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The Making of Modern Libel Law: A Glimpse Behind the Scenes

LEE LEVINE AND STEPHEN WERMIEL

The contours of modern libel law are well defined, and its path from New York Times Co. v. Sullivan\(^1\) is highly visible and well known to practitioners. Not so well known and almost invisible is the series of hard-fought, behind-the-scenes battles and deep divisions that took place inside the U.S. Supreme Court to shape that body of law into its current form.

Before the ink was dry on Sullivan, the Court was deeply divided over its meaning and ramifications in Garrison v. Louisiana,\(^2\) and the struggles to define the constitutional dimensions of libel law continued in subsequent decades through Gertz v. Robert Welch, Inc.\(^3\) to Hustler Magazine, Inc. v. Falwell\(^4\) and Milkovich v. Lorain Journal Co.\(^5\)

At the center of these struggles was Justice William J. Brennan Jr., who, as the author of the Court’s opinion in Sullivan, naturally assumed the role of defender of the faith. Appointed in 1956 and serving until his retirement in 1990, Brennan often found himself in the center of a libel sparring ring, fighting to save the basic principle of free and open debate and criticism in a democratic society that he had helped harrow criticism of his father, the police commissioner of Newark in the 1920s, and he saw the harm that resulted from press coverage of Senator Joseph McCarthy’s attacks in the 1950s. He could have easily adopted a hostile view of the press from these experiences. As discussed in the book Justice Brennan: Liberal Champion, he nevertheless developed a constitutional vision of the profound benefits of a free press to which he committed himself.

\(^1\) 4 Times v. Sullivan
\(^2\) 409 U.S. 707 (1972)
\(^3\) 412 U.S. 323 (1973)
\(^4\) 497 U.S. 838 (1991)
\(^5\) 497 U.S. 472 (1990)

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importance of a free press to a democratic system, even as he retained personal distrust of the media.⁶

At various junctures, Brennan’s efforts to implement his vision met significant resistance, as other members of the Court mounted their own campaigns to take the law in directions that Brennan was not prepared to go. Three of those Justices, Byron White, Lewis Powell, and William Rehnquist, played significant roles in some of the major post-Sullivan defamation cases decided by the Court during Brennan’s tenure.

This article provides a brief glimpse into the internal deliberations in four of those cases and, drawing on the private papers of Justice Brennan and other members of the Court,

**Exactly why Brennan became [an] ardent proponent of [the] First Amendment remains something of a mystery.**

shows how Brennan and his fellow Justices fought to control Sullivan’s legacy. Our larger study of the development of the constitutional law of defamation, from the perspective of Brennan and the other Justices who served with him in the years following Sullivan, will be the subject of a separate work, which will examine the Court’s internal deliberations in each of the thirty-five defamation and related actions decided on their merits by the Court from Sullivan in 1964 through Brennan’s retirement following Milkovich in 1990. That work and this preview of a handful of those cases draw largely on Brennan’s own papers, including the extraordinary term histories he prepared each year to chronicle the Court’s internal workings in significant cases.

We have chosen to include in this sample four cases—Garrison v. Louisiana,⁷ decided almost immediately after Sullivan; Gertz v. Robert Welch, Inc.,⁶ inarguably the most significant post-Sullivan decision addressing the law of defamation; Hustler Magazine, Inc. v. Falwell,⁷ the first such case decided by the Court after Rehnquist became its Chief Justice; and Milkovich v. Lorain Journal Co.,⁸ which, as noted, was the final defamation case on which Brennan sat.

**Garrison v. Louisiana**
The late New Orleans District Attorney Jim Garrison is best remembered for his investigation of the assassination of President Kennedy.¹¹ His Supreme Court appeal involving Louisiana’s criminal libel law, while not as widely known as the assassination probe, prompted intricate and extensive behind-the-scenes maneuvering among the Justices as they struggled with the constitutionalization of libel that Sullivan had scarcely just begun in Sullivan. Perhaps more than anything else, the story of Garrison v. Louisiana showed Justice Brennan a glimpse of the road ahead—that he would battle his friend and colleague Justice Byron White for every inch of First Amendment application to the state laws of defamation.

By the time Sullivan was argued on January 6, 1964, the Garrison case had already been accepted for review as well. While the two months from argument to decision in Sullivan was not an entirely easy journey,¹² it was a walk in the park compared with the twists in Garrison.

In November 1962, Garrison held a press conference during which he criticized the criminal court judges of Orleans Parish for cutting back his budget for vice investigations in the French Quarter; his statements referred to the “racketeer influences on our eight vacation-minded judges.”¹³ He was prosecuted under the state’s criminal libel law and sentenced to either a $1,000 fine or four months in prison. Among other things, the Louisiana law made it a crime “to expose anyone to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence.”¹⁴ The Louisiana Supreme Court upheld his conviction.

The Supreme Court reversed Garrison’s conviction by a 9–0 vote in November 1964 in an opinion by Brennan. But that result masks literally dozens of pages of unpublished opinions and the deep disagreements that split the Court before the final outcome.

After the case was argued in April 1964, there was little enthusiasm on the Court for the Louisiana law. The opinion was assigned to Brennan by Chief Justice Earl Warren. Only a month earlier, the Court had decided Sullivan, adopting in that case the so-called actual malice test—that a public official could not recover civil damages for libel without showing that a publication was made with either reckless disregard of truth or falsity or actual knowledge that the defamatory statement was false.

In Garrison, the issue was criminal, not civil, libel. In that context, Brennan opted for a different categorical approach, arguing that the Court should invalidate as unconstitutional all criminal defamation statutes that could be read as allowing prosecution for criticism of public officials, regardless of whether they provided an exception for cases in which the defendant published with actual malice. As Justice White later observed in his draft dissent from Brennan’s opinion, this holding would have had the effect of overturning every criminal libel statute then in force throughout the country.¹⁵

Nevertheless, in the draft opinion that he circulated to his colleagues following argument, Brennan likened such statutes to seditious libel laws, including the Sedition Act of 1798, the unconstitutionality of which he had effectively established in Sullivan:

Of course, any criticism of the manner in which a public official goes about his duties will tend to affect his reputation, but to the extent that the Louisiana statute is applied to punish statements made about the official conduct of public officials, it must be said to fall within the category of...
"seditious libel" statutes—which Madison said were "acts forbidding every publication that might bring the constituted agents [of government] into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures."16

Such a law, Brennan's draft continued, was fundamentally inconsistent with Madison's further admonition that, in a representative democracy, "[t]he censorial power is in the people over the government, and not in the government over the people."17 For Brennan, "[u]nder this concept, there could be no offense such as seditious libel" precisely because "uninhibited criticism of government and of government officials was deemed essential to keep the governors responsive to the sovereign people."18 Drawing specifically on Sullivan's conclusion that history had demonstrated that the Sedition Act itself was unconstitutional, Brennan took the analysis one step further:

This historical judgment embodies appreciation of a crucial distinction between civil and criminal libel laws in their application to defamatory criticism of the official conduct of public officials. The civil remedy recognizes the interest of the individual official in the integrity of his reputation; but the overriding interest of the people in free discussion of public affairs secured by the First Amendment limits the remedy to damages for defamatory statements made with actual malice. In contrast, the constitutional consensus since the time of the Sedition Act has been that in light of the importance of the protection for free discussion of public affairs, government itself has no legitimate interest that justifies criminal laws inhibiting mere discussion of it or of its officials.19

Based on this distinction, Brennan proceeded to explain that not even an actual malice requirement could save a criminal libel statute when invoked to punish criticism of public officials.

It is true that in the Times case we held that proof of actual malice would sustain a civil libel action based on criticism of the official conduct of a public official but, as we have shown, a civil action provides compensation for injury to the important private interest in reputation, and in the administration of that remedy government performs its traditional role of impartial umpire in litigation between private parties.20

Invocation of a criminal libel statute in such circumstances, however—even when the libel "is motivated by actual malice—predominantly serves not the interest of the official but the impermissible interest of the government itself in protecting itself against criticism."21 In short, Brennan's draft concluded, "our Constitution flatly bars criminal prosecutions based on the mere criticism of public men for their official conduct."22

Although he had joined Brennan's opinion for the Court in Sullivan, Justice White would have no part of his colleague's sixteen-page draft opinion. In a vigorous nine-page dissent, White faulted Brennan for striking down all state criminal libel laws. White's own opinion accused Brennan of creating a constitutional rule that "indiscriminately lumps the known lie with honest criticism and extends to both the cloak of constitutional immunity."23 He asserted that, Brennan's rendition of the history of the Sedition Act and its aftermath notwithstanding, there was "no persuasive evidence that those who drafted and adopted the First Amendment intended to sanctify the known falsehood and to make it constitutionally impervious to any sort of governmental action."24 Given Sullivan's stated premise that "the calculated falsehood damaging to reputation is not entitled to First Amendment protection,"25 White professed it "difficult to understand how the author of the lie should have his First Amendment defense overruled in a civil action but sustained by the same court in a criminal proceeding."26 In a passage that presaged opinions he would later publish in cases like Gertz v. Robert Welch, Inc.27 and Dun & Bradstreet v. Greenmoss Builders, Inc.,28 White began his retreat from the principles he had endorsed in Sullivan:

Extending protection to the malicious liar is utterly contrary to the purpose of the First Amendment to ensure the free interchange of ideas, to facilitate the ascertainment of truth and to afford every opportunity to settle upon desirable courses of conduct. . . . Admittedly the malicious falsehood designed to destroy the public official is an effective instrument of political action and can unseat the officer and topple an administration of government when used by a band of skillful liars. But it is at once at odds with the premise of democratic government and with the orderly manner in which change is to be effected, under our Constitution, in our political, economic, and social affairs.29

Accordingly, White asserted, "the constitutionality of Garrison's conviction should be measured against the standards enunciated in New York Times v. Sullivan."30

Justice Tom Clark wrote a similar nine-page dissent that Justice John Harlan joined.31 Justice Potter Stewart also expressed doubts, and Brennan's usual allies, Justices Hugo Black and William O. Douglas, who both wanted to strike down civil as well as criminal libel laws, could not endorse Brennan's distinction between the two.32 As Brennan wrote in his term history, he came to recognize that "there were only four potential votes" for his position.33 As a result, he made a defensive tactical suggestion, which his fellow Justices accepted—that the case be reargued in the Court's next term.34

After the reargument, the approach and opinions of the previous term were scrapped in their entirety, never to be released publicly. Instead, Brennan
drafted an entirely new majority opinion, one that borrowed heavily from White’s unpublished dissent from the previous term and relied exclusively on Sullivan’s actual malice standard to invalidate Garrison’s conviction. Brennan’s new opinion otherwise left the law of criminal libel intact.

Even then, however, Brennan had to endure one more Sullivan-inspired fight. In Sullivan, Brennan had fought hard to ensure that the Court itself applied its newly minted actual malice test to the facts of the case, found no actual malice, and in that manner avoided having to return the case to the presumably hostile Alabama courts. In his new majority opinion in

“Our Constitution flatly bars criminal prosecutions based on the mere criticism of public men for their official conduct.”

Garrison, Brennan pushed for a similar approach, arguing that because the Louisiana law did not contain an actual malice standard, there could be no valid application of it and, therefore, no retrial of Garrison.35 Justices Clark and Harlan, however, quickly objected to this portion of Brennan’s new opinion and, because Brennan believed that “the political situation in Louisiana made it extremely unlikely” that Garrison would be retried in any event, Brennan agreed to delete the entire discussion.36

In the end, the decision did not go nearly as far as Brennan wanted in stopping the use of criminal libel statutes, and it provided an early warning that every inch of First Amendment protection for public criticism and unfettered debate would be hard fought.

Public Figures, Public Interest, and Beyond

In the wake of Sullivan and Garrison, the Supreme Court considered defamation cases at a remarkable clip of more than one a year for the next quarter century. During those years, any pretense of harmony and unity over how to apply the First Amendment to the traditional state law of defamation disappeared. The First Amendment–based principles that Brennan considered such significant advancements in Sullivan and Garrison became the focus of, even the catalyst for, new battles in the years that followed.

In 1967, for example, the Court was deeply divided in extending the Sullivan actual malice standard from public officials to public figures in Curtis Publishing Co. v. Butts.37 And Brennan found himself struggling for support in 1971 when he pushed the Court in a plurality opinion in Rosenbloom v. Metromedia, Inc. to shift the focus for triggering application of the actual malice standard from the individual, i.e., public figures, to the topic, i.e., matters of public concern.38

Rosenbloom, a Philadelphia-area distributor of nudist magazines, was neither a public figure nor a public official when he sued a radio station for describing him as a “smut peddler” and his magazines as obscene. Brennan believed the radio station’s broadcasts should be protected by the actual malice standard, but doing so required a new approach, which he offered to his colleagues in an opinion circulated on February 17, 1971.39 No Justice responded to his circulation for more than a month, and Brennan told one colleague he felt “isolated” by the silence.40 Ultimately, expanding the actual malice protection for the news media to all reports on matters of “public concern” proved to be a tough sell and commanded only a plurality of the Court. Even the Court’s two newest Justices, Chief Justice Warren Burger and Justice Harry Blackmun, both of whom joined Brennan’s opinion, were uneasy. Indeed, Brennan’s private file on the case suggests that their votes were motivated more by their dislike for the activities of Rosenbloom, the alleged “smut peddler,” than by sympathy for efforts by the press to report about matters of public concern more generally.41 In any event, the Court’s decision in Rosenbloom, which was announced on June 7, 1971, filled a vacuum for a time as lower courts applied its “public concern” test where necessary to supplement the public figure analysis.42

As difficult as Brennan found it to cobble together a majority position in Rosenbloom, he could not have known that support would prove even harder to come by in a very short time with the September 1971 retirement of Justice Black; Black often concurred in the judgment in Brennan’s defamation cases, providing an important vote although believing the First Amendment afforded even greater protection than the standards Brennan worked to define. Six days later, also in September, Justice Harlan, who had joined Brennan in Sullivan, also retired. By early 1972, the two men had been replaced by Justices Powell and Rehnquist, appointments that would prove critical for Brennan and the further development of the constitutional law of defamation.

Gertz v. Robert Welch, Inc.

From the standpoint of Justice Brennan, the story of Gertz is one about his colleagues’ reactions to Brennan and the positions he espoused rather than about Brennan’s own role.

Elmer Gertz was a Chicago lawyer who filed a civil lawsuit for the family of a young man who was shot and killed in 1968 by a Chicago police officer. The officer was convicted of murder. A John Birch Society magazine described Gertz as a communist and socialist in the context of an article about his clients’ lawsuit against law enforcement. Gertz sued for defamation, lost when the lower courts applied the actual malice standard to bar his claim, and then sought review in the Supreme Court.43

The case was argued on November 14, 1973, and, according to Powell’s and Blackmun’s meticulous notes of the Court’s internal conference two days later, it became immediately obvious to Brennan that everything from Sullivan to Rosenbloom might be on the table.44 Extensive internal debate and negotiation took place in the ensuing seven months before the Court ruled for Gertz, but for the most part Brennan looked on somewhat helplessly.

To get a sense of what Brennan was up against, at the November 16 conference following argument, Chief Justice Burger and Justices Stewart, Powell, and White voiced their doubts
about *Rosenbloom*'s public interest standard, about the workings of the public figure test, and even to some extent about *Sullivan*. White, Powell's notes show, said the Court "has gone too far with N.Y.T.," a reference to *Sullivan*.5 Powell, according to Blackmun's notes, complained that the *Rosenbloom* standard "[t]urns it over to the press. The press can make it a matter of public interest, per se." Sensing the uphill challenge he faced and recalling that *Rosenbloom* had only commanded a plurality in the Court, Brennan, according to Powell's account, "read at length from *Rosenbloom*, whether the 'utterance' of a matter of 'public or general interest' is the test."47

But that was not to be the test for long. Having been assigned the Court's opinion by Chief Justice Burger, Powell set about the task of constructing an opinion that would command the support of five of his colleagues. And while Powell devoted himself to that effort, Brennan occupied the dissenter's chair. Indeed, while Burger, White, and Douglas also dissented in what ultimately was a 5–4 decision, their reasons were all different, and Brennan was on his own in trying unsuccessfully to save *Rosenbloom*'s public interest test.48

From the outset, Powell determined to remake substantially the constitutional balance that Brennan had struck in *Sullivan* and in the decade of decisions that followed it. As Powell wrote in an internal memo dictated to and then typed by his secretary:

> [T]he Court has gone too far already in protecting the First Amendment rights of the media as against the individual rights. . . . [T]he Court has been pursuing its own logic to what may well be the ultimate conclusion of abolishing the law of libel altogether. . . . I would like to think that our society places a greater value on the sanctity of an individual's privacy and reputation, and would like to find a rational and principled basis of decision which would protect the obvious and important rights of the media, would prevent the media from feeling inhibited to print legitimate news, and yet at the same time afford some reasoned protection to individual rights.49

This search for a new balance less weighted in favor of the press led Powell in *Gertz* to persuade four of his colleagues that the Court should adopt a complicated system of constitutional protections for allegedly defamatory expression, one in which the actual malice standard applied to public figures and to awards of punitive damages, the "public concern" standard of *Rosenbloom* was overruled, and, in cases instituted by private figures, states could use whatever standard they preferred as long as some showing of fault was required.50

Ultimately, following difficult internal negotiations and remarkable persistence, Powell's position was supported by Rehnquist, Blackmun, Stewart, and even Thurgood Marshall, normally Brennan's surest ally. For his part, Rehnquist, the Court's most junior Justice, preferred to leave libel law entirely to the states in those cases that were not directly controlled by *Sullivan* and *Butts*.51 Nevertheless, Rehnquist made clear in a February 20, 1974, letter to Powell that, after the fractured Court of *Rosenbloom*, he felt "quite strongly that as an institutional matter it is very desirable that there be a Court opinion in the case" and was therefore "willing to surrender" a portion of his views.52 Rehnquist, however, insisted that, as a condition for his vote, Powell modify a footnote that reaffirmed *Sullivan* "much more emphatically than I would be willing to do,"53 Powell agreed.54

Justice White dissented in *Gertz*, but for very different reasons. Borrowing themes from his unpublished dissent nearly a decade earlier in *Garrison*, White insisted that, while he still believed in *Sullivan*, he could not support its expansion:

> I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media. If anything, this trend may provoke a new and radical imbalance in the communications process. It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head.55

Against all of this strong disenchantment with the direction in which he had taken libel law following *Sullivan*, Brennan could only argue for adhering to the approach he had advocated in *Rosenbloom*:

> Although acknowledging that First Amendment values are of no less significance when media reports concern private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons. The accommodation that this Court has established between free speech and libel laws in cases involving public officials and public figures—that defamatory falsehood be shown by clear and convincing evidence to have been published with knowledge of falsity or with reckless disregard of truth—is not apt, the Court holds, because the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person and he has not voluntarily exposed himself to public scrutiny.

While these arguments are forcefully and eloquently presented, I cannot accept them, for the reasons I stated in *Rosenbloom*: "The New York *Times* standard was applied to libel of a public official or public figure to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in

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majority in defamation cases and would never again write an opinion on behalf of the Court in such a case. Still, as his tenure wound down, Brennan increasingly found other ways to influence the Court's defamation jurisprudence and an unexpected ally to support him in that cause.

_Hustler Magazine, Inc. v. Falwell_
In 1986, Justice Rehnquist became the Court's Chief Justice. The 1986–87 Term, the first under the new Chief, looked as though it would pass without the Court considering on its merits any cases involving the constitutional law of defamation. Near the end of that term, however, the Court granted a petition for certiorari in _Hustler Magazine, Inc. v. Falwell_.

In that case, the Fourth Circuit had divided evenly and, over a passionate dissent by Judge J. Harvie Wilkinson, had affirmed a trial verdict and damages award for the tort of "intentional infliction of emotional distress." As both Brennan's and Blackmun's notes of the conference reflect, however, Rehnquist saw Sullivan as "only tangential" relevance. In Rehnquist's view, the jury had found that this was a "parody" that had made "no factual assertion" and therefore resulted in "no damage" because the "First Amendment protects cartoon[s] and parody." Brennan's prepared statement, on which he had come increasingly to rely when speaking in conference, indicates that, although he agreed with Rehnquist about the proper result and with much of his reasoning, he differed in one significant respect. As he wrote at the time:

"...this case is squarely controlled by _New York Times v. Sullivan_. The point of _New York Times_ is that since false speech has little value, we will permit libel suits to proceed, but only when the plaintiff can demonstrate that the false speech was made with "actual malice." The speech in question here could not have reasonably been understood to constitute a statement of fact. There is an unappealed jury finding holding as much. The advertisement at issue was, at worst, tasteless hyperbole. I would nevertheless find it protected by the First Amendment. If we allow this suit to proceed, I fear that every political cartoon and every parody could be scrutinized by a jury for a determination of the motive behind it. The chilling effect would be intolerable."

As had by this time become routine, Justice White was not moved by Brennan's analysis. He began his comments at conference, according to Brennan's and Blackmun's notes, by asserting that Sullivan "has nothing to do with" this case, which was "not a libel case." For White, the "issue is whether these statements are actionable" and, he argued, "this is so false that no one would believe it." Justice Stevens, again according to both Brennan's and Blackmun's notes, agreed with Rehnquist and White that "Sullivan doesn't speak to this issue."

Rehnquist assigned the opinion to himself and circulated a draft toward the end of January 1988. As the final version indicates, it relied, despite his comments at the conference, largely on Sullivan and expressly reaffirmed both it and its reasoning. Shortly thereafter, Brennan wrote to Rehnquist to announce that he would "enthusiastically join your splendid opinion."

Brennan did, however, offer "one suggestion," but emphasized that "whether or not you accept it, my join stands." Specifically, Brennan was concerned that the statement in Rehnquist's opinion that, "while such bad motive may be deemed controlling for purposes of tort liability in dealings between one private individual and another, we think the First Amendment prohibits such a result in the area of public debate," might "be read as suggesting that bad motive can be a ground for recovery in speech directed against private individuals." Accordingly, Brennan suggested that such an "inference" might "be avoided if the sentence were worded something like the following: "Thus, at least in the area of public debate, we think the First..."
Amendment prohibits the imposition of tort liability on the basis of the speaker's bad motive."

Rehnquist responded the next day and pronounced himself "perfectly willing to try to rephrase." As an alternative to Brennan's formulation, Rehnquist proposed changing the sentence to read, "Thus, while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result when we deal with public debate about public figures." That same day, Brennan informed Rehnquist that his "suggested revision in lieu of my proposal is entirely agreeable. Thank you very much for considering my suggestion." The following day, January 27, White effectively conceded defeat on behalf of Milkovich, a local high school wrestling coach, during a match that had something of a tortured history in the lower courts, including previous petitions for review to the Supreme Court at other stages of the proceeding in one or another of the cases. On this occasion, the issue presented was whether the columnist's statements were protected by the First Amendment as the expression of his "opinion." That notion, i.e., that the First Amendment provided absolute protection to "opinions," had been embraced by a host of lower state and federal courts on the basis of a passage that Justice Powell had included in his opinion in Gertz:

" lied " after "having given his solemn oath to tell the truth," when he denied personal involvement in inciting the crowd, during testimony about the incident he gave before a high school athletic association investigating the incident. The columnist had been present at the match.

The case, as well as a related defamation action brought by another school official mentioned in the column, had something of a tortured history in the lower courts, including previous petitions for review to the Supreme Court at other stages of the proceedings in one or another of the cases. On this occasion, the issue presented was whether the columnist's statements were protected by the First Amendment as the expression of his "opinion." That notion, i.e., that the First Amendment provided absolute protection to "opinions," had been embraced by a host of lower state and federal courts on the basis of a passage that Justice Powell had included in his opinion in Gertz:

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

Milkovich v. Lorain Journal Co.
The final defamation decision in which Brennan participated as a Supreme Court Justice was Milkovich v. Lorain Journal Co., a case that, as his term history recounts, "was heard largely through the Chief Justice's efforts." Although that was undoubtedly the case, the Court's disposition of Milkovich speaks, one final time, to Brennan's enduring influence on the body of constitutional law he had crafted in Sullivan.

In Milkovich, a sports columnist for an Ohio newspaper had written a critical appraisal of the conduct of Milkovich, a local high school wrestling coach, during a match that had concluded in a brawl between fans of the two competing schools. According to the columnist, Milkovich had said " lied " after "having given his solemn oath to tell the truth," when he denied personal involvement in inciting the crowd, during testimony about the incident he gave before a high school athletic association investigating the incident. The columnist had been present at the match.

The case, as well as a related defamation action brought by another school official mentioned in the column, had something of a tortured history in the lower courts, including previous petitions for review to the Supreme Court at other stages of the proceeding in one or another of the cases. On this occasion, the issue presented was whether the columnist's statements were protected by the First Amendment as the expression of his "opinion." That notion, i.e., that the First Amendment provided absolute protection to "opinions," had been embraced by a host of lower state and federal courts on the basis of a passage that Justice Powell had included in his opinion in Gertz:

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

As Brennan noted in his term history, the lower courts had established elaborate tests that "addressed the question of how to distinguish statements of opinion from statements of fact" with one, articulated by the D.C. Circuit in a case called Olman v. Evans, having become "ubiquitous." The Olman test looked at four factors to determine whether the statement at issue, considered in the context of both (1) the language of the publication itself and (2) the broader societal setting in which it was disseminated, constituted (3) a verifiable statement that would (4) be understood by a reasonable reader to have been intended as such.

The Supreme Court, however, had never embraced such a formulation, despite several opportunities, and its failure to address the issue had long stuck in Rehnquist's craw. As Brennan noted in his term history, "[the Chief Justice had twice written dissents from denial of certiorari in such cases." In Milkovich itself, Rehnquist asked for the latest certiorari petition to be relisted and circulated a dissent from what he assumed would be another denial on January 18, 1990, the day before it was scheduled to be taken up at conference. In it, taking direct aim at Powell's comments in Gertz, Rehnquist complained that "isolated passages from opinions of this Court sometimes take on lives of their own when repeatedly invoked out of context by other courts." He reiterated his view, previously expressed in a similar dissent from a denial of certiorari in Olman, that this "dictum from Gertz" was "merely a reiteration of the classical view that there is 'no such thing as a false idea' in the political sense, and that the test of truth for political ideas is indeed the marketplace and not the courtroom." Turning to the Ohio court's application of the Olman factors, Rehnquist was particularly blunt:

The notion that an accusation of perjury is less a factual assertion when it appears on the sports page than when it appears on some other page in the newspaper is bereft of rational justification. I am likewise at a loss to comprehend how a perceived bias on the part of the speaker transforms into "opinion" an inescapably factual assertion that someone lied under oath. . . . It is not clear whether the Gertz dictum or the increasingly ubiquitous Olman test . . . is the ultimate source of the aberrational results produced by this purportedly constitutional "fact-opinion" analysis. The matter, in any event, is plainly deserving of consideration by the Court.

The next day, as the Court prepared to gather for conference, Justice Kennedy, the newly minted inhabitant of Powell's seat, wrote to Rehnquist.
that he "would be pleased to join your dissent from the failure to grant certiorari." Agreeing with Rehnquist, to a point, Brennan explained that his "approach to this question is as follows: we have held that it is a constitutional requirement that the plaintiff has to prove a statement false to recover for libel." For Brennan, "[t]hat means that 'what the actual statement was' is a fact on which the defendant's constitutional right hinges." In that regard, Brennan said, "the factors discussed" in Ollman "are useful in evaluating what a reasonable reader would think he was reading." In the last analysis, Brennan asserted, "to determine how the reasonable reader would understand" published statements, "it is necessary to consider them in context."

Turning to the facts of the Milkovich case, Brennan concluded that "the reasonable reader would view this column, read as a whole, as saying: 'I wasn't there but I figure Milkovich must have lied in court to get this result.'" Still, Brennan took pains to note, "I agree with those of you who are dismayed by unfounded character assassination. But as long as it's clear to the reader that character assassination rather than solid information is what the reader is being offered, I don't think there is any call to quash public debate." Brennan's position fell largely on deaf ears, at least at the time. Aside from Justice Marshall, no other Justice purported to embrace it at conference. Justices White, O'Connor, and Scalia asserted their agreement with Rehnquist, and all said they did not think the context surrounding the allegedly defamatory falsehood made any difference. Justice Kennedy, who in later years would be viewed by many as Brennan's heir as the Court's preeminent protector of First Amendment rights, said he did not agree with the Court's decision in Hepps and believed that a libel defendant should properly bear the burden of proving that the alleged defamation at issue in a given case was true.

As he had in Falwell, Rehnquist assigned the opinion to himself and Brennan prepared for the worst, writing Marshall that he would try his hand at a dissent. When Rehnquist's first draft arrived in his chambers on May 25, however, Brennan was, as he had been in Falwell, surprised and, to a significant extent, relieved. As he recounted in his term history, "it was far narrower than either oral argument or Conference had led anyone to expect." As Brennan read Rehnquist's draft:

[Instead of holding that statements of opinion are actionable, it held that only statements of opinion that imply a statement of defamatory and false facts are actionable. On its face, this was no different than the rule most lower courts were already applying. Moreover, it appeared to apply a kind of truncated Ollman test to the statements at issue to determine whether they implied any statements of fact. The Chief looked at the]

language used, at the "general tenor" of the article, at the verifiability of the statements, and at the broader social context. The Chief, however, seemed to assume that the only statements of opinion that would not imply facts were those that were either unverifiable, evaluative statements, or else statements cast in terms of hyperbole or parody.

All six Justices who had voted with Rehnquist at conference quickly joined his opinion. That same day, Brennan indicated to the conference his intention to circulate a dissent but Brennan had decided not to sound the "death knell to protection" for expressions of opinion "that an angry, despairing dissent would ring in a 7 to 2 decision," but rather, as his term history recounted, "to write a dissent that could help shape the nature and reach of the Chief Justice's opinion by showing how the Chief's own words and analysis could be as protective of statements of opinion as the rules developed in response to the Gertz dictum."

As Brennan analyzed the situation, "given the acracy with which state and lower federal courts translated that dictum into a new protective First Amendment doctrine, there seemed a possibility that some of them might be interested in preserving that protection if they could do so consistently with Supreme Court precedent."

Although Brennan recognized that "such an approach is, of course, far from guaranteed success," he adopted it nonetheless in the opinion that he circulated on June 15. Marshall joined it the same day and, when it was announced along with Rehnquist's opinion for the Court on June 21, it represented the last opinion that Brennan would author on the Court, as the rules developed in response to the Gertz dictum.

As we know now, Brennan's final motion was paid off in spectacular fashion. The lower courts were indeed "interested" in preserving the protections inherent in the fact/opinion distinction and, guided by Brennan's opinion, they read Rehnquist's holding as doing little more than
disassociating the Gertz dictum from such protection by grounding it instead in cases like Hepps and Falwell. As a result, in the more than two decades since Milkovich, the Ollman factors have largely survived unscathed, and the lower courts routinely assess the content of allegedly defamatory statements, in the context in which they were published, to determine, as a matter of law, whether they constitute factual assertions on which a potentially costly defamation action can properly be premised. Had he lived to see it, Brennan might have taken some extra satisfaction in the fact that such protection had in fact thrived after being unmoored from Powell’s language in Gertz, the case in which he had ostensibly lost his ability to influence the constitutional law of defamation.

Endnotes

2. 379 U.S. 64 (1964).

11. Garrison was district attorney of Orleans Parish, Louisiana, from 1961 to 1973. In 1966, he launched a controversial investigation into what he suggested was a conspiracy to assassinate President Kennedy in 1963 that he claimed involved the Central Intelligence Agency and anti-Castro Cuban ex-patriates. He brought criminal charges for conspiracy to assassinate the president against a New Orleans businessman, Clay Shaw, but Shaw was acquitted by a jury in 1969. Garrison became a focal point for the Oliver Stone film J.F.K., released in 1991 with actor Kevin Costner playing Garrison.
17. Id. at 9 (quoting James Madison, Speech in Congress on “Self-Created Societies” (Nov. 27, 1794)).
18. Id.
19. Id. at 10.
20. Id. at 14.
21. Id.
22. Id. at 16.
24. Id.
25. Id. at 2.
26. Id.
30. Id. at 7.
33. Id.
34. Id.
37. 388 U.S. 130 (1967).
38. 403 U.S. 29 (1971).
42. Rosenbloom, 403 U.S. at 29.
45. Conference Notes No. 72-617, supra note 44 (Powell, J.).
46. Conference Notes No. 72-617, supra note 44 (Blackmun, J.).
47. Conference Notes No. 72-617, supra note 44 (Powell, J.).
48. See Gertz, 418 U.S. at 354 (Burger, J., dissenting); id. at 369 (White, J., dissenting); id. at 355 (Douglas, J., dissenting); id. at 361 (Brennan, J., dissenting).
50. Gertz, 418 U.S. at 334 (asserting the actual malice standard applies to public figures and to awards of punitive and presumed damages); id. at 363 (holding that more expansive “public concern” test is rejected in private figure cases); id. at 347 (holding that a no liability without fault standard applies in private figure cases).
51. Letter from Chief Justice William Rehnquist to Justice Lewis Powell, Supreme Court of the United States (Feb. 20, 1974) (on file with the Hoover Institution Archives).
52. Id.
53. Id.
54. Letter from Justice Lewis Powell to Chief Justice William Rehnquist, Supreme Court of the United States (Feb. 22, 1974) (on file with the Hoover Institution Archives).
55. Gertz, 418 U.S. at 399–400 (White, J., dissenting) (footnote omitted) (citations omitted).
56. Id. at 362–63 (Brennan, J., dissenting) (alteration in original) (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971)).
60. Conference Notes No. 86-1278, supra note 59 (Brennan, J.); Conference Notes No. 86-1278, supra note 59 (Blackmun, J.); Conference Notes No. 86-1278, supra note 59 (Blackmun, J.).

63. See Conference Notes No. 86-1278, supra note 59 (Brennan, J.); Conference Notes No. 86-1278, supra note 59 (Blackmun, J.).

64. Conference Notes No. 86-1278, supra note 59 (Brennan, J.); Conference Notes No. 86-1278, supra note 59 (Blackmun, J.).

65. Conference Notes No. 86-1278, supra note 59 (Brennan, J.); Conference Notes No. 86-1278, supra note 59 (Blackmun, J.).


68. Id.

69. Id.

70. Id.


72. Id.


76. Milkovich, 497 U.S. at 4.


78. 750 F.2d 970 (D.C. Cir. 1984).

79. Id. at 979.

80. Brennan, supra note 75, at 81.


82. Id.

83. Id. at 5.


87. Id.

88. Id.

89. Id.

90. Id.

91. Id.

92. Id.

93. Id.

94. Id.

95. Brennan, supra note 75, at 81.

96. Conference Notes No. 89-645, supra note 87 (Brennan, J.).

97. Id.


99. Brennan, supra note 75, at 82.

100. Id. at 82-83.


102. Brennan, supra note 75, at 83.

103. Id.

104. Id.

105. See generally Partington v. Bugliosi, 56 F.3d 1147 (9th Cir. 1995); Moldea v. N.Y Times Co., 22 F.3d 310 (D.C. Cir. 1994); Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724 (1st Cir. 1992).