Washington Law Review

Volume 60 | Number 2

4-1-1985

Can Civil Rule 52(a) Peacefully Co-Exist with Independent Review in Actual Malice Cases? Bose Corp. v. Consumers Union, 104 S. Ct. 1949 (1984)

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CAN CIVIL RULE 52(a) PEACEFULLY CO-EXIST WITH INDEPENDENT REVIEW IN ACTUAL MALICE CASES?—*Bose Corp v. Consumers Union,* 104 S. Ct. 1949 (1984).

In *Bose Corp. v. Consumers Union,*[1] the United States Supreme Court addressed the role of Civil Rule 52(a)[2] in the context of a libel case. Rule 52(a) requires reviewing courts to leave undisturbed a district court's findings of fact unless clearly erroneous.[3] The Supreme Court, however, has developed two rules in response to first amendment guarantees of both free speech and an uncensored media[4] that complicate the application of Rule 52(a) in libel cases. First, the Supreme Court has demanded that each reviewing court conduct an independent review of the record[5] to ensure that libel verdicts are limited to injurious statements not protected by the first amendment.[6] Second, in media libel cases, the Court requires plaintiffs to prove "actual malice" to recover for defamation.[7] Prior to *Bose,* the Court in dicta had termed actual malice a fact determination.[8] The question in

1. 104 S. Ct. 1949 (1984).

2. FED. R. CIV. P. 52(a).

3. *See infra* text accompanying notes 25–31.

4. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

5. For a case applying independent review in the libel context, see New York Times v. Sullivan, 376 U.S. 254, 284–86, (1964). *See also* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970); St. Amant v. Thompson, 390 U.S. 727, 732–33 (1968). *See generally* Pennekamp v. Florida, 328 U.S. 331 (1946); Baumgartner v. United States, 322 U.S. 665 (1944); Fiske v. Kansas, 274 U.S. 380 (1927).

6. *See infra* text accompanying notes 33–40.

7. For a discussion of the development of defamation law and the Supreme Court's recent interjection of first amendment considerations, see R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS (1980); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349 (1975); LeBel, *Defamation and the First Amendment: The End of the Affair,* 25 WM. & MARY L. REV. 779 (1984); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976); Schaefer, *Defamation and the First Amendment,* 52 U. COLO. L. REV. 1 (1980); Van Vechten Veeder, *History and Theory of the Law of Defamation,* 3 COLUM. L. REV. 546 (1903); Wade, *Recent Developments in Tort Law and the Federal Courts,* 72 KY. L.J. 1, 15–23 (1983–84).

The question of the analytical approach the Supreme Court should take toward libel cases is beyond the scope of this Note. Among the many works on the issue are Denvir, *Justice Rehnquist and Constitutional Interpretation,* 34 HASTINGS L.J. 1011 (1983); Griswold, *Absolute Is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions,* 8 UTAH L. REV. 167 (1963); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication,* 27 U. CHI. L. REV. 661 (1960); Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113 (1981); Rudolph & Rudolph, *The Limits of Judicial Review in Constitutional Adjudication,* 63 NEB. L. REV. 84 (1983); Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role,* 97 HARV. L. REV. 433 (1983); *Symposium: Constitutional Adjudication and Democratic Theory,* 56 N.Y.U. L. REV. 259 (1981).

8. Herbert v. Lando, 441 U.S. 153, 170 (1979); *see infra* text accompanying notes 41–43.

Bose was the degree of deference the Court should accord the actual malice determination by the district court under Rule 52(a).[9]

In answering this question, the Court's opinion covered numerous constitutional and procedural topics. The inclusion of this range of ideas resulted in an ambiguous holding. The Court clearly held that Rule 52(a) does not categorically prohibit independent review of constitutional questions solely because those questions involve findings of fact traditionally left to the district court.[10] Beyond that threshold determination, however, the clarity of *Bose* fades. The Court failed to provide clear direction as to whether independent review and appellate court judgment entirely supplant Rule 52(a) and district court judgment on the question of actual malice, or instead whether the legal nature of the elements of actual malice renders the issue beyond the scope of Rule 52(a).

A further issue remains puzzling after *Bose*. The Supreme Court, having disposed of the Rule 52(a) procedural question, addressed the substantive issue of actual malice under the facts of the case. The Court introduced a new concept, which may be termed "imprecise language."[11] The Court seemed to state that where imprecise language leads to defamatory results, the state of mind of the defendant will not, as a matter of law, be subject to examination.

This Note examines *Bose* to determine whether the Court intended to totally reject Rule 52(a) as completely inapplicable in determinations of actual malice. It concludes that independent review should not replace Rule 52(a) in actual malice cases but rather should serve a separate function to ensure that the reasoning of district courts complies with constitutional legal principles.[12] The Note further suggests that *Bose* created a new rule of law protecting the media from suit where defendants have simply used "imprecise language" in reporting.

In addition, because of the ambiguitites in the Court's opinion, the case can support not only the interpretation favored here but also an interpretation that rejects the application of Rule 52(a) to actual malice findings. This Note argues that the latter interpretation should be rejected on policy grounds. Among the possible results of this interpretation are greater numbers of libel cases in an already overcrowded court system, and a

9. *See generally* Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?* 59 WASH. U.L.Q. 409 (1981).

10. *Bose*, 104 S. Ct. at 1967.

11. The Supreme Court in *Bose* did not use the exact term "imprecise language" in its opinion. This phrase, which the appeals court did use, Bose Corp. v. Consumers Union, 692 F.2d 189, 197 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984), does, however, aptly fit the high court's discussion of the substantive issue. *See Bose*, 104 S. Ct. at 1966.

12. *See infra* text accompanying notes 66–78.

weakened respect for district court judges. Further, the latter interpretation should be discarded clearly and quickly because the co-existence of two plausible interpretations of the case will result in confusion among members of the media and private citizens with libel claims.

I. BACKGROUND

A. Libel and the First Amendment: The Requirement of Actual Malice

The law of libel evolved to protect reputation from the damage of harmful false statements. It grew in an uncontrolled fashion, often yielding difficult and notoriously inconsistent court decisions.[13] As a result, state courts attempted various reforms, but little had been achieved by 1964.[14] The Supreme Court had not participated in these attempts to untangle libel law because, until 1964, it found no constitutional grounds for protecting the rights of media defendants for libelous statements.[15] In the landmark decision of *New York Times v. Sullivan,*[16] however, the Court declared that the first amendment right to free speech and the public's need for open debate could, after all, protect even defamatory statements by the media against public officials.[17]

Under common law defamation, an injured plaintiff could generally prevail against the media by proving that a statement was false and damaging to reputation.[18] The *New York Times* Court ruled that an injured public official could recover only by proving that the statement also was made with actual malice. The Court defined actual malice as knowledge that the statement was false, or reckless disregard as to whether the statement was false.[19]

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13. *See* W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771–73 (5th ed. 1984) (much of the law of defamation contains anomalies and absurdities).

14. *See* Eaton, *supra* note 7, at 1350–51.

15. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

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

17. *Id.* at 292. Later case law enlarged the category to include a variety of public figures. *See* R. SACK, *supra* note 7, at 2–34, 189–209, 227–35.

18. Courts have consistently omitted statements of opinion from susceptibility to defamation suits. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974). *See* Note, *Fact and Opinion After* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege,* 34 RUTGERS L. REV. 81 (1981).

19. *New York Times,* 376 U.S. at 279–80. The Supreme Court borrowed the phrase actual malice from common law as shorthand for the subjective state of mind required to establish defamation. The Court intended to give the words a fresh meaning. *See* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251–52 (1974). Instead, despite the Court's repeated efforts to educate the judicial and lay world, the great weight of previous meanings and traditions trailed along. Courts continued to equate spite and ill will with actual malice. *See* Eaton, *supra* note 7, at 1370–75.

The more cumbersome and now widely quoted "knowledge or reckless disregard for the truth"

The "knowledge" portion of the *New York Times* actual malice definition received little attention until *Time, Inc. v. Pape*.[20] In *Pape*, the Court recognized that awareness of objective facts, which is "knowledge" in its everyday sense, does not always amount to constitutional "knowledge." The *Pape* case involved a magazine article that described a government report recounting incidents of police brutality. The authors and editors admitted that they consciously omitted the word "alleged," which had been included in the government report on the incidents.[21] This made the account of the report technically false. Under traditional actual malice reasoning, the magazine staff had published a defamatory article because it "knew" that it had omitted the word "alleged," an omission that made the article false.[22]

The magazine staff testified, however, that they believed the overall meaning of the article to be accurate. The Court concluded that the authors simply misinterpreted the government report and that its interpretation was plausible.[23] The Court indicated that the press must be free to attempt such interpretations without fear of reprisal. It refused to permit the question of the staff's belief in the accuracy of the report to be sent a jury, declaring that if the staff's belief was reasonable, the magazine was immune from attack as a matter of law.[24]

B. Civil Rule 52(a) and Independent Review

Rule 52(a) provides in part that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[25] A reviewing

formula, although much nearer to the idea the Court initially sought, brought a second tradition-laden touchstone to the concept of actual malice: reckless disregard. This second concept, borrowed from negligence terminology, is proving just as irksome to the Court as the "actual malice" problem. It carries unshakable notions of the reasonable man standard and the defendant's deviation from it. Scholars have advocated such an objective interpretation of the standard, but the Supreme Court has not retreated from its decision to make malice a subjective determination. *See* Kalur, *Exploration of the "Outer Limits": The Misdirected Evolution of Reckless Disregard*, 61 DEN. L.J. 43, 64 (1983).

20. 401 U.S. 279 (1971).

21. *Id.* at 285.

22. *See* court of appeals reasoning, recited in *Pape, id.* at 285.

23. *Id.* at 291–92. The Court declined to call *Time's* failure to retain the word "alleged" a sufficient falsification to allow a finding of actual malice. *Compare New York Times*, 376 U.S. 254 (the *New York Times* Court noted that error is inevitable in the course of free debate and should be protected).

24. 401 U.S. at 291–92.

25. FED. R. CIV. P. 52(a). For Supreme Court interpretations of Rule 52(a), see Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855–56 (1982); Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); United States v. United States Gypsum Co., 333 U.S. 364, 394–96 (1948). The deference to the district court judge through the "clearly erroneous" standard of Rule 52(a) was a compromise among members of the Advisory Committee on Civil Rules of Procedure, as explained in *United States Gypsum*, 333 U.S. at 395 (referring to H.R. DOC. NO. 588, 75th Cong., 3rd Sess. (1937)).

court may reverse a district court if no substantial evidence in the record supports an essential finding of fact, or if the lower court applied an improper legal standard to a finding of fact to arrive at a conclusion of law.[26] An appellate court will rarely set aside a finding of fact based on the trial judge's evaluation of testimony because the trustworthiness of the witness and other subtle inferences drawn from live testimony cannot be recorded on paper.[27]

Rule 52(a) serves four primary purposes. First, it encourages a trial court to state findings of fact clearly and separately so that appellate courts will understand the factual basis of the trial court's decision.[28] Second, it crystallizes issues for purposes of estoppel and res judicata.[29] Third, by requiring the district court to commit its reasoning to paper, Rule 52(a) prompts the trial court to carefully examine its facts and conclusions.[30] A fourth, less-often articulated but generally accepted function of the Rule is to promote judicial economy.[31] The appellate courts will not repeat the fact-finding exercise carried out in the district court.

In theory, the application of Rule 52(a) is straightforward. However, the concepts of findings of fact and conclusions of law are mere labels invented by the legal profession to describe the results of precedent. In an individual case, issues frequently defy categorization as pure fact or pure law. This is especially true where rulings are not based upon one-step conclusions, but require a process of combining several facts to reach a more complex fact inference. Rule 52(a) does not apply to errors of law, mixed findings of fact and law, and findings of fact predicated on a misunderstanding of the law.[32]

Before the merger of law and equity actions, the Supreme Court entirely barred review of facts in actions at law where federal judges sat without juries, as is the case under the seventh amendment in jury trials. On the other hand, the equity rule allowed review. After some debate, the Advisory Committee adopted the equity policy for Rule 52(a). *Id.* Despite the seventh amendment provision, the Supreme Court had ruled before *Bose* that even jury findings are not insulated from independent review in constitutional cases. *See, e.g.*, Miller v. California, 413 U.S. 15, 25 (1973) (obscenity case). It is therefore not surprising that the Court would hold district court findings subject to independent review.

26. *See Inwood Laboratories*, 456 U.S. at 857 ("An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might . . . resolve the ambiguities differently . . . .'") (quoting United States v. Real Estate Bds., 339 U.S. 485, 495 (1950)); *see also United States Gypsum*, 333 U.S. at 395.

27. *See* Baumgartner v. United States, 322 U.S. 665, 670 (1944).

28. *See* Lemelson v. Kellogg Co., 440 F.2d 986, 988 (2d Cir. 1971).

29. *See* FED. R. CIV. P. 52(a) advisory committee note to 1946 amendment of Rule 52(a), *reprinted in* 5 F.R.D. 433, 471 (1946).

30. *Lemelson*, 440 F.2d at 988.

31. Interview with Cornelius J. Peck, Professor of Law, University of Washington School of Law, in Seattle, Washington (Dec. 22, 1984).

32. Justice Frank in National Labor Relations Bd. v. Universal Camera, 190 F.2d 429 (2d Cir. 1951), described such complex inferences obtained by reasoning from established events as secondary inferences. He explained that an appeals court may make secondary inferences as legitimately as a trial

These are points at which Rule 52(a) and independent review may conflict.

Prior to *Bose*, the Supreme Court had not directly addressed the role of Rule 52(a) in the first amendment context. In first amendment cases, a reviewing court has an absolute duty to examine the whole record.[33] This complete examination extends to findings of fact as well as conclusions of law. Its purpose is to ensure that trial courts base their findings and conclusions upon legal principles that are consistent with the Constitution.[34]

The Supreme Court has established this duty to conduct an independent review for two reasons. First, the Court fears that the content of outrageous but protected speech will sway triers of fact to such a degree that bias will block legal perception.[35] The result of this bias could be findings of fact that do not conform to legal guidelines. The Court, therefore, needs the power to review the record as a safeguard against this bias.[36]

A second reason for independent review is that it provides a mechanism to expand constitutional definitions. The Court is compelled to examine the whole record because it has not yet clearly drawn the line between all areas of protected and unprotected speech.[37] Some categories of speech are not protected because they are not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may

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court. Inferences based on direct observation, however, Justice Frank called primary inferences. Primary inferences were to remain the exclusive domain of trial courts. *Id.* at 432 (Frank, J., concurring). For a summary of the confusion surrounding the fact-law distinction, see Note, *The Applicability of the Constitutional Privilege to Defame: Question of Law or Question of Fact?*, 55 IND. L.J. 389 (1980). The Court's failure to define clearly the nature of actual malice as a question of fact or law compounded the confusion in *Bose*. While actual malice has been termed a finding of ultimate fact, Herbert v. Lando, 441 U.S. 153, 170 (1979), in *Bose* the Court appeared unwilling to give unqualified confirmation to that label. 104 S. Ct. at 1958.

33. Under Rule 52(a), an appellate court has always been free to examine all of the evidence in the record. *United States Gypsum Co.*, 333 U.S. at 395. Thus there is no need for the special term "independent review" to describe such access. When the Supreme Court grants reviewing courts complete access to the record, however, it is not necessarily a grant of the power to decide facts de novo. The potential conflict arises because it is often difficult to tell whether an issue has been decided on a factual or legal basis.

34. *New York Times*, 376 U.S. at 285; *see also* Baumgartner v. United States, 322 U.S. 665 (1944). In *Baumgartner*, the Court noted that determining the scope of review by calling the issue one of fact or law "is often not an illuminating test." 322 U.S. at 671. The Court declared the proof standard in a denaturalization case to be too important to completely defer to the lower court's characterization of the issue as fact or law. *Id; see also* Fiske v. Kansas, 274 U.S. 380 (1927). The *Fiske* Court reviewed a state court decision in which a state statute prohibited "criminal syndicalism." The Court noted its power to review the record, pointing to two situations where it possessed such a right. First, review is proper where the record does not support the denial of a federal right. The second situation allowing review is where conclusions of law and findings of fact are intermingled. *Id.* at 385–86.

35. Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

36. *See generally* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

37. *New York Times*, 376 U.S. at 285; *see also* City of New York v. Ferber, 458 U.S. 747 (1982) (example of the line-drawing exercise in the obscenity area).

be derived from them is clearly outweighed by the social interest in order and morality."[38] Libel, fighting words, and obscenity are the three primary categories of speech the Court has refused to protect.[39] The Court has been reluctant to relegate individual instances of expression to these unprotected categories in a wholesale manner.[40]

The Supreme Court announced, in *New York Times*, that actual malice determinations would be subject to independent review.[41] However, the exact nature of this constitutionally mandated actual malice requirement remained elusive. Invented as a device to protect first amendment rights, it seemed to encompass a legal concept.[42] Yet, evaluated as a state of mind, it seemed to describe a determination of fact.[43] The Supreme Court has never fully and directly addressed the question of the label to be applied to the term.

II. THE FACTS OF *BOSE*

In 1970 the magazine *Consumer Reports* published an article that evaluated the quality of various loudspeaker systems.[44] The author of the article expressed the view that Bose 901 loudspeakers caused instrumental sound to wander "about the room." In reality, the sound wandered "along the wall." The district court held that the author published this false statement with actual malice.[45]

Because actual malice is a state of mind,[46] the district court, in reaching its actual malice determination, relied on an inference that the author knew his words were false. It derived this inference from a number of objective

38. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

39. Miller v. California, 413 U.S. 15, 25 (1973) (obscenity); Street v. New York, 394 U.S. 576, 592 (1969) (fighting words); New York Times v. Sullivan, 376 U.S. at 285 (libel).

40. The history of the obscenity cases supports this conclusion. *See generally* Note, *The Scope of Supreme Court Review in Obscenity Cases*, 1965 DUKE L.J. 596 (1965).

41. *New York Times*, 376 U.S. 254.

42. *Id.* at 283; *see supra* text accompanying notes 33–40.

43. *See supra* text accompanying notes 25–31.

44. Seligsen, *Loudspeakers*, Consumer Rep., May 1970, at 272–79.

45. Bose Corp. v. Consumers Union, 508 F. Supp. 1249 (D. Mass. 981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984). The district court rejected Bose's claim that the article misled its audience by calling the loudspeaker evaluators a panel, by referring to sound quality tests as if objective measurements had been taken when none were performed, and by including a warning concerning the power requirements of the 901 system that also was subject to misinterpretation. The court additionally ruled that the magazine's description of sound growing to gigantic proportions was not defamatory because a reasonable reader would not take it literally. *Id.* at 1261–67.

46. The Supreme Court has borrowed varying terminology from the province of negligence to describe this state of mind, terminology that customarily connotes an objective standard. *See supra* note 19. The test, however, as St. Amant v. Thompson, 390 U.S. 727 (1968), makes clear, is purely subjective. *See infra* note 68.

facts: the normal perception of loudspeaker sound movement is along the wall between the speakers; the author also perceived that the sound moved along the wall; the words "about the room" do not and could not mean "along the wall" to anyone of ordinary intelligence; and most readers would react negatively to the unexpected information that sound wandered "about the room" rather than "along the wall."[47]

The district court found that "around the room" does not mean "along the wall" to the general populace. It therefore rejected the author's testimony that the two phrases were equivalent to him.[48] The district court accepted two motives for the use of the phrase "about the room": the magazine's built-in bias against expensive systems and its penchant for sarcasm and spite as circulation builders.[49]

The First Circuit Court of Appeals reversed upon an analysis of the magazine's editorial process. It concluded that the only additional step the *Consumers Reports* staff might have taken to prevent the use of the erroneous term would have been a more painstaking inquiry into the precise language used in the article.[50] Asserting a right to independent review,[51] the court found no showing of reckless disregard in the editorial processes that preceded publication. It concluded, therefore, that Bose had produced insufficient evidence to meet the "clear and convincing" standard of proof required to prove actual malice.[52]

In a two part analysis, the Supreme Court affirmed the court of appeals.[53]

47. Bose Corp. v. Consumers Union, 508 F. Supp. 1249, 1276–77 (1981).

48. *Id.* at 1277.

49. *Id.* at 1275–76.

50. Bose Corp. v. Consumers Union, 692 F.2d 189, 197 (1st. Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984).

51. *Id.* at 195.

52. *Id.* at 196–97. The First Circuit centered its analysis exclusively on the magazine's editorial process and reckless disregard, without focusing on the author's state of mind and knowledge. After announcing its power of independent review, the court exercised the power in a fruitless search for evidence that the magazine staff had been derelict in their editorial duties. The court presented a helpful explanation of the type of evidence required to supply an inference of actual malice; objective facts providing evidence of "negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." *Id.* at 196.

53. The Court based its decision on several rulings made by the district court and not raised on appeal. The district court devoted a large part of its opinion to determinations that (1) the creation of false impressions is not disparaging, Bose Corp. v. Consumers, 508 F. Supp. 1249, 1260–62 (1981); (2) a product disparagement claim merits inclusion under the *New York Times* actual malice protective shield, *id.* at 1271; and (3) a corporation is a public figure under *Gertz*, *id.* at 1274. The district court, in ruling on the defendant's motion for summary judgment, held that the disparaging statements were statements of fact rather than opinion. *Bose*, 104 S. Ct. at 1954 n.4. Statements of opinion are clearly protected by the first amendment. *See Gertz*, 418 U.S. at 339–40 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

The court of appeals expressed doubt about the factual nature of the statement "about the room" but

First, the Court held that Rule 52(a) did not prescribe the standard of review to be applied in the case.[54] The constitutional dimensions of the actual malice question required independent review.[55]

The Supreme Court then examined the district court record afresh. The district court had concluded that the author knew the words he used did not accurately describe the effects he had heard. The Supreme Court arrived at a different inference based on the record; the author had only chosen language less precise than he might have. The Court held that, as a matter of law, Bose failed to produce clear and convincing evidence of the presence of actual malice in the mind of the author.[56]

Unlike the court of appeals, which had focused on whether the magazine staff acted with "reckless disregard," the high court evaluated the author's knowledge of falsity. The Court accepted the district court's finding that the author's perception that the sound moved "along the wall," not "about the room." It also accepted that no intelligent person would interpret the words "about the room" to mean "along the wall"; that the author was intelligent; and that the author's testimony was not credible.[57] The Court, nevertheless, concluded that the author simply made a mistake when he wrote the article and then rationalized in court to avoid admitting it.[58]

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assumed it was both factual and false. It also assumed that Bose was a public figure, and that *New York Times* applied. *Bose*, 692 F.2d at 194. The Supreme Court declined to directly address these issues, though it echoed the concern of the court of appeals that the statements at issue were difficult to discern from opinions. It noted that its legal analysis seemed "out of place in a case involving a dispute about the sound quality of a loudspeaker." *Bose*, 104 S. Ct. at 1967. For comments on the product disparagement aspect of the case, see Note, Bose Corporation v. Consumers Union of the United States, Inc: *Extending the New York Times Privilege to Product Disparagement*, 44 U. PITT. L. REV. 1039 (1983). The Court may have tangentially addressed the opinion question in allowing imprecise language to be protected under the Constitution. The imprecise language question, however, includes factual statements. *See infra* text accompanying note 83.

54. *Bose*, 104 S. Ct. at 1959. The *Bose* Court, in reaching this holding, indicated its awareness of the blurry line between fact and law. Justice Stevens observed that where a court depends on new fact situations to fill in the details of a legal definition, this fact-law blur becomes even more exaggerated. *Bose*, 104 S. Ct. at 1959–60; *see supra* text accompanying note 30.

The Court also took a bold step regarding a longstanding dispute over the nature of the evidence evaluated under Rule 52(a). The Court acknowledged that it is more appropriate for reviewing courts to examine some types of evidence than others. For example, the Court listed documentary evidence as appropriate for appellate review. *Id.* at 1959–60. Yet some authorities advocate according the same weight to findings concerning neutral, objective evidence as to findings based on courtroom testimony. In the past, these authorities have relied on United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948). The *Bose* opinion, however, now admits considerable flexibility within Rule 52(a). *See supra* text accompanying notes 35–36.

55. *Id.* at 1967.

56. *Id.* at 1965–67.

57. *Id.*

58. *Id.* at 1966.

The Court cited authority for the proposition that rejection of a witness' testimony is not a sufficient basis for drawing a contrary inference.[59] It was not enough that the district court did not believe the author's testimony. The court was not free to infer that the author must have had the requisite intent for actual malice. The Court, relying on the first amendment, decided that the author could not be penalized for what it characterized as a mistake of imprecise language. It noted that such mistakes are inevitable in the free flow of words and ideas.

Justice Rehnquist, joined by Justice O'Connor, dissented, accusing the majority of substituting its own finding of fact for that of the district court.[60] Justice White dissented separately but agreed with Justice Rehnquist that actual malice is a question of fact subject to the "clearly erroneous" standard.[61]

III. ANALYSIS: RULE 52(A) AND INDEPENDENT REVIEW—REVIEW STANDARDS IN CONFLICT?

The *Bose* Court held that Rule 52(a) does not define the line at which appellate courts must halt in their independent review of the actual malice question.[62] Justice Rehnquist, in his dissent, accused the Court of substituting its own inquiry into the author's state of mind for that of the district court. He called this finding of "mens rea" a pure finding of fact[63] falling squarely within the confines of Rule 52(a).[64]

59. The Court cited Moore v. Chesapeake & Ohio R.R. Co., 340 U.S. 573 (1951). The *Moore* case concerned an unexplained fall from a train by a brakeman. The plaintiff claimed that the train stopped suddenly, causing the brakeman to fall. No one but the engineer witnessed the mishap. He testified that as he leaned out the window to back up the train, he saw the signalling brakeman slump and fall from the last car. The engineer said that only then did he make an emergency stop. The Supreme Court refused to allow the jury to decide whether the engineer's version was true. The Court reasoned that even if the jury disbelieved the engineer, the plaintiff had produced no evidence to support an opposite conclusion. Two dissenters strongly objected. They insisted that the strong common sense inference to be drawn by the jury, if they failed to believe the engineer, would be that the train stopped first. They accused the majority of ignoring the obvious inference and substituting its view for the jury's. For similar dissenting views, see Hess v. Indiana, 414 U.S. 105, 109 (1973) (Rehnquist, J., dissenting), and Time, Inc. v. Pape, 401 U.S. 279, 293 (1971) (Harlan, J., dissenting).

60. *Bose*, 104 S. Ct. at 1968–69. The language of the majority opinion fosters this interpretation in its observation, inserted almost parenthetically, that the district court's finding of actual malice might have been set aside under Rule 52(a). "It may well be that in this case, the 'finding' of the District Court on the actual malice question could have been set aside under the clearly erroneous standard of review . . . ." *Id.* at 1967. Rather than relying on Rule 52(a), however, the Court chose to reaffirm the independent review standard. *Id.*

61. *Id.* at 1967 (White, J., dissenting).

62. Curiously, the Court failed to identify which of the many aspects of constitutional and procedural issues that it touched upon constituted the essential justifications for this holding. Without the Court's basic rationale, it is difficult to clearly discern the limits of the holding regarding Rule 52(a) and regarding its intentions as to imprecise language.

63. *Bose*, 104 S. Ct. at 1968–70 (Rehnquist, J., dissenting).

64. *See also* the discussion of awareness and the reasonable person standard in Franklin & Bussel,

Justice Rehnquist did not suggest a plausible justification on the part of the Court to accompany his assertion that the Court conducted a de novo fact determination concerning state of mind. The most logical explanation is that the constitutional importance of the actual malice question entirely supplants Rule 52(a) and gives the Court the right to re-decide each facet of the actual malice determination. The wide-ranging *Bose* opinion is broad enough to support Rehnquist's interpretation and the suggested justification.

The better interpretation of *Bose*, however, is that Rule 52(a) continues to apply to district court findings of actual malice on "pure" fact matters, including witness credibility. Yet because both factual and legal elements contribute to the determination of actual malice, appeals courts must review the entire record to verify the strength of the legal components used by the district court in shaping its decision.[65]

Based upon its examination of the record, the *Bose* Court articulated a new actual malice principle that required rejection of the district court's decision. The Court did not review the author's testimony to determine his state of mind; rather, it established that "imprecise language" forecloses such an exploration of state of mind as a matter of law.

A. Rule 52(a) Remains Viable

The *Bose* opinion will be interpreted by those favoring absolute freedom for the press as having rejected the Rule 52(a) standard of review for libel cases.[66] The Court apparently judged the credibility of the defendant author as part of its independent review. This helps substantiate the interpretation rejecting Rule 52(a). The district court had inferred that the author knew the import of his words when he wrote them. The district court found that his later testimony, in which he claimed that he did not realize a difference between the two phrases, was not credible. The Supreme Court stated that such an inference is precluded absent objective evidence.[67] Logically, the Supreme Court should have next examined the record for this objective

The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 WM. & MARY L. REV. 825, 838–42 (1984).

65. *Bose*, 104 S. Ct. at 1960–65. The Court proceeded from its general discussion of distinguishing fact from law immediately to consideration of actual malice as a "judge-made" rule of law particularly difficult to define and to apply even-handedly. The Court seemed to view actual malice, therefore, as falling into the category identified by the Court as prone to legal error.

66. *Id.* at 1965–67. This is Justice Rehnquist's interpretation as well. For a similar dissent by Justice Rehnquist, see Hess v. Indiana, 414 U.S. 105, 109 (1973) (per curiam) ("The Court's *per curiam* opinion rendered today aptly demonstrates the difficulties inherent in substituting a different complex of factual inferences for the inferences reached by the courts below.").

67. *Moore*, 340 U.S. at 575–77; *see supra* note 60.

evidence. It did not.[68] Rather than affirming that no inference could be drawn from the author's discredited testimony,[69] the Court substituted its own inference that the author was merely rationalizing his publication mistake. Yet it cited to no objective evidence in the record to support that inference.[70]

A plausible alternative explanation exists for this apparent de novo evaluation of the credibility of the author's testimony, however. The Court may not have relied on its allusion to rationalization, but instead concluded as a matter of law that the author's words on their face could not constitute defamation.[71]

The Court initially acknowledged that Rule 52(a) itself requires review of the entire record and therefore has never barred independent review.[72] Thus the Court began with the premise that Rule 52(a) and independent review need not be mutually exclusive. The Court also affirmed the requirement of Rule 52(a) that appeals courts respect the trial judge's opportunity to observe the demeanor of the witness, and called this requirement consistent with independent review.[73] Such language is entirely antithetical to the view that constitutional urgency preempts the district court's role altogether on the determination of actual malice.

Furthermore, the Court announced that in reaching its holding, it had accepted "all of the purely factual findings" of the district court.[74] If independent review had supplanted Rule 52(a) under the holding, the Supreme Court would have had no need to rely on findings of the district court.

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68. *Compare* St. Amant v. Thompson, 390 U.S. 727 (1968) *with* Bose Corp. v. Consumers Union, 104 S. Ct. 1949 (1984). In *St. Amant*, the Court recited the reasons given for the state court determination of reckless disregard and rejected them as falling short of the actual malice definition. *Id.* at 730. The *St. Amant* Court then culled the record for evidence in support of its holding. *Id.* at 732–33. Although the *Bose* Court noted the reasons given by the district court for its actual malice determination, the Court failed to further examine the record.

Moreover, the *St. Amant* Court helpfully suggested hypothetical situations in which the bad faith publication inference could be drawn. *Id.* at 732. In contrast, the *Bose* Court provided little guidance on the knowledge inference. See Pennecamp v. Florida, 328 U.S. 331, 345 (1946) for the historical view of intent as a fact determination.

69. *Contra Moore*, 340 U.S. 573; *see supra* note 59.

70. *Bose*, 104 S. Ct. at 1966.

71. *See supra* text accompanying notes 33–40. The fact that the Supreme Court reprinted much of the author's testimony contained in the district court's opinion does not require a contrary conclusion. This testimony demonstrated that the basis of the district court's decision was the imprecise nature of the words themselves. As discussed *infra* text accompanying notes 75–83, the Supreme Court intended to protect such imprecise language under the first amendment.

72. *Bose*, 104 S. Ct. at 1959.

73. *Id.*

74. *Id.* at 1967.

B. Imprecise Language: A New Rule of Law

The Court also carefully discussed the fact-law distinction, a distinction without relevance if independent review applies equally to all legal and factual matters.[75] It then explained that actual malice is the product of slowly evolving case law.[76] This provided the underpinnings for the Court's substantive examination of the *Bose* facts. The Court noted that a legal misstep may occur when the district court must make its determinations based solely on existing case law. This causes the most concern in cases presenting new fact patterns that the Supreme Court has not yet incorporated into its constitutional definitions. In *Pape,* after such a fact pattern examination, the Court removed "knowledge" which is part of the process of interpretation by the media from liability under the "knowledge" requirement of actual malice.[77] In *Bose,* again after studying a new fact pattern, the Court announced another legal "knowledge" exception for that aspect of "knowledge" constituting the translation of interpretation into publication.[78]

The *Bose* Court for the first time recognized that an author who mistakenly uses language that is not precise will be given constitutional protection as a matter of law, although it failed to label the concept. Both the appeals court and the *Bose* dissent used the term expressly.[79] Under its new constitutional facet of actual malice, the Supreme Court had no need to rely

75. *Id.* at 1959–60.

76. *Id.* at 1960–62.

77. *Pape,* 401 U.S. 279, 290–92 (1971).

78. *See infra* text accompanying notes 79–81. The Supreme Court might have remanded this case for a re-evaluation of the fact findings in light of the correct legal standard. Since the Court did not remand, it can be assumed no fact questions remained.

79. *Bose,* 104 S. Ct. at 1966–67. It is perhaps unfortunate that the Court merely described the concept without affixing the label to it, but in light of the difficulties the Court has encountered with the defamation label "actual malice," it is perhaps not surprising. *See supra* note 11.The Supreme Court focused on the precise moment the author applied pen to paper. At that moment he may not have brought all cognitive knowledge within his understanding to conscious use. This distinction between cognitive knowledge and language that fails to exactly reflect such knowledge was the chief concern of the Court. This may explain its reluctance to simply dismiss the *Bose* dispute as a matter of opinion. Ironically, in doing so, the Court may have defeated its own goal of eliminating media self-censorship. *See infra* text accompanying note 82. Since the Court allowed the fact-opinion question to pass, it may be inferred that under the right circumstances, statements of opinion would be subject to defamation charges and Rule 52(a). Until this question is definitively answered, the media may, in close cases, choose not to publish.

on the district court's inquiry into the author's state of mind on the "knowledge question."[80]

In *Pape*, the Court had ruled as a matter of law that if a defendant's interpretation of an event was reasonable, no actual malice could be charged even where that interpretation proved erroneous. The Court decided that no jury question then existed. In contrast, the interpretation of the sound movement in *Bose* was correct, but the language used to convey the interpretation was not. The *Bose* opinion brings these two situations together under the protective umbrella of the imprecise language doctrine. In so doing, the Court enlarges the *Pape* holding beyond the narrow issue of protecting erroneous interpretation. The cases read in tandem now protect both steps in the creative process of reporting. First, the media may not be attacked for a plausible attempt to construe what it has seen, heard, or read. Further, it may not be attacked on the ground that its choice of words in describing what it has construed could have been clearer.

The Court has attempted with these two cases to avoid placing the media in the situation where every sample of journalistic composition might be subject to the fact finder's scrutiny. This explains the Court's failure to assess the evidence in the record concerning motive and the district court's impressions of the witness. It would have searched for objective evidence under Rule 52(a) if it had decided that first amendment considerations posed no barrier to such an inquiry. Instead, it determined that such a review would raise the specter of endless suits based on language that happened, in retrospect, to be less than exact.[81] Media fears over the prospects of endless legal action could have a "chilling effect" on robust debate—a result the Court has resolved to prevent under the auspices of the first amendment.[82]

The Court's protection of this aspect of the reporting process may be compared to the existing doctrine excluding statements of opinion from the reach of defamation laws. Imprecise language protection goes beyond

80. Justices Rehnquist, O'Connor, and White interpret the case without reference to this constitutional element. *Bose*, 104 S. Ct. at 1967. Justice Rehnquist terms the review a de novo determination of the "mens rea of an author, findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context." *Id.* at 1968. Even Justice Rehnquist seems to express doubts about the exact meaning of the holding, however, for his dissent also asserts that the clearly erroneous standard should apply—"unless 'actual malice' now means something different from the definition given to the term 20 years ago by this Court in *New York Times*." *Id.*

81. *Id.* at 1966 ("[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'") (quoting New York Times v. Sullivan, 376 U.S. 254 (1964)).

82. *See New York Times*, 376 U.S. at 278. The *New York Times* Court noted that "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

opinion protection, however, since the Court shields facts under this formula if they are part of the interpretive process and are reasonable.[83]

IV. CONSEQUENCES OF *BOSE:* AFTERMATH OF AN INCONCLUSIVE ENCOUNTER

A. *Consequences Under Justice Rehnquist's Interpretation*

It is plausible to interpret *Bose* as authorizing a de novo determination of the mental state of an author. Justice Rehnquist apparently adopts this interpretation. Such an interpretation suggests that the Court claimed the privilege to conduct fresh factual inquiry. A possible rationale for this approach is that the constitutional dimensions of actual malice are so difficult to define that the Court can be no clearer. This reasoning would parallel the Supreme Court's approach in obscenity cases[84] where the definitional process has been so unsuccessful.[85] Yet, such an interpretation

83. *See supra* text accompanying notes 20–24.

84. The Court has been obliged to clarify its position in obscenity cases regarding such issues as local, state, and national community standards, the scope of review regarding patently offensive material, and the obscenity tests under which a defendant is to be tried. *See* Jenkins v. Georgia, 418 U.S. 153 (1974); Hamling v. United States, 418 U.S. 87 (1974); Jacobellis v. Ohio, 378 U.S. 184 (1964).

For a critical view of this definitional morass in obscenity cases, see Katz, *Regulating Obscenity,* 5 WHITTIER L. REV. 1, 9–10. (1983). The tremendous problems raised by the obscenity cases may have left the Supreme Court leery of adopting the obscenity approach in other first amendment areas. This is perhaps why the Court made no unequivocal commitment to such independent review.

85. In the same way that appeals courts have felt the need to reserve the right to screen any alleged pornographic film, adoption of the obscenity approach in actual malice cases would preserve the ultimate legal decision on defamatory expressions for appeals courts.

There are differences between the two concepts, however. Obscenity is a matter of personal expression balanced against an elusive moral norm and the protection of society's mental well-being. Actual malice involves proven harm to the reputation of an individual balanced against the media's right to publish and the public's right to know.

The two equations are not similar enough to warrant similar treatment. The struggle in an obscenity case is to allow as much individual personal expression as possible but at the same time to prevent harm to society. The question in libel cases is to decide when an individual, although concededly injured, will nonetheless be denied compensation because of the need to protect free speech. Any guidance the Supreme Court can provide to prevent defamatory injury from occurring in the first instance is preferrable to allowing damages to an injured plaintiff afterward.

Another distinction can also be made between obscenity cases and free press cases. Obscenity cases embody two extremes. Some potential violators are motivated by commercial incentive. An entrepeneur may knowingly take a risk in an area with unclear legal boundaries. At the other extreme, obscenity cases may involve artistic endeavors that should not be subjected to predetermined rules and that cannot be judged through wholesale classifications. These are two forms of the private right of freedom of expression. Both suggest the acceptability of an amorphous standard; in the first case because an entrepeneur proceeds knowing the economic risks; in the second, because the worth of a unique creation by an individual cannot be fairly measured through the use of a vague measuring device.

In contrast, the policy behind the *New York Times* actual malice standard has been articulated in more public terms. The nation must have an informed public and robust debate to preserve its democratic qualities. The media provides these elements. It is for the country's well-being that the media must therefore function with a large degree of freedom under well-defined rules. This suggests the need for a more clearly defined uniform standard articulated in advance.

would have several negative consequences.

One noticable consequence would be a significant impact on appeals court dockets. Defendants in defamation suits, having lost their cases at the district level, would inundate the already severely overloaded dockets[86] of appeals courts with "fact" questions previously thought beyond the scope of the courts' review.[87] Also, defendants would be more inclined to appeal because the district judge's role regarding evaluation of credibility under Rule 52(a) would be undermined.[88] Such a perception would create serious ramifications regarding the actual authority of district court judges in such matters as control of case direction and agenda, ability to press for settlement and cooperation, and acceptance of "pure" fact findings as final under Rule 52(a).[89]

The effect on district court judges and on the lower court decisionmaking process would also be negative. One of the functions of Rule 52(a) is to facilitate appellate review through clearly structured and articulated findings. Another function is to prod the trial judge into a careful examination of the record before reaching a decision.[90] Whatever positive effects Rule 52(a) achieves in these areas may be undone in actual malice cases where carefully articulated findings and meticulous deliberations may be largely ignored upon appeal.

B. Consequences Under an Interpretation Preserving the Role of Rule 52(a) in Actual Malice Deliberations

If, contrary to Justice Rehnquist's view, the *Bose* opinion is not interpreted as a de novo fact finding on the question of the author's credibility, the integrity of Rule 52(a) will remain intact. If the case is interpreted as an announcement of the new imprecise language refinement to the knowledge requirement of the actual malice definition, imprecise language must now

86. *See* Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230 (1983); Lay, *Query: Will the Proposed National Court of Appeals Create More Problems than It Solves?* 66 JUDICATURE 437 (1983). For discussion of the overall court system overload, see Gazell, *Federal District Court Caseloads in the Burger Era: Rear-Guard Tactics in a Losing War?* 13 SW. U.L. REV. 699, 700 (1983); Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473, 484–85 (1973). *But see RX for an Overburdened Supreme Court: Is Relief in Sight?* 66 JUDICATURE 394, 396 (1983).

87. *See supra* text accompanying notes 25–31.

88. Justice Rehnquist suggests this possibility. *Bose*, 104 S. Ct. at 1970 (Rehnquist, J., dissenting).

89. Thus the effect would be to undermine other important Federal Rules of Civil Procedure. *See, e.g.*, FED. R. CIV. P. 26(f) (discovery conference provision that allows the court to direct attorneys for the parties to appear for the purpose of planning the content and progress of discovery).

90. *See supra* text accompanying note 30.

be accepted as immune from attack under the protective mantle of the first amendment.[91]

Even this interpretation presents several negative consequences, however. Appeals will still occur when any glimmer of hope exists that resolution of the facts might bear on the refinement of the "actual malice" definition in a way that would cause a reviewing court to reverse the adverse opinion below.[92]

Moreover, the media will assert that a defendant is now totally protected as a matter of law under the first amendment when a trial court finds imprecise language.[93] As a result, the Supreme Court must clarify the question of deliberate use of imprecise language,[94] including the question of what evidence, if any, will suffice to overcome the constitutional protection.[95] Otherwise, less responsible members of the press[96] could claim a

91. *See supra* text accompanying notes 79–83.

92. On the positive side, these increased appeals will provide reviewing courts with new fact patterns needed to enlarge upon the actual malice concept. For this reason, judicial economy provides no legitimate support for defending Rule 52(a) against constitutional considerations. But the other three justifications articulated *supra* in text accompanying notes 28–30 remain feasible goals for the Court as it carves out the constitutional significance of actual malice.

93. This assertion is possible because the *Bose* Court made no comments on possible evidence in the record that might overcome the presumption of imprecise language. It did not indicate that a second inquiry should then follow as to whether the imprecise language was deliberately employed. Yet evidence in the record could indicate that the author had reasons for using misleading language. By ignoring this evidence on the "deliberate use" question, the decision can now be read to indicate that imprecise language, found as a matter of law from the statement itself and the nature of the subject matter involved, totally forecloses inquiry into the state of mind of the author.

Others will insist imprecise language is a presumption of the court, rebuttable by clear objective evidence that a defendant deliberately chose to use the defamatory wording. This debate will persist because the district court's opinion supports the argument that its holding was based on intentional use of the language. *See, e.g., Bose,* 508 F. Supp. at 1276. If the Supreme Court reversed despite this aspect of the district court opinion, the case must be read as foreclosing the question entirely. *But see infra* note 94.

94. The Supreme Court realized that the district court decided that the author deliberately misused language, *Bose,* 104 S. Ct. at 1958, 1966, probably to achieve greater readership and to discourage buyers from purchasing the more expensive Bose system. *Bose,* 508 F. Supp. at 1275. But the Court sidestepped this crucial aspect of the question by noting that the district court did not rely on the evidence of motive in its final finding of actual malice. *Bose,* 104 S. Ct. at 1953–54 n.3. The Supreme Court concluded that the district court instead relied only on the author's vain attempt to defend his statement in court and the fact that the author's statement was an inaccurate description of his actual perception. The Supreme Court thus proceeded on the assumption that the district court understood that actual malice is proven whenever cognitive knowledge of the meaning of a phrase is shown. This, the Supreme Court explained, is an incorrect understanding of actual malice. *Id.* at 1966. Deliberate misuse of the language, therefore, did not materialize as a legitimate issue for Supreme Court review in *Bose.*

95. The public may also react to *Bose,* although not perhaps because of the concern or confusion over its procedural and substantive ambiguities. Rather, the public may react to the reams of documents and the fourteen year court battle over the seemingly tiny allegation that a speaker system causes sound to wander "about the room." Of course, the specter of icy censorship and silent halls where once reverberated the lusty voices of "robust debate" is enough to prompt the Supreme Court to forbid even

complete imprecise language defense for damaging utterences of the type that frequently contribute to boosting their circulation.[97] It is likely that this will increase the number of injured plaintiffs who receive no satisfaction in the courts.

V. CONCLUSION

Bose is disturbing because the issue the Court sought to address remains unsettled. It is unclear whether Rule 52(a) retains any viability in cases of actual malice. This Note argues that Rule 52(a) continues to apply because the Rule serves a useful and necessary function in first amendment cases separate from the function of independent review. As in traditional Rule 52(a) cases, it was critical in *Bose* that the reviewing courts be able to understand the various facts the district judge utilized in his decision. Equally helpful in a case of constitutional proportions is the role Rule 52(a) plays in nudging a judge toward careful analysis.

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the smallest infraction of constitutional mandates. Yet an opinion can nevertheless look silly to the public at large when the issue is one such as that in *Bose*. *See, e.g.*, Nagel, *How Useful is Judicial Review in Free Speech Cases?* 69 CORNELL L. REV. 302, 319–20 (1984) ("It is unlikely that courts can foster public support and appreciation by developing the meaning of the freedom of speech most frequently and authoritatively in contexts in which it appears to be a foolish . . . idea.").

Nagel notes that Cohen v. California, 403 U.S. 15 (1971) was such a case. "[T]here is an embarrassing incongruity in the majority's serious tone and lavish attention to the issue . . ." Nagel, *supra*, at 326 (agreeing with *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting)). The issue in *Cohen* was whether "Fuck the Draft" worn on a jacket constituted a breach of the peace or was protected by the Constitution. For other observations of alleged trivial use of constitutional protections, see *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting); Schaefer, *supra* note 6, at 4; Eaton, *supra* note 7, at 1365. (Schaefer and Eaton make the same point regarding *New York Times*).

The *Bose* Court had many options in structuring its opinion. By treating this case in its entirety, and addressing the range of defamation issues presented, the Court could have placed the "straying sound" problem in perspective for the public. By elucidating the evidence standard a plaintiff must meet in order to prevail in the face of imprecise language or by clearly indicating that no evidence can impeach a defendant where the alleged defamation is mere loose verbal communication, the Court might have succeeded in shifting the public gaze from the "wandering" phraseology to the aspect of the case with relevence for other later and perhaps more weighty instances of defamation. By allowing Rule 52(a) and the role of the district court judge more careful treatment, the Court might have used the particular alleged defamation to illustrate other points. The Supreme Court cannot, of course, fix upon one unfortunate side effect involving public opinion in charting the path it must take in its constitutional pronouncements. Yet for the sake of the legitimacy of the court system, the effect is one it ought not altogether ignore.

96. For a parallel problem, see St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("It may be said that such a test [reckless disregard] . . . encourages the irresponsible publisher not to inquire . . . ."). *See also* Eaton, *supra* note 7, at 1373–75; Madison, *Madison's Report on the Virginia Resolutions*, (1876), *reprinted in* J. ELLIOT, ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 546, 571 (1836) ("Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.").

97. Circulation boosting was, in fact, one of the motives the district court attributed to *Consumers Union*. *Bose*, 508 F. Supp. at 1275.

Independent review, on the other hand, fulfills the distinct role of ensuring the legal correctness of the district court's interpretation and synthesizing of fact and law to reach more complex findings of "ultimate fact." The Court in *Bose* thus came to its decision by reaching a legal conclusion that did not depend on factual findings, and, hence, encountered no reason to follow Rule 52(a).

Without the interpretation that a substantive stratum overlaid the evidence question in *Bose,* the case gives the strong appearance of a fresh and selective fact-determining process. The decision must not be interpreted as ignoring intangible evidence assimilated from actual presence in the courtroom. Interpreting *Bose* to grant carte blanche factual review to the actual malice aspects of a case is unnecessary and destructive.

The opinion also lacks clarity on the exact nature of the "imprecise language" presumption as a preclusion to factual evaluation of an author's state of mind. The muddiness of this second concept, in fact, contributes to the uncertainty over Rule 52(a). After *Bose* and *Pape,* however, lower court judges must be alert for the presence of such language as the type of error given full protection under the first amendment. It is this legal definitional boundary, and not new opportunities for appellate second guessing under a weakened federal rule of civil procedure, that will leave the media free to engage in the robust debate necessary to democracy without fear of censorship through judicial harrassment.

Cathy Parker