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## Common Constitutional Law

Justice Brennan's first impulse, when he came to write *New York Times v. Sullivan*, was to federalize the law of defamation. He would do that by making the question of whether the words are defamatory a federal constitutional question. His doing so would have created the first federal common law tort, or at least the first since *Erie R. Co. v. Tompkins* said there were none.<sup>1</sup>

Perhaps because federalization would have worked so dramatic a change, Justice Brennan settled on a calmer way of solving the problem he faced. He changed the roles of judge and jury in libel cases, reducing the role of the jury by more than half.

A procedural rule changing the allocation of power between judge and jury does not change substantive law or even indicate the direction of change in substantive law. Only its application to the facts of cases can do that. That meant we would have to wait to see what changes in substance it brought, beyond the one it brought in *New York Times* itself. Given its origin, one could wonder whether the eventual change would be to federalize the issue of whether the words were defamatory.

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1. 304 U.S. 64 (1938). Except, of course, federal maritime and patent torts, see *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). Justice Ginsburg's opinion in that case and her question to the author during the oral argument of Elman, post at p. 19, are the basis for both the title and the structure of this essay..

What almost happened over the next twenty-seven years, until the canon closed in 1991 with the issue unresolved, is the principal subject here. The remains of that effort evidences how a change in the collective cast of mind of serious people affected the Court's ability to decide issues incrementally, which is how the common law proceeds.

## I.

We know of Justice Brennan's first impulse because Anthony Lewis found the first draft of the opinion in *New York Times* among his papers and published it in 1991 as an appendix to his book, *Make No Law*. The first section of that draft dealt with whether "the Constitution is offended by a state's law of libel...." decides that it can be, but then rejects simply wiping out the offending portion of the common law by granting an absolute privilege to "criticism of public officials reflecting on their official conduct...." Anthony Lewis, *Make No Law* (Random House, 1991) App.1 at 1, hereafter, App. 1.

The next section of that draft considered what the minimum constitutional requirement for speech about government officials ought to be, and here Justice Brennan turned to *Coleman v. MacLennan*, 78 Kan. 711, 98 P.2d 281 (1908), a case protecting statements about candidates for public office unless made with actual malice. The draft adopts that standard and then considers whether, under this new view of the law, the case must be reversed, deciding that it must be.

The draft opinion could have ended there. It did not; instead, it went on to consider what should happen on remand. On that issue, the draft states a startling notion:

The threshold question is whether the statements in the advertisement complained of can reasonably be said to be capable of a defamatory meaning." Ibid. at 20.

It answered that question by saying that the Alabama Supreme Court had used a definition of what is defamatory (tending to injure a person in reputation, etc.) that the common law had long endorsed, but which failed to distinguish between public officials and private persons. It was therefore not adequate here, and

...we proceed to our own judgment whether the statements complained of by the respondent are capable of bearing a defamatory meaning. Ibid. at 21.

There followed a long discussion of the statements made in the advertisement and the conclusion that they were not defamatory:

We hold that the statements complained of by the respondent are not capable of bearing a defamatory meaning either on their face or when read in the lights of the proofs. *Ibid.* at 22.

The draft demonstrates why the language was not defamatory, but never offers a description of why the Court has the power to do what it is doing, and never generalizes by suggesting what definition will replace the common law's "words tending to injure" as a way to gauging whether the language is damaging.

After concluding that the advertisement was not defamatory, the draft turns to the question of whether the advertisement was "of and concerning" Mr. Sullivan, holding, without further specification of the theory for doing so, that there had not been clear, convincing and unequivocal testimony that it was about him. *Ibid.* at 24.

That draft never saw the light of day; it was printed but circulated, according to Lewis, only to Brennan's clerks, and the long section on the nonlibelous nature of the advertisement nowhere appears in Justice Brennan's eventual opinion for the Court. One surmises that, on second thought, or his clerks' thought, Justice Brennan decided that moving the central question of the law of defamation, the meaning of the words, into the federal law would only make it more difficult to obtain the agreement of Justices Harlan, White and Stewart and Clark.

Only the "of the concerning" point remained in the opinion. It was expanded to include a discussion of the illegitimacy of turning a statement about government into a statement about an individual who worked for government, but shows no sign of being an exercise of an independent power of the Court to read the words to determine whether they were "... capable of bearing a defamatory meaning either on their face or when read in the lights of the proofs." But, of course, the notion is there; one cannot decide that the words are not of and concerning the plaintiff without reading the words differently than did the Alabama jury. The issue is not quite the same as the issue of whether the words are defamatory, but the way the issue was handled in the opinion leaves one with the impression that deciding what the words mean may be within the Court's power.

In the first draft, the discussion of the constitutionality of the common law definition of libel occurred in connection with the issue of what should happen on remand. That issue now had to be resolved on a different theory, and Justice Brennan did so, in his opinion for the Court, by applying the new actual malice standard in a way which exercised the new balance of power between judge and jury:

As to the Times, we similarly conclude that the facts do not support a finding of actual malice...the Alabama Supreme Court's conclusion that it was a 'cavalier

ignoring of the falsity of the advertisement’...does not indicate malice at the time of the publication; even if the advertisement was not ‘substantially correct’...that opinion was at least a reasonable one, and there was no evidence to impeach the witness’ good faith in holding it. 376 U.S., at 286.

....

We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Id, at 288.

Reaching that conclusion required the Court to disregard what the Alabama jury had specifically found; the Court did so, without dissent on the issue, except to the extent that dissent is implied by the abolitionist position of Justices Black, Douglas and Goldberg. The Court, rather than a jury, would find the facts as to the author’s state of mind, because the Constitution made the Court the final finder of fact:

We ‘examine for ourselves the statements in issue and the circumstances under which they were made to see...whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect’ 376 U.S. at 285.

Justice Brennan cited *Pennekamp v. Florida*, 338 U.S. 331, 335 (1946) for the rule expanding the role of the judge, but it derives from *Fiske v. Kansas*, 274 U. S. 380 (1927), the IWW case in which the Court set aside Kansas’ criminal syndicalism statute on the ground that it violated due process, and flowered in the *Scottsboro* cases, *Powell v. Alabama*, 287 U.S. 45 (1932). *Fiske* had made it First Amendment doctrine, but one did not talk about First Amendment doctrine in 1927. Those words had not yet been invented.

## II.

*New York Times* purported only to decide a single issue, one never before put to the Court, indeed, one not imaginable during the first 150 years of the Republic: The constitutionality of the common law tort of defamation. In the course of forever changing that tort, it finally put to bed the notion of seditious libel; that was why it was, in Alexander Meiklejohn's wonderful phrase, "... an occasion for dancing in the streets."

The central holding was to require, in cases involving libel on government, a requirement of proof of a particular state of mind, called actual malice, but really meaning speech that was known to be false. There was, in the cases that followed, a rounding out of the scope of those to whom the new requirement would apply, since not all news is news about people who hold public office. The set of potential issues was reasonably clear at the outset: after all, there are only so many classes of people between the class called public officials and the class called nobody. So the issue took only three cases to reach its full dimension: The trio is *Times* in 1964, *Butts* and *Walker* in 1967 and *Gertz* in 1974.<sup>1</sup> The final form would include less than everyone but most of those who are actually newsworthy; that was implied from the outset and became reasonably clear when *Butts* and *Walker* were decided three years after *New York Times*, adding public figures to the class of persons who had reduced rights.

The secondary issue, by way of contrast, sputtered and flamed for twenty some years and comprises many cases. The issue is what words and what acts are not sufficient to prove that one knew that what was about to be published was probably false. It is a negative issue: one cannot describe all the ways any issue cannot be proven. That meant that the form of decision was usually "this is not enough", a form which does not give much guidance to the next case.

The third issue was the issue raised by Justice Brennan's first draft. It is whether some knowingly false speech would be protected on the ground that it was not, as a matter of federal law, defamatory, even if the common law would have said it was defamatory. That issue appeared only occasionally and, as we shall see, tended to get intertwined with the actual malice issue. It is the principal subject here.

There were three dissenters from the theory of *New York Times* . Justices Douglas, Black and Goldberg concurred in the result, but not the theory. All three believed an absolute privilege for “criticism of the way public officials do their duty”, 376 U.S. 295 (Black, J., concurring) was required. Their intuition was that actual malice would be “hard to prove and hard to disprove...” and ultimately, an “ evanescent protection”; the Black and Goldberg opinions show a distrust of juries in politically charged cases and an unwillingness to involve the Court in overturning bad state law verdicts. Abolishing the common law at least in cases about governmental acts and probably in all defamation cases, was, in their view, more efficient than embarking on a search for a new, partly federal, partly state, tort. If they were right, one would expect that the issue of the adequacy of the actual malice standard, of whether some speech needed protection even though it was spoken with knowledge of its probable falsity, would recur.

### III.

And, of course, it did, six years later, in *Greenbelt Cooperative Publishing Company v. Bresler*, 398 U. S. 6 (1970) and six more times over the next quarter century.

Bresler, a real estate developer, had offered to give the city land for a school in return for changing the zoning on the rest of his project. An opponent of the zoning change condemned that kind of quid pro quo as blackmail. The newspaper which reported her charge was sued for defamation. A jury found that the newspaper had a falsely accused Mr. Bresler of a crime. Two appellate courts affirmed, the Supreme Court reversed.

The developer had offered the exchange openly; an offer made publicly could not be blackmail, a covert act. The fact that the offer had been made openly was part of the newspaper’s story; it was context which had to be taken into account and doing so meant that the speaker did not really mean blackmail, but only that the developer’s offer of to give land to the city was blinding its judgment. Since the facts did not support interpreting the word blackmail as a charge of blackmail, the plaintiff’s use of the word must have meant something else.

Justice Stewart’s opinion in *Bresler* says that the word blackmail was an epithet, understood by a reasonable listener as exaggeration, and therefore as conveying something other than a fact:

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could

have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime. 398 U.S. at 14

Except, of course, the jury, which had been charged on that issue. Blackmail, according to Justice Stewart, was the kind of word that implied that the speaker was overstating his case. The word, however, conveys no such exuberant quality . If any word other than murder conveys a charge of crime succinctly, blackmail does so. Its tendency to harm reputation seems unarguable and drawing that inference was, at common law, the business of a jury, not a judge. *Bresler* gets around that cruel fact by holding that one needs to look at the context, at the other words used at the time, to decide whether the word was more than innocent malapropism. When one looks at the other words, one is using context to modify, by making innocent, a word the common law had said is not innocent.

This new law of constitutional defamation had a basis in the common law of one state. Illinois required that if there was an innocent construction of the words, they should, as a matter of law, be read innocently. No other state was so genuinely unsolicitous of reputation. The common law was quite the other way: words innocent on their face could be made libelous by context, that was what libel *per quod* was all about, but plainly libelous words, like "blackmail" could not be made innocent by their surroundings.<sup>2</sup> None of this common law background appears in *Bresler*, and it is therefore not clear on the face of the opinion that something other than the common law is being used to decipher the words.

The importance of what was going on did not escape Justice White. His dissent first notes that the case could have been, but was not, decided under the actual malice standard:

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<sup>2</sup>. *John v. Tribune Co.*, 24 Ill 2d 437, 181 N.E. 2d 105 (1962) states the Illinois position. Professor Harry Kalven Jr. mused aloud in his 1967 piece on the progress of New York Times as to whether the Court would invert the rule of libel per quod, Harry Kalven Jr., *The Reasonable Man and the First Amendment*: Hill, Butts and Walker, 1967 Supreme Court Review 267, 308fn. 126.

Although the Court does not so hold, arguably the newspaper should not be liable if it had no intention of charging a crime and had a good faith, nonreckless belief that it was not doing so. 398 U.S., at 23.

He then describes, quite precisely, what the Court is doing:

Should *New York Times v. Sullivan*, U.S. 254 (1964), be extended to preclude liability for injury to reputation caused by employing words of double meaning, one of which is libelous, whenever the publisher claims in good faith to have intended the innocent meaning? I think not. The *New York Times* case was an effort to effectuate the policies of the First Amendment by recognizing the difficulties of ascertaining the truth of the allegations about a public official whom the newspaper is investigating with an eye to publication. Absent protection for the nonreckless publication of "facts" that subsequently prove to be false, the danger is that legitimate news and communication will be suppressed

But it is quite a different thing, not involving the same danger of self-censorship, to immunize professional communicators from liability for their use of ambiguous language and their failure to guard against the possibility that words known to carry two meanings, one of which imputes commission of a crime, might seriously damage the object of their comment in the eyes of the average reader. I see no reason why the members of a skilled calling should not be held to the standard of their craft and assume the risk of being misunderstood - if they are - by the ordinary reader of their publications. If it is thought that the First Amendment requires more protection for the media in this respect in accurately reporting events and statements occurring at official meetings, it would be preferable directly to carve out a wider privilege for such reporting. *Id.*

Justice White was surely correct in suggesting that it was possible to make the result in *Bresler* fit the knowing falsehood rubric. Nonetheless, that formula is never mentioned in the opinion for the Court and both the language of *Bresler* and of Justice White's dissent suggest that the case was exploring the issue Justice Brennan had put in his first draft but opted not to pursue.

*Bresler* is an enigmatic opinion. The Court does not describe the generalized form of the theory it is applying; it does not say it was redefining the word “blackmail” as a nonderogatory word. It got the same result by saying that the use of the word had been ambiguous, and then opting for the innocent version of the ambiguity. Since doing so was contrary to the common law, the Court was replacing part of common law with federal law. It had already done that in *New York Times* by adding a requirement of proof of malice; it was now doing the same thing by adding a rule that the context, at least the context that appears in the publication, could negate the derogatory inference. The Court thus federalized the central issue of the law of defamation, which is whether the words are defamatory.

It does so by exercising the power of Justice Brennan’s rule changing the role of judge and jury. The jury, after all, had found actual malice in speaking and repeating the word blackmail. It did that by focusing on the way a reader would have understood the words. That was the common law way of gauging damaging words; its theory is an early instance of deconstruction. Shifting the burden of reading the words to the judge was a way of changing the focus from what the reader understood to what the author must have intended.

*New York Times* meant that the common law definition of what was libelous, ‘that the words tended to injure reputation’ had to change; the minimum change was that a jury find ‘that the words were intended to injure reputation.’ But *Bresler* did not give that charge to a jury or give controlling weight to what the speaker or the republisher said they had intended, as *New York Times* had done. Instead, using the reserved power of judges to find the facts in constitutional cases, it allocated the question to the judges, and then used that power to reinterpret the word by giving controlling weight to the factual context in which the word was used. Had it sent the issue back for another jury trial, it would have had to state what the jury should be told to do, and that would have made it explicit that the common law rule that the reader’s understanding of the words had been displaced and that the meaning of words was for judges, not juries, to decide.

The next time it faced this kind of issue, the Court did something even more complicated. In *Time, Inc. v. Pape*, the Court changed its focus from what the words, in context, must have meant to what the author said they meant when he or she used them. Again, however, it was the judge who was to decide what the author meant.

Time had reported on an U.S. Civil Rights Commission report on police brutality. The case had been fully tried, but a verdict for Time, Inc. was directed at the close of the evidence. There was thus no jury verdict for the plaintiff and no need or opportunity to use the rule diminishing the role of the jury. Instead, the issue was whether the facts, indulging every inference in favor of the plaintiff, stated a claim for defamation.

In referring to a section dealing with Chicago, the Commission had quoted the allegations of a complaint against a Chicago police officer. Time reported the charges without noting that they were only allegations, making it look as if the Commission had decided they were established facts. The omission could, of course, have been negligent, and there would have been no liability. Time's reporter, however, made the case more difficult by testifying that he dropped the quotation marks the Commission had used because he understood the report, read as a whole, to be an endorsement by the Commission of the likely truth of the allegations. Faced with that complication, Justice Stewart thought the problem of reporting on book length public reports deserved special consideration:

A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact - such as that a police officer has arrested a certain man on a criminal charge - there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices. 401 U.S., at 286

Those choices, Justice Stewart said, were protected by the First Amendment, because liability for errors of interpretation was inconsistent with the knowing falsehood requirement of *New York Times*:

Applying this standard to Time's interpretation of the Commission report, it can hardly be said that Time acted in reckless disregard of the truth. Given the ambiguities of the Commission Report as a whole, and the testimony

of the Time author and researcher, Time's conduct reflected at most an error of judgment. *Ibid.*, at 292

*Bresler* involved accurate quotation, an act innocent on its face, while *Pape*, in dropping the quotation marks, involved an act a jury could construe as knowingly wrongful. *Pape* is thus the more difficult case. It is hard to characterize an accusation that a police officer was brutal as an innocent statement, or as an exaggeration or as anything else not defamatory. Referring to the context did not soften or provide an innocent meaning of the word. It was, as a result, difficult to apply the theory used in *Bresler*. On the face of the text, use of word brutal and the dropping of the quotation marks are both intentional acts that result in a statement known to be false and derogatory.

The Court finds dropping of the quotation marks innocent; it does so by crediting the author's statement about why he deleted the quotation marks, and then making that statement conclusive, so that there was no need to have a jury decide whether the author's testimony as to his good faith was truthful. Doing so is an ultimate example of what it means to make the judge the final arbiter of facts affecting speech protected by the First Amendment; the judge gets to determine the credibility of the witnesses. The result reads a whole lot like an absolute privilege to make false and defamatory statements about some subjects, but a privilege granted only after the fact, on a case by case basis.

Having held in *New York Times* that intentional falsehood deserves no protection, the Court now protects precisely that kind of speech. After all, the witness said he dropped the quotation marks because he decided the Commission really meant to make a more serious charge than it actually made. It is a close to an absolute privilege for speech about public officers – as close to just wiping out the tort of defamation – as the Court will come. Perhaps only the judge who said “I can't define pornography, but I know it when I see it” could have accomplished this result without acknowledging what he had done.

The next three cases are easier. They are *Letter Carriers v. Austin*, *Bose v. Consumers Union of the U.S.* and *Hustler Magazine v. Falwell*. *Letter Carriers* says “scab” is an epithet, and thus not capable of defamatory meaning, a conclusion easier to reach but surely supported by *Bresler*. *Bose* involved the accuracy of CU's testing of high fidelity speakers, and was really a test of the limits of public issue speech, except

that the parties forgot to raise that issue. *Falwell*, decided in 1988, is important for several reasons. First, it is Justice Rehnquist's first opinion in the area. Secondly, it is a reaffirmation, but by a now quite different court, of the actual malice rule. And, lastly, it changed the role of the judge.

*Bose v. Consumer's Union* involved a jury verdict for having said that Bose's speakers that seemed to make the instruments wander around the room. The effect apparently could not be produced for the jury, though CU's tester, a professional listener, was quite clear about what he heard:

“Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.” 466 U.S. 485, at 488

The issue, for Justice Stevens, was whether the description could have been written with actual malice. The issue was entwined with a new argument about scope of review, based on Rule 52 (a) of the Federal Rules, which gives Seventh Amendment-like sanctity to trial court findings of fact. Justice Stevens, while giving no ground on the scope of judicial review in First Amendment cases, found the two contradictory rules quite compatible, emphasizing the role judges had played even at common law with respect to whether actual malice had been proven by clear and convincing evidence:

First, the common-law heritage of the rule itself assigns an especially broad role to the judge in applying it to specific factual situations. Second, the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication; though the source of the rule is found in the Constitution, it is nevertheless largely a judge-made rule of law. Finally, the constitutional values protected by the rule make it imperative that judges - and in some cases judges of this Court - make sure that it is

correctly applied. A few words about each of these aspects of the rule are appropriate. Ibid. at 501.

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The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges - and particularly Members of this Court - must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. Ibid. at 510-511.

Having established judicial primacy, Justice Stevens had no difficulty in finding that actual malice had not been proven:

Seligson [CU's tester] of course had insisted "I know what I heard." The trial court took him at his word, and reasoned that since he did know what he had heard, and he knew that the meaning of the language employed did not accurately reflect what he heard, he must have realized the statement was inaccurate at the time he wrote it. "Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves." *Time, Inc. v. Pape*, 401 U.S., at 285. See generally, *The Santissima Trinidad*, 7 Wheat. 283, 338-339 (1822). Here, however, adoption of the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities" and descriptive challenges for the writer. *Time, Inc. v. Pape*, supra, at 290. The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Ibid. at 512

The opinion cites *Pape* and is *Pape*, only this time applied to what a reporter hears, rather than what he or she reads. What looks, objectively, like knowing falsehood, is set aside, this time after a jury had found liability, because the author's testimony as to what he heard is constitutionally insurmountable. Once again, the interior mental process is given greater protection than is implied by a rule that does not protect intentionally false speech. That result is accomplished by giving great weight to the author's testimony as to his state of mind; indeed, unless he or she has written a memo saying that I gave false testimony, it appears to be binding. Since the author probably had perfect pitch, and therefore heard things the rest of us can't, or can't any longer, that is not a surprising or unfair result, although one can see why a manufacturer whose customers do not have perfect pitch would object to the dissemination of such special knowledge.

Chief Justice Rehnquist dissented:

Presumably any doctrine of "independent review" of facts exists, not so that an appellate court may inexorably place its thumb on the scales in favor of the party claiming the constitutional right, but so that perceived shortcomings of the trier of fact by way of bias or some other factor may be compensated for.

But to me, the only shortcoming here is an appellate court's inability to make the determination which the Court mandates today - the *de novo* determination about the state of mind of a particular author at a particular time. Although there well may be cases where the "actual malice" determination can be made on the basis of objectively reviewable facts in the record, it seems to me that just as often it is made, as here, on the basis of an evaluation of the credibility of the testimony of the author of the defamatory statement. I am at a loss to see how appellate courts can even begin to make such determinations. In any event, surely such determinations are best left to the trial judge. 466U.S. 485, 519-520.

*Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) involves Hustler's parody of a popular advertisement; Campari bitters had run a series of ads about the first sexual encounters of celebrities. Hustler's version suggests that the well-known plaintiff, a conservative Christian minister, had his first sexual experience in an outhouse and it involved his mother. A jury found for the defendant on a libel claim, but for the plaintiff on the claim of intentional infliction of emotional distress. The Court reverses the verdict

for emotional distress, saying that *New York Times* applies and that the jury's verdict on the defamation issue means there can be no liability for emotional harm:

Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.  
485 U.S., at 50.

Chief Justice Rehnquist, apparently not content to simply rely on the jury's finding of no liability of the libel count, examines the advertisement and concluded that it "could not reasonably have been interpreted as stating actual facts." The criterion is the same as that which Justice Brennan used in his first draft, "...whether the statements in the advertisement complained of can reasonably said to be capable of a defamatory meaning," App. 1 at 20; Justice Rehnquist is not changing the scope of the Court's power of review, but he is changing the focus of that review.

One could have said that a cartoon is, in its nature, an exaggeration, akin to an epithet, and on that ground not defamatory, as in *Bresler*. That is not what the Court said. Instead, it went to the knowing falsehood test, but this time to the falsehood portion of the phrase. Falsehood means, it said, facts, and an exaggeration – that is what a parody is – is not a fact or even something extrapolated from a fact.

The problem is that an exaggeration must be an exaggeration of something, and it is simply not possible to figure out the unexaggerated state which the cartoon was invoking. But if the cartoon was not a parody, not an exaggeration, it must have been asserting a fact. It is, moreover, a fact which the author does not even claim to be true. The holding in *Falwell*, fairly read, is thus that some speech is protected even if probably false. The odd part is that the Chief Justice didn't need to do that. The issue was

whether emotional distress was covered by *New York Times*. The Court could have said 'yes' to that, relied on the state verdict of not guilty as to the libel claim and ended the case. Some clue to why it did not comes from Justice Rehnquist's language rejecting recovery for emotional distress. It is a clue that will influence his stance in all of the remaining cases in this set:

If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. 385 U.S. at 55.

The petition for certiorari in *Falwell* had asserted error in the Court of Appeals rejection of a defense based on the fact-opinion distinction. That theory is never mentioned in the opinion. One might speculate that the Chief Justice assigned the opinion to himself so that it could be written without ever referring to that issue and, instead, say something useful about subjective jurors, and, by implication, subjective judges. Because a majority of the Court voted reverse, writing the opinion might thus present an opportunity to build some benefits for the future into a result he could not change. Indeed, his dissent in *Bose* is consistent with the view that he was picking his spots carefully; he had there said, in 1984, 466 U.S. 485, 520n2 :

The fact-finding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more suspect than the fact-finding process engaged in by a trial judge who makes written findings as here. Justifying independent review of facts

found by a jury is easier because of the absence of a distinct "yes" or "no" in a general jury verdict as to a particular factual inquiry and because of the extremely narrow latitude allowed appellate courts to review facts found by a jury at common law. Thus it is not surprising to me that early cases espousing the notion of independent appellate review of "constitutional facts," such as *Fiske v. Kansas*, 274 U.S. 380 (1927) and *New York Times*, should have arisen out of the context of jury verdicts and that they then were perhaps only reflexively applied in other quite different contexts without further analysis. See *Time, Inc. v. Pape*....

#### IV.

Whatever Justice Rehnquist's reasons for writing *Falwell*, he had, six years earlier, begun to claim that *New York Times* had gone too far. His views are stated in a dissent from the denial of certiorari in *Lawrence v. Bauer Pub. & Printing, Ltd.*, 459 U.S. 999 (1982). In voting to review the New Jersey Supreme Court's ruling that a jury verdict for two public figures had to be set aside because an independent review of the record did not support a finding of actual malice, then Justice Rehnquist said:

It seems to me inescapable that the New Jersey Supreme Court in this case felt bound by some invisible radiations from *New York Times v. Sullivan*, supra, to reweigh for itself the credibility of interested witnesses who might have been wholly disbelieved by a jury. The above quotation from the opinion of the New Jersey court indicates that it felt required to credit the testimony of the defendant's witnesses, all of whom were interested in the outcome of the lawsuit.

Justice Rehnquist's statement suggests why there was a fight over the effect of Rule 52 (a) in *Bose*. His dislike of emanations presaged a successful effort, in the last two cases of this canon, to reapportion *New York Times* so as to assert the rights of state juries and state law, and the change comes precisely because both state institutions deal with the issue of whether juries or judges should resolve the credibility of testimony by the defendant. Justice Brennan's reallocation of power between judges and juries was finally under siege.

Those last two cases are *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). It is useful, however, to backtrack again, for the result in those cases was forecast by another of Justice Rehnquist's dissents from a denial of certiorari.

That dissent was from the denial of certiorari in *Ollman v. Evans and Novak*. Understanding what the dissent was objecting to requires some background about that case, a six to five decision by the D.C. Circuit en banc which generated seven opinions, three of them on the winning side. Isolating its precise holding is something of an adventure.

At issue in *Ollman* was whether Professor Ollman, a candidate to become the Chair of the Department of Political Science at the University of Maryland, had been defamed by an Evans and Novak column which quoted an unnamed academic as stating the Ollman had "no status within the profession..." Ollman, then a Marxist and a professor at NYU, claimed that he could provide plentiful evidence of his standing in the profession.

The defense in *Ollman* was that the offending statement was not defamatory because it was a statement of opinion, rather than of fact, constitutionally protected because opinions are at the core of First Amendment protection. The argument

stemmed from a dictum in the *Gertz* case, and had been gaining momentum among the libel defense bar since 1974.

Judge Starr, writing for five of the majority, but only three as to his last part, bought that argument:

In *Gertz*, the Supreme Court in dicta seemed to provide absolute immunity from defamation for all opinions and to discern the basis for this immunity in the First Amendment. Under the First Amendment, there is no such thing as a false idea. “However pernicious an opinion may be....” By this statement, *Gertz* elevated to constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment. 750 F.2d 970, at 975

To Judge Starr, the assertion of a lack of status was essentially “meaningless and could not be libelous.”

Judge Bork’s opinion, for himself and Judges Ginsburg, Wilkey and MacKinnon, took quite a different tack. First, it rejected the fact-opinion distinction as arid and formalistic:

Some lower courts have assumed, as do some members of this court, not only that this opinion v. fact formula is controlling, but that it is governed, at least primarily, by grammatical analysis. I think that incorrect. Any such rigid doctrinal framework is inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press.

....

If common usage were the test, and if we looked at the sentence standing alone, the dissent’s characterization would certainly be correct. The challenged language is a statement that others hold a particular opinion. Whether or not they do is a question of fact, though, as I will try to show, it is a “fact” of a peculiar nature in the context of first amendment litigation. If placing the bare assertion in question into one of two compartments labeled

“opinion and “fact” were the only issue we were allowed to consider, I would join the dissent. 750 F.2d, at 994

The core of Judge Bork’s opinion is a description of what a trial of the issue of “status in the profession” would look and sound like. Given the number of subsets within political science, and the continuing debate among historians, political scientists, sociologists and anthropologists as to the dividing lines among their specialties, it would take a very wise judge to decide who was qualified to vote or testify on Ollman’s status in “the profession.” The result is likely to be a trial of what political science is, rather than rather than a trial of Ollman’s status among those who consider themselves to be political scientists.

That analysis of the practical effect of allowing the suit to go forward is the basic premise of Judge Bork’s view of the nature of judging. His statement of why judges must consider the practical effect of what they do is so eloquent that he repeated it in his biography:

Judge Scalia’s dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But most doctrine is merely the judge-made superstructure that implements basic constitutional principles. There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case. When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision –such as the first amendment–whose core is known but whose outer reach and contours are ill-defined, face the never ending task of discerning the meaning of the provisions from one case to the next. There would be little need for judges–and certainly no office for a philosophy of judging-- if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the framers’ values, defined in the

context of the world they knew, apply to the world we know. 750 F.2d, at 995.

That statement, and the process by which it is applied to the facts of the case, is pragmatism at its best. None of the “facts” about the nature of political science or the process of evaluating academic stature were part of the record; this was a case that had never been tried. Denied a record, Judge Bork drew on his own knowledge of the academic world. It is probably quite an accurate picture; like all pragmatic judging, it requires judges who know more about the world around them than most judges know.

For present purposes, however, it is only important to note where Judge Bork looked for precedent:

For this reason, it is instructive to compare the Court’s treatment of an even more clearly “factual” assertion in *Greenbelt Cooperative Publishing Company Association v. Bresler*, 398 U.S. 6 (1970).

Applying *Bresler* led Judge Bork to conclude:

Professor Ollman, as will be shown, placed himself in the political arena and became the subject of heated political debate.

....

My second point is less conventional, though by no means ruled out by case law as a next step in the evolution of doctrine in this troubling field. It is this: in order to protect a vigorous marketplace in political ideas and contentions, we ought to accept the proposition that those who place themselves in a political arena must accept a degree of derogation that others need not. 750 F.2d, at 1002.

So there you have it, Judge Bork was doing exactly what Justice Brennan had done in his first draft of the opinion in *New York Times*; he federalized the central tenet of the common law of defamation, the definition of which words are sufficiently derogatory

of the plaintiff to be defamatory. Though done in a pragmatic way, with no statement of what was being done other than to apply *Bresler* so as to characterize “has no status” as rhetorical hyperbole, Judge Bork, without any limiting theory other than that the statement occur in the public arena, replaced the common law of what was defamatory with federal law.

Judge Scalia dissented:

It is *this* risk of judicial subjectivity...which troubles me. Beyond that, I may add, I distrust the more general risk of judicial subjectivity presented by the concurrence’s creative approach to first amendment jurisprudence. It is an approach which embraces “a continuing evolution of doctrine...not merely as a consequence of thoughtful perception that old cases were decided wrongly at the time they were rendered (see, e.g., *Brown v. Board of Education* ...)...but rather in reaction to judicially perceived “modern problems,”....

....

...it is frightening to think that the existence or nonexistence of a *constitutional* rule ...is to depend on our ongoing personal assessments of such sociological factors. *Ibid*, Pp. 1038-1039.

Justice Rehnquist’s opinion dissenting from the denial of certiorari suggests the depth of his dislike for what the Court of Appeals had done:

I think the result reached by the Court of Appeals in this case is nothing less than extraordinary. At the heart of the common law of defamation were a few areas of expression which even when spoken rather than written were regarded as so damaging as to be classified as “slander per se” and therefore not to require the proof of any special damages in order to allow recovery. One of these categories consists of statements which defame the plaintiff in connection with his business or occupation....

...to quote an unnamed political scientist as saying that petitioner has “no status within the profession” is far more than the mere statements of opinion traditionally protected by qualified privilege under the common law of libel. Doctors who are disapproved of by other doctors may find solace in the fees paid by their patients...but the academic who is disapproved of by his peers has no such healthy recourse outside the profession. There, if ever, the opinion of one’s peers is virtually the sole component of one’s professional reputation. 471 U.S. at p. 1127-1129 (1985).

Because Judge Starr adopted, and Judge Bork rejected, the fact-opinion distinction and because it will be the issue in the next case, it may be useful here to consider what was at stake in the effort to import that common law theory into the First Amendment. It was not an effort to override the common law; it was, instead, at least on its face, an effort to elevate a portion of already existing common law to constitutional stature. From a theoretical point of view, that is a pretty silly thing to do.

If the fact-opinion distinction exists as part of the common law, there was no need for the defendants in *Ollman* to make a constitutional argument; they could simply defend on local law grounds, with the same result. Perhaps they did not do so because local law (the District of Columbia’s local law) was unclear, or perhaps they, or their lawyer, were simply blinded by the opportunity to argue a First Amendment defense when ancient law would have done the job.

Indeed, isn’t it likely that it was the question of how such a privilege could be lost, that prompted the defendants in *Ollman* to make the argument that the distinction was required by the constitution, and to base the argument on the broad language of *Gertz* about the sanctity of opinions? Assume for a moment that the common law privilege of fair comment, which included the fact-opinion distinction, was, as Justice Brennan said in *New York Times*, a privilege defeasible by a showing of actual malice. Then consider what might occur if *Ollman* had been tried. One of the likely first questions to Evans or Novak would have been, “Who was your source?” The answer would have been, “I can’t tell you that; the source was promised confidentiality.” There would have ensued a by-play about reporter’s privilege, and however the question of jail

time was resolved, the trial judge would have instructed the jury, as a growing custom required, that it should assume that there was no source.

If the source were invented, however, and the defense defeasible if published with knowledge of its probable falsity, the plaintiff is entitled to a finding of knowing falsehood from both the jury and the judge. By way of contrast, the argument the defendants actually made was that the words were opinion and therefore not defamatory. That defense asserts there is no actual malice issue, no need for discovery, and the existence of a source is irrelevant.

*Ollman* was thus not an effort to elevate another piece of the common law to constitutional status. It was, instead, an effort to add an absolute privilege for words called opinions, just as the Court had, perhaps, already done for the quotation marks omitted in *Pape*, the sounds heard in *Bose* and was later to do for the cartoon in *Falwell*.

## VI.

It took five more years for the now Chief Justice to get his full-fledged bite at the issue. The case was *Milkovich v. Lorain Journal Company*, 497 U.S. 1 (1990). A high school wrestling team had gotten into a fight with the opposing team, and was suspended for fighting. The coach and the school sued and got the suspension lifted. The local paper thought they should have accepted their punishment. It said, “is this the kind of lesson we want our young people learning from the administrators and coaches.” Worse, it said, they got the reversal by fudging the truth about what happened, “Anyone who attended the meet...knows in his heart that Milkovich...lied at the hearing....”

Chief Justice Rehnquist started his analysis with a history of the cases since *New York Times*, correctly parsing them, and, in the process suggesting that no harm to the main body of the doctrine was in issue. He then cites the sentence fragment from *Gertz* which started the whole opinion speculation, “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.” 418 U.S., at 339-340. He suggests that this language could hardly have been intended to federalize the fact-opinion doctrine.

He went on to suggest that only statements of the kind that might be modified by further discussion could qualify as opinions. Finally, he said that the Restatement of Torts 2d, Section 566, comment a, had acknowledged that an expression of

opinion could be defamatory, and had protected it only to the extent of requiring proof of falsity and, if the opinion was about a matter of public interest, proof that it was published solely for the purpose of doing harm, a restrictive form of the actual malice requirement. 497 U.S., at 14.

Instead of using a concept like fact or opinion, the Chief Justice focused on the portion of the actual malice rule which requires proof of falsity: if the words are not capable of being proven false, the speaker cannot have said something he or she knew was false. That is, of course, fact - opinion under another guise. What it is not is judges deciding what ambiguous words mean. Since no jury had decided the issue the Chief Justice had just created, the case could not be ended. It was sent back for trial to determine whether the coach had been accurate when he testified at the Athletic Commission hearing. The wrestling match had occurred in 1974. It was now 1990.

Justice Brennan dissented, joined only by Justice Marshall. The opinion is a backfire, adopting the majority's statement of the law and disputing only its application to the facts. The real dispute is thus over the role of the judge, with Rehnquist letting the jury have the first shot when the issue can be stated as the credibility of the author's statements, especially about why he used the words he used, while Brennan is willing to let the context of the article render its harshest words innocent.

According to Justice Brennan, the majority had imposed on the plaintiff a duty quite favorable to defendants, a duty to prove false not only what the words literally say, but also any meaning a "reasonable reader would have understood the author to have conveyed," a really delightful perversion of what Justice Rehnquist said. For Justice Brennan, the reporter's assertion that the coach was lying had been a conjecture, based on what the reporter saw at the game and wrote after hearing the coach's testimony. With that beginning, Justice Brennan had no difficulty in deciding that a court could only conclude that the reporter had faithfully reported what he believed he saw at the wrestling match.

Neither he nor the Chief Justice supported adoption of the fact - opinion distinction into First Amendment law. Justice Brennan came closest to doing so when he said, "Statements of belief or opinion are like hyperbole, as the majority agrees, in that they are not understood as actual assertions of fact..." but the end of that sentence contains a significant limitation, "...but they may be actionable if they

imply the existence of false and defamatory facts.” 497 U.S., at 27. In the case of a newspaper’s repetition of words spoken at a public meeting or events occurring at such a meeting, Justice Brennan thought, “...the only fact implied by the second statement is that the speaker drew this inference. If the inference is sincere or nondefamatory the speaker is not liable for damages.” *Id.* His reading of the story led him to the conclusion that the reporter was only stating a ‘conjecture’ when he suggested that the coach was lying about the melee, and a conjecture, while somehow different from an opinion, can be read innocently “Read in context, the statements cannot reasonable be interpreted as implying such an assertion as fact.” 497 U.S., at 28. His careful reading of the story was that the reporter had reported what he thought he saw, and, having seen a melee, he was free to conclude that the coach was not telling the truth, even if the coach honestly said that he didn’t see a melee.

Justice Brennan did, for the first time, string together some of the line of cases that began with *Bresler*:

“As the majority recognizes, the kind of language used and the context in which it is used may signal readers that an author is not purporting to state or imply actual, known facts. In such cases, this Court has rejected claims to the contrary and found that liability may not attach, ‘as a matter of constitutional law. Ante at 17. See, e.g. *Bresler*, supra (metaphor); *Letter Carriers*, supra (hyperbole); *Falwell*, supra, (parody)” 497 U.S. at 27.

Justice Brennan could persuade only Justice Marshall to join him. That meant that at least seven Justices, and probably all nine, had rejected the fact-opinion distinction. And that was probably a good thing; one of the things *Ollman* and *Milkovich* illustrate is that the distinction is very difficult to apply. Judge Bork’s opinion in *Ollman* suggests it is too formal to be useful in resolving the variety of factual situations presented by defamation cases. But the problem also stems from the fact that its form does not fit what the English language does. A philosopher would say that “opinion” is an epistemological category, while “fact” is a semantic or metaphysical category.<sup>3</sup> What is described by the two words can overlap without

3. Private correspondence, Professor Daniel D. Merrill, Professor of Philosophy ,  
*emeritus*, Oberlin College.

violating any rule of logic.’ Analyzing the meaning of a narrative sentence is not easy work; trying to do it with an instrument blunted by bad logic can be fool’s work.

The Restatement (Second) of Torts, Sec. 566 (1977) tried valiantly to deal with the overlap of the concepts embodied by the words ‘fact and opinion’ by saying that there were two kinds of opinions, pure and mixed, and that mixed opinions were, sometimes, really a form of fact rather than opinion, because they imply facts. The Comments to Sec. 566 are a lawyers’ effort to translate precise ideas taken from the philosophy of language into words they could understand and use. But conceptual analysis is a sophisticated form of philosophical inquiry, and the effort to dumb it down for lawyers results in muddled terms, and in the kind of statements one makes when one’s head is tired of thinking hard, see Judge Starr’s opinion in *Ollman*, 750 F.2d, at p. 980, esp. fn.18 and 20.

Judge Bork called the fact-opinion distinction ‘flat and barren.’ Flat and barren though it may be, a judge who understands and is sympathetic to the argument between Kant and Hume can use the distinction an empiricist would make, a distinction between knowledge and belief, to decide a defamation case. It is a distinction that tends to favor defendants, since philosophers define knowledge more carefully than do lawyers. But dealing with the Kantian notion of synthetic a priori knowledge (which the Restatement translated as opinions that implied facts, an uneasy facsimile) is no easy matter. Whether Judge Bork’s mode of analysis requires less of judges than does the Restatement (Second) is, as an empiricist might say, a question we cannot yet answer, but at least the words he used are straightforward and comprehensible by lay people.

Justice Brennan’s dissent cites Professor Alfred Hill’s 1976 effort, in the course of taking the archaic out of the law of defamation, to straighten out the confusion about fair comment. Professor Hill had suggested that the fact – opinion distinction is a variation on a more meaningful distinction between fact and value. Hill, Defamation

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and Privacy under the First Amendment, 76 Columbia L. Rev. 1205 (1976). That is not the same as Justice Brennan's 'conjecture', and does not answer Judge Bork's criticism of the use of formal categories as the principle mode of analysis, but it does convey a better sense of what is going on in the fact-opinion cases. It was available as a basis for compromise in *Milkovich*, but compromise was no longer in the air; the Chief Justice had seven votes to reverse and used them to change the relative roles of judge and jury in First Amendment case.

Chief Justice Rehnquist's win in *Milkovich*, and its rejection of adding 'conjecture' as yet another exception to the notion that *New York Times* involved only a rule requiring malice, could have ended the canon. But one more really interesting case came along, and the Court used it to say forcefully that *Bresler, Pape* and their progeny should have no descendants. *Masson v. New Yorker Magazine, Inc.*, got to the Court in 1991, only a year after *Milkovich*. Justice Brennan had, in that year, retired.

The Ninth Circuit had decided that the quotation, "I was like an intellectual gigolo - you get your pleasure from him, but you don't take him out in public..." was not actionable. Masson claimed he had never said that. During discovery, the author, Janet Malcolm, had testified that even if the literal words were not on the tapes of her interviews of Masson, he had said something very close to that. At most, she argued, she had changed the location of clauses so as to translate the syntax of the oral interview into the style she would use if she were writing instead of talking. Because a reporter often asks a question and the interviewee says 'yes,' the custom is to rephrase the answer to incorporate the substance of the question. In the nature of things, one sometimes edits the question; if the interview is not on tape and one only has notes, the notes are likely not to show either the precise question or answer, but rather a resolution of the ambiguity inherent in each.

The District Court granted summary judgment to both defendants. The Ninth Circuit affirmed, holding that the phrase "intellectual gigolo" was a rational interpretation of conversations that bristled with ambiguities, and protected by *Bose Corp. v. Consumers Union*. It had also, writing just before *Milkovich* was decided, held the phrase not defamatory because it was the expression of an opinion. For good measure, it had added that whatever harm the phrase might have caused was less than that caused by admittedly accurate quotations from Masson, and thus not actionable under the "incremental harm branch of the 'libel-proof' doctrine."

So the case came to the Court bristling with theories that enthusiastic defense counsel had decided should be litigated in the highest court in the land. The reason for using all those theories of defense was, of course, the quotation marks Malcolm had used. The words they surrounded were not on her interview tapes.

Justice Kennedy begins his discussion of the law by citing *Greenbelt* and *Milkovich*, but sideways. *Greenbelt*, a case we have cited as *Bresler* because that is the way Justice Brennan cited it, is cited for its holding that jury instructions must describe accurately the kind of malice required by federal law, *Milkovich* for its lengthy but cramped summary of the federal law of defamation. One surmises that the mode of citation is not accidental. Justice Kennedy used to teach Constitutional Law, and it is legitimate to read his citations as a way of saying those two cases are not what this case is going to be about.

What it was about was whether state or federal law was to govern the case. The dissenters, Justices White and Scalia, made the point clearly: putting quotation marks around words allegedly never said is a false statement knowingly made, and thus proof of both falsity and of actual malice. As they understood *New York Times*, the author's statement of her good intentions was not binding on the court: it followed that the quotation marks, plus Masson's statement that he had not uttered the quoted words, were sufficient to prove knowing falsehood. The dissent thus raises directly the question of whether some knowingly false speech is to be protected.

Justice Kennedy's opinion for the majority chooses, however, not to discuss whether the words might be protected even if there was actual malice. Instead, he held that the words might not be defamatory, but that was because the issue should have been decided under California, not federal, law. Local law governed the issue, relieving the Court of any role.

The issue on which his opinion focused was one the Court of Appeals had relied on, apparently as a matter of federal law. It said that the false words must hurt (the plaintiff's reputation) more than the other, uncontested, things said about the plaintiff in the writing. The doctrine is sort of the opposite of exaggeration; if one says something inaccurate and defamatory, but less defamatory than one could have truthfully said, there is no liability.

Justice Kennedy drew this rule from the textbook used in the most popular California bar review course and from (now Judge) Robert Sack's, *Libel, Slander and Related Problems* (1980), the best textbook ever written about the law of defamation. The new rule said that use of quotation marks was not enough to show knowing or

probable falsehood “unless the alteration results in a material change in the meaning conveyed by the statement.” Use of the quotation marks was relevant but not dispositive; it could be balanced by the self-defamatory character of other things Masson had said.

But it was not a federal rule:

Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech. The question of incremental harm does not bear on whether the defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not.” 501 U.S. 496, 523,

and that single issue, according to Justice Kennedy, was the sum of First Amendment law regarding defamation. As a result, the case needed to go back for trial, so that a district court sitting in California could decide whether California really had such a doctrine, and a jury could decide whether it fit the facts.

Justice Kennedy did discuss a defense argument, based on *Bose v. Consumers Union, Inc. and Time, Inc. v. Pape*, that an author need only make a rational interpretation of a complex set of facts, and that Ms. Malcolm’s article was a rational, even if inaccurate, reading. Unlike the summary treatment that claim got in *Milkovich*, Justice Kennedy discussed the cases. He characterized *Bose* and *Pape* as protecting any rational interpretation of ambiguous facts. He then declined to put quotation marks in that category. They could not be regarded as an act of rational interpretation, because they were used “to inform us that we are reading the statement of petitioner, not Malcolm’s rational interpretation.” 501 U.S. 496, 519. His holding is that deliberate alteration by adding quotation marks is not enough to prove a violation of the knowing falsehood standard, but that a jury should hear the tapes of the interviews and decide whether the words plus the quotation marks plus any other evidence showed a knowingly false emendation of the tapes. Game, set and match to the Chief Justice.

*Pape* involved removing quotation marks, *Masson* added them. Of course, the reporter in *Pape* was working from a government report, while the reporter in *Masson* was working from her own notes. But the governmental nature of the

underlying document is not the crux of the decision; it was the omission of the quotation marks, making the article read as if it was the Civil Rights Commission's own conclusion, rather than that of the reporter, that Officer Pape complained about. And while Justice Kennedy's point about quotation marks signifying that no mental processing has taken place is correct, the use or nonuse of quotation marks is not an accurate description of the mental process that is relevant under *New York Times: Malcolm's* affidavit says she went through a mental process, and since the article was written from notes and tapes of interviews, that testimony has to be true.

*Masson* implies that quotation marks trump words (like blackmail). The issue is about the power of symbols; both the quotation mark and the words are elements in a debate about what is sufficiently derogatory to cause liability. And, despite his words to the contrary, Justice Kennedy disposed of the issue by applying federal constitutional law.

After all, a holding that as a matter of Constitutional law the use of these symbols distinguishes this case from the quotation marks omitted in *Pape* is a federal holding. It follows, although the point is pretty abstract, that Justice Kennedy's conclusion about the effect of adding quotation marks is a holding that federal constitutional law governs at least some elements of deciding what is defamatory.

Perhaps Justice Kennedy knew that such a discussion was not where he wanted to go; he certainly did not go there. It seems fair to conclude that the Court was not interested in exploring whether this language was entitled to an absolute privilege under the First Amendment. Instead, it was interested in sending that whole set of issues back to the states, to see if they could deal with them as common law matters, and thus spare the Court from having to hear any more defamation cases.

Nonetheless, Justice Kennedy chose to distinguish rather than overrule. The earlier cases, he said, had distinguished between a rational interpretation of an ambiguous source and the 'direct account of events that speak for themselves,' a quote taken from *Pape* itself. 501 U.S., at 520. "The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying on ambiguous sources." *Id.* By distinguishing, rather than repudiating the earlier cases, the form of the opinion suggests that the Court has not overruled *Bresler*, *Pape*, *Bose* and *Falwell*. Whatever those cases stand for, they continue to stand.

Before turning to what they may yet mean, one can pause briefly on the Rehnquist and Kennedy contributions to old fashioned common law defamation. The members of the libel defense bar talk to each other and ideas spread as opportunity arises. Justice Kennedy's suggestion that substantial truth might, in many states, get you a summary judgment has spread to states that had never heard of it. The same can be said for Chief

Justice Rehnquist's reliance on the plaintiff's duty to prove falsehood; the number of cases holding, as a matter of state or federal law, that particular words, while nasty, are just not of the kind that can be proved true or false boggles the mind of anyone who began doing this kind of work before 1964. Indeed, the cases mix substantial truth with inability to prove them false in a kind of foggy reinvention of the fact-opinion debate.<sup>4</sup>

Diverting these cases to the states has meant that statements like: "The House member has a close personal relationship with a Washington lobbyist for the firm....", once edited out on both journalistic and legal grounds, now survive. It was once the office of libel per quod to make such statements defamatory; they now appear routinely.

The result is probably not quite what the Chief Justice or Justice Kennedy anticipated, but it is not inconsistent with what they really cared about, the departure of these cases from their court.

## V.

*Bresler* and its progeny seem to prove that the dissenters in *New York Times* were at least partly correct – the actual malice rule was not broad enough to protect all speech that deserved protection. *Bresler*, *Pape*, *Letter Carriers* and *Bose* all seem to have been correctly decided. *Milkovich* is more difficult, but strikes one as wrong, not in its holding that there was no privilege, and no need for a privilege to protect opinions, but in concluding that a melee at a sporting event was different from the sound of music in *Bose* or the federal report in *Pape*.

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<sup>4</sup>. The result is a tolerance for ambiguity unknown to the common law. See, e.g., *Schivarelli v. CBS, Inc.*, 333 Ill. app. 3d 755, 776 N.E. 2d 693, 30 Media L. Rep. 2268 (1st Dist. 2002): Similarly, here, Ms. Zekman's statement to Mr. Schivarelli, "Let's sum this up for a second, the evidence seems to indicate that you're cheating the city," was not made in any specific factual context. Ms. Zekman did not explain the evidence that she was referring to, nor did she state why she thought Mr. Schivarelli was cheating the city, how he was cheating the city, or even what she meant by the term "cheating." See *El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797, 798-99 (Tex. App. Ct. 1986)("Cheating has no unique definition. It may, in some instances, imply criminal acts; it also serves to accuse one of unfair dealings. It is not a word which has a precise meaning. It means different things to different people at different times and in different situations") and *The Traditional Cat Association, Inc. v. Gilbreath*, \_\_ Cal.App. \_\_ (Fourth District, 2004) online at [www.courtinfo.ca.gov/opinions/documents/DO4142/PDF](http://www.courtinfo.ca.gov/opinions/documents/DO4142/PDF) at p. 19.

The words used by the reporter are a problem; the accusation was that the coach lied, and context does not serve to soften such a word very much. This was, however, a suit brought by a popular local coach, already vindicated by the system in which he worked, against a non-local newspaper; the reporter may even have been born outside Ohio. Like Commissioner Sullivan, Coach Milkovich was a bully seeking affirmation by a jury.

There is an undercurrent in *Milkovich* suggesting that the press should get its facts straight, but facts which occur in an instant are more difficult to get straight than those gathered from a recording, which can be played over and over again, or a report, which can be reread. In terms of the degree of difficulty in translating information gathered by the senses into a narrative, and that is the rationale of *Pape*, the kind of reporting done in *Milkovich* was more deserving of protection than was the report in *Pape* or the appraisal in *Bose*. Nonetheless, there is a distinction of sorts among them: *Bose* is, in form, an appraisal of an eyewitness event; in Professor Hill's terms it is an evaluation and so, in a sense, is the summary of a federal report in *Pape*. In contrast, the reporting in *Milkovich* starts out as eyewitness reporting and only eventually shifts to a judgmental stance. Perhaps the lack of clear labeling of the shift justifies a distinction of constitutional stature. More likely, *Milkovich* is a mistake caused by the peculiar baggage which encumbered the opinion issue.

*Masson*, the last of the cases, is probably the right result, a conclusion one reaches on the rhetorical power of Justice Kennedy's observation that adding quotation marks is an act which states that no internal mental processing has occurred; it follows that rules which protect the process of making inferences do not apply here. So the canon closed, as it should have, with a case that defines its outer limit by saying, "however far we go, it will not be this far." So read, *Masson* could be the only set of words, or, more accurately, quotation marks may be the only set of symbols or words that are not subjected to a federal constitutional analysis before being declared defamatory.

*Ollman*, while a footnote to these cases, is probably the most difficult of all of them. If there was a source for the value judgment that "he has no status in the profession...", then Judge Bork was correct; the quotation is a way of saying Professor Ollmardid not have enough stature for this particular job, and no one gets to sue for that kind of evaluation. If there was no source, the case is harder. It then looks a lot like *Masson*, because if there was no source, the use of quotation marks is inappropriate, even though here they show not the absence of mental processing but an invention of mental processing. If one thinks about it, however, it seems more than unlikely that two veteran columnists who earn their living by calling sources to get information and

quotations would abandon their custom and invent a quote. Why do it when one knows that most academics love being called and prefer seeing their quotes in print to teaching their students. The risk that they made it up is thus extraordinarily small. Moreover, one doubts whether it is even useful to know who the source was. Since there is no requirement that it have been a knowledgeable source, or even a neutral source, the name of the source adds essentially nothing. It is the existence of a source rather than the name of the source, that is relevant. But Professor Ollman did not want abstract information; he wanted, quite humanly, to know who to challenge to a duel. The purpose of a libel suit is to avoid dueling, not promote it. While that is not a wholly persuasive reason to conclude that *Ollman* is correctly decided, it tips the balance.

As for Justice Brennan's initial impulse to wipe the slate clean, and create a federal law of which words are defamatory, it is probably a good thing that he aborted the notion. One can guess that he thought *Bresler* a small step in that direction. But his first draft did it all at once. Giving judges the burden of stating a rationale for what they were doing beyond his unstated assumption that judges can read language more carefully than juries, leaves judges with a great deal of discretion. Judge Bork said that time would cure that problem, because the aggregation of cases would eventually allow someone to describe them in a generalized way. That grant of early unbounded discretion bothers Chief Justice Rehnquist; he rejected of the state court standard of 'outrageous' in *Falwell* for precisely that reason.

The effort that began with *Bresler* foundered on the issue of whether the Constitution takes away from juries the power to judge the credibility of the author's claim that he wrote with a pure state of mind. But it is that is not the only reason one can posit for not following the path. There are, after all, eight centuries of common law in the present definition how one decides that words are derogatory. It takes great determination, or a great case, to overturn that kind of weight. Unless, of course, one believes, with Black, Douglas and Goldberg, that the Constitution requires it.

Moreover, as a structural matter, it would be feel quite odd for the core of all public defamation cases to be federal law, making them removable as of right to a federal court. If there is anything that the opinions in *Milkovich* and *Masson* make clear, it is that the present Court would not approve of that. that we should be courageous and start over, but they do suggest what a difficult task it is.

That conclusion does not, however, end the matter. *Bresler*, *Pape*, *Letter Carriers*, *Bose*, *Falwell* and *Milkovich* are all cases in which a fact-finder could (and three times did) conclude that the text had been published with knowledge of its probable falsity. The accusation by the dissenters in *Masson* that adding quotation marks was adequate evidence of knowing falsehood can be made as persuasively in each of the other

cases. It follows that all of them, except *Milkovich* and *Masson*, stand for the proposition that some knowingly false speech is to be protected. It only remains to that give judges and the people who write the words some idea of when.

## VII.

Finally, what does the set of cases say about constitutional decision making? Only Justice White served through the entire period, and he was consistent; he joined in *New York Times*, dissented in *Bresler*, pointing out its exact departure from what had been agreed upon, dissented from *Gertz* because it extended the scope of what had been agreed upon, concurred in *Falwell* to bringing emotional distress claims under the *New York Times* but suggested the rest of the opinion was unnecessary, and dissented in *Masson*, as if to say we set a standard, it has been met, and we should say so. Justice Brennan was there for all but the final case, and he kept the fire burning for protecting speech that needed protecting. But the pressure to expand provided by Justices Black, Douglas and Goldberg, who thought that if Congress could make no law of defamation neither could they, was gone by 1975. Their presence surely caused *Bresler* and *Pape*, the cases that establish that some knowingly false speech is protected. Once they were gone, replaced by justices less interested in the subject and more attuned to rules like strict or moderate scrutiny than to a requirement that the Court be the final literary critic in every defamation case, the canon was likely to end before it could give the appearance of completion.

Washington D.C., after all, is not known for sustained attention to any issue. In a push-pull place like Washington, the Court's twenty-seven year tussle with speech about public issues seems like an eon; it is not easy to make common law in such a place.

When Justice Brennan gave up the notion of a new federal law of defamation, he substituted an internal rule requiring the Court to read the language claimed to be defamatory for itself, disregarding what a trial court or a jury had done. Changes in substantive law may have greater staying power than internal rules because they are protected by *stare decisis* and create a constituency that will seek to preserve them, while procedural rules do not. Such a result is not be surprising: a group of strong minded judges seems likely, at some time, to say, 'what do you mean, I have to think about these cases in a certain way; I'll show you, I don't have to think about them at all.' And so *Masson* came to be.

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Or, perhaps, internal rules, especially a territorial rule that marks the limits of the Court's power, that defines what judges do, are the most important rules the Court has, and the debate over them is the most fundamental dispute in which its members engage. If that is the case, they are rules that can never be settled, and should not be.

We characterized Justice Brennan's substitution of a rule changing the relative roles of judge and jury as a more benign way of dealing with the problem of what to do with the remand of *New York Times*. But if internal rules are really the most powerful issues the Court deals with, then his change was more, rather than less, aggressive expansion of the Court's territory. However the Court's fact finding power had been used prior to 1964, it had not been used to create a whole new tort.

Common law defamation is a strict liability tort, but it allocated the issue of whether the words are defamatory to a jurors, telling them to decide it as reasonable men would. *New York Times* changed all that in a direction precisely contrary to the flow of the law. The law of contracts was at the same time busy moving the question of what the words in contracts mean from judges to juries, Grant Gilmore, *The Death of Contract* (Ohio State, 1960), and deconstruction, the theory which made readers rather than authors the arbiter of what words mean, was beginning its short lived ascent in the world of academic criticism.<sup>5</sup> In that sense, *New York Times* was contrarian; the culture was going in the other direction.

The common law uses juries to decide questions to which we do not know the answer, or do not know how to think rationally about - what would a reasonable man have done, shall the defendant die, how much are the punitive damages, did the corporation have a discriminatory state of mind and the like. It prefers to have juries decide issues for which there is no answer available by deduction because then there is no record of the process which led to the result. Judge Bork, Justice Stewart and, of course, Justice Brennan, were willing to allow judges to exercise the discretion to reach a result even though they could not cite a minor premise from which it followed. For them, that was what judging was about. They, and with them, students of Llewellyn, Bickel or Posner know that the power to draw the statement of facts trumps all other powers. The internal rule that the Court can in constitutional cases find its own facts is thus bound to offend any Justice who believes that the simplicity and administrability of clear cut rules are more important than achieving justice in a particular case.

Because it vests so much discretion in the court, the power to find facts

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5. Eagleton, *After Theory* (Basic Books, 2004).

necessarily conflicts with the Court's preference for rules rather than standards.<sup>6</sup> Standards is, however, simply a pejorative form of Professor Alexander Bickel's more sympathetic description of what the common law is, Alexander M. Bickel, *The Morality of Consent* (Yale, 1975). His Whig model "is flexible, pragmatic, slow-moving, highly political. It partakes, in substantial measure, of the relativism that pervades Justice Oliver Wendell Holmes theory of the First Amendment..." Ibid., at p. 4. Professor Bickel thought the alternative way of proceeding, which he called contractarian and attributed to Locke, "moral, principled, legalistic, ultimately authoritarian." Ibid., at p. 5. In that context, the changes which occurred in this subset of First Amendment cases are neither the beginning nor the end of a process which has a long history; the subset, and this essay, describe only how that debate affected the First Amendment.

Despite the fundamental difference between the two approaches, the argument is not the primary issue in very many cases; it is too abstract to have rhetorical force. The distinction between the words 'rule' and 'standards' conveys less of a sense of difference than does, for example, the fact-opinion distinction. One needs an associational aid to memory, as in 'Benedictine Rule', to recall which side is rigid.

In *Milkovich*, the lynchpin of the turning in the law described here, the apparent driving force was the Chief Justice's attachment to the state's right to control the central issue in the law of defamation, rather than any desire to reject a standard. Nothing

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<sup>6</sup>The notion that the current court prefers rules to standards is drawn from Mary Ann Case, *Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of Bush v. Gore as a Chapter in the History of Ideas About Law*, 70 U. of C L. Rev. 55 (2003). The debate over standards for constitutional issues extends beyond the First Amendment, see *Blakely v. Washington*, \_\_\_ U.S. \_\_\_ (June 24, 2004) (Scalia, J.):

Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi's* bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

For a history of the debate between legal realism and the more formal vision of judicial thinking, see Dennis J. Hutchison, *Elements of the Law*, 70 U. of C. L. Rev. 141 (2003)(passim), citing, for example, John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 Buff. L. Rev. 459, 480 (1979).

suggests he was motivated by a desire to make the scope of the First Amendment turn on establishing general principles from which one could, top down, deduce results. He did not try to impose a rule on the prior cases or to wipe them out; he simply wanted to end the expansion of a group of cases headed, he thought, in the wrong direction. It was left to Justice Kennedy, in *Masson*, to say that *Milkovich* was not only a refusal to add but that no similar additions should be contemplated. Even then, however, he did not disown the past and did not say that judges could no longer determine the facts in defamation cases.

Taken together, the cases Justice Kennedy left untouched create a constitutional overlay that defines nearly a whole cause of action. They govern the meaning of a whole lot of words, including words intentionally made ambiguous, the burden to prove falsity and the proof required to show fault and damage in all cases in the public arena. They come extraordinarily close to creating a pattern of common law adjudication of First Amendment issues. But until the Court tells us, directly or by applying it, what remains of the underlying rule of *New York Times*, the rule allocating the interesting questions in First Amendment cases to judges rather than juries, we cannot know whether there is room for growth as the common law grows.

Gauged more narrowly, what occurred was a recognition that some statements that can be proven knowingly false nonetheless deserve protection of the kind an absolute privilege grants; so put, the cases suggest that Justices Black, Douglas and Goldberg were partly right, but we're not up to admitting it yet. Until we are, the canon remains closed.