"WE EXPRESS NO VIEW ON THIS ISSUE": THE STANDARD OF PROOF FOR THE ELEMENT OF FALSITY IN A NEW YORK PUBLIC OFFICIAL/FIGURE DEFAMATION ACTION

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An individual's ability to protect his reputation and good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[1] Defamation law serves an integral peacekeeping function within the state because it provides an avenue for members of society to vindicate the harm caused to their public identity.[2] The ancient common law actions of libel and slander emerged in the 17th century[3] and were "designed to effectuate society's 'pervasive and strong interest in preventing and redressing attacks upon reputation.' "[4]

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[1] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

[2] *See id.*

[3] *See* VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID E. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS CASES AND MATERIALS 829 (11th ed. 2005). "Libel became identified with printed or written defamation, while slander remained oral." *Id.*

[4] Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986) (discussing the integral role of defamation law in society).

> The protection of honor thus involves the maintenance of "the consensus of the society with regard to the order of precedence." To serve this function, defamation law must define and enforce the ascribed status of social roles. This function can be perceived in the early common law, in which words that "would not be actionable in the case of a common person, yet when spoken in disgrace of . . . high and respectable characters . . . amount to an atrocious injury." The function was epitomized in the law of seditious libel,

Nevertheless, in a democratic society that values freedom of speech and freedom of the press,[5] the state must "balance [its] interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression."[6] The United States Supreme Court engaged heavily in this balancing act over the past half century[7] and produced a complex body of jurisprudence[8] that often shunted standard of proof questions in defamation claims to state and lower federal courts.[9]

In response, New York courts attempted to fill the void in the Supreme Court's general guidelines, forging a body of state law that incorporated some of these principles. As with most torts, the heart of the claim rests in its elements. In both New York and federal law, the elements of a defamation claim are dependent on the status of the plaintiff. New York law defines a

> which punished as a crime any speech "that may tend to lessen the King in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people." Seditious libel protected "not only the royal family and other dignitaries in person, but also certain groups which symbolize or represent the 'State.' "

Id. at 703–04 (citation omitted).

[5] *See* U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*; *see also* Edmond Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962) (interviewing Justice Black, who stated that for purposes of the First Amendment, "no law means no law"); Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 444, 516–18 (2004) (arguing that "[t]here is no constitutional basis for denying protection to fighting words, either alone or as a subcategory of speech claimed to be unworthy of First Amendment protection."); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 687–88, 708–23 (1996) (discussing arguments that certain values protected by the First Amendment are necessary to a healthy democracy and proposing that the tort of privacy actually strengthens these values).

[6] Post, *supra* note 4, at 691 (citation omitted).

[7] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268–78 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 146–55 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342–51 (1974); Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 755–61 (1985).

[8] *See* SCHWARTZ, KELLY & PARTLETT, *supra* note 3, at 830 (discussing how "[t]he Court has wavered and changed its position on several matters, so that a good deal of uncertainty remains as to the extent of present law and future change in it.").

[9] *See Gertz*, 418 U.S. at 347 ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."); *see also* Harte–Hanks v. Connaughton, 491 U.S. 657, 661 n.2 (1989).

public official plaintiff as a person "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs."[10] Likewise, public figure plaintiffs are "persons of pervasive power and influence who have assumed roles of special prominence in the affairs of society and those who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[11] In New York State, the basic elements of a libel claim for plaintiffs that are considered public officials or public figures are: (1) a defamatory statement; (2) referring to the plaintiff; (3) publication; (4) falsity; (5) actual malice; and (6) financial loss.[12] While these elements are clearly set out and defined, questions still remain as to their respective standards of proof.

Recently, in *DiBella v. Hopkins*,[13] the United States Court of Appeals for the Second Circuit considered the important question of whether the standard of proof for the element of falsity in a New York libel action was the traditional preponderance of the evidence standard or the more stringent requirement of clear and convincing proof.[14] Predicting that the New York Court of Appeals would follow the more rigorous standard of clear and convincing proof,[15] the Second Circuit cast even greater uncertainty as to the proper standard of proof for falsity in New York defamation law.[16] The court's decision prompts both the student and the scholar to further examine

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[10] N.Y. PATTERN JURY INSTRUCTIONS: CIVIL [hereinafter PJI] 3:23 (2006) (quoting Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)).

[11] *Id.* (citations omitted).

[12] *Id.*

[13] 403 F.3d 102 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 428 (2005).

[14] *See id.* at 111. It is settled law that a New York civil claimant must prove the elements of the claim by a preponderance of the evidence. *See, e.g.*, *In re* Sherman, 227 N.Y. 350, 353, 125 N.E. 546, 546 (1919); Ward v. N.Y. Life Ins. Co., 225 N.Y. 314, 322, 122 N.E. 207, 210 (1919); McKeon v. Van Slyck, 223 N.Y. 392, 397, 119 N.E. 851, 852 (1918); Roberge v. Bonner, 185 N.Y. 265, 268, 77 N.E. 1023, 1023 (1906) (per curiam).

[15] *See Dibella*, 403 F.3d at 111. The Second Circuit had to predict how the New York Court of Appeals would rule on the issue because it declined to certify the question to the state court. "We have considered and rejected the necessity of certifying this question of state law to the New York Court of Appeals." *Id.*

[16] *See id.* at 113.

this area of law and the policy decisions that shape this crucial element in an action for libel.

This Comment seeks to clarify the standard of proof for the element of falsity in a New York public official/figure libel claim. Part I will provide an overview of the United States Supreme Court's treatment of defamation law and the constitutional implications of its decisions. At the center of this body of caselaw lies the reconciliation between the First Amendment and the state's protection of the individual from defamatory statements. These cases are important because they are a roadmap to the logical evolution of defamation law and also provide the historical context of the times in which they arose. Part II will examine the underlying facts of the *DiBella* decision, and the Second Circuit's rationale for the clear and convincing standard of proof. It concludes that the Second Circuit erred in its holding. Part III asserts that the proper standard of proof for the element of falsity is a preponderance of the evidence. First, an examination of both federal law and the law of several states demonstrates widespread support for this contention. Second, a thorough analysis of New York private person defamation law is also illuminating. In cases where the New York Court of Appeals weighed First Amendment freedoms against an individual's right to defend his reputation, the same balancing act as implicated in public official/figure cases, the court chose the preponderance standard for other key elements in a libel action.

I. CATCHING THE WIND: THE ELUSIVE DEVELOPMENT OF THE FIRST AMENDMENT, DEFAMATION LAW, AND THE ELEMENT OF FALSITY

A. *Public Officials/Figures*

At old common law, libel and slander were strict liability torts.[17] That is, even if a newspaper published a defamatory statement without knowledge of the statement's falsity, the publication could be found responsible for libeling the subject of the article.[18] In *Cassidy v. Daily Mirror Newspaper Ltd.*,[19] the

[17] *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 985 (3d ed. 2005).

[18] *See id.* at 968.

[19] [1929] 2 K.B. 331.

Daily Mirror, an English publication, announced that Mr. Cassidy proposed to a woman whose photograph ran in the paper.[20] Prior to publication, the newspaper failed to discover that Mr. Cassidy was already married.[21] Although not yet divorced from his legal wife, Mr. Cassidy and his fiancé permitted the paper to publish an article about their engagement along with the accompanying photograph.[22] Shortly thereafter, the estranged Mrs. Cassidy sued the paper alleging libel on the grounds that the Mirror defamed her character.[23] Mrs. Cassidy offered as evidence the testimony of her "acquaintances," who testified "that they inferred from the article that Mrs. Cassidy was not in fact married to Cassidy, with whom she was living."[24] Under the common law regime, the paper could have asserted truth as an affirmative defense,[25] but, for reasons that are unclear, the paper failed to carry this burden and Mrs. Cassidy prevailed.[26] Today, Mrs. Cassidy would almost never be able to prevail in an American court. Amidst much controversy,[27] the United States Supreme Court has revised the state of American

[20] JOHNSON & GUNN, *supra* note 17, at 968.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 969.

[24] *Id.*

[25] *See id.* at 971. "It has long been customary for the plaintiff to allege in his complaint that the statement is false. The common law raised a presumption of the falsity of all statements that were defamatory. As a result truth has been consistently treated as an affirmative defense, which the defendant must raise and on which he has the burden of proof." SCHWARTZ, KELLY & PARTLETT, *supra* note 3, at 841.

[26] *See* JOHNSON & GUNN, *supra* note 17, at 968–69.

[27] *See* Scott M. Matheson, Jr., *Procedure in Pubic Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 219 n.12 (1987); *see also, e.g.*, David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 863–64 (1986) (proposing a declaratory remedy to streamline defamation actions); Dale M. Cendali, *Of Things To Come—The Actual Impact of* Herbert v. Lando *and a Proposed National Correction Statute*, 22 HARV. J. ON LEGIS. 441, 490–98 (1985) (supporting legislation that would promote settlement and the discovery of truth in libel actions); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 810–12 (1986) (analyzing congressional legislation proposals to streamline defamation actions and calling for a declaratory remedy approach); Marc A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 36 (1983) (arguing for legislative reform that would permit recovery of only compensatory damages for the plaintiff and attorneys' fees to any prevailing party); James H. Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U. L. REV. 375, 391–413 (1981) (calling for a "vindication action" remedy).

defamation law to the point where defamation is no longer a strict liability tort,[28] and truth is no longer an affirmative defense to be proven by the defendant.[29] Currently, even a defendant who negligently publishes a defamatory article can thwart liability in certain cases.[30] In other words, the Cassidy case would not even reach a jury.

Modern defamation law emerged from *New York Times Co. v. Sullivan*.[31] The facts of the case arose out of the Civil Rights movement and the African-American protests that put an end to Jim Crow segregation.[32] On March 29, 1960, the New York Times Company placed an advertisement in its newspaper.[33] Sponsored by sixty-four prominent American citizens under the caption "Heed Their Rising Voices,"[34] the advertisement supported The Reverend Martin Luther King, Jr. and his efforts to promote racial equality in the South.[35] The advertisement recounted that during one protest in Montgomery, Alabama, African-American students sang "My Country, 'Tis of Thee" as they rallied around the State capitol steps when in fact they sang the National Anthem.[36] The piece also described how the Montgomery Police Department surrounded Alabama State College. In actuality, they deployed nearby, and city officials did not call them to the campus in order to quell the demonstration.[37] The article also claimed that Dr. King had been arrested seven times when in fact he was arrested only four, incorrectly stated he had been charged with a felony although it was actually a misdemeanor, and falsely asserted that the local police assisted white reactionaries in the bombing of King's home.[38] Finally, Dr. King "claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom,"

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[28] *See* JOHNSON & GUNN, *supra* note 17, at 985.

[29] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80, 285–86 (holding that the burden is on the public official-plaintiff to prove actual malice by clear and convincing evidence and the falsity of the alleged defamatory statement).

[30] *See* JOHNSON & GUNN, *supra* note 17, at 985.

[31] 376 U.S. 254 (1964).

[32] *See* JOHNSON & GUNN, *supra* note 17, at 986.

[33] Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 786 (1986).

[34] *N.Y. Times Co.*, 376 U.S. at 256.

[35] *See* JOHNSON & GUNN, *supra* note 17, at 986.

[36] *N.Y. Times Co.*, 376 U.S. at 257–59.

[37] *Id.* at 259.

[38] *See* Epstein, *supra* note 33, at 787.

while the arresting officer "denied that there was such an assault."[39]

The plaintiff who brought the original state defamation claim, L.B. Sullivan, was one of three elected Montgomery City Commissioners.[40] In his official capacity, Sullivan headed the local police and fire departments, the Department of Cemetery, and the Department of Scales.[41] Although the advertisement did not mention Sullivan by name, and most of the detailed events occurred prior to his assumption of power, the basis of his claim rested on the assertion that false and defamatory statements concerning the Montgomery Police Department would lead readers to implicate him in the department's supposed malfeasance.[42]

In November, 1960, the case was tried before the Circuit Court of Montgomery County,[43] in a proceeding pervaded with racial tension.[44] Jurors were especially intimidated when Montgomery newspapers published their names and pictures.[45] After a three-day trial, the jury returned a verdict of $500,000 in favor of the plaintiff, the full amount requested in the original complaint.[46] The Alabama Supreme Court affirmed the decision,[47] holding that although Sullivan was not explicitly mentioned in the article, the New York Times could still be held accountable for libel.[48] According to the Alabama court's rationale, "it [was] common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner."[49] The court inferred from Montgomery's

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[39] *N.Y. Times Co.*, 376 U.S. at 259.

[40] *See id.* at 256.

[41] *See* Epstein, *supra* note 33, at 787.

[42] *Id.*

[43] *N.Y. Times Co.*, 376 U.S. at 256.

[44] *See* JOHNSON & GUNN, *supra* note 17, at 986. The Circuit Court judge constantly referred to "white man's justice," while plaintiff's counsel, on several occasions, referred to African-Americans as "nigger[s]." *Id.*

[45] *See id.*

[46] *See id.*

[47] N.Y. Times Co. v. Sullivan, 273 Ala. 656 (1962), *rev'd*, 376 U.S. 254 (1962).

[48] *See id.* at 674.

[49] *Id.*

governmental hierarchy[50] that, "[i]n measuring the performance or deficiencies of such groups [i.e., police and firemen], praise or criticism is usually attached to the official in complete control of the body."[51] If upheld, the jury award would have posed an insurmountable burden on the New York Times because "additional suits by other public officials had already been filed throughout Alabama."[52] The implications for the First Amendment were dire.[53]

The United States Supreme Court questioned the Alabama court's conclusions of law and granted certiorari.[54] In an opinion authored by Justice William Brennan,[55] the Court framed the issue of the case in constitutional dimensions. The Court was asked to decide "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."[56] The decision "rendered obsolete hundreds of years of legal development and much of the law of libel in every state."[57] The Court held that Alabama defamation law failed to provide proper constitutional safeguards for the freedom of speech that both the First and Fourteenth Amendments require when a libel claim is "brought by a public official against critics of his official conduct."[58] This holding rendered Sullivan's trial evidence "constitutionally insufficient to support the judgment" of the jury.[59]

In its opinion, the Court initially laid down fundamental premises under which its analysis would proceed. Justice Brennan's opinion clearly stated that while the Constitution does

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[50] *See id.* (citing 1931 Ala. Laws 30).

[51] *Id.* at 674–75.

[52] JOHNSON & GUNN, *supra* note 17, at 986.

[53] *See N.Y. Times Co.*, 376 U.S. at 264. "We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." *Id.*

[54] *See* N.Y. Times Co. v. Sullivan, 371 U.S. 946 (1963).

[55] *See N.Y. Times Co.*, 376 U.S. at 256.

[56] *Id.*

[57] JOHNSON & GUNN, *supra* note 17, at 986.

[58] *N.Y. Times Co.*, 376 U.S. at 264. As the Court recognized in a footnote to the case, the Fourteenth Amendment incorporated the First Amendment and made it applicable to the states. *See id.* at 265 n.4.

[59] *Id.* at 265.

not afford protection to libelous statements,[60] the countervailing considerations of an open democracy require that public debate on important and pressing issues "be uninhibited, robust, and wide-open."[61] At times, such considerations may require that discourse "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[62] While the Court conceded that in the realm of vociferous political deliberation, the pleader "resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement,"[63] it believed that the false or mistaken statement "is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[64]

The Court then proceeded to enumerate several constitutional mechanisms that would increase the burden on libel plaintiffs who were deemed public officials. First, the Court maintained that the constitutional guarantees of freedom of the press and freedom of speech require that a public official prove "actual malice" in order to recover damages in a defamation action stemming from his official conduct.[65] The Court defined the actual malice requirement as knowledge that the defamatory statement "was false or [made] with reckless disregard of whether it was false or not."[66] The majority opinion also provided that this crucial element be proven by convincing clarity in order for a jury to find a defendant liable.[67] Second, the Court struck down the common law requirement that the defendant prove the affirmative defense of truth in a public official defamation claim.[68] Reasoning that self-censorship would result from a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount,"[69] the Court deemed such a rule to

[60] *See id.* at 268.
[61] *Id.* at 270.
[62] *Id.*
[63] *Id.* at 271.
[64] *Id.* at 271–72.
[65] *See id.* at 279–80.
[66] *Id.* at 280.
[67] *See id.* at 285–86.
[68] *See id.* at 279–80.
[69] *Id.* at 279.

contravene the First Amendment.[70] Consequently, a public official plaintiff in a defamation action would be charged with proving the falsity of a libelous statement. Finally, the Court applied these rules to the facts before them and found that the proof offered by Sullivan against the New York Times "would not constitutionally sustain the judgment for respondent [Sullivan] under the proper rule of law."[71] Sullivan failed to prove that the Times acted with actual malice[72] and he could not establish that the article was "of and concerning" his person, a common law element.[73]

Although the Court in *New York Times* limited its holding and reasoning to public official plaintiffs, "the underlying rationale paved the way for application of the 'actual malice' standard to a broader class of plaintiffs," namely, public figures.[74] In *Curtis Publishing Company v. Butts*,[75] the Supreme Court extended the *New York Times* actual malice requirement to defamation actions concerning public figures.[76] In *Curtis*, a 1962 Saturday Evening Post article accused the respondent, Wally Butts, of conspiring to fix the results of a University of Georgia football game played against the University of Alabama.[77] Butts was the athletic director for the University of Georgia and held the reigns of its entire athletic program.[78] Since retiring as the football team's head coach, Butts entertained several offers to coach professionally.[79] In fact, at the time of the article's publication, he "maintained an interest in coaching and was negotiating for a position with a professional team."[80] The article, entitled "The Story of a College Football Fix," recounted how an Atlanta insurance salesman overheard Butts give

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[70] *See id.*

[71] *Id.* at 286.

[72] *See id.* at 286–88.

[73] *See id.* at 288. The "of and concerning" element is analogous to the element "referring to the plaintiff." *See* PJI 3:23 (2006).

[74] Andrew J. Simons & Kenneth A. Schulman, *Defamation of Public Figures and Private Persons:* Times v. Sullivan *Revisited*, 405 N.Y.S.2d No. 5 27, 28 (1978) (printed in advance sheet only).

[75] 388 U.S. 130 (1967).

[76] *See id.* at 164.

[77] *See id.* at 135.

[78] *See id.*

[79] *See* Curtis Publ'g Co. v. Butts, 351 F.2d 702, 708 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967).

[80] *Curtis Publ'g Co.*, 388 U.S. at 136.

Georgia's playbook to Paul Bryant, head coach for the University of Alabama football team.[81] It also implied that Johnny Griffith, the then-head coach of the Georgia football team, forced Butts's resignation upon learning of the allegations.[82] Butts eventually brought a diversity suit for libel, claiming five million dollars each in both punitive and compensatory damages.[83]

At trial, evidence seemed to contradict some of the basic premises underlying the piece—the accuracy of the overheard conversation, the article's characterization of the game, and the Georgia players' statements about Alabama's fortuitous performance.[84] The trial judge instructed the jury that it could award punitive damages if it found that the Post acted with actual malice.[85] Under the common law applied in the case, actual malice was defined as " 'the notion of ill will, spite, hatred and an intent to injure one . . . a wanton or reckless indifference or culpable negligence with regard to the rights of others.' "[86] The trial judge, however, never instructed the jury on the United States Supreme Court's definition of actual malice because the trial occurred before the Court's ruling in the *New York Times* case.[87] Soon after the jury found for Butts, the Court handed down its decision in *New York Times*.[88] When Curtis Publishing's ("Curtis") attorneys moved for a new trial, the district court judge refused.[89] Distinguishing the facts of the case from *New York Times*, the district court judge held that the *New York Times* decision was inapplicable because it applied exclusively to public officials.[90] Alternatively, the judge also contended that the evidence offered at trial supported a finding of actual malice as defined in *New York Times*.[91] On appeal to the Fifth Circuit Court of Appeals, a three-judge panel affirmed the lower court in a 2-1 vote.[92] The Fifth Circuit reasoned that

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[81] *See id.*
[82] *See id.* at 136–37.
[83] *See id.* at 137.
[84] *See id.*
[85] *See id.* at 138.
[86] *Id.* at 138 n.3 (quoting from the trial court's jury charge).
[87] *See id.* at 137.
[88] *See id.* at 138.
[89] *See id.*
[90] *See id.* at 138–39.
[91] *See id.* at 139.
[92] Curtis Publ'g Co. v. Butts, 351 F.2d 702, 720 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967).

the defendant, Curtis, waived any constitutional defenses arising out of the *New York Times* case because its failure to raise the issue at trial "amounted to 'an intentional relinquishment or abandonment of a known right or privilege.' "[93] The dissenter on the panel, Judge Rives, argued that Curtis did not waive its right to a constitutional defense[94] and concluded that the lower court erred when it charged the jury with the wrong definition of actual malice.[95]

The United States Supreme Court granted certiorari and affirmed the decision of the panel's majority.[96] A plurality of the Court sided with Chief Justice Warren's concurring opinion, which held that the *New York Times* actual malice standard must be applied to public figures.[97] The concurrence reasoned that an arbitrary differentiation in the standards applied to public officials and public figures would "have no basis in law, logic, or First Amendment policy."[98] The Chief Justice feared that treating public officials and public figures differently would confuse juries and lead to improper verdicts.[99] More importantly, Warren predicted that the increasing influence of private sector interests in the formulation of policy decisions and economic planning would make it increasingly difficult for the courts to discern who constituted a public official or figure.[100] As the Chief Justice stated, "[A]lthough [public figures] are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society."[101]

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[93] *See id.* at 711 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *overruled in part by* Edwards v. Arizona, 451 U.S. 477, 482 (1981) (stating that a waiver "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege")).

[94] *See id.* at 723–24 (Rives, J., dissenting). Judge Rives did not "think [that] the defendant may be said to have waived by 'silence' a constitutional right not enunciated at the time; it was not even enunciated by the counsel who petitioned for certiorari in the New York Times Co. decision." *Id.* at 723–24.

[95] *See id.* at 723.

[96] *Curtis Publ'g Co.*, 388 U.S. at 140.

[97] *See id.* at 164 (Warren, C.J., concurring).

[98] *Id.* at 163. Justice Harlan iterated that public figures did not have to prove actual malice. *See also id.* at 155. Such persons could "recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.*

[99] *See id.* at 163.

[100] *See id.* at 163–64.

[101] *Id.* at 164.

Consequently, their quasi-public roles in society create an unbridled power that can only be checked by the press.[102] The *New York Times* standard accomplished this goal and provided a practical approach[103] that balanced the "proper degree [of] legitimate interests traditionally protected by the law of defamation."[104]

B. Private Persons

The dominance of the actual malice standard in American defamation law appeared to reach its pinnacle when the Court held that it applied to defamatory statements concerning private individuals on matters of public concern.[105] In *Rosenbloom v. Metromedia, Inc.*,[106] after the police arrested petitioner Rosenbloom for possession of obscene material, the respondent radio station broadcast a news report stating that he was a "smut peddler."[107] The trial court acquitted Rosenbloom of the charges after it determined that the materials were not obscene.[108] He then brought a libel claim against the radio station.[109] Writing for the Court once again, Justice Brennan required that the plaintiff prove actual malice because Rosenbloom's activities constituted a public matter, irrespective of his stature as a private person.[110] "The community has a vital interest in the proper enforcement of its criminal laws," stated Justice Brennan, "particularly in an area such as obscenity[,] where a number of highly important values are potentially in conflict."[111] As a result, the Court "extend[ed] constitutional protection to all discussion and communication involving matters of public or

[102] *See id.* "The fact that [public figures] are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest [of the press], since it means that public opinion may be the only instrument by which society can attempt to influence their conduct." *Id.*

[103] *See id.* "It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation." *Id.*

[104] *Id.*

[105] *See* Simons & Schulman, *supra* note 74, at 28.

[106] 403 U.S. 29 (1971).

[107] Simons & Schulman, *supra* note 74, at 28.

[108] *Id.* at 28.

[109] *Id.* "A libel is a writing or broadcast which tends to expose the plaintiff to public hatred, contempt, ridicule or disgrace." PJI 3:23 (2006).

[110] *Rosenbloom*, 403 U.S. at 43–44.

[111] *Id.* at 43.

general concern, without regard to whether the persons involved are famous or anonymous."[112] The *Rosenbloom* Court over-extended the reach of the actual malice standard. By affording even greater constitutional protections to the media at the expense of private persons' reputations, the Court shifted its "emphasis from the status of the plaintiff (the public official in *Times*) to the nature of the underlying issue involved (public interest in criminal activity in *Rosenbloom*)."[113] The Court's ruling unabashedly amalgamated the public official, the public figure, and the private person involved in a matter of public concern.[114] All three classes of plaintiffs would now have to incorporate the element of actual malice in their standard pleadings.[115]

Realizing that they applied the actual malice rule to cases that the *New York Times* Court would have found unimaginable, the justices overruled *Rosenbloom* in *Gertz v. Robert Welch, Inc.*[116] The Court held that a private person involved in a matter of public interest would no longer be required to prove actual malice.[117] The *Gertz* case arose when Elmer Gertz was retained as a lawyer for a family whose son was killed by a Chicago police officer.[118] Although the police officer had been convicted of second degree murder, the youth's family hired Gertz to pursue a civil action against the officer.[119] The respondent published a magazine entitled "American Opinion," which purported that there was a communist conspiracy to besmirch and destroy American law enforcement.[120] Respondent's magazine ran a piece claiming that Gertz played an integral role in this communist conspiracy.[121] The article called Gertz a "leninist" and "Communist-fronter" and accused him, along with several communist organizations, of planning the riotous demonstrations at the 1968 Democratic Convention in Chicago.[122] The managing

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[112] *Id.* at 44.
[113] Simons & Schulman, *supra* note 74, at 28.
[114] *Id.*
[115] *Id.*
[116] 418 U.S. 323 (1974).
[117] *Id.* at 347–48.
[118] *Id.* at 325.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 326.
[122] *Id.*

editor of the publication made no effort to investigate the facts asserted in the piece and ran the story despite its inaccuracies.[123]

Gertz then filed a diversity defamation action, claiming that respondent "injured his reputation as a lawyer and a citizen."[124] After the jury returned a $50,000 verdict in Gertz's favor, the district court judge issued a judgment notwithstanding the verdict for the defendant-respondent.[125] The district judge concluded that the *New York Times* standard applied to private individuals involved in matters of public interest.[126] When Gertz appealed to the Seventh Circuit Court of Appeals, the appellate court affirmed. Although they doubted the lower court's characterization of Gertz as a private person,[127] the judges believed that the Court's decision in *Rosenbloom* required them to apply the *New York Times* standard to both public officials/public figures and private persons involved in matters of public concern.[128]

The United States Supreme Court disagreed and reversed the determination of the Seventh Circuit Court of Appeals. It held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[129] Concerned that private persons would be unable to marshal the same resources as public officials/figures in combating the validity of injurious defamatory statements, the Court believed that the state had a far greater interest in protecting the character of private persons.[130] Its decision clearly pronounced that "free press and free speech guarantees [do] not outweigh the private individual's right to collect damages for an injured reputation."[131]

Gertz clarified two main propositions. First, as already stated in *New York Times*, absolute liability for defamatory statements was per se unconstitutional. Second, state courts

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[123] *Id.* at 327.
[124] *Id.*
[125] *Id.* at 329.
[126] Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 999 (N.D. Ill. 1970).
[127] *See* Gertz v. Robert Welch, Inc., 471 F.2d 801, 805 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).
[128] *See id.* at 805.
[129] *Gertz*, 418 U.S. at 347.
[130] *See* SIMONS & SCHULMAN, *supra* note 74, at 29.
[131] *Id.* (alteration in original).

would be permitted to use the actual malice standard for private persons involved in matters of public concern or a less culpable standard as long as "the private plaintiff would at least have to prove negligence or 'fault.' "[132] This discretionary authority accorded state courts the necessary breathing room to recognize "the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shield[ed] the press and broadcast media from the rigors of strict liability for defamation."[133]

While the steady line of cases from *New York Times* to *Gertz* solidified the evolving state of defamation law with regard to the element of actual malice, the Supreme Court neglected to mention the central element of falsity.[134] Since falsity must be established before actual malice can be proven,[135] the constitutional protections afforded by the actual malice standard hinge upon the element of falsity. In *Harte-Hanks v. Connaughton*,[136] the Supreme Court discussed the element of falsity but dismissively addressed the standard of proof it requires. *Harte-Hanks* focused on the issue of whether the Sixth Circuit Court of Appeals properly exercised its independent judgment when the court neglected to evaluate "the credibility of . . . the subsidiary facts underlying the jury's finding of actual malice."[137]

In reviewing the record, the Court mentioned in a footnote that the trial judge asked the jury, " 'Do you unanimously find by a preponderance of the evidence that the publication in question was false?' "[138] The Court then went on to recognize that "there is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence."[139] After citing various sources

[132] *Id.* The Court considered "fault" to be some form of culpability other than strict liability. *See Gertz*, 418 U.S. at 347.

[133] *Gertz*, 418 U.S. at 348.

[134] The Court's focus in *N.Y. Times* and its progeny concentrated on the application of the actual malice standard not the element of falsity.

[135] The legal definition of actual malice, knowledge that the defamatory statement "was false or [made] with reckless disregard of whether it was false or not," presupposes that the statement is already false. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (alteration in original).

[136] 491 U.S. 657 (1989).

[137] *Id.* at 659.

[138] *Id.* at 661 n.2.

[139] *Id.*

that support both sides in the ongoing debate, the Court simply stated, "*We express no view on this issue*."[140] The Court has since refused to consider the matter,[141] and has consistently denied certiorari in cases addressing the question.[142] Nevertheless, as a matter of New York law, the Second Circuit Court of Appeals' decision in *DiBella v. Hopkins* has brought the issue to the foreground.

II. *DIBELLA V. HOPKINS*

A. The Facts

On April 4, 2005, a three-judge panel of the Second Circuit Court of Appeals decided the case of *DiBella v. Hopkins*.[143] The facts of the case focused on several supposedly defamatory statements made by a world-championship boxer concerning the character of his promoter. Plaintiff Lou DiBella was a former executive with the cable entertainment network Home Box Office (HBO).[144] DiBella acted as a primary force in shaping the network's boxing programming, which achieved successful ratings throughout his tenure with the network.[145] Defendant Bernard Hopkins was the undisputed middleweight champion holding titles from the International Boxing Federation (IBF), the World Boxing Association (WBA), and the World Boxing Conference (WBC).[146] Around February, 2000, DiBella and Hopkins concluded an informal agreement whereby the plaintiff agreed to promote and market the defendant in the boxing entertainment industry.[147] The agreement was to take effect

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[140] *Id.* (emphasis added).

[141] The author could not locate any mention of the standard of proof for falsity in the Court's caselaw since 1989.

[142] *See* Firestone v. Time, Inc., 460 F.2d 712, 718 (5th Cir. 1972) (finding that falsity must be proven by clear and convincing evidence), *cert. denied*, 409 U.S. 875 (1972); Goldwater v. Ginzburg, 414 F.2d 324, 341–42 (2d Cir. 1969) (discussing standards of proof used in determining falsity), *cert. denied*, 396 U.S. 1049 (1970); *see also* Tavoulareas v. Piro, 817 F.2d 762, 775–76 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 870 (1987). More recently, the Court denied certiorari in *DiBella v. Hopkins*, 403 F.3d 102 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

[143] 403 F.3d 102 (2d Cir. 2005).

[144] *Id.*

[145] *See id.*

[146] *Id.*

[147] *See id.* at 107.

once plaintiff left HBO.[148] Nevertheless, defendant agreed to pay plaintiff an advance fee of $50,000 for his services while plaintiff remained at HBO.[149] Once plaintiff left the network, he began to work for Hopkins, advising him on several future bouts.[150] Eventually, plaintiff and promoter Don King arranged a middleweight tournament with the goal of unifying all the middleweight championship titles in one fighter.[151] Hopkins won the match on September 29, 2001, and became the undisputed middleweight champion of the world.[152]

The relationship between plaintiff and defendant began to deteriorate after the unification bout.[153] In several interviews with various publications and media,[154] Hopkins claimed that he bribed DiBella with $50,000 while the latter was still employed by HBO, so that the network would feature him in prime-time bouts.[155] HBO executives allegedly knew of this arrangement

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[148] *See id.*

[149] *See id.*

[150] *See id.*

[151] *See id.*

[152] *See id.*

[153] *See id.* at 107–09.

[154] *See* Ron Borges, *A Protest Lacking Punch Burns: Filing Is on Shaky Ground*, BOSTON GLOBE, Dec. 24, 2001, at D9; Bernard Fernandez, *Hopkins Faces Lawsuit*, PHILA. DAILY NEWS, Jan. 10, 2002, at 90; Steve Kim, *As the World of Bernard Hopkins Turns*, MAXBOXING.COM, Dec. 20, 2001, http://www.maxboxing.com/kim/kim122001.asp.; Interview by Rich Marotta, ESPN Radio, with Bernard Hopkins (Feb. 1, 2002).

[155] *See DiBella*, 403 F.3d at 107–09. For instance, Hopkins stated the following:

> Understand, every time I fought (the past couple of years), Lou DiBella got paid, even when he was with HBO, which is f**king wrong. What I'm saying is that the bottom line is, the Syd Vanderpool fight, should an HBO employee accept $50,000 while he's still working for HBO? . . . So if they want the cat out [of] the bag, then let's let the f**king cat out of the bag.
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> Ask HBO why an employee of their company asked me to give him $50,000? And I paid him too. Now, is that ethically right? You think Time Warner [the parent company of HBO] wants to hear about that? What I'm telling you right now is some serious, serious allegations, but these guys here try to make it seem like I'm the bad guy and Lou is probably whispering stuff around, too, probably, but he probably isn't saying anything openly. And that influence can hurt me when I get to HBO, [DiBella] being friends with the people over there.
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> . . . .
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> It was me taking out of my career before I even fought Trinidad [sic], that paid to get on a card. Was the money wired, or the checks sent prior, yeah, that was a way of not being discovered. The bottom line is, where did the $50,000 come from? It wasn't a gift. I didn't know him that well to give him $50,000. Way before he started establishing his relationship with me as far as an advisor. So what I'm saying is that every time Lou DiBella did

and did not object.[156]

In December, 2001, after learning that his former client accused him of soliciting bribes, DiBella sued Hopkins for libel in the Southern District of New York.[157] The jury predicated their verdict in favor of DiBella on one interview, but failed to find for plaintiff based on three others.[158] The jury's award to DiBella was $110,000 in compensatory damages and $500,000 in punitive damages.[159] Both plaintiff and defendant appealed to the Second Circuit Court of Appeals. DiBella claimed that the district judge erred when he instructed the jury that New York libel law required the element of falsity be proven by clear and convincing evidence.[160] Therefore, he argued that the Second Circuit panel should reverse and remand the case for a new trial based on the claims the jury rejected, and that the jury should be instructed that the proper standard of proof for falsity was preponderance of the evidence.[161]

B. *The Analysis*

The Second Circuit panel began its analysis by enumerating the five elements of a claim for libel under New York law.[162] The court then went on to hold that DiBella was a public figure because of his achievements in boxing promotion, "and the

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> something for Bernard Hopkins or played a role for Bernard Hopkins, even when he was with HBO, he got paid.
>
> . . . .
>
> I can back up every damn thing I'm saying and it's going to make certain people who are wrong run under the covers and wish I never said it. Because other people are going to ask questions and they're going to start digging.

Id. at 107–08 (quoting Kim, *supra* note 154).

[156] *See id.* at 107.

[157] *See id.* at 109.

[158] *See id.* ("The jury returned a verdict in DiBella's favor on the libel claim arising from Hopkins' interview with Steve Kim, but rejected his three other claims connected with the articles by Ron Borges and Bernard Fernandez and the radio interview with Rich Marotta.").

[159] *See id.*

[160] *See id.*

[161] *See id.*

[162] *See id.* at 110 (citing Meloff v. New York Life Ins. Co., 240 F.3d 138, 145 (2d Cir. 2001)). The appellate court listed the elements as follows: "(1) a written defamatory statement of fact regarding the plaintiff; (2) published to a third party by the defendant; (3) defendant's fault, varying in degree depending on whether plaintiff is a private or public party; (4) falsity of the defamatory statement; and (5) injury to the plaintiff." *Id.* (quoting *Meloff*, 240 F.3d at 145).

success with which he sought and obtained the public's attention by organizing and promoting boxing bouts seen by millions of HBO subscribers."[163] As a result, the appellate court concluded that DiBella would have to prove actual malice by clear and convincing evidence.[164] Speaking to the element of falsity, the three-judge panel recognized that its standard of proof was "an open question" that the United States Supreme Court left unsettled.[165] Regardless, the panel skirted the direct constitutional problem of the standard of proof for falsity by citing *Bell v. Maryland*[166] to decide the case on state law grounds.[167] The appellate court determined that "under our diversity jurisdiction, we are obligated to apply New York's standard of proof for falsity, so long as we can safely determine the federal Constitution does not require a higher standard of proof."[168]

Since the Second Circuit sat in diversity jurisdiction, the panel faced the central question of how the New York Court of Appeals would rule on this issue. Since that court never addressed the standard of proof for falsity, the panel relied on three main sources of law: (1) New York Appellate Division cases; (2) Second Circuit Court of Appeals precedent; and (3) other scholarly sources, which will be discussed in turn.[169]

1. New York Appellate Division Cases

Three of the four appellate divisions of the New York Supreme Court[170] have held that falsity must be proven by clear and convincing evidence.[171] As the Second Circuit conceded in

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[163] *Id.*

[164] *See id.*

[165] *Id.* (citing Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989)).

[166] 378 U.S. 226 (1964).

[167] *Id.* at 237.

[168] *See DiBella*, 403 F.3d at 111.

[169] *See id.* at 112.

[170] *See* N.J. Steel Corp. v. Lutin, 297 A.D.2d 557, 557–58, 747 N.Y.S.2d 89, 90 (1st Dep't 2002); Armstrong v. Simon & Schuster, Inc., 280 A.D.2d 430, 431, 721 N.Y.S.2d 340, 341 (1st Dep't 2001); Khan v. N.Y. Times Co., 269 A.D.2d 74, 76–77, 710 N.Y.S.2d 41, 43 (1st Dep't 2000); *see also* Kaplansky v. Rockaway Press, Inc., 203 A.D.2d 425, 426, 610 N.Y.S.2d 581, 582 (2d Dep't 1994); Patane v. Griffin, 164 A.D.2d 192, 195, 562 N.Y.S.2d 1005, 1008 (3d Dep't 1990).

[171] *See supra* note 170 and accompanying text.

the *DiBella* opinion, however, "[t]hese cases are not entirely persuasive."[172]

For cases representing the First Department's view, the Second Circuit cited *New Jersey Steel Corp. v. Lutin*;[173] *Armstrong v. Simon & Schuster, Inc.*;[174] and *Khan v. New York Times, Inc.*[175] In *New Jersey Steel*, the First Department reduced an award in favor of the plaintiff because it failed to demonstrate actual damages.[176] In so holding, the court only in dictum stated, "clear and convincing evidence supports the verdict finding that the offending letter . . . was false, defamatory and made with actual malice."[177] The court cited to no authority to support its proposition that falsity be proven by clear and convincing evidence.[178]

In the second case to address the issue, *Armstrong*, the trial court held that the plaintiff was a public figure because, although currently employed as a defense attorney, he held several public official positions.[179] As a result, the plaintiff had to demonstrate that the defendants publicized their defamatory statements with actual malice.[180] The First Department upheld the defendants' motion for summary judgment because the plaintiff failed to prove actual malice by clear and convincing evidence.[181] In dictum, once again, the justices stated that "plaintiff was required to prove by clear and convincing evidence that the complained of passage" was "substantially false and defamatory."[182] Yet again, the First Department cited to no authoritative support. Finally, in *Khan*, the court clearly stated that the element of falsity was not in dispute.[183] It stated in dictum that, "[w]here plaintiff is a public figure, he must prove, 'by clear and convincing evidence,' that the published material is

[172] *DiBella*, 403 F.3d at 112.
[173] 297 A.D.2d 557, 557–58, 747 N.Y.S.2d 89, 90 (1st Dep't 2002).
[174] 280 A.D.2d 430, 431, 721 N.Y.S.2d 340, 341 (1st Dep't 2001).
[175] 269 A.D.2d 74, 76–77, 710 N.Y.S.2d 41, 43 (1st Dep't 2000).
[176] *See N.J. Steel*, 297 A.D.2d at 557–58, 747 N.Y.S.2d at 90–91.
[177] *Id.* at 557–58, 747 N.Y.S.2d at 90.
[178] *See id.* at 558, 747 N.Y.S.2d at 90.
[179] *See Armstrong*, 280 A.D.2d at 431, 721 N.Y.S. at 341.
[180] *See id.* at 431, 721 N.Y.S. at 341.
[181] *See id.*, 721 N.Y.S. at 341.
[182] *Id.*, 721 N.Y.S. at 341.
[183] *See Khan*, 269 A.D.2d at 75, 710 N.Y.S.2d at 42 ("It is undisputed that two New York Times articles written by its reporter . . . were false and defamatory.").

false."[184] No citation pertaining to the standard of proof for falsity appeared after this statement.[185]

Kaplansky v. Rockaway Press, Inc.[186] presented the Second Department's contribution to the debate. The action arose when the defendant depicted plaintiff, Steven Kaplansky, a public-figure, in a defamatory light.[187] Plaintiff sued for libel and appealed the trial court's determination that he failed to prove falsity and actual malice by the requisite standard of proof.[188] Unlike the First Department cases, the Second Department addressed the issue of the standard of proof for falsity. The justices held that since plaintiff was a public figure, he "had to plead and prove by clear and convincing evidence that the words at issue were substantially false."[189] In support of their contention, the justices cited authority[190] that simply asserted "the plaintiff has the burden of proving falsity." The same cases were "silent on the standard of proof."[191]

The Third Department's position was the oldest case cited by the Second Circuit and the most ambiguous. In *Patane v. Griffin*,[192] the plaintiff, a member of the Madison County Board of Supervisors, sued residents of the county for libel when they "forwarded a letter . . . to the District Attorney requesting a full Grand Jury investigation 'to determine if there [were] any unethical dealings' in plaintiff's land acquisitions."[193] The trial court granted summary judgment to defendants, and plaintiff appealed.[194] The Third Department affirmed the lower court on the grounds that plaintiff abandoned his appeal of the summary

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[184] *Id.* at 76, 710 N.Y.S.2d at 43.

[185] *See id.* at 76–77, 710 N.Y.S.2d at 43.

[186] 203 A.D.2d 425, 610 N.Y.S.2d 581 (2d Dep't 1994).

[187] *Id.* at 426, 610 N.Y.S.2d at 582.

[188] *See* DiBella v. Hopkins, 403 F.3d 102, 113 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

[189] *Kaplansky*, 203 A.D.2d at 426, 610 N.Y.S.2d at 582.

[190] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986); Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 245, 567 N.E.2d 1270, 1275, 566 N.Y.S.2d 906, 911 (1991); Steinhilber v. Alphonse, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986); Silsdorf v. Levine, 59 N.Y.2d 8, 10, 449 N.E.2d 716, 717, 462 N.Y.S.2d 822, 823 (1983); Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 379–80, 366 N.E.2d 1299, 1305–06, 397 N.Y.S.2d 943, 950 (1977).

[191] *DiBella*, 403 F.3d at 112.

[192] 164 A.D.2d 192, 562 N.Y.S.2d 1005 (3d Dep't 1990).

[193] *Id.* at 194–95, 562 N.Y.S.2d at 1007.

[194] *See id.* at 195, 562 N.Y.S.2d at 1007–08.

judgment motion.[195] Justice Mercure, writing for the court, opined in dictum that it was well settled that a public official "must demonstrate by clear and convincing evidence that the complained of statements were made, their falsity, their defamatory meaning and that their publication by defendants was with actual malice."[196] The problem with this statement is twofold. First, the opinion cited no authority for the position that falsity must be proven by clear and convincing evidence.[197] Second, and more importantly, Justice Mercure's punctuation sheds significant doubt on whether he actually meant that falsity must be proven by clear and convincing evidence. It appears the court's statement is open to the interpretation that plaintiffs are required to prove falsity in conjunction with providing clear and convincing evidence of only actual malice. Under this construction, the *Patane* decision would have left the traditional preponderance of the evidence standard of proof intact.

2. Second Circuit Court of Appeals Precedent

The Second Circuit's caselaw also played an integral role in the panel's conclusion that clear and convincing evidence is the proper standard of proof; however, Judge Cardamone identified the weakness that even the Second Circuit's "own caselaw is somewhat unclear on this point."[198] In *Buckley v. Littell*,[199] the Second Circuit Court of Appeals held that falsity must be proven by clear and convincing evidence.[200] The case arose when Franklin H. Littell authored a book called *Wild Tongues*.[201] The book recounted a history of American political extremism from both the left and right of the political spectrum.[202] Much of the work critiqued the literature of the extreme right and included commentary on the John Birch society and William F. Buckley.[203] The defendant leveled a devastating analysis of the plaintiff's

[195] *See id.* at 198, 562 N.Y.S.2d at 1009.
[196] *Id.* at 195, 562 N.Y.S.2d at 1008.
[197] *See id.* at 195, 562 N.Y.S.2d at 1008.
[198] *See* DiBella v. Hopkins, 403 F.3d 102, 113 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 428 (2005).
[199] 539 F.2d 882 (2d Cir. 1976).
[200] *See id.* at 889–90.
[201] *See id.* at 884.
[202] *See id.*
[203] *See id.* at 884 & n.1. Both the John Birch Society and William F. Buckley are known for their right of center socio-political views. *See id.* at 884, 886. Mr. Buckley was publisher of the conservative journal The National Review. *See id.* at 885.

political views and his journalistic integrity.[204] The appeals court ruled that Buckley was a public-figure[205] and held that he had to demonstrate "with convincing clarity not only that the appellant's statements were false," but that he acted with actual malice.[206] The court cited *Gertz* and *New York Times* to support the statement, but neither case commented on the standard of proof for falsity.[207]

Even more problematic for this holding was an earlier Second Circuit case that held a contrary opinion. In *Goldwater v. Ginzburg*,[208] the Second Circuit held that the element of falsity need only be proven by a preponderance of the evidence.[209] The case reached the court when Senator Barry Goldwater sued Ralph Ginzburg and several others for publishing "false, scandalous and defamatory statements referring to and concerning plaintiff" in a publication ironically named "Fact Magazine."[210] The article claimed that American psychologists favored Lyndon Johnson to win the 1964 Presidential Election and that Goldwater had suffered from several nervous breakdowns in the past.[211] The Second Circuit held that the trial court correctly charged the jury that all elements of a defamation claim, except actual malice, had to be proven by a preponderance of the evidence.[212] In response to defendants' claim that all elements in a defamation action had to be proven by clear and convincing evidence, the author of the opinion, Judge Waterman,

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[204] *See id.* at 884 n.1. The following paragraph contained the alleged defamatory statements:

> Buckley has been caught out for misquotations (with quotation marks!) and for repeating radical right malice and rumor, but he never admits a mistake or apologizes to the victims. Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do. Reynolds won his suit, of course, but it took all of his time and resources for most of three years, and he died shortly thereafter.

Id.

[205] *See id.* at 885–86.

[206] *Id.* at 889–90.

[207] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80, 285–86 (1964) (showing the absence of the Court's discussion on the standard of proof for falsity).

[208] 414 F.2d 324 (2d Cir. 1969).

[209] *See id.* at 341.

[210] *Id.* at 327.

[211] *See id.* at 330.

[212] *See id.* at 341.

wrote, "[t]he *Times* decision changed state libel law only to the extent of requiring public officials to prove actual malice" by clear and convincing evidence.[213] All other elements of a defamation claim "need only be proved by a preponderance of the evidence—the burden of proof imposed by New York law."[214]

Did New York law significantly change in the interim years between the Second Circuit's opinion in *Goldwater* and its holding in *Buckley*? As Judge Cardamone noted, "We have not been able to identify a New York case decided between 1969 [the year of the *Goldwater* decision] and 1976 [the year of the *Buckley* decision] reflecting a change in New York law."[215] Lacking the solid support of New York or Second Circuit precedent, the panel looked to scholarly works to strengthen its decision.

3. Scholarly Sources

Relying on several scholarly works to support its position on falsity, the court first looked to New York's Civil Pattern Jury Instructions.[216] Yet the panel's reliance on the Instructions proved ill-founded because the text "incorporates the clear and convincing evidence standard in reliance" on the same New York Appellate Division cases that the Second Circuit earlier characterized as "not entirely persuasive."[217] In addition, the Pattern Jury Instructions offer only qualified support for the clear and convincing standard because they recommend a close examination of *Goldwater*.[218] Therefore, the Pattern Jury Instructions are only as accurate as their underlying authority, and as already mentioned, that authority is speculative and unfounded in law.

The court also referred to Federal Circuit Judge Robert D. Sack's treatise on defamation law.[219] According to the court's citation, Judge Sack explained that public figures "*may* have the

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213 *Id.*

214 *Id.* Although Judge Waterman cited no New York law, he could have very possibly examined the long line of precedent establishing that the traditional standard of proof for elements of a New York civil action is preponderance of the evidence. *See supra* note 14.

215 DiBella v. Hopkins, 403 F.3d 102, 113 (2005). The belabored investigation and research on the part of the author and the Second Circuit itself show that the law never changed at all.

216 *See id.* at 115 (citing PJI 3:23 (2006)).

217 *DiBella*, 403 F.3d at 112.

218 *See* PJI 3:27 cmt. (2006).

219 *DiBella*, 403 F.3d at 115.

burden not only of pleading and proving falsity, but also of establishing it 'with convincing clarity.' "[220] The judge cited to several cases that support the clear and convincing standard,[221] and the Second Circuit incorporated them into its decision.[222] The court did not, however, take notice of the scholarly authority that *unequivocally* espoused the preponderance standard. For instance, O'Malley, Grenig & Lee's Federal Jury Practice & Instructions, § 124.03, states that the standard of proof for the element of falsity in a federal jury charge is preponderance of the evidence.[223] The note to the section explains that the purpose of the instruction is to bring jury instructions into compliance with *New York Times* and *Curtis*, both of which involved public officials/figures.[224] It further provides that the instruction "sets forth the minimum plaintiff would have to establish in order to comply with the holdings of those cases."[225] New York law has never held to the contrary.

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[220] *Id.* (citing ROBERT D. SACK , SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 3.4 (3d ed. 2003) (emphasis added)).

[221] *See id.* § 3.4 n.46.

[222] *See DiBella*, 403 F.3d at 115.

[223] *See* 3 KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 124.03 (5th ed. 2000).

> Plaintiff ____'s claim consists of six essential elements as follows:
>
> One: that defendant ____ published written statements as opposed to oral statements;
>
> Two: that the written statements constituted libel as that term is defined for you in these instructions;
>
> Three: that the publication was "of and concerning" plaintiff ____;
>
> Four: that the publication was communicated to third persons;
>
> Five: that the publication was false in some material particular; and
>
> Six: that the written statements were published with actual malice, as that term is explained in these instructions.
>
> The burden is on plaintiff ____ to prove the first five of these elements by a preponderance of the evidence.
>
> The burden is stricter with regard to the sixth element—the element of actual malice. Plaintiff ____ has the burden of establishing by clear and convincing evidence that the publication was made with actual malice.
>
> If you find that plaintiff _____ has established these six elements by the standards explained here, you should find for plaintiff _____. If you find that plaintiff _____ has failed to establish any element then you should find for defendant _____.
>
> The burden of proof of each element is on plaintiff _____. Defendant _____ is not obliged to call any witnesses or introduce any evidence.

Id.

[224] *See id.*

[225] *Id.*

In a tone of judicial restraint, Judge Cardamone concluded that "it would be inappropriate for a federal court to disregard these [Appellate Division] cases based solely on the lack of authoritative support for the assertions they contain."[226] Quite the contrary, a "lack of authoritative support" is exactly the reason why the court's interpretation of the standard of proof should be rejected. Each branch of the law should be grounded by the solid root of precedent. In contrast, the Second Circuit's opinion fails to pin down any specific caselaw to support its clear and convincing standard. Instead, it wanders in the ether, grasping for a rule of law that simply does not exist.

III. SUPPORT FOR THE PREPONDERANCE STANDARD

Despite the Second Circuit's recent opinion, which largely marginalized support for the preponderance standard,[227] the law and arguments supporting such a standard would no doubt be "convincing" to the New York Court of Appeals. A closer examination of federal authority, state authority, and New York private person defamation law all provide compelling reasons for the court to adopt the preponderance standard.

A. *Federal Authority*

Federal authority plays an integral role when determining the standard of proof for falsity in New York. The Second Circuit misconstrued the clear and convincing standard, which it espoused as grounded in New York law, because it divorced this standard from the federal caselaw in *New York Times* and its progeny.[228] In actuality, the Appellate Division cases cited in *DiBella* relied on federal authority for the mistaken contention that falsity must be proven by clear and convincing evidence.[229]

[226] *DiBella*, 403 F.3d at 113.

[227] *See id.* at 114. "We acknowledge that a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence." *Id.*

[228] *See id.* at 111 ("Here, we are persuaded that state law requires clear and convincing proof of falsity, and decline therefore to address this open question in federal constitutional law.").

[229] *See* Armstrong v. Simon & Schuster, Inc., 280 A.D.2d 430, 431, 721 N.Y.S.2d 340, 341 (1st Dep't 2001) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)); *see also* Khan v. N.Y. Times Co., 269 A.D.2d 74, 76–77, 710 N.Y.S.2d 41, 43 (1st Dep't 2000) (citing Masson v. New Yorker Mag., 501 U.S. 496, 510 (1991)); Kaplansky v. Rockaway Press, Inc., 164 A.D.2d 425, 426, 610 N.Y.S.2d 581, 582 (2d Dep't 1994) (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986));

It seems that there is no independent state authority for the clear and convincing evidence standard. This contention makes sense because a plaintiff's burden of proving falsity stems from public official/figure defamation law which originated in *New York Times* and its interpretation of the federal Constitution.[230] Therefore, federal authority that endorses the preponderance standard of proof for falsity is significantly persuasive in a discussion of the New York standard.

Numerous federal authorities hold that preponderance of the evidence is the correct standard of proof for falsity. In *Rattray v. City of National City*,[231] the Ninth Circuit Court of Appeals held that the standard for proving falsity was preponderance of the evidence.[232] The plaintiff in the case, Samuel Rattray, was a National City police officer for two years.[233] Rattray, an African-American,[234] was accused of sexually harassing a female co-worker.[235] Rattray's supervisor, Captain Fowler, encouraged the female officer to tape her conversation with Rattray in order to verify the complaint.[236] After the female officer complied, Captain Fowler reviewed the recording and determined that although the conversations were inappropriate, they did not meet the requirements of actionable conduct.[237] Fowler instead counseled Rattray to stop engaging in such unprofessional conduct.[238] When Captain Fowler confronted Rattray about his actions, the officer "denied making such comments."[239] Consequently, Captain Fowler recommended that Rattray be dismissed for dishonesty, and "ultimately [The Chief of Police] decided to terminate Rattray['s employment]."[240]

Patane v. Griffin, 164 A.D.2d 192, 195, 562 N.Y.S.2d 1005, 1008 (3d Dep't 1990) (citing *N.Y. Times Co.*, 376 U.S. at 280).

[230] *See Phila. Newspapers, Inc.*, 475 U.S. at 775; *see also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964), *overruled in part by* Hancock v. Thalacker, 933 F. Supp. 1449 (N.D. Iowa 1996) (citing *N.Y. Times Co.*, 376 U.S. at 279–80).

[231] 51 F.3d 793 (9th Cir. 1994).

[232] *See id.* at 801.

[233] *See id.* at 795.

[234] *Id.* Rattray believed that his race played a significant role in his dismissal from the police force. He brought claims of "intentional discrimination under § 1983 and Title VII [of the Civil Rights Act of 1964]." *See id.* at 795–96.

[235] *See id.*

[236] *See id.* at 796.

[237] *See id.*

[238] *See id.*

[239] *Id.*

[240] *Id.*

Rattray then filed suit under various federal civil rights law along with a state claim for invasion of privacy.[241] After the suit was filed, Chief of Police Terry Hart commented to a local newspaper that "he could not discuss the specific violation made by Rattray, but that the department [had] 'clear, convincing and strong information and evidence about something he did and he lied about it.' "[242] Thereafter, Rattray amended his complaint to include a defamation claim based on the interview.[243]

After a jury trial, Rattray was awarded $300,000 on his defamation claim.[244] Defendants then moved for a new trial, and the district judge granted the motion on the grounds that the verdict contravened "the great weight of the evidence."[245] At the initiation of the second trial, the district judge ruled that Rattray's defamation action would have to include clear and convincing proof of the falsity of Chief Hart's press statement.[246] When Rattray responded that he would be unable to meet this requirement, the lower court granted summary judgment in favor of the defendants and Rattray appealed.[247]

At the outset of the Ninth Circuit panel's decision, the judges concluded that the state of the law as to falsity required them to follow the Second Circuit's decision in *Goldwater*, not *Buckley*.[248] "According to established practice," the court held, "all elements of a defamation claim, with the exception of actual malice in the case of a public official, *must* be proved by a preponderance of the evidence."[249] The appellate court cited to Dewitt, Blackmar & Wolff's Federal Jury Practice and Instructions to support their holding.[250] The Ninth Circuit judges reasoned that the "*New York Times* decision effectively held that the requirement that allegedly defamed public officials prove malice by clear and convincing evidence, when added to the preexisting common law

[241] *See id.*
[242] *Id.*
[243] *See id.*
[244] *See id.*
[245] *Id.*
[246] *See id.*
[247] *See id.*
[248] *See id.* at 801.
[249] *Id.* (emphasis added). The appellate court cited to Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions to support their holding. *Id.*
[250] *Id.* (using EDWARD J. DEVITT, CHARLES B. BLACKMAR & MICHAEL A. WOLFF, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 84.08 (4th ed. 1987) to support the decision).

requirements calling for proof of the other elements . . . by preponderance of the evidence, adequately protects those constitutional interests."[251] The panel believed that the *New York Times* Court intended the sole requirement of clear and convincing actual malice to balance the proper safeguards of the First Amendment with plaintiff's right to defend his character.

The appellate court also reasoned that the nature of the evidence needed to prove actual malice greatly differed from that required to prove falsity.[252] While actual malice demanded proof that a defendant willfully failed to investigate the underlying factual material for a piece, or alternatively, that the accused willfully shielded himself from the truth, "the ultimate truth or falsity as to a particular charge may be essentially unproveable."[253] The court also believed that in a case such as plaintiff's, particularly where the false statement pertained to an individual's "state of mind," proof of falsity by clear and convincing evidence "would serve only as a constitutionally unnecessary barrier to recovery."[254]

Other federal courts have held similarly to the Ninth Circuit. In *NAGE/International Brotherhood of Police Officers v. BUCI TV, Inc.*,[255] the District of Massachusetts held that "[a] public figure plaintiff suing a media defendant . . . *must* prove . . . by a preponderance of the evidence that the defendant published a defamatory, provably-false factual assertion concerning the plaintiff."[256] The United States Court of Appeals for the District of Columbia also held that a public figure plaintiff must show clear and convincing proof of actual malice and "a preponderance of evidence of falsity."[257] Interestingly enough, two opinions from the lower courts of the Second Circuit, one from the Southern District of New York and one from the Eastern District of New York, establish, although in dictum, that falsity in a public figure case must be proven by the preponderance standard.[258] These

[251] *Id.* at 801.
[252] *See id.*
[253] *Id.*
[254] *Id.* at 802.
[255] 118 F. Supp. 2d 126 (D. Mass. 2000).
[256] *Id.* at 130 (emphasis added).
[257] Liberty Lobby, Inc. v. Rees, 852 F.2d 595, 598 (D.C. Cir. 1988).
[258] *See* Boule v. Hutton, 138 F. Supp. 2d 491, 505 (S.D.N.Y. 2001); Corp. Training Unltd. v. NBC, 981 F. Supp. 112, 118 (E.D.N.Y. 1997). The Second Circuit upheld the district court's preponderance standard although it remanded the case to

cases are remarkable because, although they predate *DiBella*, the district judges in those cases declined to follow *Buckley*'s interpretation of New York law and instead found *Goldwater* more compelling.

Therefore, since New York public official/figure defamation law is dependent on federal constitutional interpretation, these cases provide well-reasoned support for the preponderance standard of proof for falsity. The New York Court of Appeals should follow suit.

B. *State Authority*

Various state authorities have also established the preponderance requirement as the correct standard for falsity. A common thread in all of these opinions is that each one, either implicitly or explicitly, adopted the Ninth Circuit's rationale from *Rattray*; namely, that the *New York Times* Court found the preexisting common law preponderance standard for falsity sufficient to protect First Amendment guarantees. Illustrative of this theme is *Elder v. Gaffney Ledger, Inc.*,[259] where the former Chief of Police for the Town of Blacksberg, South Carolina sued the Gaffney Ledger for printing an opinion suggesting that he accepted bribes.[260] The state court clearly held that "[t]he statement's falsity *must* be proved by a preponderance of the evidence."[261] Likewise, the Supreme Court of Florida ratified jury instructions calling for a preponderance standard.[262] In *Bentley v. Buntan*,[263] the Texas Supreme Court explicitly stated that the standard is a preponderance of the evidence because the United States Supreme Court never altered the pre-existing common law standard of proof. There, co-hosts of a call-in talk show accused a local judge of corruption.[264] The judge won his suit and the defendants appealed.[265] Citing the *New York Times* case, the Court held that "[w]e have not required proof of falsity to be by more than preponderance of the evidence, and neither

determine whether these same false statements violated state unfair competition laws. *See* Boule v. Hutton, 328 F.3d 84, 93 (2d Cir. 2003).

[259] 511 S.E.2d 383 (S.C. Ct. App. 1999).

[260] *See id.* at 386.

[261] *Id.* at 387 (emphasis added).

[262] *See In Re* Standard Jury Instructions, 575 So.2d 194, 196, 200 (Fla. 1991).

[263] 94 S.W.3d 561, 587 (Tex. 2002).

[264] *See id.* at 566–67.

[265] *See id.* at 567.

has the United States Supreme Court."[266] This rationale applies with equal force to the standard of proof for falsity in New York.

It is well settled in New York law that the standard of proof for any element in a civil action, such as libel or slander, is preponderance of the evidence.[267] Although *New York Times* established that public official/figure plaintiffs must bear the burden of proving the element of falsity,[268] the *New York Times* Court never specified the quantum of evidence necessary to meet that burden, leaving New York's preexisting common law standard intact. Similarly, New York common law permitted truth as an affirmative defense,[269] where the burden "is on the defendant to prove by a fair preponderance of the credible evidence"[270] that the alleged statement, "as a whole was true."[271] As stated earlier, *New York Times* changed this common law regime in public official/figure cases.[272] The *New York Times* Court converted the defendant's affirmative defense of truth into plaintiff's burden to prove the element of falsity.[273] In essence, the affirmative defense of truth and the element of falsity are two sides of the same coin, speaking to the same issue: the veracity of the alleged defamatory statement. *New York Times* merely altered who the proponent of the evidence must be and left the common law standard of proof for the truth/falsity of the statement unchanged. That standard is preponderance of the evidence.

C. Private Persons in New York Law

The United States Supreme Court held in *Gertz* that as long as states do not adopt a strict liability standard in regards to fault, they may adopt any fault standard, including actual malice, to sustain liability for a private person defamation claim on a matter of public concern.[274] The New York Court of Appeals established its private person culpability standard in *Chapadeau*

[266] *Id.* at 587.
[267] *See supra* note 14.
[268] *See supra* note 29.
[269] PJI 3:33 (2006).
[270] *Id.*
[271] *Id.*; *see also* King v. Tanner, 142 Misc. 2d 1004, 1008 (N.Y. Sup. Ct. 1989); A.T. v. M.K., 145 Misc. 2d 525, 528 (N.Y. Fam. Ct. 1989).
[272] *See supra* note 29.
[273] *See id.*
[274] *See supra* text accompanying note 129.

v. Utica Observer-Dispatch.[275] The opinion is important not only because of its significance in private person claims, but also because it provides a framework for how the court would rule on falsity's standard of proof in public official/figure cases.

The facts centered on a plaintiff public school teacher whom police arrested for possession of heroin.[276] The defendant newspaper falsely reported that plaintiff and two other men partied in a local park where police later found drugs and beer.[277] In actuality, plaintiff did not know the two other individuals, who were arrested in a separate incident.[278] Plaintiff sued for libel, and when defendant moved for summary judgment, the trial court denied the motion.[279] Thereafter, the Appellate Division reversed, holding that under *Rosenbloom*, plaintiff could not marshal enough evidence to prove actual malice with convincing clarity.[280] Plaintiff appealed to the New York Court of Appeals when the United States Supreme Court overruled *Rosenbloom* in *Gertz*.[281] The New York court framed the issue as "subject to the limitations enunciated in *Gertz*, [when] may a publisher of defamatory falsehoods about a private individual be held liable."[282] In affirming the Appellate Division's grant of summary judgment, the court announced its own standard for culpability in a private person/public concern case.[283] The court held as a matter of New York law, that a private person libel plaintiff must prove by a preponderance of the evidence that defendant published defamatory statements "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[284]

Chapadeau's preponderance standard for the element of fault is significant for two main reasons. First, the New York Court of Appeals has a long tradition of affording extensive First Amendment protection to the press and providing liberal freedom

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[275] 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).
[276] *See id.* at 197, 341 N.E.2d at 569, 379 N.Y.S.2d at 62.
[277] *See id.*, 341 N.E.2d at 569–70, 379 N.Y.S.2d at 62.
[278] *See id.*, 341 N.E.2d at 570, 379 N.Y.S.2d at 62.
[279] *See id.*, 341 N.E.2d at 570, 379 N.Y.S.2d at 62.
[280] *See id.* at 197–98, 341 N.E.2d at 570, 379 N.Y.S.2d at 62.
[281] *See id.* at 198, 341 N.E.2d at 570, 379 N.Y.S.2d at 62–63.
[282] *Id.*, 341 N.E.2d at 570, 379 N.Y.S.2d at 63.
[283] *See id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.
[284] *Id.*, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

of speech guarantees.[285] As the court stated in *Immuno AG v. Moor-Jankowski*:[286]

> The expansive language of our state constitutional guarantee, its formulation and adoption prior to the Supreme Court's application of the First Amendment to the states . . . the recognition in very early New York history of a constitutionally guaranteed liberty of the press . . . and the consistent tradition in this state of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events' . . . all call for particular vigilance by the courts of this state in safeguarding the free press against undue interference.[287]

Clearly, the court seemed to pride itself on granting far greater First Amendment protection than the United States Supreme Court. Yet, when faced with the discretion of affording the most stringent First Amendment protections to the press, the court refused to apply actual malice along with the clear and convincing standard of proof to private persons.[288]

The opinion also illustrated that while the court granted wider latitude than the United States Supreme Court in matters of free press and free speech,[289] it still wished to balance those interests with protections of the individual's right to vindicate his public self. Therefore, the court's underlying rationale in *Chapadeau* demonstrates that it would be equally receptive to

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[285] *See, e.g.*, Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913 (1991); *see also infra* note 288; *cf.* N.Y. CONST. art. 1 § 8 (stating that "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

[286] 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991).

[287] *Id.* at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

[288] *See supra* text accompanying notes 129–31. Instead, the Court held for a different standard where the plaintiff had to prove "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau*, 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

[289] *See Immuno AG*, 77 N.Y.2d at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

> It has long been recognized that matters of free expression in books, movies and the arts generally, are particularly suited to resolution as a matter of State common law and State constitutional law, the Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout the Nation, and the State courts supplementing those standards to meet local needs and expectations.

Id., 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

maintaining the preponderance standard for falsity in New York public official/figure defamation actions because both public and private plaintiffs demand the same considerations: balancing the guarantees of the First Amendment with the "need for vindication of honor" served by the law of defamation.[290]

CONCLUSION

Underlying this paper's analysis of *New York Times* and its progeny is the proverbial pendulum. Initially, under the common law, courts granted extreme deference to libel and slander plaintiffs.[291] From *New York Times* onward, the pendulum, moving with the driving force of the First Amendment, began to favor defendants, namely the media. The present concern is that this pendulum has now swung too far.[292] With the combination of both clear and convincing proof of falsity and actual malice, there is a definite risk that public official/figure defamation law will become an unprovable tort.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[293] Justice Byron White's concurring opinion illustrated this very concern.[294] Fearing that the *New York Times* line of cases overextended protections afforded to the press,[295] Justice White

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[290] Curtis Publ'g Co.v. Butts, 388 U.S. 130, 147 (1967).

[291] *See* SCHWARTZ, KELLY & PARTLETT, *supra* note 3, at 841.

[292] *See* Matheson, *supra* note 27, at 219 n.13; *see also, e.g.*, Epstein, *supra* note 33, at 814–17 (arguing that the actual malice standard should be abandoned for the resurgence of strict liability); Marc A.Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 834–51 (1984) (proposing that defamation plaintiffs prove defendant's awareness of defamatory meaning); Robert Gilson & Madelyn Leopold, *Restoring the "Central Meaning of the First Amendment": Absolute Immunity for Political Libel*, 90 DICK. L. REV. 559, 572–75 (1986) (purporting that courts allow absolute immunity for political debate in defamation suits); Paul A. LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249, 287–318 (1987) (espousing the reformation of state tort law to protect defamatory political speech, the expansion of emotional harm damages, and the limitation of damages); Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time To Return to "The Central Meaning of the First Amendment*," 83 COLUM. L. REV. 603, 614–25 (1983) (supporting an active judicial role in the guidance of defamation litigation, and First Amendment protections for criticism of government conduct and non-officials involved in public affairs).

[293] 472 U.S. 749 (1985).

[294] *See id.* at 765 (White, J., concurring).

[295] *See id.* at 771. "But if protecting the press from intimidating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both

believed that the actual malice standard might actually come to hurt the American public because damaging misinformation might never be proven false.[296] "The lie will stand, and the public continue to be misinformed about public matters[,]" because "the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation."[297] Ultimately, the values *New York Times* sought to protect would be undermined. As Justice White stated, "[i]n a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance."[298] Due to the gauntlet of procedural hurdles established by *New York Times*,[299] however, the people's "only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts."[300] The additional clear and convincing evidence standard for falsity would only be a continuation down this dangerous path. And, step by step, we would move further and further away from the only thing that "in the long view, [is] essential to enlightened opinion and right conduct on the part of the citizens of a democracy":[301] the truth.

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cases." *Id.*

[296] *See id.* at 767–68.

[297] *Id.* at 768.

[298] *Id.* at 767.

[299] *See id.* at 768.

> Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality.

Id.

[300] *Id.*

[301] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).