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The Scope of Independent Apellate Court Review in Public Person Libel Cases

Paul D. Driscoll

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I. INTRODUCTION

Juries are particularly unsympathetic to media defendants in deciding libel cases.[1] While the trend is toward fewer media defendants going to trial, once there, they are losing a higher percentage of cases and facing larger compensatory and punitive damage awards.[2]

Media defendants also face a declining success rate in the appellate courts. A Libel Defense Resource Center report on 1989-90 cases found that 48% of the libel verdicts against the media were upheld in their entirety, a sharp increase from an average of about 25% in prior studies and 38% in 1987-88.[3] Although this trend is distressing to media interests, appellate court review remains pivotal in reversing media defeats in the trial courts and in limiting excessive damage awards. For the entire decade of the 1980s, 75% of the awards against media defendants were reversed, remanded, or substantially reduced on appeal.[4]

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1. The Libel Defense Resource Center ("LDRC") reported that media defendants won 26% of the 213 jury verdicts decided in the 1980s. The median jury award was $200,000, with awards at or in excess of $1 million in almost one of four cases. Media defendants faced the same dismal success rate with juries for the 1990-91 period, winning verdicts in eight out of twenty-nine trials. The median damage award for the 1990-91 period skyrocketed to $1.5 million. On average, over 90% of the trial verdicts are decided by juries rather than judges. *LDRC Recap and Update: Trial Results, Damage Awards and Appeals, 1980-89 and 1990-91: The "Chilling Effect" Writ Large . . . Then Writ Larger*, LDRC BULL. Special Issue B, July 31, 1992, at 3-5 [hereinafter "LDRC Recap and Update"].

2. *Average Libel Award Increases Tenfold*, PRESSTIME, Oct. 1991, at 30. An analysis of 1989-90 cases by the Libel Defense Resource Center showed that the media lost 69% of jury verdicts, up from 58% reported in the two previous years. The average award in the thirty libel cases that went to verdict in the 1989-90 period was nearly $4.5 million—more than ten times the average amount in 1987-88, when sixty libel cases went to verdict. An LDRC survey of cases decided in the early 1980s found the average libel award was more than triple the average award for medical malpractice cases, prompting Anthony Lewis to observe: "In short, juries seemed to think that persons whose reputations were wrongfully injured by the press deserved three times the compensation of those whose bodies had been injured by incompetent doctors." ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 220 (1991).

3. PRESSTIME, *supra* note 2, at 30.

4. LDRC RECAP AND UPDATE, *supra* note 1, at 4.

These statistical reflections of trial court error and excess highlight the importance of appellate court review of libel verdicts. Media defendants have come to expect favorable outcomes in the appellate courts. But, despite their level of present success at the appellate level, the appropriate scope of appellate court review remains unresolved and is becoming "one of the most critical emerging issues in libel litigation."[5] Narrowing the scope of independent appellate review could deal a serious blow to the success rate of media defendants in libel litigation.

This Article examines the application of independent appellate court review to actual malice determinations in public plaintiff defamation cases. It first reviews appellate court departure from the traditional fact/law distinction in so-called "constitutional fact" cases. Next, it examines efforts by the United States Supreme Court to provide guidance regarding the scope of independent review in libel cases and assesses how lower courts have responded. Finally, it concludes that a broad scope of independent review is to be preferred.

II. THE FACT/LAW DISTINCTION

Distinguishing between questions of fact and questions of law has been the longstanding approach to allocating decision-making responsibilities between trial and appellate courts in civil cases.[6] Questions of fact are for trial court triers of fact and are reviewed narrowly and deferentially on appeal; questions of law are freely reviewed on appeal.[7]

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5. RODNEY SMOLLA, LAW OF DEFAMATION § 12.09[4], at 12-43 (1989).

6. Martin Louis, *Allocating Adjudicative Decision Making Between the Trial and Appellate Levels: A Unified View of the Scope of Review, The Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 (1986). The fact/law distinction began to take shape after the adoption in 1937 of Federal Rule of Civil Procedure 52(a). The rule provided 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 the credibility of the witness." FED. R. CIV. P. 52(a). In 1985, the rule was amended to "[f]indings of facts, whether based on oral or documentary evidence . . . ." FED. R. CIV. P. 52(a) (emphasis added). "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984).

7. Louis, *supra* note 6, at 993. Judicial application of the fact/law distinction is often confusing because the "two categories are used to describe at least *three* distinct functions: law declaration, fact identification, and law application." Thomas Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985) (emphasis in original). According to Monaghan: Law declaration involves "formulating a proposition [that] affects not only the [immediate] case . . . but all others that fall within its terms."

The traditional allocative function of the fact/law distinction, however, does not fully operate in so-called constitutional fact cases, where strict adherence to the deference normally owed a lower court's findings of fact would threaten constitutional values. In these cases, the scope of appellate review is expanded in order to protect vital constitutional principles. Cases involving so-called "mixed questions of fact and law,"[8] as well as questions of "ultimate" constitutional fact,[9] are subject to expanded independent review by the appellate courts. The United States Supreme Court initiated the concept of independent appellate review in *Fiske v. Kansas*[10] when it reversed a conviction for criminal syndicalism stating it would review the facts found by a state court when a constitutional issue was so intermingled with the facts as to make review necessary.[11] Since then, the Court has exercised its power to independently review lower court determinations in cases involving a variety of constitutional issues.[12]

> Fact identification . . . is a case-specific inquiry into *what happened here.* It is designed to yield only assertions that can be made without *significantly* implicating the governing legal principles. Such assertions, for example, generally respond to inquiries about who, when, what, and where—inquiries that can be made "by a person who is ignorant of the applicable law." . . .
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> Law application . . . is residual in character. It involves relating the legal standard of conduct to the facts established by the evidence.

Monaghan, *supra*, at 235-36 (footnotes omitted).

8. *See* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

9. *See* Herbert v. Lando, 441 U.S. 153, 170 (1979).

10. 274 U.S. 380 (1927).

11. *Id.* at 385-86.

12. *See, e.g.*, Connick v. Myers, 461 U.S. 138 (1983) (independent review of whether employee's speech was a matter of public concern in wrongful termination action); Street v. New York, 394 U.S. 576 (1969) (independent review of constitutional protection for flag burning); Roth v. United States, 354 U.S. 476 (1957) (independent review appropriate to determine if publication was obscene); Niemotko v. Maryland, 340 U.S. 268 (1951) (independent review of disorderly conduct conviction for speaking in public park without permit); Watts v. Indiana, 338 U.S. 49 (1949) (independent review appropriate to determine if confession was voluntary); Pennekamp v. Florida, 328 U.S. 331 (1946) (independent review of whether publications posed a clear and present danger to administration of justice); Bridges v. California, 314 U.S. 252 (1941) (independent review of whether publications posed a clear and present danger to administration of justice); Norris v. Alabama, 294 U.S. 587 (1935) (independent review to determine if state had unconstitutionally excluded blacks from juries).

III. INDEPENDENT REVIEW OF LIBEL VERDICTS

A. New York Times v. Sullivan

In addition to establishing the requirement that public officials prove actual malice with convincing clarity, the landmark decision of *New York Times Co. v. Sullivan*[13] was also the United States Supreme Court's first application of independent appellate review to a libel case. Rejecting the argument that the Seventh Amendment barred re-examination of state courts' findings of fact,[14] the Court said that its duty was not limited to the elaboration of constitutional principles but that it must also, in proper cases, "review the evidence to make certain that those principles have been constitutionally applied."[15] To do so, said the Court, it is necessary to "'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."[16]

Thus, in addition to establishing the substantive requirement of actual malice, the *Sullivan* decision also instituted a procedural safeguard for expression by granting appellate judges the final word on whether the speech at issue is protected by the Constitution. Indeed, libel scholar David Anderson believes that the expansion of judicial control beginning in the *Sullivan* case has "had far greater practical effect than the actual malice rule itself."[17] The Court's requirement that actual malice be proven with convincing clarity has had its greatest effect, not on juries, but on judicial review.[18] "The Supreme Court has never explained what the phrase [convincing clarity] means, but it obviously enhances judges' power to overturn jury verdicts that under usual rules would have to be accepted."[19]

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13. 376 U.S. 254 (1964).

14. *Id.* at 285 n.26. The Seventh Amendment provides, in part, that "no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. For a discussion of the relationship between the Seventh Amendment and the role of independent review in libel cases, *see* Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Court*, 35 AM. U. L. REV. 3, 40 (1985).

15. *Sullivan*, 376 U.S. at 285.

16. *Id.* (citing Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

17. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 494 (1991).

18. *Id.*

19. *Id.*

In the years following the *Sullivan* decision, the Court frequently exercised its independent review of libel verdicts.[20] Such review, however, focused primarily on correcting the [mis]application of the evolving actual malice rule to existing facts.[21] Libel judgments against media defendants were often found to have resulted from erroneous application of the legal standard.[22] It was not until *Bose Corp. v. Consumers Union of the United States, Inc.*[23] came before the Court in 1984 that the scope of independent appellate review in the context of a libel case became a central issue for the Court.

B. Bose Corp. v. Consumers Union

This 1984 product disparagement case involved a review published in *Consumer Reports* magazine that was critical of a loudspeaker system manufactured by the Bose Corporation.[24] At the conclusion of a bench trial in federal district court, the judge ruled that Consumers Union had published a false and disparaging statement and acted clearly and convincingly with actual malice by publishing a product review stating that the sound of the instruments heard through the Bose speakers tended to wander "about the room," whereas evidence established that the sound actually tended to wander "along the wall."[25] The lower court judge based his decision against the magazine primarily on a perceived lack of credibility in the testimony of the reviewer who insisted that he had used the challenged phrase "about the room" to actually mean "along the wall." The First Circuit, claiming that it was not bound by the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a),[26] conducted an

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20. *See* St. Amant v. Thompson, 390 U.S. 727 (1968); Time, Inc. v. Pape, 401 U.S. 279 (1971); Herbert v. Lando, 441 U.S. 153 (1979); Levine, *supra* note 14, at 47-50.

21. *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970) (question for reviewing court was whether actual malice rule had been correctly applied to the facts).

22. *See* Comment, *The Expanding Scope of Appellate Review in Libel Cases—The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice*, 36 MERCER L. REV. 711, 716-18 (1985).

23. 466 U.S. 485 (1984).

24. 508 F. Supp. 1249 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

25. 508 F. Supp. at 1276-77.

26. Rule 52(a) provides in part: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." FED. R. CIV. P. 52(a).

independent review of the entire record and reversed.[27] It concluded that the author had simply used "imprecise language" and was just unwilling to admit his error. Bose appealed to the Supreme Court, arguing that the appellate court was bound to accept the trial court's findings of fact unless they were clearly erroneous.

The United States Supreme Court affirmed the court of appeals.[28] In rejecting Rule 52(a) as the standard governing independent review of libel decisions, the majority opinion by Justice Stevens acknowledged the strategic importance of appellate review in ensuring the protection afforded by the actual malice rule established in the Sullivan case. The Court said that the appellate review requirement was a rule of federal constitutional law[29] and that:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."[30]

In dissent, Justice Rehnquist, joined by Justice O'Connor, argued that the constitutional requirement of actual malice, in either its knowing falsehood or reckless disregard component, was a question of pure historical fact, a subjective, state-of-mind determination, best left to the trial judge.[31] In Justice Rehnquist's view, "appellate courts are simply ill-prepared to make [such findings] in any context, including the first amendment context."[32] While the majority viewed independent review of the actual malice finding as an application of law issue, Justice Rehnquist categorized

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27. 692 F.2d 189 (1982).

28. *Bose*, 466 U.S. 485 (1984).

29. *Id.* at 510.

30. *Id.* at 511. Independent review applies whether the lower court's fact-finding function was performed by a jury or by a trial judge. *See id.* at 501.

31. *Id.* at 519 (Rehnquist, J., dissenting). *See* Herbert v. Lando, 441 U.S. 153, 170 (1979). *See also* Pullman-Standard v. Swint, 456 U.S. 273, 289 (1982) (purely factual findings usually include inquiries into a defendant's state of mind).

32. *Bose*, 446 U.S. at 515. In dissent, Justice White believed that the knowing falsehood component of the actual malice test was an historical fact while the reckless disregard factor was not. Since the trial court judge had found that the reviewer knew the statement at issue was false at the time of publication, he would have reversed and remanded based on the court of appeals' inappropriate, de novo review of the findings. *Id.*

the actual malice determination as one of pure historical fact.[33] He distinguished libel cases from those relied on by the majority to justify an expanded scope of appellate review—such as cases involving obscenity and fighting words—where questions of mixed fact and law provide a stronger case for independent fact-finding.[34]

The *Bose* case left unanswered many questions regarding the scope of independent review. As one commentator put it: "The interpretive challenge [of *Bose*] . . . does not lie in determining *whether independent review is required*, but rather lies in determining *what independent review requires*."[35] The Court in *Bose* did not clearly address what it means to review an "entire" lower court record and the amount of deference owed to a judge's or jury's determinations of credibility, subsidiary facts, inferences drawn from those facts, and the aggregation of such inferences in determining the ultimate question of actual malice. Also left unclear is whether heightened review applies to issues other than actual malice, such as falsity, or whether independent review applies differently to summary judgments, directed verdicts or judgments notwithstanding the verdict (JNOV).

In the years following the *Bose* decision, lower courts struggled to apply its holding. Decisions have generally taken either a broad or a narrow approach to independent review. Sometimes, appellate courts have gone out of their way to avoid addressing the issue.

Media interests have generally taken the position that the independent review rule translates into a requirement for de novo review.[36] They point to the requirement in *Sullivan* that appellate courts must "make an independent examination of the *whole* record"[37] and to Justice Stevens' statement in *Bose* that "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review."[38]

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33. *Id.* at 517-18 n.1.

34. *Id.* Justice Rehnquist did find a stronger case exists for independent appellate court fact-finding after a jury trial where there may be a need to compensate for bias or the use of general verdicts. *See id.* at 518 n.2.

35. Richard E. Rassell et al., *Connaughton v. Harte-Hanks and the Independent Review of Libel Verdicts*, 20 U. TOL. L. REV. 681, 693 (1989).

36. Anderson, *supra* note 17, at 495. When a reviewing court engages in de novo review, it makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for the plaintiff.

37. *Sullivan*, 376 U.S. at 285 (emphasis added).

38. *Bose*, 466 U.S. at 508-09 n.27. In addition to the need to protect constitutional values, the Court in *Bose* identified two other reasons for reviewing actual malice determinations—the common law heritage of the rule, which assigns an especially broad role to the judge in applying it to specific factual situations, and the status of the actual malice rule as a constitutionally-based

In other words, no deference at all should be accorded any finding germane to actual malice. To support this position, proponents of the broad view argue that there are ample reasons to conclude that juries cannot be relied upon to reach the correct verdict in libel cases: they cannot comprehend the law,[39] are prejudiced against media interests,[40] and routinely fail to take into consideration the larger values at stake, such as the need to prevent chilling effects on the press.[41] Instead of being viewed as the vanguard of free speech for the press, juries in libel cases are highly suspect,[42] supporting Professor Schauer's observation that "much of contemporary first amendment doctrine, theory, and commentary is devoted to protecting speech *from* the jury."[43] Clearly, the reversal rate of jury verdicts for libel plaintiffs suggests that one or more of these factors exists in many cases.

An additional problem lending support to the broad view stems from the use of general verdicts in libel trials. Appellate court panels often begin with only the trial court's determination that the statements at issue were false, defamatory and made with actual malice. The appellate court then, in essence, manufactures findings and inferences which the jury could have made or must have made in deciding in favor of the plaintiff.[44] If the court then deferentially reviews these findings, it may be less likely to set them aside as inadequate proof of actual malice because they were actually constructed by the reviewing court based on the general verdict alone.[45]

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but, nevertheless, judge-made rule of law given meaning through the evolutionary process of common law adjudication. *Id.* at 502.

39. *See* Rebecca Spar, Note, *Model Jury Instructions for the "Actual Malice" Standard*, 39 RUTGERS L. REV. 153, 156 (1986).

40. *See, e.g.*, Newton v. NBC, 930 F.2d 662, 671 (9th Cir. 1990) (First Amendment values will be subverted by a local jury biased in favor of a prominent local public figure against an alien speaker who criticizes that local hero), *cert. denied*, 112 S. Ct. 192 (1991).

41. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring) (evidence is mounting that juries do not give adequate attention to limits imposed by First Amendment), *cert. denied*, 471 U.S. 1127 (1985).

42. Erica F. Plave, Note, *Tavoulareas v. Piro: An Extensive Exercise of Independent Judgment*, 56 GEO. WASH. L. REV. 854, 856 (1988).

43. Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 765 (1986).

44. In a federal district court bench trial, the judge will make specific written findings of law and findings of fact as required under FED. R. CIV. P. 52(a).

45. One way in which trial judges can preserve a record of jury findings is to routinely employ special verdicts in libel cases. For a positive review of special verdicts, see Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601 (1975). Most states have provisions for special verdicts similar to Federal Rule of Civil Procedure 49(a) which provides that:

Those supporting a narrow application of independent review argue that expansive review effectively eviscerates the traditional role of trial court judges and juries, essentially vesting appellate courts with original jurisdiction in libel cases.[46] Such wholesale substitutions of lower court determinations by a reviewing court would make the trial "little more than a necessary hurdle en route to the real trial by the judge."[47] Under the narrow view, *Bose* does not alter the traditional rules governing the review of jury verdicts. Thus, judicial deference is constitutionally mandated to presumed jury findings of underlying facts, evaluations of credibility, and the inferences drawn.

With regard to the *Bose* Court's pronouncement that the entire record should be reviewed by the appellate court de novo, supporters of the narrow view contend that the decision addressed only the ultimate question of actual malice, demonstrated by the majority's reliance upon the distinction between questions of fact and questions of law. The Court in *Bose* specifically stated:

> Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a *"de novo"* review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff.[48]

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence . . . .

FED. R. CIV. P. 49(a). There is concern, however, that requiring the use of special verdicts could undermine the "salutary role of a jury's general verdict in safeguarding First Amendment rights." *See* Levine, *supra* note 14, at 70 n.332.

46. Tavoulareas v. Piro, 759 F.2d 90, 108 (D.C. Cir. 1985), *vacated for reh'g en banc*, 763 F.2d 1472 (D.C. Cir. 1985), *rev'd*, 817 F.2d 762 (D.C. Cir. 1987) (en banc), *cert. denied*, 108 S. Ct. 200 (1987). *See* Martin London, *The "Muzzled Media": Constitutional Crisis or Product Liability Scam*, in AT WHAT PRICE?: LIBEL LAW AND FREEDOM OF THE PRESS, at 3, 5-6 (Perspectives on the News: A Twentieth Century Fund Paper No. 4, 1993).

47. Rich Brown, *Wayne Newton Takes His Case to Supreme Court*, BROADCASTING, Aug. 12, 1991, at 30.

48. *Bose*, 466 U.S. at 514 n.31.

In addition, the Court in *Bose* observed that examination of the entire record is not forbidden by Rule 52(a), and that findings of fact can be overturned under the clearly erroneous standard.[49] According to the narrow view, independent review should serve only to apply the law in determining whether findings that are not clearly erroneous are sufficient to clear the actual malice hurdle.[50]

C. Independent Review in Appellate Courts Following Bose

Following the Court's decision in *Bose*, both federal and state appellate courts struggled with the scope of independent review, often decrying the lack of a clear explanation of the issue.[51] An example of the fractious nature of the disagreement over the appropriate scope of independent review is found in the *Tavoulareas* case.[52]

William Tavoulareas, the president of Mobil Oil, alleged that he and his son were defamed by a 1979 story in the *Washington Post* that said, among other things, that he had used his influence to "set up" his son in a shipping firm whose business included a multi-million dollar management services contract with Mobil. In 1983, the jury awarded Tavoulareas $250,000 in compensatory and $1.85 million in punitive damages but the district court judge overturned the judgment.[53] On appeal, a divided panel reversed the JNOV and reinstated the verdict.[54]

The majority opinion applied a narrow view of independent review and held that *Bose* required review of only the "ultimate fact" of actual

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49. *Id.* at 499. 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.'" (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). *Id.*

50. The Court noted that the First Circuit decision did not overturn any factual finding to which Rule 52(a) would be applicable. *Id.* at 514 n.31. It also observed that even accepting all of the purely factual findings of the district court it may nevertheless hold as a matter of law that the record did not contain clear and convincing evidence of actual malice. *Id.* at 513. The Court also said that independent review does not eclipse the Rule 52(a) requirement that due regard be given to the trial judge's opportunity to observe the demeanor of the witnesses. *Id.* at 499-500.

51. *See* Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 841 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989).

52. Tavoulareas v. Washington Post Co., 567 F. Supp. 651 (D.D.C. 1983), *aff'd in part and rev'd in part sub nom.*, Tavoulareas v. Piro, 759 F.2d 90, (D.C. Cir. 1985), *vacated for rehearing en banc*, 763 F.2d 1472 (D.C. Cir. 1985), *aff'd en banc*, 817 F.2d 762 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 870 (1987).

53. Tavoulareas v. Washington Post Co., 567 F. Supp. 651 (D.D.C. 1983).

54. Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985).

malice and not the preliminary factual findings upon which the ultimate finding was based.[55] In this view, the evidence and all reasonable inferences derived from it should be examined in the light most favorable to the plaintiffs—the standard generally employed in reviewing JNOV determinations.[56]

In dissent, Judge Wright assailed the majority opinion as a distortion of the *Bose* holding on independent review. His primary criticism was of the notion that the review process required resolving all inferences in favor of the plaintiff and that these "malice-laden inferences" must be cumulated before *New York Times/Bose* independent review comes into play.[57] The court vacated and set the case for rehearing.[58]

Sitting en banc, the full panel concluded that the article was substantially true and upheld the district court's grant of JNOV.[59] While the proper scope of independent review under *Bose* was the central focus of the arguments by both parties, the majority opinion dodged addressing this "difficult enterprise"[60] by claiming to have reviewed the entire record using traditional JNOV standards[61] in finding that the district court's verdict for the newspaper had been correct: "[The dispute] is whether *Bose* . . . sanctioned independent review as to findings of underlying facts, evaluations of credibility, and the drawing of inferences . . . . Sailing into these uncharted waters is unnecessary to the proper and principled disposition of this case."[62]

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55. *Id.* at 107-08. The opinion gives three reasons for this conclusion: (1) *Bose* is framed only in terms of the ultimate issue as indicated by the extensive discussion of the distinction between purely factual findings and so-called ultimate facts; (2) the *Bose* decision never suggests that any factual determination other than the ultimate actual malice conclusion may be independently reviewed; and (3) the fact/law distinction used by the Court in *Bose* is meaningful only to distinguish the ultimate issue of actual malice from preliminary facts. *Id.*

56. *Id.* at 105-06. *See* Alden v. Providence Hospital, 382 F.2d 163, 165 (D.C. Cir. 1967) ("[U]nless the evidence, along with all inferences reasonably to be drawn therefrom, when viewed in the light most favorable to the plaintiff is such that reasonable jurors in fair and impartial exercise of their judgment could not reasonably disagree in finding for the defendant, the motion must be denied.") (footnote omitted); 5A JAMES W. MOORE ET AL., FEDERAL PRACTICE ¶ 50.07[2] (2d ed. 1984) ("[T]he motion for judgment n.o.v. may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.").

57. 759 F.2d at 146-47 (Wright, J., dissenting).

58. *Tavoulareas*, 763 F.2d at 1472.

59. *Tavoulareas*, 817 F.2d 762 (D.C. Cir. 1987) (en banc).

60. *Id.* at 776.

61. *Id.* at 777. See MOORE, *supra* note 56, at ¶ 50.07[2].

62. *Tavoulareas*, 817 F.2d 762, 777 (D.C. Cir. 1987) (en banc).

In dissent, Judge MacKinnon rejected the majority's claim that it had conducted a traditional JNOV analysis, arguing that the court had invaded the jury's function by reweighing the evidence, overriding obvious jury determinations on credibility of witnesses, generally going only about half way in giving plaintiff the benefit of the inferences to which he was entitled, and thus refusing to find the *underlying* facts, as required, in the manner most favorable to the jury verdict.[63]

Judge MacKinnon viewed the issue as one of reconciling the Supreme Court's requirement for independent review in defamation cases with the "well-settled standard" reiterated in *Anderson v. Liberty Lobby*: "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."[64] Judge MacKinnon's solution would be to limit appellate review to the "ultimate constitutional fact" of clear and convincing proof of actual malice, while accepting the most favorable facts and legitimate inferences that the jury could reasonably have found for the plaintiff.[65]

In a concurring opinion, Chief Judge Wald also rejected the majority's claim that it had decided the case without any special application of the post—*Bose* independent review standard.[66] Judge Wald claimed that the court did in fact re-examine and reject permissible inferences that the jury might have drawn, but felt that such re-examination is sanctioned under *Bose*.[67] Judge Wald viewed the independent review requirement as including an examination of even the permissible inferences a jury may presumably have drawn under the traditional JNOV standard.[68] Judge Wald challenged the panel to tackle the "knotty constitutional issue" regarding what constitutes independent review under *Bose* to properly reach a conclusion as to the absence of actual malice.[69] Such clarification, Judge Wald stated, is badly needed in this volatile area of the law.[70]

It would appear that the en banc decision in the *Tavoulareas* case did indeed apply *Bose* independent review, and broadly so. As one commentator has noted:

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63. *Id.* at 810 (MacKinnon, J., dissenting).

64. Tavoulareas v. Piro, 817 F.2d 762, 816 (D.C. Cir. 1987) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)).

65. *Id.* at 816.

66. *Id.* at 804 (Wald, C.J., concurring).

67. *Id.* at 805.

68. *Id.*.

69. Tavoulereas v. Piro, 817 F.2d 762, 804 (D.C. Cir. 1987) (en banc).

70. *Id.* at 806.

> [I]t is evident that the court did, in fact, apply *Bose* in its review of facts, witness credibility, and inferences pertinent to finding actual malice. The deference the court ostensibly extended to the jury's findings correlated only to those findings with which the court agreed. When the court disagreed with what the jury presumably could have found, whether objective facts, credibility of witnesses, or critical inferences, the court substituted its own evaluations.[71]

Other federal appellate courts, recognizing the difficulty of reconciling the proper scope of independent review under *Bose*, have also struggled to avoid a head-on consideration of the issue. For example, the 1987 decision by the Seventh Circuit Court of Appeals in *Brown & Williamson Tobacco Corp. v. Jacobson*[72] avoided the "open question" of whether *Bose* allows review as to underlying facts, evaluations of credibility, and the drawing of inferences.[73] It nevertheless applied a wide-ranging scope to its appellate review while avoiding "the difficult issues left unresolved by *Bose*,"[74] because, in its view, both deferential and de novo review yielded the same result in the case.[75]

While the court in *Brown & Williamson* specifically limited its acceptance of broad-based independent review to the case at hand, it did suggest that it would fully examine lower court transcripts to ensure a correct result was reached. To the extent that lower court records might provide evidence contrary to a jury's credibility findings, the court appeared ready to act because it did not believe "that *Bose* requires an appellate court to believe the unbelievable and to accept the untenable."[76] Such a conclusion, however, would appear to meet the requirement of the clearly erroneous rule. The court did not specify whether it was willing to substitute its own conclusions for those made by the lower court that were not clearly erroneous.

A 1985 decision by the Fifth Circuit Court of Appeals in *Bartimo v. Horsemen's Benevolent & Protective Ass'n*[77] upheld a district court's grant of involuntary dismissal on the grounds that the plaintiff had failed to show that a published article stating he "allegedly" had connections with the

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71. Plave, *supra* note 42, at 877.
72. 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).
73. *Id.* at 1128.
74. *Id.* at 1129.
75. *Id.*
76. *Id.*
77. 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986).

mafia was made with actual malice. While it purported to review the entire lower court record, it declined to review the credibility findings of the district court or the subsidiary factual findings supporting the ultimate determination regarding actual malice.[78]

State courts have also struggled with the independent review issue. In *McCoy v. Hearst Corp.*,[79] the California Supreme Court reversed a jury verdict against the *San Francisco Examiner* because of insufficient evidence of actual malice. In an example of the broad view of independent review, the California Supreme Court stated that under *Bose*, discredited testimony rejected by the jury could be "salvag[ed] from the heap of disbelief" and re-interpreted.[80] The California Supreme Court rejected the position that it was bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in their favor. It stated that it could and would "substitute its own inferences on the issue of actual malice for those drawn by the trier of fact,"[81] believing that "it is constitutionally inadequate to review only those portions of the record that support the verdict."[82]

A narrower reading of *Bose* in state court is found in *Wanless v. Rothballer*.[83] There, the Illinois Supreme Court overturned a $500,000 jury verdict, concluding that while it would not re-examine discrete facts, it would engage in a *Bose*-required de novo review of the application of those facts to the actual malice standard.[84]

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78. *Id.* at 898. *Cf.* Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1070 (5th Cir. 1987) (*Bose* independent review applies to summary judgment but fact-finder retains its traditional role in the determination of facts).

79. 727 P.2d 711 (Cal. 1986), *cert. denied*, 481 U.S. 1041 (1987), *petition to recall remittitur denied*, (Cal. Ct. App. June 10, 1991), *aff'd*, (Cal. Aug. 28, 1991), *petition for cert. filed*, 60 U.S.L.W. 3486 (U.S. Jan. 14, 1992) (No. 91-889).

80. 727 P.2d at 717. The California Supreme Court's reading of *Bose* as having rejected the credibility determination of the lower court was clearly in error. The Court repudiated this interpretation of *Bose* in *Harte-Hanks*, 491 S. Ct. at 689 n.35. The plaintiff's second petition for certiorari to the United States Supreme Court argues that this misapplication of *Bose* was critical to the California Supreme Court's decision and that, had the proper standard of review been applied, it might well have affirmed the judgment. Brief for Appellant at 7.

81. 727 P.2d at 718.

82. *Id.*

83. 503 N.E.2d 316, 321 (Ill. 1986), *cert. denied*, 482 U.S. 929 (1987).

84. *Id.* For a description of the case, *see* SMOLLA, *supra* note 5, at 12-48. Other state courts have adopted a narrow approach to independent review in libel cases. *See, e.g.*, Starkins v. Bateman, 724 P.2d 1206, 1212 (Ariz. Ct. App. 1986) (an appellate court is not equipped to undertake de novo review of underlying facts to determine if they support actual malice by clear and convincing evidence and to do so would entirely displace the function of the jury in defamation cases); Lent v. Huntoon, 470 A.2d 1162, 1170 (Vt. 1983) (reviewed evidence of

In a two-step approach, the court first examined the record to determine if the jury's resolution of the subsidiary facts, including credibility assessments, was clearly erroneous. It identified eleven subsidiary facts with which the jury could have supported its actual malice finding[89] and on review held that such findings were not clearly erroneous.[90] The court proceeded with what it considered to be the *Bose*-required independent review—a "second look" that included checking the entire record to correct errors of law, including errors infecting mixed findings of law and fact, and examining whether the jury's findings of fact were predicated on a misunderstanding of a governing rule of law.[91] After weighing the cumulative impact of the subsidiary facts on independent review, the court held that there was clear and convincing evidence of actual malice.[92]

The majority took the position that independent review was properly limited to a review of the jury's ultimate finding of actual malice, rejecting the position that independent review required an independent resolution of subsidiary facts that might be probative of actual malice.[93] Thus, the majority held that, in the case of a plaintiff successful in the trial court, the inferences from the facts presented at trial should be drawn in favor of the plaintiff and cumulated before being subjected to appellate review for constitutional sufficiency.

2. The Supreme Court's Decision

The Supreme Court unanimously affirmed the decision but took a somewhat different approach to the question of independent review.[94] In the majority opinion, Justice Stevens began his analysis of the issue reaffirming the importance of the independent review requirement by stating that reviewing courts must consider the factual record in full to decide whether the evidence is sufficient to cross the constitutional threshold of clear and convincing proof of actual malice.[95] The Court then specified that credibility-based determinations were governed by the

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89. *Id.* at 843-44.

90. *Id.* at 844.

91. *Id.* at 845.

92. *Id.* at 847.

93. The court criticized the broad scope of review it felt had been applied by the D.C. Circuit sitting en banc in the *Tavoulareas* case. *See id.* at 840 n.8.

94. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).

95. *Id.* at 686-88.

D. Harte-Hanks Communications v. Connaughton

The latest word from the United States Supreme Court on the issue of independent review came in *Harte-Hanks Communications v. Connaughton*,[85] a 1989 public person libel case in which the Court upheld a $200,000 jury verdict against a small newspaper. The case was brought by Daniel Connaughton, a former challenger for a municipal judgeship in Hamilton, Ohio. Connaughton had tape recorded an interview with a witness who accused the incumbent judge's administrative assistant of bribery. Connaughton turned over the information to authorities and the assistant was subsequently convicted of three charges of bribery. The sister of the witness, who had also participated in the taped interview, went to the newspaper and claimed that Connaughton had promised the sisters vacations, jobs and other inducements for providing the information against the administrator. She also claimed that Connaughton had promised to keep the information confidential and use it only to confront the incumbent judge privately so he would be forced to resign.[86]

The newspaper, a strong supporter of the incumbent, published the sister's allegations that Connaughton had used "dirty tricks" such as promises of jobs and vacations to acquire information useful against the incumbent. This was done without questioning the first sister who participated in the interview or listening to the tapes of the interview that had been made available to the newspaper. Connaughton sued for libel and a federal district court jury found the statements were defamatory and had been made with actual malice.[87]

1. The Sixth Circuit's Decision

By a 2 to 1 vote, the Sixth Circuit affirmed.[88] The decision provides an example of a narrow view of independent review. In ruling for the plaintiff, the Sixth Circuit rejected the idea that independent review required an independent resolution of subsidiary facts underlying the jury's finding of actual malice. It held that such subsidiary facts, including inferences drawn from credibility determinations, were subject only to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a).

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malice in the light most favorable to plaintiff).

85. 491 U.S. 657 (1989).

86. *Id.* at 660.

87. *Id.* at 660-61.

88. Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988).

clearly erroneous rule.[96] The Court acknowledged that the jury *may* have found the eleven subsidiary facts identified by the Sixth Circuit but concluded that the case should be decided "on a less speculative ground."[97] Justice Stevens then constructed three testimonial-based findings that the jury *must* have rejected in order to have found actual malice.[98] Presumably discerning no clear error, the Court considered these three findings alongside the undisputed evidence and concluded that actual malice inextricably followed.[99]

Justice Scalia, in a concurring opinion, labeled as "peculiar" the manner in which the majority opinion resolved the independent review question.[100] He noted with approval that the majority had adopted the most significant element of the Sixth Circuit's approach—accepting the jury's determination of at least the necessarily found controverted facts rather than making an independent resolution of the conflicting testimony.[101] Taking the narrow view, Justice Scalia characterized the proper scope of the majority's evidentiary review as limited to whether the jury could *reasonably* have reached its conclusions, rather than the Courts exercising its own independent judgment on the permissible conclusions to be drawn from the testimony.[102]

Justice Scalia also took issue with the majority's reliance on the identification of three justifications that it claimed the jury *must* have rejected in order to have concluded that the paper acted with the requisite actual malice. In his view, even rejection of one of the three justifications

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96. *Id.* at 688.

97. *Id.* at 690.

98. *Id.* at 690. The Court concluded that the jury must have rejected the newspaper employees' testimony that: (1) they didn't talk to the other sister because Connaughton failed to place them in touch with her; (2) the taped interview was not listened to because they believed it would provide no new information; and (3) they believed the allegations against Connaughton were substantially true. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989). The Supreme Court noted—as did the court of appeals—that there was evidence in the record that would have supported either the conclusion that the sister or the judicial candidate was lying. *Id.* at 681.

99. *Harte-Hanks Communications,* 491 U.S. at 690-91.

100. *Id.* at 697 (Scalia, J., concurring).

101. *Id.* at 698. Justice White, in a concurring opinion joined by Justice Rehnquist, repeated his position taken in *Bose* that the trial court's findings of historical fact, including the knowing falsehood component of the actual malice rule, were reviewable only under the clearly erroneous standard. *Id.* at 694 (White, J., concurring). Justice White found this view consistent with the views of Justice Scalia. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 694 (1989). Justice Kennedy, in a concurring opinion, also endorsed the analysis of Justice Scalia. *Id.* at 696 (Kennedy, J., concurring).

102. *Id.* at 696.

would have provided a sufficient basis for clear and convincing proof of actual malice. Justice Scalia endorsed the Sixth Circuit's analysis in its entirety and said he would limit reviewing courts' independent assessment to whether actual malice was clearly and convincingly proved. The limitation would be based on the assumption that the jury had made all the supportive findings for the plaintiff reasonably possible.[103]

Justice Scalia identified the "nub of the conflict," which he recognized as being "of overwhelming importance in libel actions by public figures,"[104] as whether

> the trial judge and reviewing courts must make their own "independent" assessment of the facts allegedly establishing malice; or rather . . . that they must merely make their own "independent" assessment that, *assuming all of the facts that could reasonably be found in favor of the plaintiff were found in favor of the plaintiff*, clear and convincing proof of malice was established.[105]

While the *Harte-Hanks* decision makes clear that lower court findings of fact anchored in credibility determinations must be accepted unless clearly erroneous, many questions remain as to the proper scope of review of trial verdicts. It appears that the resolution of basic historical facts in dispute that are anchored in credibility determinations are for the jury as long as such conclusions are not clearly erroneous. For example, if a defendant reporter claims to have interviewed the plaintiff extensively, and the plaintiff claims never to have talked to the reporter, it is up to the jury to decide who is telling the truth.

But, as the Court acknowledged in *Bose*, discredited testimony is not a sufficient basis for drawing a contrary conclusion of knowing falsehood.[106] What is unclear is what level of discretion appellate courts have in weighing the evidence once the jury has made factual findings based on credibility. Also unclear is whether the jury's inferences drawn from facts anchored in credibility determinations are subject to vigorous de novo review or whether they must be accepted, cumulated, and only then compared to the actual malice standard.[107] The decision in *Harte-Hanks*

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103. *Id.* at 699.

104. *Id.* at 697.

105. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 697 (1989).

106. *Bose*, 466 U.S. at 512. *See* Moore v. Chesapeake & Ohio R. Co., 340 U.S. 573, 576 (1951) (discredited testimony is not a sufficient basis for drawing a contrary conclusion of knowing falsehood). Inconsistent testimony, however, may be probative of actual malice. *See* Masson v. New Yorker Magazine, 18 Media L. Rep. (BNA) 2241, 2252 (1991).

107. *See* Anderson, *supra* note 17, at 495 n.22.

was made easier by the existence of strong, uncontroverted evidence probative of actual malice. With the jury having rejected credibility-based testimony supporting the newspaper's case, the Court turned to several "critical" pieces of uncontroverted evidence that strongly supported the inference of actual malice:[108] the newspaper had not interviewed the most important source despite denials by six witnesses about the allegations against Connaughton; the newspaper had not listened to the tape of the interview despite its obvious news value; and the newspaper witnesses gave significantly discrepant testimony about how the newspaper went about preparing the story.

E. Independent Review Following Harte-Hanks

Striking the proper balance over the scope of independent review has continued to present "a daunting task"[109] to federal and state appellate courts, even after the United States Supreme Court's decision in *Harte-Hanks*. For example, in *Newton v. NBC*,[110] the Ninth Circuit reversed a $5.3 million jury award. The court concluded that *Bose* and *Harte-Hanks* had created a "credibility exception" to the *Sullivan* rule of independent review.[111] It constructed a two-tier approach to the review process, applying different degrees of deference to various jury findings. Presumptions of correctness about findings of fact that turn on credibility carry "maximum force," while the presumption applies with less force "when a factfinder's findings rely on its weighing of evidence and drawing of inferences."[112]

Even though the Ninth Circuit's decision in *Newton* contains language acknowledging its responsibility to defer to the jury's credibility findings, the panel seems uncomfortable with the task of reconciling respect for the jury's factfinding with its role in protecting First Amendment values. The panel expressed concern that the jury was biased in its verdict in favor of the local hero and warned that "we cannot ignore the risk that a jury's credibility determinations may also subvert those [First Amendment] values."[113] The court undertook an extensive recitation and review of the testimonial evidence and even singled out certain credibility

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108. *Harte-Hanks*, 491 U.S. at 682-83.
109. Newton v. NBC, 930 F.2d 662, 672 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991).
110. *Id.* at 687.
111. *Id.* at 671.
112. *Id.* at 670-71.
113. *Id.* at 672.

determinations to which it was not willing to defer.[114] On balance, the independent review in the *Newton* case was decidedly broad.[115]

A strikingly different view of the independent review issue in the wake of *Harte-Hanks* is presented by the Kentucky Supreme Court in *Ball v. E.W. Scripps Co.*[116] In *Ball*, the court reinstated a $175,000 jury verdict against *The Kentucky Post* in favor of a local prosecutor. In assessing the proper standard of independent review, the Kentucky Supreme Court noted that it was not absolutely clear that the *Harte-Hanks* decision embraced the view that a reviewing court should defer to all subsidiary facts that the jury could have found. Nevertheless, it embraced Justice Scalia's opinion in the case and concluded that the *Harte-Hanks* decision was either completely co-extensive with the Sixth Circuit's extremely narrow approach, or nearly so.[117]

The proper scope of independent review following *Harte-Hanks* was also a central issue in *Bressler v. Fortune Magazine*,[118] where the Sixth Circuit Court of Appeals, by a 2 to 1 vote, reversed a federal district court jury's $550,000 award against *Fortune* magazine. In her dissenting opinion, Judge Batchelder assailed the majority for failing to accord the proper deference to the jury's credibility determinations:

> Because there is in the record evidence that creates a genuine factual issue as to what the reporters' subjective beliefs were, the majority finds that the judgment cannot stand. But the test is not whether there is evidence in the record which puts the facts regarding the reporters' state of mind into genuine issue, nor is the test whether there is evidence which, if believed, would show that the reporters acted in good faith. The test is whether the jury, in believing some of the testimony and in rejecting other testimony was clearly erroneous, and if it was

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114. *Newton*, 930 F.2d at 683. Noting that the credibility of a journalist's source should be a separate inquiry from the credibility of the journalist himself, the panel refused to accept the jury's apparent finding that the journalists' explanations for not including a source's information in a news story were not credible simply because the jury had found the source to be credible when the journalists had not. *Id.*

115. For a discussion of the Newton case, *see Newton v. National Broadcasting Co., Inc.: Evidence of Actual Malice, the Editorial Process and the Mafia in Public Figure Defamation Law*, 22 GOLDEN GATE U. L. REV. 235, 248 (1992). ("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.").

116. 801 S.W.2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991).

117. *Id.* at 689.

118. 971 F.2d 1226 (6th Cir. 1992).

> not, whether there is sufficient evidence in the record clearly and convincingly to establish actual malice . . . . Where the record contains such evidence, to overturn the jury's finding of actual malice because there is also evidence to the contrary, without regard to the jury's right to disbelieve that contrary evidence unless it was clearly erroneous in doing so, is, in effect, to hold that the jury may not find actual malice unless there is no evidence in the record which, if believed, would support a finding of good faith. That is not the law.[119]

IV. CONCLUSION

There is at present no consistent application of independent review procedures by either federal or state courts in libel cases. Courts seem wary of directly confronting the issue. When the issue is addressed, there is often considerable disagreement about the appropriate method of analysis. Further clarification by the Supreme Court is necessary.

Overall, it seems that most appellate courts have applied a broader view of independent review, sometimes under the guise of deference to lower court findings. As Smolla pointed out about the *Tavoulareas* case:

> The court was deferential only with regard to basic preliminary facts, and only with regard to purely factual inferences—inferences, for example, as to what particular actions or statements establish concerning basic motives. The court refused, however, to give any deference to the mixed factual and legal inferences that could be drawn from these facts.[120]

The Ninth Circuit in the *Newton* case did essentially the same thing. While it acknowledged that the "credibility exception" in *Harte-Hanks* applies with maximum force, it also emphasized that a jury's finding that a journalist's sources were not credible must be interpreted in terms of the credibility that the journalist bestowed—correctly or incorrectly—on those sources. On factual issues not involving witness credibility—weighing evidence and drawing inferences—the Ninth Circuit extended far less deference. Other courts have taken a significantly narrower view.

The *Harte-Hanks* decision provided little additional guidance on the parameters of independent review. Credibility determinations can be reversed only if they are clearly erroneous, but issues about weighing the

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119. *Id.* at 1256 (Batchelder, J., dissenting).

120. SMOLLA, *supra* note 5, § 12.09[4] at 12-49.

evidence and drawing inferences were not clearly addressed. While *Harte-Hanks* makes clear that factual conclusions anchored in credibility determinations must be accepted unless clearly erroneous, a finding that a defendant's explanations are not credible falls far short of the necessary proof of actual malice. It also remains unclear whether the Constitution requires independent review of all elements in a libel case, such as falsity, and whether the standard for independent review is different in a summary judgment or directed verdict context.[121]

A broader use of appellate review is preferable. The paramount goal of independent review is to ensure that cases are correctly decided so that constitutional values remain protected. This is clearly the course charted by the Supreme Court in *Sullivan* and *Bose*. As one commentator has suggested:

> [I]t is difficult to argue that actual malice requires judges and juries to search out and punish journalistic malpractice. Rather, *Bose*, like [*Sullivan*], suggests that actual malice has less to do with factual issues of credibility and subjective intent than with identifying a legally mandated category of expression—knowing or reckless falsehood—unworthy of constitutional protection. Although factual findings are certainly not irrelevant to the actual malice determination, *Bose* reestablishes its essentially judgmental, and hence judicial, quality.[122]

The determination of actual malice is more of a law application function than a state of mind fact identification. Although the Court's decision in *Bose* has been criticized by Monoghan for charging appellate courts with an absolute "duty" to perform review, he correctly interpreted the Court's mandate:

> An appellate court cannot content itself with accepting the results of a "reasonable" application of admittedly correct legal norms to the historical facts. The court's responsibility is to scrutinize the record and marshall the evidence to see if it yields the characterization put on it by the court below.[123]

This is not to say that juries are superfluous to libel litigation. The actual malice standard, in addition to being an ultimate issue of constitutional fact, requires an assessment of the defendant's state of mind, which

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121. The Court in *Harte-Hanks* did not address the issue of independent review of the falsity. For a discussion of independent review of summary judgment, see Levine, *supra* note 14, at 76.

122. Levine, *supra* note 14, at 37.

123. Monaghan, *supra* note 7, at 242.

is often drawn from circumstantial evidence interpreted from testimony. But the fundamental lesson of the *Sullivan* case is that libel litigation is distinct from ordinary civil litigation because of the precious constitutional liberties involved. Resolution of the independent review issue should begin by recognizing that "[t]he Constitution may be just as easily subverted by manipulation of the 'preliminary' facts in the record as by manipulation of the ultimate conclusions."[124] Such concerns should be considered by the Supreme Court in clarifying the proper scope of review. By striking the proper balance, the Court can suitably preserve the First Amendment values involved in libel litigation.

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124. SMOLLA, *supra* note 5, § 12.09[4] at 12-52 (emphasis omitted).