

1989

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Lois G. Forer

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Recommended Citation

Forer, Lois G. (1989) "Libel, Privacy and the First Amendment," *William Mitchell Law Review*: Vol. 15: Iss. 4, Article 2.
Available at: <http://open.mitchellhamline.edu/wmlr/vol15/iss4/2>

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LIBEL, PRIVACY AND THE FIRST AMENDMENT

LOIS G. FORER†

The Western world was shocked by Ayatollah Khomeini's call for the assassination of author, Salman Rushdie, whose novel, *Satanic Verses*, allegedly slandered the prophet Muhammad. The book was not published or distributed in any Islamic countries. A high British official has called Rushdie's book blasphemous and suggested that the moribund statute penalizing blasphemy be amended to include remarks offensive to any religion.

Recently, the Thatcher government of Britain prosecuted, some say persecuted, Peter Wright, a former British secret service agent who wrote a book, *Spycatcher*, critical of the government. Publication was banned in England.

Writers and politicians in Europe and the United States have tergiversated in responding to these assaults on freedom of expression. Civil libertarians in Britain suggest that what that nation needs is the equivalent of our first amendment.

Certainly a provision in the basic charter of government protecting freedom of expression is highly desirable but it is not an impregnable shield against omnipresent attempts to muzzle, punish, or obtain money from those who express views that others find inimical. Lest any American be lulled into believing that the first amendment provides a guaranty of freedom of speech and of the press, let me call your attention to a few of the successful attacks on the first amendment that have been upheld by the United States Supreme Court in recent years. Former CIA agent Frank W. Snapp III, who wrote a book about his experiences in the agency, had his royalties confiscated.¹ Britain at least allowed Wright to keep the earnings on his book from sales in other countries.

† Retired Judge, Court of Common Pleas, Philadelphia, Pennsylvania. Member of the Libel Reform Project of the Annenberg Washington Program. Judge Forer's latest book, *A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT*, was published in 1987.

This article was presented as a speech at the annual William Mitchell Law Review banquet in April 1989.

1. *Snapp v. United States*, 444 U.S. 507 (1980).

Philip Agee, another former CIA agent, had his passport lifted for making critical remarks about government policy.² Samuel Loring Morison, a military intelligence employee, was convicted under the Espionage Act for mailing photos of a Soviet aircraft carrier to *Jane's Defence Weekly*, a highly respected British publication.³ Ralph Ginzburg was convicted and imprisoned for publishing journals that were admittedly not obscene. However, the Supreme Court inferred a salacious intent from the fact that these journals were mailed from post offices in towns named "Blue Ball" and "Intercourse".⁴ Only this year, 1989, the Court upheld against a first amendment challenge to the applicability of the Indiana RICO statute to adult bookstores even though sale of obscene materials is only a misdemeanor. The Court did set aside an *ex parte* order authorizing seizure of *all* realty and personalty of the defendants.⁵ Our government sought to enjoin the *Progressive*, a Wisconsin magazine, from printing material taken from the public library.⁶ It cost the *Progressive* a third of its income to fight this suit which was ultimately dropped.

After the Supreme Court lifted the injunction against publication of the Pentagon Papers,⁷ most Americans thought that freedom of expression and the first amendment had been secured. I suggest that this assurance is unfounded. Court sanctions and violations of freedom of expression continue. The most recent spate of actions have not been brought by the government but by private parties who have resurrected the old common law of libel as a weapon not only to vindicate hurt feelings but also to obtain large sums of money from the media, unwary individuals and corporations.

By misreading legal history and indulging in wishful thinking, most Americans continue to believe that they are protected when expressing their opinions. All too often they find that they are defendants in costly libel suits. One of the most

2. Haig v. Agee, 453 U.S. 280 (1981).

3. United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 259 (1988).

4. Ginzburg v. United States, 383 U.S. 463, 467 (1966), *reh'g denied*, 384 U.S. 934 (1966).

5. Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989).

6. United States v. Progressive, Inc., 486 F. Supp. 5, 5-6 (W.D. Wis. 1979).

7. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

shocking is the case of *McDonald v. Smith*.⁸ Smith wrote a letter to President Reagan with respect to the pending appointment of McDonald to the sensitive position of United States Attorney. The letters were very derogatory. McDonald did not get the appointment and sued for libel. The Supreme Court upheld a substantial verdict against Smith who thought he was exercising two important rights—one, to express his opinion on a matter of public interest and two, to petition the government. Neither argument prevailed.

Although I am not a proponent of the theory of original intent in judicial interpretation, it is instructive to look at what the framers of the first amendment had to say about their intentions. The language of this oft cited charter of liberty is clear and absolute. A nonlawyer might logically conclude that there is no room for interpretation. It reads in pertinent part, "Congress shall make *no* law . . . abridging the freedom of speech or of the press. . . ."⁹ If this were not clear enough, we have James Madison's own gloss on the provision. He wrote, "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press as one of the great bulwarks of liberty, shall be inviolable."¹⁰ Neither clarity of language nor unmistakable evidence of the intent of the founding fathers, however, has sufficed to secure free speech and freedom of the press in the United States.

From time to time we take heart from a favorable decision and assume that the danger is over. But as John Philpot Curran declared in 1790, "The condition upon which God hath given liberty to man is eternal vigilance. . . ."

In 1735, as every school child knows, John Peter Zenger was prosecuted for libel for publishing an article critical of the British colonial governor of New York. Thanks to the skill of the great Philadelphia lawyer, Andrew Hamilton, the jury failed to convict Zenger who was ultimately released from prison. This crime was known as seditious libel. Under the law as it was then, truth was no defense to libel. Although this case has stood for freedom of the press in America, in fact, it had no real effect on the law. For the next two centuries, the crime of

8. 472 U.S. 479 (1985).

9. U.S. CONST. amend. I (emphasis added).

10. 1 ANNALS OF CONG. 434 (J.Gales ed. 1789).

sedition libel flourished in the colonies and under the Constitution. Countless editors and publishers who criticized the government or government officials were prosecuted, tried, convicted and imprisoned for seditious libel. As recently as the early part of this century, in *Patterson v. Colorado*,¹¹ the United States Supreme Court upheld a conviction for contempt against an editor who had criticized the Colorado Supreme Court. Justice Holmes, writing for the Court, grafted onto the first amendment a severe limitation. He held that this guaranty of freedom of expression was limited to prohibiting only prior restraint of publication. After an article was published the author and publisher could be punished for contempt, as in this case, or be held responsible for libel.

A decade later in the famous, or infamous, *Schenck* case,¹² the Supreme Court upheld the conviction of the Secretary of the Socialist Party, a legal entity, for printing and mailing pamphlets opposing the first World War. In that decision, again written by Justice Holmes, another exception was carved out of the first amendment, the clear and present danger test. With a facile but irrelevant aphorism Holmes declared, "No one has a right to shout fire in a crowded theater."¹³ But Schenck was not in a theater, crowded or empty. He did not shout fire. He printed a little pamphlet expressing his opinion of the war. Without a scintilla of evidence that anyone had read the pamphlet or been influenced by it, Holmes held that its publication made recruitment for the armed forces more difficult. Even if such had been proved, it requires a suspension of logic to find that such a publication constituted a clear and present danger to the United States. Nonetheless, the *Schenck* case has been cited for generations as a milestone in the protection of first amendment rights.

The following term, in *Abrams v. United States*,¹⁴ the Supreme Court made the astonishing declaration that "sedition libel is dead." One might have thought that seditious libel died in 1800 with the expiration of the infamous Alien and Sedition Act.

That position has been taken at face value for more than half

11. 205 U.S. 454 (1907).

12. *Schenck v. United States*, 249 U.S. 47 (1919).

13. *Id.* at 52.

14. 250 U.S. 616 (1919).

a century. But even a cursory reading of the *Abrams* case discloses that Abrams was convicted of conspiring to violate the Espionage Act by printing “disloyal, scurrilous, and abusive language” about the United States and the war effort. Although the crime charged was conspiracy, in fact, Abrams was convicted for a publication that clearly falls within the definition of seditious libel.

During the McCarthy era in another astonishing opinion, *Dennis v. United States*,¹⁵ the Supreme Court denied freedom of speech even though there was no evidence that the speech constituted a “clear and present danger.”

In 1964, the Supreme Court decided *New York Times v. Sullivan*.¹⁶ This decision was also hailed as an extraordinary advance in the protection of first amendment rights. Professor Alexander Meiklejohn, a leading civil libertarian, declared, “It is an occasion for dancing in the streets.” Even though the Court held contrary to centuries of precedent that libel of public officials was within the ambit of the protection of the first amendment, a look at the decision and its progeny would indicate to most persons who value that constitutional provision that his elation was premature and unfounded.

Criticizing supposedly liberal decisions of the Supreme Court is not an activity that is designed to help a lawyer win friends and influence people in the legal and academic establishments. Significantly, when in 1960, Professor Leonard Levy published *Legacy of Suppression*,¹⁷ a scholarly study highly critical of the Supreme Court’s decisions in the area of free speech, he was urged by many academicians not to release the book because of the harm to free speech that they envisioned the book would cause. The reissuance of a revised version of the book in 1985¹⁸ met with a better reception.

Perhaps the change in academic climate has occurred because of the spate of decisions following *New York Times v. Sullivan*. It must also be noted that members of the high court themselves have been savage in their criticisms of the *Sullivan* case. Nothing I could say can equal their vituperation. For ex-

15. 341 U.S. 494 (1951).

16. 376 U.S. 254 (1964).

17. L. LEVY, *LEGACY OF SUPPRESSION* (1960).

18. *LEGACY OF SUPPRESSION* was reissued under the title *EMERGENCE OF A FREE PRESS*.

ample, Justice Black wrote in 1967, "No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings."¹⁹ Justices Brennan, Marshall, Blackmun and Stevens, in a dissenting opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, noted: "Without explaining what is a 'matter of public concern,' the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not. . . ."²⁰

It is worth a few moments to look at the *Sullivan* case and see what the Court really decided. This was a libel action brought by the sheriff of Montgomery County Alabama against the *New York Times*. An Alabama jury awarded Sullivan \$500,000. The verdict was upheld by the Alabama Supreme Court. The United States Supreme Court reversed. As in most libel cases, the allegedly defamatory statement in the *Sullivan* case was not in dispute. On March 29, 1960, the *New York Times* published an advertisement by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The advertisement listed the names of the officers of the committee and its address, and asked for financial contributions.²¹ L.B. Sullivan, the plaintiff, was a commissioner of the City of Montgomery, Alabama, whose duties included supervision of the police department. He was not mentioned by name in the advertisement, but he claimed that mention of the police referred to him. Moreover, out of ten paragraphs in the advertisement, only the third and a part of the sixth paragraphs were the basis of Sullivan's claim of libel.

Although some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery, these inaccuracies did not substantially alter the facts or change the gravamen of the complaint. If the advertisement had correctly reported that Dr. King had been arrested four times instead of seven, as the advertisement stated, Sullivan would still have had the same legal claims. The Court also pointed out that the Committee paid \$4,800 for the advertisement and that approximately 394 copies of the edition of the newspaper containing the advertisement were circu-

19. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 171 (1967).

20. 472 U.S. 749, 785 (1985) (emphasis in original).

21. A copy of the advertisement is attached at the end of the majority's decision. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

lated in Alabama. Of these, thirty-four copies were distributed in Montgomery County. The total circulation of the *New York Times* on that day was approximately 650,000 copies.

Sullivan did not claim that he had suffered any pecuniary damage. Under the common law, that was not necessary. There were many legal grounds on which the verdict could have been reversed without raising the constitutional issue of the first amendment rights. The Court might have held that the press is not responsible for the content of a paid advertisement that is not scandalous or libelous on its face. The printing of an advertisement or the reporting of a statement by another as a news item, even though libelous, could have been held to be privileged. The contrary view would require the press to censor advertisements and refrain from reporting newsworthy comments. The tortured identification of Sullivan with the actions of the police was unnecessary. The Court could have held that the advertisement was not "of and concerning" him. Under such a reading Sullivan would have had no standing to complain. The Court might also have held that, given the temper of the times in Montgomery, Alabama, the statement did not hold Sullivan up to contumely and ridicule in his community, the test of defamation. He might also have been held to be libel-proof with respect to this statement.

Two other well-established principles of general law also militated against the verdict. The award was clearly excessive and could have been reduced to nominal damages. The Court might well have held that because of the minute fraction of a percent of papers distributed in Montgomery that the *New York Times* was not doing business in Alabama and, therefore, could not be sued in that state. The action should have been brought in New York.

The Court, however, chose this occasion to enunciate new law. For more than a century, the Supreme Court had repeatedly declared that libel was not protected by the first amendment. The Court did not forthrightly declare that all libel was protected. Instead it created two new exceptions to the law of defamation: first, the law as applied to public officials—later expanded to include public figures—is different from the law applicable to all others; and second, with respect to public figures, the plaintiff must prove that a defamatory statement,

even if untrue, was made with "actual malice."²² Thus the old law of defamation, as rewritten by the United States Supreme Court in *New York Times v. Sullivan*, was stated by the Court as follows:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.²³

Justices Black and Douglas in their concurring opinion stated that in their views "the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Time advertisement their criticisms of the Montgomery agencies and officials."²⁴ Justice Goldberg, joined by Justice Douglas, objected to the actual malice standard stating, "[T]he First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct. . . ."²⁵

One of the unintended consequences of this decision was to fuel the impetus to sue for libel. For almost two centuries civil libel had been an anachronism, but a relatively harmless one because very few persons did bring libel actions. Those who did had reason to regret it. For example, Alger Hiss. Had he not sued Whittaker Chambers for libel, against the advice of his lawyer friends, he would never have been convicted of perjury. Harold Laski bitterly resented his unsuccessful libel suit based on a charge that he "advocated revolution." Even those who won recovered small verdicts.

As recently as 1947, Professor Zechariah Chafee of the Harvard Law School wrote:

An able American has too much else to do to waste time on an expensive libel suit. Most strangers will not believe it, and his enemies, who will believe it, of course, were against him before. Anyway, it is just one more blow in the rough-and-tumble of politics or business. Even if his reputation is lowered for a while, he can make a fresh start at his home or in a new region and accomplish enough to overwhelm old

22. *Id.* at 279–80.

23. *Id.*

24. *Id.* at 293.

25. *Id.* at 298.

scandals. A libeled American prefers to vindicate himself by steadily pushing forward his career and not by hiring a lawyer to talk in a courtroom.²⁶

Today such a sentiment seems to be a quaint reminder of a far distant time. Now actions for libel are being brought against cartoonists, restaurant critics, credit companies, consumer reports, biographers, novelists, professors who deny their colleagues tenure, letter writers, speakers at public meetings, and, of course, the press and electronic media. Following the *Sullivan* case, from 1964 to 1986, more than 1029 lower circuit court decisions involving freedom of speech exclusive of obscenity have been reported. Countless unreported cases have been tried and even more have been settled regardless of the merits to avoid the high cost of litigation. The United States Supreme Court has rewritten the law of libel in some seventy decisions during this period. When one considers that the high court decides at most 160 cases with opinion each year, this seems to be an inordinate amount of effort devoted to one small area of law, despite its importance. Defamation suits along with bankruptcy and mergers have been a growth industry for the legal profession.

It is not only the number of libel suits, which is enormous, but also the cost of defense that has a chilling effect on every one. These lawsuits have been a disaster for both plaintiffs and defendants, a waste of time for the courts, and have sharply curtailed the access of the public to information and opinion that all of us as citizens of a democracy should have. Members of the media admit that lawyers are now in the editorial rooms not only of radio and television stations and newspapers but also book and magazine publishers. Phil Donahue asks, "Is the press becoming wimpy?" When the average cost of the defense of a libel suit is more than \$200,000 even the wealthiest media giants have to think carefully before airing or publishing stories. The bottom line cannot be ignored. For many small newspapers and journals one lawsuit can mean the difference between bankruptcy and viability.

A few notorious cases reveal the unsatisfactory nature of libel actions since *New York Times v. Sullivan*. The suit by General Ariel Sharon of Israel against *Time* magazine consumed

26. Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS* 106-07 (1947).

three months of trial and eleven days of jury deliberation. The jury found, in accordance with the judge's instructions, three separate special verdicts that were returned *seriatim* (the jury did not know in advance what the effect of its special verdicts would be on the outcome of the case—an extraordinary and unprecedented procedure). The special verdicts the jury had to answer were: 1) Was the statement in question defamatory? 2) Was it false? 3) Was it made with "actual malice?" The jury's answers to questions one and two were yes. The answer to question three was no. A verdict was accordingly entered in favor of the defendant. The jury, obviously outraged by their own verdict, volunteered an answer to a question they were not asked. They found that *Time* magazine was negligent in publishing the statement.

In the libel action brought by General William Westmoreland against CBS and "60 Minutes," after eighteen weeks of trial and the expenditure by both sides of an estimated six to ten million dollars, the action was withdrawn.

The suit by Tavoulaareas against Mobil Oil which resulted in a verdict of two million dollars is not yet over. The case of *Herbert v. Lando*²⁷ has been in litigation more than fifteen years.

Dickens would have had a field day with libel law except that in these notorious multimillion dollar cases the parties are not the poor and downtrodden but the rich and powerful. Poor people who have been libeled and whose privacy has been brutally invaded cannot afford to sue. And defendants who have no insurance and are of moderate means must buy off the plaintiffs at exorbitant amounts.

Libel has always been an action for the rich and important. Has anyone ever heard of a poor welfare mother suing for libel because she was falsely accused of bearing children in order to increase her allotment? Indeed, under English law, stating that a person was poor was deemed to be libelous per se. A cursory review of reported libel cases reveals that most plaintiffs are well to do and well known persons in their communities. Many libel defendants are enormously wealthy. In fact, they are often sued because they have deep pockets. However, less affluent defendants suffer considerably.

Since my book, *A Chilling Effect*, was published a year and a

27. 441 U.S. 153 (1979).

half ago, I have received letters from many libel plaintiffs and defendants. One of these defendants who had written a letter to the *Journal of Medical Primatology* pointed out that an Austrian manufacturer of pharmaceuticals planned to establish a research facility in Sierra Leone, West Africa, to use chimpanzees in research and testing of hepatitis vaccine. She pointed out the dangers of such a program to the dwindling chimpanzee population, an endangered species, and the possible perils of the spread of hepatitis among wild chimpanzees. The company sued the letter writer, the journal, the editor, and a number of others. The trial judge denied a motion for a directed verdict and a motion to dismiss. On appeal from this decision a unanimous court found that the statements in the letter were true and not defamatory. During the four years between the filing of suit and the decision of the appellate court the insurance carrier for the letter writer had paid more than \$200,000 in legal defense costs and settled by paying the plaintiff \$100,000. Other defendants whose legal costs were similarly enormous also settled for substantial sums.

The amounts of the verdicts, often for many millions, shock many people. Should hurt feelings and bruised egos be awarded more than actual physical harm and monetary losses? Westmoreland, for example, had demanded damages of \$120 million. Even though eighty or ninety percent of verdicts in favor of libel plaintiffs are reversed on appeal, this affords little protection to hapless defendants who have expended hundreds of thousands of dollars in defense costs. Certainly, from the viewpoint of the public this is a waste of valuable court time. From the viewpoint of the trial judge—not an important consideration, I admit—it is an exercise in futility. No other field of the law has such a high rate of reversal.

I suggest that all these ills arise not because of the avarice of the litigants and lawyers, although that factor cannot be discounted, but because of the unsettled state of the law and its counterintuitive doctrines. First, let us look at a number of the recent post-*Sullivan* doctrines that have caused so much difficulty and then consider possible remedies.

The public/private figure test has been productive of much litigation and many decisions that would strike most people as grossly unfair. *Sullivan*, you will recall, was a public official. It is easy to decide in advance of suit whether or not the plaintiff is a public official. But who can know whether or not he or she

is a public figure? Gertz, a lawyer in private practice, was falsely accused by the John Birch publication of being a Leninist and a communist fronter. A jury awarded him \$50,000. Clearly the statement was false and defamatory and caused harm. The court set aside the verdict because there was no proof of "actual malice." The Supreme Court, holding that he was not a public figure, remanded for a new trial.²⁸ Although Gertz ultimately recovered almost a decade later, consider the result if he had also been an unpaid member of a school board or held some other part-time public office, as many lawyers do. The harm to him would have been at least as great, possibly greater because he might have lost his public office. And yet because there was no proof that the publisher acted with "actual malice" he would be denied recovery. In the *Sharon* case, when the jury volunteered its finding that *Time* magazine was negligent, they were clearly indicating their dissatisfaction with the actual malice test and their preference for the usual fault standard of negligence. Negligence is the time honored standard for liability in civil cases other than libel. It has functioned successfully for several centuries. But in just twenty-five years the actual malice standard has provoked a storm of criticism and widespread dissatisfaction.

For illustrations of the manifest unfairness of this standard let us look at several United States Supreme Court decisions. The mayor of Ocala, Florida who was running for re-election was falsely and negligently accused of having a criminal record. Just before the election, the local paper published an article stating that the mayor had a criminal record. The mayor lost the election and sued the paper for libel. At trial the defendant admitted that the statement was false. It was the mayor's brother who had a criminal record. Five minutes of investigation would have revealed the truth. But the Supreme Court reversed a verdict in favor of the unfortunate mayor because the publisher acted without "actual malice."²⁹

On the other hand, Mary Alice Firestone, the ex-wife of the heir to the Firestone millions, recovered \$100,000 in a libel action against *Time* magazine for a brief item reporting her di-

28. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974).

29. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299-300 (1971).

voice. This verdict was upheld by the Supreme Court.³⁰ *Time* magazine had reported correctly the fact of the divorce, but stated that it was on the grounds of adultery. The decision of the Court was unclear. She had been sued for adultery and the local papers had carried lurid accounts of the evidence. However, by examining the law of Florida, the Court concluded that the divorce could not have been granted on that ground. Since she was a purely private figure, *Time* magazine could not claim the protection of the "actual malice" rule. The test of a public figure is one who thrusts him or herself into the public eye. By her own flagrant actions this plaintiff had thrust herself into public notice. Nonetheless, the Court held that she was not a public figure. Therefore, she could recover in libel even though the reporter was probably not negligent.

But, compare the case of the Hill family. They were the victims of a brutal crime that was so disrupting to their lives that they moved to another community to avoid being reminded of their ordeal. The crime was widely reported at the time. Of course, it was news. The incident was also the basis of a fictionalized play, *The Desperate Hours*. The Hills did not sue the dramatist. But when *Time* magazine ran a story stating that the play was a factual re-enactment of the crime involving the Hills, they did sue. The article was admittedly false. The play was not factual; it was fictional. The article was not defamatory. However, the reopening of this painful incident to the public certainly invaded their privacy. The trial court found for the Hills. The Supreme Court reversed, holding that they were public figures.³¹ While they may have been public figures at the time of the crime and shortly thereafter, they had not been public figures before and certainly not after the lapse of several years. Again, the common sense question to have asked would have been, was the magazine negligent in not investigating whether the play was fact or fiction. I believe the reporter was clearly negligent and that the Hills should have recovered.

Countless rape victims find themselves not only victims of criminals but also victims of the legal system. Long after the crime has been reported and the offender tried, the victim has

30. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). The Court remanded to state court for determination of fault, refusing to review the damage award. *Id.* at 461.

31. *Time, Inc. v. Hill*, 385 U.S. 374, 375 (1967).

to relieve the ordeal when some reporter or producer of a docudrama decides to resurrect the incident.

In a particularly heartless case, a young girl was brutally raped. The case was widely reported at the time but none of the media gave the victim's name, a practice that is voluntarily adhered to by most responsible journalists. Some time later when the victim was dead the matter was again reported, this time giving the victim's name. Her family sued. The Supreme Court denied recovery, holding that she was a public figure.³²

The actual malice standard which was designed to protect first amendment rights is not only unfair to plaintiffs who are denied recovery for serious harms but also to the defendants. In order to prove "actual malice," i.e., the state of mind of the editor, producer or publisher, the plaintiff is entitled to the most searching discovery. Notes of meetings of reporters and editors, preliminary drafts, outtakes of television shows and any scrap of paper, tape, or film that bears on what was in the mind of the defendant must be produced. This violates the privacy of the defendant and puts the lawyer in the editorial room where, I submit, lawyers do not belong. Of course, such lengthy and time consuming discovery escalates the costs of trial. And the jury is forced to base its decision on what is essentially not a provable fact.

While much of the publicity with respect to libel and privacy suits has been focused on the reporting of news, *Sullivan* has affected fiction, biography, humor, and commercial speech. All have been subjected to the doctrines spawned by *Sullivan* with little analysis of the different interests affected and imperilled. These decisions have had the much deplored chilling effect on freedom of expression which the Supreme Court declared it wanted to prevent.

Many of these decisions appear to laypersons and a number of lawyers to be bizarre. For example, the author of a novel describing nude psychotherapy found herself sued by a nude psychotherapist. The doctor who claimed to be affronted by the novel did not prove that he suffered any damage. It was admitted that the book was a novel which, by definition, is a work of imagination, not factual reporting. The therapist in the novel bore not the slightest physical resemblance to the

32. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

plaintiff and had a different name. The plaintiff is but one of many nude therapists and this modality of treatment is not copyrightable or otherwise exclusively his property or unique to him. Nonetheless, the Supreme Court refused to review a substantial verdict in his favor.³³

Those who admittedly write about real people are in great jeopardy. Take Joe McGinnis who wrote *Fatal Vision*, a best selling biography of Captain Jeffrey MacDonald who was convicted of murdering his pregnant wife and two children. The book was made into a popular television show. MacDonald had entered into a contract with McGinnis under which, in return for forty percent of the royalties, MacDonald would cooperate with the author who retained control of the manuscript. When the author reached the conclusion that MacDonald was guilty, MacDonald sued. Even though by contract as well as common law and the first amendment, an author has a right to express his opinion, the case was not dismissed. McGinnis had to sue his publisher's insurance carrier to compel the carrier to defend the law suit. McGinnis won that round but lost a subsequent suit to recoup from the carrier his legal expenses in successfully compelling the carrier to provide his defense. Despite the popularity of the book, legal costs have probably exceeded McGinnis' substantial earnings. After there was a hung jury, McGinnis paid MacDonald more than \$300,000 to settle the suit. Apparently the federal government is not pursuing its claim to confiscate profits from crime under the federal crimes code.

Biographers have fared even worse. Antoni Gronowicz wrote a biography of Pope John Paul that had a fulsome introduction by Cardinal Krol of Pennsylvania. Gronowicz was criminally prosecuted by the federal government for mail fraud on the theory that some of the statements in the book, particularly his claims as to the numbers of times he had interviewed the Pope, were false. The Third Circuit upheld the government's right to prosecute and ruled that the first amendment did not protect the hapless author.³⁴ As a trial judge I wondered how the defendant would subpoena the Pope and whether the court would compel the Pope to submit to inter-

33. *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Cal. Ct. App. 1979), cert. denied, 444 U.S. 984 (1979).

34. *In re Gran Jury Matter, Antoni Gronowicz*, 764 F.2d 983 (3rd Cir. 1985).

rogatories and depositions. The trial of this case would have presented more difficulties than the prosecution of Colonel North. Fortunately for the government, the author died before trial was scheduled.

Movie star Elizabeth Taylor sued to prevent production of a docudrama about her life claiming a right of publicity and that she was a private figure. If anyone in recent years has thrust herself into the public eye, it is certainly Elizabeth Taylor. Her multiple marriages, her illnesses, and her dieting have been widely reported. But the court gave preference to the commercial claims of Taylor over the constitutional rights of the producer. At the opposite end of the spectrum is J.D. Salinger, the obsessively reclusive author of *Catcher in the Rye*. Certainly the author of a modern classic that has been required reading in many high schools and colleges for more than a generation should be unable to claim that he is a purely private figure. Salinger objected to quotations from his letters, which letters the biographer had found in a library. Publication of the book was enjoined. This ruling reversed decades of law which held that prior restraint of publication in the absence of a clear and present danger is unconstitutional. What danger could Salinger be exposed to except unfavorable publicity or invasion of privacy? The remedy for such harms, if provable, is an action for civil damages. Salinger quickly copyrighted his letters after the biography was written but before the court of appeals decided the case. The Supreme Court denied certiorari, the effect of which was again to give protection to financial interest over first amendment rights.³⁵ Salinger's possible property interest in the belatedly copyrighted material was held to override the freedom of the press.

Defenders of the Supreme Court can point with satisfaction to the decision in the *Hustler* case³⁶ holding that obvious parody cannot be the subject of an action for emotional distress. This is one of only a very few cases since *Sullivan* in which first amendment rights were unequivocally upheld.

This confusion of commercial interests with free speech is another distressing aspect of the post-*Sullivan* cases. In a

35. *Salinger v. Random House*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd and remanded*, 811 F.2d 90 (2nd Cir. 1987), *reh'g denied*, 818 F.2d 252 (2nd Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1987).

36. *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988).

number of astonishing decisions the first amendment has, I suggest, been misapplied. The case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,³⁷ illustrates this trend. This case arose out of an admitted error in a credit report. It was tried and decided under legal principles enunciated in *New York Times v. Sullivan* and its progeny.

The facts are simple and uncontested. Dun & Bradstreet erroneously informed five of its regular customers that plaintiff had filed a voluntary petition of bankruptcy. That error was committed by a seventeen-year-old high school student employed by defendant. Apparently no one checked his work. Many judges would have treated this as a commercial case. Defendant was clearly negligent. Plaintiff should have recovered whatever losses it incurred as a result of the dissemination of the erroneous information. Under this doctrine, a jury would have been instructed that if the defendant was grossly negligent and acted with reckless disregard for the rights of the plaintiff, punitive damages could be awarded in the discretion of the jury in order to punish defendant for its conduct and to deter future gross negligence. In awarding punitive damages, the jury would be permitted to consider the defendant's assets, but the award would have to bear some relationship to the actual damages. For example, if a plaintiff could prove that it probably lost a contract on which it would have made a profit of \$10,000, it would recover \$10,000 in compensatory damages. An award perhaps of \$20,000 in punitive damages would not be unreasonable.

Because the complaint alleged libel, this simple case that could have been tried in two or three days bedeviled the trial judge, the Vermont Supreme Court, and nine justices of the Supreme Court. They labored mightily and brought forth not a mouse but a three-headed monster.

The jury returned a verdict of \$50,000 in presumed damages and \$300,000 in punitive damages. The Vermont Supreme Court upheld the verdict. It concluded that the precatory language with respect to punitive damages in *Gertz* was applicable only to media defendants. Justice Powell, writing for a plurality of the Supreme Court consisting of himself and Justices Rehnquist and O'Connor, held that matters not of "public concern" are entitled to "reduced" first amendment protec-

37. 472 U.S. 749 (1985).

tions. Although public concern had been mentioned in prior cases it had not been a critical test of liability. Chief Justice Burger and Justice White concurred but urged that both the *Gertz* and *Sullivan* cases be reexamined. The clear implication is that they would like to overrule these decisions. Justices Brennan, Marshall, Blackmun, and Stevens dissented, pointing out the difficulties in using a test of "public issues" or "public concern" and the fact that each future case would have to be decided by the trial courts on an ad hoc basis.

Although there was not a scintilla of evidence that the plaintiff had suffered any losses, a verdict of \$50,000 in presumed damages and \$300,000 in punitive damages was upheld.

In another case the Supreme Court held that congressional restrictions on the amount of money that candidates can spend on their political campaigns violates the first amendment.³⁸ The dissenters bitterly complained that adopting a view that "money talks" is simplistic.

Is there a way out of this morass? I believe there is a comparatively simple and direct solution—a federal statute governing the law of libel and privacy.

It has taken the Supreme Court more than a quarter of a century to confuse the law of libel and privacy. It will take at least that long to undo the harm that has been done. No court can write a blueprint for an entire body of law; that is a task for the legislature. Courts are limited to deciding cases and controversies. These arise in an aleatory fashion. Frequently the facts are anomalous. Much of the present difficulty has arisen because of the blind use of precedent in dissimilar cases.

The idea of a statute has gained popularity in the past year. "Annenberg Washington," an institute of Northwestern University devoted to communications policy studies, established a task force to study the problem of libel.³⁹ It included lawyers for libel plaintiffs and for libel defendants, academicians, journalists, a representative of the insurance industry and a judge. There was a general agreement on the part of all participants that the present state of the law is unsatisfactory and that an appropriate solution was a statute. Some favored a state statute on an experimental basis, others a federal statute.

38. *Buckley v. Valeo*, 424 U.S. 1 (1976).

39. *Proposal for the Reform of Libel Law: Report of the Libel Reform Project of the Annenberg Washington Program* (1988).

I believe that a federal statute is preferable. Most of the print and electronic media do business in more than one state. Almost all books and periodicals are published on a national basis. Even regional and local papers frequently are sold across state lines. The entire communications industry is engaged in interstate commerce. Therefore, it should be governed by federal law. At present ingenious plaintiffs search the laws of the fifty states looking for the most favorable jurisdiction even though neither the plaintiff nor the defendant resides there. Defendants have had to defend suits in states in which they were never physically present. This blatant jurisdiction hopping also adds to the cost of litigation and unduly burdens many courts.

There was general agreement at Annenberg Washington that one statute should cover all actions for defamation, libel, libel per quod, right of publicity, and similar claims. It was unanimously agreed that both presumed and punitive damages be abolished and that compensatory damages be proved by clear and convincing evidence. There was also agreement that apology, reply, and retraction should be made much easier and that a demand for retraction or reply should be a condition precedent to any action for libel.

The Annenberg group also favored, as I do, a provision immunizing what is called neutral reportage. If a publication or a speaker correctly reports the views expressed by another, that is neutral reporting. It would protect publications that print letters to the editor and accurate reports of speeches and other publications with attribution. Incidentally, if such a law had been in effect in 1964, Sullivan's suit against the *New York Times* would have been dismissed.

Some academicians favored a declaratory judgment in lieu of an action for damages. However, it was the consensus at a public meeting of journalists and media lawyers that plaintiffs who assert a claim for damages should be entitled to recover for provable harm and not be limited to a declaratory judgment.

There was also profound dissatisfaction with the actual malice standard and the difficulties in trial that it generates. I also favor a statutory provision tightening the distinction between fact and opinion so that initially on a motion for directed verdict the judge can make that crucial decision.

The participants also agreed that the law has worked great hardship on small publications and has contributed substantially to the “blanding” of the press. I also favor a clear declaration, contrary to recent decisions of the United States Supreme Court,⁴⁰ that the public’s right to know be given statutory recognition.

Drafting a statute, particularly in a sensitive area of the law in which competing constitutional rights are at issue, will not be an easy task. The Annenberg group made an admirable beginning effort in less than a year. I believe that if Congress were to consider the subject and hold committee hearings that a more rational and workable law could be enacted.

More than two centuries ago, the great English jurist, Lord Mansfield, wrote, “Whenever a man publishes, he publishes at his peril.” That chilling statement has never been more true than today. In our dangerous world where all of us face the perils of nuclear annihilation, destruction of the ozone layer, and all the complex problems of the global village, the public needs more information and more robust and uninhibited discussion. We also need the intellectual stimulation of arts and literature that are not censored either by government or by the omnipresent fear of a crippling libel suit. It is time for the Congress to act.

40. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).