and the right to be free from character attacks."⁴⁰ In *Gertz v. Robert Welch, Inc.*⁴¹ a majority of the Court retreated from its earlier position by holding that states no longer had to follow the standard set forth in *Rosenbloom* which required private figures involved in events of public or general interest to show actual malice. Gertz, a prominent Chicago attorney, had been retained by the family of a youth shot and killed by a Chicago policeman. The trial attracted widespread attention in the area and an article was published in the John Birch Society magazine describing Gertz as a "communist-fronter" and a "Leninist." The Court said it was abandoning the holding in *Rosenbloom* because:

The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge . . . legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to deter-

37. *Id.* at 43.

38. *Id.* at 43-44.

39. Yasser, *Defamation as a Constitutional Tort: With Actual Malice for All*, 12 *TULSA L.J.* 601, 614 (1977) [hereinafter Yasser].

40. *Id.*

41. 418 U.S. 323 (1974). The Court left the standard of proof required of private plaintiffs up to the states as long as they did not impose liability without fault. The Court also restricted recovery by private individuals not proving actual malice to compensation for actual injury. Upon a showing of actual malice both presumed and punitive damages could be recovered.

mine, in the words of Mr. Justice Marshall, "what information is relevant to self government." We doubt the wisdom of committing this task to the conscience of judges.⁴²

"Thus the 'public or general interest' test for determining the applicability of the *New York Times* standard was rejected as inadequately serving the competing values at stake."⁴³

The Court then addressed the issue of whether Gertz was a public figure for the purposes of applying the *New York Times* test. Once again the Court was not very helpful in delineating between public figure and private person.⁴⁴ The Court stated that some individuals become public figures for "all purposes and in all contexts" due to the "pervasive fame or notoriety" they have achieved.⁴⁵ However, more commonly, an individual "voluntarily injects himself" or finds himself "drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."⁴⁶

The Court stated that, unless it is clear that an individual has attained general fame or notoriety in the affairs of society, he should not be deemed a public figure for all aspects of his life.⁴⁷ The Court tried to reduce the public figure doctrine to a more meaningful context. It looked to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation to determine whether the plaintiff had thrust himself into "the vortex of this public issue," or engaged the public's attention in an attempt to influence the outcome of the controversy.⁴⁸ The Court recognized that in some cases it may be possible for an individual to become a public figure through no purposeful action of

42. *Id.* at 346 (citation omitted). In the opinion of Mr. Justice Douglas:

a State impinges upon free and open discussion when it sanctions the imposition of damages for such discussion through its civil libel laws. Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions. It is indeed this very type of speech which is the reason for the First Amendment since speech which arouses little emotion is little in need of protection.

Id. at 359 (Douglas, J., dissenting). See also Comment, 70 MICH. L. REV. 1547 (1972).

43. Yasser, *supra* note 39, at 615. The Court in *Gertz* felt that private individuals were more vulnerable to defamation than were public officials and public figures. Therefore it was necessary for the state to retain substantial latitude in enforcing legal remedies for defamation in order to protect the reputation of a private individual. 418 U.S. at 345-46.

44. Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709 (1978).

45. 418 U.S. at 351.

46. *Id.*

47. *Id.* at 352.

48. *Id.*

his own, "but the instances of truly involuntary public figures must be exceedingly rare."⁴⁹

The most significant aspect of the Court's opinion is the distinction it draws between public figures and private individuals,⁵⁰ a distinction which is important because "the outcome of much future litigation will pivot on which side of the line the plaintiff is placed."⁵¹ It should be noted, however, that some cases decided after *Gertz* have expressed difficulty in applying the standards supplied by the Supreme Court for determining who is a public figure.⁵² One district court has asked, "How and where do we draw a line between public figures and private individuals? . . . Defining public figures is much like trying to nail a jellyfish to the wall."⁵³

While the Court's dividing line between public figures and private individuals is somewhat blurred, it is clear that the Court has shifted its focus from public interest to the nature and extent of the plaintiff's participation in a public controversy in order to determine the availability of the constitutional privilege.⁵⁴ The *Gertz* standard appears to establish three categories of public figures: 1) the individual who voluntarily participates or is drawn into a public controversy becoming a limited public figure; 2) the individual who occupies a position of power and influence or who has attained general fame or notoriety in the community because of his achievements and thus becomes a public figure for all purposes; and 3) the involuntary public figure. The Court did not set forth any explanation of how one becomes an involuntary public figure.⁵⁵

49. *Id.* at 345. The dissenting opinion of Mr. Justice Brennan stated:

[V]oluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. . . . Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction.

Id. at 364, citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 48.

50. *Eaton, supra* note 27, at 1419.

51. *Id.*

52. 75 A.L.R.3d 616 (1977).

53. *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

54. *Eaton, supra* note 27, at 1425. *Gertz* preserves an action for defamation for a private person who is involuntarily involved in a matter of public interest or concern, whereas, a private person who is voluntarily involved in a matter of public interest or concern is still subject to the *New York Times* standard. *Id.* at 1424 n.307.

55. *Id.* at 1421-22. In *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), the plaintiffs appeared to be involuntary public figures. The plaintiffs were the children of parents who had been found guilty of conspiring to transmit information relating to the national defense more than twenty years before. Although the children had changed their names, and were thrown into the limelight involuntarily, they were held to be public figures. The court found

A look at Supreme Court decision in recent years may aid in establishing the perimeters of the elusive concept of public figure. In *Time, Inc. v. Firestone*,⁵⁶ the Court confirmed its decision in *Gertz* to shift the focus from the event to the individual. The Supreme Court reversed the lower courts and held that Mrs. Firestone was not a public figure since she had not assumed "any role of especial prominence in the affairs of society, other than perhaps Palm Beach society."⁵⁷ The Court stated that while the divorce proceedings of wealthy individuals may interest some portion of the reading public, it is not the sort of public controversy referred to in *Gertz*.⁵⁸ The Court also found that she did not "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."⁵⁹ The Court noted that Mrs. Firestone was compelled to resort to judicial proceedings in order to obtain a legal release from the bonds of matrimony.⁶⁰

Justice Marshall, in a dissenting opinion, noted that Mrs. Firestone was prominent among Palm Beach society; her actions attracted the attention of a sizeable portion of the public and her appearances in the public were numerous enough to "warrant her subscribing to a press-clipping service."⁶¹ He also noted that the Firestones' marital difficulties were well known, that the law suit became "a veritable *cause celebre* in social circles across the country," and that "[f]ar from shunning the publicity, Mrs. Firestone held several press conferences in the course of the proceedings."⁶² In coming to the conclusion that Mrs. Firestone was a public figure, Justice Marshall distinguished her from a private individual on two grounds. First, he found it significant that a private individual would

that as children of famous parents they had achieved roles of special prominence in the affairs of society which invited attention and comment. In granting summary judgment in favor of the author, the court also pointed to the fact that defamatory statements were related to the time when the family was in the public eye.

56. 424 U.S. 448 (1976). Mrs. Firestone, wife of Russell Firestone, heir to the tire fortune, sued *Time* magazine for publishing that her husband was granted a divorce from her on the grounds of extreme cruelty and adultery. Although Russell Firestone had alleged extreme cruelty and adultery in his complaint, the court granted the divorce because of lack of domestication of the parties. When *Time* refused to retract the report Mrs. Firestone brought a libel action against the magazine.

57. *Id.* at 453. The Court refused to extend the actual malice standard to reports of judicial proceedings in general, holding that inaccurate and false statements in reports of judicial proceedings have no *New York Times* privilege. *Id.* at 457. *Contra*, 25 EMORY L.J. 705 (1976).

58. 424 U.S. at 454.

59. *Id.* at 453.

60. *Id.* at 454.

61. *Id.* at 485 (Marshall, J., dissenting).

62. *Id.*

not have had the access to the media that Mrs. Firestone enjoyed and therefore would have been deserving of greater protection.⁶³ Secondly, the fact that Mrs. Firestone initiated the law suit and held press conferences indicated that she had thrust herself into the forefront of a public controversy that invited attention and comment.⁶⁴

The Court in *Firestone* narrowed the standard defined in *Gertz* to two classes of public figures. The standard for all purpose public figures remains essentially the same.⁶⁵ Justice Rehnquist, writing for the majority, "chose the standard from *Gertz* which described public figures for limited purposes as those who 'have thrust themselves to the forefront of particular public controversies in order to influence the resolutions of the issues involved.'" ⁶⁶ In choosing the "thrusting" language from *Gertz* instead of defining public figure as one who "voluntarily injects or is drawn into a particular public controversy," it appears that the Court has eliminated this class of involuntary public figures.⁶⁷ Lower courts, taking account of *Firestone* when faced with a public figure determination, have come up with conflicting results.⁶⁸

Even though the Rehnquist opinion in *Firestone* cites *Butts* with approval, it does not appear that *Butts* had any "especial prominence in the affairs of society" or "thrust himself into the forefront of a particular controversy" any more than Mrs. Firestone.⁶⁹ Also, the Court in *Firestone* noted that divorce was not the type of public controversy discussed in *Gertz*, but left unanswered the question as to what events or issues merit a public controversy status.⁷⁰ Furthermore, the Court has left unanswered

63. *Id.*

64. *Id.* at 486-87.

65. *Compton, Developing Standards of Care After Time, Inc. v. Firestone: Experimentation is Needed*, 29 MERCER L. REV. 841, 849 (1978) [hereinafter *Compton*].

66. *Id.*

67. *Id.*

68. *See, Ryder v. Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir.), *cert. denied*, 429 U.S. 1041 (1976); *Transworld Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex.), *cert denied*, 429 U.S. 1123 (1976). *See generally*, Annot. 75 A.L.R.3d 616 (1977).

69. 424 U.S. at 453.

70. One of the most interesting lower court decisions decided after *Firestone* dealing with the public figure concept was *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976). *Rosanova* sued *Playboy* magazine for an article it published in which the plaintiff was labelled as a mobster. The plaintiff admitted that he was socially acquainted with many "underworld figures" due to his business connections with two golf clubs in the Chicago area. Although the plaintiff had been subject to governmental investigations and prosecutions, he had never been convicted of a crime. The plaintiff contended that he was not a

the question of whether the class of involuntary public figures has really been eliminated.⁷¹

B. *The 1979 Decisions Dealing With the Public Figure Concept*

Two 1979 Supreme Court decisions dealing with the public figure concept, *Hutchinson*⁷² and *Wolston*,⁷³ have clarified the position of the Supreme Court regarding the status of the public figure in some respects but have left many issues still unresolved. The confusion existing in the lower courts as to what constitutes a public figure is apparent from the fact that the Supreme Court in both cases reversed lower court holdings which had held that the plaintiffs were public figures.

In *Hutchinson*, Senator Proxmire of Wisconsin awarded his "Golden Fleece of the Month Award" to federal agencies which had funded Dr. Hutchinson's study of emotional behavior.⁷⁴ Proxmire's purpose in making these monthly awards was to bring to the public's attention what he termed to be the most "egregious examples of wasteful governmental spending."⁷⁵ The award was announced in a speech⁷⁶ the text of which

public figure because "he had not thrust himself into the vortex of any public issue" and he did not have sufficient access to the media to contradict the statements of the defendant magazine. Rosanova further contended that a private individual is not a public figure "merely because other publishers have printed unsupported allegations concerning him." *Id.* at 444-45. The court rejected Rosanova's arguments and held that he was a public figure because his voluntary contacts and involvement with members of the underworld were bound to invite attention and comment.

It would appear from the *Rosanova* decision that voluntary associations with persons who have attained pervasive fame or notoriety in society is sufficient to render a person a public figure for the limited purpose of comment upon his voluntary contacts and involvement resulting from such associations. The decision also indicates that comment on the activities relating to underworld figures would be considered the type of public controversy referred to in *Gertz*.

71. See note 55 *supra*. If *Meeropol* is still considered valid, it would appear that *involuntary* associations or relationships with individuals who have attained pervasive fame or notoriety in the past is sufficient to render persons public figures for at least the limited purpose of comment on the activities relating to the prior events, even after a substantial period of time has elapsed.

72. 443 U.S. 111 (1979).

73. 443 U.S. 157 (1979).

74. The government contributed over \$500,000 to fund Hutchinson's research. The study focused on finding an "objective measure of aggression, concentrating upon the behavior patterns of certain animals (including monkeys), such as the clenching of jaws when they were exposed to various aggravating stressful stimuli." 443 U.S. at 115.

75. *Id.* at 114.

76. *Id.* at 115-16. Proxmire is not certain that he actually delivered the speech on the Senate floor. He said he may have merely inserted it into the Congressional Record. The Court assumed, without deciding, for the purpose of this case that a speech printed in the

was incorporated in a widely distributed press release.⁷⁷ It was also referred to in newsletters sent out by the Senator, in a television program on which the Senator appeared, and in telephone calls made by his legislative assistant to the sponsoring federal agencies.⁷⁸ The lower courts held that Dr. Hutchinson was a public figure because he actively solicited public funds and voluntarily participated in activities of public controversy - namely the expenditure of public funds.⁷⁹

The Supreme Court rejected the reasoning of the lower courts and held that Dr. Hutchinson was not a limited public figure because he did not "thrust himself or his views" into a public controversy in order to influence others.⁸⁰ The Court went on to state that in fact "[r]espondents have not identified such a particular controversy; at most they point to a concern about general public expenditures. But that concern is shared by

Congressional Record carries immunity under the speech or debate clause, U.S. CONSTITUTION, art. 1, § 6, as though delivered on the floor. *Id.* at 116, n.3.

77. The text of the speech incorporated in the press release concluded with the following comment:

The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaws. It seems to me it is outrageous.

Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

It is time for the Federal Government to get out of this "monkey business." In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the American taxpayer.

121 CONG. REC. 10803 (1975) *cited in* Hutchinson v. Proxmire, 443 U.S. at 116.

78. Although it is beyond the scope of this article the Court also held that the speech or debate clause did not immunize the Senator from liability for defamation for statements made in newsletters and press releases where neither was "essential to the deliberations of the Senate" and neither was part of the deliberative process; newsletters and press releases likewise were not privileged as part of the "informing function" of Congress. *Id.* at 130-33.

79. 431 F. Supp. 1311, 1327 (1977). The Court also held that Dr. Hutchinson was a public official because of the important public position he held as director of research at the Kalamazoo State Hospital; also he was dealt with as a responsible public official by the federal agencies that funded his research; and he held himself out as president of a not-for-profit corporation that purports to act in the public interest. *See* Adey v. United Action for Animals, 361 F. Supp. 457 (S.D.N.Y. 1973), *aff'd*, 493 F.2d 1397 (2d Cir.), *cert. denied*, 419 U.S. 842 (1974), where "the district court held that a research scientist employed by NASA and involved in planning a space flight for a monkey, was both a public figure and a public official for the purpose of an action based on allegedly defamatory remarks about his treatment of experimental animals." 431 F. Supp. at 1327.

The court of appeals did not decide whether the district court was correct in holding that Hutchinson was a public official in light of its decision that Hutchinson was a public figure. 579 F.2d 1027, 1035 n.14 (1978).

80. 443 U.S. at 135.

most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure."⁸¹

The Court also found that Dr. Hutchinson had not attained such prominence as to render him a public figure for all purposes. Neither local newspaper reports of Dr. Hutchinson's successful application for federal grants, nor his publications in professional journals invited the degree of public attention essential to attain the public figure level. Therefore, Dr. Hutchinson was not a public figure, at least prior to the Golden Fleece Award.⁸² The Court reasoned that if Dr. Hutchinson's writings created a public controversy it was a consequence of the Golden Fleece Award and that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."⁸³ The Court also found that Dr. Hutchinson did not have the "regular and continuing access to the media" which is characteristic of having become a public figure since his access was limited to responding to the announcement of the Golden Fleece Award.⁸⁴ Finally, the Court expressed the concern that to find that Dr. Hutchinson was a public figure would result in classifying anyone who received a federal grant as a public figure.⁸⁵

Although the Court did not make a determination of whether Dr. Hutchinson was a public official, the Court's decision could have the effect of restricting not only who is a public figure but also who is a public official for the purposes of applying the *New York Times* test. It is apparent that the *Hutchinson* case involved an individual whose views would be of "as much concern to the citizens as the attitudes and behavior of public officials with respect to the same issues and events."⁸⁶ Also, it is difficult to conceive that constitutional protection afforded by *New York Times* is meant to apply to the hierarchy of government officials based on the actual or apparent importance of their position⁸⁷ and not to a re-

81. *Id.*

82. *Id.* at 135-36. The Court did not decide whether Hutchinson was a public official.

83. *Id.* at 135.

84. *Id.* at 136. Hutchinson's access to the media was demonstrated by the fact that some newspapers and wire services reported his response to the announcement of the Golden Fleece Award. The Court found that Hutchinson did not have the regular and continuing access to the media to make him a public figure for all purposes. However, if the Court had found Hutchinson to be a limited public figure it is apparent that Hutchinson possessed sufficient access to the media for the purpose of responding to the defamatory attacks in relation to government spending on his study and the Golden Fleece Award.

85. *Id.* "[T]he use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area." *Time, Inc. v. Firestone*, 424 U.S. at 456.

86. See note 33 *supra* and accompanying text.

87. See notes 28-30 *supra* and accompanying text.

search scientist who has received over one-half million dollars of government funds.

In *Wolston*⁸⁸ the plaintiff sued Reader's Digest for publishing a book in 1974 in which he was falsely identified as a Soviet agent. In 1957 and 1958, Wolston had received numerous subpoenas at his home in Washington, D.C. to testify before a New York grand jury investigating Soviet intelligence agents in the United States.⁸⁹ On one occasion, Wolston failed to respond to a subpoena after unsuccessfully trying to persuade law enforcement authorities not to require him to travel to New York on account of his mental condition. Wolston later pleaded guilty to the contempt charge and received a suspended sentence.⁹⁰ During the six week period between Wolston's failure to appear before the grand jury and his sentencing, fifteen articles in Washington and New York newspapers had been published discussing these events. The publicity subsided following Wolston's sentencing, and he largely succeeded in returning to a private life.

The district court held, and the court of appeals affirmed, that Wolston was a public figure for the limited purpose of comment on his connection with, or involvement in, Soviet espionage in the 1940's and 1950's.⁹¹ The trial court held that by refusing to comply with the subpoena, Wolston became involved in a controversy of a public nature that invited attention and comment, and thereby created a public interest in knowing about his connection with espionage.⁹² The district court wrote that it was not convinced that the "Supreme Court [meant] to limit public figure status to persons with power and influence or, for that matter, even to persons who have purposefully sought to engage the public's attention."⁹³

The Supreme Court, in reversing, held that Wolston was not a public figure for all purposes since "[h]e achieved no general fame or notoriety and assumed no role of special prominence in the affairs of society as a

88. 443 U.S. 157 (1979).

89. Wolston's aunt and uncle had been arrested and later pleaded guilty to espionage charges.

90. At the hearing Wolston offered to testify before the grand jury but was refused. Wolston pleaded guilty to the contempt charge after his wife, who was pregnant at the time, became hysterical upon being called upon to testify as to his mental condition.

91. 429 F. Supp. 167, 176 (1977).

92. *Id.* at 176-77.

93. *Id.* at 175. The court held that it could not agree with Wolston's "literal, restrictive interpretations of *Gertz* and *Firestone*. . . . Rather, as the Court said in *Gertz* '[it] is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Id.* at 174-75, citing *Gertz v. Robert Welch*, 418 U.S. at 352.

result of his contempt citation or because of his involvement in the investigation of Soviet espionage in 1958."⁹⁴ The Court also held that Wolston was not a limited public figure because the evidence did not justify finding that Wolston had "voluntarily thrust" or "injected" himself into the forefront of the public controversy surrounding the espionage investigation.⁹⁵ Rather, Wolston's failure to appear seemed simply to have been the result of his poor health.⁹⁶ The Court found that it was "difficult to determine with precision the 'public controversy' into which [Wolston] is alleged to have thrust himself. Certainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible citizens understandably were and are opposed to it."⁹⁷

The Court held, in effect, that for Wolston to be a public figure the Court would have to find that his failure to appear before the grand jury was intended to affect, or did affect, an issue of public concern. The fact that an individual becomes involved in a newsworthy event that attracts public attention will not transform him into a public figure.⁹⁸

This reasoning leads us to reject the further contention of respondents that any person who engages in criminal conduct automatically becomes a public figure for the purposes of comment on a limited range of issues relating to his conviction. . . . To hold otherwise would create an 'open season' for all who sought to defame persons convicted of crime.⁹⁹

Justice Blackmun, in a concurring opinion joined by Justice Marshall, stated that he saw no reason to adopt "so restrictive a definition of public figure" in this case.¹⁰⁰ The two Justices stated that they concurred only in

94. 443 U.S. at 165.

95. *Id.* at 166.

96. *Id.* at 168. The Court found that Wolston was dragged unwillingly into the controversy and that he played only a minor role in whatever public controversy there may have been in the investigation of Soviet espionage. The Court declined to hold that Wolston's mere citation for contempt was sufficient to render Wolston a public figure for purposes of comment on the investigation of Soviet espionage. *Id.* at 167.

97. *Id.* at 166 n.8.

Respondents urge, and the Court of Appeals apparently agreed, that the public controversy involved the propriety of the actions of law-enforcement officials in investigating and prosecuting Soviet agents. . . . We may accept, *arguendo*, respondents' characterization of the "public controversy" involved in this case, for it is clear that petitioner fails to meet the other criteria established in *Gertz* for public-figure status.

Id. (citations omitted).

98. *Id.* at 168.

99. *Id.* at 168-69. The public interest in accurate reports of judicial proceedings is protected by *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975).

100. 443 U.S. at 170 (Blackmun, J., concurring).

the result because they considered the lapse of sixteen years sufficient to render a consideration of Wolston's public figure status unnecessary.¹⁰¹

This analysis implies, of course, that one may be a public figure for purposes of contemporaneous reporting of a controversial event, yet not be a public figure for purposes of historical commentary on the same occurrence. Historians, consequently, may well run a greater risk of liability for defamation. Yet this result, in my view, does no violence to First Amendment values.¹⁰²

The reasoning behind this appears to be that historians have a greater opportunity to research and reflect on the material they print in contrast to newspaper reporters and radio and T.V. broadcasters.

Justice Brennan, in a dissenting opinion, stated that he believed Wolston qualified as a limited public figure for the purpose of comment on his connection with or involvement in espionage.¹⁰³ "The issue of Soviet espionage in 1958 and of Wolston's involvement in that operation continues to be a legitimate topic of debate today, for that matter concerns the security of the United States. The mere lapse of time is not decisive."¹⁰⁴

C. Conclusion

The Court in *Hutchinson* and *Wolston* seems to confirm that there is no longer a category of involuntary public figures. It appears that if an individual has not sought publicity in some way he cannot be required to meet the stringent "actual malice test" of *New York Times* when he sues for libel. However, the Court in *Wolston* did not address the issue of whether Wolston achieved general fame or notoriety in the affairs of society by virtue of his involuntary association with or relationship to an aunt and uncle who pleaded guilty to espionage charges. Whether the wife of a famous entertainer¹⁰⁵ or the children of famous parents¹⁰⁶ will qualify as public figures in the future is difficult to determine. The Court seems to have narrowed the limited public figure to one who "literally or figura-

101. *Id. Contra*, *Time, Inc. v. Johnson*, 448 F.2d 378 (4th Cir. 1971) (mere passage of time will not necessarily insulate from the application of *New York Times*). See also *Brewer v. Memphis Pub. Co.*, 538 F.2d 699 (5th Cir. 1976), where the court of appeals observed that the Supreme Court's decisions leave open the question whether a "person who has been a public figure in the past can retreat to private status. . . ."

102. 443 U.S. at 171 (Blackmun, J., concurring).

103. *Id.* at 172 (Brennan, J., dissenting).

104. *Id.*

105. *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (holding that the spouse of a public figure "more or less automatically becomes a part time public figure").

106. See *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), note 55 *supra* and accompanying text.

tively 'mounts a rostrum' to advocate a particular view."¹⁰⁷ The test of what is a "public controversy" seems to have been changed in the 1978 Term. In *Wolston*, the Court indicated that the Soviet espionage trials involved no public controversy since "all responsible United States citizens understandably were and are opposed to [Soviet espionage]."¹⁰⁸ But is it not also true that all good citizens are opposed to college football coaches fixing games?¹⁰⁹ In *Hutchinson*, the Court stated that the respondents failed to point to any public controversy; rather, they pointed to a general concern about public expenditures.¹¹⁰ The Court, in seeking to relieve lower courts of the responsibility of determining "public interest" in the context of libel suits by abandoning their position in *Rosenbloom*, has replaced it with the complex task of defining when an individual "thrusts" himself into a "public controversy." It gives virtually no guidance as to what is considered to be a public controversy. Prior to the Court's decisions in *Wolston* and *Hutchinson*, most lower courts, like the lower courts in these cases, would have found espionage and government spending to be legitimate topics of public debate.

Also, the Court left unanswered whether it is possible for a person who was once a public figure, but who wishes to attain anonymity by withdrawing from the limelight, to retreat to private status by the mere lapse of time. Finally, is it possible that Justices Blackmun and Marshall are correct in their analysis that the first amendment constitutional privilege is meant in some instances to extend to reporters, but that that same protection will be denied historians writing about the same individuals?

Unfortunately, the *Hutchinson* and *Wolston* decisions have not only failed to answer questions that have long perplexed the lower courts in defamation cases, but have raised even more complex issues to be resolved in the future. As one first amendment expert has noted, one effect of the *Hutchinson* and *Wolston* decisions will necessarily be to "limit what the public learns about real criminals, about possible wastes of public funds, and about others whose conduct and misconduct affect us all."¹¹¹

IV. MALICE

The common law's qualified privilege of "fair comment" allowed publi-

107. 443 U.S. at 169 (Blackmun, J., concurring).

108. *Id.* at 166 n.8.

109. See notes 31-35 *supra* and accompanying text.

110. See note 8 *supra* and accompanying text.

111. Floyd Abrams, *Washington Post*, June 27, 1979, at A-10, col. 1.

cation of comments or opinions criticizing the actions of public officials.¹¹² In *New York Times*¹¹³ the Supreme Court held that as a first amendment requirement, publication of defamatory falsehoods concerning the official conduct of such persons was not actionable as libel unless the publisher was guilty of "actual malice." As discussed above, *Hutchinson* and *Wolston* appear to have restricted the applicability of the public figure label to a libel plaintiff. The Supreme Court's most recent decision on the issue of proving malice, *Herbert v. Lando*,¹¹⁴ facilitates the ability of a libel plaintiff who is classified as a public figure to discover evidence to help prove his case.

In *Herbert* the Court attempted to affirm the observation of one commentator that *New York Times* merely extended the common law; it did not create a new rule at the urging of modern journalists.¹¹⁵ However, the support for the opinion seems to say simply that the pendulum has swung far enough in favor of the press. The *Herbert* decision recognized that *New York Times* "effected major changes in the standards applicable to civil libel actions,"¹¹⁶ but demonstrated that plaintiffs still retain full use of modern discovery tools.

A. *Origin and Development of the "Actual Malice" Standard*

The Supreme Court in *New York Times* adopted the minority view that the common law "fair comment" privilege protects false assertions of fact if they were made for the public benefit with an honest belief in their truth.¹¹⁷ The Court stated,

The constitutional guarantees require, we think, a federal rule that pro-

112. PROSSER, *supra* note 7, at 819.

113. 376 U.S. 254. The inappropriateness of the term "actual malice" will be discussed below. PROSSER, *supra* note 7, at 821; Eaton, *supra* note 27, at 1370 n.87.

The *New York Times* standard has been applied in causes of action other than libel. *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (standard applied to federal labor law); *Pickering v. Board of Educ. of Township High School Dist. 205, Will Co.*, 391 U.S. 563 (1968) (teacher exercised his right to speak on issues of public importance and the school attempted to fire him); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (state statute did not create a cause of action for libel, but did create one for unwanted publicity).

114. 441 U.S. 153 (1979). The decision allows public libel plaintiffs to discover the thoughts, opinions, conclusions and conversations of the journalists responsible for publishing the allegedly libelous article.

115. Eaton, *supra* note 27, at 1366. "If the majority opinion in *New York Times* is read to the last line of the last footnote, it becomes clear that the Court was working with existing common law models and was not fashioning new tort law out of whole cloth."

116. 441 U.S. at 159.

117. See notes 1-15 *supra* and accompanying text.

hibits 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.¹¹⁸

To hold otherwise, the Court felt, would result in a rule that "dampens the vigor and limits the variety of public debate."¹¹⁹ The Court's decision, however, stirred a decade of legal debate on the meaning of "actual malice."¹²⁰ Although the Court's definition of the term appears to be clear from a reading of the opinion, it spent ten years and a number of cases reiterating that it did not mean common law malice.¹²¹ The problem has not gone unnoticed, prompting one Justice to write, "I have come greatly to regret the use in [*New York Times*] of the phrase 'actual malice.'"¹²² The Court still employs the term,¹²³ but in a series of cases since *New York Times* it has shown not only what malice is not,¹²⁴ but also what it is.

New York Times defined actual malice as publishing a statement with "knowledge that it was false or with reckless disregard of whether it was false or not."¹²⁵ That same year the Court elaborated, limiting actionable statements to "only those false statements made with [a] high degree of awareness of their probable falsity."¹²⁶ It is sufficient to show "intent to

118. 376 U.S. at 279-80. This has been referred to as "unquestionably the greatest victory won by the defendants in the modern history of the law of torts." PROSSER, *supra* note 7, at 819.

119. 376 U.S. at 279.

120. 31 VAND. L. REV. 375 (1978); 47 GEO. WASH. L. REV. 286 (1978); Eaton, *supra* note 27, at 1375 n.113 (citing cases where plaintiffs have shown the requisite malice). A decade later the Court was still finding it necessary to take time to correct lower courts' definitions of malice. See *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974).

121. 419 U.S. 245 (1974) (common law definition of malice is an improper jury instruction); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 52 n.18 (1970) ("ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard"); *Greenbelt Coop. Pub. Assn., Inc. v. Bresler*, 398 U.S. 6 (1970) (malice defined as spite, hostility or deliberate intention to harm); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing"); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967) (bad or corrupt motive, personal spite, ill will or a desire to injure plaintiff); *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (negligent misstatement of fact); *Henry v. Collins*, 380 U.S. 356 (1965) (intent to inflict harm); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (ill will, speaking out of hatred).

122. 441 U.S. at 199 (Stewart, J., dissenting). See PROSSER, *supra* note 7, at 821; Eaton, *supra* note 27, at 1370 n.87.

123. 441 U.S. at 160.

124. See note 121 *supra*.

125. 376 U.S. at 280.

126. 379 U.S. at 74.

inflict harm through falsehood,"¹²⁷ or that "the defendant in fact entertained serious doubts as to the truth of his publication."¹²⁸ In *Herbert* the Court summarized the rules, stating, "[s]uch 'subjective awareness of probable falsity' may be found if 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'"¹²⁹

In *Butts* the public official doctrine was extended to public figures.¹³⁰ Justice Harlan, writing the opinion of the Court,¹³¹ decreed a slightly different test for proving malice by public figure plaintiffs.¹³² The Chief Justice, however, joined by four concurring Justices,¹³³ stated in his concurrence that, "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy."¹³⁴ Thus the same test applies in either case.

The foregoing cases appear to have settled the question of what test applies in a libel action by a public figure against the publisher of defamatory falsehood. The recent *Herbert* decision should eliminate virtually all questions about the ability of a public plaintiff to gather the necessary information to meet his burden of proof.

B. *Herbert v. Lando*

1. Background

Anthony Herbert came to national attention in March, 1971, when he accused his superior officers of covering up Vietnam war crimes on the part of the United States.¹³⁵ Herbert had been relieved of command after pressing his charges in spite of the lack of interest on the part of his superior officers.¹³⁶ Columbia Broadcasting System, Inc. (CBS),

127. *Henry v. Collins*, 380 U.S. 356, 357 (1965).

128. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The majority opinion admitted that this may encourage ignorance and dampen the publisher's desire to investigate, so he would not suspect falsehood.

129. 441 U.S. at 156-57 (citations omitted).

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

131. Justice Harlan was joined by Justices Clark, Stewart and Fortas.

132. "[H]ighly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155.

133. Justices Black, Douglas, Brennan and White.

134. *Id.* at 163 (Warren, C.J., concurring).

135. *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977).

136. *Id.* Herbert served in Korea where he earned a Bronze Star, three Silver Stars and four Purple Hearts by age 22. In 1968 he returned to war in Vietnam as a battalion commander in the 173rd Airborne Brigade. He earned another seven medals in less than two

culminated the media attention given Herbert on February 4, 1973, with a segment on its program "60 Minutes" entitled, "The Selling of Colonel Herbert."¹³⁷ Mike Wallace narrated the program, with Barry Lando as producer and editor.¹³⁸ In addition, Lando contributed an article to the *Atlantic Monthly* entitled, "The Herbert Affair."¹³⁹ The tone of both of these reports, "cast serious doubts upon Herbert's veracity and concluded that the American press had been deluded by Herbert's story."¹⁴⁰

Herbert subsequently instituted a libel action against CBS, Lando, Wallace and *Atlantic Monthly*, claiming Lando deliberately distorted the record, and that *Atlantic Monthly* republished the statements knowing they were false.¹⁴¹ Herbert conceded he was a public figure for *New York Times* purposes, and proceeded to depose Lando at great length to obtain the evidence he needed to prove "actual malice."¹⁴²

Lando objected to certain questions inquiring into his thoughts, opinions and conclusions while working on the story, on the ground of first amendment protection.¹⁴³ The district court denied his objection, and on interlocutory appeal the court of appeals vindicated the contentions of Lando and his fellow reporters,¹⁴⁴ and ruled that requiring such questions

months. Herbert was relieved after 58 days of command. *Washington Post*, October 1, 1979 at B-3, col. 1.

137. 568 F.2d at 982.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977). Herbert sued for 44.7 million dollars.

142. The deposition lasted over a year, filled 2903 pages of transcript and contained an additional 240 exhibits. 441 U.S. at 202 (Stewart, J., dissenting).

143. The court of appeals grouped the objectionable questions into five categories:

1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the *Atlantic Monthly* article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

568 F.2d at 983.

144. *Amici curiae* briefs were filed with the appellate court on behalf of the American Society of Newspaper Editors, *Chicago Sun-Times*, *Chicago Daily News*, *The Miami Herald Publishing Co.*, National Broadcasting Co., Inc., *The New York Times Co.*, and Radio Television News Directors Ass'n. *Id.* at 975.

to be answered would chill the very thought processes of journalists and "consume the very values which the [*New York Times*] landmark decision sought to safeguard."¹⁴⁵

The dissenting opinion argued that Herbert's inquiries were proper. "Obviously, such a review has a 'chilling' or deterrent effect. It is supposed to. The publication of lies should be discouraged . . . The majority's attempt to eliminate or reduce that chill is supportable in neither precedent nor logic."¹⁴⁶

2. Supreme Court Opinion

Herbert applied to the Supreme Court for a writ of certiorari, which was granted.¹⁴⁷ The Supreme Court reversed the appellate court, refusing to,

hold for the first time that 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.¹⁴⁸

The Court felt that the expanded first amendment protection urged by Lando would put too great a burden on public libel plaintiffs, a burden already heavy under *New York Times*.¹⁴⁹ The six man majority decided that the press was already sufficiently protected under the *New York Times* line of cases, and concluded that direct inquiry on the ultimate issue of knowledge should not stifle truthful publication substantially more than the indirect proof Lando urged the Court to require.¹⁵⁰ Thus the Court ruled that in order to meet his burden of proof, a public libel plaintiff may inquire into the thoughts, opinions and conclusions of the

145. *Id.* at 984.

146. *Id.* at 995-96 (Meskill, J., dissenting).

147. *Herbert v. Lando*, 435 U.S. 922 (1978).

148. 441 U.S. at 155. The press response was obvious in the following day's *New York Times* headline, "Newsmen Dealt Blow on Defense in Suits for Libel." The article stated, "[t]he reaction from journalists was immediate and strongly negative." *New York Times*, April 19, 1979, at 1, col. 2. Bill Leonard, president of CBS News, called the ruling, "another dangerous invasion of the nation's newsrooms." *Washington Post*, April 19, 1979, at A-16, col. 1.

149. 441 U.S. at 170. The *New York Times* burden, expanded to include public figures in *Curtis Publishing Co.*, 388 U.S. 130 (1967), has proven a difficult hurdle for public libel plaintiffs. For a collection of seventeen cases in eleven years since *New York Times* where libel has been shown, see *Eaton, supra* note 27, at 1375 n.113.

150. 441 U.S. 172-73.

people responsible for publishing a libelous article, "where there is a specific claim of injury arising from a publication that is alleged to have been knowing or recklessly false."¹⁵¹ The Court made clear, however, that this right of inquiry is limited, and that the first amendment *does* insulate the editorial process from "private or official examination [designed] merely to satisfy curiosity or to serve some general end such as the public interest."¹⁵²

The *Herbert* decision meshes well with *New York Times* and its progeny. The press, which has been referred to as "the only organized private business that is given explicit constitutional protection,"¹⁵³ was put in a superior position by the 1964 ruling.¹⁵⁴ It would be unjustifiable to totally shield the press from liability for printing statements it knows or has reason to suspect are false. Such journalism is irresponsible, not in the public interest, and not an element of freedom of the press.¹⁵⁵ The balance between no special protection and complete insulation was reasonably struck in *New York Times*.¹⁵⁶ To win a libel suit against the press, a public plaintiff must show that the allegedly libelous article was published with knowledge or reckless disregard of its falsity.¹⁵⁷ The determinative issue in such a suit is what the defendant knew or believed. Obviously, the most relevant and material evidence on this point is the defendant's own admissions about what he felt and thought. Unlike recognized privileges such as the marital and attorney-client privileges, the social considerations present do not favor the press. The privilege would protect libelous statements, and would deny a defamed public plaintiff access to the most valuable evidence available to him.

The *Herbert* Court felt compelled to find that the press was not shielded from discovery methods in a libel suit.¹⁵⁸ However, even though

151. *Id.* at 174.

152. *Id.*

153. Stewart, "Or of the Press," 26 HASTINGS L.J., 631, 633 (1975). Justice Stewart discusses various ways the Court has protected the press.

154. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). See note 147 *supra*. See also Note, *Developing Standard of Care After Time, Inc. v. Firestone: Experimentation is Needed*, 29 MERCER L. REV. 841 (1978).

155. "[D]amages liability for defamation abridges neither freedom of speech nor freedom of the press." 441 U.S. at 160.

156. 376 U.S. 254 (1964).

157. *Id.*

158. 441 U.S. at 158-69. The facility of the result is shown by the 8-1 vote on the question of inquiry into a reporter's thought processes. Justice Stewart dissented because he felt that "inquiry into the broad 'editorial process' is simply not relevant in a libel suit" of this nature. 441 U.S. at 199 (Stewart, J., dissenting). Justices Brennan and Marshall dissented on the issue of communications among the respondents, category no. 4 in note 143. *Id.* at 181

the Court reached the desired result, the relative weakness of the supporting authority in much of the majority opinion does not adequately justify the holding.¹⁵⁹

Part II of the majority opinion by Justice White has two basic themes running through it. First, that this type of editorial process evidence has never been objected to in the past,¹⁶⁰ and second, that at common law this type of evidence has always been admissible to show malice when necessary for punitive damages.¹⁶¹ Both of these contentions fall short of being solid support for the liberal discovery rule emanating from *Herbert*; therefore, the decision rests heavily on the balancing test in Part III.¹⁶²

a. Absence of Past Objections

In Part II of the majority opinion, Justice White first observed that in the past the Court has dealt with cases in which the record contained some evidence that might be considered part of the editorial process under Lando's definition.¹⁶³ In these cases, Justice White pointed out, the Court did not even intimate that this type of evidence may be improper.¹⁶⁴ Thus, he concluded, the Court in the past felt that the practices were constitutional, and therefore it should not alter its traditional stance now.¹⁶⁵ While this argument seems logical, the flaw in it is that the propriety of the inquiries was never an issue before the Supreme Court until *Herbert*.

The Court has occasionally decided a case on an issue that was not briefed or argued before the Court, but the practice has been rare, and criticism has been leveled at the Court when it occurs.¹⁶⁶ The usual proce-

(Brennan, J., dissenting in part), 208-09 (Marshall, J., dissenting). For a discussion of the communication issue dissent, see note 208 *infra*.

159. See notes 163-97 *infra* and accompanying text.

160. See notes 163-71 *infra* and accompanying text.

161. See notes 172-97 *infra* and accompanying text.

162. 441 U.S. 169-75. See notes 198-214 *infra* and accompanying text.

163. 441 U.S. at 160.

164. *Id.* at 161 n.6. "It is quite unlikely that the Court would have arrived at the result it did had it believed that inquiry into the editorial processes was constitutionally forbidden."

165. *Id.* at 168-69. However, *stare decisis* is not always applicable. "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Barnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting).

166. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 676 (1961) (the issue upon which the decision was based was "briefed not at all and argued only extremely tangentially") (Harlan, J., dissenting). "I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an impor-

ture is to decide the case before the Court on the narrow issues that have been raised, avoiding constitutional questions when at all possible.¹⁶⁷ The lack of objection in the past cases, therefore, should not weigh heavily in a decision on a constitutional issue.¹⁶⁸

Lower court cases are also cited to show that courts have accepted this type of evidence in the past,¹⁶⁹ but, as will be discussed below, only two of these admitted evidence over objection that would probably be considered objectionable by Lando.¹⁷⁰ The fact that there have been no objections raised in the past, and courts have not done so on their own, is not a strong argument to support a decision of constitutional magnitude.¹⁷¹

b. Admissibility of Editorial Process Evidence at Common Law

The second theme in Part II of Justice White's opinion is that the common law has always allowed the type of evidence objected to by Lando.

Reliance upon such state-of-mind evidence is by no means a recent development arising from *New York Times* and similar cases. Rather, it is deeply rooted in the common-law rule, predating the First Amendment, that a showing of malice on the part of the defendant permitted plaintiffs to recover punitive or enhanced damages.¹⁷²

A showing of malice was also important with the common law fair comment privilege,¹⁷³ which could be defeated by demonstrating malice on the part of the defendant. This is the same type of proof required by *New York Times*,¹⁷⁴ and Justice White observed, "[c]ourts have traditionally admitted any direct or indirect evidence relevant to the state of mind of

tant issue." *Id.*

167. "The most important thing we do is *not* doing,' said Justice Brandeis once in this connection." H. ABRAHAM, *THE JUDICIARY* 177-78 (4th ed. 1977); "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944) (Frankfurter, J.).

168. Numerous landmark cases overturned prior practice when the Court upheld a challenge to the practice. In these cases, the Court waited until the particular challenge, as is present in *Herbert*, to reverse prior practices. See *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

169. 441 U.S. at 165-67 n.15.

170. *Johnson Pub. Co. v. Davis*, 271 Ala. 474, 124 So.2d 441 (1960); *Sandora v. Times Co.*, 113 Conn. 574, 155 A. 819 (1931). See also notes 180, 182 *infra*.

171. See note 168 *supra*.

172. 441 U.S. at 161-62.

173. See note 117 *supra*.

174. The only difference was that the common law courts included common law malice as a sufficient proof, which *New York Times* does not. See note 121 *supra*.

the defendant and necessary to defeat a conditional privilege. . . .¹⁷⁵

Justice White's argument seems persuasive. The practice has been so extensive in the past that it would be difficult to admit error now. However, in the words of Justice Holmes, "[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."¹⁷⁶ More importantly, the cases cited by Justice White to support his analysis of the common law do not necessarily lead to the result reached in *Herbert*. In an extensive footnote,¹⁷⁷ Justice White cited a number of cases, dating back to 1837, and stated,

In scores of libel cases courts have addressed the general issue of the admissibility of evidence that would be excluded under the editorial process privilege asserted here and have affirmed the relevance and admissibility of the evidence on behalf of libel plaintiffs.

. . . .

None of these cases as much as suggested that there were special limits applicable to the press on the discoverability of such evidence, either before or during trial.¹⁷⁸

The problem is that most of the cited cases deal with items of evidence that would probably not fall into Lando's proposed category. Lando argued that his conclusions, thoughts, opinions and conversations with co-defendant Wallace should be privileged.¹⁷⁹ Only two of the cited cases admitted evidence over objection that would probably be considered privileged under Lando's scheme. The court in *Sandora v. Times Co.*¹⁸⁰ excluded several "editorial privilege" type questions because they were not relevant and admitted one. In that case, the city editor of a newspaper was required to answer questions about how the prominence of the subject affected the intensity of the investigation.¹⁸¹

In *Johnson Publishing Co. v. Davis*¹⁸² the defendant's magazine pub-

175. 441 U.S. at 165.

176. *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470 (1903) (Holmes, J.) (discussing standards of care in a negligence action). See note 164 *supra*.

177. 441 U.S. at 165-67 n.15.

178. *Id.*

179. See note 143 *supra* for the types of questions Lando argued should be prohibited.

180. 113 Conn. 574, 155 A. 819, 823 (1931). The court excluded questions of the reporter about whether he had ever had occasion to disbelieve people and whether the city editor could physically check all in-coming stories. Also excluded was a question of the editor about prior reliance on his reporter's information.

181. *Id.*, 155 A. at 823.

182. 271 Ala. 474, 124 So.2d 441, 445-56 (1960). The plaintiff had been on trial for the attempted murder of the Reverend Ralph Abernathy. He was accused of attacking Aberna-

lished an article asserting that Davis had resigned from a prior teaching position because he had engaged in sexual relations with students.¹⁸³ The Alabama Supreme Court ruled that the editor of the magazine could be cross examined about whether he intended to convey the meaning that plaintiff had been forced to resign because of the charges brought against him.¹⁸⁴ The inquiries in these two cases went to the mental processes of the defendants, which is the type of questioning objected to by Lando. The courts' rulings in *Sandora* and *Davis* thus support the result reached in *Herbert*. However, the other cases cited by Justice White are less helpful.

In *Freeman v. Mills*¹⁸⁵ the evidence at issue was a communication between the defendant and the Los Angeles Turf Club. Lando did not object to questions concerning communications between those responsible for publication and third parties, so this would most likely not fall under Lando's asserted privilege and should therefore be admissible.¹⁸⁶ *Scott v. Times-Mirror Co.*¹⁸⁷ dealt with written items, which do not intrude into the thought processes of the publisher, and therefore are not items which *Herbert* would have affected.¹⁸⁸

The readers' states of mind were held admissible in one cited case to show the publication's effect on them for the purpose of establishing the libelous nature of the article.¹⁸⁹ Another ruled merely that "the surrounding circumstances and conditions must be taken into account. . ."¹⁹⁰ One case admitted evidence of subsequent repetition of the alleged libel

thy with a pistol and hatchet during a confrontation over Abernathy's alleged affair with his wife. The alleged libelous statement was published in an article about the Reverend Martin Luther King attending the trial.

183. *Id.*, 124 So.2d at 445-56.

184. *Id.*, 124 So.2d at 461.

185. 97 Cal. App.2d 161, 217 P.2d 687 (1950).

186. See note 143 *supra* for the types of questions Lando argued should be prohibited.

187. 181 Cal. 345, 184 P. 672 (1919). At issue were other publications by the defendant, the complaint filed in a separate case, and a biographical sketch of the plaintiff. The court based its holding of admissibility upon a earlier California decision, *Davis v. Hearst*, 160 Cal. 143, 116 P. 530, 548 (1911), which held that the actual intent of the defendant is important only to show that the plaintiff was the object of the libel where it is unclear whether or not he was harmed, or as evidence offered by the defendant to rebut the charge of malice. Thus it appears that these courts did not intend that, or consider whether, the type of questions objected to by Lando would be admissible.

188. See note 143 *supra* for the types of questions Lando argued should be prohibited.

189. *Western Union Tel. Co. v. Vickers*, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

190. *Cook v. East Shore Newspaper*, 327 Ill. App. 559, 64 N.E.2d 751, 764 (1945). The surrounding circumstances the court was concerned with were the original language of the article, the mode and extent of publication, evidence of previous ill will, and former libels.

by the defendant;¹⁹¹ another admitted evidence of three earlier attacks on the plaintiff by the defendant, which the defendant admitted were evidence of malice.¹⁹²

These cases, along with the ten others cited by Justice White in this part of the footnote,¹⁹³ deal with items of evidence that fall outside the zone of protection advocated by Lando.¹⁹⁴ They do not support the result reached in *Herbert* because none of them involved evidence which would be excluded if the Court had ruled in favor of Lando.

Additionally, Justice White cited twenty-three cases in which the courts have admitted "editorial process" evidence on behalf of the defendants.¹⁹⁵ This affords a weak basis, however, for denying a constitutional privilege. Several constitutional privileges protect the assertor;¹⁹⁶ he cannot be forced to act against his will, but in each case the person can waive the constitutional privilege on his own volition. By analogy, even if the privilege proposed by Lando was adopted, newsmen would still be able to

191. *Berger v. Freeman Tribune Pub. Co.*, 132 Iowa 290, 109 N.W. 784 (1906).

192. *Conroy v. Fall River Herald News Co.*, 306 Mass. 448, 28 N.E.2d 729 (1940).

193. 441 U.S. at 165-67 n.15. The ten other cases cited by Justice White are *Rice v. Simmons*, 2 Har. 309, 31 Am. Dec. 766 (Del. 1837) (the testimony of defendant's witnesses was objected to because it would be permitting the party to make evidence for himself); *Thompson v. Globe Newspaper Co.*, 279 Mass. 176, 181 N.E. 249 (1932) (the plaintiff was not allowed to introduce testimony of reporters and their editors to show malice on an agency theory because the court said the agents were not responsible for the publication); *Cyrowski v. Polish-American Pub. Co.*, 196 Mich. 648, 163 N.W. 58 (1917) (the testimony of third persons who advised the defendant to question the plaintiff about the truth or falsity of allegations before publishing them was admitted to show the effect on the defendant's state of mind); *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974, 976 (1925) (proof of malice is sufficient "[i]f it appears that the publisher knows" about the falsity; this could be shown by evidence of personal ill feeling, the exaggerated language used, and the mode and extent of publication); *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S.W. 332 (1910) (when a previous charge was made by the defendant, the plaintiff and two witnesses went to defendant's office and told him it was false, so when he printed the story he had full knowledge); *Butler v. Gazette Co.*, 119 App. Div. 767, 104 N.Y.S. 637 (1907) (depositions which had been stipulated as evidence for the court); *Briggs v. Byrd*, 34 N.C. 377 (1851) (comments by plaintiff to witnesses); *McBurney v. Times Pub. Co.*, 93 R.I. 331, 175 A.2d 170 (1961) (statement by the defendant to plaintiff); *Lancour v. Herald & Globe Ass'n* 112 Vt. 471, 28 A.2d 396 (1942) (subsequent publication); *Farrar v. Tribune Pub. Co.*, 57 Wash.2d 549, 358 P.2d 792 (1961) (evidence offered on behalf of the defendant). *Rice* and *Farrar* deal with evidence admitted on behalf of the defendant, and therefore belong in the second category of cases in Justice White's footnote. See notes 195-96 *infra* and accompanying text.

194. See note 143 *supra* for the types of questions Lando argued should be prohibited.

195. 441 U.S. at 166-67 n.15.

196. Among these privileges are the fourth amendment protection against illegal search and seizure, the fifth amendment protection against self incrimination and the sixth amendment right to a jury trial.

offer editorial process evidence on their own behalf or waive the privilege and answer plaintiff's questions. Consequently, the fact that the questioning has never been objected to in the past could simply mean that newsmen have never chosen to invoke the privilege until now.

An examination of prior cases reveals that the common law does not clearly support the new holding, except by implication and extension. The cases apparently held that all relevant evidence is admissible, but very few appear to have considered the areas of discovery to which Lando objected.¹⁹⁷ The decision should therefore be predicated on something other than precedent. Justice White supplied another basis in Part III of the majority opinion.

c. Balancing

In the third part of his opinion, Justice White discussed the competing interests on both sides of the *Herbert* issue.¹⁹⁸ The result was a balancing of concerns in which the Court felt that the interests of the individual outweighed the intrusion on the press.¹⁹⁹

The last fifteen years have demonstrated that the *New York Times* standard is the appropriate doctrine to protect the press under the first amendment.²⁰⁰ "At the same time, however, the Court has reiterated its conviction . . . that the individual's interest in his reputation is also a basic concern."²⁰¹ The substantially increased burden the proposed privilege would place upon public libel plaintiffs requires that the case for the privilege be clear and convincing before the Court would make the change.²⁰²

The major argument put forth by the press was that "requiring disclosure of editorial conversations and of a reporter's conclusions about the veracity of the material he has gathered will have an intolerable chilling effect on the editorial process and editorial decision-making."²⁰³ The Court, though, stated that denying the privilege would not result in the

197. *Johnson Pub. Co. v. Davis*, 271 Ala. 474, 124 So.2d 441 (1960); *Sandora v. Times Co.*, 113 Conn. 574, 155 A. 819 (1931).

198. 441 U.S. at 169-75.

199. *Id.* Even the *Washington Post* admitted in an editorial that, "the claim may well have been too broad, given the value with which it was colliding." *Washington Post*, April 20, 1979, at 14, col. 1.

200. 441 U.S. at 169. For cases reaffirming *New York Times*, see notes 125-29 *supra*.

201. 441 U.S. at 169.

202. *Id.* at 170.

203. *Id.* at 171.

suppression of truthful information,²⁰⁴ and that direct evidence should not be "substantially more suspect" than the indirect evidence to which the press has not objected.²⁰⁵ The Court concluded, "[o]nly knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct, which respondents do not suggest, constitutional values will not be threatened."²⁰⁶

The Court decided the issue of discovery of Lando's thoughts and conclusions by an 8-1 vote.²⁰⁷ It was split more evenly on the issue of conversations between Lando and Wallace.²⁰⁸ Justices Brennan²⁰⁹ and Marshall,²¹⁰ dissenting on this point, believed that allowing such inquiry would dampen prepublication discussion and impair the quality of journalism. Marshall was willing to go further than Brennan by giving absolute privilege to the expressions of misgivings among journalists.²¹¹ Brennan felt that in-house conversations should be privileged until the plaintiff has made a *prima facie* case of falsity.²¹² The majority believed that the exposure to liability under *New York Times* would increase resort to prepublication conversations to avoid errors,²¹³ thus it rejected Marshall's argument. The majority also rejected Brennan's argument as a "burdensome complication" if it called for a bifurcated trial, or a mere formalism if it simply required an affidavit or verification of the pleadings.²¹⁴

204. *Id.* at 172. "Of course, if inquiry into editorial conclusions threatens the suppression not only of information known or strongly suspected to be unreliable but also of truthful information, the issue would be quite different." *Id.*

205. *Id.*

206. *Id.* at 173. See note 146 *supra* and accompanying text for a similar argument expressed by the dissent in the court of appeals decision.

207. Note 158 *supra*. See note 143 *supra* for the types of questions objected to.

208. *Id.*

209. 441 U.S. at 194 (Brennan, J., dissenting in part).

210. *Id.* at 209 (Marshall, J., dissenting).

211. *Id.* "It is not enough, I believe, to accord a discovery privilege that would yield before any plaintiff who can make a *prima facie* showing of falsity. . . . Unless a journalist knows with some certitude that his misgivings will enjoy protection, they may remain unexpressed." *Id.* (Citations omitted).

212. *Id.* at 197.

213. *Id.* at 174. "[W]e find it difficult to believe that error-avoiding procedures will be terminated or stifled simply because there is liability for culpable error and because the editorial process will itself be examined in a tiny percentage of instances in which error is claimed and litigation ensues." *Id.*

214. *Id.* at 174-75 n.23.

C. Conclusion

The result of the balancing done by the Court, and the inferences that can be drawn from history, is that a public figure in a libel suit can question the responsible journalists, apparently without limit, to obtain evidence of their knowledge or reckless disregard of falsity. If plaintiffs abuse the privilege, the Court may find it necessary to return and clarify the holding, though in light of the extent of Lando's deposition,²¹⁵ which the Court recited without objection, it may be hard to ever show that a plaintiff has abused his discovery right. This aspect of the decision is most worrisome to the press. "While the claim may well have been too broad, given the value with which it was colliding, the way in which the Court brushed it aside opens the door to serious limitations on freedom of the press."²¹⁶ However, the Supreme Court felt that this would not be a problem, and only time will tell if the decision will be as detrimental to the free press as some warn.²¹⁷

V. CONCLUSION

The Supreme Court in *Hutchinson*, *Wolston*, and *Herbert* has indicated its intention to limit and redefine the first amendment privilege applicable to public figures in libel actions. The Court has retreated from its earlier stand in libel cases which took the *New York Times* standard and the logical implications inherent in the holding to extend a greater constitutional protection to the press. The Court has tried to harmonize and balance the equally desirable ideals of affording an individual the protection and integrity of his reputation with the importance of a free press. It is apparent from the latest decisions of the Court that the balance in recent years has shifted in favor of the individual. The Court, in the 1978 Term, has expressed an unwillingness to afford the press any increased constitutional protection. In fact, if the Court continues to follow the trend in its recent decisions of redefining and limiting the constitutional privilege, the potential consequence could lead in the future to an even greater infringement on the freedom previously enjoyed by the press.

215. See note 142 *supra*.

216. Washington Post, April 20, 1979, at 14, col. 1.

217. Bill Leonard, President of CBS News, called the ruling, "another dangerous invasion of the nation's newsrooms." Washington Post, April 19, 1979, at 1, col. 5. The fears of the press may be reflected by the recent availability of first amendment insurance to cover the costs of defending libel suits. Washington Post, October 2, 1979, at 14, col. 1.