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TORTS

NEWTON v. NATIONAL BROADCASTING CO., INC.: EVIDENCE OF ACTUAL MALICE, THE EDITORIAL PROCESS AND THE MAFIA IN PUBLIC FIGURE DEFAMTION LAW

I. INTRODUCTION

In *Newton v. National Broadcasting Co., Inc.*,[1] the Ninth Circuit held that in public figure defamation actions,[2] appellate courts must independently review[3] evidence of actual

1. Newton v. National Broadcasting Co., Inc., 913 F.2d 652 (9th Cir. 1990) (per Norris, J.; the other panel members were Goodwin, C.J. and Nelson, J.), *withdrawn, am'd and reh'g en banc denied*, 930 F.2d 662 (1991), *cert. denied*, _ U.S. _ (1991).

2. A public figure is defined as: (1) those "deemed a public figure for all purposes," (2) those "who thrust themselves into the forefront of a particular controversy" and hence become public figures in relation to that issue, and (3) those who become public figures "through no purposeful action of [their] own." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). This characterization is important because public figure plaintiffs must satisfy a more demanding evidentiary standard under the first amendment. For further discussion of the public figure doctrine *see infra* notes 38-43 and accompanying text.

3. Generally, appellate courts review all purely factual findings for clear error. *See* United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395. The Supreme Court has ruled, however, that some circumstances require a more discriminating deference. *See* Fiske v. Kansas, 274 U.S. 380, 385-86 (1927) (less deference warranted where "conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question, to analyze the facts"). The exercise of heightened appellate review has become known as the doctrine of independent review. *See generally* Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 A.M. U.L. REV. 3 (1985). For further discussion of the doctrine of independent review *see infra* notes 57-62 and accompanying text.

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malice[4] associated with a journalist's investigative or editorial techniques.[5] The court reasoned that subjecting the editorial process to judicial scrutiny imperils free speech, and explained that "the media should not fear that its journalists' professional judgment will be second-guessed by juries without the benefit of careful appellate review."[6]

Under *Bose Corp. v. Consumers Union of United States, Inc.*,[7] evidence of actual malice turning on the factfinder's assessment of a speaker's credibility at trial must be reviewed for clear error.[8] *Newton* exempts evidence of actual malice associated with a journalist's investigative techniques from the *Bose* mandate.[9] By excluding a particular category of evidence from the range of the *Bose* decision, the practical effect of *Newton* is thus to narrow the scope of the *Bose* Court's holding.[10]

II. FACTS

On October 6, 1980, Carson Wayne Newton (Newton) was the subject of a three and one-half minute feature on the NBC Nightly News entitled "Wayne Newton and the Law."[11] The broadcast reported that Newton was attempting to purchase

4. "Actual malice" is a term used to describe the culpable state of mind required in cases governed by the constitutional rules of defamation. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The standard is satisfied by publication of a defamatory falsehood with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. For further discussion of the actual malice standard *see infra* notes 44-52 and accompanying text.

5. *Newton*, 930 F.2d at 683. In *Newton*, the Ninth Circuit treated a decision by the NBC journalists who researched the broadcast to disregard information furnished during a pre-broadcast interview with Mark Moreno, Newton's acquaintance and business associate, as conduct constituting an "investigative technique." *See id.*

6. *Id.* For a discussion of the remedial function served by appellate courts *see infra* notes 131-38 and accompanying text.

7. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

8. *See id.* at 499-500; *see also* Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989).

9. *Newton*, 930 F.2d at 683.

10. *See id.*

11. Newton v. National Broadcasting Co. Inc., 930 F.2d 662, 666 (9th Cir. 1991). Excerpts from a portion of the broadcast read as follows:

> [Guido] Penosi is a New York hoodlum from the Gambino Mafia family, a man with a long criminal record . . . Penosi is also a key figure in a federal grand jury investigation . . . that involves one of the big casinos . . . [in Las Vegas], the Aladdin; and one of Las Vegas's top performers, singer Wayne Newton. . . . A federal grand jury is now investigating the role of Guido Penosi and the mob in Newton's deal for the Aladdin. . . . Investigators say that last year, just before Newton announced he would buy the Aladdin, Newton called

the Aladdin Hotel in Las Vegas, and that he had contacted Guido Penosi, characterized by NBC as a New York Crime figure, for help completing the deal.[12] The broadcast reported further that Penosi contacted Frank Piccolo (another "mob boss")[13] regarding Newton's request, and that in exchange for helping Newton, Piccolo received a hidden interest in the Aladdin.[14]

NBC also reported that the Federal Bureau of Investigation (FBI) was investigating the role of Penosi and the mob in Newton's acquisition of the Aladdin,[15] and strongly suggested that Newton had given false testimony before Nevada Gaming Board authorities.[16] NBC aired two follow-up stories after the initial broadcast.[17]

On April 10, 1981, Newton filed a defamation action against NBC and three of its journalists.[18] Newton claimed that NBC "either falsely stated or conveyed the false impression that 'Mafia and mob sources' helped [him] buy the Aladdin" and that while under oath he had deceived Nevada gaming authorities about his relationship with the Mafia.[19] NBC moved for summary judgment, but the motion was denied.[20] The district court reasoned that although NBC "had 'made a substantial and persuasive showing that each of the statements made [were] either true or protected under the common law privilege of fair reporting,' the jury could find that the NBC

> Guido Penosi for help with a problem. Investigators say whatever the problem was, it was important enough for Penosi to take it up with leaders of the Gambino family in New York. Police in New York say that this mob boss, Frank Piccolo, told associates that he had taken care of Newton's problems and had become a hidden partner in the Aladdin hotel deal.

Id. (citing the district court's record at 43-47).

12. *Id.* Apparently, in early 1980 Newton and his daughter received death threats from members of the Genovese family. *Id.* at 673. Newton testified at trial that he contacted Penosi for help resolving this conflict. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 666-67. Though Newton was involved, the focus of the investigation was on the flow of East Coast mob money into the entertainment industry in Las Vegas and Hollywood. *Id.*

16. *Id.*

17. *Id.* at 667. There were "two subsequent broadcasts concerning the grand jury investigation" of Penosi's role in Newton's purchase of the Aladdin and Newton's indictment. *Id.*

18. *Id.* Newton sued the reporter, the field producer, and the executive producer. *Id.*

19. *Id.* Although Newton raised this argument on appeal, the court declined to consider whether liability could be imposed for defamation based on false impressions, as opposed to false statements. *Id.* at 668 n.5.

20. *Id.* at 667.

broadcasts left a false and defamatory impression about Newton."[21] NBC's motion for a change of venue was also denied.[22]

Trial was held in a Las Vegas federal district court, where, following a 37-day trial, the jury returned a special verdict finding against all four defendants[23] and awarding Newton more than $19 million in compensatory and punitive damages.[24] The $5 million punitive damage award was the largest in American libel history.[25]

NBC subsequently moved the court for judgment notwithstanding the verdict or, in the alternative, for a new trial.[26] NBC's motion was denied, but the court did set aside both Newton's $5 million dollar award for damages to his reputation[27] and his $9 million dollar award for lost past and future income.[28] Additionally, Newton was ordered to file a remittitur.[29] He filed the remittitur, and both parties appealed.[30]

III. BACKGROUND

Prior to 1964, defamatory speech[31] was not protected by the Constitution.[32] Since 1964, however, the Supreme Court

21. *Id.*

22. *Id.*

23. *Id.* The jury found "that at least one statement and one impression about Newton conveyed by one or more of the three broadcasts was defamatory, of a factual nature, and was false." *Id.* The jury found further that "two of the three NBC journalists had made a false and defamatory statement with knowledge of falsity or with serious subjective doubts about the statement's truth or accuracy and that all three individual defendants intended to convey a false or defamatory impression about Newton with knowledge of falsity or serious subjective doubt about the truth of the impression." *Id.*

24. *Id.* Additionally, Newton received approximately $3.5 million in prejudgment interest. *Id.*

25. *Id.* at 666.

26. *Id.* at 667-68.

27. *Id.* at 668. The district court concluded the award "shocked the conscience." *Id.*

28. *Id.* With respect to Newton's claim for lost income, the district court reasoned the broadcast had not "tarnished" his reputation. *Id.*

29. *Id.* Newton was ordered to file a remittitur "of all sums except $225,000 for physical and mental injury, $50,000 as presumed damages to reputation, and $5 million in punitive damages." *Id.*

30. *Id.* In his cross appeal, Newton asked the court to reinstate the $9 million award for lost past and future income. *Id.* at 688 n.4.

31. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559; *see also* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 111, at 774 (5th ed. 1984); FOWLER V. HARPER ET AL., THE LAW OF TORTS (2nd ed. 1986) § 5.1 (1). While the idea of disgrace is necessarily involved, communications "likely to arouse only sympathy or pity in decent people" may also be defamatory. Prosser & Keeton, *supra*, at 773.

32. Beauharnais v. Illinois, 343 U.S. 250, 255-56 (1952).

has recognized a qualified constitutional privilege to defame public officials.[33] The privilege, based on the First Amendment,[34] now also extends to cases involving public figure plaintiffs as well.[35] Although the precise boundaries of the privilege have not yet been defined,[36] developments since 1964 have had a profound effect on both substantive and procedural aspects of defamation law.[37]

A. ACTIONS ARISING UNDER THE FIRST AMENDMENT

Characterization of the parties to a defamation action dictates whether the case is governed by the First Amendment.[38] Cases involving "public figure" plaintiffs are subject to constitutional restraints,[39] as are actions involving "public

33. *New York Times*, 376 U.S. at 280-81; McKinnon v. Smith, 275 N.Y.2d 900, 903 (1966). The privilege is qualified because it can be overcome by a showing, with clear and convincing evidence, that the defendant published a defamatory falsehood with actual malice. *New York Times*, 376 U.S. at 281.

The privilege has its origins in *New York Times* where Sullivan, one of three elected commissioners of the City of Montgomery, Alabama, sued the *Times* after an advertisement criticizing local police was featured in the paper's March 29, 1960, edition. *Id.* at 256. Fixing clear and convincing evidence of actual malice as a prerequisite to recovery in public official defamation actions, the Supreme Court held that Sullivan's failure to prove the advertisement had been published with "knowledge that [the advertisement's allegations] were false or with reckless disregard of whether [they were] false or not" precluded his recovery. *Id.* at 279-80.

34. The first amendment provides, *inter alia*, that "Congress shall make no laws . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. One commentator suggests that although the Supreme Court has reviewed first amendment problems extensively, "no meaningful distinction between the freedoms of speech and press" has been drawn, the Court "frequently comming[ing] both in the term 'freedom of expression.'" Genevra K. Loveland, Comment, *Newsgathering: Second-Class Right Among First Class Freedoms*, 53 TEX. L. REV. 1440, 1441 (1975). This commentator also presents a compelling argument for treating freedom of press as a broader right than freedom of speech, reasoning that "while freedom of speech protects the *individual's* right to express opinions and beliefs, freedom of the press necessarily embraces as well *society's* interest in the unfettered dissemination of information on matters of public concern to the electorate." *See id.* at 1441-42 (emphasis added).

35. *See infra* notes 38-43 discussing the public figure doctrine.

36. *See, e.g.*, United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (1968), *cert. denied*, 394 U.S. 921 (1969); *see also* Prosser & Keeton, *supra* note 31, at 805; W. Page Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1228 (1976).

37. *See* Prosser & Keeton, *supra* note 31, at 805; RESTATEMENT (SECOND) OF TORTS (Special Note on the Impact of the First Amendment of the Constitution on the Law of Defamation).

38. Randall P. Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on Bose Corporation v. Consumers Union*, 8 HAMLINE L. REV. 105, 105 n.4 (1985); Prosser & Keeton, *supra* note 31, at 805.

39. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967); *Gertz*, 418 U.S. at 342; *see also* Prosser & Keeton, *supra* note 31, at 806. For a definition of the public figure designation *see supra* note 2. At

officials,"[40] providing the allegedly defamatory communication relates to the plaintiff's official conduct.[41] While judges determine whether the plaintiff is a public figure or a public official as a matter of federal law,[42] the defendant "probably" has the burden to prove the action implicates the First Amendment.[43]

B. COMPOSITION OF THE CONSTITUTIONAL PRIVILEGE

1. *Actual Malice*

In cases arising under the First Amendment, the constitutional privilege may only be defeated by proof the defendant published[44] a defamatory statement with actual malice.[45] At common law, proof of actual malice was not required.[46] In fact,

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one time the Supreme Court recognized involvement in an event of public interest as conduct potentially giving rise to public figure status. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) (plurality opinion). This interpretation, however, has been expressly rejected. *See Gertz*, 418 U.S. at 343-46. For a succinct discussion of the public figure test as applied to corporations *see* Gary A. Paranzino, Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp v. Consumers Union of United States, Inc.*, 71 CORNELL L. REV. 477, 485 n. 50 (1986).

40. *New York Times*, 376 U.S. at 279-80; *Gertz*, 418 U.S. at 342.

41. *See generally* Tucker v. Kilgore, 388 S.W.2d 112, 112 (1964), *reh'g denied* (1965); Monitor Patriot Co. v. Roy, 401 U.S. 265, 273 (1971); Goldwater v. Ginzburg, 261 F. Supp. 784 (S.D.N.Y. 1966); Zurita v. Virgin Islands Daily News, 578 F. Supp. 306 (1984); Burgess v. Reformer Pub. Co., 146 Vt. 612 (1986). The scope of the public official designation has not been expressly defined. *See generally* Klahr v. Winterble, 4 Ariz. App. 158 (1966); Fignole v. Curtis Publishing Co., 247 F. Supp. 595 (D.C. N.Y. 1965). At a minimum, though, the designation appears to apply to government employees who have substantial control over governmental affairs. *See* Rosenblatt v. Baer, 383 U.S. 75 (1966); Prosser & Keeton, *supra* note 31, at 806.

42. Harper, *supra* note 31 § 5.29; RESTATEMENT (SECOND) OF TORTS § 580A cmt. c; Prosser & Keeton, *supra* note 31, at 806.

43. *See* Prosser & Keeton, *supra* note 31, at 806.

44. The element of publication does not require that the defamatory statement be "printed or written." *Id.* at 797. Rather, publication requires communication of the allegedly defamatory statement by the defendant to "some one other than the person defamed." *Id.*

45. *New York Times*, 376 U.S. at 279-80; *Gertz*, 418 U.S. at 342; *Harte-Hanks*, 491 U.S. 667; Time, Inc. v. Pape, 401 U.S. 279, 284 (1970); *see also Bose*, 466 U.S. at 512.

46. James L. Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655, 698 (1979). In tracing the historical antecedents of the *New York Times* actual malice test, Judge Oakes observes that plaintiffs were essentially required to allege malice on the part of the defendant as an element of the common law cause of action for defamation. *Id.* However, plaintiffs were not required to prove malice. *Id.* Rather, "the law allowed the jury to conclusively presume malice from the speaking or writing of defamatory words." *Id.* Judge Oakes suggests that the *Sullivan* Court used the term "actual malice" to distinguish malice in the sense of a culpable state of mind of a speaker when publishing a defamatory falsehood from this implied malice existing at common law. *Id.*

prior to 1964, liability could be imposed without regard to whether the defendant was at fault.[47]

"Malice" has traditionally been associated with ill-will, hatred and spitefulness.[48] Within the context of defamation litigation, however, the concept of actual malice bears only a slight resemblance to its historical predecessor.[49] Indeed, under existing rules, evidence of ill-will or spite will not suffice.[50] Rather, proof the defendant published a defamatory falsehood with knowledge of falsity or with reckless disregard for the truth is required.[51] The standard is deliberately subjective.[52]

2. *Plaintiff's Evidentiary Burden*

At common law, recovery against the intentional publisher of defamatory material was permitted on a theory of strict liability in tort.[53] In contrast, today, in cases governed by *New York Times*, actual malice must be demonstrated by clear and convincing evidence.[54] The heightened burden of

47. *See infra* note 53 and accompanying text describing plaintiff's evidentiary burden at common law.

48. Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1349 (S.D.N.Y. 1977) (Supreme Court's definition of "actual malice" distorts common English); Mahoney v. Adirondack Publishing Co., 71 N.Y.2d 31, 36 n.1 (1987) (term malice "commonly understood to mean hostility or ill will toward another person").

49. *Harte-Hanks*, 491 U.S. at 666 n.7 ("the phrase 'actual malice' is unfortunately confusing in that *it has nothing to do with bad motive or ill will*) (emphasis added); *see also Rosenbloom*, 403 U.S. at 52 n.18; Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 280-81 (1974).

50. *Harte-Hanks*, 491 U.S. at 666; *Cf.* Erica F. Plave, *Tavoulareas v. Piro: An Extensive Exercise of Independent Judgment*, 56 GEO. WASH. L. REV. 854, 871 (1988) ("under some circumstances, evidence of ill will or bad motives, when combined with more weighty evidence of defendant's bad faith, may be probative of a willingness to publish falsehoods").

51. *New York Times*, 376 U.S. at 279-80; *Bose*, 466 U.S. at 511 n.30; *Harte-Hanks*, 491 U.S. at 667. The concept of reckless disregard is not easily defined. St. Amant v. Thompson, 390 U.S. 727, 730 (1968). However, publication with a "high degree of awareness of probable falsity" or serious doubt as to the publication's truth will suffice. Garrison v. Louisiana, 379 U.S. 64, 74 (1964); *St. Amant*, 390 U.S. at 731.

52. *Bose*, 466 U.S. at 511 n.30; Newton v. National Broadcasting Co., Inc., 930 F.2d 662, 668 (9th Cir. 1991); *see also New York Times*, 376 U.S. at 279-80; *Harte-Hanks*, 491 U.S. 667; *St. Amant*, 390 U.S. at 731.

53. Prosser & Keeton, *supra* note 31, at 804; *see also* Keeton, *supra* note 36, at 1222 ("the liability structure could be characterized as no-fault in the sense that, if the matter published proved to be false, the defendant nonetheless incurred liability no matter how reasonable his belief in the truth of the matter asserted"); Harper, *supra* note 31, § 5.0 n.1.

54. *New York Times*, 376 U.S. at 285-86; *Gertz*, 418 U.S. at 342; *Bose*, 466 U.S. at 511; *Harte-Hanks*, 491 U.S. at 688; *see also* RESTATEMENT (SECOND) OF TORTS § 580A cmt. f. While originally the Supreme Court referred to a standard of "convincing clarity," subsequent decisions reveal that "clear and convincing evidence" is analogous

proof[55] is imposed to reduce the risk first amendment values will be invaded.[56]

3. *The Doctrine of Independent Review*

Appellate courts generally review purely factual findings for clear error.[57] But, with the exception of credibility

to evidence demonstrated by "convincing clarity." *See, e.g., Bose*, 466 U.S. at 511. Notably, one commentator suggests the standard can be represented quantitatively by a figure of 75%, as compared to beyond a reasonable doubt at 95% and preponderance of the evidence at 51%. Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 104 n.28 (1984).

While clear and convincing evidence of actual malice is required under the first amendment, this is not the case where actions between "private individuals" are involved. *See generally Gertz*, 418 U.S.323. The Supreme Court has declared that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory false hoods injurious to a private individual." *Id.* at 347. Accordingly, as between private individuals, the defendant's conduct may be measured against an objective negligence standard. *See id.*

55. "[T]he 'clear and convincing' standard of proof is a higher standard which reflects a societal judgment about the greater importance of particular types of adjudication." *Newton*, 930 F.2d at 699-70 n.9 (citing Cruzan v. Missouri, 58 U.S.L.W. 4916, 4921 (1990)).

56. *New York Times*, 376 U.S. at 285-86; *see also* Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact on the First Amendment*, 66 TEX. L. REV. 215, 240-41 (1987); Paranzino, *supra* note 39, at 481.

In *Rosenbloom*, Justice Brennan articulated the Court's rationale for imposing the heightened burden of proof. There, he explained that:

> In the normal civil suit where [the preponderance of the evidence] standard is employed, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.

Rosenbloom, 403 U.S. at 50 (quoted in David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 247-48 (1976)).

57. Fed. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous"); *see also Gypsum*, 333 U.S. at 394-95. The scope of appellate review under the clearly erroneous standard is narrow because findings are presumed to be correct. J. FRIEDENTHAL ET AL., CIVIL PROCEDURE, § 13.4, at 601.

Purely factual findings usually include inquiries into a defendant's state of mind. Pullman Standard v. Swint, 456 U.S. 273, 289 (1982); *Newton*, 930 F.2d at 670 n. 12; *see also* Levine, *supra* note 3, at 6-7 ("this kind of fact bound inquiry has traditionally been the province of the jury"). The Supreme Court, however, has not treated evidence of actual malice - arguably involving "no more than findings about the mens rea of an author," *Bose*, 466 U.S. at 515 (Rehnquist and O'Connor, J.J., dissenting) - as a question of pure fact. *See id.*, at 514. Rather, actual malice appears to have been characterized as a mixed law-fact question. *See id.* at 501. Reconciling *Bose*

determinations,[58] in public figure defamation actions, evidence of actual malice is reviewed de novo.[59] De novo, or "independent review," is justified on grounds that the First Amendment obligates courts to measure evidence of actual malice against the governing constitutional principles.[60] The doctrine applies regardless of whether the action is brought in state or federal court[61] and whether the factfinder is a judge or a jury.[62]

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and *Swint* is difficult, and the *Bose* decision has been expressly criticized in this respect. *See* Paranzino, *supra* note 39, at 489-93 ("the Court's inability to explain the different treatment accorded similar questions in *Swint* and *Bose* may result in a perception of independent appellate review as a tool of judicial favoritism"). Unfortunately, the Ninth Circuit, while observing that its independent review of the evidence of actual malice had "a peculiar twist," offered no insight into this discrepancy. *Newton*, 930 F.2d at 670.

58. *See infra* note 64 and accompanying text discussing the standard credibility determinations are properly reviewed under.

59. De novo review was originally mandated in *New York Times* where the Supreme Court declared appellate courts "must make an independent examination of the whole record . . . to assure . . . that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285 (citations omitted). For an extensive list of contemporary circuit court decisions exercising independent review *see* Paranzino, *supra* note 39, at 483 n. 39.

The Supreme Court first exercised independent review in the context of first amendment cases in *Fiske*, 274 U.S. at 385-86, where the Supreme Court independently reviewed a factual determination by a Kansas court that the defendant was guilty of violating a Kansas Criminal Syndicalism Act. *Id.* Reviewing the evidence independently, the Court reversed the conviction. *Id.* at 387. At trial, the defendant had testified that "he did not believe in criminal syndicalism." *Id.* at 383. The jury found this testimony incredible. *Id.* at 385. Rejecting the jury's findings, the Court concluded that insufficient evidence existed to sustain the verdict. *Id.* at 386.

The Court has also exercised independent review in cases involving a variety of first amendment concerns. *See* Street v. New York, 394 U.S. 576, 592 (1969) (assessing whether defendant's remarks "were so inherently inflammatory" as to constitute "fighting words"); Hess v. Indiana, 414 U.S. 105, 108-109 (1973) (*per curiam*) (determining whether defendant was guilty of incitement to riot); Miller v. California, 413 U.S. 12, 37 (1973) (evaluating whether defendant was in possession of obscene materials); Jenkins v. Georgia, 418 U.S. 153, 159-61 (1974) (measuring motion picture against obscenity standards).

60. *New York Times*, 376 U.S. at 285 ("this Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied"); *see also Bose*, 466 U.S. at 501- 502.

61. *See Bose*, 466 U.S. at 499. The doctrine originated in *New York Times*, an action reaching the Supreme Court on certiorari from the Alabama Supreme Court. *New York Times*, 376 U.S. at 285. It was first extended to the federal court system in *Bose*, a diversity action brought in the United States District Court for the District of Massachusetts. *Bose*, 466 U.S. at 488. The *Bose* Court reasoned the concept of federalism dictated extension of the doctrine to the federal courts. *Id.* at 499 ("surely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts").

62. *Newton*, 930 F.2d at 670 n.11 (citing *Bose*, 466 U.S. at 501).

4. *The Credibility Exception*

As previously discussed, evidence of actual malice is generally subject to independent review in actions governed by *New York Times*.[63] Evidence of actual malice turning on the factfinder's assessment of a speaker's credibility at trial, however, is not reviewed de novo. Rather, under *Bose* and *Harte-Hanks*, appellate courts are required to accord heightened deference to the factfinder's credibility determinations,[64] and credibility determinations are thus properly reviewed under the

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63. *See supra* note 59 and accompanying text.

64. *See Bose*, 466 U.S. at 500 (special deference must be given to credibility determinations); *Harte-Hanks*, 491 U.S. at 688 ("credibility determinations are reviewed under the clearly erroneous standard . . ."); *see also Newton*, 930 F.2d at 670-71 (special deference is required when reviewing the jury's credibility determinations); Newsom v. Norris, 888 F.2d 371, 377-78 (6th Cir. 1989); Diesen v. Hessburg, 455 N.W. 2d 466, 451 (1990). *Bose* and *Harte-Hanks* require greater deference, because under *New York Times*, when reviewing evidence of actual malice, appellate courts are not required to defer to *any* of the jury's factual findings. *See New York Times*, 376 U.S. at 285.

Bose involved a product disparagement action brought by a stereo-speaker manufacturer against *Consumer Reports* after the magazine reported that "individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." *Bose*, 466 U.S. at 488. At trial, Arnold Seligson, who prepared reports for the article, testified that he had intended to describe movement "back and forth along the wall between the speakers" rather than "about the room." *Id.* at 495-96. Rejecting Seligson's testimony as incredible, the district court concluded the article was published with actual malice and judgment was entered in favor of the plaintiff. *Id.* at 497. On appeal, the Supreme Court framed the issue as whether, *accepting the district court's credibility determination*, clear and convincing evidence of actual malice was present. *Harte-Hanks*, 491 U.S. at 689 n.35. Ultimately, the Court concluded the evidence was constitutionally deficient. *Bose*, 466 U.S. at 513. The Court reasoned that "the difference between hearing violin sounds move around the room and hearing them wander back and forth [fit] easily within the breathing space that gives life to the First Amendment." *Id.*

Similarly, in *Harte-Hanks*, the Supreme Court deferred to the jury's determination that the defendant publisher's testimony was not credible. *Harte-Hanks*, 491 U.S. at 692. There, a mayoral candidate sued the *Daily Journal* after the newspaper charged him with bribing a grand jury witness. *Id.* at 660. Apparently there was evidence, known to the story's editors, suggesting that the *Journal's* source of information for the story was not trustworthy. *Id.* at 692-93. When asked to explain the failure to pursue this evidence, one editor testified that he believed this evidence had not been significant. *Id.* at 683-84 n.32. The jury rejected the editor's testimony as incredible, and delivered a verdict for the plaintiff. *Id.* at 661. Adhering to its decision in *Bose*, the Court concluded the jury's assessment of the publisher's credibility at trial was properly reviewed for clear error. *Id.* at 688. And, remarking that the evidence was "unmistakably sufficient to support a finding of actual malice," the Court affirmed the judgment of the Court of Appeals. *Id.* at 693. The Court reasoned that, "[a]ccepting the jury's determination that [the defendant's] explanations for these omissions [was] not credible, it [was] likely that the newspaper's inaction was the product of a deliberate decision not to acquire knowledge of the facts that might confirm the probable falsity of [the] charges." *Id.* at 692.

clearly erroneous standard.[65] This mandate, labeled the "credibility exception" by the Ninth Circuit,[66] is justified on grounds that appellate courts, with only bare records before them, are in "no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact."[67]

C. DEFAMACAST

Courts are not in complete agreement as to whether defamation by radio and television is a new tort or whether it is properly classified as libel or slander.[68] While many courts treat defamation by radio and television as either libel or slander,[69] some courts in fact treat it as a new tort, frequently called *"defamacast."*[70] Regardless of how the tort is classified, plaintiffs are still subject to constitutional restraints in cases governed by *New York Times*.[71]

IV. THE COURT'S ANALYSIS

The Ninth Circuit's principal task was determining whether the district court's finding that NBC broadcasted the October

65. *Bose*, 466 U.S. at 500; *Harte-Hanks*, 491 U.S. at 688; *see also Newton*, 930 F.2d at 670-71; *Newsom*, 888 F.2d at 377-78; *Diesen*, 455 N.W. 2d at 451.

66. *Newton*, 930 F.2d at 671 ("we read *Bose* and *Harte-Hanks* as creating a '*credibility exception*' to the rule of independent review") (emphasis added).

67. Bose Corp. v. Consumers Union of United States, 692 F.2d 189, 195 (1st Cir. 1982); *Harte-Hanks*, 491 U.S. at 688; *Newsom*, 888 F.2d at 377-78. "The reason for using the clearly erroneous standard is that the trial judge is thought to have an advantage over the appellate court because of his opportunity to view the witnesses; demeanor evidence is of course unavailable to the appellate court." Friedenthal, *supra* note 57, at 601; *see also* Inwood Labs, Inc. v. Ives Labs, Inc., 456 U.S. 844, 854 (1982) (clearly erroneous standard "rests upon the unique opportunity of the trial court judge to evaluate the credibility of witnesses").

68. *See* Jeffrey F. Ghent, Annotation, *Defamation by Radio or Television*, 50 A.L.R. 3d 1311, 1319 (1990).

69. Apparently where a written script is used, most courts treat defamation by radio and television as libel. *See generally* Martins v. Coelho 478 N.Y.2d 58 (1984); National Ass'n of Government Employees, Inc. v. Central Broadcasting Corp., 379 Mass 220 (1979), *cert. denied*, 446 U.S. 935; First Independent Baptist Church v. Southerland, 373 So.2d 647 (1979); Gray v. WALA-TV, 384 So.2d 1062 (1980); Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605 (1955); *see also* Shor v. Billingsley, 158 N.Y.2d 476 (1956) (statement made on television not from written script treated as libel). In contrast, California courts classify defamation by radio and television as slander. *See, e.g.*, White v. Valenta, 234 Cal. App. 2d 243 (1965); Arno v. Stewart, 245 Cal. App. 2d 955 (1966).

70. *See, e.g.*, American Broadcasting-Paramount Theaters, Inc. v. Simpson, 106 Ga. App. 230 (1962); Summit Hotel Co. v. National Broadcasting Co. 336 Pa. 182 (1939); Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167 (1963).

71. *See* Prosser & Keeton, *supra* note 31, at 812; RESTATEMENT (SECOND) OF TORTS § 581(2) cmt. g.

6 story with actual malice was supported by constitutionally sufficient evidence.[72]

A. Rejecting The District Court's Holding

The district court's ruling was based on two findings.[73] First, the district court found that NBC's conduct, whether or not intentional, constituted reckless disregard for the truth.[74] The court reasoned that NBC should have foreseen that the October 6 broadcast would create a defamatory impression that the Mafia helped Newton purchase the Aladdin.[75] Second, the district court ruled that because the defamatory impressions created by the October 6 broadcast were "clear and inescapable, the jury could reject as incredible the journalists' testimony"[76] that the broadcast was "not intended to leave a false impression."[77]

The Ninth Circuit rejected both findings.[78] Emphasizing that actual malice is a subjective inquiry,[79] the court rejected the district court's first contention that NBC *should have* foreseen the defamatory impression created by the October 6 broadcast.[80] The court reasoned that the district court had erroneously employed an *objective* standard.[81]

The Ninth Circuit also dismissed the district court's second contention.[82] The Ninth Circuit reasoned that the jury's negative assessment of the testimony of the NBC journalists at trial *alone* could not support the verdict.[83] The Ninth Circuit

72. Newton v. National Broadcasting Co., Inc., 930 F.2d 662, 668 (9th Cir. 1991) ("[t]he issue of actual malice disposes of this appeal").

73. *Id.* at 680.

74. Newton v. National Broadcasting Co., Inc., 677 F. Supp. 1066, 1068 (1987).

75. *Id.*

76. *Id.* at 1067.

77. *Id.* at 1067-68.

78. *See infra* notes 79-85.

79. *Newton*, 930 F.2d at 680.

80. *Id.*

81. *Id.* Emphasizing that the *New York Times* actual malice test is deliberately subjective, the Ninth Circuit explained that the "objective negligence test" employed by the district court constituted reversible error, because "[n]egligence can never give rise to liability in a public figure defamation case." *Id.*

82. *Id.*

83. *Id.* The Ninth Circuit explained that "[w]hen the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Id.* (citing *Bose*, 466 U.S. at 512).

reasoned further that the district court had erroneously ruled that the jury could infer from the nature of the broadcast that NBC intended to defame Newton.[84] The court explained that by shifting the focus of the actual malice inquiry from the state of mind of the NBC journalists to the impressions allegedly created by the broadcast, the district court's ruling was inconsistent with the mandate of *New York Times*.[85]

B. PRELIMINARY INQUIRIES

Before addressing the arguments advanced on appeal, the court addressed two issues: Identifying the appropriate standard to review the jury's findings of actual malice,[86] and discerning whether Federal Rule of Civil Procedure 52(a) imposed restrictions on the court's ability to review the jury's credibility determinations.[87]

1. *The Standard of Review*

In attempting to identify the appropriate standard of review, the Ninth Circuit focused on the Supreme Court's decisions in *New York Times*, *Bose* and *Harte-Hanks*.[88] The court

84. *Id.*

85. *Id.* The court's analysis here was premised on the idea that the requisite intent could not be inferred from the nature of the broadcast, or, more specifically, from the jury's interpretation of the "supposed impressions left by the broadcast. . . ." *Id.* at 681. The court reasoned that to "permit liability to be imposed not only for what was not said but also for what was *not intended* to be said" would eviscerate the first amendment protections recognized by the Supreme Court in *New York Times*. *Id.* (emphasis added).

With respect to this issue, a compelling argument was presented in an appellate brief filed by *amici curiae*, submitted in support of NBC's appeal by ABC, CBS and Fox Television. The brief focused on the issue of whether liability could be imposed based on false impressions viewers *may have* drawn from a news broadcast. Brief for *Amici Curiae* at 2, Newton v. National Broadcasting Co., Inc., 930 F.2d 662 (9th Cir. 1991) (88-05848). Emphasizing that "[a]n impression, by definition, is something not said by the journalist, but that may be taken away by the viewer," *amici* argued that the first amendment prohibited liability based solely on impressions in public figure cases. *Id.* at 9-15. *Amici* stressed that were liability permitted in this manner, the media would be "unduly burdened." *Id.* at 14. As an alternative argument, *amici* argued that recovery should only be permitted where the plaintiff presents clear and convincing evidence that the defendant intended to leave the allegedly defamatory impression. *Id.* at 15-21. The Ninth Circuit apparently adopted the later argument. *See Newton*, 930 F.2d at 681.

86. *Id.* at 669.

87. *Id.* at 671.

88. *See id.* at 669. The Ninth Circuit stated that "[a]s we consider the direction in which we should proceed, our compass is the Supreme Court's decisions in *New York Times*, *Bose* and *Harte-Hanks*." *Id.*

interpreted *New York Times* as mandating an "independent examination of the whole record."[89] The court explained, however, that when specifically reviewing credibility determinations, *Bose* and *Harte-Hanks* require a narrower standard.[90] The court thus concluded that under the doctrine of independent review, with the exception of credibility determinations, all evidence of actual malice is reviewed de novo in actions arising under the First Amendment.[91]

2. *Rule 52(a)*

The Ninth Circuit recognized that Federal Rule of Civil Procedure Rule 52(a) requires deference to the trial court's factual findings.[92] The court also recognized that when reviewing findings of fact turning on the jury's assessment of a speaker's credibility at trial, the Rule's presumption of correctness is stronger than in other cases.[93] Nonetheless, the court concluded that even when paying special deference to credibility determinations, appellate courts must examine the factual record "in full."[94] The court reasoned this review was necessary to protect the fundamental first amendment values at issue.[95] Through this analysis, the court concluded Rule 52(a) did not restrict the scope of its independent review.[96]

89. *Id.* (emphasis added).

90. *Id.* at 670-71.

91. *Id.* at 671.

92. *Id.* at 670. Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses." FED. R. CIV. P. 52(a).

93. *Id.* The court also observed that the presumption of correctness carries "less force when a factfinder's findings rely on its weighing of evidence and drawing of inferences." *Id.* at 671.

94. *Id.* (quoting *New York Times*, 376 U.S. at 285 (citing Pennekamp v. Florida, 328 U.S. 331, 335 (1946))).

95. *Id.* at 672.

96. *Id.* at 687. The Ninth Circuit's analysis here paralleled the Supreme Court's analysis in *Bose*, where the Court also sought to determine whether Rule 52(a) restricted its ability to review credibility determinations. *See Bose*, 466 U.S. at 498-501. In *Bose*, the Court held that Rule 52(a) did *not* limit its ability to exercise independent appellate review. *Id.* at 514. The Court reasoned that Rule 52(a) did not prescribe the standard of review for "mixed finding of law and fact," and thus arguably characterized the actual malice inquiry as a mixed law-fact question. *See id.* at 501.

The Ninth Circuit did not expressly adopt the *Bose* Court's characterization. The court, however, appears to have ruled that it was not bound by Rule 52(a). *See Newton*, 930 F.2d at 671-72. Accordingly, it is reasonable to conclude that the court implicitly treated the actual malice determination in a fashion similar to the *Bose* decision, as a mixed law-fact finding. Language in the opinion supports this conclusion. In a footnote, the court observed that actual malice involves a state of mind inquiry "normally subjected to review under the 'clearly erroneous' standard." *Id.* at 670

C. INDEPENDENT REVIEW BY THE NINTH CIRCUIT

Newton argued that an inference of actual malice was raised by NBC's failure to mention (during the October 6 broadcast) that Penosi had been contacted for help resolving problems Newton was having with the Genovese family.[97] Emphasizing the journalists knew Newton contacted Penosi concerning the threats,[98] Newton argued that although they testified the threats were not mentioned because information concerning their origin was rejected as incredible,[99] the jury "must have concluded that the journalists were lying."[100] Newton argued further that the journalists' incredible testimony supplied an inference of actual malice.[101]

The Ninth Circuit rejected Newton's argument.[102] The court reasoned that NBC's failure to mention the threats was irrelevant,[103] and that mentioning the threats would not have diminished the broadcast's defamatory impact.[104] The court also concluded that even if inclusion of the threats would have diminished the broadcast's defamatory impact, the evidence would still have been constitutionally deficient.[105] The court concluded thus that Ross and Silverman's decision not to rely on Moreno's explanation for Newton's contacting Penosi did not

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n.12. Yet evidence of actual malice was reviewed de novo. *Id.* at 679-83. Hence, because the court declined application of the clearly erroneous standard, arguably it characterized the evidence as something more than a "pure question of fact," most likely as a mixed law-fact question.

97. *Id.*

98. *Id.* at 682. During an interview with Mark Moreno, Newton's close friend and business associate, the journalists who prepared the story for NBC (Ross and Silverman) learned that Newton possibly contacted Penosi concerning the problems he was having with the Genovese family. *Id.* at 678. Newton claimed the interview with Moreno clearly explained why he had consulted Penosi. *Id.* at 682.

99. *Id.*

100. *Id.*

101. *See id.* at 681.

102. *Id.* at 681-82.

103. *Id.*

104. *Id.* The court concluded that even if the threats had been mentioned:

> [a]ll the essential ingredients of the broadcast would have remained; the ongoing federal investigation; the fact that Newton had had financial difficulties; the fact that he had sought and obtained the assistance of organized crime; the fact that that assistance had included high level criminal figures helping Newton out; and the fact that those figures then spoke with each other about 'earning' off Newton after he was licensed to run the Aladdin. *Id.*

105. *Id.*

constitute clear and convincing evidence of actual malice, as required by *New York Times*.[106]

Newton also advanced several other arguments in support of the jury's verdict.[107] Rejecting each of these arguments as well,[108] the court concluded insufficient evidence of actual

106. *Id.* The court observed that Newton's argument was predicated on the assumption that Ross and Silverman *should have* accepted Moreno's explanation of why Newton contacted Penosi. *Id.* (emphasis added). The court expressly rejected this assumption. *Id.* The court reasoned that Ross and Silverman had valid reasons for rejecting Moreno's testimony, being that the journalists knew Moreno had connections with the Mafia, and because while Moreno claimed to be Newton's business manager, Newton had testified to the Nevada Gaming Board that he and Moreno had "no association whatsoever." *Id.* at 683-84. The court also noted that Newton's attorney had "flatly denied" Penosi was contacted regarding the threats. *Id.*

107. *Id.* at 684-87. Newton advanced the following arguments:

(1) That to defame Newton, NBC included a reference in the October 6 broadcast to Newton's financial problems in order to bolster the idea that he sought to obtain assistance from the Mafia. *Id.* at 684.

(2) That removal of the word "serious" from an early draft of the broadcast reflected NBC's desire to exaggerate Newton's financial difficulties again in order to suggest he contacted Mafia figures for money to help buy the Aladdin. *Id.* at 685.

(3) That because Ross and Silverman learned at the Gaming Board hearing that the Valley Bank was going to help finance Newton's purchase of the Aladdin, Ross and Silverman knew no hidden partner was involved, and thus falsely stated that the Mafia had a hidden interest in the Aladdin. *Id.*

(4) That the broadcast was misleading as the result of language choices and editing decisions made by NBC. *Id.* at 685-86.

(5) That the failure of Ross and Silverman to interview Newton provided evidence the journalists consciously avoided hearing Newton's account of events. *Id.* at 686.

(6) And, finally, that the broadcasts "overall impression," if not the individual statements, was defamatory. *Id.* at 687.

108. Newton's additional arguments were rejected for the following reasons:

(1) References in the October 6 broadcast to Newton's financial difficulties were true, and thus incapable of furnishing evidence of actual malice. *Id.* at 684.

(2) Removal of the word "serious" was insignificant because of its low probative value. *Id.* at 685.

(3) Testimony at the Gaming Board hearing did not exclude the possibility of a hidden partner because the Bank's involvement and a Mafia influence were not mutually exclusive. *Id.*

(4) Language choices and editing decisions could not subject NBC to liability because the editorial process is protected by the First Amendment. *Id.* at 685-86.

(5) Newton could not claim NBC "did not try hard enough to interview him" when initially in fact he refused to be interviewed. *Id.* at 686.

malice existed to support the jury's verdict.[109] Accordingly, the Ninth Circuit reversed.[110]

V. CRITIQUE

Newton's case raised the troubling issue of whether juries should be trusted to safeguard free speech.[111] Confronting this issue directly, the Ninth Circuit signaled its response by expressly limiting the range of issues immunized from appellate scrutiny, and, in turn, effectively narrowing the jury's role in public figure defamation actions.[112] This was a sound measure. Impartial juries may be threatening the continued viability of first amendment due process.[113] Consequently, the remedial function served by first amendment independent appellate review - moderating the jury's impact on free speech - is becoming increasingly important.[114] The Ninth Circuit's decision is commendable because *Newton* is responsive to this need.[115]

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(6) And, lastly, the overall impression communicated by the broadcast was irrelevant because the court evaluates the broadcasts, not from the perspective of an ordinary viewer, but as a set of facts having constitutional significance. *Id.* at 687.

109. *Id.*

110. *Id.*

111. *See generally* Newton v. National Broadcasting Co., Inc., 930 F.2d 652 (1991). As observed by Justice Goldberg in his concurring opinion, this was also the real issue presented in *New York Times*. 376 U.S. at 300 (Goldberg and Douglas, J.J., concurring). The issue is "troubling" because, while jury trials permit the community to be represented in the adjudicative process, their presence potentially threatens free speech as well. *See infra* notes 139-151 and accompanying text discussing media self-censorship.

The trial of John Peter Zenger is perhaps one of the earliest cases raising the issue of precisely what role juries should play in protecting free speech. The trial is reported as the Trial of John Peter Zenger, 17 Howell's St. Trials 675 (1816); *see also* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTED OF THE NEW YORK WEEKLY JOURNAL (S. Katz ed. 1963). Zenger, a publisher and political dissenter, was prosecuted for the common law crime of seditious libel after he published an article criticizing Governor William Crosby's regime of the Province of New York. Though the jury was obligated under the law to convict Zenger, as the only issues before the jury were whether Zenger published the article and whether it referred to the allegedly libelous subject, neither of which were contested by Zenger, he was acquitted. Because the jury exceeded its legal authority, in effect resolving the issue of whether the article was libelous (treated at the time of the trial as a question for the judge), the case raised an important question: Whether the jury was sufficiently competent to be entrusted with the responsibility to protect free speech. *See generally* Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761 (1986).

112. *Newton*, 930 F.2d at 683.

113. *See infra* notes 139-151 and accompanying text.

114. *See id.*

115. *See Newton*, 930 F.2d at 683. *Newton* is responsive to the increasing need for remedial appellate review because, by narrowing the range of issues immunized

A second issue raised in *Newton* is the question of at what cost society is willing to protect the plaintiff's interest in reputation.[116] This issue was raised because, while plaintiffs tend to prevail before a jury,[117] their rate of success on appeal is extremely low,[118] and by expanding the scope of first amendment independent appellate review, the Ninth Circuit fixed heightened scrutiny as an additional obstacle to recovery.[119] This aspect of the decision is also laudable. Plaintiffs have a legitimate interest in maintaining their reputation.[120] But, where conflicting with society's interest in

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from de novo review, *Newton* removes restrictions on first amendment independent appellate review, and thus better enables appellate courts to temper the impact potentially impartial juries have on first amendment freedoms. *See id.*

116. In *Newton*, the Ninth Circuit was challenged to balance the individual's interest in reputation against society's larger interest in deterring media self-censorship. *See generally id.*, at 682-83. Proceeding on the assumption that these interests have an inversely proportional relationship, the issue might be stated more precisely as whether society is willing to protect the plaintiff's interest in reputation at the expense of the gradual depletion of first amendment freedoms.

117. Matheson, *supra* note 56 at 281, n.379 (arguing empirical evidence "confirms the perception that juries cannot be expected to be sufficiently sensitive to first amendment freedoms"). Professor Matheson emphasizes the following findings: The Iowa Libel Research Project determined that in media libel cases between 1974 and 1984 defendants prevailed at trial in only 1 of 13 cases brought before a jury; the Libel Defense Resource Center found that in cases brought prior to 1982 plaintiffs prevailed at trial in approximately 89% (42/47) of cases submitted to a jury and that between 1982 and 1984 their rate of success was 62% (33/53); and, that according to Professor Marc Franklin between 1977 and 1980 plaintiffs were victorious at trial in 83% (20/24) of the actions heard by juries. *Id.*

Professor Franklin has attempted to explain why juries frequently find in favor of the plaintiff. *See* Marc. A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 5 (1983). He suggests the phenomenon may be explained by the following factors: (i) "sympathy for a plaintiff who is perceived to have suffered harm"; (ii) confusion over "the complexity of the judges' instructions in libel law"; and, (iii) "animosity towards the press." *Id.* at 7-8.

118. Plave, *supra* note 50, at 854 n.1 (federal appellate courts have reversed "approximately 70% of the libel judgments won by plaintiffs involving rulings on actual malice"); Franklin, *supra* note 117, at 5 ("[i]n all, plaintiffs who sue media defendants ultimately get and keep judgments in five to ten percent of all libel cases . . ."); Matheson, *supra* note 56, at 280 ("using independent appellate review, appellate courts have reversed approximately eighty percent of the jury verdicts entered against publishers").

119. *See Newton*, 930 F.2d at 683.

120. In his concurring opinion in *Rosenblatt*, Justice Stewart remarked that the right of individuals to protect their good name "reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty." *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring). Similarly, Justice Harlan, writing for himself and three other Justices, has commented that society has a "pervasive and strong interest in preventing and redressing attacks upon reputation." *Butts*, 388 U.S. at 147; *see also* Janklow v. Newsweek, 788 F.2d 1300, 1308 (8th Cir. 1986) (Bowman, Ross and Fagg, J.J., dissenting) ("the right to obtain legal redress for injury to one's . . . reputation" is precious); *Gertz*, 418 U.S. at 341; Robertson, *supra* note 56, at 204-12; Keeton, *supra* note 36, at 1221-22; Prosser & Keeton, *supra* note 31, at 771.

promoting the free flow of ideas, the individual's interest in reputation must yield.[121] Free speech and press are cornerstones of our constitutional system,[122] and where the "security of the Republic"[123] is concerned, "the needs of the many outweigh the needs of the few."[124]

Concern for free speech clearly influenced the Ninth Circuit's analysis.[125] In fact, interpreting the court's holding as a policy statement to the effect that competing interests must yield to free speech would not be entirely unreasonable. Recognizing this, a more detailed consideration of these issues becomes necessary here.

A. FIRST AMENDMENT JURISPRUDENCE

The credibility exception limits the range of issues subject to de novo appellate review.[126] Consequently, by immunizing credibility determinations from heightened appellate scrutiny, the credibility exception inhibits the remedial function of appellate review. Recently compiled empirical evidence strongly suggests this may not be wise. Particularly compelling is evidence revealing that juries frequently find for plaintiffs in media libel actions[127] and that the fear of litigation is encouraging media self-censorship.[128]

By drawing on its remedial authority, the Ninth Circuit tailored its holding to address precisely this concern.[129]

121. *See infra* notes 159-177 and accompanying text arguing that society's interest in promoting the free flow of ideas is paramount to society's interest in protecting the individual's interest in maintaining reputation.

122. *See generally New York Times*, 376 U.S. 254 (1964). There, the Supreme Court declared that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system." *Id.* at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)). Similarly, in *Bose*, the Court stated that "[t]he freedom to speak one's mind is not only an aspect of liberty - and thus a good unto itself, but also is essential to the common quest for truth and the vitality of society as a whole." Hustler Magazine v. Falwell, 85 U.S. 46, 49 (1988) (quoting *Bose*, 466 U.S. at 503-04)).

123. *New York Times*, 376 U.S. at 269.

124. CHARLES DICKENS, A TALE OF TWO CITIES, at 364 (Signet ed. 1960). When considering the fact that plaintiffs appear to be using courts to vindicate themselves rather than to obtain redress, this phrase would seem to take on additional significance. *See infra* notes 163-66.

125. *See Newton*, 930 F.2d at 682-83.

126. *See supra* notes 63-67 and accompanying text.

127. *See supra* note 117.

128. *See infra* notes 139-152 discussing defamation litigation and the media.

129. *See Newton*, 930 F.2d at 683.

Understanding this aspect of the court's decision thus requires an appreciation for the remedial function of appellate review. Additionally, because the *Newton* decision represents a response to jury hostility towards the media,[130] this development must also be considered.

1. *The Remedial Function of Appellate Review*

The fact finding process is not infallible.[131] Recognizing this, the legal system has charged appellate courts with the task to expose and remedy the system's procedural shortcomings.[132] This is accomplished by authorizing appellate courts to discard the factfinder's findings in favor of their own,[133] to render judgment with limited deference to the disposition

130. *See id.* In attempting to explain why juries are hostile towards the media, Professor Franklin suggests that this animosity may be the product of a common perception that journalists are "arrogant" and that the press "appears to be reluctant to admit its errors." Franklin, *supra* note 117, at 8-9. Notably, plaintiffs are also perceived as hostile towards the media. *See* Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789, 791-92 (1986). Professor Bezanson suggests this may result from poor relations between plaintiffs and media defendants. *Id.* In support of this supposition, he emphasizes the fact that while plaintiffs frequently "contact the media before contacting a lawyer," the media's response is reported as being "offensive," typically characterized by plaintiffs as "arrogant, indifferent or insensitive." *Id.* at 792.

131. Friedenthal, *supra* note 57, at 598 ("[w]e recognize that trials will not be error free"); Matheson, *supra* note 56, at 239-40 (the fact- finding process cannot "guarantee accurate results").

132. *See* Matheson, *supra* note 56, at 273. Appellate courts are empowered to remedy flaws exposed during the reviewing process by substituting their findings in favor of the factfinder's. Friedenthal, *supra* note 57, at 601. Appellate courts, however, do not have license to arbitrarily discard trial court findings. Questions of law are reviewed with minimum deference. *Swint*, 456 U.S. at 287 (district court's legal determinations are not reviewed for clear error). Questions of law involve general legal "principles, rules and standards governing particular conflicts. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 253 (1985). Questions of fact, on the other hand, are not freely reviewable. Friedenthal, *supra* note 57, at 601. "Case specific inquiries about who, when, what and where" can be characterized as questions of fact. *Id.* Factual findings are generally not disturbed unless clearly erroneous. *See* FED. R. CIV. P. 52(a); *Gypsum Co.*, 333 U.S. at 394-95.

Mixed questions of law and fact, like pure questions of law, also appear to be subject to de novo review. *See Bose*, 466 U.S. at 517; Friedenthal, *supra* note 57, at 602; CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2589, at 753 (1971). In *Bose*, the Supreme Court explained that mixed fact-law findings "cross the line from ordinary principles of logic and common experience ordinarily entrusted to the finder of fact into the real of a legal rule" requiring independent review. *Bose*, 466 U.S. at 517 n. 17. Arguably, in *Bose*, actual malice was treated as a mixed law-fact question. *See Bose*, 466 U.S. at 517 (Rehnquist and O'Connor, J.J., dissenting); *but see* Bezanson, *supra* note 38, at 118 (arguing the Court was not prepared to characterize actual malice as a mixed law-fact question).

133. *See supra* note 132.

arrived at in the trial court,[134] and to review particular categories of evidence independently.[135]

Some circumstances warrant greater appellate scrutiny.[136] Where required, the remedial powers of appellate courts are expanded.[137] Heightened scrutiny thus represents a powerful mechanism for moderating the factfinder's impact on the judicial process.[138] As demonstrated below, within the context of public defamation law, this remedial, or "corrective," function is becoming increasingly important.

2. *A Sensitive Reaction: Defamation Litigation and the Media*

Contemporary first amendment theory has witnessed a marked shift in attitudes towards juries.[139] When the First Amendment was adopted, juries were widely regarded as the "primary protector of free speech."[140] Today, however, some

134. As a practical matter, however, appellate courts only reverse lower courts where "convinced the court below was clearly wrong." Friedenthal, *supra* note 57, at 605.

135. *See Bose*, 466 U.S. at 518 (Rehnquist and O'Connor, J.J., dissenting). "Presumably any doctrine of 'independent review' exists . . . so that the perceived shortcomings of the trier of fact by way of bias or some other factor may be compensated for." *Id.*

136. The exercise of heightened review is justified on grounds that a more discriminating deference is required in cases implicating constitutional freedoms. *See, e.g., Newton*, 930 F.2d at 670 ("rule of independent review assigns judges a constitutional duty that cannot be delegated to the trier of fact"). At least this appears to be the case where first amendment values are implicated, and the Supreme Court's decision in *Bose* has been expressly criticized for failing to explain why heightened appellate review is required where free speech is involved but not where other areas of constitutional law are concerned. *See* Monaghan, *supra* note 132, at 264; Bezanson, *supra* note 38, at 114.

137. The remedial powers of appellate courts are expanded because heightened scrutiny requires only minimal deference to findings by the trier of fact. *See generally New York Times*, 276 U.S. 254 (1964); *Bose*, 466 U.S. 485 (1984).

138. Clearly the Supreme Court contemplated this notion in *New York Times*, independent appellate review mandated specifically to temper the impact of prejudice in favor of Sullivan, a prominent local figure. *See New York Times*, 376 U.S. at 285; *see also Newton*, 930 F.2d at 671. Directed verdicts and judgments notwithstanding the verdict (JNOV) also represent mechanisms for controlling juries. *See generally* Friedenthal, *supra* note 57, at 540.

139. Schauer, *supra* note 111, at 765. One commentator observes that the jury's role in the judicial process has shifted as well. Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 127 (1985). Professor Kotler suggests that gradually the jury's role has shifted from the "eighteenth century conception of the jury's function as that of finder of law" to the "modern notion that the jury is essentially a finder of fact." *Id.*

140. Schauer, *supra* note 111, at 765; Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 528 (1970) (juries have "long been extolled as a great guarantor of individual freedom, including freedom of speech").

scholars argue free speech may need to be protected from juries.[141] Primarily, these scholars argue that juries are not sufficiently sensitive to first amendment freedoms,[142] and emphasize that juries are incapable of grasping the subtleties of the actual malice standard.[143] This shift in attitude is the product of developments since 1964, evidence compiled in the wake of the Supreme Court's landmark decision in *New York Times* strongly suggesting concern for whether juries are competent to protect free speech may be warranted.[144] The media has not been indifferent to these developments. In fact, media behavior appears to have been distinctly influenced, and, while documenting instances of media self-censorship is difficult,[145] the consensus is that "a chill has indeed set in."[146]

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141. *New York Times*, 376 U.S. at 300 (Goldberg and Douglas, J.J., concurring) (arguing that juries cannot effectively safeguard free speech and for an absolute rather than qualified privilege); Ollman v. Evans, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985) ("juries do not give adequate attention to limits imposed by the First Amendment"); Monaghan, *supra* note 140, at 529 (arguing juries should play a limited rather than expansive role in first amendment cases); Schauer, *supra* note 111, at 765 ("where 250 years ago, more jury power was taken as coincident with greater freedom of speech, more jury power now is taken as just the opposite"); Levine, *supra* note 3, at 28 (reporting juries are not adequately protecting free speech).

142. *See supra* note 141.

143. *New York Times*, 376 U.S. at 300 (Goldberg and Douglas, J.J., concurring) ("there can be little doubt that public debate and advocacy will be restrained" if the issue of liability for "false and maliciously motivated statements" is left to the jury); *see also* Keeton, *supra* note 36, at 1224 ("notion that a jury can make practical use of theoretical distinctions is simply a fallacy"). Specifically with respect to how skilled juries are in handling the concept of actual malice, a recent statement made by a juror following the delivery of the original verdict in Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir 1987) (*en banc*), *cert. denied*, 484 U.S. 870 (1987), is illustrative. When asked by a reporter why the jury found for Tavoulareas, one juror responded that while the jury did not believe the *Post* published the allegedly defamatory article with actual malice, they did believe the *Post* failed to prove the article was true. Plave, *supra* note 50, at 878 (quoting Brill, *Inside the Jury Room at the Washington Post Libel Trial*, AM. LAW., Nov. 1982, at 1); *see also Rosenblatt*, 383 U.S. at 95 (Black, J., concurring and dissenting) (actual malice affords the press "little protection against high emotions and deep prejudices which frequently pervade local communities"); *but cf. Bose*, 466 U.S. at 515 (Rehnquist and O'Connor, J.J., dissenting) (actual malice determination "involve[s] no more than findings about the mens rea of an author, findings which appellate courts are ill-prepared to make"); Matheson, *supra* note 56, at 274 (emphasizing that judges may be no better than juries at protecting free speech, because "like jur[ies], [they are] free to use suppression of speech as a policy tool").

144. *See supra* note 117.

145. Levine, *supra* note 3, at 29 n. 125; David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 430 (1975); Franklin, *supra* note 117, at 15.

146. Levine, *supra* note 3, at 29 n. 125 (quoting Massing, *The Libel Chill: How Cold Is It Out There?*, COLUM. JOURNALISM REV. May/June 1985 at 31); *see also* David A. Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271, 283 (1976) ("I have no doubt that [the threat of self-censorship] is real and serious"); *but see* David W. Robertson, *supra* note 56, at 260-61 (express-

One explanation for this phenomenon may be that the media is having a sensitive reaction to developments in the legal community. Considering the nature of the editorial and investigative processes, this result is not surprising. As observed by the Ninth Circuit:

> Newspapers and other media regularly digest a veritable avalanche of facts; these facts must be gathered from diverse sources, not all of equal reliability; judgments as to accuracy must often be made on the basis of incomplete information and under the pressure of a deadline. Newspapers might never be published if they were required to guarantee the accuracy of every reported fact; time and manpower do not permit the type of verification that would prevent all mistakes.[147]

Similarly, the Eight Circuit has cautioned that:

> Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must always be left to writers and editors. It is not the business of government.[148]

Yet as lower courts have struggled to apply the actual malice test, standards of journalistic conduct have increasingly become subject to judicial scrutiny.[149] Paralleled by a significant

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ing skepticism concerning whether threats of self-censorship actually exist); *Gertz*, 418 U.S. at 390 (rejecting proposition that the threat of private litigation causes the press to refrain from publishing).

147. *Newton*, 930 F.2d at 683 (citing Masson v. New York Magazine, Inc., 895 F.2d 1535, 1557 (9th Cir. 1989)).

148. *Janklow*, 788 F.2d at 1306.

149. Levine, *supra* note 3, at 24. Notably, some commentators argue in favor of media regulation. For example, Professor Robertson argues that "[e]nough evidence of media irresponsibility and abuse of power exists to disparage full reliance on the media's willingness to police itself." Robertson, *supra* note 56, at 208. He emphasizes that "[e]nsuring a free and dynamic press is one thing; permitting the press to be a law unto itself is another." *Id.* Professor Martin Shapiro suggests that among the factors supporting arguments for more law regulating the media are "concentration," the

increase in the number of defamation actions instituted against the media,[150] developments in the legal community have conspired to create a legal environment which may be hostile to free speech.[151] This was the background against which *Newton* was decided, and undoubtedly of which the Ninth Circuit was acutely aware.[152]

3. *Sound Measures by the Ninth Circuit*

As demonstrated in *New York Times*, the remedial authority of appellate courts can be harnessed to achieve socially desirable results.[153] In *Newton*, the Ninth Circuit expressly recognized this proposition.[154] More importantly, by taking measures to narrow the scope of the credibility exception, the

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result of the diminished number of major newspapers and television networks being a proportional increase in the survivors' power, the "geographic scope" of the media, and, with respect to television, the special characteristic of "dramatic nuance," television journalists having enormous "power of insinuation." Martin M. Shapiro, *Libel Regulatory Analysis*, 74 CAL. L. REV. 883, 883-84 (1986). In contrast, some scholars challenge the viability of this position, Professor Anderson arguing, for example, that "libel law is [not] an appropriate solution to the problem . . . too clumsy, too discriminatory, too uncertain." Anderson, *supra* note 146, at 283.

150. Levine, *supra* note 3, at 24. Professor Levine reports that "[o]ne major liable insurance carrier has estimated a 10% to 25% increase in the number of defamation actions in the past few years alone." *Id.* at 24 n.100.

151. *See generally id.* at 24-32. In addition to an increase in the number of libel action instituted against the media, the size of damage awards and cost of defending defamation litigation have also spiraled. *Id.* at 25 n.102; Franklin, *supra* note 117, at 10-11 (suggesting escalating damage awards may result from the fact that "when summary judgment procedures are rigorously administered only the most egregious cases reach the jury" and also from the lack of "guidelines for determining damages"); *but see* Bezanson, *supra* note 130, at 791 ("By most standards, plaintiffs' financial victories were of *modest* proportion.") (emphasis added). In turn, escalating defense costs have resulted in higher insurance premiums, and increased litigation fees have produced reluctance of even the insured media to engage in certain types of journalism. *See* Time, Inc. v. Hill, 385 U.S. 374, 389 (1971) (threat of engaging in litigation results in self-censorship); Herbert v. Lando, 441 U.S. 153, 205 (1979) (Marshal, J., dissenting) (expense of vindication may be more important to publishers than risk of liability). Undoubtedly this exercise in self-restrain can accurately be characterized as having a "chilling effect" on free speech, precisely the result sought to be avoided by the Supreme Court in *New York Times*. *See generally New York Times*, 376 U.S. 254. For a comprehensive discussion of the chilling effect, *see* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

152. *See generally Newton*, 930 F.2d 683.

153. *See generally New York Times*, 376 U.S. 254 (1964).

154. *Newton*, 930 F.2d at 670. The Ninth Circuit observed that "[t]he requirement of independent appellate review established in *New York Times* is a rule of federal constitutional law which 'reflects' a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* (citations omitted).

court implemented it.[155] In light of the foregoing discussion, it would seem that these measures were particularly warranted. But heightened review was also seemingly compelled by the specific facts of Newton's case;[156] Newton is a "local hero,"[157] and both the Ninth Circuit and the district court were appreciative of the fact that venue was an issue of constitutional significance.[158] Taken together, these two factors support a determination that the Ninth Circuit employed sound measures in resolving the issue of whether NBC broadcast the October 6th report with actual malice.

B. Footing the Bill for Recovery

On appeal, approximately one of ten plaintiffs stands to prevail in defamation actions instituted against the media.[159] This fact has led one commentator to suggest that this may be the most "dismal performance by plaintiffs in any area of tort law."[160] Support for this conclusion may also be drawn from the fact that even victorious plaintiffs are likely to be disappointed with their awards.[161] Yet, while "most suits fail, suits persist."[162]

155. *See id.* at 683. The Ninth Circuit employed procedural means to achieve substantive ends, e.g., heightened appellate review is employed to safeguard free speech. *Id.* This notion of "procedural balancing" originated in Speiser v. Randall, 357 U.S. 513 (1958), a case involving "subversive" expression where the Supreme Court concluded "the manner in which the judiciary identified protected expression is as significant as the constitutional definition of safeguarded speech." Levine, *supra* note 3, at 11.

156. *Newton*, 930 F.2d at 671. Serving to distinguish Newton's case from *Bose* and *Harte-Hanks*, Newton's status as a local celebrity had additional significance. *Id.* The court expressly recognized this, stating: "[O]ur case . . . differs from *Harte-Hanks*, in which the jury resolved a dispute between a local politician and a local newspaper, and *Bose*, in which the plaintiff was an obscure corporation." *Id.* The distinction is important because it highlights the fact that jury bias in favor of Newton posed a particularly acute threat to first amendment due process, and, considering the gravity of the circumstances, it thus seems appropriate to conclude that measures taken by the court were wise, especially when existing incentives for media self-censorship are considered as well.

157. *Id.* at 666.

158. *Id.* at 672 n.16 ("[w]e note . . . that some courts have referred to the decision as to venue of public figure defamation cases as being of 'constitutional stature'"). Recognition of the important role venue played in Newton's case is also implicit in the district court judge's threat that if Newton would not file the remittitur, a new trial would be ordered in the Central District of California. *Id.* at 668.

159. Bezanson, *supra* note 130, at 790 n.4; Franklin, *supra* note 117, at 4-5.

160. Franklin, *supra* note 117, at 5.

161. Bezanson, *supra* note 130, at 790-91. Professor Bezanson reports that: "Successful litigants obtained an average of $80,000 in damage awards. *Id.* Excluding two large awards, however, the average recovery was only $20,600, a sizeable portion of which went to fees and costs. *Id.* Plaintiffs who settled their claims obtained an average of $7,000, which also must be reduced by fees and costs." *Id.* at 791.

162. *Id.* at 789.

Perhaps escalating damage awards provide a simple explanation for this phenomenon. This explanation, however, is inadequate, most plaintiffs apparently bringing suit to vindicate their reputation, not to fill their pocket-books.[163] Professor Bezanson suggests thus that "plaintiffs [may] view the lawsuit as an instrument of self-help, regardless of its judicial outcome."[164] Considering the fact that rising libel insurance premiums and litigation fees appear to be creating incentives for media self-censorship,[165] it only seems appropriate to ask whether, under the circumstances, the cost of permitting courts to be used in this manner is exacting too high a price from society.[166]

Historically, courts have recognized that plaintiffs have a legitimate interest in maintaining their good reputation.[167] But courts have also recognized society's interest in promoting the free flow of ideas.[168] This countervailing consideration has not been neglected, the system of existing privileges gradually developed to regulate the balance between these competing interests.[169] Notably, the balance appears to have been tipped in favor of free speech.[170] This can be explained as a conscious determination by society that the individual's interest in reputation must yield to society's larger interest in promoting the free flow of ideas. In other words, society has decided (via the courts) that, as a whole, we will not foot the bill for recovery.

Newton serves to preserve this balance by fixing heightened appellate scrutiny as an additional obstacle to recovery in

163. *Id.* at 793; Anderson, *supra* note 145, at 435. Justice Thurgood Marshall expressly observed this, stating that "many self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery." Franklin, *supra* note 117, at 6 (quoting Herbert v. Lando, 441 U.S. 153, 204 (1979) (Marshall, J., dissenting)).

164. Bezanson, *supra* note 130, at 791.

165. See *supra* note 151.

166. Perhaps actions brought simply as means for retribution and not for compensation are accurately termed "nuisance" cases. *See* Franklin, *supra* note 117, at 5-6.

167. *See supra* note 120.

168. *See generally New York Times*, 376 U.S. 254 (1964); *Bose*, 466 U.S. 485 (1984); *Harte-Hanks*, 491 U.S. 657 (1989); *Gertz*, 418 U.S. 323 (1974); *Pape*, 401 U.S. 279 (1970); *see also* Keeton, *supra* note 36, at 1222.

169. Keeton, *supra* note 36, at 1222.

170. The balance has been tipped in favor of free speech, because *New York Times* and its progeny have made recovery more difficult in public figure defamation cases. *See generally New York Times*, 376 U.S. at 279-80; *Bose*, 466 U.S. at 514; *Harte-Hanks*, 491 U.S. at 657. Professor Robertson suggests that by 1971, "the Court plainly perceived the need for 'breathing space' for [free speech and press] as much weightier than the reputation interest at stake. . . ." Robertson, *supra* note 56, at 205.

public figure defamation actions involving the media.[171] Simply put, this is a sensible result. As Madison succinctly stated: "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."[172] Similarly, writing under their pseudonym "Cato," John Trenchard and William Gordon proclaimed: "As long as there are such Things as Printing and Writing, there will be Libels."[173] But, as Cato's letters are also quick to point out, libel "is an Evil arising out of a much greater Good."[174] This "greater good" is free speech, and because *Newton* reinforces procedural safeguards bracing the First Amendment,[175] the decision is praiseworthy. Were recovery permitted for such abuses (abuses which both Madison[176] and the Supreme Court[177] emphasize are inevitable) without adequate safeguards, society's interest in free speech would be compromised.

VI. CONCLUSION

Newton exempts evidence of actual malice associated with a journalist's investigative techniques from the scope of the credibility exception.[178] Consequently, *Newton* expands the scope of first amendment independent appellate review.[179] Because remedial first amendment review is becoming increasingly important, the Ninth Circuit's decision is commendable. *Newton* is responsive to an important need, and by narrowing the jury's role in public figure defamation actions, should help to preserve the continued viability of first amendment due process.

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171. *See Newton*, 930 F.2d at 683.

172. *Pape*, 401 U.S. at 290 (quoting 4 J. Elliot's Debates on the Federal Constitution 571 (1876)).

173. Oakes, *supra* note 46, at 720 (quoting Cato, *Reflections Upon Libeling* (letter no. 32), in 1 CATO'S LETTERS 96, 246, 252 (Da Capo reprint ed. 1971)).

174. *Id.* The Supreme Court has expressed this sentiment as well. In *Rosenbloom*, the Court, in a plurality opinion, emphasized that: "In an ideal world, the responsibility of the press would match the freedom and the public trust given it. But from the earliest days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse." *Rosenbloom*, 403 U.S. at 51.

175. *See Newton*, 930 F.2d at 683.

176. *See Pape*, 401 U.S. at 290.

177. *New York Times*, 376 U.S. at 271-72 ("erroneous statement is *inevitable* in free debate") (emphasis added).

178. Newton v. National Broadcasting Co., Inc., 930 F.2d 652, 683 (1991). For a discussion of the credibility exception *see supra* notes 63-67 and accompanying text.

179. *See Newton*, 930 F.2d at 683.

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