The "Muzzled Media": Constitutional Crisis or Product Liability Scam?

by Martin London

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In a thirty-year campaign making effective use of money, power, and access to the media, a concord of wealthy industrialists—including the entire range of media owners—has persuaded our judiciary to make significant changes in the common law. Their demands center on the drive to eliminate or reduce liability for defamation, and, failing complete success, to diminish the damages they must pay for the injury they inflict. The result is a curtailment of individual rights. And, the campaign continues today at high levels of intensity. There is a constant drumbeat for an even greater shift of power to the powerful.

The drive to diminish damage recoveries is simply the media's assertion that *media* speech ought be free. They demand we ignore the inevitable consequence of a rule change that would permit malicious defamation without penalty; namely, a reduced willingness of the citizenry to become involved in public service and public debate, and the loss of individual rights to protect one's reputation and privacy.

The victims include everyone who is not an owner or editorial employee of a perpetrator. Those suffering the greatest losses are public servants of modest means.

As a result of the publishers' gains so far, personal reputations enjoy less protection today than ever before. Our loss comes as a direct and proportional result of the publishers' legal victories. Astonishingly, the media have accomplished this political shift of power without a national debate on the subject. A debate, after all, requires advocates of opposing views. But virtually all of the hundreds of thousands of words published each year on this subject speak to the same side of the issue. Editorial pages and legal articles warn against the "muzzling effect"[1] created by "an explosion of libel litigation in the 1980s and the escalation of multimillion-dollar verdicts into the 1990s . . ."[2] against newspapers. Learned lawyers and "free speech" advocates flood the professional environment with law review articles, speeches, and tracts seeking legislative and judicial

change "before the threat of massive losses saps the strength of our free press."[3] Some proposals go so far as to propose the elimination of any damage recoveries at all, even when a malicious liar willfully destroys the reputation of a blameless citizen.[4]

But the "threat" to the media is a myth. Far from facing imminent demise, the media are flourishing. They enjoy expanded rights that protect their professional and economic interests.[5] Make no mistake: they enjoy those rights at the expense of the rest of us.[6] What's more, the press is constantly, and effectively, campaigning to gain more for itself and leave us less. New compromises are being struck as the press continues to demand and take more turf. The judicial seeds sown by the Supreme Court in the 1960s have blossomed into something out of *The Little Shop of Horrors.*

Exposing the Myth: Media Influence on the Judiciary

Most "First Amendment experts" are working lawyers. Others are academicians or journalists. They are intelligent and experienced, and many are well paid. All are extremely effective—in court and out.

Let's cut through the euphemisms: the phrase "First Amendment lawyer" is a synonym for "publishers' lawyer." Even the vernacular tells the story: the publishers and their counsel control every aspect of the discussion. Publishers' lawyers write lots of articles, committee reports, Op-Ed pieces, professional "bulletins," and the like, and otherwise advance their clients' views via an impressive network of outlets. To say that bar association and related committees are "dominated" by media lawyers is an understatement. The simple fact is, there *is* no plaintiff's libel bar, no libel-victim's rights group, no society for preservation of personal reputations. The effect of this defendants' "legal expert chorus" is overwhelming. It drowns out infrequent expressions of contrary views and it dulls the senses of its audience, especially the judiciary.

The current focus of much expert chorus attention is the subject of damages in libel actions, particularly punitive and presumed damages. The campaign for their abolition is extensive. And the judiciary comes to the decision process with a long history and predisposition to give the press undue latitude when the phrase "First Amendment freedoms" is uttered. And it is *always* uttered.

Has the judiciary really knuckled under to the press? I offer four examples in support of an affirmative answer to that question.

Special "Jury-Verdict Nullification" Rules for Publishers

The maxim "hard cases make bad law" is the real rationale for the Supreme Court's decision in *New York Times Co.* v. *Sullivan*,[7]—which promulgated the "actual malice" doctrine that would overpower libel victim's rights for decades to come. The holding came at the height of the civil rights battles of the 1960s and apparently was the only way to get the *New York Times* out from under an adverse Alabama libel judgment arising out of the defendant's publication of an advertisement paid for by the "Committee to Defend Martin Luther King." Mr. Sullivan, a Montgomery, Alabama, commissioner in charge of the police department, claimed that he was libeled by an advertisement advocating support for the civil rights movement in Montgomery. The advertisement contained several "minor factual errors" regarding police treatment of civil rights protesters. A Montgomery county jury awarded Sullivan $500,000 in damages.[8] The Alabama Supreme Court agreed the *Times* had violated Sullivan's Alabama state law reputational rights, and affirmed the judgment. The U.S. Supreme Court reversed, giving the publishers a new, and formidable, defense to libel claims by public officials (and private citizens who engaged in debate of public issues).[9] From that day forward, such a plaintiff could succeed only by showing "actual malice"—that not only were defendant's statements false, but the defendant knew they were false, or recklessly disregarded the issue of truth.[10]

Ten years after *New York Times*, the Supreme Court further reduced a libel victim's likelihood of obtaining a remedy for his loss by ruling that the victim must prove actual malice not by the ordinary preponderance-of-the-evidence standard imposed on most other civil plaintiffs, but by a more demanding "clear and convincing" standard.[11] And, in 1985, in *Bose* v. *Consumers Union*,[12] the Supreme Court hobbled plaintiffs anew by ruling that even when a jury finds that a plaintiff *has* proved actual malice by clear and convincing evidence, reviewing judges may, indeed must, make their own independent assessment of the trial evidence on the malice question.[13] It is startling that this ruling was not met with the lawyerly equivalent of rioting in the streets. Jury supremacy has *always* been an accepted part of our constitutional scheme. When a jury sits, judges do not assess evidence: only the jury can find the facts. Even powerful appellate judges are not authorized to weigh the evidence and decide how they would have voted as a juror. Judges lack that power even when a jury verdict deprives a citizen of his most valuable right—his liberty.

But in *Bose*, the Supreme Court decided that publishers and their editorial employees faced with civil tort claims are entitled to more appellate consideration than that given to a citizen appealing a prison sentence or a company like Texaco seeking reversal of an $11 billion breach-of-contract verdict. Defendants who lose actual malice libel verdicts now have the exclusive right to demand that the appellate court "independently assess" the evidence earlier weighed by the jury. That extraordinary right not only raises questions about plaintiffs' right to a trial by jury (guaranteed by the Seventh Amendment),[14] but it taxes an already overburdened appellate system so that there are obviously fewer judicial resources available to all the other litigants.[15]

How did that come to pass? Are a publisher's First Amendment rights really so much more important than every other citizen's constitutional rights? Is this a reasonable allocation of judicial resources?

The Media's Right to Disobey the Law

The tenets of our constitutional scheme require everyone to obey the law,[16] and to obey court orders.

Not surprisingly, there is a corollary rule, known as the collateral bar rule, that one who disobeys a court order will not be heard to attack the merits of the disobeyed order in an effort to justify disobedience of that order.

The case most often cited for the rule goes back to the tempestuous labor situation following World War II.[17] In 1946, a federal court issued a "no-strike" order to the United Mine Workers. The union (led by the memorable John L. Lewis) disobeyed and was fined for criminal contempt. On appeal, the union argued that it ought not be punished because the disobeyed order was rendered by a court whose jurisdiction was doubtful. The Mine Workers argued, in effect, "The district judge ought not to have made that order in the first place. Therefore, we ought not be punished for violating its terms." The Supreme Court disagreed, and ruled that our constitutional process requires citizens to obey *all* court orders, even those later overturned: chaos would ensue were citizens free to decide which order to obey and which to defy.

"No man can be judge in his own case" was the way the Supreme Court put it twenty years later when it upheld the criminal contempt conviction of Dr. Martin Luther King, Jr., for violating a "no-parade" order that Dr. King thought unconstitutionally violated *his* free speech rights.[18] The Court stated that the collateral bar rule applies to everybody. The dramatic words of our highest court are worth repeating:

> No man can be the judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion.[19]

But Mr. Lewis and Dr. King were in the wrong business. To get away with violating court orders, you've got to be in the newspaper business.

That, I suggest, is the lesson taught by *In re The Providence Journal.*[20] From 1962 to 1965, the FBI violated the Fourth Amendment rights of a citizen by warrantless eavesdropping. In 1976, *The Providence Journal* requested the fruits of the illegal search pursuant to the Freedom of Information Act. The FBI declined on the ground that such revelation would be, as the court described it, "an unwarranted invasion of personal privacy."

In 1985, the citizen died. The *Journal* renewed its request, and this time the FBI voluntarily complied. The deceased citizen's son sued the newspaper to block publication of his father's illegally seized conversations.

The demand for an injunction was served on *The Providence Journal* on November 12. On November 13, the court convened a conference, set a hearing for November 15, and restrained publication for the interim 48-hour period. *The Journal* sought neither reconsideration nor appellate review of that order. Instead, on November 14, it disobeyed the order and published the substance of the illegally seized personal conversations.

A contempt hearing ensued. The paper's only defense was an attack on the merits of the restraining order. The publisher argued, in effect, "The district judge shouldn't have made that order in the first place. Therefore, we should not be punished for violating its terms." But, despite the clear Supreme Court holdings in the cases involving John L. Lewis and Dr. King, the First Circuit *reversed* the lower court's contempt order. The rationale of the appellate acquittal? The publisher ignored the court's order because it believed the order violated its rights under the First Amendment.[21]

While a detailed explication of the Circuit Court's decision is beyond the scope of this paper, one must note the deference this court showed to this corporation that had thumbed its nose at the judicial process. Every conceivable argument was brought to bear in the court's opinion to justify letting *The Journal* off the hook, including the argument that the newspaper had, after all, promised its readers the story would be forthcoming, and if a competitor got the story first, "some readers of the *Journal* might lose confidence in that paper's editorial competence."

Compare that, if you will, to the Supreme Court's conclusion to send Dr. King to jail, even though *his* failure to march might possibly have lost *him* some supporters' "confidence" as well.

The Supreme Court ducked the challenge; it refused, on jurisdictional grounds, to review the First Circuit's decision.[22]

The fair question is: Is there a *legitimate* policy basis for these distinctions? I suggest there is none.

The Right to Escape Unfavorable Libel Verdicts

The extremes to which the judiciary goes to reshape the law to mollify the interests of the press are to be seen in the recent refusal of a New York State Supreme Court judge to enforce a British libel judgment.[23] The opinion wreaks with antipathy for a citizen's right to protect his reputation, and is, or at least should be, an embarrassment even to the publishers' expert chorus.

The New York law on "comity"—the principle that courts of one state or jurisdiction should give effect to laws and judicial decisions of another jurisdiction, not as a matter of obligation but of deference and mutual respect—is substantially in sync with that of our other state and federal jurisdictions: New York recognizes foreign money judgments as long as the foreign judgment was rendered in a legal system that provides impartial tribunals and provides for such basic due process requirements as accommodate American notions of personal and subject matter jurisdiction.[24]

But not all foreign judgments get recognition. New York courts need not recognize foreign judgments when "the cause of action on which the judgment is based is repugnant to the public policy of this State."[25] And while no two countries have identical substantive and procedural laws, U.S. courts essentially follow, and do not relitigate, a foreign state's judicial determinations as long as basic due process notions are respected. The international need for comity is so great that courts rarely refuse to recognize a foreign judgment on public policy grounds,[26] even when there is great variance between the law or practice in a foreign jurisdiction and that in the United States. Indeed, the United States Supreme Court has found no violation of public policy even where the foreign jurisdiction rendering the judgment does not allow cross-examination of witnesses, and permits hearsay and unsworn testimony.[27]

The rule established in 1964 by the New York Court of Appeals is that we enforce foreign-based rights, except those "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[28]

But in an unprecedented decision in 1992, a New York State trial court found a British libel judgment to have failed that test, and refused to enforce it in New York. The underlying facts in *Bachchan* v. *India Abroad*[29] were not complex. The defendant published, in England, a report that Swiss authorities had seized a numbered bank account owned by the plaintiff. The bank account was, the defendant said, a repository of illegal kickbacks from a Swedish arms manufacturer.

The reported facts were wrong. The plaintiff had no Swiss bank account and had no connection to the arms manufacturer.

Another publisher of the same story admitted its fault, paid damages, and issued a public apology. The defendant, however, did none of these things, and the plaintiff sued. The British jury awarded the plaintiff £40,000.

The plaintiff sued in New York State Supreme Court to collect on the judgment.

The New York court did what the First Circuit did in the *Providence Journal* case: it wrote an opinion that was embarrassingly deferential to the press, and which was, by any objective standard, silly. The court found two grounds to refuse recognition of the British libel judgment.

First, the New York court noted that the British libel law treats truth as an affirmative defense and imposes the burden of proving it on the defendant, whereas U.S. law (since 1986)[30] does the opposite, that is, it imposes the burden of proving falsity on the plaintiff. The technical distinction obviously has far more importance to scholars than jurors. Wherever the burden of persuasion lies, the plaintiff invariably sets out to prove falsity and the defendant sets out to prove truth.

Second, said the judge, for libels committed in New York, the plaintiff must prove fault (gross irresponsibility in cases against the press) whereas the British law has no such requirement.[31] The New York judge imposed that requirement upon the British substantive law.

Clearly, the stated grounds for the New York decision are plainly inadequate to meet the test for nonrecognition: the British libel judgment was not "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." Nevertheless, the court concluded that the enforcement of the British libel judgment in favor of the plaintiff would be "antithetical to the protections afforded the press by the U.S. Constitution."[32]

The New York court's nit-picking approach to procedural and substantive legal distinctions, if applied to other fields of law such as contracts and other torts, would destroy centuries-old notions of international comity. Because one can almost never find a case where the

rules of procedure and substance are identical in both the forum and enforcement states, there would always be room to argue that the foreign judgment is contrary to the "public policy" of the enforcement state.

But I suggest the *Bachchan* case does not represent the onset of the Balkanization of international comity rules. The real significance of the decision is that it is so wrongheaded, so capricious, that it is simply inconceivable that it could have been written except with respect to that small list of subjects on which irrational judgments are *de rigueur* (international Communism in the 1950s, junk bonds in the 1990s, and "Freedom of the Press" throughout).

The *Bachchan* decision will doubtless generate a cascade of hallelujahs by the First Amendment expert chorus.

The Right to Invade Privacy

The law of privacy protects individuals against unwarranted intrusions and assaults on their dignity, providing a valuable alternative to libel law for individuals aggrieved by the media. An example of the privacy tort in action illustrates its worth. In the early 1970s, I had the privilege to represent Jacqueline Onassis, widow of President Kennedy. She and her young children, Caroline and John, were subjected to intense harassment by a freelance photographer, Ronald Galella, self-described as "the world's only American paparazzi."[33] In court, his lawyer referred to him as a "photo-journalist." A federal district court found that Galella had "insinuated himself into the very fabric of Mrs. Onassis' life" by "intrud[ing] into her children's schools, hid[ing] in bushes and behind coat racks in restaurants, sneak[ing] into beauty salons, brib[ing] doormen, hat check girls, fishermen in Greece, hairdressers and schoolboys, and romanc[ing] employees."[34] And Galella suggested he might stop if paid a fee.[35] The courts vindicated Mrs. Onassis's privacy rights and granted injunctive relief to protect her from Galella's assaults.

But recourse to privacy law has become less and less of a meaningful option in the last twenty years. Mrs. Onassis would be less likely to get relief today. The media's victories in the libel arena seem to have shrunk privacy rights, too. Again, the press has aggressively sought special rules for itself, making the right to privacy in many ways little more than an empty promise.

Some jurisdictions do recognize the tort of public disclosure of private facts. The action protects an individual against widespread dissemination of private facts, the revelation of which would be highly

offensive to a reasonable person.[36] Liability for disclosure may not be imposed, however, if the disclosure is "newsworthy," that is, if it is "of legitimate concern to the public."[37] Not surprisingly, newsworthiness has been broadly interpreted, rendering the tort virtually useless against the press.

"[I]nformation disclosed to educate, amuse or enlighten" is deemed to be of legitimate public concern[38] so long as revelation of such information does not, judged according to local community mores, become "a morbid and sensational prying into private lives for its own sake."[39] But courts have not shied from finding a newsworthiness justification for the revelation of titillating private information. As one First Amendment expert wrote in a law review:

> If the case law is any gauge, most judges share the Supreme Court's reluctance to engage in line drawing over newsworthiness and simply accept the press's judgment about what is and is not newsworthy. Although courts will occasionally find that a particular story is not privileged, *the vast majority of cases seem to hold that what is printed is by definition of legitimate public interest.*[40]

Ironically, instead of berating the courts for putting the fox in charge of the hen house, the writer ultimately concluded that the tort should therefore be abolished. In other words, the good professor urges that because the courts have been so deferential to the press as to permit the press to define its victims' rights, the victims should therefore have no rights at all.

Once upon a time, one of our truly great courts suggested that, in appropriate cases, even revelation of newsworthy private facts would be actionable. Fifty years ago, the Second Circuit[41] implied that when a revelation is so shocking that it "outrage[s] the community's notions of decency" recovery still might be had even if the information is newsworthy.[42] The Ninth Circuit's 1975 decision in *Virgil* v. *Time, Inc.*[43] also has been read to leave the question open.[44] But subsequent decisions upholding a citizen's right to privacy are virtually nonexistent. The climate is increasingly inhospitable to such a ruling. It would take a brave jurist to withstand the chastisement of the media and the scoldings from the expert chorus.

So what we get are decisions like *Pearson* v. *Dodd.*[45]

In 1965, former employees and staff members of United States Senator Thomas J. Dodd broke into his office, stole documents from his files, made copies of them, replaced the originals, and gave the

copies to newspaper columnists Jack Anderson and Drew Pearson, "*who were made aware of the manner in which the copies had been obtained.*"[46] Defendants nevertheless published articles containing information gleaned from these documents.

Even though there was no effort to deny either that the theft occurred, or that defendants knew their information was feloniously acquired, the court held the journalists were not liable for any tort. Why? Because the evidence did not establish that they actively aided and abetted the removal of the documents. The evidence showed only that the reporters had received copies of the documents knowing that they had been removed without authorization.[47] In Judge J. Skelly Wright's words:

> If we were to hold [the reporters] liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort.[48]

And the court continued:

> A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.[49]

But, of course, defendants did more than just listen. After listening, they *published*. But the publication of the information was held not to "reach back" and make the journalists liable for intrusion.[50]

The deference Judge Wright showed the press forced the jurist into a pretzel-logic analysis that even he must have recognized as embarrassing. Following his own rationale, Judge Wright was compelled to conclude that were "an eavesdropper to the marital bedroom" to hear material that "is of public interest," the press could publish that material with impunity.

Does that make sense? Is it good policy? Circuit Judge Edward Allen Tamm, who concurred in the result, was not so sure. He wrote:

> Some legal scholars will see in the majority opinion—as distinguished from its actual holding—an ironic aspect.

> Conduct for which a law enforcement officer would be soundly castigated is, by the phraseology of the majority opinion, found tolerable; conduct which, if engaged in by government agents would lead to the suppression of evidence obtained by these means, is approved when used for the profit of the press. There is an anomaly lurking in this situation: the news media regard themselves as quasi-public institutions yet they demand immunity from the restraints which they vigorously demand be placed on government. That which is regarded as a mortal taint on information secured by any illegal conduct of government would appear from the majority opinion to be permissible as a technique or modus operandi for the journalist. Some will find this confusing, but I am not free to act on my own views under the doctrine of stare decisis which I consider binding upon me.[51]

I respectfully suggest that *Pearson* v. *Dodd* is another hard case that made bad law. The rationale of the decision hangs on the most fragile of hooks—that Pearson did not aid or assist in the theft before the theft. He was, in the vernacular, only the fence for the loot. That analysis fails for two simple reasons: (1) in the theft of all other property, receipt of the booty is equally felonious; and (2) because the thieves took information, the knowledge that people like Pearson would be willing to publish it was the only reason for the theft. Because Pearson's (or somebody's) willingness to publish was the only motive for the burglary, it follows that if, as a matter of policy, we made Pearson's *publication* improper, we would effectively discourage any such theft. The result would not be dissimilar to cases involving theft of trade secrets, product formulas, screenplay concepts, and so forth.

It is bad policy to permit the press to participate in the publication of private citizens' unlawfully obtained business files or bedroom confidences, simply to pander to the public's desire to learn another's secrets. And extending the rationale of *Pearson* v. *Dodd* to the fruits of thefts of private papers from private citizens is not only bad policy, it is also wrong.

Two examples illustrate the point:

Recently, I was consulted by a client whose private papers had been stolen. Confidential business secrets had been appropriated and sent to a newspaper. Obviously, the thief wished to harm my client. Possibly he had indirect monetary gain in mind (he could "sell short" in advance of an embarrassing article), or possibly he sought psychic gain (that is, he disliked my client and would take pleasure from the

latter's public humiliation), or possibly he expected to enhance his own reputation or wealth by some other means. It is easy to hypothesize several motives, but in fact it makes no difference what type of gain motivated the thief: he stole for one kind of personal "profit" or another.

Shortly after the theft, the journalist called the crime victim. The journalist was, of course, immediately made aware that the information had been unlawfully taken from the premises. He admitted he had no doubt that was so. Did he return the stolen material or forswear publication of the ill-gotten data? Hardly. He demanded an exclusive interview (which he would publish) about the substance of the stolen documents. Failing that, he said, he would publish the business secrets without the benefit of any explanation from their owner.

The story is not over. The fence-journalist was represented by distinguished counsel—an eminent First Amendment expert. I called him. When I asked for the return of the stolen documents, his laughter was politely subdued. He is, after all, a colleague at the bar, an acquaintance, a sometimes adversary, and he was gentle. He treated me with the condescension one reserves for the senile and the demented. With kindness, but with clarity and firmness, he told me that as far as he was concerned, my client had no rights against his client, before or after publication. If I thought he was wrong, I should sue. I did not sue.

Example number two is a hypothetical drawn from situations that have occurred to other lawyers of my acquaintance: I have little doubt this scenario will soon become a reality if the rationale of *Pearson* v. *Dodd* remains the law.

Assume a lawyer is retained to represent a private citizen charged with a crime. While the defendant's name would not have earlier been recognized by the public, the allegations of criminality are sufficiently titillating so that the tabloid press is attracted to the case.

The client meets with his lawyer. Confidences are exchanged, and the lawyer's notes are kept in a secure file. The press follows the case as if it involved Woody and Mia. Journalistic competition is keen. Eventually, a disgruntled employee steals the typescript of the lawyer's confidential interview and the thief gives it to the press.

Is there anyone who believes for a moment that "journalistic ethics" would prevail and the sensational confidential interview would not be published?

This case is hypothetical only in that it is a synthesis of two events that actually occurred quite recently. In one instance occurring two years ago, press accounts reported the theft of a confidential memorandum

from a lawyer's office. Somebody who desired to embarrass the lawyer, or more likely to embarrass his client, stole the confidential document and sent it to an advocacy group critical of the client's product. There could not be, and was not, any question that the document was taken without the lawyer's authority. There was equally no ambiguity about the fact that it was a lawyer's "think piece," that is, a classic lawyer's work product entitled by law to absolute confidentiality. Such is the state of the common law, and common morality, that the chairperson of the recipient advocacy group—a law professor—called a press conference and published the document.

I am aware of no newspaper that refused to publish the contents of the lawyer's confidential memorandum. Moreover, I am aware of no editorial, no law review article, no First Amendment expert that publicly criticized the press for its conduct. Nor am I aware of any civil claim made by the crime victim, against either the law professor or the media who ultimately "bought" the story and consumed the stolen product.

The second instance I refer to was reported during the 1992 trial of William Kennedy Smith in a Palm Beach, Florida, court. Newspaper accounts reported that an intruder—thought to be a reporter from one of the supermarket tabloids—had unlawfully entered the house that defense lawyers were using as their law office. It was never revealed whether the intruder was able to learn any secrets. Since none were published, probably none were obtained.

There can be little doubt that the public's appetite for sensational trivia is as great now as it has ever been. Lawyers for Woody and Mia, Amy Fisher (and her alleged paramour, Joey Buttafuoco), and other "celebrity" figures of the moment must surely be aware that the sanctity of their notes and files may be under attack. One of my colleagues, a "celebrity divorce lawyer," informs me that he has special security procedures for celebrated cases, including dedicated celebrity wastepaper baskets, the contents of which are handled differently from all other office trash.

He had better be careful. We all should be. The current state of the law panders to the press and ignores the rest of us, lawyers and clients alike. Any interesting material stolen from a lawyer's office, a businessman's office, a celebrity's home, could be, and certainly will be, published without hesitation, and without sanction, if *Pearson* v. *Dodd* remains the law.

What explains the lack of judicial protection of an individual's rights of privacy against the press? I believe our judicial officers are honest, well meaning, and smart. They try their best to write decisions

in the best common law tradition—decisions that adequately and accurately reflect the sense of the community. How do they determine the sense of the community? Like the rest of us, they read, they listen, and they observe. However, what they see and hear is the output of the legal expert chorus. And what they observe is their colleagues responding to the chorus. And they do likewise.

In another context, Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit recently addressed the Federalist Society in Washington, D.C. He had this to say:

> Still, I believe the more important influence and the key explanation for the recent misbehavior of judges is the press. Mr. Dooley said, as you will recall, that judges follow "th' iliction returns." That is not really so. They, of course, owe their appointments to the electoral process, but in past decades, the courts, perhaps particularly the Supreme Court, have seemed to take pride in ignoring popular will. Federal judges have instead appeared particularly prone to listen very carefully to the views of what has been described as the "new class" or, lately, the "chattering classes." In the United States, that very much means the press.
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> So I understand better today the reason for the evolution of some judges. More often than not, it is attributable to their paying close attention to newspaper accounts of their opinions. You would be amazed at how thin-skinned some judges are.[52]

Doesn't this judicial deference to the press's interests reduce public esteem for the media and courts alike? And more importantly, isn't it simply unfair?

Damage Awards: Muzzle or Microphone?

There is intense media pressure for the abolition of *all* damage awards to public officials.[53] The Annenberg Libel Reform proposal would not only bar punitive (and presumed) damages, but would bar *any* damages where a retraction or reply was published.[54] Professor C. Thomas Dienes, former general counsel for *U.S. News & World Report* and the

Atlantic Monthly, described the Annenberg Libel Reform proposal's elimination of punitive and presumed damages as a "vital, valuable change" that is "sweet music to the media."[55]

As a back-up position for their no-damages-at-all campaign, the media press for the abolition of punitive and presumed damages.

Punitive damages are rendered not to compensate the victim, but to deter the offender. But because a court cannot award counsel fees in a libel case except as an element of punitive damages, they have a compensatory role as well. In both these roles, but especially the former, punitive damages are a favorite target of the expert chorus. Punitive damages, goes the chant, deter valuable reporting, so that one can "almost feel the brakes clamping down on serious journalism, controversial magazine and book projects and hot political debates."[56]

Presumed damages are a close second on the press hit list.[57] These are compensatory, not punitive, but are nevertheless abhorred by publishers because they offer a recovery to a victim who is unable to prove specific economic injury. Given the nature of loss of reputation that follows upon defamation, obviously some injury has occurred, but how much? The presumed-damages concept gives the jury the ability to make an estimate of the value of the victim's reputational loss without requiring him to prove specific economic consequences, such as lost wages, a decline in sales, and so on. Without presumed damages, most injured libel victims would have great difficulty proving damages for their very real injuries.[58]

What would be the result if the campaign against these two types of damages is successful?

Assume a small-town newspaper (let's call it the *Free-Wheeling Press*) finds that the combined effect of the recession and serious competition from local television stations has so reduced its advertising revenue that the paper is seriously in the red. The publisher calls in his managing editor and emphasizes the need to make a profit, suggesting that it is very much in the editor's personal economic interest to find stories that sell newspapers.

Salvation, it turns out, is but a phone call away. Our editor learns that his youngest reporter has just received a call from his cousin, a police-station janitor, with fast-breaking news: a local college professor, recently elected to the community's school board, is a suspect in a police investigation concerning several instances of child molestation. No arrest has yet been made.

Under normal circumstances, the editor would not even consider running a story premised on that kind of information; but these are

not normal circumstances, and he does run the story—on page one. The publication has two immediate results: (1) the professor immediately calls the newspaper, insists he has nothing to do with molesting children, and demands a retraction; and (2) the competing newspaper and the local television stations pick up the "news" story, and run it.

So significant is the community response, that the editor runs a second story, and a third. Ultimately, the story blossoms into a series of eight articles. The cub reporter is soon referred to as the paper's "Ace Investigative Journalist" and each day's story is more provocative, more defamatory, and more widely read than the one the day before. When the professor's lawyer threatens legal action, *The Free-Wheeling Press* prints his letter and responds with a front page editorial headlined, "Professor, Stop Molesting Little Girls and Boys and Leave Journalism to the Journalists." Circulation soars, advertising rates increase, red ink turns to black, and the paper promotes the series for a Pulitzer prize.

But the reporter's cousin made a mistake. The professor was never a suspect. The actual suspect (later convicted) lived in the next town, was an editor, not a professor, and the error occurred because of the similarity of their names. When he discovered his error, the janitor told his reporter-cousin, who told his managing editor, who told the publisher.

The error was discovered after the first article—but before the second.

The professor sues. The publisher, editor, and reporter spring-clean their offices, destroy their notes and memos, and then file an answer denying any liability to the professor.

Now, even if our innocent professor were able to prove the paper's actual malice—that at least starting with article number two, defendant had actual knowledge its story was false—the professor would still be required to prove damages. His main chance here would be to rely on the presumed-damage rule that permits the jury to make the commonsense presumption that the false charge of child molestation resulted in some injury to reputation, even if the professor were not fired from his job and therefore could not show specific economic loss. And the only way a jury could award the professor his counsel fees, or vote a deterrent sanction for the *Free-Wheeling Press*'s abominable misconduct, would be to award punitive damages. Both of these presumed and punitive damage awards would, of course, be subject to reduction by the trial judge and again by the appellate courts.

In fact, without the potential recovery of both presumed and punitive damages, our professor likely would not be able to sue for the loss of his rights.

And that, I suggest, is what the publishers really want.

Let there be no doubt about the stakes in this contest: without the availability of presumed and punitive damages, few public figures, or anybody else of modest means, would ever again be economically able to sue for even the most vicious defamation.

What arguments do the media make against these damages? That they "chill freedom of speech?" The very existence of the law of libel certainly does have a "chilling effect" on freedom of speech, at least from the media's perspective. Why shouldn't it? Is there a public benefit to be derived from the dissemination of willfully false statements? What we are talking about is lies: speech that by definition has been proven to be of no value and therefore entitled to no protection by the First Amendment. Punitive damages are available only where the defendant published the false and defamatory statement with knowledge that it was false, or with reckless disregard for the truth.[59] They are never awarded on the basis of mere mistake or negligence, but only in cases where "there is no good faith attempt to point out real abuses to the public [but] only an unsubstantiated attack on the character, reputation and good name of a particular individual."[60]

Moreover, the history of libel claims subsequent to *Times* v. *Sullivan* shows conclusively that the availability of punitive and presumed damages has hardly cooled, no less chilled, the press. Given the frequency, volume, and stridency of the legal expert chorus, one would think that libel was a real and present danger to the continued existence or performance of the communications industry. But, in fact, since the *Times* v. *Sullivan* ruling in 1968, the largest libel verdict affirmed in the federal courts is in the modest sum of $3,050,000. I tried that case. The judgment beggared no small town publisher. It was paid by one of America's great corporations, CBS, Inc., when its net worth exceeded $1.5 billion. And in order to win that award, we were required to litigate for five years against this media giant, produce a million pages of documents in response to CBS's pretrial discovery demands, overcome several motions for judgment (along with dozens of motions for almost every other imaginable pretrial relief), make two trips to the Court of Appeals, and ultimately defend our verdict in briefs filed with the United States Supreme Court.[61]

When one looks at the extraordinary facts of this case, one could fairly conclude that the only problem it presents is that the damage award was not nearly large enough to serve any beneficial purpose. As a result, CBS and the media in general remain, to this day, virtually unchastised.

What happened? CBS's Chicago anchor, Walter Jacobson, broadcast a television program in which he suggested that the Brown & Williamson Tobacco Corporation was "hooking kids on poison" by running Viceroy cigarette advertisements built around the themes of "pot, wine, beer, and sex." The statement was false. Brown & Williamson had not ever adopted any such program and had not ever run any such advertisements.

Notwithstanding the falsity of the story, and the extreme damage it did to the plaintiff, the first federal judge to hear the case threw it out, with a vague reference to "Freedom of the Press." We won an appellate reinstatement of the complaint and the case ultimately went to trial. But the law is so favorable to the press that all CBS had to do to win at trial was to prove that when Jacobson wrote his script, he *believed* it to be true. It was no surprise to the packed courtroom, then, that Jacobson testified at trial that he well recalled his thoughts when he typed his script, and he well recalled his contemporaneous belief that what he wrote was accurate in every detail. But it sure surprised me. Jacobson had earlier told me, in sworn pretrial testimony, he had no recollection *whatever* about what, if anything, he thought when he wrote the script. Indeed, he confessed, he did not remember writing it at all.

The record was chock full of other damning facts. A researcher for the program had ascertained, before the broadcast, that Brown & Williamson flatly denied Jacobson's claims. Moreover, there were no advertisements to support Jacobson's charges. The researcher gave Jacobson a "balanced piece" he had written which set forth those exculpatory facts. Not only did Jacobson reject the balanced piece, but while the case was pending, the CBS researcher destroyed all copies of it, along with all pertinent notes and other important evidence, all in violation of a CBS legal department directive to the contrary.

The District Court, and then the Circuit Court, made exhaustive post-trial inquiries and concluded that the jury verdict for plaintiff was not only reasonable, it was clearly correct. While the program, broadcast twice (once before a Brown & Williamson complaint of inaccuracy, and once afterwards), reached 2.5 million people in the Chicago area, and elements of it were later reported in *Life* magazine, the jury awarded only $3 million in compensatory damages and $2 million in punitive damages.

I suggest the jury was stingy when it came to punitive damages. First, the jury knew that the plaintiff had incurred over $1.3 million in legal expense up through the end of the trial. Second, they were certainly aware that CBS's conduct in preparing the broadcast, as well as in destroying the evidence pretrial, was in wanton disregard of the

plaintiff's rights. Third, defendant CBS had a net worth of $1.5 billion, while the individual reporter (against whom a $50,000 punitive damage award was found) had a net worth of $5 million. And fourth, and not of the least significance, the jury knew that Jacobson had not been deterred by the finding of liability but had brazenly announced that he would do it again.

This last point is worth explaining because Jacobson's post-verdict recalcitrance not only was, I believe, a significant factor in the jury's verdict, but it also shows that the media's use of the "Freedom of Speech" shibboleth can be hypocritical in the extreme. Here is what happened.

To protect against the jury being influenced on the liability issue by the details of the damage issue (that is, CBS's wealth), the trial judge directed a bifurcated trial. We tried liability issues first, and then gave the jury the damages evidence only after it decided the first question. Obviously, had the jury found no liability, we would never have reached the damage question. After a three-week liability trial, the jury quickly returned a verdict for plaintiff.

Because defendant Jacobson was a local media star, the press covered the trial closely. There was no television in the courtroom, but Jacobson, guided by the public relations counsel hired by CBS expressly for this trial, gave a daily press conference in the lobby of the courthouse building. Immediately after the liability verdict, Jacobson gave an extended news conference to scores of television and print journalists. He flat-out rejected the jury's decision on his culpability, and boasted that if he were to do the program again tomorrow, he would do it the same way. The local CBS station manager repeated those sentiments on the radio the following day.

The damage trial followed the next week, before the same jury. Because deterrence is an element the jury may consider on the question of punitive damages, we offered into evidence the videotape of Jacobson's broadcast press conference in which he trumpeted his recalcitrance. CBS objected to admissibility. The ground? "To admit into evidence the statements Jacobson made to the press," argued the broadcaster, "would violate Jacobson's First Amendment rights."

Obviously, the evidence was admitted. The punitive damage award was sustained both by the District Judge and by the Circuit Court of Appeals.

On the issue of compensatory damages, Brown & Williamson chose, as was its right, to eschew the complicated proofs that would be involved in showing various sales trends, income figures by geographic district as compared with television viewing, and so on.

Plaintiff in effect "waived" specific proof of loss and sought only presumed damages. Under the circumstances, I suggest the jury's award of $3 million on that account was modest. Nevertheless, the trial judge, showing an excessively keen concern for defendant's media status, threw out the $3 million compensatory damage award altogether. The Circuit Court reversed that part of the trial judge's opinion, holding that plaintiff was clearly entitled to elect to pursue presumed damages only and therefore had no obligation to offer evidence of specific economic injury. Nevertheless, the Seventh Circuit exercised *its* discretion to reduce the jury's $3 million presumed damage award to $1 million.

The Supreme Court of the United States declined to accept the case for review.

What do we learn from this largest affirmed federal verdict ever?

We certainly learn that if CBS had chosen as its victim a corporation or individual of modest means, then it is likely no claim would ever have been brought. We also learn that only in the most unusual circumstances would a plaintiff see this case through to judgment; we know from the record that it cost $1.3 million to get to the end of trial, and we also know that there were extensive (and expensive) post-trial proceedings at the District Court, at the Circuit Court, and in the Supreme Court of the United States. It is clear that no one in his right mind would bring this kind of a case as an income-generating vehicle.

Another punitive damage award in a libel context produced a robust debate on this issue last year: the West Virginia Supreme Court decision in *Hinerman* v. *The Daily Gazette Company, Inc.*[62]

Ray Hinerman was a lawyer employed by the United Mine Workers Union and his duties included, among other things, representing miners in prosecuting Workmen's Compensation claims. In that capacity, Hinerman won a 20 percent disability verdict for a retired worker. Hinerman then left the UMW and went into private practice. The worker retained Hinerman, as a private lawyer, to take an appeal. Hinerman did the work, the appeal was won, the worker refused to pay, and the lawyer sued his former client and won a judgment for the agreed-upon fee. A local newspaper, published by an owner who detested lawyers and who had a long history of lawyer-baiting, published a scurrilous editorial attacking the lawyer for suing the worker for legal fees. The editorial egregiously misstated the facts, accusing the lawyer of seizing 100 percent of the worker's compensation benefits after having done only one day's work. The publisher also suggested the lawyer was connected with a cabal of "crooked lawyers under prison sentence or indictment."

The editorial was blatantly false and in fact contradicted a straight news story that had appeared in the publication just a few days earlier. The editorial employee who wrote the piece, responding to a number of calls of protest from the victim's colleagues, acknowledged that he had gone too far and indicated he would publish a retraction, but then refused to do so because his employer forbade him.

The result was a jury verdict for $75,000 in compensatory damages and $300,000 in punitive damages. By a divided court, the West Virginia Supreme Court affirmed. In a far-ranging discussion of the modern history of judicial deference to the media, this court concluded that there was a "slow shift to become more solicitous to the rights of injured victims." (The dissent vigorously and acerbically rejected that conclusion.) In any event, it is not arguable that the court correctly identified the tension in today's policy discussions:

> There is, nonetheless, no vehicle other than the commercial media for the transmission of information. A tightening of the libel laws, therefore, inevitably implies higher levels of self-censorship, which jeopardizes full, robust, and untrammeled political debate. It is for that reason, then, that trial and appellate courts, notwithstanding the pronounced pro-victim shift, are still more solicitous of the media than of any other class of business defendants in our tort system.
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> However, in the punitive damages area there is a yet unresolved tension among (1) the public's demand for accountability; (2) the surpassing arrogance of the media; and, (3) the courts' justified concerns that punitive damages will lead to excessive self-censorship.
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> * * *
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> We accept with enthusiasm the First Amendment obligation of the courts to protect robust and untrammeled discussion, but we fail to see how untrammeled media arrogance in any way furthers the legitimate ends of free speech.[63]

The bottom line for the *Hinerman* court was defendant's arrogant failure to acknowledge it had made a mistake. Even though any

reasonable person, and that includes the editorial writer himself, would immediately recognize that the editorial was inaccurate, unfair, and defamatory, the publisher simply set himself above the law and virtually insisted that his status as "publisher" permitted him to do as he pleased. The failure to make apology and offer reasonable compensation were the factors that pushed this court over the edge. The court then announced the West Virginia rule on punitive damage in libel cases to be thus:

> In all American manufacturing, we impose liability for defective products. "Libel" is the peculiar name given to the product liability law that applies to the media. We have not given the media favorite status over automobile, stepladder, and lawn mower manufacturers because we want arrogant, abusive, and irresponsible media companies; rather, we have given favored status to the media because we do not want to chill robust and untrammeled debate about public issues.
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> Consequently, we recognize that society is better served if some latitude for "human error" is accorded both our impecunious mom and pop papers and the great media conglomerates with regard to punitive damages. However, none of these policy considerations persists when punitive damages are sustained against a company that has refused to make a prompt, prominent and abject apology for a known mistake and failed to make a reasonable offer of settlement. Under these circumstances, tempering punitive damages nurtures arrogance and unaccountability rather than full robust debate.[64]

While I am not nearly as confident as is the majority of the West Virginia Supreme Court that there is a shift toward recognizing the rights of libel victims, I respectfully suggest nobody would have even considered uttering such a conclusion ten years ago. It is nice to see.

The legal chorus, however, tends not to draw attention to cases like *Brown & Williamson* v. *Jacobson* and *Hinerman* v. *The Daily Gazette*. Instead, the inclination is to point to extraordinary results that suggest the press is repeatedly at the mercy of bet-your-company cases that threaten to reduce the reportorial function to describing yesterday's weather. For example, the *Los Angeles Times*[65] recently

reported that a Waco, Texas, jury rendered a $58 million libel judgment against a Dallas television station that had broadcast an eleven-part series defaming a district attorney named Victor Feazell. While we have no published legal opinions that tell the story, the press account does indicate that the libel victim was a heroic district attorney who had been victimized by a heavy-duty conspiracy among the Texas Rangers and other Texas law enforcement personnel. District Attorney Feazell had proved that the Rangers and the other conspirators had "solved" a large number of local murder cases by attributing responsibility for them to a pathological confessor who had been thousands of miles from the scene in a number of the murders. The libel jury was convinced that the television station was part of the conspiracy to discredit Feazell (who had even suffered an indictment at the hands of the bad guys.) Plaintiff apparently showed that each of the eleven televised episodes was demonstrably false.

Did the large verdict destroy the television company, or inappropriately chill its freedom of expression? There is no evidence that it did. All we know from the press accounts is that the case was settled.

What conclusions could we draw from this news report? Not many. We do not know how large the settlement was. We cannot know whether any part of the award would have survived an appeal. Finally, we must recognize that certain jurisdictions more regularly produce eye-popping verdicts than others. It is a serious mistake to revamp the substantive rules of contract, tort, and all other laws, in order to discourage jury response to a Joe Jamail (who, representing Pennzoil, won an $11 billion breach-of-contract verdict against Texaco) or others possessed of his unique talents. If those verdicts are a problem, it is not one that will be fixed by altering the substantive law of contracts or libel.

It is certainly true that, if we did change the libel law to eliminate presumed or punitive damages, we could expect a reduction in the number of libel claims. But not because of a reduction in the number of libelous statements. On the contrary, one can reasonably expect that the elimination of the cop from the beat will be accompanied by an increase in muggings. The real result of the elimination of presumed and punitive damages would be an increase in journalistic irresponsibility and a proportional increase in publishers' profits.

Further, the media's "chill" argument is self-centered. Presumed and punitive damages may do more than simply compensate for and deter abuses by the press. The mere availability of these damages, no matter how infrequently they are ultimately recovered by successful plaintiffs, encourages speech by citizens who might otherwise

remain silent.[66] Because libel victims have the potential to recover presumed and punitive damages, the citizenry may be emboldened to engage in public-issue debate despite the threat of a media barrage launched from within the "actual malice" bunker. And a barrage it is. The decision to participate in public life has been described as "akin to the decision that the criminal defendant must consider in pondering whether to testify at trial. Entering the vortex opens one's whole life to impeachment by the media, and that opening is without recourse."[67]

Punitive and presumed damages thus play an important First Amendment role in *encouraging* debate.

And libel actions themselves may be a valuable means of public debate. In some cases, prominent libel trials have spotlighted the plaintiff's rebuttal.[68] The libel trials of generals William Westmoreland against CBS[69] and Ariel Sharon against *Time* magazine[70] come to mind. General Westmoreland's defense of his actions during the Vietnam War and General Sharon's defense of his role (or lack thereof) in a massacre in a Lebanese refugee camp received widespread public attention. Would the generals have received as much attention if they merely had denied the charges the media had made against them? Probably not.[71]

Now, it is true that both generals are proud men, of at least some means, and have friends in high places, and perhaps their quest for vindication and vengeance would have led them to sue for libel even without the possibility of punitive and presumed damages. But what about our poor college professor libeled by the *Free-Wheeling Press*? Notwithstanding the attention his libel trial would focus on his denial, he probably would never be able even to consider litigation without the possibility of significant damage recovery.

Presumed and punitive damages help keep the libel laws from being irrelevant to those subject to the *Times* v. *Sullivan* standard. Presumed and punitive damages make it economically feasible for a libel victim to find an attorney, cope with wealthy media defendants' litigation strategies of gamesmanship and delay, and at least give the rare plaintiff who reaches trial a shot at recovery of his legal fees. Presumed and punitive damages thus become a form of empowerment for those who are defamed but who are otherwise powerless to secure redress. No wonder the press launches such a powerful assault against the availability of these remedies.

In fact, the press has little to worry about under the current libel scheme. Not only are few libel cases commenced, not only are they expensive, inconvenient, and time consuming, but they require the plaintiff himself to republish the offensive falsehood, and then sit back

and "take" the defendant's repetition of the lie in the privileged judicial effort to prove the charges are true. Furthermore, the defendant is even privileged to defame the plaintiff anew in the courtroom, in the effort to show reputational flaws, even though those *new* defamations are irrelevant to the false statements that are the subject of the libel action.

Conclusion

Lawyers' briefs end with a pithy conclusion. Here's mine:

The press isn't muzzled. It simply wants what all other businesses want: greater freedom profitably to manufacture and market its product, while escaping from product-liability responsibility when the product causes injury. The commonweal will not be served by giving publishers any more immunity than they already enjoy. The judiciary ought pay more attention to the rights of the victims.

Notes

1. See Barbara Dill's paper in this volume, p. 36.

2. Dill, p. 40. See generally *Ollman* v. *Evans*, 750 F.2d 970, 996–97 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (citing, approvingly, commentary on threat to free speech of growing number of libel actions), *cert. denied*, 471 U.S. 1127 (1985).

3. Dill, p. 47.

4. See, e.g., William W. Van Alstyne, "First Amendment Limitations on Recovery from the Press—An Extended Comment on 'The Anderson Solution,'" *William and Mary Law Review* 25 (1984): 793, 807; Comment, "Punitive Damages and Libel Law," *Harvard Law Review* 98 (1985): 847; Randall Bezanson and Gilbert Cranberg, "Punitive Damages: Muzzled Press?" *New York Times*, June 13, 1988, p. A19.

5. Between 1974 and 1984, the media were successful in about 81 percent of all libel suits brought against it. In libel suits brought by public figures, the media were successful about 90 percent of the time. This success is a clear result of the courts' special treatment of the media. The press's constitutional privileges are determinative in about 80 percent of all libel cases, such that "[t]here is little escape from the conclusion that the constitutional privileges have come to dominate, if not supplant, the common law tort of defamation." Randall P. Bezanson, et al., *Libel Law and the Press: Myth and Reality* (New York: The Free Press, 1987), pp. 121, 150.

6. It has been estimated that as many as 50 percent of the "factually strong defamation cases" are foreclosed entirely by the constitutional privileges (Bezanson, et al.).

7. 376 U.S. 254 (1964).

8. Had the Court not relieved the *Times*, the civil rights movement could have been stifled. Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Random House, 1991), pp. 314–45.

9. The *New York Times* standard applies to public figures as well as public officials. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335–36 (1974) (citing *Curtis Pub. Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U.S. 130, 162 [1967] [plurality]).

10. *New York Times*, 376 U.S. at 279–80.

11. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 342.

12. 466 U.S. 485 (1985).

13. Id. at 511. The Court stated that appellate courts must review the entire record so as to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." Id. at 514.

14. Independent appellate review dates at least as far back as *New York Times*, in which the Court, in an effort to discourage further litigation by Sullivan against the *Times* (see Lewis, *Make No Law*, pp. 170–82), reviewed the trial court record, concluding that the evidence adduced at trial failed to establish actual malice by clear and convincing evidence. 376 U.S. at 285–86. The Court disposed of the Seventh Amendment in a footnote stating that the Amendment's "ban or re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts." Id. at 285 n.26.

15. Just how extraordinary independent review is can be seen in the Court's failure to give adequate guidance to courts of appeals as to how such review should be conducted. The issue is a quagmire of amorphous concepts. *Bose* "ducked the hard question how an appellate court is supposed to conduct a meaningful independent review of the evidence when actual malice hinges on the publisher's subjective state of mind. State of mind determinations often turn on an evaluation of witness credibility, which appellate judges cannot effectively perform." Scott M. Matheson, Jr., "Procedure in Public Person Defamation Cases: The Impact Of the First Amendment," *Texas Law Review* 66 (1987): 215, 275. Justice (now Chief Justice) Rehnquist noted this problem in dissent: "the facts determinative of [actual malice]—actual knowledge or subjective reckless disregard for truth—involve no more than findings about the *mens rea* of an author, findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context." *Bose*, 466 U.S. at 515 (Rehnquist, J., dissenting). Justice White, also dissenting, agreed with Justice Rehnquist that actual knowledge was a historical fact not independently reviewable, but conceded that reckless disregard was independently reviewable. Id. (White, J., dissenting). Presumably, Justice White's distinction is based on the fact that reckless disregard usually required the finder of fact to "infer recklessness from circumstantial evidence." Gary A. Paranzino, Note, "The Future of Libel Law and Independent Appellate Review: Making Sense of *Bose Corp.* v. *Consumers Union of United States, Inc.*," *Cornell Law Review* 71 (1986): 477.

16. *United States* v. *Nixon*, 418 U.S. 683 (1974).

17. *United States* v. *United Mine Workers of Am.*, 330 U.S. 258 (1947).

18. *Walker* v. *City of Birmingham*, 388 U.S. 306, 320 (1967).

19. Id. at 320–21.

20. *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir.), *modified*, 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. dismissed*, 495 U.S. 693 (1988).

21. Id. The First Circuit, sitting en banc, subsequently issued an admittedly dictum opinion that, too, was embarrassingly deferential. It asked the paper next time to please try an appeal before ignoring court orders. "It is not asking much . . . to make a good faith effort, to seek emergency relief" before ignoring the Court's order. The Court took pains to note the *Journal*'s "long and distinguished history of responsible journalism." 820 F.2d 1354, 1355 (1st Cir. 1987) (en banc), *cert. dismissed*, 495 U.S. 693 (1988).

22. 495 U.S. 693 (1988).

23. See *Bachchan* v. *India Abroad Pubs. Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Co. 1992).

24. N.Y. Civ. Prac. L. & R. 5304.

25. N.Y. Civ. Prac. L. & R. 5304(b)(4) (emphasis added).

26. *Laker Airways* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984) ("The standard for refusing to enforce judgments on public policy grounds is strict").

27. *Hilton* v. *Guyot*, 159 U.S. 113, 204–205 (1895).

28. *Intercontinental Hotel Corp.* v. *Golden*, 15 N.Y. 2d 9, 13 (1964).

29. 585 N.Y.S. 2d 661 (Sup.Ct., N.Y.Co. 1992).

30. Decision in *Hepps* v. *Philadelphia Newspapers*, 474 U.S. 767 (1986).

31. Id. at 664–65. For a general discussion of British libel law, see Kathleen A. O'Connell, Comment, "Libel Suits Against American Media in Foreign Courts," *Dickinson Journal of International Law* 9 (1991): 147.

32. 585 N.Y.S.2d at 665 (emphasis added).

33. *Galella* v. *Onassis*, 353 F. Supp. 196, 216 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 487 F.2d 986 (2d Cir. 1973).

34. Id. at 228.

35. Id. at 214–15.

36. Restatement (Second) of Torts, § 652D (1977).

37. Id.

38. E. Gabriel Perle & John T. Williams, *The Publishing Law Handbook* § 4.03[a], at 142.2 (1991 Supp.).

39. *Virgil* v. *Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). The *Virgil* formulation, derived from the Restatement, has been called "the most elaborate and accepted definition." Ronald F. Wick, Note, "Outing and the Private Facts Tort," *Georgetown Law Journal* 80 (1991): 413, 425. An alternative standard, developed by the California Supreme Court, considers "'the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety.'" *Briscoe* v. *Reader's Digest Ass'n, Inc.*, 93 Cal. Rptr. 866, 874 (Cal. 1971) (quoting Kapellas v. Kofman, 81 Cal. Rptr. 360, 370 [Cal. 1969]).

40. Diane L. Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort," *Cornell Law Review* 68 (1983): 291, 353 (emphasis added).

41. *Sidis* v. *F-R Publishing Co.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

42. Id. at 809 (declining to decide "whether or not the newsworthiness of the matter printed will always constitute a complete defense").

43. 527 F.2d 1112 (9th Cir. 1975).

44. In *Diaz* v. *Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Cal. App. 1983), a California court of appeals, citing *Virgil*, stated that the "newsworthy privilege is not without limitation." Id. at 767. *Diaz* concerned the press's revelation that the first female president of the College of Alameda's student body was a transsexual. Id. at 765.

45. 410 F. 2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

46. Id. at 703 (emphasis added).

47. Id. at 705.

48. Id.

49. Id.

50. Id. at 706.

51. Id. at 708 (Tamm, J., concurring).

52. Laurence Silberman, Address Before the Federalist Society (June 13, 1992), reprinted in "Attacking Activism, Judge Names Names," *Legal Times*, June 22, 1992, p. 14.

53. Noting that counsel for the *Times* in *New York Times* v. *Sullivan* had argued that the First Amendment prohibited libel damage recoveries by public officials, Lewis argued in the *Columbia Law Review* that the time had come for the Court to adopt that view. Anthony Lewis, "*New York Times* v. *Sullivan* Reconsidered: Time to Return to the Central Meaning of the First Amendment," *Columbia Law Review* 83 (1983) 621 (hereinafter "Central Meaning of the First Amendment").

54. See Rodney A. Smolla and Michael J. Gaertner, "The Annenberg Libel Reform Proposal: The Case for Enactment," *William and Mary Law Review* 31 (1989): 25.

55. C. Thomas Dienes, "Libel Reform: An Appraisal," *Michigan Journal of Law* 23 (1989): 1, 7. Unlike many other media advocates, however, Professor Dienes recognizes the legitimacy and importance of the individual's reputation interest. He criticizes the Annenberg proposal's foreclosing of damages to plaintiffs where a retraction or reply is published, stating that a retraction or reply should only serve to limit the plaintiff to actual or special damages (p. 4)

56. Dill, p. 57.

57. See, e.g., David Anderson, "Reputation, Compensation, and Proof," *William and Mary Law Review* 25 (1984): 774, 758.

58. See Paul A. Le Bel, "Defamation and the First Amendment: The End of the Affair," *William and Mary Law Review* 25 (1984): 779.

59. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

60. *Maheu* v. *Hughes Toolco*, 569 F.2d 459, 478 (9th Cir. 1977).

61. *Brown & Williamson Tobacco Corporation* v. *CBS, Inc.*, 713 F.2d 262 (7th Cir. 1983), *on remand*, 644 F. Supp. 1240 (N.D. Ill. 1986), *aff'd in part and rev'd in part*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). The author of this paper was trial and appellate counsel to Brown & Williamson.

62. 423 S.E.2d 560 (W. Va. 1992), *cert. denied*, 113 S.Ct. 1384 (1993).

63. 23 S.E.2d at 575–76, 580.

64. 423 S.E.2d 581.

65. *Los Angeles Times*, December 29, 1991, p. A-1, column 3.

66. Professor Jerome Barron notes that "[i]t is not possible to number those, however talented and public-spirited who choose not to withstand the pitiless, constant, and often scurrilous scrutiny that is today the lot of those who participate in American public life. The transformation of American libel law in favor of the media defendant may not have depopulated public life of the wise, the virtuous, and alas, also the sensitive but . . . there is no assurance that it has not either." Jerome A. Barron, "Punitive Damages in Libel Cases—First Amendment Equalizer," *Washington and Lee Law Review* 47 (1990): 105, 110.

67. Barron, "Punitive Damages."

68. Merely requesting substantial punitive damages may attract significant public attention. See Barron, "Media Accountability," pp. 793–94.

69. *Westmoreland* v. *CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. 1984).

70. *Sharon* v. *Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

71. Anthony Lewis takes the opposite view, arguing that General Westmoreland did not need a libel action to get the public's attention and that he "was able to give his critics as good as he got." Lewis, "Central Meaning of the First Amendment," pp. 621–22. Whatever the facts regarding General Westmoreland's ability to command public attention even without a libel trial, there is little doubt that the libel trial helped intensify the attention his rebuttal received and increase the credibility of his arguments.