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Immaculate Defamation: The Case of the Alton Telegraph

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IMMACULATE DEFAMATION: THE CASE OF THE *ALTON TELEGRAPH*

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ABSTRACT

At the confluence of three major rivers, Madison County, Illinois, was also the intersection of the nation's struggle for a free press and the right of access to appellate review in the historic case of the Alton Telegraph. The newspaper, which helps perpetuate the memory of Elijah Lovejoy, the first martyr to the cause of a free press, found itself on the losing side of the largest judgment for defamation in U.S. history as a result of a story that was never published in the paper—a case of immaculate defamation. Because it could not afford to post an appeal bond of that magnitude, one of the oldest family-owned newspapers in the country was forced to file for bankruptcy to protect its viability as a going concern.

Attention must be paid to a case in which plaintiff's counsel earns a place in the Guinness Book of World Records and his adversary is honored for distinction in the defense of a free press and the people's right to know. Notwithstanding subsequent reform of the supersedeas bond process, the inability to appeal a defamation award for lack of sufficient resources to secure a bond still presents an existential threat to all but the largest media companies. The appeal bond process thus has a chilling effect on organizations engaged in newsgathering and dissemination, abridging freedoms protected by the First Amendment. This Article proposes a re-imagination of the appeal bond to accommodate the legitimate interests of the judgment creditor while protecting a media defendant's constitutional right to appeal.

TABLE OF CONTENTS

I. INTRODUCTION 583
II. BACKSTORY 587
III. TRIAL 595
IV. AFTERMATH 599
V. AN APPEAL FOR APPEAL BOND REFORM 604
VI. CONCLUSION 613

I. INTRODUCTION

At about the midpoint of its journey, the mighty Mississippi River turns almost due east for a distance of fifteen miles before reaching Alton, Illinois, where it joins forces with the Missouri River and resumes its proper course south to the Gulf of Mexico.[1] The River

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1. The Mississippi River flows 2,350 feet through America's heartland from its headwaters in the north central Minnesota wilderness. *Mississippi River Facts*, NAT'L PARK SERV., http://www.nps.gov/miss/riverfacts.htm (last visited July 27, 2013). Its source, an antler-shaped glacial lake, was discovered in 1832 by Henry R. Schoolcraft, who named it Lake Itasca, derived by combining two Latin words, *veritas* (true) and

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Bend is the brand used by Alton and neighboring communities at the southwestern edge of Illinois to market the region for its natural beauty as a tourist destination.[2] It is an apt metaphor for the rule of law in the jurisdiction where these river towns are located. The Madison County judicial system has long been regarded as "bent."[3]

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capita (head). ANN MCCARTHY, THE MISSISSIPPI RIVER xvi (1984). It is unclear whether Schoolcraft knew that the lake already had an Ojibwa name, *Omashkoozozaaga'igan* (Elk Lake). The river's name is a combination of the Ojibwa words *misi* (big) and *sipi* (river). JOHN MADSON, UP ON THE RIVER 21 (1985).

2. The River Bend begins at the confluence of the Mississippi and Illinois Rivers in Grafton, Illinois. The Metro East is the formal name for the portion of the St. Louis Metropolitan Statistical Area consisting of the eastern suburbs of St. Louis situated across the Mississippi River. The Metro East is the second-largest urban area in Illinois after the Chicago metropolitan area. *See* U.S. CENSUS BUREAU, 2010 CENSUS DATA, *available at* http://www.census.gov/2010census/.

3. A jurisdiction's lawsuit climate is a significant factor in business owners' growth and expansion plans. According to Metro East's legal journal, "The reputation we've acquired nationally is a black cloud that hangs over all of us." Editorial, *Don Weber Wants to Change the Courthouse Climate in Madison County*, MADISON-ST. CLAIR REC. (Jan. 28, 2012), http://madisonrecord.com/arguments/241298-don-weber-wants-to-change-the-courthouse-climate-in-madison-county. Based upon a survey of lawyers who represent major employers, the American Tort Reform Association currently ranks Madison County as the third-most unfair litigation environment in the nation, a slight improvement from its ranking prior to 2005 as the very worst jurisdiction. *Judicial Hellholes*, AM. TORT REFORM ASS'N (Apr. 18, 2013), http://www.judicialhellholes.org/2012-13/Madison-county-illinois/. A national survey of lawyers by the U.S. Chamber Institute for Legal Reform recently named Madison County as the sixth-most unfair and unreasonable jurisdiction in the country. Inst. for Legal Reform, *Illinois Lawsuit Climate Ranks Among Nation's Worst*, U.S. CHAMBER COM. (Sept. 10, 2012), http://www.instituteforlegalreform.com/states/illinois. Madison County's class action filing rate per capita is about twenty times the national average. Noam Neusner, *The Judges of Madison County*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39. Former judge and state's attorney Donald W. Weber explained why Madison County has been such a popular venue for personal injury suits. "Attorneys will do whatever they can to have their cases tried here. [It has] a big pool of laborers, with all the steel companies, barge lines, and railroads that come through here. So the juries are much more likely to be sympathetic to the plaintiff than the big companies." Stewart McBride, *Is It Libel if It's Never Printed*?, CHRISTIAN SCI. MONITOR (June 25, 1981), http://www.csmonitor.com/1981/0625/062563.html. Although their exposure and treatment occurred elsewhere, non-residents have historically filed a disproportionately large percentage of asbestos-related personal injury claims in Madison County, attracted by the reputation of its juries for being generous to working-class plaintiffs. *See generally* Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235 (2004). Not unlike Delaware, where corporation franchise taxes are an important part of the state budget, filing fees generated by asbestos lawsuits represent a significant source of income for Madison County government. A recent audit of county finances reported an increase in revenue attributable primarily to court filing fees, noting that 1,563 asbestos lawsuits were filed in 2012, compared with 952 in 2011. Sanford J. Schmidt, *Audit Finds Madison County Finances Strong*, TELEGRAPH (Jul. 11, 2013), http://www.thetelegraph.com/news/local/article_8fbd101c-e9b8-11e2-95b8-0019bb30f31a.html.
Members of the Madison County plaintiffs' bar are actively involved in the highly politicized process by which judges are selected. Circuit Court Judge Barbara Crowder, who formerly oversaw Madison County's asbestos docket, was recently reassigned when it was disclosed that she had granted 82% of 2013 trial slots to the firms of plaintiffs' lawyers who had made $30,000 in contributions to her re-election

The Alton Telegraph has been the principal source of local news for residents of the River Bend since its founding in 1836.[4] Following a jury trial in 1980, the paper found itself on the wrong side of the largest damage award in the history of U.S. libel law.[5] What makes the *Telegraph Case* extraordinary, and one of immaculate defamation, is that the libel was based upon a story that was never published in the paper.

On appeal, the *Telegraph Case* would have presented important issues of reporters' privilege and the rights of citizens to report possible criminal activity to law enforcement officials. Major newspapers and journalism societies raised these issues in amicus briefs in support of the Telegraph.[6] A pattern of rulings by the trial judge against the Telegraph on matters of law and evidence might well have been held to constitute prejudicial error.

What makes the *Telegraph Case* tragic is that the trial court decision was never made subject to appellate review. A jury would have the last word after deliberating only five hours following a trial that lasted more than five weeks. The enormity of the judgment against the Telegraph dwarfed its net worth. The paper could not afford to post the bond, known as a supersedeas bond,[7] necessary to file an appeal.[8]

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campaign just days before. Stephanie Francis Ward, *Illinois Judge Removed from Asbestos Docket over Campaign Contributions*, A.B.A. J. (Dec. 14, 2011), http://www.abajournal.com/news/article/ill_judge_removed_from_asbestos_docket_due_to_campaign_contributions/. Record-breaking jury awards have been blamed for the high malpractice insurance premiums that have resulted in an exodus of physicians from Madison County. Christi Parsons, *Verdicts Belie Image in Madison County*, CHI. TRIB. (Jan. 9, 2005), *available at* http://articles.chicagotribune.com/2005-01-09/news/0501090493_1_settlement-and-verdict-payments-jury-verdict-research-circuit-court-clerk.

4. The slogan, "Serving the River Bend since 1836," appears directly below the name of the paper on the front page. *The Telegraph*, http://www.thetelegraph.com/ (last visited Dec. 27, 2013).

5. Although there have since been larger libel judgments against newspapers, the $9.2 million award against the *Telegraph* is the equivalent of $25 million adjusted to constant dollars, placing it among the largest libel verdicts awarded in U.S. history. *2012 Report on Trials and Damages*, MEDIA L. RES. CTR., http://www.medialaw.org/publications/frequently-requested (last visited Dec. 27, 2013).

6. STEPHEN A. COUSLEY, SAVING THE ALTON TELEGRAPH 11 (1981). The Appellate Court of Illinois did not permit them to be filed. *See infra* note 139 and accompanying text.

7. The supersedeas bond has been a little-known feature of appellate practice since colonial times. ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 95–99 (1941). Following a successful trial verdict, plaintiff becomes a judgment creditor of the defendant, entitled to satisfy the judgment by seeking to execute against defendant's assets. H. Thomas Watson et al., *Judgment Enforcement Issues for Appellate Lawyers* (Feb. 13, 2013), http://www.lacba.org/Files/Main%20Folder/Areas%20of%20Practice/AppellateCourts/Files/Judgment_Enforcement_Issues_for_Appellate_Lawyers_2_13_13_Outline.pdf. By placing the assets of a bonding company behind the obligation, an appeal bond ensures that money to satisfy the judgment will be available to appellee if the judgment is affirmed on appeal. *Id.* The parties to an appeal bond consist of the principal (appellant), the obligee or party protected by the bond (appellee), and the surety (typically an insurance company) who agrees to be legally liable to pay appellee if the judgment is affirmed and the principal is unable to satisfy

The family that had treated the Telegraph as a stewardship through four generations was forced to file for bankruptcy protection to preserve its viability as a going concern.

As a haunting and cautionary tale about the relationship between reporters and their sources in agencies of government, the case of the Alton Telegraph is a very good story.[9] It earned plaintiff's counsel a place in the Guinness Book of World Records.[10] For his family's heroic efforts to save the Telegraph, the publisher received the prestigious John Peter Zenger Award for Freedom of the Press and the People's Right to Know.[11] Inspired by subsequent developments in

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the judgment. *Id.* The principal signs an indemnity agreement, promising to reimburse the surety if the surety is made to pay. *Id.* The surety will require the principal to furnish a letter of credit or other form of collateral. *Id.* The principal pays an annual premium, typically 1–2% of the amount of the bond. *Id.* Agencies of the federal government are not required to post an appeal bond. FED. R. CIV. P. 62(c).

8. Posting an appeal bond is technically not a requirement for filing an appeal. Price v. Philip Morris, Inc., 793 N.E.2d 942, 946 (Ill. App. Ct. 2003). Rather it is a device that stays enforcement of the judgment by execution against defendant's assets during the pendency of the appellate process. *Id.* In theory, a defendant can appeal without posting a bond, but then the plaintiff would be free to execute on the judgment while the appeal was pending. Richard G. Stuhan & Sean P. Costello, *The Appeal Bond—What It Is, How It Works, and Why It Needs to Be Factored Into Your Litigation Strategy*, http://www.jonesday.com/files/Publication/983c1326-51c1-4ebc-9e6e-001ef4268418/Presentation/PublicationAttachment/daa0a1a0-c224-4cde-a744-64d80a235d12/Spring_2008_The_Appeal_Bond.pdf (last visited Dec. 27, 2013). In *Obsidian Finance Group, LLC v. Cox*, after obtaining summary judgment for $2.5 million in damages in a defamation suit against an Internet blogger, plaintiff sought to execute on the judgment by asking the sheriff to seize and sell to the highest bidder (who would presumably be plaintiff) the "intangible personal property" owned by defendant, consisting of defendant's right to appeal. Obsidian Fin. Grp., LLC v. Cox, 812 F. Supp. 1220 (D. Or. 2011). If this novel judgment execution stratagem succeeds, defendant, who could not afford to post a supersedeas bond, will lose the right to appeal. The case, which is currently pending before the U.S. Court of Appeals for the Ninth Circuit, raises the issue to be discussed, *infra*, in Part V of this Article. The central issue in *Obsidian*, whether the full panoply of First Amendment protections is available only to institutional media, is beyond the scope of this Article. *See* Eugene Volokh, *May Plaintiff Cut Off a Poor Defendant's Right to Appeal by Having the Sheriff Sell Off Defendant's Right to Appeal* (Jan. 11, 2013), http://www.volokh.com/2013/01/11/may-plaintiff-cut-off-a-poor-defendants-appeal-by-having-the-sheriff-sell-off-defendants-right-to-appeal/.

9. Although once a subject of controversy, the value of narrative in legal scholarship is no longer a matter of dispute. *See, e.g.*, Paul A. Lombardo, *Legal Archaeology: Recovering the Stories Behind the Cases*, 36 J.L. MED. & ETHICS 589 (2008); Jean C. Love, Commentary, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87 (1998). Since 2005, Foundation Press has published an entire "law stories" series which now contains thirty-seven titles.

10. *See infra* note 90.

11. The University of Arizona School of Journalism has presented this award, now known as the John Peter and Anna Catherine Zenger Award, annually since 1954 in the cause of freedom of the press and the people's right to know. *The John Peter and Anna Catherine Zenger Award*, U. ARIZ. SCH. JOURNALISM, http://journalism.arizona.edu/zenger (last visited Jan. 4, 2014). In 1734 Zenger was charged with seditious libel for publishing news stories critical of royal government officials in colonial New York. *Id.* His wife continued to publish the *New York Weekly Journal* while her husband

Madison County, the appeal bond process in most states has since been reformed. However, a media organization could still be crippled by the inability to seek appellate review of a sizeable damages award, which is why the *Telegraph Case* retains its claim to our attention as it nears its thirty-fifth anniversary.

Following the Introduction, Part II of this Article explores the events leading to the *Telegraph Case*. Part III examines the proceedings at the trial court level. Part IV describes the surreal aftermath in which eleven grounds of error were never considered by an appellate tribunal for lack of an appeal bond. Part V argues that, without significant re-imagination, the supersedeas bond requirement may violate an emerging right to appeal. Meanwhile, as it applies to organizations engaged in newsgathering and dissemination, the appeal bond process abridges freedom of the press and the people's right to know.

II. BACKSTORY

"Every lawsuit is a potential drama: a story of conflict, often with victims and villains, leading to justice done or denied."[12] In any drama, the place in which events unfold can profoundly influence the outcome.[13] In the *Telegraph Case*, the city of Alton itself functions as a principal character.

Alton was named in honor of his firstborn son by Rufus Easton, a prominent lawyer and land speculator who served as the first postmaster of St. Louis.[14] By reason of its proximity to St. Louis,[15] and its location near the confluence of three navigable rivers,[16] Easton perceived the natural advantages of the site as the base for a passenger ferry service.[17] By 1818 Easton had acquired much of the land that

was imprisoned for ten months before being brought to trial. *Id.* Zenger's acquittal by a jury after deliberating for ten minutes established the principle that truth is a defense against libel, and is regarded as helping to lay the foundation for the First Amendment. *See* Allen Pusey, *John Peter Zenger Acquitted*, A.B.A. J. 72 (Aug. 2013); *The Trial of John Peter Zenger*, NAT'L PARK SERV., http://www.nps.gov/feha/historyculture/the-trial-of-john-peter-zenger.htm (last visited Dec. 27, 2013). Paul S. Cousley, the third generation of Cousleys to serve as publisher of the Telegraph, was the 1981 recipient of the Zenger Award. *Id.*

12. Lombardo, *supra* note 9, at 589.

13. According to classic Aristotelian theory, place is one of the three unities (together with time and action) of dramatic construction. *Classical Dramatic Structure*, http://www.math.brown.edu/~banchoff/Yale/project04/th-class.html (last visited Dec. 27, 2013).

14. W.R. BRINK, HISTORY OF MADISON COUNTY, ILLINOIS 375 (1882).

15. Alton is twenty-five miles northeast of St. Louis. *About Alton*, http://www.riverbender.com/officespace/about_alton.cfm (last visited July 27, 2013).

16. The Corps of Discovery, led by Meriwether Lewis and William Clark, embarked in May 1804 from a point near the confluence of the Mississippi and Missouri Rivers in what is now the town of Hartford, Illinois. DAYTON DUNCAN & KEN BURNS, LEWIS & CLARK 21 (1997).

17. Evidence of Easton's primary reason for his interest in the location is found in the deeds conveying parcels of land in Alton in which he expressly reserved ferry

comprised Alton when it was chartered as a city by the Illinois legislature in 1837.[18]

Easton's vision proved correct. Alton flourished as a thriving center for transportation and commerce throughout the steamboat era of the 1820s and 1830s.[19] Steamships carried cargo from the Illinois River to the north and the Missouri River to the south to the Port of St. Louis and down the Mississippi River to New Orleans. Although Mark Twain was unimpressed by his visit,[20] Alton's prime location and the region's abundant limestone, coal, and timber resources attracted an influx of entrepreneurs and talented craftsmen.[21] Prominent among them was Lucas J. Pfeiffenberger, who designed dozens of private residences, churches, and public buildings of architectural significance, and served four terms as mayor of Alton between 1872 and 1883.[22] Pfeiffenberger also served as the first president of the Piasa Building and Loan Association,[23] the predecessor to the Piasa First Federal Savings & Loan Association (Piasa),[24] whose failure was central to the *Telegraph Case*.[25]

By the middle of the nineteenth century Alton was one of the most important and enterprising cities in Illinois.[26] Alton boasted four

rights for himself and his heirs. DORA BROWN TICKNER, HISTORY OF ALTON, ILLINOIS 5–6 (1958).

18. BRINK, *supra* note 14, at 389.

19. Easton did not personally benefit financially from his investment. KRISTIE C. WOLFERMAN, THE INDOMINABLE MARY EASTON SIBLEY: PIONEER OF WOMEN'S EDUCATION IN MISSOURI 33, 45 (2008). His heavy speculation in Alton real estate left him in "straightened circumstances for the rest of his life." *Id.*

20. Alton was the first community outside of Missouri that Samuel Clemens saw when he left home in 1853 at the age of eighteen and sailed down the Mississippi to St. Louis. B. CLAY SHANNON, STILL CASTING SHADOWS: A SHARED MOSAIC OF U.S. HISTORY 201 (2006). He described Alton as "a dismal little river town full of death, disease, disaster, violence and murder." *Id.*

21. Alton attracted immigrants from Scotland, Ireland, England, and Germany. MERWIN G. FAIRBANKS, A HISTORY OF NEWSPAPER JOURNALISM IN ALTON, ILLINOIS 17 (1973). "It is hard to believe that at one time in history our city was an industrial mecca." WOLFERMAN, *supra* note 19, at 45.

22. Pfeiffenberger stopped in Alton in 1857 en route to the gold rush in California and never left. SUSAN H. EASTMAN, RIVER BEND: AN AREA THAT KNOWS NO PANICS 63 (1981).

23. *Obituary of Lucas J. Pfeiffenberger,* MADISON COUNTY ILGENWEB, http://madison.illinoisgenweb.org/Obituaries/obituariesP.html (last visited Dec. 27, 2013). Upon his death, his son, James Mather Pfeiffenberger, succeeded his father as president of Piasa. *Id.*

24. According to Native American legend, the Piasa bird was a fierce, winged monster dreaded for carrying villagers off one by one to a cave along the river bank at the site of what would later become Alton, where they would be eaten. FAIRBANKS, *supra* note 21, at 2–3. Ouatogo, an Illini chief, finally was able to trick the creature into making an attack, whereupon twenty warriors armed with bows and poisoned arrows ambushed and succeeded in killing the giant bird. *Id.* An image of the Piasa bird is painted on a bluff overlooking the river.

25. *See infra* notes 74–75 and accompanying text.

26. *Chicago & Alton Railway*, KINGDOM CALLAWAY HIST. SOC'Y, http://www.kchsoc.org/carr_article.html (last visited Dec. 27, 2013).

newspapers at the time, including the Telegraph, which published its first issue on January 15, 1836.[27] It was home to more than 100 industries engaged in brewing, baking, and banking among others, and institutions of higher education.[28] Alton was growing faster than St. Louis and was almost as large as Chicago.[29] The city hosted the final senatorial debate between Abraham Lincoln and Stephen A. Douglas in 1858[30] and was a leading candidate to become Illinois' state capital.[31]

Significant income and wealth disparity was a byproduct of the city's rapid industrial growth, resulting in the sorting of Alton's residents into sections separated by geography and social class.[32] Pfeiffenberger and other architects designed magnificent Queen Anne Victorian, Italianate, and Georgian Revival mansions built of stone or brick on the bluffs in the Middletown district of the city for the families of steamboat captains and captains of industry. Working-class families settled in neighborhoods of one-story frame houses in the flood-prone low-lying areas closer to the river.[33]

A tragic event threatened Alton's growing prosperity and enshrined the city in the history of the nation's struggle for freedom of the press a century before the *Telegraph Case*. In what has been described as the first battle of the Civil War,[34] the abolitionist Elijah Parish

27. It began as the four-page Alton Weekly Telegraph and was known as the Alton Evening Telegraph in the 1960s. FAIRBANKS, *supra* note 21. Other Alton newspapers were the Spectator, the Observer and the Temperance Herald. *Id.*

28. Major employers included Laclede Steel, Owens Illinois Glass Company, Standard Oil, and Western Cartridge Company. *Our Alton . . . 175 years ago (1837)*, HAYNER PUB. LIBR. DISTRICT (Summer 2012), http://www.haynerlibrary.org/wp-content/uploads/2012/06/2012-Summer-Newsletter.pdf.

29. "In 1836, easterners had referred to Alton as the Queen of the West. It vied with St. Louis in importance as a port city." SHANNON, *supra* note 20, at 202.

30. On October 15, 1858, after arriving in Alton before dawn aboard the steamship *City of Louisiana*, Lincoln dined with Senator Lyman Trumble in the Christian Hill neighborhood before strolling down the square for his seventh debate with Douglas. *Historic Christian Hill*, ST. LOUIS POST-DISPATCH, Sept. 24, 1978, at 14.

31. BRINK, *supra* note 14, at 379. Alton received the most votes in a statewide election held in 1834 to choose the capital, but its narrow margin over Springfield was deemed inconclusive. *Why Alton Is Not the Capital of Illinois*, MADISON COUNTY ILGENWEB, http://madison.illinoisgenweb.org/alton_not_capital.html (last visited Dec. 12, 2013).

32. "The majority of Upper Alton's inhabitants were Northerners from New England and New York. Alton was a city divided by the Upper Town and the Lower Town, by Northern Yankees and Southern sympathizers, by an upper business class and a lower laboring class." Judy Hoffman, *"If I fall, my grave shall be made in Alton": Elijah Lovejoy, Martyr for Abolition*, GATEWAY: Q. (Spring 2005).

33. CHERYL EICHAR JETT, ALTON 8 (2009). Even laborers, bricklayers and stonemasons earned an exceptional wage of $1 to $3 daily compared to 40-cents being paid elsewhere. HAYNER PUB. LIBR. DISTRICT, *supra* note 28.

34. Editorial, *Commemorate Elijah Lovejoy with a Stamp*, ST. LOUIS POST-DISPATCH, Feb. 22, 2010, at A14.

Lovejoy, a Presbyterian minister[35] and editor of the Alton Observer, was murdered in Alton.[36] In response to his editorializing against slavery, Lovejoy's printing press had been dismantled and thrown into the Mississippi River by a pro-slavery mob.[37] After this happened for the third time, Lovejoy resolved to defend his property.

On the night of November 7, 1837, an alcohol-fueled mob carrying guns, clubs, stones, and torches surrounded the Godfrey, Gilman & Company warehouse on the Mississippi riverfront. One man climbed a ladder up the three-story building intent on setting fire to the premises for the purpose of destroying Lovejoy's fourth printing press, which he had surreptitiously shipped from Cincinnati the previous night.[38] Standing with his supporters on the roof, Lovejoy was killed by shotgun blasts fired from the mob.[39]

News of Lovejoy's death was reported throughout the nation and prompted countless editorials, pamphlets, and sermons. The national publicity galvanized public support for the antislavery movement[40]

35. At the time of his death Lovejoy was serving as the first pastor of the present-day College Avenue Presbyterian Church, then known as Upper Alton Presbyterian Church. *Our History*, C. AVENUE PRESBYTERIAN, http://collegeavepres.org/index.php?pagekey=aboutus_history (last visited Dec. 27, 2013).

36. In Lovejoy's honor, the Thirteenth Amendment to the Constitution abolishing slavery was drafted in Alton. *Illinois in Focus: A Photographic Tour of the Land of Lincoln*, www.illinoisinfocus.com/alton-elijah-lovejoy.html (last visited Dec. 27, 2013). Alton recently observed the 175th anniversary of Lovejoy's martyrdom. Kathie Bassett, *Free Speech Martyr Honored on 175th Anniversary of Death*, TELEGRAPH (Nov. 4, 2012), http://www.thetelegraph.com/news/local/article_d4b0b154-263d-11e2-bdb5-0019bb30f31a.html.

37. Born in Maine in 1802, Lovejoy moved to St. Louis in 1832 and became editor of the St. Louis Times. *See generally* PAUL SIMON, FREEDOM'S CHAMPION—ELIJAH LOVEJOY (1994); PAUL SIMON, LOVEJOY: MARTYR TO FREEDOM (1964). Lovejoy's strident editorials against slavery prompted a local judge, Luke E. Lawless, to declare the paper a threat to democracy. *Id.* Lovejoy had previously called Judge Lawless an "Irish papist" for not prosecuting those responsible for lynching a local black cook. *Id.* Fearing for himself and his young wife, Lovejoy fled St. Louis and relocated across the river to the free state of Illinois in September 1836 where he became editor of the Alton Observer. *Id.*

38. T. J. Greaney, *Famed Editor Merits Stamp of Approval*, COLUMBIA DAILY TRIB. (Feb. 11, 2010), http://www.columbiatribune.com/opinion/columnists/famed-editor-merits-stamp-of-approval/article_c763a9c2-dc33-5486-8608-97b0f5b4e249.html.

39. No one was ever convicted of a crime in connection with Lovejoy's murder. TICKNER, *supra* note 17, at 17.

40. Lovejoy's death was an "earthquake" sending shock waves through America and "felt in the most distant regions of the earth." John Quincy Adams, *Introduction* to JOSEPH C. LOVEJOY AND OWEN LOVEJOY, MEMOIR OF THE REV. ELIJAH P. LOVEJOY 12 (1838). By its mobilization of antislavery sentiment, Lovejoy's martyrdom was a turning point in American history comparable in significance to Harriet Beecher Stowe's publication of *Uncle Tom's Cabin.* John Brown stood up at the end of a memorial prayer meeting in Ohio and announced, "Here, before God, in the presence of these witnesses, from this time, I consecrate my life to the destruction of slavery!" Letter from Professor Iver Bernstein, Washington University in St. Louis (Oct. 12, 2009) (on file with author). In an address on the centennial anniversary of Lovejoy's death, President Herbert Hoover said, "Since his martyrdom, no man has openly challenged free speech and the free press in America." Former President Her-

and left Alton's reputation permanently scarred.[41]

Lovejoy is remembered as both the first casualty of the Civil War[42] and as the first martyr to the cause of freedom of the press.[43] The printing press Lovejoy died defending was carried to a window and thrown onto the river bank, where it was broken into pieces that were scattered in the Mississippi River.[44] The main frame of the hand-press was recovered in 1915 and resides in a place of honor in the front lobby of the Alton Telegraph.[45]

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bert Hoover, Centennial Observance of Martyrdom of Elijah Parish Lovejoy Address at Colby College (Nov. 8, 1937) (transcript available at http://www.colby.edu/lovejoy/recipients/hoover_r.shtml).

41. Some historians blame the notoriety of Lovejoy's murder for Alton's long and persistent economic decline. "Alton's prosperity and hopes for the future were gone. The city that was noted for the quality of its citizenry, its benevolence, and its men of influence, witnessed a steady exodus of its most progressive and prosperous citizens. Alton was an ostracized city with a devastated economy." Hoffman, *supra* note 32. Other historians disagree, citing completion of the first railroad to Alton, the Chicago and Alton, as a catalyst in the city's resurgence. "[F]or some years subsequent to 1837, trade was stagnant and prosperity depreciated, while many of the most enterprising business firms met with financial ruin. About the year 1842, business revived again, and from that time on the city has had a healthy, steady and constant growth." BRINK, *supra* note 14, at 389. Economic conditions in Alton, and the rest of southwestern Illinois, suffered more serious and permanent damage in the 1970s following enactment of the first federal environmental laws, which rendered the region's virtually inexhaustible supply of bituminous coal unmarketable because of its high sulfur content. *Id.*

42. A four-ton bronze statue of Winged Victory on a ninety-three-foot granite column in Alton Cemetery is a towering monument to Lovejoy's memory and the tallest in Illinois. *The Lovejoy Monument*, http://www.state.il.us/hpa/lovejoy/monument.htm (last visited Dec. 27, 2013). According to an inscription, Lovejoy engaged in "the first armed resistance to the aggressions of the slave power in America." *Id.*

43. Lovejoy personifies the impact of the abolitionist movement on the evolution of freedom of expression. Before 1837, much of the press had been timid in defense of free speech for abolitionists, who were regarded by many as fanatics. Lovejoy's martyrdom demonstrated how violation of the free speech rights of the unpopular threatened the rights of all. Before 1837, the constitutionally guaranteed freedoms of speech and the press were understood simply as protections against interference by government. Lovejoy's martyrdom demonstrated that, in order to be meaningful, freedom of expression necessarily includes protection from private violence. Michael K. Curtis, *Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109 (1997). *See also* MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000). Lovejoy was an 1826 graduate of Colby College in Maine. *Elijah Parish Lovejoy Journalism Award*, COLBY, http://www.colby.edu/academics_cs/goldfarb/lovejoy/ (last visited Dec. 27, 2013). Each year since 1952 Colby has conferred the Elijah Parish Lovejoy Award on a journalist whose work upholds the Lovejoy tradition. *Id.* In his remarks upon receiving the award in 1983, New York Times columnist Anthony Lewis described the chilling impact the *Telegraph Case* would have on the willingness of newspapers to engage in investigative journalism. Anthony Lewis, *Convocation Address*, http://www.colby.edu/lovejoy/recipients/lewis_r.shtml. *See infra* note 145.

44. As reported in the Alton Observer, Nov. 7, 1837, *available at* http://www.altonweb.com/history/lovejoy/ao1.htm.

45. COUSLEY, *supra* note 6, at 6.

Thirteen years after Lovejoy's murder, John A. Cousley emigrated to Alton from Ulster as part of a mass exodus seeking to escape the Irish potato famine.[46] He went to work for the Telegraph in 1860 as an apprentice, known as a "printer's devil."[47] By 1891 Cousley had saved enough money to purchase a majority interest in the Telegraph from publisher and principal owner Wilbur T. Norton.[48] Cousley was succeeded as publisher by his son, Paul Bliss Cousley, in 1913, and by his grandson, Paul Sparks Cousley, in 1962.[49] By the time of the *Telegraph Case*, the paper was one of the oldest family-owned newspapers in the U.S. with a circulation of 38,000.[50]

By the late 1960s the Telegraph had earned a reputation for award-winning[51] investigative journalism[52] and had made some enemies in the process.[53] In 1968 Telegraph city editor Elmer Broz assigned two reporters, William Lhotka and Joseph Melosi, to investigate rumors that construction trade unions in Madison County had been infiltrated by members of organized crime families with headquarters in Chi-

46. From 1846 to 1851, during the period known as the Great Potato Famine, it is estimated that as many as 800,000 people died of disease and starvation in Ireland, and close to one million emigrated to the U.S. and Canada. THE FAMINE IMMIGRANTS xii–xv (Ira A. Glazier, ed. 1983).

47. Joseph J. Dromgoole, *Boyhood Friendship Grew to Partnership of Cousley, McAdams*, ALTON EVENING TELEGRAPH, Jan. 15, 1936, at 5.

48. FAIRBANKS, *supra* note 21, at 306.

49. *Id.* at 235, 307–08. By the time of the *Telegraph Case*, Stephen A. Cousley, a second cousin of Paul S. Cousley, was editor and assistant to the publisher. *Id.* at 308.

50. McBride, *supra*, note 3. The *Telegraph* was the largest daily newspaper in Madison County. COUSLEY, *supra* note 6, at 9.

51. "Its crusading editors brought home awards and commendations." CONRAD C. FINK, STRATEGIC NEWSPAPER MANAGEMENT 308 (1995). From 1958 to 1962, the Telegraph was cited twenty-two times for its achievements, including for excellence in local news coverage and exposure of scandal and fraud. FAIRBANKS, *supra* note 21, at 318.

52. "[T]he *Alton Telegraph* had a reputation in its community and throughout Illinois for responsible and significant investigative reporting. Over the years the paper had reported a variety of cases of crime and corruption that might otherwise not have come to light." PETER E. KANE, ERRORS, LIES AND LIBEL 113 (1992) (italics in original). Investigative journalism conducted by the Telegraph in 1969 uncovered a conflict of interest scandal that led to the resignation of two Illinois Supreme Court justices. KENNETH A. MANASTER, ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS 151–52 (2001). After Chicago newspapers picked up the story initially reported by the Telegraph that the justices were stockholders in a financial institution that was a party to an appeal, the state legislature appointed John Paul Stevens, then a private practitioner, as independent counsel to conduct an investigation, setting the stage for Stevens's appointment to the U.S. Court of Appeals for the Seventh Circuit in 1970 and as an associate justice of the Supreme Court in 1975. *Id.*

53. Editor Stephen Cousley speculated that the *Telegraph Case* may have been part of an effort by the local Democratic Party political machine to put the paper out of business in response to its long tradition of vigorous investigative reporting. McBride, *supra* note 3 ("We've done a pretty hard-nosed job of reporting on officialdom in the county, digging into things over the years that need digging into. We consider all our reporters to be investigative reporters, and a newspaper that is doing its job will put a spotlight on political officials and judges. Over the years we've made a lot of enemies.").

cago.[54] In multiple conversations with the reporters during the course of their investigation, a former Madison County Sheriff and the Chief Investigator for the Sheriff's Office shared their suspicions about why Piasa had grown in size unusually rapidly:[55] Piasa was being used to launder the proceeds of illicit Mafia activities in Chicago[56] by making loans to finance real estate development in Madison County by a construction company headed by Piasa's largest customer, James C. Green.[57]

Green had been solicited as a banking customer by Robert L. DeGrand, Piasa's Executive Vice President.[58] Green claimed to be the biggest builder of four-family housing units south of Chicago, with all of his financing provided by Piasa.[59] After the Telegraph reported that Piasa had loaned money to Donald Hazel, a convicted felon with supposed organized crime connections, Piasa encouraged and facilitated Green's acquisition of a portfolio of Hazel's properties.[60] The $25 million of indebtedness owed to Piasa by Green's construction company and affiliated entities exceeded by six times the limit on the amount that Piasa could legally lend to a single borrower,[61] a key component of federal banking regulation.[62]

After several months of fruitless investigation, Lhotka and Pelosi were unable to confirm the speculation about Piasa's alleged involvement in money laundering. Unwilling to report rumors without verifiable evidence,[63] they instead prepared a typed three-page, single-spaced memorandum, dated March 26, 1969, describing in considera-

54. Rumors of a possible connection between Piasa and organized crime had been circulating in the Alton community for several years prior to 1969. Brief of Appellants at 6, James C. Green v. Alton Telegraph Printing Co., 438 N.E.2d 203 (No. 80-602) (App. Ct. Ill. Jul. 28, 1981).

55. *Id.* at 5. Piasa had grown from assets of $10 million to more than $100 million in a ten-year period. COUSLEY, *supra*, note 6, at 7.

56. COUSLEY, *supra*, note 6, at 5.

57. Brief of Appellants, *supra* note 54, at 54.

58. A fellow officer of Piasa at the time was Dr. Mather Pfeiffenberger, grandson of architect Lucas Pfeiffenberger. *See supra* text accompanying note 22. The Author, who currently lives in the house where Mather Pfeiffenberger raised his family, first became aware of the *Telegraph Case* as a result of a chance encounter with DeGrand's son, Thomas A. DeGrand. "I used to play in your house as a child," Tom DeGrand told the Author in summer 2012.

59. Brief of Appellants, *supra* note 54, at 23.

60. The reporters' sources in the Madison County Sheriff's Office indicated that Hazel was a silent partner in Green's biggest projects, and that Green was a front man for Hazel and other hoodlums. *Id.* at 8.

61. KANE, *supra* note 52, at 114.

62. Regulatory limitations on loans to one borrower "are a critical safety and soundness standard . . . to prevent . . . insured [financial institutions] from placing themselves at risk by concentrating too great a portion of their assets in any single borrower." OFFICE OF THRIFT SUPERVISION, EXAMINATION HANDBOOK § 211.1 (Dec. 2007), *available at* http://files.ots.treas.gov/422037.pdf.

63. Brief of Appellants, *supra* note 54, at 11.

ble factual detail a "possible link between the Chicago family of the Cosa Nostra and Piasa" in Madison County.[64]

In their memorandum the reporters wrote that "a criminal conglomerate appears to be flourishing unchecked in Madison County," that "Hazel, reportedly the No. 2 crime boss in the county, is connected with James Green Construction Co., a multimillion dollar operation," and that "Hazel is a silent partner on some of Green's biggest apartment projects. . . . It is unclear as to how these men are connected with the Mafia. But all are associates of hoods . . . ." The memorandum solicited the help of the U.S. Department of Justice "to put all the pieces together,"[65] in which event the reporters expected to receive preferential treatment, in the form of a "scoop," if federal law enforcement officials were able to verify the information.[66] The reporters transmitted the memorandum, marked "Confidential" in large capital letters on every page,[67] to Brian Conboy, a Special Prosecutor who headed a task force of the Organized Crime and Racketeering Section of the Department of Justice with whom the reporters had met during the course of a broad-based federal investigation into organized crime, labor racketeering, and official corruption in and around St. Louis.[68]

The reporters assumed that the memorandum would be seen only by investigators in the Justice Department.[69] However, Conboy's successor disclosed the substance of the memorandum to officials of the Federal Home Loan Bank Board (the Board).[70] In August 1969 a team of investigators from the Board in Chicago arrived at the offices of Piasa to conduct an expedited annual examination of the institution. In response to a question, DeGrand was told that the investigation had been prompted by a memorandum from a Telegraph reporter. During the course of a six-week examination, investigators uncovered no evidence of organized crime money passing through Piasa to Green or otherwise.[71] They did discover unrelated regulatory violations and irregularities, including the magnitude of loans by Piasa to Green in excess of federal banking limits and inflated appraisals of real property pledged by Green as collateral for loans.[72] In an effort

64. *Id.* at 13.
65. KANE, *supra* note 52, at 115.
66. Brief of Appellants, *supra* note 54, at 15.
67. *Id.* at 12.
68. *Id.* at 9. The suggestion for the memorandum originated with Conboy and conformed to the customary practice of federal prosecutors at the time. *Id.* at 11.
69. G. MICHAEL KILLENBERG, PUBLIC AFFAIRS REPORTING NOW: NEWS OF, BY AND FOR THE PEOPLE 337 (2008). "They had confidence in the discretion of the Justice Department, and believed that its investigation would be closed if it could not verify the memorandum through its informants." Brief of Appellants, *supra* note 54, at 15.
70. Brief of Appellants, *supra* note 54, at 17.
71. *Id.* at 18.
72. *Id.* at 19.

to correct the deficiencies identified by the Board, Piasa discontinued extending further credit to Green in November 1969.[73]

After the St. Louis Post-Dispatch reported that Piasa was under federal investigation for questionable lending policies and practices, and with rumors circulating about organized crime connections, depositors withdrew their savings in a run on the bank.[74] Ultimately the Federal Savings and Loan Insurance Corporation arranged for the merger of Piasa into Illini Federal Savings & Loan Association (Illini Federal),[75] which obtained the appointment of a receiver for Green's properties, citing dangerously high vacancy rates and arrearages in the payment of rent.[76]

III. TRIAL

The *Telegraph Case* was one of a series of nine lawsuits filed by attorney Rex Carr on behalf of Green to recover damages arising from the loss of his investment properties as a consequence of Piasa's failure.[77] In a complaint against the Telegraph, Melosi, and Lhotka, filed on July 26, 1977,[78] Green claimed the reporters' memorandum was defamatory, and its transmittal was the proximate cause of his inability to obtain financing for his projects and ultimately for their loss.[79]

Because an overwhelming majority of libel suits are decided on motions for summary judgment,[80] the Telegraph underestimated the likelihood that the case would ever go to trial.[81] But the *Telegraph Case* had been filed in Madison County, whose judges have a reputation for routinely refusing to grant defendants' pre-trial motions[82] and whose

73. *Id.* at 21.

74. *Id.* at 56.

75. *Id.* at 22.

76. The Internal Revenue Service had filed a lien against Green's construction company for failure to withhold payroll and social security taxes. THOMAS B. LITTLEWOOD, COALS OF FIRE 65 (1988). Multiple mechanic's liens had been filed against its properties by trade creditors. Brief of Appellants, *supra* note 54, at 25.

77. Green was awarded damages of $3 million against Illini Federal as a result of a separate lawsuit filed by Carr. *See infra* note 133 and accompanying text.

78. Brief of Appellants, *supra* note 54, at 27.

79. However, Green made no effort to obtain alternative sources of financing elsewhere. *Id.* at 24.

80. Only 19% of all libel cases reach a jury. McBride, *supra* note 3.

81. As its lead attorney, the Telegraph selected William M. Cox, an inexperienced litigator who had never tried a libel case. LITTLEWOOD, *supra* note 76, at 115. The paper retained Stephen Cousely's brother-in-law, Charles Williamson, to represent the reporters. *Id.*

82. Schwartz, *supra* note 3, at 248. "Few, if any, other jurisdictions in the United States so reflexively deny defendants' summary judgment motions." *Id.* at 249.

working-class juries are famous for their generosity to plaintiffs injured by corporate defendants.[83]

In motions to dismiss and for summary judgment, the Telegraph argued that the reporting of allegations of wrongdoing to law enforcement officials is absolutely privileged and that Green's suit, which was not filed until eight years after delivery of the reporters' memorandum, was barred by Illinois' one-year statute of limitations for libel. The court denied the paper's motions based on the existence of disputed factual issues.[84]

Trial began on April 28, 1980, and lasted five weeks.[85] On June 3, 1980, after only five hours of deliberation, the jury awarded Green $9.2 million, including $2.5 million in punitive damages, far exceeding the Telegraph's net worth of $3 million.[86] By summarily denying defendants' post-trial motion on November 26, 1980, Madison County Circuit Court Judge Charles Chapman declined the last clear chance to correct the outcome.[87]

Legendary trial lawyer Edward Bennett Williams once observed that a third of all cases can never be won, a third can never be lost, and the battle over the remaining third is what makes or breaks a trial lawyer's reputation.[88] Although Carr was already one of the most successful plaintiffs' lawyers in the country,[89] the *Telegraph Case* earned him a place in the Guinness Book of World Records.[90]

Carr's advocacy in the *Telegraph Case* illustrates the effectiveness of litigation tradecraft. A classic trial lawyer technique is to identify a familiar image or analogy drawn from everyday life to help make a

83. Madison County, along with neighboring St. Clair County, is known as "Plaintiffs' Paradise" for the staggering verdicts awarded by pro-plaintiff juries. JOHN A. JENKINS, THE LITIGATORS 375 (1989).

84. On the statute of limitations question, there was a factual issue of when Green first knew, or should have known, about the memorandum. Brief of Appellants, *supra* note 54, at 27–28.

85. *Id.* at 31.

86. *Id.*

87. *Id.* Judge Chapman summarily denied the motion on the day before his last day in office without issuing an opinion. COUSLEY, *supra* note 6, at 10.

88. G. Christopher Ritter, *The Five Habits of Highly Successful Trial Lawyers*, http://www.thefocalpoint.com/uploads/articles/article_44.pdf (last visited Dec. 27, 2013). Carr could afford to be charitable to the Telegraph's trial counsel, and uncharacteristically modest, in his characterization of the case. "There is no conceivable way any lawyer could have won their side of the case." LITTLEWOOD, *supra* note 76, at 148. Carr's evaluation of the case has remained unchanged. "I do think the case was a lay-down case," Carr recently wrote in an exchange of correspondence in which the Author suggested that Carr was either being modest or gallant in defending the trial judge whose handling of the case has been criticized by commentators. E-mail from Rex Carr (Jul. 3, 2013, 12:43 PM) (on file with author). *See infra* note 119.

89. JENKINS, *supra* note 83, at 371.

90. Steve Gonzalez, *Rex Carr: Champion of Victims*, MADISON-ST. CLAIR REC. (Dec. 22, 2004), http://www.madisonrecord.com/issues/308-telecommunications/136817-rex-carr-champion-of-victims.

complex concept more easily understood.[91] Carr convinced the jury that what the Telegraph did was no different than allowing one of its delivery trucks to run recklessly over Green, leaving him crippled.[92] Jurors interviewed afterwards said they did not even consider abstract First Amendment issues of press freedom. They deliberated primarily over how much to award Green to compensate for his losses.[93]

Keeping the case simple is a technique shared by the most successful trial lawyers.[94] This technique is especially important in Madison County, where an idiosyncratic selection process screened prospective jurors for level of education, effectively limiting the number of college-educated citizens on the list of eligible jurors.[95] Carr was determined to maintain the focus on the reporters' misconduct in making unfounded allegations in the memorandum about Piasa's involvement with mobsters, which he attributed to a combination of laziness and personal greed.[96] To this end Carr sought and obtained a crucial pretrial ruling on a motion in limine by Judge Chapman that limited testimony about Green's excessive borrowing and other irregularities uncovered by the Board.[97] This evidence was central to the Telegraph's key defense that the proximate cause of Green's injury was Piasa's noncompliance with banking regulations and not the memorandum's allegations about Mafia connections.[98] In support of his motion, Carr argued that such evidence would "unduly complicate this trial and make it extremely difficult for the jury to understand."[99]

It requires a considerable investment of time and energy to know the facts well enough to keep the case simple.[100] By the time the *Telegraph Case* went to trial, Carr, by his own estimate, had devoted the better part of one-third of the previous eight years to immersing himself in the details of the federal government's investigation of Piasa.[101] This later proved decisive in Carr's withering five-day cross-examination of Albion Fenderson, General Counsel and Senior Vice President of the Board. Fenderson had testified that the Board's decision to order Piasa to discontinue lending to Green was based solely upon the

91. Ritter, *supra* note 88.
92. KILLENBERG, *supra* note 69, at 337.
93. McBride, *supra* note 3. Jurors interviewed after the trial acknowledged being under the misconception that a public body such as the school district would receive the punitive damage award. LITTLEWOOD, *supra*, note 76, at 145. Although they represent an easy target, it would be unfair to blame jurors for the outcome of the *Telegraph Case*. As in any trial, the jury reached its judgment based upon the evidence it was permitted to hear and the instructions it received. Schwartz, *supra* note 3, at 237.
94. Ritter, *supra* note 88.
95. LITTLEWOOD, *supra* note 76, at 84–85.
96. *Id.* at 139.
97. Brief of Appellants, *supra* note 54, at 119–23.
98. *Id.* at 47–62.
99. LITTLEWOOD, *supra* note 76, at 119.
100. Ritter, *supra* note 88.
101. LITTLEWOOD, *supra* note 76, at 134.

serious violations of banking regulations disclosed by its audit of Piasa and not on the allegations in the memorandum about Green's involvement in money laundering.[102] In addition to twice accusing Fenderson of lying under oath,[103] Carr made sure jurors knew that Fenderson was not "one of them."[104]

Reminiscent of the public outcry following Elijah Lovejoy's murder,[105] the verdict in the *Telegraph Case* was the subject of reports by wire services, major metropolitan newspapers and trade journals.[106] Paul Findley, a former journalist and member of Congress representing Madison County, tried to rally support for the Telegraph.[107] He wrote letters to dozens of editors and publishers urging creation of a legal defense committee to underwrite the cost of an appeal.[108] "The idea that a newspaper can be sued and possibly driven out of business because of something it didn't print is absurd," Findley wrote in a newspaper column.[109] The overwhelming sentiment among the national news media was that of sympathy for the paper, with the notable exception of a story reported by Morley Safer on CBS' *Sixty Minutes* criticizing the Telegraph for engaging in substandard practices in investigative journalism.[110]

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102. *Id.* at 136.

103. Judge Chapman denied defense motions for a mistrial on both occasions. Brief of Appellants, *supra* note 54, at 92. A veteran litigator knows when to deviate from the conventional wisdom, such as asking an open-ended question or a question to which the lawyer does not already know the answer. Accusing a witness of lying is generally discouraged because of the risk that jurors may sympathize with a beleaguered witness. Erin Fuchs, *How to Destroy a Witness on the Stand*, BUS. INSIDER (July 9, 2013), http://www.businessinsider.com/how-to-destroy-a-witness-on-the-stand-2013-7.

104. "You are a Harvard grad, aren't you?" Carr asked the witness. LITTLEWOOD, *supra* note 76, at 136.

105. Editor Stephen Cousley drew the comparison. "If we buckled up and rolled over, we'd be giving up the Lovejoy tradition. Somebody has to stand up and fight." McBride, *supra* note 3.

106. Stories about the case appeared in the New York Times, Christian Science Monitor, Chicago Sun-Times, Chicago Tribune, Washington Post, Miami Herald, Los Angeles Times, San Francisco Examiner, Oakland Tribune, Fort Worth Star-Telegram, Editor & Publisher, Arizona Daily Star, and the St. Louis Post-Dispatch, among many others. COUSLEY, *supra* note 6, at 11.

107. *Id.*

108. McBride, *supra* note 3.

109. In an interview, Findley told a reporter:

> In my day I would feel duty bound to present whatever scuttlebutt I picked up. The reporters weren't trying to hang anybody. They were just trying to cooperate. If this becomes precedent, then every citizen, especially reporters, is in trouble. They will be reluctant to keep notes and supply leads to law enforcement officials. [This] threatens the very right and obligation of newspapers to gather and disseminate information.

Id.

110. Safer's is a minority opinion. During his time as publisher, Paul S. Cousley earned the respect of his competition for his courage in giving young reporters the freedom to follow their investigative instincts. MANASTER, *supra* note 52.

IV. AFTERMATH

Nothing concentrates the mind quite like a seven-figure damages award. If the Telegraph had not previously treated the case with the seriousness it deserved,[111] it signaled its intention to pursue a vigorous appeal by retaining the Chicago law firm of Jenner & Block. The case was assigned to Philip W. Tone, who had rejoined the firm in 1980 after serving as a United States District Judge and later as a member of the U.S. Court of Appeals for the Seventh Circuit.[112] Libel specialist David P. Sanders co-signed a 143-page brief filed with the Appellate Court of Illinois on July 28, 1981. At a cost of $100,000,[113] it was surely the most expensive brief never considered by an appellate panel.

The brief led with the argument, which was initially raised by the Telegraph in pretrial motions, that disclosures to public officials are absolutely privileged.[114] Although this is an issue on which authority was divided, and was apparently unsettled in Illinois at the time of the *Telegraph Case*, there is no doubt that such disclosure was privileged if made in good faith.[115] As evidence of the reporters' lack of good faith, Carr stressed their expectation of a "scoop" as a quid pro quo for their information.[116] This evidence was a two-edged sword for the plaintiff. On the one hand, it established an essential element required to hold an employer strictly liable on a respondeat superior theory: In preparing and transmitting the memorandum, the reporters were actuated by a motive to serve their employer, as opposed to some personal animus.[117] On the other hand, it demonstrated that the reporters, as responsible journalists, were unwilling to go to print without confir-

111. MARK SABLEMAN, MORE SPEECH, NOT LESS 110 (1997). The Telegraph clearly had not appreciated the gravity of the situation. The paper quickly rejected a pre-trial offer by Carr to settle the case for the $1 million of insurance coverage that was available, in what would have been a record-setting settlement of a U.S. libel case. LITTLEWOOD, *supra* note 76, at 118. Carr generally takes a contrarian view of settlement. "A poor trial is *better* than a good settlement, because I've gotten all my business from publicity about me and my cases. You don't get any publicity from a settlement." JENKINS, *supra* note 83, at 372 (emphasis in original).

112. SR 0286, 2001 Leg., 92nd Gen. Assemb. (Ill. 2001), *available at* www.ilga.gov/legislation/legisnet92/srgroups/sr/920SR0286LV.html.

113. FINK, *supra* note 51.

114. Brief of Appellants, *supra* note 54, at 32–44.

115. William A. Wick, *A Libel Tragedy*, 56 DEF. COUNSEL J. 19, 22 (1989).

116. LITTLEWOOD, *supra* note 76. Carr believes that he also succeeded in casting doubt on Melosi's credibility by challenging his testimony that a local contractor, whose name Melosi insisted he could not recall, had implicated Green and DeGrand in the use of Mafia money. E-mail from Rex Carr, *supra* note 88 ("He said he could not remember the name of the source because he made himself forget the name because he knew he might be asked to identify his source. I suggested to him that he concentrate on forgetting the name of 'Rex Carr' and see how successful he might be. The jury visibly reacted to the question.").

117. *See, e.g.*, Nelson v. American-West African Line, 86 F.2d 730, 732 (2d Cir. 1936), *cert. denied*, 300 U.S. 665 (1937) (reinstating suit against employer seeking damages incurred by able seaman struck by drunken boatswain because agent's use of

mation from federal law enforcement officials of information previously obtained from sources in Madison County government.[118] The expectation of a scoop proves that the memorandum was a necessary part of the reporters' newsgathering process prior to publication. The authors of the brief are not alone in believing that the trial judge should have directed a verdict in favor of the Telegraph on this point.[119]

Without explicitly accusing him of bias,[120] the brief catalogued Judge Chapman's consistent pattern of rulings adverse to the Telegraph on matters of law and evidence[121] and errors in his instructions to the jury.[122] Of the eleven separate grounds for error, the argument portion of the brief devoted a disproportionately large amount of

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the phrase "turn to" demonstrated he was acting on behalf of employer in the process of rudely awakening plaintiff in sufficient time to assume his watch).

118. In *Doe v. Daily News, L.P.*, the trial judge cited absolute reporters' privilege in granting defendants' motion dismissing a libel suit filed by a rape victim who had been falsely accused of perpetrating a hoax by columnist Mike McAlary, the subject of a 2013 Broadway play by Nora Ephron entitled "Lucky Guy." Doe v. Daily News, L.P., 660 N.Y.S.2d 604 (Sup. Ct. N.Y. 1997). McAlary admitted that he had not interviewed the victim or any witness, and had relied solely upon information provided by sources inside the New York City Police Department. *See* Martin Garbus, *The Damage Done by a "Lucky Guy,"* N.Y. TIMES, Apr. 2, 2013, *available at* http://www.nytimes.com/2013/04/03/opinion/the-damage-done-by-a-lucky-guy.html?_r=0. The court held that the First Amendment precludes liability from being imposed on reporters who rely upon erroneous information from official sources. *Doe*, 660 N.Y.S.2d at 613.

119. Wick, *supra* note 115, at 23. No response to the brief was ever filed on behalf of Green. *Id.* In an exchange of correspondence with the Author, Carr rejected the "argument that there was a freedom of the press privilege protecting this information not published but given to the [federal government] by a reporter seeking a story. . . . Freedom of the press to malign and slander others is limited to articles published in the paper in good faith, not to information published privately to law enforcement agencies for the purpose of getting a story." E-mail from Rex Carr, *supra* note 88.

120. It has not gone unnoticed that Judge Chapman, himself a former plaintiffs' lawyer, presided over the *Telegraph Case* while serving the balance of his term as a lame-duck following his defeat in a judicial election in which he had sought unsuccessfully to obtain the Telegraph's endorsement. *See, e.g.*, KANE, *supra* note 52, at 117; COUSLEY, *supra* note 6, at 9. Although the brief avoided direct personal criticism of Judge Chapman, the argument section began by blaming trial court error as having "resulted in the outrageous spectacle now to be reviewed by this Court." Brief of Appellants, *supra* note 54, at 32.

121. Among the most damaging of Judge Chapman's rulings was his refusal to permit evidence to be introduced that Green had already recovered $3 million from Illini Federal in recoupment for the same losses claimed in his libel suit against the Telegraph. *See* sources cited *supra* note 103 and accompanying text. Judge Chapman's pretrial rulings on the reporters' privilege and statute of limitations issues were cited as grounds for reversal or remand for a new trial, as were his refusals to grant a mistrial on the basis of misconduct by plaintiff's counsel. *Id.*

122. Among Judge Chapman's questionable instructions was advising the jury that damages could be awarded for lost future profits. Illinois courts have long held that lost profits must be established with certainty in order to constitute an element of damages. TAS Distributing Co. v. Cummins Engine Co., 491 F.3d 625, 632 (7th Cir. 2007). Even in Madison County, a properly instructed jury might have regarded lost future profits in a field as competitive and market-sensitive as real estate development to be too speculative to be provable with certainty.

space (25%) to the claim that the Telegraph had been denied a fair trial by reason of juror passion and prejudice, kindled by Carr's pervasive gross misconduct in the jurors' presence.[123]

Damage awards against newsgathering organizations for defamation are among the most likely to be reversed on appeal,[124] or substantially reduced.[125] Besides the possibility that it was generated by juror passion and prejudice,[126] the award of $2.5 million in punitive damages was reversible on other grounds. At the time of the *Telegraph Case*, Illinois followed the so-called "complicity rule," by which an

123. Brief of Appellants, *supra* note 54, at 88–116. Fenderson was not the only witness Carr accused of lying under oath in the presence of the jury. *See supra* note 103 and accompanying text. As part of his impeachment of Melosi, described in note 116, *supra*, Carr asked whether the witness had studied in journalism school "how Goebbels of the Nazi Party made the science of the big lie a real skill and a real science." Brief of Appellants, *supra* note 54, at 99. Carr would similarly invoke the name of the Nazi propaganda minister, and reference to the "big lie," during closing argument in 1987 on behalf of a class of plaintiffs in a toxic tort case against the Monsanto Company. JENKINS, *supra* note 83, at 428. In reading the 4,000-page trial transcript, Philip Tone, a strong proponent of courtroom civility, likely would have been more outraged by Carr's riffs than someone more familiar with the rough-and-tumble standards of practice in Madison County. James Janega, *Jurist Won Respect from Peers*, CHI. TRIB. (Nov. 30, 2001), http://articles.chicagotribune.com/2001-11-30/news/0111300046_1_superb-judge-lawyer-and-judge-jimmy-carter. *See* JENKINS, *supra* note 83, at 376. Carr's accusing witnesses of lying under oath in the presence of the jury was the brief's principal example of attorney misconduct. Brief of Appellants, *supra* note 54, at 92. However, it cited no binding precedent for the proposition that it is prejudicial error in Illinois to deny a motion for a mistrial on this basis in a civil suit, and research has disclosed no Illinois case to this effect. *Id.*

124. KANE, *supra* note 52, at 120–21. Seventy percent of libel judgments against publishers are reversed on appeal. Gary A. Parazino, *The Future of Libel Law and Independent Appellate Review*, 71 CORNELL L. REV. 477, 483 (1985).

125. Even when verdicts are upheld, damages are often reduced substantially. According to former CBS News division president Richard S. Salant:

> Juries routinely award . . . extravagant punitive damages of millions, sometimes tens of millions of dollars. Just as routinely, the appellate judges reduce the punitive damages, or simply remove them. It is a senseless ritual in which only the attorneys win. All the publicity centers on the original award, and that encourages other libel litigations.

Richard Salant, *Libel Speeches and Articles*, NEW CANAAN LIBR. DIGITAL COLLECTIONS, http://newcanaanlibrary.info/omeka/items/show/8 (last visited July 27, 2013). Former Miss Wyoming Kim Pring was awarded $26.5 million in damages in February 1981 after Penthouse published a fictional account of the bizarre sexual behavior of a thinly disguised Miss Wyoming. Pring v. Penthouse Int'l., Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (recognizing that obvious fantasy is not actionable as defamation). The jury verdict was reversed on appeal. In *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987), the court reversed a $1.6 million defamation judgment. *See also* Morsette v. Final Call, 764 N.Y.S.2d 416 (N.Y. App. Div. 2003) (reducing by more than one-half a $13 million libel verdict against Nation of Islam newspaper).

126. Contemporaneously with the incipient appeal of the *Telegraph Case*, the Ohio Court of Appeals overturned a $40 million judgment against Hustler magazine on the grounds that the "enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice." Guccione v. Hustler Magazine, Inc., No. 80AP-375, 1981 WL 3516, at *40 (Ohio App. 1981).

employer is not strictly liable for punitive damages based on the tortious misconduct of employees.[127] In order to recover punitive damages a plaintiff must prove culpability on the part of managerial personnel or ratification of employee misconduct. There was no evidence that any Telegraph editor ever saw the memorandum or knew of its contents.[128]

Second, under the interpretation of the First Amendment guarantee of freedom of the press adopted by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, punitive damages are awardable only if the plaintiff proves by clear and convincing evidence that the defamatory statements were made with actual malice or with reckless disregard for their truth or falsity.[129] There was no such evidence in the *Telegraph Case*, other than that the reporters believed the contents of the memorandum to be true.[130]

The compensatory damages portion of the award was likewise vulnerable to substantial reduction on appeal. Almost half of the $6.7 million in compensatory damages consisted of lost future profits from uncompleted projects, based upon conjecture regarding their success.[131] Commercial real estate development involves an inherently high level of market risk because of the infinite variety of things that can and will go wrong, making estimates of future profitability highly speculative.[132] In addition, the Telegraph was prejudiced by another of Judge Chapman's questionable orders in limine, preventing defense counsel from mentioning that Green had already obtained a $3 million verdict in a lawsuit against Illini Federal in compensation for his inability to obtain financing and loss of his properties—the same losses Green claimed in the *Telegraph Case*.[133]

"I was very worried that the verdict might be overturned by the Appellate Court," Carr has acknowledged; "I thought there was at least a 50/50 chance of that occurring or a sizable reduction."[134] Although Carr's worries about the verdict surviving appellate review were understandable, they turned out to be unnecessary. In order to appeal a civil judgment, the Illinois court rules governing appellate practice required a defendant to post a supersedeas bond equal to

127. Timothy R. Zinnecker, *Corporate Vicarious Liability for Punitive Damages*, 1985 BYU L. REV. 317, 318 n.8 (1985). States that follow the "course of employment" rule impose vicarious liability for punitive damages whenever the employee acts within the scope of employment. *Id.*

128. Brief of Appellants, *supra* note 54, at 13.

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

130. Brief of Appellants, *supra* note 54, at 11.

131. *Id.* at 73.

132. *See* text accompanying *supra* note 122.

133. Brief of Appellants, *supra* note 54, at 116. *See supra* note 121 and accompanying text.

134. E-mail from Rex Carr, *supra* note 88.

150% of the damage award, including punitive damages.[135] With a net worth of only $3 million, the Telegraph lacked the resources to secure a $13.8 million appeal bond. The Telegraph sought a relaxation of the bond requirement, claiming that the enormity of the judgment made it a practical impossibility to comply.[136] Both the intermediate appellate court and the Supreme Court of Illinois refused, citing the absence of any flexibility under the rules or interpretative cases.[137]

In order to protect its assets from immediate seizure and preserve its status as a going concern, the Telegraph was forced to file a Petition under Chapter 11 of the Bankruptcy Code on April 10, 1981.[138] The Cousleys erroneously believed that the bankruptcy filing would shelter the Telegraph's assets against execution by Green, while at the same time enable the paper to appeal the award without having to post a bond.[139] The federal bankruptcy court held on January 22, 1982, that it had no jurisdiction to consider the merits of the Telegraph's state court appeal.[140] The Illinois Appellate Court held on April 7, 1982, that the state courts no longer had jurisdiction over the case once the Telegraph was involved in bankruptcy proceedings.[141] Finding itself in a Catch-22 situation, the Telegraph agreed to settle the case in June 1982 for $1.4 million, of which one million dollars came from the paper's insurer paying the policy limit.[142] The Telegraph by then had paid more than $600,000 in attorneys' fees.[143]

Once aggressive in its news coverage, the Telegraph turned cautious, even passive, in the wake of the case.[144] Editor Stephen Cousley described the Telegraph as being like "a tight end who hears

135. Although many jurisdictions have since reformed their appeal bond process by state statute or court interpretation, a supersedeas bond in the full amount of the judgment, plus interest and costs, was typically required to stay execution of federal and state court judgments at the time of the *Telegraph Case*. *See infra* notes 166–86.

136. Green v. Alton Telegraph Printing Co., 438 N.E.2d 203, 204 (Ill. App. Ct. 1982).

137. *Id.*

138. *In re* Alton Telegraph Printing Co., Inc., 16 B.R. 787 (Bankr. S.D. Ill. 1982) (declining to interpret the federal bankruptcy statute as a broad jurisdictional grant of authority by Congress to usurp state court appellate processes).

139. *Id.*

140. *Id.*

141. Green, 438 N.E.2d at 211.

142. Jonathan Friendly, *Settlement Due in Alton Telegraph Case*, N.Y. TIMES, Apr. 15, 1982, at 12.

143. KANE, *supra* note 52, at 120.

144. "A chill descended on the *Telegraph.* Salaries were frozen. Newsroom vacancies went unfilled. Cautious editors barred the use of anonymous sources; reporters often destroyed notes after use lest they be subpoenaed in any future lawsuit." FINK, *supra* note 51. The Telegraph began subjecting reporters' contacts with outside sources to supervision by editors. Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 858 (1985).

footsteps."[145] Cousley has also remarked, "Wouldn't you be gun-shy if you nearly lost your livelihood and your house?"[146]

New York Times columnist Anthony Lewis, accepting Colby College's annual award in 1983 in memory of Elijah Lovejoy, described the chilling effect of the *Telegraph Case* on the paper's tradition for investigative journalism:[147] "Inside the paper, there are all kinds of cautionary rules to ward off heavy libel damages in the future. . . . When someone recently said there was misconduct in a sheriff's office, the editor decided against investigating the story. 'Let someone else stick their neck out this time,' he said."[148]

The Telegraph was sold to a newspaper chain controlled by Ralph M. Ingersoll in 1985.[149] Stephen Cousley resigned as editor in September 1986.[150]

V. An Appeal for Appeal Bond Reform

Entitlement to an appeal is thoroughly engrained in the popular imagination[151] and is taken for granted by many law-trained people.[152] However, the right to appeal is without basis in constitutional law.[153] There is a persuasive argument for recognizing a constitutional right to appeal as a fundamental element of procedural fairness.[154] It is based upon the structural need for a reliable appellate check on trial court decision-making, not only in places like Madison County with its reputation for having "magnet courts."[155]

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145. John Curley, *How Libel Suit Sapped the Crusading Spirit of a Small Newspaper*, Wall St. J., Sept. 29, 1983, at 1.

146. Salant, *supra* note 125.

147. Colby College gives the Elijah Parish Lovejoy Award to a journalist whose work upholds the Lovejoy values place on free expression and investigative reporting. *See supra* note 43.

148. Sam Zagoria, *Time to Review Use of Libel Litigation*, Courier, Dec. 14, 1984, at 4A.

149. Charles Storch, *Ingersoll Buys Alton Telegraph*, Chi. Trib. (May 23, 1985), http://articles.chicagotribune.com/1985-05-23/business/8502010803_1_libel-suit-new-presses-cousley.

150. Killenberg, *supra* note 69, at 338.

151. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1220 (2013).

152. The fact that criminal convictions are expunged when an appellant dies during the appellate process demonstrates the value placed on appellate review in the criminal justice system. *See, e.g.*, U.S. v. Crooker, 325 F.2d 318 (8th Cir. 1963).

153. The Fourteenth Amendment guarantee of due process of law has not been held to include a constitutional right to an appeal. U.S. v. MacCollom, 426 U.S. 317, 323 (1976). The Supreme Court has declined petitions for *certiorari* seeking to persuade the Court to recognize a constitutional right to appeal in both civil and criminal cases. Robertson, *supra* note 151, at 1221.

154. ABA Comm. on Standards of Judicial Admin., Standards Relating to Appellate Courts §3.10, at 18 (1994).

155. Inst. for Legal Reform, *supra* note 3. Concern about judicial bias is not limited to states like Illinois where elected judges are subject to political pressures. "Some-

Trial and appellate court judges experience the trial drama from very different perspectives. Unlike their appellate court counterparts, trial judges personally confront the victims and villains of the drama in their courtrooms, evaluating their demeanor and credibility, or perceived lack thereof. Under the circumstances,[156] it is foreseeable that trial judges' emotional impulses may influence their judgment.[157]

Misplaced confidence in the certainty of access to appellate review has a liberating, but not necessarily beneficial, influence on trial court behavior.[158] Mindful of the availability of an appellate corrective, trial judges may be tempted to access their inner-Solomon,[159] be empow-

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times the bias may be unconscious; judges are, after all, subject to the same cognitive biases as everyone else." Robertson, *supra* note 151, at 1263.

156. "[J]udges, like everyone else, have two cognitive systems for making judgments—the intuitive and the deliberative—and the intuitive system appears to have a powerful impact on judges' decision making." Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (2007).

157. Judge Kevin Duffy presided over a bench trial of a lawsuit filed by magazine publisher Penthouse against Dominion Federal Savings & Loan for breaching a commitment to participate in a $97 million loan to finance a casino-hotel project in Atlantic City. Penthouse Int'l, Ltd. v. Dominion Fed. Sav. & Loan Ass'n, 665 F. Supp. 301, 307–08 (S.D.N.Y. 1987). Dominion's share of the loan was twice the maximum amount it could lend to a single borrower under the same federal banking regulation that Piasa violated in its loans to Green. *Id.* When a sub-participant backed out of the deal too late to find a replacement, Dominion desperately needed a way out of its commitment without incurring liability. *Id.* at 303. Judge Duffy found that attorney Phillip Gorelick was retained to serve "as Dominion's hatchet man," to "bully and intimidate" Penthouse by making an endless series of unreasonable demands until the commitment expired and Dominion was released from its obligation. *Id.* at 308. Judge Duffy found incredible Gorelick's testimony that he could not have acted in bad faith for the purpose of destroying the deal because his client had never made him aware of its dilemma. *Id.* at 306. Driven literally to the point of distraction by what he perceived as Gorelick's perjury, Judge Duffy held the members of Gorelick's law firm jointly and severally liable for damages by reason of their partner's fraudulent conduct in the sum of $130 million, the lion's share of which represented lost future profits from a hypothetical Penthouse casino-hotel. *Id.* at 312. All of Judge Duffy's factual findings were categorically reversed on appeal as clearly erroneous, together with all of his conclusions of law. Penthouse Int'l., Ltd. v. Dominion Fed. Sav. & Loan Ass'n, 855 F.2d 963 (2d Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989).

158. The availability of robust appellate remedies has "created a situation in which the relationship between the trial and appeal are rightfully considered to exist in a symbiotic relationship." Robertson, *supra* note 151, at 1256.

159. In *Popov v. Hiyashi*, Judge Kevin McCarthy might have awarded ownership of Barry Bonds' single-season homerun record baseball to Patrick Hyashi, in whose hands (and then pocket) the loose ball came to rest in the right-field stands at San Francisco's PacBell Park on October 7, 2001. Popov v. Hiyashi, No. 400454, 2002 WL 31833731, at *1 (Cal. Super. Ct. Dec. 18, 2002). But first in time the ball had briefly been in the webbing of a glove worn by Alex Popov, who tried to catch the ball in flight only to lose it after being tackled, roughly jostled and kicked (and perhaps bitten) in the ensuing scrum. *Id.* at *1–2. Judge McCarthy concluded that a zero-sum decision awarding the ball to either party on these facts would be unfair to the other. *Id.* at 8. He convened a session of court at the University of California, Hastings College of Law to hear a panel of law professors participate in a forum on the law of possession. *Id.* at *3. When the professors predictably disagreed, Judge McCarthy found himself "left with something of a dilemma." *Id.* at *7. He used his equitable

ered to strike a blow for morality or intuitive fairness,[160] lash out against what they perceive as disrespect[161] or social injustice,[162] or yield to such powerful forces of human nature as empathy, indignation, and outrage.[163]

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discretion to craft a novel but personally satisfying remedy: By ordering that the baseball be sold and the proceeds divided equally between the claimants, Judge McCarthy secured a place in first-year Property casebooks for his opinion, and the sobriquet of Solomon-like for himself. Dean E. Murphy, *Solomonic Decree in Dispute Over Bonds Ball*, N.Y. TIMES, Dec. 19, 2002, at A24. Whether the decision would have survived appellate review will never be known. The ball sold at auction for only $450,000. NICK TASLER, THE IMPULSE FACTOR 97 (2008). Popov's share was insufficient to pay his legal fees, let alone finance an appeal. Attorney Martin Triano sued his former client to collect $473,530 in unpaid legal fees. *Id.* Hyashi's lawyer presumably had agreed to take the case on a contingency fee basis. *Id.*

160. Montgomery County, Maryland Circuit Court Judge James S. McAuliffe was refreshingly candid in announcing his decision from the bench in a lawsuit filed by a client of the Author seeking to enforce a two-page letter of intent for the purchase of a $13 million shopping center. Order, Gorlitz v. Montgomery Village Assocs. II L.P., Civil No. 13856 (Cir. Ct. Md. May 23, 1986), at 6 (on file with author). Letters of intent under the circumstances are routinely held by courts to be unenforceable for lack of commercial certainty, as the trial judge acknowledged before granting declaratory judgment in favor of the purchaser. *Id.* Judge McAuliffe expressly noted the strong probability of appeal as a consideration in deciding the case according to his personal sense of justice. *Id.* "I think it not unlikely that there will be cross appeals filed in this case . . . finding their way along Route 50 to this state's capitol," he opined adding, "I am not so much concerned about the winning and the losing. . . . [R]egardless of the winning and losing, I am going to sleep at night." *Id.*

161. Judge Kathleen McHugh of the Broward County Circuit Court in Florida was prepared to accept football player Chad "Ochocinco" Johnson's plea bargain until he gave a playful slap on the backside to his lawyer during a hearing. Roger Groves, *Questionable Ethics by the Judge that Jailed Chad Johnson*, FORBES (June 11, 2013), http://www.forbes.com/sites/rogergroves/2013/06/11/questionable-ethics-by-the-judge-that-jailed-chad-johnson/. Judge McHugh rejected the bargain and sentenced Johnson to thirty days in jail, perhaps punishing him for spectators reacting with laughter in her courtroom. *Id.*

162. For no apparent good reason, Miami-Dade County Circuit Court Judge Valerie Schurr in the summer of 2009 granted a request by Joseph and Blanca Doyle for continuance of Republic Federal Bank's residential mortgage foreclosure of their 8,300 square foot home with an assessed value of $2.6 million. Republic Fed. Bank v. Doyle, 19 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 2009). "I was trying to make everybody happy," Judge Schurr explained in her opinion:

> We have so many foreclosures here and I give continuances on these sales. I just do. . . . [Y]ou know, people are having a hard time now. They are having a difficult time. Everybody knows it. Businesses are failing. People are losing money in the stock market. You know, employment is high. It's just everybody knows that we are in a bad time right now and I hate to see anybody lose their home.

Id. The Florida Court of Appeal rebuked Judge Schurr for "abuse of discretion in the most basic sense of that term." *Id.* Although granting continuances generally is within the trial judge's discretion, "no judicial action of any kind can rest on such a foundation." *Id.* The sternly worded unanimous opinion quoted Justice Cardozo's admonition that a judge "is not to yield to spasmodic sentiment, to vague and unregulated benevolence." *Id.* at 1054–55 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921)).

163. A Long Island couple was left debt-free as a result of a Suffolk County judge's indignation after hearing testimony by the regional manager for IndyMac Bank. *See*

By providing a check on both the perception and the reality of biased, corrupt, or simply misguided trial court decision-making, access to appellate review encourages confidence in the rule of law. Appellate decision-making is widely considered as enjoying the benefits of deliberation, including the exchange of viewpoints and information, inherent in the dynamics of the appellate process.[164] If nothing else, the appellate courts' claim to superior judgment is based upon the larger panel of deciders, on the theory that "three heads are better than one."[165]

The statistical probability of a successful appellate outcome demonstrates the harshness of an inflexible appeal bond requirement, especially in the context of large-verdict defamation cases. The reversal rate of state court cases on appeal is only 33%.[166] But the rate increases to 42% when a defendant appeals a judgment for plaintiff, and to 48% when the amount of the judgment exceeds $1 million.[167] The rate of reversal or reduction of punitive damage awards in libel cases is higher than 70%.[168] Considering the likelihood of success on the merits, the Telegraph's inability to seek appellate review of a multimillion dollar defamation award for want of a supersedeas bond was highly prejudicial.

The appeal bond process in many states has been reformed since 1980, inspired by tobacco litigation tried in Madison County.[169] A lawsuit filed in 2000 by Sharon Price, on behalf of herself and a class of smokers,[170] alleged that Philip Morris, manufacturer of Marlboro

IndyMac Bank v. Yano-Horoski, 890 N.Y.S.2d 313 (N.Y. Sup. Ct. 2009). The lender's intransigent refusal to restructure the couple's sub-prime loan, or otherwise cooperate in avoiding foreclosure was, according to Judge Jeffrey Spinner, not only "harsh, repugnant, shocking and repulsive," but also "inequitable, unconscionable, vexatious and opprobrious." *Id.* at 319. Noting that "Suffolk County is in the yawning abyss of a deep mortgage and housing crisis with foreclosure filings at a record high rate," Judge Spinner *sua sponte* invoked his equitable jurisdiction to void the mortgage, erasing the $290,000 principal balance and an additional $235,000 in accrued interest and penalties. *Id.* at 317.

164. "The availability of appellate review . . . protect[s] against the possibility of irreversible harm caused by a single judge's biased or otherwise flawed decision making." Robertson, *supra* note 151, at 1257.

165. Research has repeatedly shown that aggregating a number of individual judgments provides a significantly more reliable result. *Id.* at 1264.

166. *Id.* at 1227.

167. *Id.*

168. Salant attributes the high rate of reversal in libel cases to sympathetic juries. "When juries decide punishment in libel cases, their natural sympathies tend to lie with the damaged plaintiff with whom they can identify far more easily than with the powerful and sometimes arrogant news organizations." Salant, *supra* note 125.

169. Richard G. Stuhan & Sean P. Costello, *The Appeal Bond—What It Is, How It Works, and Why It Needs to be Factored into Your Litigation Strategy*, http://www.jonesday.com/files/Publication/983c1326-51c1-4ebc-9e6e-001ef4268418/Presentation/PublicationAttachment/daa0a1a0-c224-4cde-a744-64d80a235d12/Spring_2008_The_Appeal_Bond.pdf (last visited Dec. 27, 2013).

170. Price v. Philip Morris, Inc., No 00-L-112, 2003 WL 2259760, at *1 (Ill. Cir. Ct. Mar. 21, 2003).

Lights and Cambridge Lights cigarettes, among other brands, had violated the Illinois Consumer Fraud Act by engaging in materially false and deceptive representations in using the descriptor of "Lights" in the branding of both cigarettes and the phrase "Lowered Tar and Nicotine" on both cigarette packaging labels.[171] Following a bench trial in Madison County Circuit Court in 2003, Philip Morris was ordered to pay $7 billion in compensatory damages, $3 billion in punitive damages to the State of Illinois, plus attorneys' fees.[172]

In order to stay execution under Rule 305 of the Illinois rules governing appellate practice,[173] Philip Morris was required to post a $12 billion supersedeas bond to cover the entire judgment, interest, and costs of appeal.[174] The manufacturer claimed it could not post a bond of that magnitude and make a $2.6 billion payment due under a national agreement that resolved lawsuits between cigarette makers and several states.[175] Accordingly, Madison County Circuit Court Judge Nichols Byron reduced the size of the bond, allowing Philip Morris to make cash payments of $800 million and to deliver a $6 billion interest-bearing promissory note.[176]

The plaintiffs appealed the revised bond arrangement.[177] The Appellate Court of Illinois held that Rule 305 was unambiguous[178] and that the trial court had no authority to deviate from its requirements.[179] It remanded the case to the Madison County Circuit Court to recalculate the amount of the appeal bond.[180]

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171. *Id.* (citing 815 ILL. COMP. STAT. ANN. 505/2).

172. *Id.* at *29. The Illinois Supreme Court later reversed the judgment and ordered the case dismissed, holding that the Federal Trade Commission had permitted tobacco companies to market cigarettes as "light" thereby preempting state consumer fraud laws. Price v. Philip Morris, Inc., 848 N.E.2d 1 (Ill. 2005), *reh'g denied*, 846 N.E.2d 597 (Ill. 2006), *cert. denied*, 549 U.S. 1054 (2006).

173. ILCS S. CT. R. 305(a) Commentary (Revised Dec. 17, 1983).

174. Price v. Philip Morris, Inc., No. 00-L-112, 2003 WL 2259760, at *29 (Ill. Cir. Ct. Mar. 21, 2003).

175. Barry Miller & Jonathan Fuerbringer, *Philip Morris Appeal Bond Is Cut in Half*, N.Y. TIMES, Apr. 15, 2003, http://www.nytimes.com/2003/04/15/business/15TOBA.html?pagewanted=1&pagewanted=all.

176. *Id.* Elizabeth Warren, then a Harvard University law professor specializing in bankruptcy and currently a U.S. Senator from Massachusetts, testified against the reduction of the amount of the bond and the substitution of a promissory note as being too small and too risky to protect the judgment creditor. Brian Brueggemann, *Philip Morris Bond Is "a $6 billion IOU," Expert Says*, BELLEVILLE NEWS-DEMOCRAT (Apr. 25, 2003), archive.tobacco.org/news/124191.html. Madison County earned $17.6 million in interest from the bond which was used to discharge virtually all county debt, pay for administration and criminal courts buildings, establish an early retirement program for county employees, and install a state-of-the-art 911 dispatch system. Steve Whitworth, *Supreme Court Turns Out the "Lights,"* TELEGRAPH (Nov. 28, 2006), http://www.highbeam.com/doc/1G1-155113870.html.

177. Price v. Philip Morris, Inc., 793 N.E.2d 942, 946 (Ill. App. Ct. 2003).

178. *Id.* at 948.

179. *Id.*

180. *Id.* at 950.

Philip Morris appealed to the Supreme Court of Illinois.[181] In the exercise of its supervisory authority, the Supreme Court reinstated Judge Byron's modified appeal bond requirement for Philip Morris.[182] In addition, exercising its rule-making authority governing appellate practice, the Supreme Court amended Rule 305 "to give the courts discretion in a money judgment case to approve a bond or other form of security that covers less than the entire amount of the judgment plus anticipated interest and costs."[183]

Since *Philip Morris*, most states have amended their appeal bond statutes to make the process less onerous for appellants.[184] Five northeastern states do not require a bond at all.[185] Other states impose caps on the amount that must be bonded,[186] exclude the punitive

181. Philip Morris, Inc. v. Ill. Appellate Court, Fifth Dist., No. 96644, 2003 Ill. LEXIS 2625 (Ill. Sept. 16, 2003).

182. *Id.* at *1.

183. ILCS S. CT. RULE 305 (Commentary) (Revised Jan. 15, 2004).

184. "Appeal bond reform began in earnest in about 2000." Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damage Tort Reform*, 39 AKRON L. REV. 1089, 1091 (2006). For a summary of the appeal bond requirements in all 50 states, see Ariz. Chamber Found., *Bonds. Appeal Bonds* (Jan. 2011), *available at* http://www.azchamber.com/assets/files/Press%20Releases/2011/Bonds.%20Appeal%20Bonds.pdf (Exhibit #1).

185. They are Connecticut, Massachusetts, New Hampshire, New Jersey and Vermont. Ariz. Chamber Found., *supra* note 184. In Maine, execution of judgments is stayed pending appeal, but the court has discretion to order the judgment debtor to post a bond in an amount determined by the court to compensate for the delay, loss of interest and cost of appeal. ME. R. CIV. P. 62(c) (2013). In Minnesota, trial courts have discretion to waive an appeal bond, although the state supreme court has instructed that this discretion is to be exercised sparingly. MINN. R. APP. P. 108.02 (Advisory Committee Comment, 2009 Amendments).

186. There are few states remaining, such as Alabama, Alaska, and Washington, that require full-judgment appeal bonds. ALA. R. APP. P. 8(a)(1); ALASKA CT. R. 204(d); WASH. R. APP. P. 8.1. Many states have caps that are set at such high levels as to be virtually meaningless. *See, e.g.*, ARK. CODE ANN. § 16-55-214 (2003) ($25 million); COLO. REV. STAT. § 13-16-125 (2003) ($25 million); FLA. STAT. ANN. § 45.045(1) (West 2013) ($50 million); GA. CODE ANN. § 5-6-46 (2004) ($25 million); IND. CODE § 34-49-5-3(A), (B)(1)–(2) (2013) ($25 million); IOWA CODE ANN. § 625A.9(2)(B) (West 2013) ($100 million); KY. REV. STAT. ANN. § 411.187(1) (West 2012) ($100 million); MICH. COMP. LAWS ANN. §600.2607(1) (West 2013) ($25 million); MO. REV. STAT. § 512.099(1) (2012) ($50 million); MISS. R. APP. P. 8(b)(2), (c) (2013) ($100 million); N.C. GEN. STAT. ANN. § 1-289 (B) (West 2013) ($25 million); N.D. CENT. CODE ANN. § 28-21-25 (1) (West 2011) ($25 million); OHIO REV. CODE ANN. § 2505.09 (West 2014) ($50 million); OKLA. STAT. ANN. tit. 12, § 990.4 (B)(1)(C) (West 2013) ($25 million); R.I. GEN. LAWS § 42-133-11.1(A) (2012) ($50 million); S.D. CODIFIED LAWS §15-26a-26 (2013) ($25 million); TENN. CODE ANN. § 27-1-124 (A), (B) (West 2013) ($25 million); VA. CODE ANN. §8.01-676.1(J) (West 2013) ($25 million); W. VA. CODE ANN. § 58-5-14(B), (D) (West 2013) ($50 million); WIS. STAT. ANN. § 808.07(2M)(a) (West 2013) ($100 million). In Kansas for judgments exceeding $1 million, upon proof that requiring a bond in the full amount of the judgment will result in "a denial of the right to an appeal," the court may reduce the size of the bond to $1 million plus 25% of the amount of the judgment in excess of $1 million. KAN. STAT. ANN. § 60-2103(d)(1) (2012). Arizona, Nebraska, and Texas have caps of 50% of appellant's net worth. ARIZ. R. CIV. APP. P. 7(a)(2)(A)–(C) (2013); NEB. REV. STAT. § 25-1916(1) (A)–(C) (2012); TEX. R. APP. P. 24.2(a)(1)(A)–(B) (2013). Hawaii

damages portion of the award entirely,[187] or limit the amount of punitive damages required to be bonded.[188]

Even if a statute or appellate court rule appears mandatory on its face, some courts, both federal[189] and state,[190] have been receptive to equitable arguments seeking an interpretation that allows for the exercise of discretion, with Judge Frank Easterbrook's being the most analytically satisfying: By placing the assets of a bonding company behind the obligation, an appeal bond assures that money to satisfy the judgment will be available to appellee if the judgment is affirmed on appeal.[191] As a practical matter, a defendant who would be rendered insolvent by a damages judgment will be unable to secure a bond.[192] Even if such a defendant could obtain a bond, the result would be a windfall to the judgment creditor, who would then be placed in a preferred position over unsecured creditors of the judgment debtor.[193] What a judgment creditor can reasonably expect under such circumstances is that its position will be protected against

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and Wyoming have caps for small business appellants based upon number of employees. HAW. REV. STAT. § 607-26(A)(1) (2013) ($1 million); WYO. STAT. ANN. § 1-17-201(A) (West 2013) ($2 million).

187. ARIZ. R. CIV. APP. P. 7(a)(2)(A)–(C) (2013); TENN. CODE ANN. § 27-1-124 (B) (West 2013); TEX. R. APP. P. 24(a)(1) (2013); UTAH R. CIV. P. 62(j)(2)(C) (2013).

188. IDAHO APP. R. 13(b)(15) (2013) ($1 million); MISS. R. APP. P. 8(b)(2)(c) (2013) ($100 million).

189. A supersedeas bond in the full amount of the judgment, plus interest and costs, is required to stay execution of a federal court judgment. FED. R. CIV. P. 62(d). Notwithstanding its literal language, some federal court judges have interpreted Rule 62(d) as providing room for flexibility. For example, Judges Richard Posner and Frank Easterbrook have taken the position that a federal court may limit the required amount of the appeal bond to compensatory damages, and substitute alternative forms of security, such as forbidding the payment of dividends or other cash distributions by the judgment debtor during the pendency of an appeal. Olympia Equip. Leasing Co. v. W. Union Tel. Co., 786 F.2d 794, 797 (7th Cir. 1986); *see also* Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1152–55 (2d Cir. 1986) (upholding reduction of $12 billion bond requirement to $1 million), *rev'd on other grounds*, 481 U.S. 1 (1987); N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 281 (7th Cir. 1986) (court has discretion to require appellant to provide periodic reports to facilitate monitoring in lieu of bond).

190. *See, e.g.*, Polar Equip., Inc. v. Brunswick Corp., No. 3AN-87-3826 CI (Alaska Sup. Ct. Apr. 23, 1992) (refusing to order bonding of punitive damages portion of award so long as appellant maintained a net worth equal to ten times the unbonded amount of the judgment); Midkiff v. de Bisschop, 574 P.2d 128, 131 (Haw. 1978) (amount of bond discretionary with trial court); Scott River Sand & Rock Co. v. Dunevant, 213 P.3d 251, 253 (Ariz. Ct. App. 2009) (court has discretion to reduce bond or substitute alternate security); Shanghai Inv. Co v. Alteka Co., 993 P.2d 516, 538 (Haw. 2000) (court has discretion to allow alternative forms of security in lieu of appeal bond).

191. *See* Olympia Equip. Leasing Co., 786 F.2d at 800 (Easterbrook, J., concurring).

192. *Id.*

193. *Id.*

erosion during its period of jeopardy (i.e., while the right to enforce its judgment is stayed pending completion of appellate review).[194]

If and when there is a constitutional right to an appeal, the constitutionality of non-discretionary appeal bond rules and statutes will be subject to challenge in situations like the *Telegraph Case*, where posting a bond in the full amount of the judgment would force the judgment debtor into bankruptcy.[195]

Whether or not a constitutional right to appeal is ever recognized generally, for media defendants the right to appellate review is an essential buttress of explicit constitutional guarantees protected by the First Amendment.[196] Freedom of the press has long been held to occupy a preferred position among the constitutional values[197] in light of journalists' role in keeping people informed as citizens.[198] Supreme Court decisions recognize that access to independent appellate review ensures that protected expression will not be inhibited by protecting media defendants against the existential threat of potentially crippling damage awards.[199] Without the certainty of access to appellate re-

194. The median time from filing notice of appeal to final disposition in a civil appeal in the federal court system was 12.2 months in the twelve-month period ending September 30, 2012. *Judicial Business 2012*, U.S. COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B04ASep12.pdf (Table B-4A) (last visited Dec. 27, 2013). Note: For the twelve-month period ending on March 31, 2013, the median time was 11.8 months, based upon unpublished data on file with the Author.

195. One commentator already believes that requiring an appellant to post a supersedeas bond without judicial discretion to provide for alternative forms of security "denies an appellant's due process right to an effective appeal." Elaine A. Carlson, *Mandatory Supersedeas Bond Requirements – A Denial of Due Process Rights?*, 3 BAYLOR L. REV. 29, 39 (1987).

196. "[F]irst amendment rights are fragile and can be destroyed by insensitive procedures. . . . [C]ourts must thoroughly evaluate every aspect of the procedural system which protects these rights." Henry P. Monaghan, *First Amendment "Due Process*," 83 HARV. L. REV. 518, 551 (1970).

197. "[T]he First Amendment rests on the assumption that the widest possible dissemination of information . . . is essential to the welfare of the public, that a free press is a condition of a free society." Gertz v. Robert Welch, Inc., 418 U.S. 323, 398 (1974) (White, J., dissenting).

198. KILLENBERG, *supra* note 69, at xv. ("Journalists play an indispensable role as surrogates for citizens too busy, too tired, too infirm or too unqualified to govern for themselves. Reporters act on the public's behalf when they scrutinize candidates for elected office; request judicial records at the courthouse; investigate the expenditure of municipal tax dollars; attend meetings of the school board; interview prisoners held in the county jail; or stand watch over a limitless range of issues and conditions that touch the lives of citizens. As they serve the public, journalists expose corruption, sound alarms, question public policy, demand accountability and expose injustice.").

199. The Supreme Court has recognized the uniqueness of libel suits in establishing a heightened standard of review for malice in order "to ensure that protected expression will not be inhibited." Appellate judges "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505, 514 (1984). The Court has also required that appellate courts engage in de novo review of punitive damages awards. Robertson, *supra* note 151, at 1252–54.

view, the prospect of staggering libel judgments can chill the exercise of First Amendment rights, as the Court in *Gertz* predicted,[200] especially by small publications that are a principal source of minority and unpopular points of view.[201]

Newsgathering organizations that seek to raise First Amendment defenses in appealing a punitive damages judgment are constitutionally entitled to independent appellate review, even if they cannot afford a supersedeas bond for the full amount of the judgment.[202] In such cases, a judgment creditor is entitled to protection against the possibility that appellant's financial condition may take a turn for the worse during the appellate process, and it is also protected against the specter of appellant dissipating assets or placing assets beyond the reach of execution.[203]

The legitimate interests of both parties may be accommodated by alternative forms of security in lieu of a supersedeas bond.[204] As a condition of appeal, the trial court may require the judgment debtor to (a) take all steps necessary to maintain the value of its assets (e.g., carry adequate insurance); (b) not make payments to third parties except debts to trade creditors in the ordinary course of business; (c) freeze salaries; (d) suspend bonuses, dividends, and other cash distributions; (e) refrain from incurring further indebtedness or pledging existing assets as collateral for antecedent indebtedness; or (f) afford inspection and audit rights to the judgment creditor.[205] Additional conditions may be imposed depending upon the particular circum-

200. *Gertz*, 418 U.S. at 340; Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 770 (White, J., concurring) ("If the press could be faced with possibly sizable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified.").

201. *Punitive Damages and Libel Law*, *supra* note 144.

202. *Cf.* Adsani v. Miller, 139 F.3d 67 (2d Cir. 1998) (Because there is no right to appeal the judgment in a copyright infringement case under the due process or equal protection clause, a non-resident judgment debtor with no assets in the U.S. may be required to post a *supersedeas* bond without violating constitutional protections.).

203. *See generally* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 786 F.2d 794, 800 (7th Cir. 1986) (Easterbrook, J., concurring).

204. *See* Timothy S. Bishop & Jeffrey W. Sarles, *Supersedeas Bonds: A Crushing Burden* (June 15, 2013), http://www.appellate.net/articles/supersedeas.asp; David Axelrod & Peter Batalden, *Staying Enforcement of a Money Judgment Pending Appeal* (Aug. 2008), http://www.horvitzlevy.com/images/ps_attachment/attachment95.pdf; Lori Ploeger, *Federal Stays and Supersedeas Bonds*, http://www.cooley.com/files/tbl_s5SiteRepository/FileUpload21/304/A-Ploeger-Federal%20Stays%20and%20Supersedeas%20Bonds.pdf (last visited Dec. 27, 2013).

205. The alternative security package is similar to the typical financial covenants for the protection of creditors included in commercial loan agreements designed to assure that debtors will maintain their financial status and refrain from conduct that would adversely affect their condition. The constant tension between lenders and borrowers closely resembles that between judgment creditors and debtors. *See* Robert M. Lloyd, *Financial Covenants in Commercial Loan Documentation: Uses and Limitations*, 58 TENN. L. REV. 335, 342–43, 346 (1991).

stances.[206] Accelerated oral argument should be made available in such cases to reduce the period of time during which appellee is at risk.[207]

Since colonial times, the supersedeas bond has been understood as a means of ensuring that, if affirmed on appeal, the judgment will be satisfied. It is time to re-imagine the concept of an appeal bond in a more fundamental way than occurred during the first generation of reforms inspired by *Philip Morris.* For media defendants at least, the appeal bond should properly be understood as a device to preserve the status quo and protect the constitutional right to appeal.[208]

VI. Conclusion

Located near the confluence of three major rivers, the city of Alton became the place where the exercise of freedom of the press and the right to appeal intersected in the historic case of the Alton Telegraph. The paper that helps perpetuate the memory of Elijah Lovejoy, the first martyr in the cause of a free press, was forced to file for bankruptcy after losing a record judgment in a libel suit. The irony is that the suit was based upon a story that never appeared in the paper. The

206. For example, in *Obsidian Finance Group, LLC v. Cox*, appellee complained that appellant was causing further harm to appellee by continuing to post defamatory comments on appellant's websites. Obsidian Fin. Grp., LLC v. Cox, 812 F. Supp. 1220 (D. Or. 2011). Under such circumstances, it would be appropriate to condition relaxation of the appeal bond requirement upon appellant suspending further comment about appellee pending the outcome of the appellate process. This and certain other elements of an alternative security package may constitute an abridgment of speech. That certain burdens on the press result in incidental abridgment of speech does not render them impermissible. If partial or incidental abridgement of speech is justified by valid governmental interests, constitutional rights have not been denied. Am. Commc'n Ass'n v. Douds, 339 U.S. 382, 399 (1950).

207. Accelerated oral argument was part of the package of alternative security crafted by the Seventh Circuit in *Olympia Equip. Leasing Co.*, 786 F.2d at 799.

208. Illinois now has an appeal bond statute that strikes the balance recommended in this Article. In its present form, Rule 305(a) of the Rules Governing Appellate Practice provides that an appeal bond ordinarily shall be in an amount sufficient to cover the judgment, costs and interest reasonably anticipated to accrue during the pendency of an appeal. ILCS S. Ct. R. 305(a) (2013). However, the rule goes on to provide as follows:

> If the court, after weighing all the relevant circumstances, including the amount of the judgment, anticipated interest and costs, the availability and cost of a bond or other form of security, the assets of the judgment debtor. . . and any other factors the court may deem relevant, determines that a bond or other form of security in the amount of the judgment plus anticipated interest and costs is not reasonably available to the judgment debtor, the court may approve a bond or other form of security in the maximum amount reasonably available to the judgment debtor. In the event that the court approves a bond or other form of security in an amount less than the amount of the judgment plus anticipated interest and costs, the court shall impose additional conditions on the judgment debtor to prevent dissipation or diversion of the judgment debtor's assets during the appeal.

Id.

tragedy is that the jury verdict was never subject to appellate review because the Telegraph lacked the resources to post a bond of the magnitude required to stay enforcement of the judgment pending appeal.

Thirty-five years after the *Telegraph Case*, the inability to seek appellate review of a crippling damages award in a libel suit still presents an existential threat to all but the largest media organizations. By its chilling effect on newsgathering and its adverse impact on the people's right to know, the appeal bond requirement abridges First Amendment freedoms. A re-imagination of the supersedeas bond requirement, at least as it applies to media defendants seeking to raise First Amendment protections, will reconcile their constitutional right to appeal and the legitimate interests of their judgment creditors.